

**DEVELOPMENT CONTROL AND REGULATORY BOARD****3<sup>rd</sup> AUGUST 2023****REPORT OF THE CHIEF EXECUTIVE****COUNTY MATTER****PART A – SUMMARY REPORT**

- APP.NO. & DATE:** 2022/1491/03 (2022/LD/0104/LCC) – 29<sup>th</sup> July 2022
- PROPOSAL:** Certificate of Lawfulness for an Existing Use or Development (CLEUD) to seek to confirm that former and current/proposed uses fall within the same use class – Class B2 (General Industrial) Use.
- LOCATION:** Gibbet Lane, Shawell, Leicestershire, LE17 6AA (Harborough District)
- APPLICANT:** Beauparc Group & Tarmac Trading Limited
- MAIN ISSUES:**
- (i) Whether the original operations at the site, under the relevant and extant planning permissions, constitute a B2 (General Industrial) Planning Use Class.
  - (ii) Whether the existing site activities require planning permission.
- RECOMMENDATION:** REFUSE on grounds that the existing lawful use is a Sui Generis Planning Use Class and is not B2 (General Industrial).

**Circulation Under Local Issues Alert Issues Procedures**

Mr. B. L. Pain, CC.

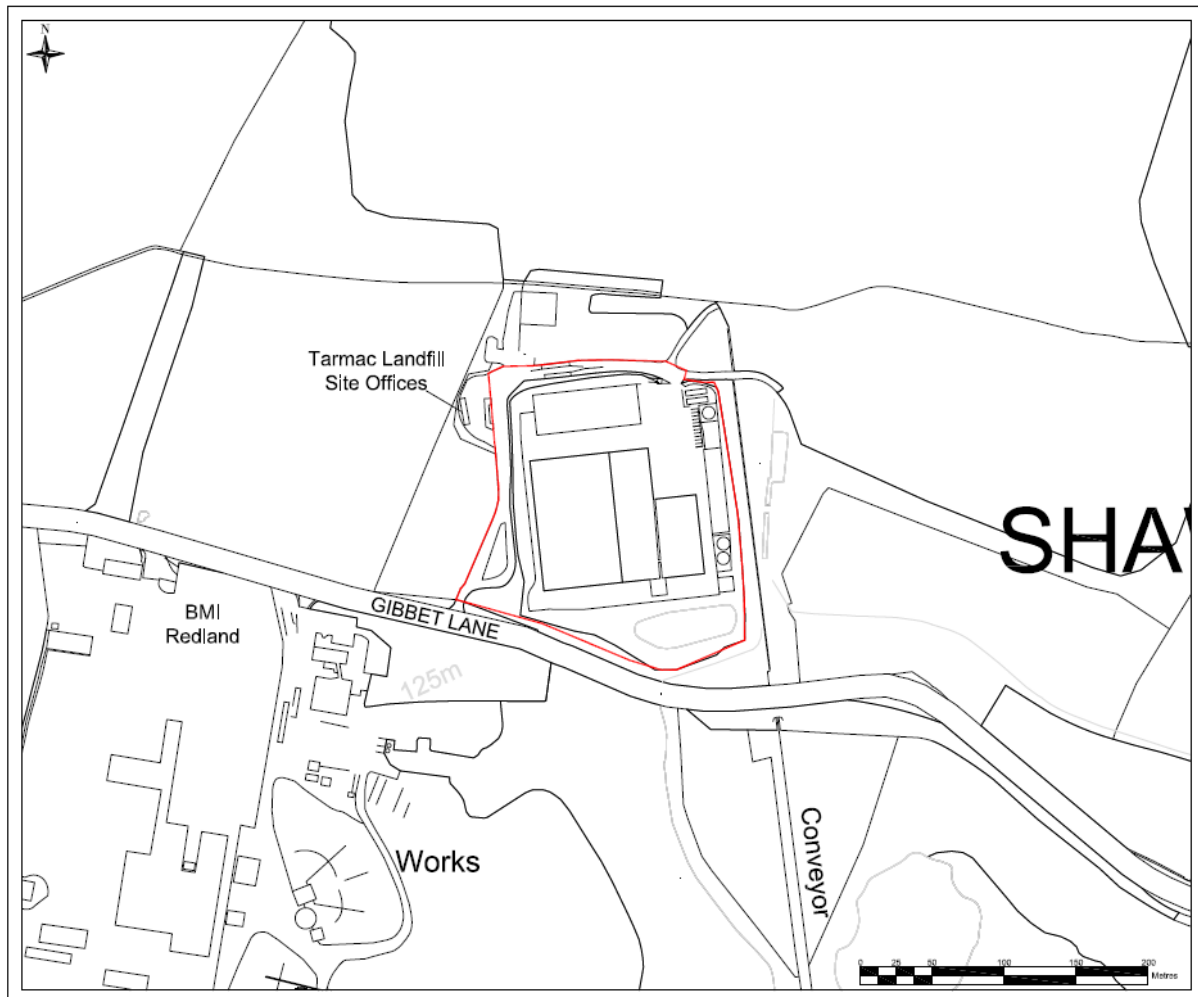
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## **PART B – MAIN REPORT**

### **Site Location**

1. The application site is located on Gibbet Lane, Shawell, within the wider active Shawell/Cotesbach quarry and landfill site operated by Tarmac Trading Limited. The site is approximately 600m north-west of the village of Shawell and 1.3km south of the village of Cotesbach, near Lutterworth. Gibbet Lane links Shawell with the A5/A426 junction to the west.
2. The site is on the north side of Gibbet Lane, directly adjacent to Shawell landfill and previous mineral extraction areas that are being progressively restored. To the south of Gibbet Lane lies the Quarry processing plant, a number of silt settlement lagoons, a roof tile works, and the site of a disused concrete block works.
3. The nearest residential properties to the site are Marchwood House and Littledene, which are approximately 400 metres south-east on Gibbet Lane. Other properties in Shawell are located about 150 metres further to the east and south-east, at distances between 550 and 850 metres from the site boundary. A property known as Greenacres, on Gibbet Lane near the A5/A426 roundabout, is located about 700 metres west of the site. Two semi-detached properties, Keepers Cottage and West Cottage, are situated adjacent to the northern quarry boundary, 950 metres north-east of the Mechanical Biological Treatment (MBT) facility.
4. There are no statutory ecological designations within the application site. Cave's Inn Pit, a Site of Special Scientific Interest (SSSI) is located approximately 1km south-east of the site.
5. The application site falls into Flood Risk Zone (FRZ) 1, the lowest designated zone of fluvial flooding.
6. There are no Listed Buildings, Scheduled Monuments or Registered Parks and Gardens within or in close proximity to the application site. Within a 2km radius, there are two Scheduled Monuments: The Station at Tripontium (1005759), which is located approximately 1km south-west of the site, and the Motte castle and associated earthwork SSW of All Saints Church in Shawell (1017549) which is located approximately 1km south-east. Shawell Conservation Area is approximately 500m east of the site boundary, and the nearest Listed Buildings are at least 600m away within Shawell Village.
7. There are no Public Rights of Way within the application site itself, however there are two footpaths and a bridleway in close proximity. Footpath X24 is the closest at 10m away but is located on the other side of Gibbet Lane, extending in a south-east direction to Shawell village. Bridleway X27 is also currently diverted around the western side of the wider site until August 2045.



## **Background**

### **Planning History**

8. In September 2008, planning permission was granted under reference 2008/0789/03 for a fully enclosed composting facility for the processing of up to 50,000 tonnes of waste per annum (tpa) and ancillary development.
9. The facility opened in 2010 and was operated by New Earth Solutions Limited (NES). The facility principally received household waste from kerbside collections in Leicestershire which was then subject to a Mechanical Biological Treatment (MBT) process to recover value in the form of recyclates (ferrous and non-ferrous metals and plastics), and to manufacture a compost-like output (CLO) for use in land reclamation and to a refuse derived fuel (RDF) for use in energy generation.
10. Permission was subsequently sought for an increase to the throughput of the facility from 50,000tpa to 60,000tpa and a commensurate increase to the HGV movements in and out of the site from 240 to 300 a week (2012/0972/03 and 2012/CSub/0208/LCC). The increase in HGV movements was granted but the increase in throughput was refused on the ground that the operation of the existing MBT facility gave rise to an unacceptable adverse effect by reason of

odour as evidenced by a significant number of odour complaints from residents in Shawell village.

11. Following the above refusal, an application for an increase in waste throughput from 50,000 to 75,000tpa was made in 2013 (2013/0809/03) and subsequently refused on the grounds of the failure of the site's location against the locational policies of the Waste Core Strategy which sought to locate new waste developments within or around the main urban areas. This decision appealed and dismissed by the Planning Inspectorate in October 2014. The Planning Inspector concluded that the site was not well related to waste arisings and did not have any convincing benefits of co-location. Given that the proposal related to a greenfield site in the countryside, policy required an overriding need for the development which the Inspector could not identify.
12. In April 2020 an application was submitted for a Change of use from Mechanical Biological Treatment (MBT) facility to a Material Recovery Facility (MRF). The application also sought an increase of waste throughput to 150,000 tonnes per annum; and a revision of operating hours and minor ancillary revisions to site infrastructure (Ref: 2020/0657/03 (2020/CM/0045/LCC)). The application was considered by the Development Control and Regulatory Board on 8 October 2020 and refused on the grounds that the proposed development would conflict with the locational policies of the Leicestershire Minerals and Waste Local Plan, which seek to locate new waste developments within or around the main urban areas.

### Permitted Operation

13. The extant planning permission allows a process which involves open-air composting of refuse. Material is subject to approximately 28 days of composting before being transferred to a maturation building where it remains for maturation for 4-12 weeks. Then it is transferred to the screening halls where it is screened to remove any oversized material and transferred to the adjacent landfill site for use in landfill restoration as a compost/soil replacement product. Any recyclables which are recovered from the waste stream (such as ferrous and non-ferrous metals, plastics etc.) are baled and wrapped and taken off site for recycling.
14. The majority of the material not suitable for recycling or composting is turned into RDF (Refuse Derived Fuel), whilst the bio-fines are taken into the adjacent composting halls and formed into windrows, which are long piles of matter laid out and turned regularly as part of the aerobic process to form a Compost Like Output (CLO).
15. During its operational years, the outputs from the site included recyclables that were taken off-site for recycling, the CLO which was used at sites other than the adjacent landfill, and the RDF which was sent to the Netherlands for use in energy generation. Residues and reject materials were sent to the adjacent Cotesbach Landfill.

16. Between 2010 and 2016, the facility experienced a number of operational issues and received numerous complaints, primarily regarding odour, and as a result of this alongside other operational shortcomings, was closed in 2016. The site has remained mothballed since its closure.

## **Procedural Matters**

### Planning law

17. The main planning law relevant to the application comprises The Town and Country Planning Act 1990 ['TCPA 1990'] and The Town and Country Planning (Use Classes) Order 1987 (as amended) ['UCO'].

### Legislation and guidance

18. Relevant Government advice on the application of the UCO was contained in ODPM Circular 03/20051 but this has now been replaced by National Planning Practice Guidance (PPG). The relevant section(s) of PPG will be referred to where appropriate.
19. Section 192 (2) of TCPA 1990 provides that if, on an application under that section, the local planning authority is provided with information satisfying it that the use or operations described in the application would be lawful they shall issue a certificate to that effect. In any other case the application should be refused. The onus is on the applicant to demonstrate that the operations or development is lawful.
20. The decision is to be based strictly on factual evidence, the planning status/history of the site and the relevant law or judicial authority applicable to the circumstances of the case. The planning merits of the proposed use applied for do not fall to be considered.
21. PPG advises as follows: A local planning authority needs to consider whether, on the facts of the case and relevant planning law, the specific matter is or would be lawful. Planning merits are not relevant at any stage in this particular application or appeal process. In determining an application for a prospective development under section 192 a local planning authority needs to ask "if this proposed change of use had occurred, or if this proposed operation had commenced, on the application date, would it have been lawful for planning purposes?" Paragraph: 009 Reference ID: 17c-009-20140306, Revision date: 06 03 2014.
22. Guidance states that there is no statutory requirement to consult third parties including parish councils or neighbours. A local planning authority may, however, seek evidence from these sources as a courtesy, or if there is good reason to believe they may possess relevant information about the content of a specific application. Views expressed by third parties on the planning merits of the case, or on whether the applicant has any private rights to carry out the operation, use or activity in question, are irrelevant when determining the

application. Paragraph: 008 Reference ID: 17c-008-20140306, Revision date: 06 03 2014.

### Case Law

23. *In Bennet Fergusson Coal Limited v First Secretary of State* [2003] EWHC 1858 the judge held that a materials recycling facility may (and would likely) fall within Use Class B2, but the specific activities on a particular site would have to be assessed on a case by case basis. In his judgement, the judge found that the inspector had misdirected himself in concluding that the use in that case was *sui generis* as they had taken into account a number of irrelevant matters, but the judge did not come to a conclusion himself as to the correct classification of the use and, each case needs to be assessed on its own facts.

### Consultation

24. As outlined earlier, although consultation is not a statutory requirement in the Certificate of Lawfulness process, a courtesy consultation was undertaken by the Council with Shawell Parish Council and Newton and Biggin Parish Council.
25. Newton and Biggin Parish Council declared that they are not in a position to support or refute the evidence set out by the applicant and would therefore defer to Shawell Parish Council on the submission of appropriate evidence.
26. Shawell Parish Council's comments are summarised as follows:
- The applicant's assertion that it has never adhered to the original planning permission requirement for composted output to be used for the restoration of the landfill and that this has never been enforced is refuted.
  - The Parish Council refers to the original planning application and (typically) one additional HGV movement with all other HGV movements (e.g. inbound) being the same as those already bringing waste to the site, linking the site, building and operations to the adjacent landfill.
  - The former New Earth Solutions managers' statements that compost was never used on site and the argument that the input waste streams were not destined for landfill is questioned.
  - The whole site is covered by a 2004 "Review of Old Mineral Plans" (ROMP). These are done every 15 years. The existing ROMP predates the plant and any change of use of this facility should be done in the context of the whole site and applicable policies, confirmed in an updated ROMP.
  - There is a site Restoration Plan that states the site should be returned to greenfield in 2044.
  - As previous planning decisions (that twice refused further development) emphasised "for the avoidance of doubt" that the operation was linked to the landfill, which was stated clearly for both refusals.
  - The plant was closed from 2016 / 2017 and the additional offload of recycled material (e.g. to Holland) was temporary for economic reasons, and stopped before the plant closed. Therefore, the material must have

gone to the adjacent landfill instead, as intended in the original planning consent.

- The applicant's consultants emphasise the nature of the building is not unique ("sui generis") to a composting plant, but suggest that it is a generic industrial building. The floor space is especially large to accommodate the composting process. If it was used for plastic recycling (or other general waste processing) then it could accommodate 450,000tpa - nine times the level that is currently permitted.
- The last NES planning permission was only for 75,000 tonnes and the applicant's application was for 150,000 tonnes. So, the building is specially designed for composting – hence its large floorspace for 50,000tpa throughput.
- There was a visit by the planning authority in early 2022. The Parish Council had requested to the LPA that enforcement action should be taken if unpermitted activities were taking place but no unpermitted activities were found.
- There was previously debate about whether the 300 HGV movements per week were additional or a subset of the overall site allowance. The original planning documents are clear that they are a subset of the site allowance (they replace the HGV movements that would have gone directly to the landfill). Given the distances HGVs normally travel to Shawell / Cotesbach, these would not appear to be separate waste streams.
- The application for an increase from 240 HGV movements per week to 300 was a separate application to the increased throughput tonnage (50ktpa to 75 ktpa) arguing that this would allow more flexibility to handle more smaller refuse collection vehicles (RCVs).

### **Application Assessment**

27. The existing site activities and the use for which the CLEUD is sought is described in the application supporting information as follows:

*(a) Waste acceptance, including checking hauliers' compliance with the Waste Duty of Care Code of Practice;*

*(b) Waste reception and storage, including the process of sorting the waste and removal of large items;*

*(c) Mechanical treatment, shredding and sorting of mixed municipal waste including the sorting of waste materials to segregate and bulk recyclable and other materials;*

*(d) Mechanical treatment, shredding and sorting of source segregated plastics including the sorting and picking of waste polythene and processing the same through the plastic recycling plant (including shredding, washing, grinding, drying, heating and cooling)..."*

28. The grounds on which the CLEUD is sought are that:

(i) The original operations at the Site, under planning permissions described further below, constituted a B2 (general industrial) use;

(ii) The current operations at the Site also constitute a B2 (general industrial) use; as a result,

(iii) The existing activities do not involve the development of land and planning permission is not required pursuant to Article 3(1) and Schedule 1 to the Town and Country Planning (Use Classes) Order 1987 (as amended) (“the Use Classes Order”); and, therefore,

(iv) The existing site activities are lawful and a Certificate may be granted pursuant to section 191(1)(a) of the Town and Country Planning Act 1990 (“the 1990 Act”).

29. The legal framework and the tests that must be applied by the Council when determining lawfulness is Section 191 (4) of the 1990 Act , which states as follows:

*“If, on an application under this section, the local planning authority are provided with information satisfying them of the lawfulness at the time of the application of the use, operations or other matter described in the application,*

*or that description as modified by the local planning authority or a description substituted by them, they shall issue a certificate to that effect; and in any other case they shall refuse the application.”*

30. The 1990 Act goes on to state that the onus of proof is on the Applicant to satisfy the Council that the existing use is lawful.

31. Article 3 (1A) of the Use Classes Order (UCO) provides that:

*“(1A) subject to the provisions of this Order, where a building or other land is situated in England and is used for a purpose of any class specified in –*

- (a) Part B or C of Schedule 1, or  
(b) Schedule 2,*

*The use of that building or that other land, or if specified, the use of part of that building or the other land (“part use”), for any other purpose of the same class is not to be taken to involve development of the land.”*

32. This enables use of the land and buildings for alternative uses without the need for planning permission, provided that the existing and proposed uses fall within the same use class.



33. Where the Use Class is Sui Generis, the development falls outside the use classes, denoting “Of its own kind or class, unique, on its own.” (LexisNexis glossary definition).
34. The view of the Council has been consistent in that the permitted use for the site would not have been granted in this location without a close operation with the adjacent landfill operation as the development would have been contrary to the policy at the time of determination, which was Policy CS4 of The Leicestershire & Leicester Waste Development Framework: The Core Strategy and Development Control Policies up to 2021 (2008). Policy CS4 and gave the highest priority to locations on land with an existing waste management use where transport, operational and environmental benefits could be demonstrated as a consequence of the co-location of waste management facilities.
35. This was evidenced within the supporting documentation of the original planning application (Ref: 2008/0789/03).
36. In the Third Planning Application 2013/1425/03 Condition 2 limits the Third Planning Permission to the period expiring one year after the permanent cessation of landfilling operations at Shawell Quarry / Cotesbach landfill.
37. Condition 3 requires the development to be carried out in accordance with details of the First Planning Permission and accompanying supporting statement.
38. Condition 7 requires the retention of topsoil and subsoil resources for the reclamation of the application site or adjacent Shawell Quarry/Landfill site landscaping scheme linking to the “*Landscape Maintenance Plan submitted pursuant to condition 8 of planning permission 2008/0789/03 and approved on 6<sup>th</sup> January 2010.*”
39. Condition 25 requires that “*No later than 31<sup>st</sup> September 2044 the operator shall submit a scheme of site clearance and reclamation of the site for the approval of the Waste Planning Authority.*”
40. The Officer’s report in Planning Application 2020/0657/03 refused the Change of use to a Material Recovery Facility (MRF) on the grounds of conflict with locational policies of the Leicestershire Minerals and Waste Local Plan, confirming the existing MBT facility as subservient to the wider permission, with restoration of a principally minerals development. It was originally envisaged that the majority of waste outputs would be used for infilling, and that a proposed MRF use would be a further divergence from the original location benefits of the facility’s location.

#### Key issues for consideration

**Does the existing use, whether or not it is a use carried out in or adjacent to a mine or quarry, fall within Use Class B2 or is it *sui generis*?**

41. It is acknowledged that the existing operations (i.e. those for which the CLUED is sought) when considered in isolation fall within the UCO definition of Use Class B2: General Industrial as industrial processing of biodegradable materials which are sanitised and stabilised in order to produce a particulate matter of commercial value. However, Article 2 of the UCO excludes industrial processes where they are in or are adjacent to a mine or quarry and the view of officers remains that the relationship between the use of the Site and the use of the wider landfill/ quarry as encapsulated by the October 2013 Planning Permission is key and that this relationship takes the use outside of B2. The 2020 application (2020/0657/03) refused permission for a change of use to a Materials Recovery Facility (MRF) and an increase in the waste throughput to 150,000 tonnes per annum as the proposal lacked demonstrable benefits of co-location and would involve the exportation of the vast majority of waste outputs by HGV to distant and dispersed locations. The subsequent appeal was dismissed.

**Is the use one carried out in or adjacent to a mine or quarry so as to fall outside Use Class B2?**

42. It is accepted that the link between output from the site and the adjacent landfill/quarry, whilst operational, has not been at the intended level as set out in the October 2013 Planning Permission. However, it is also noted that there has been a tenuous link in practice between the use of the Site and the use of the landfill/ quarry Site. On balance, officers are not satisfied that this should be the decisive factor in the determination of this issue and though the applicant argues that the Council is wrong to look beyond the operation within the Site buildings, officers do not agree with this position and are giving weight to the factor of planning permission being granted in a temporary capacity on grounds of co-locational benefits where it would not have been otherwise granted, due to non-accordance with the council's policy position both at the time of the original planning permission, and now.

Conclusion

43. Whilst officers acknowledge that Article 2 of the UCO supports the applicant's position that the operations in question fall within the defined outline of an "industrial process" officers are satisfied that, in this case, the consideration of this facility has to extend beyond that of the operation that is taking place inside the buildings as the link between the buildings and the quarry and the onward destination of output is key, by virtue of the intentions of the original planning permission. Therefore, officers are satisfied that, in this particular case, it is a reasonable interpretation of The Town and Country Planning (Use Classes) Order 1987 Schedule Part B Use to determine the existing use outside of Class B2 and that the use is indeed Sui Generis.
44. Officers remain of the view that the temporary permitted use for the site would not have been granted in this location without a close operation with the adjacent landfill operation as per the appeal decision (2013/0809/03) for the refused application to increase waste throughput. The development would have been contrary to Policy W4 of the LMWLP (formerly Policy CS4 of The

Leicestershire & Leicester Waste Development Framework) without the intended linked landfill operations.

45. Officers take on board the consultation representation made by Shawell Parish Council that subsequent planning applications have likewise relied on the link with the landfill and whilst it is acknowledged that the landfill element has not been fulfilled to the level intended, the link is still present, as referenced in the Conditions.
46. On consideration of the above, it is therefore recommended that a Certificate of Lawful Use be refused for the following reasons: The information provided by the applicant fails to satisfy, on the balance of probabilities, that the existing use described in the application is Use Class B2, and therefore lawful; and, it would make a material change of use of the application site, thereby comprising development requiring planning permission.

### **Recommendation**

47. REFUSE the Certificate of Lawful Existing Use or Development (CLEUD)

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