



**LONDON BOROUGH OF BROMLEY
HOUSING, PLANNING & REGENERATION**

**THE COUNCIL'S RESPONSE TO THE APPELLANT'S STATEMENT OF CASE DATED
16 MAY 2023 IN RESPECT OF GROUNDS (C) AND (F)**

JULY 2023

**LBB Ref No: EN/21/00270/CHANGE
PINS Ref No: APP/G5180/C/22/3312256**

Appeal by Bournewood Sand and Gravel against an Enforcement Notice issued by the London Borough of Bromley in respect of the material change of use of the land from agriculture to the deposit of waste at the site at Lower Hockenden Farm, Hockenden Lane, Swanley, BR8 7QH

1. The comments contained within this document are made specifically in response to the grounds (c) and (f) appeals set out within the appellant's Statement of Case dated 16 May 2023 ("the appellant's Statement"). This statement is to be considered alongside the Council's previous response dated June 2023 to the appellant's Statement concerning the ground (b) appeal. Following the appellant's confirmation of additional grounds of appeal (i.e., grounds (c) and (f)), the Council was invited by the Planning Inspectorate to submit further comments in respect of those grounds.¹ Those grounds are considered below.

Ground (c) appeal – that legally, that what is alleged in the Enforcement Notice is not a breach of planning control

2. As set out in the Council's response of June 2023, the appellant had previously stated in its grounds of appeal that the material the subject of the Enforcement Notice amounted to topsoil used to "*conserve soil moisture, moderate soil temperature and control growth of weeds...*" which was the subject of Environment Agency exemption. That the appellant now also wishes to rely on ground (c) represents a step-change in its approach, having now acknowledged the fact that the site does contain waste material, and going on at para 5.13 to provide a breakdown of materials derived from screening operations which it says would be used for farming. This includes materials it defines as "hardcore" and "clean hardcore".

¹ Confirmed within an email from the Planning Inspectorate to the Council sent on 13 June 2023.

3. Notwithstanding that the Council maintains its position that the appeal site has been subject to a material change of use from agriculture to the deposit of waste, it will nonetheless address the ground (c) argument now being advanced by the appellant: namely that the materials placed on the land comprise security bunds which form a means of enclosure and constitute permitted development.

Class A, Part 2, Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order 2015 (GPDO): The erection, construction, maintenance, improvement or alteration of a gate, fence, wall or other means of enclosure

4. As a starting point, it is necessary to consider the provisions of Class A, Part 2, Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order 2015 (GPDO). This allows for the erection, construction, maintenance, improvement or alteration of a gate, fence, wall or other means of enclosure. Given that the alleged bunds do not form a gate, fence or wall, this case must turn on whether, as a matter of fact and degree, these can be considered to comprise a means of enclosure. The question of what constitutes an enclosure has been the subject of court judgments and other appeal decisions which the Council will submit in its evidence.
5. The appellant claims that work on the alleged bunds was stopped due to the service of the Enforcement Notice by the Council. As previously outlined by the Council in its June 2023 response, at no point prior to the appellant's Statement of 16 May 2023 was it ever suggested that the material on the land constituted security bunds. Irrespective, the material on the site is not considered to resemble a means of enclosure; nor does it bear any resemblance to the engineering operations denoted on drawing numbers BDG-02 and BSG-03 which accompany the appellant's Statement. As the Council has previously stated, given the coverage, composition and appearance of the material on site, the Council does not accept that it amounts to a security bund.
6. Even if were to be accepted by the Inspector that the material on site does constitute part of an on-going engineering operation being undertaken in accordance with drawing numbers BDG-02 and BSG-03, for reasons outlined below the Council does not consider that this would amount to permitted development. It appears that the appellant is seeking to introduce a ground (a) appeal by the back door.
7. Even if the appellant's claim that all the material on the land is site-derived is true, it does not make any sense that it would wish to protect the farm in this location with the alleged/proposed bunds. As the Council has previously pointed out, the land immediately to the north of the appeal site which is actively farmed contains timber post and rail fencing which is typical of the sort of enclosure to be found in agricultural settings. It appears that the appellant has now simply introduced a new argument *ex post facto* to justify the waste deposits on the land – and in order to identify a new use for this material, rather than pay for its proper disposal. The appellant's

contention regarding the need for such an enclosure appears far-fetched and lacks any credibility. Furthermore, the distribution of the waste deposits across the site further suggests that there was never any intention at the outset for this material to be used as an enclosure.

8. Accepting that an “other means of enclosure” must have some similarity with gates, walls or fences (concept of *ejusdem generis*), it must be a matter of fact and degree as to whether a bund falls within the GPDO definition, including whether it does actually function as an enclosure. As opposed to a fence or wall, which is essentially a narrow linear structure, drawing numbers BDG-02 and BSG-03 show a structure 5.25m wide and up to 1.9m high which would extend to approximately 1100m along *part* of the eastern, southern and western site boundaries. It would also contain a gap along its southern side adjacent to a public footpath.
9. In any event, what was present when the Enforcement Notice was served did not comply with paragraph A.1(b) as it exceeded 2m above ground level. Reducing the height to below 2 m in the future could only be achieved through significant ground works, which would not be covered by this permitted development right.
10. Given that the alleged/proposed bund would not replace an existing means of enclosure or enclose active farmland, nor that it would actually enclose any land given its fragmented course, it is unclear what exactly is being enclosed. That the appellant would seek to erect such a complex “means of enclosure” rather than simply rely on existing methods of enclosure indicates that the primary function of the alleged/proposed bund would be a means of depositing the waste on the site. As a matter of fact, what has occurred is not the construction of a means of enclosure as set out in the GPDO.
11. The effectiveness of the alleged/proposed bund within the appeal site also appears to be subject to conflicting opinion between the appellant and the tenant farmer, Robin Moxin. Mr Moxin asserts that the whole farm “*was blighted by anti-social behaviour [and that] this has now been narrowed down to the top field on the southern boundary*” (presumably, the area of land south of the post and rail fencing): the implication being that the bund has been completed. In contrast, the appellant’s Statement states that the bund is incomplete and that anti-social behaviour persists. Reference is also made to a meeting with various public bodies on 12 April 2023 where the matter of persisting anti-social behaviour was discussed.
12. It is further noted that the red-edged line on drawing number BSG-01 denoting the extent of the agricultural unit does not include the full extent of the area of land subject to the Enforcement Notice. However, the extent of the proposed bund denoted on drawing number BSG-02 includes land outside the denoted agricultural unit. The basis for this inconsistency is unclear.
13. In summary, the appellant has failed to demonstrate that the waste material on site constitutes a gate, fence, wall or other means of enclosure.

Class A, Part 6, Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order 2015 (GPDO): The carrying out on agricultural land comprised in an agricultural unit of 5 hectares or more in area of— (a) works for the erection, extension or alteration of a building; or (b) any excavation or engineering operations, which are reasonably necessary for the purposes of agriculture within that unit

14. At paragraph 5.11 the appellant's Statement alternatively seeks to rely upon part (b) of Class A of Schedule 2 of the GPDO if the Inspector were to find that the materials are waste. The appellant has not provided any explanation of how erection of the bunds is reasonably necessary for the purposes of agriculture within that unit. The Council does not consider security bunds are reasonably necessary for the purposes of agriculture.
15. In any event, it is important to note that Condition A.2(2) of Class A of Schedule 2 of the GPDO requires that development consisting of (among other things): (a) the erection, extension or alteration of a building; (b) the formation or alteration of a private way; and (c) the carrying out of excavations or the deposit of waste material (where the relevant area, as defined in paragraph D.1(4) of this Part, exceeds 0.5 hectares) will require an application to the local planning authority *"for a determination as to whether the prior approval of the authority will be required as to the siting, design and external appearance of the building, the siting and means of construction of the private way, the siting of the excavation or deposit or the siting and appearance of the tank, as the case may be."* No such application has been received nor granted by the local planning authority. As for the email referenced at paragraph 2.7 of the appellant's Statement (a full email chain has not been provided) this appears to be unrelated to the appeal site, and, in any event, the response presented by the appellant and dated October 2018 did not derive from the LPA.
16. In paragraphs 5.12 to 5.14 the appellant discusses future plans, none of which are relevant for this appeal.
17. Whilst the appellant's Statement at paragraph 2.5 suggests that the waste material on the site derives from 10km of fencing and associated earth works undertaken on the land *"for the protection and management of livestock, etc"* the location of which is shown on drawing number BSG-01, it goes on to say at paragraph 2.6 that this material was used in the creation of new security bunds. For reasons outlined earlier in this statement in respect of the provisions of Class A, Part 2, Schedule 2 of the GPDO such "engineering operations" (if they are so defined by the appellant) do not constitute permitted development, and it follows that these works cannot be deemed reasonably necessary for the purposes of agriculture.
18. The appellant's Statement fails to satisfactorily account for the origin of the waste material on the site, and the assertion that this material derives from residual fencing material seems improbable; nor has the appellant's Statement demonstrated changes in ground level on the site which it says has resulted from the erection of 10km of fencing. It fails to account for all the sundry materials

and changes in land levels and volumes identified by the Atkins Report (included at Appendix 9 of the Council's Statement of Case). In short, the appellant's Statement fails to provide any evidence of the waste material being site derived. The Council considers that the waste material on the site has been imported from outside the site and it will present evidence to support this assertion in its evidence.

19. In summary, in attempting to account for the waste material on the appeal site the appellant has failed to demonstrate any excavation or engineering operations on the site which might be considered reasonably necessary for the purposes of agriculture within that unit.

Ground (f) appeal – that the steps required by the Enforcement Notice are excessive

20. The appeal on ground (f) is that the requirements of the notice exceed what is necessary. When an appeal is made on ground (f), it is essential to understand the purpose of the notice. S173(4) provides that the purpose shall be either to remedy the breach of planning control or to remedy any injury to amenity. In this case, the requirements of the Enforcement Notice are the cessation of further deposits of waste on the land; the cessation of the use of the land for the deposit of waste and removal of all waste material from the land (within 12 months); and the restoration of the land to its condition before the breach of planning control took place (within 18 months).
21. The appellant' Statement presents a "fall-back" position at paragraphs 5.16–5.20. The appellant's arguments presented under ground (f) are muddled and, at best, appear to be a further attempt to present a ground (a) appeal by the back door, as well as a re-run of the arguments presented under ground (c). The appellant provides no practical arguments in support of its assertion that the requirements of the Enforcement Notice are excessive, nor does it suggest alternative "lesser steps" which would address the requirements of the Enforcement Notice.
22. Whilst at paragraph 4.3 the appellant' Statement claims that it is "*unclear which precise materials on the land the Council allege are waste*", as already highlighted the appellant seeks to suggest that the material is site derived (arising from the erection of fencing), that it comprises security bunds, and it goes on to provide a breakdown of materials derived from screening operations, including materials it defines as "hardcore" and "clean hardcore". Accordingly, it is submitted that the appellant must have known exactly what has been deposited on the land – and it would be implausible to suggest otherwise. This demonstrates further inconsistencies in the appellant's Statement.
23. In the Council's opinion, there are no lesser steps available which would address the serious breach of planning control which has occurred and the appellant hasn't specified any. The Council considers that it is expedient that all of the waste material is removed from the site. It does not

consider that the rearrangement of the waste material in the form of bunds would address the purpose of the Enforcement Notice.

24. The Council appends an email sent to the appellant's agent on 7 June 2023 responding to his proposed arrangements to address the requirements of the Enforcement Notice. As is evident, the Council does not regard these steps as satisfactory.
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From: [Stephenson, John](#)
To: [adrian lynham](#)
Cc: [Courtine, Paul](#); [Bord, David](#)
Subject: RE: Lower Hockenden Farm Appeals (email 1 of 5)
Date: 07 June 2023 14:52:24
Attachments: [image001.png](#)

Dear Mr Lynham,

Without prejudice save as to costs

I refer to your letter dated 16 May 2023 concerning Land at Lower Hockenden Farm, Swanley (Appeal 33112256)

I consider points (i) to (iv) are your methodology for complying with requirement (b) of the notice. Removing from the land all "other materials" is acceptable. Removing all "clean hardcore" from the land and not just from the western field is required. I am not in a position to comment on what your client proposes to do with the waste after it has been removed from the land, but I would encourage them to liaise with the Environment Agency and obtain any necessary permits.

Point (iii) says some of the waste would not be removed. This would be in breach of requirement (b). In relation to point (iv), any "clean soil" deposited on the land from the erection of fencing is waste and would need to be removed from the land.

There is likely to be other waste on the land which does not fall under any of your definitions, for example the residual shredded wood and other material referred to in paragraph 5.11 of the Council's statement of case. This would all need to be removed as well.

As for your client's future intentions to construct security bunds, what you describe is unlikely to be classed as an "other means of enclosure" under class A of part 2 of the GPDO by virtue of factors including its likely extent and means of construction. Should a planning application be submitted, I would question the appropriateness and visual impact of the proposed bunds within the Green Belt.

There is clear harm caused by the breach of planning control, which needs to be remedied. I would therefore not support a request to stay the appeal.

I hope this information is of some further assistance.

Kind regards

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