

To:
All members of the
Environment and Sustainability
Committee

Please reply to:
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Date: 3 March 2022

Supplementary Agenda

Environment and Sustainability Committee - Tuesday, 8 March 2022

Dear Councillor

I enclose the following item which was marked 'to follow' on the agenda for the Environment and Sustainability Committee meeting to be held on Tuesday, 8 March 2022:

10. Report on request for site investigation of land to rear of Thames Side 3 - 22

To consider a report regarding the request for a site investigation of land to the rear of Thames Side, Chertsey.

Yours sincerely

Chris Curtis
Corporate Governance

To the members of the Environment and Sustainability Committee

Councillors:

I.J. Beardsmore (Chairman)	N.J. Gething	V.J. Leighton
O. Rybinski (Vice-Chairman)	M. Gibson	S.C. Mooney
M.M. Attewell	K.M. Grant	R.J. Noble
J.T.F. Doran	N. Islam	J.R. Sexton
T. Fidler	T. Lagden	V. Siva

Spelthorne Borough Council, Council Offices, Knowle Green

Staines-upon-Thames TW18 1XB

Environment & Sustainability Committee

8 March 2022



Title	Contaminated land site investigation at landfill to rear of Thameside
Purpose of the report	To note
Report Author	Tracey Willmott-French – Senior Environmental Health Manager Dr Claire Lucas – Principal Pollution Control Officer Karen Limmer – Principal Solicitor
Ward(s) Affected	Shepperton Town
Exempt	No
Exemption Reason	
Corporate Priority	Clean and Safe Environment
Recommendations	<p>Committee is asked to:</p> <ol style="list-style-type: none"> 1. To note the written legal advice to the Council regarding the use of powers under the Contaminated Land Act 2006 and the Part 2A jurisdiction; and 2. To note no further action may be taken as it may be unlawful, unless new evidence comes to light, and is considered in accordance with the Statutory Guidance.
Reason for Recommendation	Written Advice has been received which sets out the Council's powers and duties in relation to this matter. It advises that in the current circumstances any further action may be unlawful.

1. Key issues

- 2.1 As Members are aware, following the tragic death of Zane Gbangbola, an Inquest was held which reported its findings in September 2016. Members are reminded of the Coroner's Factual Findings and Conclusions attached to the Report to this Committee on 14 September 2021. This document sets out in detail all the relevant issues relating to the cause of Zane's death, including matters relating to land, the use of a petrol pump and the medical evidence. The Coroner concluded that the cause of death was carbon monoxide toxicity, as a result of inhaling toxic carbon monoxide fumes that had been generated by a petrol pump.
- 2.2 Since then, the family have continued to campaign on their son's behalf.
- 2.3 Members will also recall that the proper course of action is for the family to apply to the Attorney General seeking to persuade her to issue a *fiat* and apply to the High Court to consider exercising its powers under s13 of the Coroners Act 1988 if they wish to challenge the Coroner's Findings.

- 2.4 The Joint Written Opinion deals with the powers available to the Council which fall within Part 2A of the Environmental Protection Act 1990. Consideration has also been given to the question of jurisdiction. This is attached at Appendix 1.
- 2.5 A detailed Desk Study had been conducted at the time of the Coroner's Inquest and it had concluded that the risk profile at the site did not meet the criteria to either proceed to further even more detailed assessment or for the site to be categorised as 'contaminated land' under Part 2A of the Environmental Protection Act 1990.
- 2.6 Further enquiries have been made of other agencies as previously reported to this Committee.
- 2.7 This report asks the Committee to note the background to the request, to remind members of the Coroner's Findings and Conclusions, and to note Counsel's Joint Opinion, which advises that any further action may be unlawful.

3. Jurisdiction

- 3.1 Advice has also been sought on the issue relating to the jurisdiction regarding the enforcement of any permits. The status and extent of permits and/or waste management licences applicable to the land that may have been issued by the Environment Agency are dealt with fully in the Opinion and Counsel have concluded that the jurisdiction remains with the Council and is not passed to the Environment Agency. This means that the land is subject to the statutory regime as previously advised.

4. Legal Issues

- 4.1 Members will recall that previously they were advised of a number of legal issues:
 - The official verdict of the inquest which did not attribute the tragedy to matters of land contamination cannot be ignored by the Council in exercising its duties under Part 2A of the Environmental Protection Act 1990 (EPA). The Council would require evidence of the Significant Possibility of Significant Harm in order to instigate further investigation of the land under Part 2A of the EPA in accordance with statutory guidance.
 - As a regulatory body the Council cannot disregard the regulatory position or investigations of other regulators such as the Police, Fire Service, Coroners Service, the Public Health England or the Environment Agency. The data regarding the site that was presented to the Inquest must also be considered in the Council's decision making. Under Part 2A statutory guidance the landowner is also to be given the opportunity to provide evidence which they did to the Coroner's Inquest so that step has already taken place and that testing did not indicate the presence of a source of hydrogen cyanide.
 - The Council cannot exercise its powers of entry under Part 2A of the EPA on the basis of gathering additional evidence out of a motive to overturn the verdict of an inquest. The Council does not have the

evidence required to exercise power of entry under Part 2A of the Environmental Protection Act.

- The prior evidence of independent experts commissioned by the Council to investigate the matters of risk from the historic landfill site behind Thameside, as presented to the Coroner, cannot be disregarded in the context of the Council exercising its statutory duties under Part 2A of the EPA. There is no scientific evidence that gives a basis or reason to disregard the advice previously given independently regarding hydrogen cyanide.
- 4.2 Counsel have now considered in detail the interaction of the Part 2A regime and the environmental permitting regime, and then they go on to consider at paragraph 38 the question of the motive behind the exercise of the Council's exercise of its statutory powers. They have also considered and reviewed the actions taken by the Council to date.
- 4.3 In recent case law, the High Court stated that 'It was a matter for the Council to decide whether it needed any further inquiries or assessments to be conducted, in the light of the Claimant's objections. The Court should not intervene merely because it considers that further inquiries would have been sensible or desirable. It should intervene only if no reasonable authority could have been satisfied on the basis of the information before it.' This should also be borne in mind in relation to the enquires already made by officers, which have not produced any further factual evidence.
- 4.4 In summary, Counsel advise that the Council's powers under Part 2A are engaged, and that in the light of the studies carried out to date and the matters pursued, including the evidence given at the time of the Inquest, there is no further justification for further investigative work being undertaken, which would include sampling. The Statutory Guidance states that in these circumstances, where the land is unlikely to be contaminated the Council should bring its inspection and risk assessment to an end. Any further work would not be in accordance with the Statutory Guidance. Any such action would therefore be unlawful. Paragraphs 47-51 set out the detailed position.

5. Financial Implications

- 5.1 Costs to date have been for specialist legal advice.
- 5.2 If any action were to be considered unlawful, then any associated expenditure would be unlawful too.
- 5.3 In any event no specific budgetary provision has been made for the financial year 2022/23.

6. Other considerations

Section 17 Crime and Disorder Act 1998: Duty to consider crime and disorder implications. There are no implications from this report.

7. Equality and Diversity

- 7.1 There are no equality and diversity implications from this report.

8. Sustainability/Climate Change Implications

There are no sustainability implications from this report in that the actions taken or proposed at this stage, do not create significant emissions, or result in a sustainability impact.

- 8.1 The Council will continue to follow statutory guidance regarding land contamination and Officers have responded to recent survey circulated to land contamination professionals by the Construction Industry Research and Information Association (CIRIA), who are working with the Environment Agency to explore how extreme climate events may affect land contamination in England and how climate change may affect remedial activities.

Background papers: There are none

Appendix 1: Written Joint Opinion

**IN THE MATTER OF SPELTHORNE BOROUGH COUNCIL'S CONTAMINATED
LAND POWERS**

JOINT OPINION

Introduction

1. We are instructed to advise Spelthorne Borough Council (the “Council”) in respect of its powers under the land contamination regime, specifically Part 2A of the Environmental Protection Act 1990 (“EPA 1990”).
2. The request for our advice arises from a decision made on 14 September 2021 by the Council’s Environment and Sustainability Committee that it should explore the possibility of an investigation and examination of the Lavenders Landfill site (“the Site”). The Site is adjacent to the family home of the deceased Zane Gbangbola in Chertsey. Zane Gbangbola tragically died in February 2014. It is our understanding that his family’s belief is that the cause of his death was due to cyanide poisoning arising from the Site.
3. Prior to the decision made in September 2021, the Full Council had considered whether to issue a Notice of Motion seeking a reopening of the inquiry into Zane’s death. A letter was subsequently written to the Government calling for an inquiry into his death. The response received from DEFRA advised that the correct course of action is for the family to apply to the Attorney General seeking to persuade her to issue a *fiat* in order to apply to the High Court to consider exercising its powers under s13 of the Coroners Act 1988. The Council were advised by DEFRA that such action would be likely to require new material evidence as a necessary pre-condition for a *fiat* to be issued and before the High Court would consider ordering a fresh public inquiry. The High Court would then consider its

powers in line with the statutory provisions under s.13 and the case law guidance of the courts. In such a case the court would need to be satisfied that it was necessary or desirable in the interests of justice that an investigation be (re)opened.

4. In the light of these decisions and actions, the Council's Environment and Sustainability Committee is making the consideration of the Lavenders Landfill site a priority. That is why the Council wishes to know the nature and extent of its powers in relation to that site as well as the neighbouring site to the north of the M3, which drains into the Lavenders Landfill site.
5. We are specifically asked to advise on the following questions:
 - (1) Having regard to the extant waste management licence in respect of Lavenders Landfill (the site to the south of the M3) and the permit for the neighbouring site to the north of the M3, are Spelthorne Borough Council's powers and duties in respect of the contaminated land regime under Part 2A of the Environmental Protection Act 1990 engaged in respect of the Lavenders Landfill site or the neighbouring site to the north?
 - (2) If the Council's powers/duties in respect of the Part 2A regime are engaged, having regard to the desktop study undertaken in advance of Zane Gbangbola's inquest, is there justification to undertake further investigation of the Lavenders Landfill site in pursuit of the Council's Part 2A powers?

The Context for our Advice

6. The factual background to this matter is well known to the Council and accordingly we include here a summary only of the matters that provide a relevant contextual background for our advice.

The Inquest – Evidence relating to Hydrogen Cyanide and Findings

7. Following Zane's death in February 2014, an inquest was held to seek to ascertain the cause of death. The Coroner's report, dated 7 September 2016, found that Zane died from carbon monoxide poisoning as an unintended consequence of the use of a petrol pump in his home, which was used to pump floodwater out of the house during a period of flooding of the Thames. During the inquest, consideration was made as to whether Zane had died

as a consequence of carbon monoxide poisoning or hydrogen cyanide poisoning. The reason that hydrogen cyanide poisoning was considered by the Coroner was due to a reading taken by the Surrey Fire and Rescue Services from a monitor used at the front door of the property, which alarmed for hydrogen cyanide on one occasion but not on two other sweeps of the property. The evidence at the inquest from a scientific advisor to the Fire and Rescue Services was that the hydrogen cyanide sensor on the monitor used could also be triggered by nitrogen dioxide and nitric oxide and that further testing suggested that the monitor was likely to have responded one of the oxides of nitrogen rather than hydrogen cyanide, as these arise from exhaust fumes from a petrol engine and fire appliances were parked outside the family home at that time.

8. The Environment Agency also undertook testing for hydrogen cyanide in the floodwater located in the basement of the property, the results of which showed that no hydrogen cyanide was present.
9. The Coroner's Report notes that Brett Aggregates, the owners of the Site, also undertook testing, which involved testing the surface water in the lake at the Site and in a smaller pond closer to Zane's home. The tests did not show free cyanide or hydrogen cyanide. Ground gases were also tested, which did not show hydrogen cyanide.
10. The Coroner's Report notes that a Council officer, Olivia Flint, gave evidence and explained that in response to a press article linking Lavenders Landfill to Zane's death, the Council had undertaken a desktop study intended to address the question of contamination on the site generally. She explained that there was "no basis upon which she could assess the site as contaminated".¹
11. The Council also commissioned experts, who gave evidence at the inquest, to produce a paper entitled 'WCA Briefing Paper on Chemistry of Cyanide Compounds and Migration into Buildings'. Their report sought to assess whether cyanide-containing waste, on the assumption that it was present, could possibly lead to harmful or lethal levels of hydrogen cyanide entering nearby properties during a period of flooding. The report concluded that it was unlikely that there could have been sufficient levels of hydrogen cyanide in the property to cause harm to health or death. If there had been, the authors of the report

¹ Coroner's Report, para. 52.

would have expected to have seen an environmental impact such as dead fish in the lake or the Thames and evidence of cyanide leaching out elsewhere over the years. Further, if hydrogen cyanide had entered the house, it was not expected that its presence would come and go quickly but rather that it would be present and detectable for some time. Also, if the gas was present at the Site, given that the top 2.8 metres of the land is impervious clay, this would act to keep the gas within the Site.

12. Zane's family also commissioned expert evidence from Geo-Environmental Services, who undertook soil and water testing at the family home for a four week period, which did not establish any potential source of hydrogen cyanide. The evidence of the family's expert was that hydrogen cyanide in the land could not be ruled out and that it was possible that floodwater had triggered a one off discharge containing hydrogen cyanide from a source within the land and carried it to the family home, which had washed away by the time the water was tested 12 hours later.

13. The Coroner considered all of this evidence and stated that:

*“none of the land/soil or water testing conducted at the house or the land behind it (as set out above) found any evidence of a source of HCN (or any other toxic gases)”*²

14. He came to the conclusion that it was “very unlikely that a source of HCN had found a pathway to enter the house on 7th February at a harmful or lethal level”³

The Contaminated Land Regime under Part 2A of the Environmental Protection Act 1990 and the Council's Approach to the Lavenders Landfill Site

15. Section 78B(1) of the EPA 1990 requires every local authority to cause its area to be inspected from time to time for the purpose of “(a) of identifying contaminated land”. The purpose of the Part 2A regime is to “provide a means of dealing with unacceptable risks posed by land contamination to human health and the environment”⁴

² Coroner's Report, para. 95.

³ Ibid.

⁴ Statutory Guidance, para. 1.3.

16. Contaminated land is defined in s. 78A(2) as:

any land which appears to the local authority in whose area it is situated to be in such a condition, by reason of substances in, on or under the land that – (a) significant harm is being caused or there is a significant possibility of such harm being caused; or (b) significant pollution of controlled waters is being caused, or there is a significant possibility of such pollution being caused.”

17. Once land has been identified as contaminated land, the Part 2A regime requires the enforcing authority to consider how it should be remediated and, where appropriate, it must issue a remediation notice to require such remediation. The enforcing authority in the context of the Part 2A regime is either the local authority or the Environment Agency depending on the specific context in accordance with the legislation.

18. There is Statutory Guidance in respect of the Part 2A regime, dated April 2012. It recognises that there are two broad types of “inspection” likely to be carried out by local authorities under their inspection duty, specifically:

“(a) strategic inspection, for example collecting information to make a broad assessment of land within an authority’s area and then identifying priority land for more detailed consideration; and (b) carrying out the detailed inspection of particular land to obtain information on ground conditions and carrying out the risk assessments which support decisions under the Part 2A regime relevant to that land.”

19. The Site is present on the Council’s database of former land uses that may result in land contamination. Prior to the tragedy, the land was not identified by the Council’s strategic inspection as being at the top of or even high up on the Council’s priority list for conducting detailed inspections, the ranking of which is based upon a risk rating assigned by specialist software.

20. However, following the death of Zane Gbangbola, a decision was made to prioritise the Site for a Phase 1 Desktop Study. In other words, notwithstanding its place in the priority list, the Council decided that the Site merited more detailed consideration having regard to the tragic incident.

21. The Phase 1 Desk Study, which considered cyanide, concluded that the investigation had not clearly identified an unacceptable risk but had instead only identified a ‘moderate’ risk. Section 7.4 of the Study states:

“A key output from the preliminary risk assessment is to judge whether any unacceptable risks with the contaminant linkages can be identified. An unacceptable risk is defined in the Statutory Guidance as meaning “a risk of such nature that it would give grounds for land to be considered contaminated land under Part 2A” (Defra, April 2012). Therefore an unacceptable risk is where there is a significant possibility of significant harm. A Moderate risk classification, where it is relatively unlikely that possible harm would be severe or any harm is more likely to be relatively mild, does not clearly identify an unacceptable risk. For land to proceed to the next stage of risk assessment there should be evidence that an unacceptable risk could reasonably exist.”

22. In the concluding section of the Study, the following is stated:

“However, the risk assessment process needs to take into account uncertainties to ensure that the possibility of an unacceptable risk has not been missed. Therefore it is appropriate that the site should be kept under review and further information collected. The Environment Agency and Brett Aggregates Ltd have yet to be issued with a direction for general disclosure in the Coroner’s Inquest relating to the incident of February 2014. As discussed in Section 4.6, these two bodies are likely to hold additional relevant environmental information as yet unseen by the Council. This report and the preliminary risk assessment needs to be reviewed and updated accordingly once this information becomes available.”

23. Appendix 5 of the report presented to the Council’s Environment and Sustainability Committee in November 2021 states the following in relation to any update:

“The additional site investigation information presented to the Inquest by other parties did not conclude that there was a presence of cyanide or hydrogen cyanide, therefore the updates would not be expected to have altered the outcome of the original assessment. The Coroner’s findings and Conclusions did not attribute the cause of the tragedy to hydrogen cyanide in particular or any land contamination.”

24. The Part 2A Statutory Guidance addresses when local authorities should cease pursuing further investigatory work in respect of a site. Paragraph 3.12 of the Guidance states that the inspection process should “normally continue until it is possible for the local authority to decide: (a) that there is insufficient evidence that the land might be contaminated land to justify further inspection and assessment; and/or (b) whether or not the land is contaminated land.” Whilst the guidance does use the word “normally”, it is directing local authorities towards a threshold that they should “normally” meet before discontinuing. There may be exceptional circumstances where they might cease investigation before the thresholds in (a) or (b) are reached. The guidance must be read in the context of the statutory powers and duties to which it relates.

25. Paragraph 3.13 states:

“For land to proceed to the next stage of risk assessment there should be evidence that an unacceptable risk could reasonably exist. If the authority considers there is little reason to consider that the land might pose an unacceptable risk, inspection activities should stop at that point.”

26. Paragraph 3.14 states:

“It may become apparent during the course of detailed inspection of land that the assumptions that led to the prioritisation of the land prove to be incorrect, and that the risks posed by the land are lower than expected. In such cases the authority should consider whether (and if so how) to proceed with its inspection, having regard to the need to prioritise inspection activities in accordance with Section 2. There may be good reason to continue until a decision can be taken on whether or not the land is contaminated land. However, as soon as it becomes clear to the authority that the land is unlikely to be contaminated land, it should bring its inspection and risk assessment to an end and redirect its efforts to the inspection of other land in line with its approach to prioritisation.”

27. Paragraph 2.12 states:

“If the local authority intends to carry out an inspection using statutory powers of entry under section 108 of the Environment Act 1995 it should first be satisfied that there is a reasonable possibility that a significant contaminant linkage may exist on the land.”

28. Our attention has been directed to a BBC news article dated 24 February 2020 which came to light after the Desktop Study and the Coroner’s Report. It reported on a former Ministry of Defence (MoD) engineer, who apparently wished to remain anonymous, stating that he believes sub-contractors working for a now closed tank research facility 5 miles from the site dumped waste chemicals, which he believed could produce cyanide, into the gravel pits behind Zane’s home. The anonymous individual who had contact with the BBC has not contacted the Council. It is understood that the tank research facility was in operation in many years ago. Officers have contacted the BBC who were unable to assist.

The Environmental Permitting Status of the Lavenders Landfill Site and the Site to the North of the M3

29. The status of the Site is somewhat complex.

30. We understand that it remains subject to a Waste Management Licence dating from 1977 (ref: 83099), which has not been surrendered. The Waste Management Licence was modified by the Environment Agency in 2003 to insert a number of new conditions, the most pertinent of which required a cessation of the disposal and/or tipping of waste

activities on 21 August 2003 unless by that date the licence holder, Brett Aggregates, had submitted a written investigation and risk assessment to the Environment Agency that showed that the level of risk to groundwater was in accordance with Regulation 15 of the 1994 Regulations. We think that this must be a reference to the Waste Management Licensing Regulations 1994 albeit the modification itself does not state this.

31. Following a FOI request in relation to the Lavenders Landfill site made to the EA by the Council, Alex Chown, an EA officer stated by email on 27th October 2021 that “No disposal of waste may take place under licence 83099 as it is not a Landfill Directive compliant permit”. So, although the licence has not been surrendered, the EA’s position is that no disposal of waste may take place under it. It is not clear what is meant by the permit not being Landfill Directive compliant and nor do we know whether Brett Aggregates sought to comply with the modified conditions in 2003. However, we do understand that Brett Aggregates has not put the site into use as a landfill site and we also understand that there has not, as a matter of fact, been disposal of waste under the licence.

32. With regard to the site to the north of the M3, this is the subject of a 2006 Environmental Permit (ref: RP3233LJ) for use as a landfill for inert waste with an associated activity of fuel storage (see Schedule 1 - Operations of the Permit). This area was previously licensed under the 1977 Waste Management Licence, as modified, but the 2006 Environmental Permit superseded the licence in relation to the north of the M3 area only. Alex Chown’s email of 27th October 2021 explains that no waste has ever been disposed of under this permit. Page 3 of Alex Chown’s witness statement to the inquest explained that the 2006 Permit is characterised as ‘pre-operational’, which means that it is under the EA’s regulatory control but not operating. The trigger for it to be operational is the installation of a geological barrier, which has not occurred. Mr Chown’s witness statement states that this is a requirement of the Landfill Directive 1999. A feature of this Permit is that it states on pg 2 of the Permit that the area to the north of the M3 drains into the area to the south (i.e. into Lavenders Landfill site).

The Law

The Interaction between the Part 2A regime and the Environmental Permitting Regime

33. The key provision for the purposes of determining the interaction between contaminated land powers under Part IIA and the Permitting Regime is s. 78YB of the EPA 1990. It states, so far as relevant, as follows:

78YB.— Interaction of this Part with other enactments.

(1) *This Part shall not apply if and to the extent that—*

- (a) *any significant harm, or pollution of controlled waters, by reason of which land would otherwise fall to be regarded as contaminated, is attributable to the operation of a regulated facility; and*
(b) *enforcement action may be taken in relation to that harm or significant pollution.*

(3) *If, in a case falling within subsection (1) or (7) of section 59, section 59ZA(1), 59ZB(1) or (8) or 59ZC(1) above, the land in question is contaminated land, or becomes such land by reason of the deposit, keeping or disposal of the controlled waste in question, a remediation notice shall not be served in respect of that land by reason of that waste or any consequences of its deposit, keeping or disposal, if and to the extent that it appears to the enforcing authority that the powers of a waste regulation authority or waste collection authority under section 59, 59ZA, 59ZB or 59ZC (as the case may be) may be exercised in relation to that waste or the consequences of its deposit, keeping or disposal.*

(4) *No remediation notice shall require a person to do anything the effect of which would be to impede or prevent the making of a discharge in pursuance of an environmental permit or, in relation to Scotland, in pursuance of a consent given under Part II of the Control of Pollution Act 1974.*

(5) *In this section—*

“enforcement action” means action under regulation 36, 37 or 42 of the Environmental Permitting (England and Wales) Regulations 2016;

“regulated facility” has the meaning given in regulation 8 of those Regulations.

34. The operation of a regulated facility is defined in regulation 8 of the Environmental Permitted (England and Wales) Regulations 2016 (the “2016 Regulations”) as follows:

“operate a regulated facility” means—

- (a) *operate an installation, mobile plant, a medium combustion plant or a specified generator, or*
(b) *carry on a waste operation, mining waste operation, radioactive substances activity, water discharge activity, groundwater activity, small waste incineration plant operation, solvent emission activity or flood risk activity”*

35. The action that may be taken under regulation 36, 37 or 42 of the 2016 Regulations is, to the extent relevant, summarised as follows:

- (i) Reg. 36 – The serving of an enforcement notice by the EA if an operator has contravened, is contravening or is likely to contravene an environmental permit

condition. The notice can specify steps to remedy the contravention and remedy the environmental effects caused by the contravention.

- (ii) Reg. 37 – The serving of a suspension notice by the EA if the operation of a regulated facility under a permit gives rise to a risk of serious pollution regardless of whether or not there has been a breach of condition of the permit or a risk of pollution where there has been a contravention of a condition of the permit. The suspension notice must state that the permit ceases to have effect to the extent stated in the notice until it is withdrawn and must, amongst other matters, set out the steps required to be taken to remove the risk.
- (iii) Reg. 42 – This authorises the EA to take enforcement action in the High Court for the purposes of securing compliance with, *inter alia*, notices under reg. 36 and reg. 37.

36. The effect of s. 78YB(1) is that the Part 2A regime does not apply to a site that would otherwise be considered to be “contaminated” under that regime where:

- (i) The significant harm or pollution of controlled waters that would otherwise render the site “contaminated” is attributable to the operation of a regulated facility e.g. a waste operation; and
- (ii) Enforcement action may be taken in relation to that harm or significant pollution under regulations 36, 37 or 42 of the 2016 Regulations.

37. Section 78YB(3) relates to circumstances in which an enforcing authority has identified that land is contaminated land due to actions taken in respect of controlled waste and where the authority would otherwise be required to issue a remediation notice but it is prevented from doing so where an alternative remedy exists under ss. 59, 59ZA, 59ZB or 59ZC of the EPA 1990. Each of these provisions provide a power for action to be taken for the removal of controlled waste that has been unlawfully deposited, kept or disposed of. In other words, where waste has been deposited, disposed or kept on a site where there is either no permit/licence at all or where the depositing, keeping or disposing of waste is not in accordance with the deposit, these provisions allow the relevant authority to require

action to be taken or to take action itself in certain circumstances (e.g. where the occupier didn't deposit the waste itself).

Ulterior Motive/Improper Purpose

38. There is no statutory power which is entirely unfettered (see e.g. *Rooke's case* (1598) 5 Co.Rep. 99b, 100a.⁵). It is also a well-established principle of public law that statutory powers must be used for the purpose for which they were conferred and not for some other purpose: *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 (see also Baroness Hale at [1999] in *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12). In *Padfield*, the relevant Minister abstained from exercising his statutory discretion to order an investigation because he feared the consequences of the investigation might be politically embarrassing.
39. There is a corresponding negative obligation on the part of public decision-makers that they should not be motivated by an improper purpose or motive when making a decision even if that be thought by the decision maker to be in the wider public interest (see e.g. *Aberdeen City and Shire Strategic Development Planning Authority v Elsick Development Company Limited* (2017) UKSC 66.
40. In *R v Inland Revenue Commissioners ex p Preston* [1985] AC 835 at 865B, Lord Templeman described improper motive cases as those where the decision-maker had acted "'unfairly" when they abused their powers by exercising or declining to exercise those powers in order to achieve objectives which were not the objectives for which the powers had been conferred."

⁵ Lord Coke, defined discretion as "a science or understanding to discern between falsity and truth, between right or wrong, between shadows and substance, between equity and colourable glosses and pretences, and not according to their wills and private affections"

Advice

(1) Having regard to the extant waste management licence in respect of Lavenders Landfill (the site to the south of the M3) and the permit for the neighbouring site to the north of the M3, are Spelthorne Borough Council's powers and duties in respect of the contaminated land regime under Part 2A of the Environmental Protection Act 1990 engaged in respect of the Lavenders Landfill site or the neighbouring site to the north?

41. This question is directed towards the application of s. 78YB of the EPA 1990 and specifically whether, if it considered it to be necessary and appropriate, the Council is able to exercise Part 2A powers in respect of the Lavenders Landfill site and/or the site to the north of the M3 having regard to the environmental permitting position in respect of both sites.
42. Section. 78YB does not envisage that all sites that are subject to an environmental permit or waste management licence necessarily fall outside the scope of Part 2A powers. Therefore, the mere fact that there remains an un-surrendered licence and permit in respect of the sites (south and north of the M3 respectively) does not mean that the Council's powers are displaced.
43. In circumstances where as matters stand, neither the waste management licence nor the permit to the north of the M3, permit a regulated facility to operate⁶ (and Brett Aggregates has not sought to operate a landfill in respect of either site), our view is that it is unlikely that any issue arising in respect of the sites that would otherwise result in one or both of them falling under the definition of contaminated land could be 'attributable to the operation of a regulated facility', which is required by s. 78YB(1) of the EPA 1990 for the Part 2A regime to be disapplied. Whilst 'operation of a regulated facility' is not defined in respect of s. 78YB, we consider that it is likely to be construed by the courts as involving the operation for which the licence or permit was granted taking place on the land. We note that the EA describes the permit in relation to the site north of the M3 as 'pre-operational'.
44. In order for the Council's powers in respect of the Part 2A regime to be disapplied, s. 78YB(1) requires not only that the land would be considered to be contaminated but for

⁶ Due to the absence of geological barrier in respect of the north and the 2003 modification conditions and non-compliance with the Landfill Directive in respect of the south.

the fact that the contamination is attributable to the operation of a regulated facility but also that enforcement action is *capable* of being taken by the EA under regulations 36, 27 or 42 of the 2016 Regulations as explained above. These enforcement measures focus on breaches of environmental permit/licence conditions or where there is a risk of serious pollution regardless of whether or not there has been a breach of condition. This is consistent with our view that ‘operation of a regulated facility’ involves the operation for which the licence or permit was granted taking place on the land. It is difficult to see what possible enforcement action could be taken in respect of a site that is not operational.

45. As for s. 78YB(3) as far as we are aware, there is no evidence that *controlled* waste has been unlawfully deposited, kept or disposed of on either site. The only activity on the Lavenders Landfill site that we are aware of is the installation of a bund, which we understand was made up of rubble, by neighbouring occupiers as a rudimentary flood defence measure when the flooding of the Thames occurred in 2014. Accordingly, we do not consider that the alternative enforcement remedies referred to in s. 78YB(3) would be available such that the Part 2A *regime* would not for this reason be disapplied. We have had regard to the BBC article regarding the anonymous account of possible waste chemicals being disposed of historically on the site but since this allegation is from an unidentified individual and is unsupported by any corroborating evidence, we do not consider that it could be said to establish that there had in fact been an unlawful waste deposit nor that there was any alternative remedy in place to the exercise of Part 2A powers should either site be found to constitute ‘contaminated land’.

46. As a consequence of the above, we do not consider that the Council’s powers and duties in respect of the Part 2A regime are likely to be disapplied in respect of either site.

(2) If the Council's powers/duties in respect of the Part 2A regime are engaged, having regard to the desktop study undertaken in advance of Zane Gbangbola's inquest is there justification to undertake further investigation of the Lavenders Landfill site in pursuit of the Council's Part 2A powers?

47. On the basis of the assessments undertaken to date and the evidence that we are aware of, we do not consider that there is presently any justification to undertake further investigation of the Lavenders Landfill site in pursuit of the Council’s Part 2A powers.

48. The Part 2A Statutory Guidance is clear that having undertaken a preliminary risk assessment, which the Council did when it conducted the Phase 1 Desktop Study in preparation for the inquest, there should be evidence that an unacceptable risk could reasonably exist before further risk assessments and investigations are undertaken (see para. 3.13 of the Guidance as set out above).
49. The findings of the Phase 1 Desktop Study were that an unacceptable risk did not reasonably exist and it was unlikely to be determined contaminated land under the definition of Part 2A and the Statutory Guidance. We understand that there has been no change in circumstances or evidence in respect of the Site since the Desktop Study. Beyond the evidence presented at the inquest, which did not establish the presence of cyanide on the Lavenders Landfill site, the only possible new evidence since the Desktop Study was undertaken is the BBC article but as already explained, this is simply an assertion made by an unidentified individual who has chosen not to speak openly or provide information to the Council. It is not corroborated by any evidence. We do not consider that this information would justify further investigative work being undertaken under the Council's Part 2A powers due to this.
50. Further, the Council must ensure that it uses the Part 2A regime for the purpose for which the powers under that regime were conferred (*Padfield*). The Statutory Guidance requires local authorities to prioritise inspection activities and paragraph 3.14 states that "as soon as it becomes clear to the authority that the land is unlikely to be contaminated land, it should bring its inspection and risk assessment to an end and redirect its efforts to the inspection of other land in line with its approach to prioritisation." This is to ensure that the statutory purpose of the contaminated land regime is met i.e. to ensure that the local authority has properly inspected all of its area for contaminated land. If a local authority were to continue to investigate a site where previous investigation work identified that the land was unlikely to be contaminated, the authority would not be acting in accordance with the Statutory Guidance, which it is required to do.
51. Finally, the Council must ensure that it does not exercise its powers under the Part 2A regime for an improper purpose or motive. As stated above, the Statutory Guidance identifies the purpose of the regime as being to "provide a means of dealing with unacceptable risks posed by land contamination to human health and the environment". Any action that is taken under the Part 2A powers ought to be in pursuit of that aim. If

those particular powers were exercised with an alternative purpose in mind, for example to seek to gather evidence or information that might support an application to the High Court for a fresh public inquiry in respect of Zane Gbangbola's death, however laudable that purpose may be, we consider that there is a real risk that such action would be unlawful. It could thus be the subject of a successful legal challenge.

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28 February 2022

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