PINS REFERENCE:

APP/G5180/C/22/3312256

LBB REFERENCE:

EN/21/00270/CHANGE

APPEAL BY

BOURNEWOOD SAND AND GRAVEL LIMITED

LOWER HOCKENDEN FARM, HOCKENDEN LANE, SWANLEY, BR8 7QH

PROOF OF EVIDENCE OF DAVID BORD BA (HONS) PG(Dip) MRTPI

LONDON BOROUGH OF BROMLEY

September 2024

1.0 QUALIFICATIONS

1.1 My name is David Bord and I hold a Bachelor of Arts with Honours in Town and Country Planning and a Postgraduate Diploma in Planning. I am a Chartered Town Planner and a Member of the Royal Town Planning Institute. I am a Principal Planning Officer employed by the London Borough of Bromley and have worked in both Development Management and in the Planning Appeals and Investigations Section in which I am currently based. In this appeal, I am duly authorised to give evidence on behalf of the local planning authority.

1.2 The evidence which I provide for this appeal is true and has been prepared in accordance with the guidance of the Royal Town Planning Institute. I confirm that the opinions expressed are my true and professional opinions.

2.0 INTRODUCTION

2.1 This appeal concerns the site known as Lower Hockenden Farm, Hockenden Lane, Swanley, BR8 7QH and relates to the decision of the London Borough of Bromley to issue an Enforcement Notice in respect of the unauthorised material change of use of the land from agriculture to the storage of waste.

2.2 The Enforcement Notice was issued on 27 October 2022 under the terms of Section 171A(1)(a) of the Town and Country Planning Act 1990 (as amended). The alleged breach of planning control is:

> *"Without planning permission, the material change of use of the land from agriculture to the deposit of waste."*

2.3 The reasons why the Council considered it expedient to issue the Enforcement Notice are as follows:

> *"It appears to the Council that the above breach of planning control has occurred within the last ten years.*
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> *The purpose of the green belt in this location is to check the unrestricted sprawl of large built-up areas, assist in safeguarding the countryside from encroachment and assist in urban regeneration by encouraging the recycling of derelict and other urban land. The use conflicts with those purposes and also fails to preserve the openness of the green belt. It is therefore inappropriate development in the green belt. There are no considerations which clearly outweigh the harm to the green belt by reason of the inappropriateness of the use and other harm resulting from it. In the absence of very special circumstances the use is contrary to policy 49 of the Bromley Local Plan, policy G2 of the London Plan and section 13 of the National Planning Policy Framework (NPPF).*
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> *The development also adversely affects visual amenity of the area and the amenity of users of footpath 170 by reason of the amount, extent and height of the deposits. Part of the land is within the Windmill Hill Wood Site of Importance for Nature Conservation (SINC). The nature of the use is such that it may significantly affect the nature conservation interest of the SINC. It has not been shown that such harm could be mitigated. For these reasons the land is an unsuitable location for the use and its use is contrary to policies 37, 69, 77 and 114 of the Bromley Local Plan, policy SI 8 of the London Plan, paragraph 185 of the NPPF and paragraph 7 of the National Planning Policy for Waste.*

The use undermines Development Plan objectives regarding sustainable waste and management, which seek to ensure that waste is managed and deposited appropriately, and that the amount of waste generated is minimised. Notwithstanding that, at the present time the Council does not require any additional waste management sites to meet the apportionment targets in the London Plan. It is therefore contrary to Bromley Local Plan Policy 112 and London Plan Policies SI 7 and SI 8."

2.4 The steps required to remedy the breach of planning control are:

"(a) Cease depositing further waste on the land – within 7 days after this notice takes effect

(b) Cease using the land for the deposit of waste and in particular remove all waste from the land – within 12 months after this notice takes effect

(c) Restore the land to its condition before the breach of planning control took place – within 18 months after this notice takes effect"

2.5 The Notice would have taken effect on 1 December 2022 had an appeal not been made against it.

2.6 The appellant has appealed against the Enforcement Notice on the following grounds:

(b) Factually, that the breach of control alleged in paragraph 2 [of the Enforcement Notice] has not occurred;

(c) Legally, that what is alleged in paragraph 2 is not a breach of planning control; and

(f) The steps required by the notice in paragraph 4 are excessive.

3.0 APPEAL SITE AND SURROUNDINGS

3.1 The appeal site forms part an open area of land to the south of Hockenden Lane which has a lawful agricultural use. The site is traversed by Public Footpath No 170 which extends to a distance of approximately 1 mile and which connects Hockenden Lane in the north to Bourne Wood in the south and ultimately Crockenhill Village after traversing a railway line. A map of the footpath is attached at **Appendix 2 of the Council's Statement of Case**. Along its eastern side the site adjoins the A20 trunk road. The site adjoins a quarry to the south known as Bournewood Sand and Gravel with a gated access connecting the two sites (the public footpath having been temporarily diverted around the quarry until that area is restored). Both sites are in the same ownership.

3.2 The site falls entirely within the Metropolitan Green Belt and partly comprises a Site of Interest for Nature Conservation. To the west of the appeal site is a woodland known as Bourne Wood which comprises a Site of Interest for Nature Conservation and is subject to a blanket Tree

Preservation Order. Details of the Local Plan designations are outlined in the map attached at **Appendix 3 of the Council's Statement of Case**.

3.3 The areas of land which are subject to the Enforcement Notice are situated to the south of a line of post and rail fencing which separates them from areas of land to the north which have remained in agricultural use.

4.0 PLANNING HISTORY

4.1 Under reference 11/00536/FULL1, retrospective planning permission was granted on 11 May 2011 for a new vehicular access and access track. This replaced a former access originally through the adjacent yard of Lower Hockenden Farm with the new access diverted around the yard. I attach details of this planning application, including supporting documents and the approved plan, at **Appendix DB1**.

4.2 Under reference APP/G5180/C/21/3285855, a planning appeal issued in respect of an Enforcement Notice concerning the material change of use of land for storage of metal containers, skips, quarrying equipment, metal cylinders and other machinery was allowed on 21 December 2022. This was on the basis that the Enforcement Notice was not served on everyone with an interest in the land. A copy of the Appeal Decision is attached at **Appendix 5 of the Council's Statement of Case**.

4.3 On 15 December 2022 a further Enforcement Notice was issued by the Council in respect of the material change of use of the land from agriculture to storage, a copy of which is attached at **Appendix 6 of the Council's Statement of Case**. On 3 August 2023 the Council wrote to the appellant's agent advising that the steps contained in the Notice had been complied with and that the Council would pursue no further action. A corresponding appeal was withdrawn.

5.0 ANALYSIS

5.1 In this section, I will set out the basis for the Council's decision to contest this appeal.

5.2 The appellant has appealed on the following grounds: (b) that factually, the breach of control alleged in the Enforcement Notice has not occurred; (c) that legally, what is alleged in the Enforcement Notice is not a breach of planning control; and (f) that the steps required by the Enforcement Notice are excessive. I will address these grounds in turn.

5.3 The appellant initially pursued a ground (b) appeal, as conveyed within letters dated 30 November 2022 and 6 March 2023, submitted by its previous agent, Iceni Projects. Subsequently, a further Statement of Case was submitted by a second agent, Continuplan

Limited, dated 16 May 2023, which updated and replaced the previous statement.[1] By way of email dated 13 June 2023 the Planning Inspectorate invited the Council to comment on grounds (c) and (f) appeals which were made by the second agent. Following the Council's responses to the appellant's Statement of Case (in documents dated May 2023 and June 2023 – the latter specifically concerning the grounds (c) and (f) appeals), the appellant commented on the Council's statement in relation to appeal grounds (c) and (f) in a document dated 4 August 2023.

5.4 Since no appeal on ground (a) has been pursued I will not delve into the planning merits of the contravention which is alleged by the Council.

Ground (b): factually, the breach of control alleged in the Enforcement Notice has not occurred

5.5 The areas of land enforced against are situated to the south of a line of post and rail fencing which separates it from the land to the north which has remained in agricultural use. Investigations of the appeal site have identified significant changes in its land levels which has included the deposit of substantial quantities of anthropogenic materials.

5.6 The Council has undertaken detailed investigations of the appeal site. These have included site inspections in conjunction with the Environment Agency, in which the nature of deposited material has been recorded, as well as Planning Contravention Notices (PCNs) involving Killoughery Properties Limited (the site owners) and Bournewood Sand and Gravel Limited (the appellants). The Council has also commissioned independent analysis of the site which has included LIDAR data analysis in order establish the nature of deposits within the site, and changes in ground levels and changes in landform by volume which have occurred. In view of the available evidence the Council considers that a material change of use of the land involving the deposit of waste has occurred which necessitates the Enforcement Notice.

5.7 Materials identified within the appeal site have included the following: (1) hard and soft plastics of various sizes, such as plastic bags, rope, sections of piping, broken plastic equipment and smaller unidentifiable fragments; (2) metal fragments such as screws, clips, shards and hinges; (3) cables and wiring, including insulating plastic; (4) branches and wood fragments, including painted and treated wood; (5) concrete boulders and lumps, including aerated concrete and aggregates; (6) plasterboard; (7) woodchip material in a general sandy gravel matrix; (8) chalk and flint gravels and chalk boulders; (9) glass, including broken shards of coloured glass; (10) broken ceramics, such a tile fragments; (11) brick fragments, including aerated concrete blocks and red bricks; and (12) insulation materials, such as foamboard. I append photographs of material deposited at the appeal site at **Appendix DB2** (taken on 16 November 2021), at

[1] Confirmed within paragraph 1.4 of the appellant's Statement of Case of 16 May 2023.

Appendix DB3 (taken on 28 February 2022), and at **Appendix DB8** (taken on 25 July 2024). I also attach a series of aerial photographs of the site (taken on 30 April 2021) at **Appendix DB4**.

5.8 Aside from the materials listed within the preceding paragraph, the Council and the Environment Agency have identified residual shredded wood within the appeal site (assumed to be the "wood cuts" cited by the appellant); however, much of this material comprises treated wood (which includes paint traces) which were clearly derived from either construction material or furniture, as well as fragments of plastic and building hardcore (see, for example, images contained at **Appendix DB2**).

5.9 The independent analysis undertaken by Atkins (part of the SNC-Lavalin Group) ("the Atkins Report", dated 26 September 2022) – a copy of which is included at **Appendix 9 of the Council's Statement of Case** – has concluded the following:

> *"The volume balance calculations indicate that there has been an overall increase in the deposition of materials from numerous areas across the site.*
>
> *From the evidence gathered during the site walkover, at least a proportion of the recently deposited materials are likely to be Made Ground of varying composition including sandy gravels with anthropogenic materials such as woodchip, plastics, metals, concrete, bricks, ceramics, etc. The material is of unknown quality in terms of chemical components and the source(s) of the material is not known."*

5.10 Responses to the PCNs issued by the Council on 8 November 2021 are included at **Appendices 10 and 11 of the Council's Statement of Case**. Neither party contacted provided any detailed answers to the Council's questions; however, in response to the Council's question regarding the origins of soil/stones/shredded wood matter and other deposits imported onto the land, Bournewood Sand and Gravel responded that this was "generated from the land." In response to a question regarding details of any permission/s or licence/s which exist to permit the deposits on the land, Bournewood Sand and Gravel responded that this was "material from land." During the course of a site visit on 16 November 2021, an employee of Killoughery advised the Council that material on the land derived from fencing material which had been shredded. I include a copy of the log recorded by a Council Planning Investigation Officer at **Appendix DB5**.

5.11 A letter from the Environment Agency dated 23 January 2023 regarding its observations of the appeal site is included at **Appendix 12 of the Council's Statement of Case**, together with accompanying photographs. While the letter refers to the adjoining quarry to the south, it includes specific reference to the appeal site (which it refers to as: *"agricultural land, known as*

Windmill Hill Wood; land adjacent to the A20 Swanley Bypass, which leads to Hockenden Lane, Swanley"). The letter states as follows:

> *"A site visit was undertaken on 14 July 2021, by Paul Bennett and John Radclyffe of the Environment Agency to Bournewood Landfill. We also inspected the agricultural land, known as Windmill Hill Wood; land adjacent to the A20 Swanley Bypass, which leads to Hockenden Lane, Swanley.*
>
> *This agricultural land was accessible through the open rear gate of the landfill site. We observed residual shredded wood on the ground leading from the site and onto the agricultural land. We observed significant soil and stones stockpiles, indicative of construction wastes as well as 2 shredded wood and plastics partially buried under the soil stockpiles, around the edge of the adjoining fields, adjacent to the A20 Swanley Bypass, which led to Hockenden Lane Swanley. There was also visual evidence that the levels of some of the fields, on the opposite site of Windmill Hill Wood, leading to Hockenden Lane had been raised. Significant volumes of soil and stones indicative of construction wastes had been deposited and stockpiled. In some areas we considered that the land level had been raised by at least 2-3 metres with additional extensive soil, stone stockpiles noted since our last visit in 2019.*
>
> *We took a number of photographs, and a selection of these photographs will be sent to you, as a separate attachment to this letter.*
>
> *We identified shredded wood stockpiles and residue within Bournewood landfill, which appeared to have been the source of the shredded wood stockpiles on the land at Hockenden Lane."*

5.12 In regard to the waste exemptions, which were cited the appellant in its grounds of appeal letter of 30 November 2022, the Environment Agency has advised the following:

> *"Waste exemptions are considered a low level activity, not requiring the need for an Environmental Permit and are incumbent on the applicant to register and comply with the requirements of the exemptions to ensure the strict limits are adhered to and that the activity does not breach the relevant objectives for which the exemption was registered; i.e. (a) without risk to water, air, soil, plants or animals; (b) without causing a nuisance through noise or odours; and (c) without adversely affecting the countryside or places of special interest."*

5.13 The Environment Agency has confirmed to the Council that waste exemptions have been sought in relation to the appeal site and the adjoining quarry; however, the appellant has

provided little information in regard to such exemptions, other than to state that a farmer has an exemption to spread mulch across the land, and that this is *"simply wood cuts from the site itself and does not involve any importation of material onto the site."* The Inspector will note that this does not account for the plastic, ceramic, concrete and deposited soil which have been identified. I have not seen any evidence, either on site or from the appellants, which could be the source for the extensive quantity of material which has been deposited. The amount of material deposited on the land (by estimations taken from the Atkins Report and from my own inspections of the site) cannot be matched to any equivalent excavations or levelling works on the site, and neither have I ever seen evidence of the large amount of wood which would have to have been sourced if the deposits were all "*wood cuts from the site itself*".

5.14 Whilst the Council, within its Statement of Case dated January 2023, acknowledged that the land to the north of the areas enforced against had remained in agricultural use, it stated that this did not account for the land subject to the Enforcement Notice – to the south of the line of post and rail fencing – where substantial waste deposits had been identified. It further stated, in relation to the movement of topsoil, that it had no reason to dispute that this had occurred within areas of land which had ***remained*** in agricultural use. The appellant, however, within its Statement of Case of 16 May 2023, appears to have insinuated that the Council has accepted that the waste deposits – to the south of the line of post and rail fencing – are in fact soil.[2] This is not the case.

5.15 While the appellant pleads within its Statement of Case of 16 May 2023 that it is unclear which materials comprise waste[3], it subsequently goes to provide a breakdown of materials derived from screening operations[4] which it says would be used for farming, including materials it defines as "hardcore" and "clean hardcore". The appellant also goes on to make a contingent argument that *"even if the Inspector were to find that these materials are "waste", the works would still be permitted under Part 6 as they comply with all the conditions in A2(1), and specifically part (c) that the hardcore is all site derived"* [5], thereby appearing to acknowledge that the material on site is waste. My evidence is that the material seen on site is: (a) not all wood cuts or hardcore, and (b) even where wood cuts or hardcore, not likely to be site-derived, at least on the evidence I have seen.

5.16 For a ground (b) appeal to succeed, the burden of proof is firmly on the appellant to demonstrate that the matters stated in the Enforcement Notice relating to the material change of use of the land have not occurred as a matter of fact. In this case, the appellant has failed to not only

[2] At paragraph 5.11
[3] At paragraph 4.3
[4] At paragraph 5.13
[5] At paragraph 5.13

demonstrate that this has not occurred, but the Council has comprehensive evidence to substantiate its case.

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

5.17 In contrast to its initial ground of appeal (b), the appellant is now arguing additionally, in its Statement of Case of 16 May 2023, that the material within the appeal site comprises security bunds, rather than agricultural topsoil or mulch subject to an Environment Agency exemption. It is stated to comprise of site-derived material and material arising from the erection of fencing.[6] The appellant also now appears to suggest that the agricultural use of this land is contingent upon the formation of security bunds which it says are reasonably necessary for the purposes of agriculture.

5.18 The appellant further states that the area enforced against forms part of a much larger agricultural unit, and that it remains functionally related to the whole agricultural unit and forms part of a single planning unit. It adds that the measures required to secure the land (presumably the bunds) are reasonably necessary for the purposes of agriculture. The appellant further alleges that the works have not been completed due to the enforcement action pursued by the Council, and that the part-completed security bunds will need screening and reprofiling to finish them. The appellant advises that these works will be undertaken using a mobile screen and an excavator and that they expect to remove some "clean hardcore and hardcore" from the soils.

5.19 The appellant asserts that the land subject of the Enforcement Notice forms part of a much larger agricultural unit which is managed by a tenanted farmer and that it is functionally related to the whole agricultural unit. The accompanying letter from the tenant farmer, Robin 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).[7] Mr Moxin claims that the fence has been *"effective to a degree"* but that the placement of the bunding *"has had a larger impact"* and that it is more difficult for the trespassers to gain access to the farm across the bunded areas. This would appear to conflict with the appellant's Statement of Case which says that the bunding is incomplete and that anti-social behaviour persists.[8]

5.20 The areas of land which have remained in active agricultural use are bound by post and rail fencing (as shown on Plan No BSG-01 included with Appendix A of the appellant's Statement) rather than by bunding, so it must be questioned by what measure the alleged bunding is

[6] At paragraph 1.1
[7] Appendix B accompanying the Statement of Case.
[8] At paragraph 2.9.

deemed to have been successful in protecting agricultural activities given that it is occupying an area which is not actually farmed. Furthermore, it is notable that no bunding is proposed beyond the areas of land subject to the Enforcement Notice (as denoted on Plan No GSG-02 included with Appendix A of the appellant's Statement) so as to protect the *existing* farming activities. I enclose photographs of the enclosures which surround the active agricultural areas which adjoin the appeal site at **Appendix DB6**. The images show how agricultural activities have persisted despite the absence of security bunds.

5.21 Of note, following a request for information made by the Council on 15 June 2022, under the provisions of Section 16 of the Local Government (Miscellaneous Provisions) Act 1976, the landowner stated that the appeal site (i.e., the land south of the post and rail fencing) was occupied by Bournewood Sand and Gravel Ltd and it listed no other parties as being in occupation of the land, including the tenanted farm, Mr Moxin. I include a copy of the response received by the Council at **Appendix DB7**.

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

5.22 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/proposed bunds do not form a gate, fence or wall, this appeal must turn on whether, as a matter of fact and degree, these can be considered to comprise a means of enclosure.

5.23 In determining whether the alleged bunds satisfy the requirement of Class A, consideration must be given as to whether it has some function of enclosure. For example, in Prengate Properties v Secretary of State for the Environment (1973) 25 P. & C.R. 311 (and also South Oxfordshire DC v Secretary of State for the Environment (1986) 52 P. & C.R. 1) Lord Widgery C.J. stated that the permission: *"would not extend to someone who places a free standing wall in the middle of his garden in circumstances in which the wall neither encloses nor plays any part in the enclosure of anything."*

5.24 The courts have held that the words *"or other means of enclosure"* are governed by the *"ejusdem generis"* rule, so that the means of enclosure must be similar to a gate, fence or wall. In Ewen Developments Ltd v Secretary of State for the Environment [1980] J.P.L. 404, a court judgment determined that a bund would not meet this requirement. In that judgment the court upheld a planning Inspector's conclusion that the construction of a number of earth embankments was not permitted by Class A because *"…the earth embankments around the*

appeal site were not considered a means of enclosure around the appeal site are not a means of enclosure that fall within the same category as the gates, fences and walls that are permitted…" notwithstanding they did enclose land.

5.25 In R. (Dennis) v Sevenoaks DC [2005] 2 P. & C.R. 4, the court quashed the council's determination that the walls of a silage clamp were permitted development within this Class by virtue of their enclosing function. The court held that it was wrong in principle to consider the function of the walls in isolation from the larger scheme for the creation of the silage clamp. In deciding whether a wall can reasonably be described as a means of enclosure within this Class, it is necessary to take account of all relevant circumstances and the decision in each case will be fact sensitive depending very much on the nature and location of the wall in question. Sullivan J said at §50 that:

> *"the defendant's bald submission that "where a wall has the dual purpose of enclosure and retention it remains a means of enclosure" is unduly simplistic. All relevant circumstances must be considered and the decision in each case will be fact sensitive depending very much on the nature and location of the wall in question."*

And at §51:

> *"Accepting that means of enclosure within a larger landholding are permitted by Class A in Pt 2 of the Order (e.g. to sub-divide the holding), the location of a wall within a landholding may well be one of the relevant factors in deciding whether it can sensibly be described as a means of enclosure. In addition, so far as can be ascertained from any application for planning permission or for determination under the Order, its proposed function within the landholding may also be relevant."*

5.26 There is no legal authority which establishes that a bund should be regarded as a means of enclosure under Part A. 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 function as an enclosure.

5.27 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. 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 more conventional methods of enclosure indicates that the primary function of the alleged/proposed bund would be a means of depositing the waste on the site.

5.28 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. 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 credibility. 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. 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.

5.29 Based on my observations the appeal site is significantly exposed and easily accessible by foot, even where it is characterised by steep inclines. I do not think the southern end of the site has a bund across it at present – the ground features there are clearly all earth and are clearly historical. Moreover, drawing number BSG-02 denotes a *proposed* bund along the southern site boundary; and as is evident within the images contained at **Appendix DB8** the southern end of the site has been subject to numerous incursions as evidenced by the tracks running up its slopes. It is also evident that the adjoining quarry to the south has been much more effectively secured with steel palisade fencing (see images contained at **Appendix DB8**). Furthermore, the post and rail fencing, which has enclosed the farming activities to the north (see images contained at **Appendix DB6**) has, in my opinion, formed a much more definable means of enclosure which impedes access by foot. I note that drawing number BDG-02 also includes a security bund adjacent to the A20 trunk road to the east, but where this reaches the south-western part of the site it ends, and the site is easily accessible by foot or motorbike at a point where trespassers would be most likely to enter it. I would also question the likelihood of the appeal site being breached from the A20 given that it is a fast inhospitable road (with a 70mph speed limit) and contains numerous roadside vegetation which would act as a buffer so as to prevent potential breaches by vehicles or pedestrians. The conclusion in this area is that a security bund is not required in this location and is serving no purpose aimed at securing the site. I attach a Google image taken from the A20 side of the boundary at **Appendix DB9**.

5.30 Given its coverage, composition and appearance my view is that the material on site cannot be reasonably necessary so as to act as security bunds. It appears to me that the appellant has simply introduced a new argument to justify the deposit of the waste deposits on the land and

to identify a new use for this material. It should be noted that this argument cannot by its very nature apply to the spread-out material in the south-west of the site.

5.31 Even if it 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 I outline below (under Class A, Part 6, Schedule 2 of the GPDO) I do not consider that this would amount to permitted development.

5.32 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 2m in the future could only be achieved through significant ground works, which would not be covered by this permitted development right. It appears that the appellant is seeking to introduce a ground (a) appeal by the back door.

5.33 In summary, I consider that the appellant has failed to demonstrate that the waste material on site constitutes a gate, fence, wall or other means of enclosure. As a matter of fact, what has occurred is not the construction of a means of enclosure as set out in the GPDO.

Relevant Appeal Decisions

5.34 In support of the Council's case I draw specific reference to the following Appeal Decisions, in which it was argued by the appellants that the bunds in question did not amount to a breach in planning control.

i. Appeal Decision APP/Y3940/C/18/3225946 dated 12 November 2019 concerning Nightwood Farm in Salisbury. An appeal was made against an enforcement notice which included a requirement to remove a bund and any related or resultant materials, paraphernalia, debris or detritus from the land. I attach a copy of this Appeal Decision at **Appendix DB10**. The Inspector concluded the following at paragraphs 39–41:

> *"39. In my view, in order for the bund to be truly effective as a security barrier, I consider that it would have had to have been more akin to a wall or fence and, in particular, to be a continuous barrier if it was to be a means of enclosure. In this case I also find it difficult to understand exactly what was, or is, being enclosed. At best it could only have provided a barrier for a small part of the site between the woodland and the hardstanding area. In my view, the bund acting alone cannot be said to be an effective barrier, wall or enclosure.*
>
> *40. It is a U-shaped or L-shaped earth structure open at both ends, as well as having a gap in the middle (where the metal gate is located) to allow access to*

the woodland. Thus it does not actually enclose the surrounding space or spaces within this part of the site and thus does not even enclose the space in which it is positioned. The gap is clearly intended to allow access through the bund to the woodland beyond and, as a matter of fact and degree, this gap in my view further reinforces my conclusion that the bund does not form what would normally be recognised as a means of enclosure, being akin to a wall or fence.

41. It follows, in my view, that it cannot therefore be a means of enclosure for the purposes of the GPDO. I agree with the Council and others that the evidence indicates that the bund was formed primarily as a means of depositing the waste materials on the site from between the storage buildings. As a result it may have looked like some form of barrier but I do not accept the contention that was akin to the formation of a wall, fence or other enclosure for the purposes of security by enclosing part of the overall site. The arguments that it formed an enclosure only surfaced, in my view, as a means of allowing the bund to remain in place. If this is not the case it is difficult to understand why the LDC application was made which was well before the enforcement notice was eventually issued."

ii. Linked Appeal Decisions APP/X0360 /C/18/3201164 and APP/X0360/W/17/3190455 dated 3 April 2019 concerning Land adjacent to Worleys Lane, Reading. An appeal was made against an enforcement notice which included requirements to remove bunds from the land. I attach a copy of this Appeal Decision at **Appendix DB11**. The Inspector concluded the following at paragraphs 8–9:

"8. Class A of Part 2 permits "the erection, construction, maintenance, improvement or alteration of a gate, fence, wall or other means of enclosure". I was directed to an appeal decision from 2014 which dealt with a very similar case and which referenced the concept of 'ejusdem generis'. This is that in a law where there is a list of specific classes of persons or things which then refers to that list in general terms, the general statement only applies to the same kind of persons or things specifically listed. So in this case the "other means of enclosure" must be of a similar nature to a gate, fence or wall. In the 2014 appeal it was noted that other appeals had been decided both ways, it was a matter of fact and degree in each case. In that appeal the Inspector found the bunds were not a part of the list of means of enclosure, because of the nature and scale of their construction.

> *9. In this appeal the bunds would not seem to be as massive as those in the 2014 appeal, but nevertheless they are substantial constructions, containing many tons of earth and no doubt other spoil. In my view a fence or wall is essentially a narrow linear structure and an earth bund is quite a different construction. Even a relatively modest one is a much more massive structure, taking up much more space and with a much greater degree of permeance. Consequently, I do not consider the bunds fall within Class A of Part 2 of the GPDO and therefore do require a separate planning permission."*

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

5.35 At paragraph 5.11 the appellant's Statement of Case of 16 May 2023 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 on the appeal site are waste. The appellant has not provided any explanation of how the erection of the bunds is reasonably necessary for the purposes of agriculture within that unit. The site area enforced against does not appear to be being used for any agricultural purpose, and it is difficult to see what agricultural use it could be put to, given the present and composition of the waste material. The Council does not consider security bunds are reasonably necessary for the purposes of agriculture.

5.36 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 of Case of 16 May 2023 (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.

5.37 Within paragraphs 5.12 to 5.14 of their Statement of Case of 16 May 2023 the appellant discusses future plans, none of which are relevant for this appeal.

5.38 Whilst paragraph 2.5 of the appellant's Statement of Case of 16 May 2023 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 proof 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.

5.39 The appellant 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 given the composition of the deposited material which I have identified above; nor has the appellant 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. In short, the appellant's Statement of Case of 16 May 2023 fails to provide any evidence of the waste material being site derived. It is also worth noting how it appears at odds with the appellant's ground of appeal letter of 30 November 2022 in which it was asserted unequivocally within page 2 that no storage of waste *"have taken place or are currently taking place within the Site."*

5.40 In conclusion, 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): the steps required by the Enforcement Notice are excessive

5.41 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).

5.42 The appellant' Statement of Case of 16 May 2023 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. The Inspector is respectfully reminded that a ground (f) appeal can only be entertained in the absence of a ground (a) appeal where the steps required by the notice concerned relate solely to remedying injury to amenity (see Miaris v SSCLG [2015] EWHC 1564). The requirements of the Enforcement Notice are not included simply for the purpose of remedying injury to amenity but for the reasons set out in full on the face of the Notice (reproduced at paragraph 2.3 above), including protecting the openness of the Green Belt from inappropriate development and in the interests of sustainable waste management. In those circumstances the ground (f) appeal ought to be dismissed in any event.

5.43 Whilst paragraph 4.3 of the appellant' Statement of Case of 16 May 2023 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 is 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.

5.44 In my opinion, there are no lesser steps available which would address the serious breach of planning control which has occurred and the appellant has not specified any. The steps required by the Notice are necessary and proportionate. The Council considers that it is expedient that all 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.

5.45 I append an email sent to the appellant's agent on 7 June 2023 at **Appendix DB12** responding to his proposed arrangements to address the requirements of the Enforcement Notice. As is evident, the Council did not regard these steps as satisfactory.

LIST OF APPENDICES (NOTE: THESE ARE IN ADDITION TO THE APPENDICES ATTACHED TO THE COUNCIL'S STATEMENT OF CASE AND REFERENCED IN THIS PROOF)

APPENDIX DB1	**Documents relating to planning application reference 11/00536/FULL1**
APPENDIX DB2	**Site photographs 16 November 2021**
APPENDIX DB3	**Site photographs 28 February 2022**
APPENDIX DB4	**Aerial photographs 30 April 2021**
APPENDIX DB5	**Notes taken by Council Planning Investigation Officer 16 November 2021**
APPENDIX DB6	**Photographs of fencing enclosing adjoining agricultural land**
APPENDIX DB7	**Response to S16 of Local Government (Miscellaneous Provisions) Act 1976**
APPENDIX DB8	**Site photographs 25 July 2024**
APPENDIX DB9	**Image from A20 facing the appeal site**
APPENDIX DB10	**Appeal Decision APP/Y3940/C/18/3225946 (12 November 2019)**
APPENDIX DB11	**Linked Appeal Decisions APP/X0360 /C/18/3201164 and APP/X0360/W/17/3190455 dated 3 April 2019**
APPENDIX DB12	**Response to agent 7 June 2023**