

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	Committee is asked to: <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; and2. 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