

**Agenda Item No. 4.1**

**DERBYSHIRE COUNTY COUNCIL  
REGULATORY – PLANNING COMMITTEE**

**6 November 2017**

Report of the Strategic Director – Economy, Transport and Environment

- 1 APPLICATION FOR A CERTIFICATE OF LAWFUL USE FOR THE  
EXISTING WASTE RECYCLING FACILITIES, FURNACE HILL,  
LOWER MARKET STREET, CLAY CROSS  
APPLICANT: RE-USE SALES LTD  
CODE NO: CL4/0415/9**

**4.2450.1 to 4.2450.6**

**Introductory Summary** This application has been submitted to the County Council for the grant of a Certificate of Lawful Existing Use (CLEUD) under Section 191 of the Town and Country Planning Act 1990 (the 1990 Act) in respect of a use of land relating to waste recycling.

Unlike a conventional planning application, each application for a CLEUD is determined entirely on the available factual evidence about the history of the land use to which it concerns. This is because these applications have to be granted or refused according to whether or not there is considered ‘on the balance of probabilities’ to be an existing use or development referred to under the application which has become lawful in terms of the 1990 Act.

The application, in this case, has not provided a clear account of the use of the land which it is claiming to be lawful. However, it appears to contend that there was an existing use at the time of the application of some land, within the area of land described by the application plan, for waste recycling activities, which was different from the storage related uses of certain parts of the area which were authorised and controlled under two planning permissions granted by the Secretary of State (on appeal), and which had become lawful by the time of the application through having been on-going for over 10 years. I consider that no such lawful use is substantiated by any available evidence, for the reasons explained below. The information that is available provides evidence that any activities, that might possibly be identified as forming any existing planning use relating to waste treatment over any of the land at the time of the application, would not have been of any sufficient duration and continuity to establish a new lawful planning use.

I am therefore recommending that the resolution of the Committee is for refusal of this CLEUD application.

(1) **Purpose of Report** To enable the Committee to determine the application.

(2) **Information and Analysis**

### **Application Details**

This application is submitted by Mitchell and Proctor, on behalf of Re-Use Sales Ltd, and relates to land at Furnace Hill, Lower Market Street, Clay Cross, which the application describes as having “mixed uses and waste recycling, skip and plant hire functions”. The application appears to claim that a “waste recycling facilities” use had, at the time of the application (15 April 2015), been a continuous use since before 29 March 2005 (i.e. for more than 10 years).

### **Location and Description of Application Land**

The area of land identified on the plan attached to the application is situated off the A6175 at the junction of Furnace Hill Road and Lower Market Street, Clay Cross, and is accessed from Furnace Hill Road.

The area mainly comprises two distinct parts, eastern and western, with a ramp sloping down from the western part to the eastern part. The western part, which is closest to the site entrance, contains a reception building and a car parking area. The eastern part contains two old industrial type buildings located towards the north-east boundary of the site. The majority of the surface of both parts is unbound and covered in mud, and contains deleterious material that appears to have been present over a long period.

### **History of Application Land**

The land is understood to have a history which includes previous industrial uses associated with the traditional heavy engineering businesses that were predominant in Clay Cross during the 20<sup>th</sup> century.

Files kept by North East Derbyshire District Council (NEDDC) indicate a history of unauthorised activities related to old vehicles and machinery being stored on the land during the 1990s, which resulted in several enforcement actions and an enforcement appeal in respect of the eastern part of the site. This appeal concluded with a planning permission being granted by the Secretary of State for the change of use of the eastern affecting part of the site to a use for “*the purpose of dealing in surplus vehicles, plant, machinery, fuel, oil and other materials, including the storage, adaption and renovation pending sales*”.

In 1999, NEDDC refused an application for retrospective planning permission for the establishment on the western part of the land for a skip hire business. NEDDC then took enforcement action in respect of this unauthorised development but planning permission was subsequently approved subject to

conditions, under an enforcement appeal in 2001. The 2001 permission authorised the use of the western area of the site, excluding the access road and a specified landscaping area, for the open storage and parking of skips and road vehicles associated with skip hire.

On 31 January 2007, Derbyshire County Council granted a planning permission (CW4/0906/96) for the establishment of a waste recycling facility at the site but no development under this permission was commenced by the end of the period for its commencement. Consequently, the permission lapsed. The drawings submitted with that application are particularly revealing as they display the layout of the land at that time, the respective parts for the skip hire business (western part) and the vehicle repair and storage use (eastern part), together with ancillary facilities such as offices and car parking areas. A 'pre-commencement' condition of the 2007 planning permission prevented that development being commenced until all the existing scrap material on the application site, including old unusable vehicles, not required in connection with the development, had been removed from the site. Notes from site inspection made by officers of this Authority indicate that this removal was not fully achieved.

### **Supporting Information**

The applicant has provided no evidence by way of statutory declaration, witness statements or other documents, with the application, relying entirely on a short supporting statement provided by its agent. The supporting statement suggests that the application relies on the site history records of both NEDDC and Derbyshire County Council, and the historic planning applications received, enforcement action taken and planning permissions granted by both authorities and the Secretary of State (briefly referred to above).

The supporting statement also makes reference to enforcement action taken by the Environment Agency, resulting in a prosecution by the Agency in 2006 for an illegal disposal of waste materials. The statement refers to 'waste operations' being undertaken at the land at the time and adds that the applicant subsequently applied for and obtained a Waste Management Licence from the Environment Agency. It also comments on the planning permission granted by this Authority in 2007 for the establishment of a waste recycling facility at the site.

The statement also includes the submission by the applicant that "*our clients have continued to use the site for waste recycling facilities and other uses as authorised under the extant consent granted by the Secretary of State continuously, without any break, since before 29 March 2005, as communications with North East Derbyshire District Council, Derbyshire County Council and Environment Agency over the intervening ten years or more can testify*".

## **Consultations**

There is no legal requirement to undertake consultations or publicity in respect of a CLEUD application. In this instance, however, and considering the previous site history a number of organisations and local businesses were consulted to see whether they held evidence relating to the application. Such organisations included the Environment Agency, the NEDDC Environmental Health Officer (EHO) and Clay Cross Parish Council, as well as nearby businesses.

## **Comments Received**

The NEDDC EHO reports on direct involvement with the site on several occasions, including:

- 2004. Investigated site following a complaint and observed the operator burning materials but cannot provide any further details.
- 2005. Investigated site following another complaint and observed the operator sifting through waste materials on a concrete pad. He refers to observing some degree of separation but could not confirm whether or not it constituted a recognisable waste management activity.
- 2010. Investigated the site following a complaint about odour and observed similar activity to that taking place in 2005.

Clay Cross Parish Council refers to the history of complaints and legal action against successive operators relating to unauthorised activity at the site. The Council also indicates that it remains concerned about the appearance of the site, particularly in view of its relationship to the benefits being obtained from progression of the regeneration scheme in the town.

## **Case Analysis**

Whilst the longer history of the site is not pertinent to the determination of this application, it is important to have regard to those extant permissions, which the application incorrectly refers to in the singular, which apply to the eastern and western parts of the land. The uses under these permissions are distinct and separate in terms of activity and purpose. As indicated above, the conditional permission relating to the eastern part of the land was granted under the Secretary of State's decision of 22 April 1996 "for the purposes of dealing in surplus vehicles, plant, machinery, fuel, oil and other materials, including storage, adaptation and renovation pending sale"; whilst the conditional permission for the western part of the land was granted under the appeal decision of 6 March 2001, "for the open storage and parking of skips and road vehicles associated with skip hire".

The planning application that resulted in the 2007 planning permission (CW4/0906/96) proposed the receipt and processing of up to 20,000 tonnes per year of inert and green waste from households and small building sites. The accompanying drawing identified the area of the proposed activity as a

central part of the land (primarily located on the lower eastern section referred to above) site onto which the incoming waste would be discharged, separated and stored in one of nine concrete bays (3.6m x 8.5m) on a concrete base measuring 17m x 34m. Although the red line boundary for that application site encompassed the whole of the land, the waste receipt and processing activities proposed by the application related only to this central part, with the application documentation indicating the continuation of the existing authorised uses, albeit in a more formalised way, in the western and eastern parts of the land.

The database held by Derbyshire County Council contains a collection of site visit notes and photographs of the land dating from December 2006 to early 2015. The County Council's first involvement with the land was a site inspection by officers of this Authority on 1 February 2006, in response to an enquiry by the Environment Agency. The file note of the inspection refers to the site being predominantly a scrap yard consisting of old vehicles, plant and machinery. Several empty skips were noted together with some wood burning in a container, plus three full skips of mixed waste. When asked for a statement, the owner confirmed she was in the process of clearing the site in order to cater for a waste transfer station and this was the reason for the full skips. The owner expressed an opinion that the operation of the site for such a purpose would not require a new planning permission given the then existing permissions.

The information provided in support of planning application CW4/0906/96 was generally prepared in the summer of 2006 before being submitted in the September of that year and it states that (at the time) all waste (from the skip hire business) was being taken directly to landfill. The proposed development of a facility to obtain benefit from that waste and cease disposal via landfill was put forward as a major issue in support of the application.

Although the next site inspection report in the County Council's file is dated 11 October 2007, there is a note in that report referring to an earlier site visit on 6 July 2007 when it was the view of the County Council's officer that the clearance of the site in preparation for commencement of the 2007 permission was not yet completed. The 11 October 2007 site inspection notes that there was still scrap on site such that Condition 3 had not yet been complied with, but also notes the owner's indication that waste from skips had been deposited on the land, sorted and removed (at the end of the working day) over the previous three week period.

The main feature of the photographs taken on these site visits in the period up to the end of 2009 is the presence of a substantial volume of old vehicles and containers, together with numerous yellow skips of varying size. The old vehicles and related scrap is that referred to in the various application and appeal reports that was required to be removed to enable approved

developments to commence. The skips are indicative of the skip hire business. Some photographs (dated 24 September 2009 and 30 September 2009), indicate the presence on the ground of piles of waste materials (type unknown) located against the concrete wall constructed in a manner that could form a recognised waste sorting area as part of a recycling facility. In others, this area contains some of the skips. Again, whilst they indicate a presence on each occasion of waste materials on the land, they also show that at least some of the materials have remained present on the land for a long period. The photographs do not show any signs of a waste facility having been established over any part of the land that is distinguishable from the authorised uses of the western and eastern parts under the planning permissions.

Site inspections and photographs from the last three years relate to the presence on the central part of the land of a large pile of more newly imported waste material. The size of the pile, the duration it has been present without being sorted and separated, and the lack of any discernible sorted bundles of materials indicates that it represents operation carried out in breach of planning control.

In conclusion, it is considered that there is no cogent body of evidence to support any claim that the central part of the land, or indeed any other part of the land, has been subject to any material change of use to use for waste recycling (as opposed to the uses specified in the permissions granted by the Secretary of State which have been referred to) any time, and that in any event the available evidence of the history of the land over the 10 year period up to the date of the application shows that there was no continuous use of this kind up to that time. The application is therefore recommended to be refused.

(3) **Financial Considerations**      The correct fee of £1,690 has been received.

(4) **Legal Considerations**      This is an application submitted under Section 191 of the Town and Country Planning Act 1990, as amended by Section 10 of the Planning and Compensation Act 1991.

By virtue of the Act, a continuous use for 10 years of a parcel of land in breach of planning control, which has not been subject to enforcement action under the Act, can establish an on-going lawful use for the land under planning law which did not previously exist.

The determination of this application concerns matters of fact and not questions on amenity or planning merits. The activity at the application site may result in an impact on amenity in terms of visual impact, noise or traffic, but cannot be conditioned (Article 6). In the case of a CLEUD, the action of

the Waste Planning Authority is prescribed by law, in that the Town and Country Planning Act 1990 (as amended) requires that a CLEUD be granted where sufficient evidence is provided to show the use over the prescribed period, without taking account of any amenity concerns.

Nevertheless, such a grant will not provide any continuity for the commission of any public or private nuisance. The determination of this application in accordance with the statute is regarded as being compatible with the human rights under the European Convention on Human Rights (including a persons' entitlement to a fair and public hearing in the determination of his civil rights and obligations, under Article 6 of the Convention).

(5) **Environmental and Health Considerations** As contained in the report.

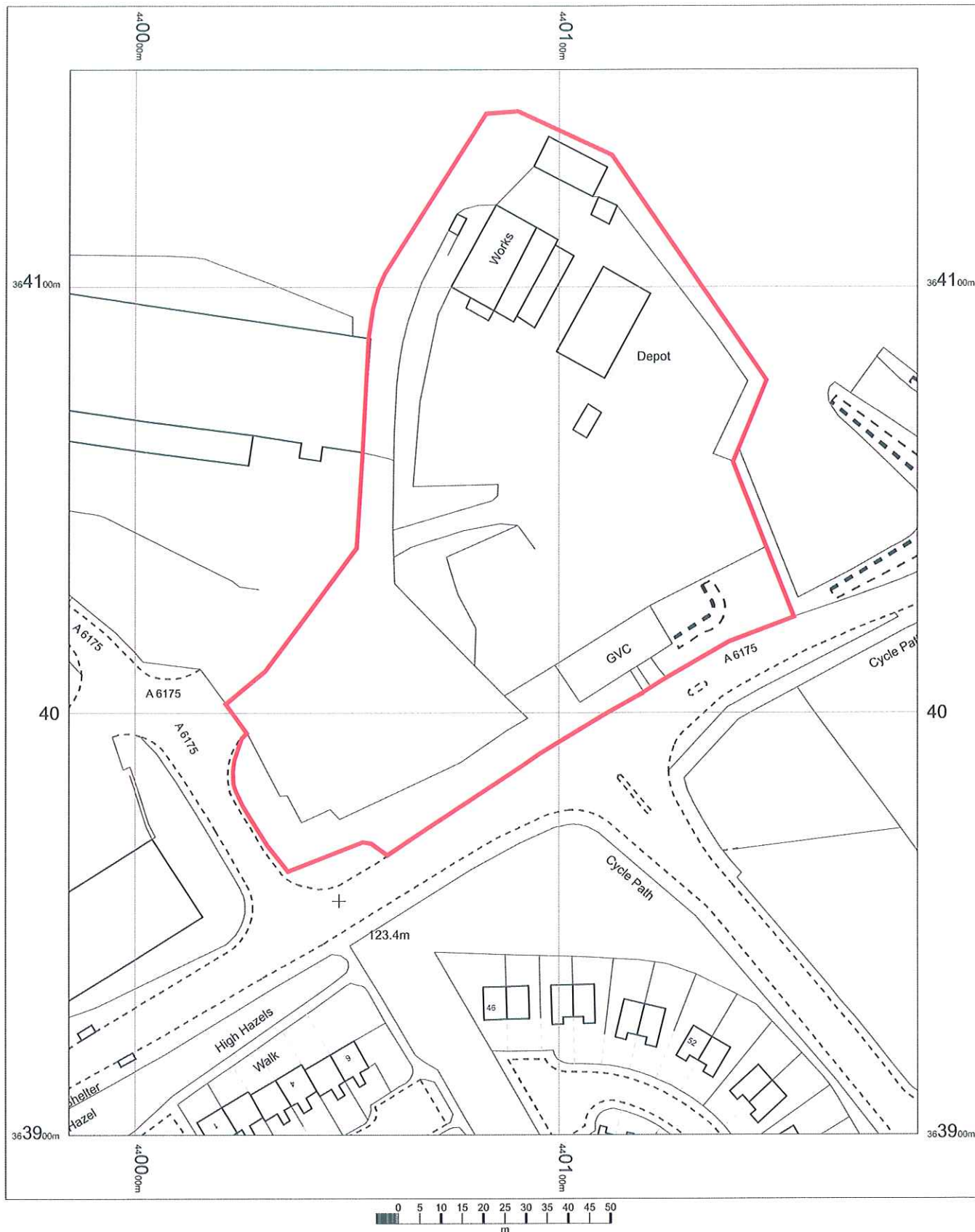
### **Other Considerations**

In preparing this report the relevance of the following factors has been considered: prevention of crime and disorder, equality and diversity, human resources, property, social value and transport considerations.

(6) **Background Papers** Held on file 4.2450.1 to 6.

(7) **OFFICER'S RECOMMENDATION** That the Committee resolves that the application referred to in this report for the grant of a Certificate of Lawful Use for the use of land at Re-Use Sales Ltd, Furnace Hill, Lower Market Street, Clay Cross be **refused**.

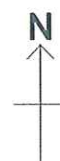
**Mike Ashworth**  
**Strategic Director – Economy, Transport and Environment**



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