

BATH AND NORTH EAST SOMERSET COUNCIL

MEETING: **Development Control Committee**

AGENDA

MEETING DATE **18 May 2011**

ITEM NO:

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

Maggie Horrill, Planning and Environmental Law Manager (Tel: 01225 395174)

REPORT ORIGINATOR: Ms Lisa Bartlett, Development Manager (Tel:01225 477281)

AN OPEN PUBLIC ITEM

BACKGROUND PAPERS:

Application for planning permission: 00/02417/FUL

Development Control Committee reports of 29 October 2008 and 26 February 2009;

Two Enforcement Notices dated 25 February 2009

West of England Joint Waste Core Strategy

Inspector's Report on the Joint Waste Core Strategy

Annexes:

Annex A – Order of the High Court dated 7 December 2010.

Annex B - Site Location Plan

Annex C - Minute of Development Control Committee Meeting of 18 February 2009

Annex D - Judgement of Mr Justice Lindblom dated 3 December 2010

Annex E - Extract Joint Waste Core Strategy – Key criteria and development management policies relating to the Fullers Earth land.

TITLE: Land at former Fullers Earth Works, Fosseyway, Combe Hay, Bath

WARD :- Bathavon West

1.0. THE PURPOSE OF THIS REPORT

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

2.0. LOCATION AND DESIGNATION

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

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

3.0. INTRODUCTION AND BACKGROUND

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

3.2. At the meeting of this Committee on the 18 February 2009 the Development Control Committee delegated authority to take enforcement action when it resolved that the Divisional Director for Planning and Transport Development, in consultation with the Planning and Environmental Law Manager, be authorised to exercise the powers and duties (as applicable) under Parts VII and VIII of the Town and Country Planning Act 1990 (including any amendments to or re-enactments of the Act or Order or Regulations made under the Act) in respect of the above site. A copy of the full Minute is attached to this Report as **Annex C**.

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

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

4.0 ORDER OF THE HIGH COURT

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

5.0. HIGH COURT JUDGEMENT

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

The Court held that:-

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

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

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

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

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

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

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

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

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

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

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

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

6.0 WEST OF ENGLAND JOINT WASTE STRUCTURE CORE STRATEGY

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

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

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

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

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

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

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

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

6.3.5 **Policy 10 Waste Water treatment:**

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

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

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

- **mechanical and biological processes:** A generic term given to any facility incorporating mechanical (eg. material recycling/recover facilities) and biological (eg in vessel composting) processes.
- **thermal processes:** Waste management processes involving medium and high temperatures to recover energy from the waste which includes pyrolysis and gasification based processes.

7.0 The JWCS and Fuller's Earth

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

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

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

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

8.0 BACKGROUND TO ALLOCATION PROCESS

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

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

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

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

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

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

8.6 In his report the Inspector states that;

"the former Fuller's Earth site is subject to a number of constraints. Amongst other things, reference has been made to the ecological value of the site; its geological importance; its location relative to the Cotswolds Area of Outstanding Natural Beauty and any extension of the AONB; the presence of a major aquifer; its location within the Green Belt; and the potential effect on the setting of the nearby City of Bath World Heritage Site. Additional concerns include the alleged carrying out of unauthorised development (the subject of enforcement action¹) and the fact that the previously envisaged growth of the area may not occur.

The Partnership recognises that the site is constrained. Its approach has been to set down key development criteria, specific to the site, which would need to be taken into account in any scheme of development. The location is seen as important. It would serve the needs of the south east of the plan area as well as the area as a whole. ----- In terms of the impact on the environment, I see no reason in principle why an

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

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

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

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

9.0 CURRENT POSITION

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

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

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

10.0 CONCLUSION

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

11.0 RECOMMENDATION

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

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