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Royal Borough
of Windsor &
Maidenhead

Enforcement report for consideration by members

**LAND AT HYTHE END FARM,
HYTHE END ROAD,
WRAYSBURY**

1. SUMMARY

1.1 Following legal advice sought by the Local Planning Authority (LPA) it is now necessary to consider if lawful development certificate 97/75746 should be revoked and if it is expedient to give further consideration to the alleged intensification of the use of the site. This report sets out a detailed history of this matter and also presents the options available to the Council in respect of these matters.

2. RECOMMENDATION

1. Not to pursue the revocation of the Lawful Development Certificate dated 9 September 1998 and granted under reference 97/75746
2. Not to give further consideration to the case of intensification in the use of the site and thus not to serve an Enforcement Notice in relation to that allegation

3. INTRODUCTION

- 3.1 The site operates as a waste processing centre under the name of Fowles Crushed Concrete Limited (FCC) and Fowles Property Limited (FPL). It was acquired in March 2015, when FPL purchased the freehold of the entire site and FCC took exclusive possession of the planning unit under an informal tenancy agreement. It was previously occupied by Charles Morris Fertilisers (CMF) who let the inner part of the site to Carcarc Limited. Carcarc went into liquidation in 2012 and in February 2013 FCC took a lease over the same part of the site that was previously occupied by Carcarc.
- 3.2 In 1998, when the site was operated by CMF, a Certificate of Lawful Use was granted certifying that the 'storage before and after processing and processing of excavated/dredged/builders materials, timber with associated plant and machinery' on land identified in the certificate was lawful. The certificate was granted with notes attached clarifying that the certificate was issued for the purposes of s191 of the 1990 Act, that it certifies the lawfulness of the described use on the identified land, and that it is limited to the extent of the development described in the application and to the land shown on the attached plan.
- 3.3 The Hythe End Road Association, a group of residents that live in close proximity to the Land, is concerned that the Certificate was granted on evidence that was false and has sought legal advice to ascertain if there is sufficient evidence to warrant the revocation of the Certificate.
- 3.4 Residents also allege that there has been a material change of use at the site on the grounds of intensification and they would like the LPA to initiate formal enforcement action in respect of this alleged breach of planning control.
- 3.5 This report will set out the options available to the Council in respect of both of these issues. It will deal with the issues separately and incorporate the legal advice that has been sought to inform these decisions.

4. THE SITE AND SURROUNDINGS

- 4.1 The site covers an area of some 7.6 hectares and is located on the east side of Hythe End Road. It operates as a waste processing centre, that stores and processes waste building materials, timber and associated plant and machinery.
- 4.2 The site is almost totally enclosed by a bund and is screened in views along Hythe End Road by the bund and hedgerow trees. Additionally it is located within the Green Belt and an area liable to flood (Flood Zone 3 and 3b). The surrounding area comprises a mix of fields and residential properties. The site is accessed via a track that runs through land to the west of Hythe End Road, starting on Feathers Lane.

5. RELEVANT PLANNING AND ENFORCEMENT HISTORY

Planning History

Under application 97/75746 a certificate of lawfulness was granted which detailed the *'storage before and after processing and processing of excavated/dredged/builders materials, timber with associated plant and machinery'*. The Certificate was dated 9 September 1998, and a copy is attached to this report.

Enforcement History

15/50341/ENF- Formation of hardstanding and weighbridge and erection of building used to maintain plant and machinery on site.

Retrospective planning applications were submitted in 2016 in an attempt to regularise these matters. The relevant application numbers and the description of development detailed within each application is outlined below:

16/02366/FULL - Detached building for the maintenance of plant and machinery associated with the storage before and after processing and processing of waste materials which is the subject of a Certificate of Lawful Use dated 9 September 1998 (retrospective).

16/01725/FULL- Replacement concrete surfacing associated with the lawful storage and processing of waste material, with associated drainage infrastructure and access ramps (part retrospective).

These applications are pending determination as the LPA is waiting for the consultation responses from the Environment Agency before the applications can be determined. As a result the enforcement file is being held in abeyance until these applications are determined.

16/50274/ENF- Change of use of the land to a mixed waste transfer station and skip hire business

On the 6th September 2016 an enforcement notice was issued that alleged the material change of use of the land from storage before and after processing and processing of excavated/dredged/builders materials, timber with associated plant and machinery to a mixed use comprising the storage before and after processing and

processing of excavated/dredged/builders materials, timber with associated plant and machinery and skip hire, skip storage and skip distribution.

The enforcement notice was appealed and the planning inspectorate subsequently allowed the appeal on the 20th June 2017. The notice was based on the use described in the LDC constituting the lawful use of the land, and sought to restore that use through the requirements of the notice by ceasing the skip hire, storage and distribution element of the use.

The Secretary of State concluded that the ground (c) appeal should succeed and the notice was subsequently quashed. A ground (c) appeal is one under section 174(2)(c) of the 1990 Act where it is said that the matters stated in the enforcement notice to be a breach of planning control do not constitute a breach of planning control, that is that they are lawful. Such matters may be lawful for a range of reasons (as set out in section 191(2), because they did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason). In this case, the Inspector concluded that the use of the site for the business of skip hire, storage and distribution was ancillary to the primary use of the site as defined in the certificate, and that as a matter of fact and degree the use alleged in the notice has not resulted in a material change in the character of the site, which remains as a waste processing centre¹.

As a result there is an up-to- date decision by the Secretary of State concerning the lawful use of the site.

This appeal decision is now an important record in the planning history of the site. It provides a record of the lawful use on the site at the time the appeal was determined. The LPA relied on the LDC in determining the base use of the site in the appeal and whilst officers disputed the level of use, the base use was not questioned. Indeed, it formed the basis of what the Council considered the lawful use of the site to be.

17/50035/ENF- Raising land levels

The LPA is awaiting data from the Environment Agency to assess if there has been a breach of planning control.

6. REVOCATION OF THE CERTIFICATE OF LAWFULNESS

6.1 Section 193(7) of the Town and Country Planning act 1990 Act (the Act) details that:

“A local planning authority may revoke a certificate ... if, on the application for the certificate—

(a) a statement was made or document used which was false in a material particular;
or

(b) any material information was withheld.”

¹ See paragraph 60 of the decision which follows a lengthy analysis.

- 6.2 The Council has sought advice relating to section 193(7) which advises that a statement or document is false in a “material particular” if it is false in an important respect, in a way which affected the decision to grant the LDC. Where a local planning authority proposes to revoke an LDC on the basis that statements had been made that were false in a material particular, it should identify precisely the statements said to be false in a material particular².
- 6.3 It is also important to keep in mind that the only bases upon which a lawful development certificate can be revoked are those set out in s193(7). There is no legal basis for a general review of the decision to issue the certificate. As Mr Green points out³, the consideration is not whether the certificate was issued in error, that inadequate enquiries were made, that vague evidence was accepted or that information obtained after the issue of the certificate casts a different light on events.
- 6.4 The Hythe End Road Association obtained advice from counsel (Mr Mark Beard), who concludes that the requirements of s193(7) of the Act- the provision empowering the LPA to revoke the LDC- are met and that the public interest in maintaining proper and effective planning control justifies commencing revocation.
- 6.5 This opinion focusses on the three statements which are identified by Mr Beard as being false in particular⁴.
- 6.6 The LPA instructed Counsel (Mr Robin Green) to comment on the same point i.e. ‘whether or not either (or both) of the limbs of s193(7) are satisfied by the information provided’ and ‘whether the Council is compelled to exercise its 193 (7) discretion in the way Mr Beard’s opinion indicates’.
- 6.7 In the advice received, Mr Green provides comment on the three statements referred to by Mr Beard. Specifically he states⁵:
- 6.8 ‘Taking all these statements together, what strikes me is how insubstantial they are. Although they are made to support the application for an LDC in respect of the land to the east of Hythe End Road, in the cold light of day they provided, in my opinion, very little evidence that that land was used in any significant way’.
- 6.9 Further to the above, in response to ‘*whether or not either (or both) of the “limbs” of s193 (7) are satisfied by the information provided*’ Mr Green states the following:

‘Of the three statements on which Mr Beard focuses, the first two are so ambiguous that their falsity is not readily established. If understood as statements relating to land on both the east and west side of Hythe End Road, they are not (on the information available to me) demonstrably false.

² See paragraph 23 of the advice of Robin Green referring to *R v Epping Forest DC ex p Martin Philcox* [2000] PLCR 57 and *R v Surrey County Council ex p Bridge Court Holdings Ltd* [2000] PLCR 344

³ See paragraph 25 of his Advice

⁴ See paragraph 34 of his Advice

⁵ See paragraph 32 of his Advice

'As to the third statement, for the reasons given in paras 33 and 34 above it may be that the Council could conclude that it was false in a material particular. The information before me does not allow me to go further.

'There is no evidence before me that shows that material information was withheld in 1998, but I do not discount the possibility'.

- 6.10 Officers share the views of Mr Green. Although there are issues of vagueness as to the intensity of the use across the wider site to east and west of Hythe End road there is no consistent body of evidence that shows the statements made to be false on the balance of probability. This is obviously a matter of judgment. However, the use of aerial photographs in particular is not a reliable basis for contradicting a sworn statement of fact because the photographs represent a moment in time, whereas the statement is addressing a much wider period. Further, photographs require interpretation and it is difficult to use them to contradict a claimed intensity or frequency of use.
- 6.11 The third statement referred to is taken from Mr Morris's second statutory declaration that "the preponderance of the activities described in the schedule of operations referred to in paragraph 6 [concerning use or movement of machinery and/or materials into or away from the site for each of the years 1987 to 1997 inclusive] relate to operations carried out on the site on the east side of Hythe End Road.
- 6.12 It is officers' view that this is the only statement that could realistically be considered against the evidence to be false in a material particular. In overall terms, officers agree with the Advice given by Mr Green. Mr Green in paragraph 31 notes the breadth of the statement, and that in reality it says no more than that over the period considered more of the activities took place on the eastern land than the western land. Further, that the extent to which the processes related to screened soil took place on the western side is ambiguous.
- 6.13 Overall, in officers' view on the evidence available, it is simply not possible to conclude that this statement is false. There is an inherent ambiguity in the evidence in respect of what activities are carried out where i.e. it is not definitively established whether operations concerning fine screened soil took place exclusively on the east side or the west side, or split between the two. Mr Morris's declaration says that the buildings on the west side are used to store fine screened soil. However, there is no clear evidence that all processes related to such soils occurred on the western side, or that the preponderance of overall activity was on the western side. The conclusion put forward by Mr Morris was that the preponderance of the activities referred to took place on land to the east of Hythe End Road. Officers find it very difficult to conclude on the evidence before us on the balance of probabilities that this statement was false. It is clearly a conclusion reached in relation to the totality of the use over a number of years. During that period there will have been, as noted by Mr Green, a range of activities taking place at different levels of intensity and in different locations and with different inter-connections. It seems to us that Mr Morris as the operator of the site was well-placed to make that assessment, and the evidence that is available does not show it to be false. As such relying on this document could leave the LPA in a vulnerable position, and it is difficult for the Council on the evidence available

to justify a conclusion that this was a statement that can be shown to be false in a material particular so as to meet the requirement of s193(7)(a).

- 6.14.1 Therefore, largely for the reasons given by Mr Green, but also following further consideration by officers in light of the information available, officers do not consider that the limbs of section 193(7) are met on the balance of probability and so it would not be expedient to instigate the process for revocation.
- 6.15 However, given that section 193(7) provides the Council with a discretion to revoke where the limbs are met, officers have gone on to consider whether it would be expedient to do so if one of the limbs was met.
- 6.16 Whilst the 1990 Act does not say what factors the Council must consider in the exercising S193 (7) Counsel has identified the points below as relevant:

- a) *The circumstances surrounding the false statement (was it deliberate or inadvertent);*

As set out above, the ambiguity of the statement in question means that to an extent the statement is one of factual judgment. The evidence does not clearly suggest that the statement was a serious, deliberate misrepresentation or that it was done for gain. Further, if the statement were false this would not mean that there was no lawful use of the land to the east of Hythe End Road. The statement was a conclusion as to whether the preponderance of the activity took place on one side or the other. It may be said that if the statement were knowingly false then it was likely to have been made to influence the outcome of the certificate application. However, as set out above, in officers' view there is no clear evidence to indicate this was the case.

- b) *The potential effect on the environment and the public of revoking the certificate or allowing it to stand;*

If the LDC was revoked the LPA would have to consider the lawful use of the land. The effect of a revocation is not to leave the land without any lawful use. The lawful use would have to be re-assessed. This would arise if a new application for a certificate was made, but also and in any event if the Council is to be able to control properly land use in its area. Officers consider it relevant to consider at this stage the likely lawful use of the land and the consequences of the revocation.

- 6.17 The recent appeal decision informs this position. As referred to above, the enforcement notice was drafted on the basis that the certified use was the lawful use of the land. The Inspector concluded that the skip uses were ancillary to the primary use defined in the certificate, and that there had not been a definable change in the character of the use. The evidence supporting the certificate application was referred to extensively in that appeal. That evidence supported the grant of the certificate at the time that it was granted, and the appeal process did not disclose any new information that showed the certified lawful use to have been unlawful as a description of the historic use of the site (that is setting aside for the moment questions of the intensity of the use).

- 6.18 The Council made extensive reference to aerial photographs and available evidence, including the application for the certificate in 1997, with a view to comparing the use that had operated under Mr Morris and the use that operates under FCC. Although the Council did not seek to go behind the certificate on this appeal, the Council did make the case that the certificate defined the use by reference to the level of activity disclosed by the material supporting the certificate application (see Note 3 on the Certificate) and that therefore if the use being undertaken at the date of the enforcement notice was materially different in character from that then the current use was unauthorised. This involved assessing the current use against the available evidence as to the use when the site was occupied by Mr Morris, including the certificate application (this is recorded in paragraph 45 of the decision letter). This argument was addressed in detail by the Inspector and he disagreed (see in particular 54, 58 and the analysis leading to these conclusions). This is certainly not a case where in the absence of the certificate the site would clearly have a different lawful use.
- 6.19 As a consequence, officers are of the view that the history of use of the site is likely to disclose a lawful waste processing use of the character considered and analysed by the Inspector as being the lawful use. That decision accepts that the levels of activity were less intense than those under FCC.
- 6.20 Further, the Inspector's decision stands as a recent planning judgment of the Secretary of State as to the lawfulness of the existing use by reference not simply to the certificate but also through comparison of the respective character of the historic use and the current use disclosed by all the evidence available.
- c) The effect on the landowner of revoking the certificate, including on his Convention rights.
- 6.21 The impact on the landowner is relevant. The LDC was granted 20 years ago and the first indication of a challenge came in December 2015. Shortly afterwards the land with the LDC in place was acquired by the current landowner at a substantial cost. If the LDC was revoked there is no obligation to pay compensation on revocation and therefore the LPA must consider if the revocation would constitute a lawful interference with the landowner's rights under article 1 of the First Protocol to the Convention, and in any event to consider the impacts on the landowner.
- 6.22 At the date of acquisition of the land the Council has no reason to believe the landowner anticipated the certificate to be challenged. Secondly, following the acquisition of the land, the Council has taken enforcement action and participated fully in the appeal process on the basis that the lawful use of the land was that certified by the certificate. The effect of the revocation would be to call into question the lawful use of the land after these two events. The consequence of the revocation exercise is either going to be very limited if the lawful use is in any event for a waste processing use of the nature described in the certificate (as is the view of officers), or substantially deleterious to the landowner, which weighs against the expediency of taking revocation action, particularly where this is contrary to the basis upon which the Council has recently enforced.

- 6.23 Further, officers are not satisfied that there is a sound basis for changing the Council's position from that which formed its case on appeal in May 2017. There is no particular new material available since the time of that inquiry. The Council through the appeal process had decided to rely on the LDC, and the Council can be expected to have good reason for changing its position.
- 6.24 It is possible that this review would provide such a basis and a good reason to change the Council's position. However, officers have concluded that there is no sound basis for taking a different view now that at the date of issue of the Enforcement Notice or the consideration of evidence at the inquiry.
- 6.25 Mr Green's advice concludes that the LPA is not compelled to revoke the certificate. In reaching this view it is important to note that the discretion afforded to an LPA under section 193(7) is intentionally broad.
- 6.26 In Mr Beard's advice he suggests an additional relevant consideration as being the public interest in maintaining proper and effective control over the Site. Officers recognise the value of proper and effective control over the site. It was for this reason that the Council took the enforcement action that it did. However, for reasons given above, there is no clear evidence of an attempt to subvert the system. Further, it would not be expedient to trigger revocation to uphold public interest in the system if it was not otherwise expedient to do so, which is officers' conclusion here.
- 6.27 Officers have also considered, in order to take into account the full range of interests, the position of affected local residents. The objective of the lawful development certificate statutory scheme is that it allows for certification of the lawful use of the land, and that the lawfulness is thereafter conclusively presumed. It follows that if the certificate is revoked such use is no longer conclusively presumed and an alternative use may be found. Understandably, an aspiration of those local residents who have sought the revocation of the certificate is that such alternative lawful use would have lesser environmental impacts than the current use. However, review of the evidence by officers has not disclosed a case on the balance of probabilities for a lawful use of a materially different character than the certificated use, or a procedural breach or abuse of process which might provide a public policy argument for intervention. Therefore, while the position of local residents may be understood, the Council does not consider that these aspirations justify instigating the revocation process.
- 6.28 It is the view of officers that even if it could be shown that the false statement referred to above had been made it would not be expedient to instigate the process for revocation of the certificate. This is based on consideration of the nature of the statement and the context in which it was made, the consequence of revocation in light of recent consideration of the history of use of the land through the recent enforcement appeal process, and the potential impacts on the landowner who has relied on the certificate.
- 6.29 **It is the recommendation of the Head of Planning that the revocation of the Lawful Development Certificate dated the 9 September 1998 and granted under reference 97/75746 is not pursued.**

INTENSIFICATION

- 6.30 In planning terms a material change of use can occur when an existing use intensifies to such a degree that it brings about a definable change in the character of the use of the land. It should be noted that case law has established that intensification alone is not sufficient to constitute a material change of use if it does not change the definable character of the land⁶.
- 6.31 The Hythe End Road Association allege that the intensification of the use of the site has resulted in a material change of use and the LPA have been asked to pursue enforcement action to address this allegation.
- 6.32 In order to determine if there has been a material intensification in the use of the site the LPA must consider the lawful use. For present purposes, and in light of the first question addressed in this report, officers have considered this question on the basis of the lawful use as described in the certificate.
- 6.33 The lawful use set out in the Certificate does not set any parameters around the scale of the use or the quantity of materials involved or the numbers of vehicles coming to and from the site. However it does identify a waste processing centre.
- 6.34 In light of the above, the relevant question in establishing if there has been a material change of use resulting from intensification is whether the historic use of the site compared to its current use results in a change to the definable character of the site. This was reviewed in the enforcement appeal whereby the inspector came to the following conclusion:
- ‘Compared with the use of the site between 2003 and 2012, the current use of the site is more intensive. Nevertheless, having regard to the activities taking place on the site; the presence of stockpiled waste; the use and storage of sizeable pieces of plant and machinery required for the sorting and processing of waste, the clear impression that I gained from my site visits is that the appeal site as a whole has the character of a waste processing centre. In that sense, it is no different from the character of the site when CMF and Carcarc Limited occupied the site’.*
- 6.35 From the extract above it is clear that the inspector came to the conclusion that the current use of the site albeit more intensive did not change the definable character of the land. Accordingly, if the LPA chose to allege a material change of use, it would need to demonstrate that the definable character of the site has changed since this appeal decision. To date there is no evidence that this is the case.

7 OPTIONS AVAILABLE TO MEMBERS

- 7.1 Members are asked to consider the Council’s position following the legal advice summarised above. Officers are available to answer any questions members may have.
- 7.2 Copies of the full opinions of Mr Mark Beard and Mr Robin Green of Counsel are appended under Part II of this report.

⁶ *Hertfordshire CC v SSCLG* [2012] EWCA Civ 1473

7.3 Once members have considered and debated the report there are four courses of action open to them:

- (1) To pursue the revocation of the Lawful Development Certificate dated 9 September 1998 and granted under reference 97/75746
- (2) To decide not to pursue the revocation of the Lawful Development Certificate dated 9 September 1998 and granted under reference 97/75746
- (3) To further consider the case of intensification in the use of the site with a view to serving an enforcement notice in relation to that allegation.
- (4) Not to give further consideration to the case of intensification in the use of the site and thus not to serve an Enforcement Notice in relation to that allegation

Members should consider all four options.

Option 1: To pursue the revocation of the Lawful Development Certificate dated 9 September 1998 and granted under reference 97/75746

7.4 If the Council is minded to revoke the certificate this will trigger a process under Article 39 of the Town and Country Planning (Development Management Procedure)(England)Order 2015. In essence, notice must be given to the owner and occupiers of the land as well as any other person who will be affected by the revocation inviting representations. The Council will then have to take into account such representations before deciding whether or not to revoke the certificate.

7.5 Following Counsels' advice it is officers view that there is not a strong case for identifying with precision a statement that the Council can be satisfied was false in a material particular. Counsel's advice identifies one such statement as a potential candidate, although he expressed the view that the statement is relatively insubstantial. In officers' view, this is a broad statement based on the totality of activity over a number of years, and the evidence does not show it to be false.

7.6 In any event, officers do not consider that it would be expedient to seek revocation of the certificate on the basis of that statement (even if false) for the reasons given above. Although arguably material to the outcome of the LDC process when the statement is placed in the context of the evidence put forward through the application and considered recently through the enforcement appeal it does not negate the lawfulness of the use described in the application.

7.7 Recent legal advice has confirmed that revocation of the LDC will not necessarily result in the current use of the site being unauthorised. The consequence of revocation is that the use described as lawful at the date of the application is not conclusively presumed.

Option 2: Not to pursue the revocation of the Lawful Development Certificate dated 9 September 1998 and granted under reference 97/75746

7.8 This option would be consistent with action taken on the site to date. The LDC was used to establish the base use in the enforcement appeal decision and

therefore any decision to revoke the certificate would need to justify why this position has changed. To date the LPA has not challenged the use of the site as it is not disputed that a waste processing site can lawfully operate from the site.

- 7.9 The effect of this option is that the recent Inspector's report represents the last word on the lawfulness of the use. The certificate remains in force with the use described in it conclusively presumed to be lawful, and the activities taking place on the site at the date of the enforcement notice lawful as being within the primary use so described, and also not of a definably different character.

Option 3: To further consider the case of intensification in the use of the site with a view to serving an enforcement notice in relation to that allegation.

- 7.10 To pursue this option officers would need to build a case to demonstrate that a material change of use has occurred since the enforcement appeal decision. This is because the inspector details that the use of the site between 2003 and 2012 compared to the use in 2016 is not of a different definable character. Officers are not aware of any evidence that would substantiate such a claim.

Option 4: Not to give further consideration to the case of intensification in the use of the site and thus not to serve an Enforcement Notice in relation to that allegation

- 7.11 It is open to members to not give further consideration to the case of intensification if following consideration of the information in this report they consider this to be the preferred route.

8 RECCOMENDATION BY HEAD OF PLANNING

- 8.1 In respect of the revocation of the LDC, the Head of Planning recommends that the LPA does not pursue the revocation of the Lawful Development Certificate dated 9 September 1998 and granted under reference 97/75746.
- 8.2 The LPA has reached this decision based on the legal advice sought in which Mr Green has advised that the Council is not obliged to propose the revocation of the LDC triggering the procedure in art 39 of the 2015 Order. In particular the LPA considers that the ambiguity of the statements in the LDC, the effect of the enforcement appeal decision and fact that revocation will not result in the waste processing use of the site being unauthorised result in revocation being ineffective.
- 8.3 In respect of pursuing a material change of use at the site, the Head of Planning recommends that the LPA does not pursue the intensification in the use of the site. This view is informed by the enforcement appeal decision which concluded that the current use of the site albeit more intensive than the former use, has not resulted in a change to the definable character of the land.