

Decision Maker: PLANS SUB-COMMITTEE NO. 1

Date: Thursday 3 April 2014

Decision Type: Urgent Non-Executive Non-Key

Title: LAND ADJACENT TO TINTAGEL (WASTE4FUEL SITE),
CORNWALL DRIVE, ORPINGTON BR5 3JB

Contact Officer: Tim Horsman, Deputy Development Control Manager (East)
Tel: 020 8313 4956 E-mail: Tim.Horsman@bromley.gov.uk

Chief Officer: Chief Planner

Ward: Cray Valley West

1. Reason for report

The lawful boundaries of the adjoining waste transfer station have been breached and tipping of waste and associated activities have expanded onto open Green Belt land adjacent to the site. Further harmful unauthorised expansion of the use could readily occur.

2. **RECOMMENDATION(S)**

1. That authority be given for injunction proceedings to be commenced:

(i). to restrain the owner of titles SGL717180 and SGL339839 and the operators of the adjoining waste transfer station, whether by themselves or by causing or permitting others, from using without planning permission any part of these titles for any purpose in association with the adjoining waste transfer station or from carrying out any building, engineering or other operations in association with that use; and

(ii). to require the owner of title SGL339839 and the operators of the adjoining waste transfer station to remove the tipped material on the area marked hatched on the attached plan and to reinstate the land to its former appearance;

2. That the Director of Corporate Services be given delegated powers to authorise the institution of further proceedings under the Town and Country Planning Act 1990 and related legislation in respect of the land comprised in titles SGL717180 and SGL339839 should he deem those proceedings to be necessary.

3. COMMENTARY

- 3.1 The land subject of this report is two parcels, one situated to the eastern side of Sevenoaks Way with Ruxley Lakes SSSI to the east and Council owned land to the west (Title SGL339839) and the second also to the east of Sevenoaks Way and immediately to the south of the A20 Swanley By Pass (Title SGL717180) The two parcels are located to the immediate north and south of a site known as Land Adjacent to Tintagel, Cornwall Drive and more recently known as Waste4Fuel Ltd. The land to the south is subject to a Tree Preservation Order. That land has in part been recently used to extend the Waste4Fuel site without planning permission and is being used for the deposit and sorting of waste. The area of encroachment is shown hatched black on the attached plan. An area of the land to the north shown cross hatched black has already been partly encroached for the stationing of various machinery and storage of materials in connection with the use, also without planning permission.
- 3.2 Waste4Fuel is located at the end of Cornwall Drive, a residential cul-de-sac comprising 7 dwellings. Ruxley Lakes, a Site of Special Scientific Interest, is located beyond a public footpath to the east of the site. The waste transfer station site is roughly rectangular with a small compound containing a mobile phone mast to the south eastern corner. Both the Waste4Fuel site and all of the relevant adjoining land is within the Green Belt.
- 3.3 The Waste4Fuel site is currently in use as a waste transfer station and the majority of the site is taken up with substantial amounts of waste. To the northern boundary of the site various machinery for sorting waste is located, and at the entrance onto Cornwall Drive is a weighbridge and portable offices. The Waste4Fuel site benefits from an Environment Agency permit as a waste transfer station. That area now includes the area shown cross hatched black. The Waste4Fuel site (excluding the cross hatched area) has been the subject of two planning appeal decisions determined together in 2001 against the Council's refusal to grant certificates of lawfulness for existing uses and the issue of an enforcement notice against the use of the land as a waste transfer station. The appeals were allowed and certificates granted and enforcement notice quashed.
- 3.4 The Environment Agency (EA) are currently pursuing action through the High Court. The EA secured an order from the Court requiring the removal of all combustible waste stored at the site by 1st May 2014.

The EA have returned the matter to the High Court alleging a contempt of the High Court. Those proceedings are expected to be determined with a few weeks.

- 3.5 It has recently been drawn to the attention of the Council that the boundary of the site to the south has been breached, and that tipping of waste and associated activities are now occurring approximately 20 metres beyond the area identified within the certificates of lawfulness. The waste deposited in this area appears to be in excess of 1 metre in height above previous ground level, although this height could increase readily. The land to the south of the site does not benefit from planning permission for any such activity. The current operators of the waste transfer station have suggested verbally that this expansion was due to requirements from other statutory bodies, however any operational requirement for this expansion has been created by the behaviour of the site operator in bringing excessive amounts of waste on to the site.
- 3.6 Recent and historic aerial photographs of the site are available on file and clearly show the areas where unauthorised expansion to the south has occurred. There has been no indication that the landowner has not allowed the expansion or is seeking to take any action to rectify it, and combined with the lack of any prior notice of the current expansion, these facts suggest that

a further expansion may take place. Due to the nature of the materials deposited it may not be straightforward to rectify this breach and it seems possible that a further breach could readily occur.

- 3.7 Recent information of which the Council has been made aware indicates that the operator is intending to introduce an incinerator onto the site. No informal approach or planning application have been received regarding this proposal, which is likely to require planning permission in itself being potentially outside of the lawful use of the Waste4Fuel site and involve transforming rather than removing the waste, as the EA High Court Order requires.
- 3.8 In respect of planning policy considerations of the extension of the Waste4Fuel site, all of the relevant land is within the Green Belt. With regard to Unitary Development Plan Policy G1 and the National Planning Policy Framework 2012, the use of land for deposit and sorting of waste is inappropriate development, harmful by definition to the openness of the Green Belt. This activity is also considered to cause actual harm to the openness and character of the Green Belt and the area in general, in particular as the type of waste being deposited would be difficult to remove from the land. There are residential properties near to the land which are also adversely affected by the unauthorised expansion of the waste operation.
- 3.9 Section 187B of the Town & Country Planning Act 1990 states:

“Where the local planning authority considers it necessary or expedient for any actual or apprehended breach of planning control to be restrained by injunction, they may apply to the court for an injunction, whether or not they have exercised or are proposing to exercise any of their powers under this part.”

- 3.10 The case of **South Buckinghamshire DC v Porter (“Porter”)** is an important precedent as far as injunctions are concerned, being a case in which the impact of the Human Rights Act 1998 was taken into account. In this case, the court’s approach to grant injunctive relief under section 187B is set out below in relevant part:

“...but it seems to me no less plain that the judge should not grant injunctive relief unless he would be prepared if necessary to contemplate committing the defendant to prison for breach of the order, and that he would not be of this mind unless he had considered for himself all questions of the hardship for the defendant and his family if required to move, necessarily including therefore, the availability of suitable alternative sites. I cannot accept that the consideration of these matters is, as Burton J suggested was the case in the pre-1998 era, “entirely foreclosed” at the injunction stage. Questions of the family’s health and education will inevitably be of relevance. But so too, of course, will be the need to enforce planning control in the general interest and, more importantly therefore the planning history of the site. The degree and flagrancy of the postulated breach of control may well prove critical. If conventional enforcement measures have failed over a prolonged period of time to remedy the breach, then the court would obviously be the readier to use its own, more coercive powers. Conversely however, the court might well be reluctant to use its powers in a case where enforcement action had never been taken. On the other hand, there might be some urgency in the situation sufficient to justify the pre-emptive avoidance of an anticipated breach of planning control. Considerations of health and safety might arise. Preventing a gypsy moving onto a site might, indeed, involve him in less hardship than moving him out after a long period of occupation. Previous planning decisions will always be relevant; how relevant, however, will inevitably depend upon a variety of matters, including, not least, how relevant they are, the extent to which considerations of hardship and availability of alternative sites were taken into account, the strength of the conclusions reached on land use and environmental issues, and whether the defendant took the opportunity to make his case for at least a temporary personal planning permission”

- 3.11 In reaching a decision to apply to the County Court for an injunction, the Committee must therefore take various matters into account:-

The London Borough of Bromley is the Local Planning Authority (LPA) for the area and as such has a duty to enforce planning control, taking into account relevant legislation, Government guidance and its own policies as set out in the Unitary Development Plan. It must, however, also demonstrate that the use of an injunction is in the public interest, and it must give consideration to all possible remedies, and that due consideration of the human rights of the defendant have been taken account of.

In considering an application for an injunction, the Court will apply various tests set out in the Porter judgement which must be satisfied and it will have to be demonstrated that, in reaching a decision to seek this form of enforcement, the Committee has also taken into account all material considerations and to have properly posed and approached the article 8(2) questions as to necessity and proportionality.

- 3.12 **Necessity** – whilst the court will not question the correctness of the planning status, it is bound to come to a broad view as to the degree of damage resulting from the breach and the urgency or otherwise of bringing it to an end.

In this case, the harm has come about swiftly and without any consultation with the Council and there has been no indication of a willingness to comply voluntarily at the present time, with the site operator indicating that they feel there is justification from other agencies for the expansion. There would appear to be a significant risk in the circumstances of further swift uncontrolled expansion of the activities.

- 3.13 **Proportionality** – it is essential to demonstrate that the use of an injunction is appropriate and necessary for the attainment of the public interest objective sought but also that it does not impose an excessive burden on the individual whose private interests are at stake.

In this case, it may be felt that it is not disproportionate to use the remedy of injunctive relief in order to prevent further uncontrolled harm to the Green Belt. It is not considered satisfactory for the operator's continuing failure to comply with EA permit requirements to remove waste to result in operations spreading onto open land

- 3.14 **Planning history and degree of flagrancy** – It will require to be demonstrated that conventional measures would fail to effectively remedy the breach in light of circumstances at the site.

The existing waste transfer operation is inappropriate within the Green Belt, however it has become lawful via the passage of time within the area subject to the certificates of lawfulness. The operators have previously been made aware of minor infringements of the lawful (planning) site boundary, which no attempt has been made to rectify, and a more severe breach has now occurred without any consultation with the LPA. It seems likely that further harmful breaches could occur without warning, which would be difficult to rectify. The operator has also allegedly failed to comply with the EA High Court Order over a period of time, instead bringing more waste onto the site.

- 3.15 **Failure of conventional methods of enforcement and lack of attempt to try other enforcement methods:-** the court may take into account any other steps which could have been taken by the Council.

It is clear that there is a real risk of further harm occurring in the immediate future, and in light of the history and circumstances of the site and operator, an injunction is considered to be the only effective method of preventing further significant harm. Other enforcement options available to the Council such as Stop Notices or Enforcement Notices are not considered to carry a suitable

level of deterrent and could take considerable time to be effective, only being capable of being deployed once harm has already occurred. Furthermore, given the apparent behaviour of the landowner and site operator, it is unlikely that any breach would be rectified without intervention.

- 3.16 **Hardship to the owner** – the court in considering the matter of the unauthorised development will take into account considerations of hardship caused to the owner.

In this case, the site is open land with no lawful commercial or residential use at present. There is not considered to be any hardship that would occur by the granting of an injunction. The operators of the waste transfer station and the owners of the land should not be allowed to benefit from an alleged breach of a High Court order.

- 3.17 **The availability of alternative sites and the opportunity to apply for at least temporary personal permission** – These are matters to which Members should also give consideration.

There appears no legitimate reason why the site should have expanded beyond its lawful boundaries other than being improperly operated. There is no need for consideration of an alternative site in the circumstances since the operation should be contained within the existing lawful site boundaries. It is not considered that any planning application for the expansion of the waste transfer operation onto adjacent Green Belt land would be considered favourably since it is contrary to established policy and in light of the manner of operation of the existing site and the impact on nearby residential properties.

- 3.18 **Conclusion:** On balance there is clear demonstrable harm to the openness and character of the Green Belt by virtue of the additional tipping and sorting of waste outside of the lawful site boundary, and the information above explains that an injunction is the only suitable method of preventing any further uncontrolled and unauthorised expansion of the site. There is clearly some urgency in the situation sufficient to justify the pre-emptive avoidance of an anticipated breach of planning control.

4. POLICY IMPLICATIONS

- 4.1 The use of the land for tipping and sorting of waste is inappropriate within the Green Belt, and harmful to the openness and character of the area, contrary to Policy G1 of the Unitary Development Plan and the National Planning Policy Framework 2012. The use is also detrimental to the amenities of nearby residential properties, contrary to Policy BE1 of the Unitary Development Plan.

5. FINANCIAL IMPLICATIONS

- 5.1 In the event of a successful application for injunction, costs would be sought from the defendant. In the event of an unsuccessful application, the Council might be liable in costs to the defendant of an amount which cannot at this stage be quantified.

6. LEGAL IMPLICATIONS

Addressed in the report above.

Non-Applicable Sections:	Personnel Implications
Background Documents: (Access via Contact Officer)	Enforcement and Legal files containing exempt information as defined by Schedule 12a of the Local Government (Access to Information) Act 1985 are not available for public inspection