

<b>DECISION-MAKER:</b>	<b>Planning &amp; Rights of Way Panel</b>
<b>SUBJECT:</b>	Unauthorised land tipping – land rear of 63 Botany Bay Road
<b>DATE OF DECISION:</b>	15 MARCH 2011
<b>REPORT OF:</b>	Steve Lawrence, Site Development Team Leader
<b>STATEMENT OF CONFIDENTIALITY NOT APPLICABLE</b>	

**BRIEF SUMMARY - Authority is sought to serve an Enforcement Notice and a permanent Stop Notice to prevent further unauthorised tipping of waste and to remediate the appearance of the land and thereafter prosecute any breaches of those Notices where expedient to do so in the Courts.**

**RECOMMENDATIONS:**

- (i) That the Development and Planning Manager be authorised to decide whether or not EIA development is involved within Schedule 2 of the TCP(Environmental Impact Assessment) Regulations 1999 and if it is to issue a scoping opinion with the regulation 25 notice
- (ii) That .the Solicitor to the Council be authorised to serve a Change of Use Enforcement Notice relating to the unauthorised change of use of the land from the mixed use of residential and open land to the mixed use of residential, open land and land used for the importation, tipping and deposit of refuse and waste materials.

The notice shall require :-

- The cessation of the importation, tipping and deposit of refuse and waste upon the land
- the removal of brick/building materials rubble that have been deposited on the land, identified in the location and photograph shown in **Appendix B.**
- The removal of the tipped waste from within the curtilage of 73/73a Botany Bay Road, identified in **Appendix A** to a licensed tip within six months of the Notice taking effect;
- within one month of the notice taking effect, the submission to the Local Planning authority of a slope stability survey of the tipped material identified in the geo-station survey undertaken by Encompass Surveys (Drg. ENC-070211-738)and dated February 2011;
- Within one month of the submission of the slope stability survey, the submission of a scheme for the Local Planning Authorities approval to remediate any instability of the tipped material; such scheme to deal with the method of stabilising the tipped material, the time scale for implementation of the

scheme, a scheme of planting to landscape the tipped material and the recording of the extent of the tipped material.

- Such other steps as the Solicitor to the Council considers appropriate to remediate the breach of planning control
- (iii) That the Solicitor to the Council be authorised to serve a permanent Stop Notice to prevent further unauthorised importation, tipping and deposit of refuse and waste.
- (iv) That delegated authority be given to the Solicitor to the Council to pursue any breaches of these Notices in the Courts, should further tipping occur at any point in the future or should the requirements of the enforcement notice not be met.

### **REASONS FOR REPORT RECOMMENDATIONS**

The unauthorised tipping of waste and related engineering operations to raise the level of land in the affected area has had a detrimental effect on the environment and is also likely to be prejudicing public safety in the following ways:-

- Has caused an ordinary watercourse to be diverted and is likely to have caused harm to a Site of Importance for Nature Conservation(Shoreburs Greenway);
- has created a mound of unknown stability which could harm the amenities of occupiers of adjoining land, should it subside, where such tipping has already encroached onto neighbouring land. Such raising of land levels has also created an oppressive sense of enclosure to occupiers of neighbouring land;
- The tipping of waste materials is unsightly and harms the visual amenities of the area particularly from the Site of Importance for Nature Conservation (Shoreburs Greenway);

The reasoning stated for serving the recent Temporary Stop Notices was therefore given as:-

The depositing of waste materials on the identified land - (most of which is a Site of Importance for Nature Conservation) - is considered to be harmful to the visual amenities of the area and outlook and safety of occupiers of adjoining property. It has the potential to cause contamination and general harm to the environment and adversely affect the quality of groundwater, notably a stream, which has been caused to be diverted from its original alignment. It is also the most likely cause for a public sewer to have collapsed, which resulted in a pollution incident. The unauthorised tipping activity is therefore considered to be contrary to the following policies of the Development Plan for Southampton set out below:-

City of Southampton Local Plan Review (March 2006)

SDP1 (i), SDP7 (i)/(ii)/(v), SDP9, SDP12, SDP23, NE4 and CLT3

City of Southampton Local Development Framework Core Strategy (January 2010)

CS13 (6)/(7)/(10), CS21 and CS22

## DETAIL

1. On 3 March 2011, several Temporary Stop Notices were served on persons relating to land at 53 to 63 Botany Bay Road and to land at the rear of 53 to 73 Botany Bay Road adjoining Shoreburs Greenway. **Appendix C** is a copy of the TSN.

2. The planning history of the land shows that Planning permission was refused in 1968 for the infilling of land to the rear of 53-71 Botany Bay Road. The lawful use of the land is (as stated on the Appointed Day, 01/07/1949) pasture (please refer to **Appendix A**) land. The Council were then required to Compulsorily acquire the land. The Secretary of State confirmed the acquisition by Order in 1969 which required the council to serve a Notice to Treat. Protracted negotiations took place as to purchase price, but none could be agreed. Negotiations broke down in 1971 and the Notice formally withdrawn in October of that year.

3. Outline planning permission was granted for housing on part of the land fronting Botany Bay Road in 1976, but was never pursued. A condition to that consent had required details of landscaping, including any adjustments to finished land levels. No topographic survey accompanied that application.

4. Some tipping appears to have occurred on the front part of the plot of 69-71 Botany Bay Road in 1981. No action appears to have occurred against that infringement, whereby the owner said this was to form the base of a pair of semi-detached houses that had received outline planning permission in 1979. Ultimately, the dwelling which now occupies that site was regularised under a permission given in 1991. The County Surveyor was involved at that time, but concluded that it was not a controlled waste issue. Again, no topographic survey was undertaken and no photographic record of previous land levels appears to have existed.

5. When the Council were agents for Southern Water it would seem the sewer was compromised even in January 1987 when cctv sewer inspection rear of No.61 revealed 'two major joint displacements', attributed to the tipping that was taking place. Alternative means of control other than planning legislation were also sought at that time from the Director of Law and Administration. The land owner was written to and requested to cease the tipping activities.

6. A further complaint to planning occurred in 1988 related to No.63. Again

the suggestion that stabilizing the 'bank' was referred to the Director of Technical Services and problems seem to have ceased shortly thereafter as no formal action was taken.

7. There were approaches and a site meeting to discuss further infilling in 1994 related to the owner's concerns about subsidence, but the planning officer discouraged that, in particular saying that the culverting of the stream and visual impact to the Greenway would be unacceptable. Proper surveys and sectional drawings were requested of proposals, but none were ever forthcoming.

8. On 19/01/2009 a man rang on behalf of his mother (the owner). He said that he had imported about 100 tons of materials to the site in order to shore up the land that the existing caravans occupied. He said he had acquired the material from various places but that he had no documentation to validate the amount or where it came from. He said that he did not know that he required permission. He stated that he would not import more material. On 20/01/09 a letter was sent to the 'son' confirming the telephone conversation of the previous day and confirming that planning permission was required for the works to raise the land levels by the importation of material.

9. On 13/02/09 a meeting was held with SCC (Planning Enforcement and Environmental Health), the Environment Agency (EA) and Southern Water (SW).

- SW advised that two sewers ran through the land and that one had collapsed due to the weight of the materials and that they would probably look to divert sewer around the imported material. They advised that they would consider whether they could take any action against the land owner. Southern Water have controls over what can be deposited or built over their sewers
- The EA were of the opinion that the materials were inert and so did not pose any health risk and that there was no immediate risk of flooding.
- Planning Enforcement advised that whilst there was a breach of planning control it was unclear what action could be required and that legal advice would be sought.
- It was agreed that all parties would review their enforcement positions and contact the landowners separately and that a later meeting would be arranged to review progress.

10. The son of the land owner rang on 05/03/09. He denied that any further material had been brought on to the land. He said that he had also received

a letter from the EA (dated 23/02/09 see **Appendix D**) and was in touch with them. He said he did not think that he done anything wrong and said he was only trying to shore up the land that the caravans were on. He said he was going to write to the EA giving full details of what had been done and he said he would send in a copy of the letter. (Planning is not aware that a response has been received by the EA and none has been received by the Council).

11. An independent surveyor was identified by the Council to undertake a survey of the site in February 2010, but that survey was never undertaken. The owner of the site and the agent that had been acting for them have been written to requesting permission to come onto the site to make a topographic survey. The agent then wrote to the Council setting out a number of options/remedial solutions. That letter is reproduced **as Appendix E**.

Environmental Health response to the stated options is as follows:-

- The removal of all the material is preferable but the history of the site prevents this. Option 3 is therefore preferred. Option 4 is not acceptable on environmental grounds, and options 1 and 2 fail on cost.

The Planning Ecologist's reaction to these Options is:-

- The land on the other side of the stream, referred to in option 4, is part of the SINC unlike the land on which the tipped material currently sits. The addition of further tipped material would certainly damage the ecological interest of the SINC.
- The idea of culverting the stream is a complete non starter. It would be very damaging to the integrity of the Greenway and potentially expose land further upstream to increased risk of flooding. The Environment Agency is currently trying to de-culvert streams to provide improved flood management capacity.
- In addition, covering the stream would enable further tipping in the future.

12. Over the years then a number of incidences of tipping have been recorded, where the local planning authority has written to the owners of the land to draw to their attention the unauthorised nature of their activities and requested such tipping to cease.

13. A pollution incident occurred 9 April 2009 when a public sewer passing through the affected land collapsed. The most likely cause of this collapse is the weight of tipped material that has been placed on top of it. Southern Water (SW) are actively planning remedial work on a diversion of the sewer

through the Greenway under its permitted development rights, within the Shoreburs Greenway, which is recognised as a Site of Importance for Nature Conservation (SINC) on the Proposals Map of the City of Southampton Local Plan Review (March 2006). Structural failure of the 300mm dia vitrified clay (vc) sewer pipe has already occurred and the parallel 375mm dia vc sewer has bowed. Their current timescales are:-

- Detailed Design November 2010 to March 2011
- Procurement of Contractor April / May 2011
- Sewer Replacement / Renewal commences May / June 2011
- Commissioning September 2011

14. The work of itself is likely to be disruptive in terms of unavoidable tree removal and other ecological impact, as well a temporary closure of a public right of way. In the meantime SW have installed a temporary gravity fed cross-connection between the two sewers and are routinely cleaning the sewers to prevent a build up of debris.

15. The Environment Agency (EA) wrote to the land owners on 23.2.09 specifying a breach of 3 separate pieces of legislation but has not pursued the matter. Officers from EA have recently been back to the site and have spoken with the site owners again setting out that the depositing of waste is contrary to legislation. Despite that, the tipping of material has continued. The Planning Enforcement Team has kept the matter under close review going onto the site four times since last September and is compiling a photographic data base of evidence. Comparison of site visit photography taken on 20.9.2010, 5.1.2011 and 3.3.2011 did reveal some recent deposit of rubble/tarmac surfacing and continued disposal of horse manure (See **Appendix F** to this paper).

16. The difficulty so far faced is that whilst tipping has undoubtedly taken place over very many years very little actual evidence exists in terms of proving the previous precise profile of the land, by way of any former topographic survey or detailed, dated photography. To that end a topographic survey was carried out on 7 February 2011 with the site owner's consent, bearing in mind his concerns about land stability and the safety of his family.

17. Such timeous evidence is vital to inform the proper drafting of requirements of any Enforcement Notice as it is necessary to have a record of the size of the tipped mound so that any possible further breaches of planning control can be monitored

18. The land owner has been written to 6 times since 8.1.2009. The owner

has always been advised that no further tipping should take place and that what had taken place constituted development for which no planning permission had been granted. Opportunity to make a retrospective application to seek to resolve the matter has been invited and relevant forms supplied, but no application has been submitted to date. On 8.9.09 a letter requesting a meeting was sent to the land-owner identifying dates for a meeting to be held in the Civic Centre. The landowners failed to attend the meeting.

19. The only recent reply ever received in writing from the owner (1.7.09) has been an allegation that the council did not install proper drainage when the road was originally laid out (**Appendix G**). The owner asserts that this has caused road water run-off to flow over their site towards the valley bottom, thus contributing to their land instability problem. They claim to have only tipped materials in an attempt to make the land more stable and raising of levels had been taking place on the site for more than 30 years. They claim that they were trying to address a problem which was caused by the Council and any damage to property would also be the Council's responsibility.

20. Colleagues in Highways confirmed (30.7.10) that there is in fact adequate drainage in the road and it is highly unlikely that this is causing land instability issues. The conclusion reached was that, 'the potential run-off from the rain falling on land within the property (the majority of which is impermeable surface) is far more likely to have more impact on the embankment and there is unlikely to be any significant contributory run-off from the public highway.

21. A request was made at a joint meeting of the council, SW and EA on 15.10.10, that the Environment Agency carry out sampling of the stream in the Greenway proximate to the tipped material, to ascertain whether any contaminative materials were leaching out via groundwater. That sampling is now being carried out, but results will need to be monitored over the coming months. The EA has recently set out its position in a letter dated 8 February 2011, reproduced as **Appendix H**.

22. It is thought unlikely that the tipped waste will be contaminating the stream though the monitoring mentioned above will confirm this is so. In view of this the EA supports the strategy of allowing the tipped material to remain upon the land and ensuring stability and landscaping of the same. The notice therefore proposes under enforcement as it does not require the removal of all the tipped material. To do so would be disproportionately costly and the tipped material would have to go to a further location for waste. Given the length of time that material has been tipped on and off and the extent of the tipping it is recommended that the preferred course of action is to define the extent of the tipped material, stabilise it and screen it and then enforce against any future tipping.

23. The Temporary Stop Notice ceases to have effect on the 31<sup>st</sup> March and

given the above history of tipping and refusal to cease the importation of waste to the site it is considered expedient to serve a permanent stop notice. This will allow a prosecution of the persons responsible if waste continues to be imported onto the site.

## **RESOURCE IMPLICATIONS**

### **Capital/Revenue**

If an enforcement notice is served and is not complied with and the Council consider using its default powers to execute the requirements of the notice then the cost will be very considerable. Under-enforcement in the steps above is recommended, not least because the provenance of the tipped materials is unknown and may contain prescribed contaminants, which if removed wholesale, could pose a greater pollution problem of itself and for the other reasons set out in Para 22 above ).

None.

### **Property/Other**

None

## **LEGAL IMPLICATIONS**

### **Statutory Power to undertake the proposals in the report:**

Town and Country Planning act 1990 section 172 and section 183.

### **Other Legal Implications:**

Those served with the Enforcement notice have a right of Appeal to the Secretary of State. There is no right of appeal against a Stop Notice: any challenge would be by way of judicial review in the High Court

The Human Rights Act 1998 incorporated into domestic law the European Convention on Human Rights (the Convention). The Convention includes provision in the form of articles, the aim of which is to protect the rights of the individual.

Section 6 of the Human Rights Act prohibits public authorities from acting in a way which is incompatible with the Convention. Various Convention rights may be engaged. The following articles have been considered :

Article 1 of the First Protocol protect the rights of everyone to the peaceful enjoyment of possessions. No one can be deprived of possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

Article 8 protects private and family life, home and correspondence. No public authority can interfere with these interests except if it is in accordance with the law and is necessary in a democratic society in the interest of national security, public safety or the economic well –being of the country, for the prevention of disorder or crime, for the protection of health or moral or for the protection of the rights and freedoms of others.



The European Court of Human Rights has recognised in the context of Article 1 that regard must be had to the fair balance which has to be struck between the competing interest of the individual and of the community as a whole. Similarly any interference with Article 8 rights must be necessary for the reasons set out. In this case, any interference with Convention rights is considered to be justified in the public interest in order to secure the proper planning of the land within the LPA's area.

Regard has also been had to the Equalities legislation and the Crime and Disorder Act and the Race Relations Act in making these recommendations and the recommendations are proportionate having regard to the wider impact upon the area of the unauthorised activity.

## **POLICY FRAMEWORK IMPLICATIONS**

The report and recommendations are consistent with policies of the City of Southampton Local Plan Review (March 2006) and Local Development Framework Core Strategy (January 2010).

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### **SUPPORTING DOCUMENTATION**

**Non-confidential appendices are in the Members' Rooms and can be accessed on-line**

#### **Appendices**

A.	Ordnance Survey 1:1250 extract, and photographs showing the site where the Enforcement and Stop Notices to be served will relate to and that part of tipped material that has encroached into the back garden of 73/73a botany Bay Road.
B.	Location and photographs of brick/building materials rubble that have been recently deposited at the rear of 63 Botany Bay Road.
C.	Temporary Stop Notice served on owner of 63 Botany Bay Road, 3 March 2011
D.	Letter from Environment Agency dated 23/02/09.
E.	Letter from agent representing the land owner dated 3.2.2010.
F.	Photography taken 20.9.2010, 5.1.2011 and 3.3.2011, illustrating recent tipping activities.
G.	Letter from site owner dated 1.7.2009.

H.	Letter from Environment Agency dated 8/02/10.
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**Documents In Members' Rooms**

1.	None
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**Integrated Impact Assessment**

Do the implications/subject/recommendations in the report require an Integrated Impact Assessment to be carried out.	No
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**Other Background Documents**

Title of Background Paper(s) - None

Relevant Paragraph of the Access to Information Procedure Rules / Schedule 12A allowing document to be Exempt/Confidential (if applicable)

**Integrated Impact Assessment and Other Background documents available for inspection at: Civic Centre, Civic Centre Way**

<b>WARDS/COMMUNITIES AFFECTED:</b>	Sholing Ward
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