



Appeal Decision

Site visit made on 30 October 2019

by **Anthony J Wharton BArch RIBA RIASI**

an Inspector appointed by the Secretary of State for Housing Communities and Local Government

Decision date: 12 November 2019

Appeal Ref: APP/Y3940/C/18/3225946

Nightwood Farm, Lucewood Lane, West Grinstead, Salisbury SP5 3RN

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeal is made by In Excess Ltd, against an enforcement notice issued by Wiltshire Council
- The enforcement notice, numbered 16/00383/ENF was issued on 28 February 2019.
- The breach of planning control as alleged in the notice is: the creation of a bund in the approximate position shown cross-hatched on the attached plan as well as being shown on the photograph attached to the notice.
- The requirements of the notice are as follows:
 - (a) Remove the bund and any related or resultant materials, paraphernalia, debris or detritus from the land.
 - (b) Restore the ground level to match the profile of the land that existed prior to the unauthorised development taking place.
- The period for compliance with the requirements is 4 months.
- The appeal is proceeding on grounds (a), (c), (f) and (g) as set out in section 174(2) of the Town and Country Planning Act 1990 as amended.

Costs Application: An application for costs has been made by In Excess Ltd, against Wiltshire Council. This is the subject of a separate decision.

Decision

1. The appeal succeeds to a limited degree on ground (g) only. Otherwise the appeal is dismissed (see formal decision below).

Background information

Introduction

2. The earth bund has been formed to the west of a group of industrial storage buildings which lie immediately to the north of Nightwood Farmhouse. The bund lies in the south-west corner of the site. The 5 barns and two dwellings were purchased in 2015. The buildings within the site initially had a lawful mixed use for Storage, in Class B of the Uses Classes Order, and Agriculture (the use included the rearing of pigs). The current lawful use is for storage purposes only in Class B. Upper Brickwood Farm and Old Brickwork farm lie to the east and south-east of the site compound respectively and there are other dwellings to the south-east, accessed from the unsurfaced Lucewood Lane leading from the highway.

3. The bund lies within the appellant company's land, but outside of the established storage use and hardstanding areas. Its overall length is around 70m (including a roughly central gap). A metal gate gives access from the hardstanding area, through the gap in the bund, to the woodland part of the appellant's land beyond. Thus the

bund lies between the outer wire deer fence boundary and the inner metal railing boundary which encompasses the storage and other buildings.

4. The bund is stated to be between 1.3m and 1.8 m in height and between 4.5m and 9m in width. When seen from inside the site (through the metal railings), it is roughly uniform in shape with a slope of around 45 degrees. However, it varies slightly in width and height and forms a rough U-shape or L-shape, with its central gap opening on to the concrete hardstanding. The outer edge is less uniform in shape and merges into the woodland ground cover. This makes the precise width difficult to assess. The Council indicates that the site lies within a designated Special Landscape Area (SLA) and within the Salisbury Plain and West Wiltshire Down Landscape Character Area (SPWDDLCA).

5. Adjacent to the appeal site there is an area of Ancient Woodland (AW) known as 'Nightwood Copse'. This forms part of a wider County Wildlife Site (CWS) within this part of the open countryside. Various grasses, thistles, weeds and other vegetation have formed on the surface of the bund, which is described by the LPA as having been formed of contaminated soil and general rubble. Thus, the bund has partly encroached into the AW and three trees were removed.

6. The bund extends from an existing block wall at its southern end, in a rough semi-circle northwards, to a point where the surrounding boundary fence changes direction roughly at right angles north in a straight line. It is aligned outside of the curved outer edge of the concrete hardstanding and the metal palisade fence. Between the edge of the hardstanding and the fence there is a strip of scalplings. The double metal gate in the fence is roughly central to the hardstanding and there is a gap of around 3.5m in the bund behind the gate. This effectively cuts the bund into two sections and allows access into the woodland.

7. The site plan (Job No CL2540) provided by consultants Alder and Allen (A+A) (acting on behalf of the Environment Agency-EA) shows the position of the two parts of the bund more accurately than the plan attached to the enforcement notice or the Council's GIS Mapping diagram. This was apparent at my site visit, as was the gap, between the north and south sections of the bund adjacent to the gate of the metal paling fence which links the hardstanding area to the woodland beyond.

Relevant Planning History

8. The site has a detailed planning history but the most relevant matters are as follows. Planning permission had been granted retrospectively in 2010 (S/2010/0197) for the change of use (COU) of two former agricultural barns to a B8 Storage use. A permission in 2012 (S2012/0403) was granted for a COU from B8 Storage to a Martial Arts Training Facility (Class D2). In 2015 a further COU of 3 Agricultural buildings to B8 use was granted (15/06792/FUL). In the same year approval was granted for re-cladding two of the buildings (15/09867/FUL) and approval was also granted at that time for a variation of a condition attached to the permission. An application in 2016 (16/08573/FUL) for a concrete hardstanding/turning circle was withdrawn. This was later considered to be permitted development.

9. A retrospective application (17/10079/FUL) for the retention of the grass planted bund (now the subject of the notice), was refused on 18 January 2018. Officers had initially concluded that approval should be granted. However, this was not accepted by the Planning Committee (PC). Amongst other things, evidence presented at the meeting by others had referred to asbestos material being contained within the bund (see below). For whatever reason the period during which this decision could have been appealed lapsed. The enforcement notice, the subject of this appeal, was then issued on 28 February 2019 and this appeal was then submitted on 2 April 2019.

10. On 31 May 2018 an application (18/05195/CLE) had been submitted to the LPA seeking a Lawful Development Certificate (LDC), under section 191 of the Act, for the retention of the earth bund. This was on the basis that the bund formed 'a means of enclosure' and thus constituted permitted development under Article 3; Class A; Part 2 (minor Operations) of Schedule 2 of the Town and Country (General Permitted Development) Order 2015 as amended (GPDO). This was refused by notice dated 6 December 2018.

11. In the statement submitted on behalf of the appellant reference is made to an 'Improper influence in the Planning Process'. This related to allegations by a third party that asbestos sheets had been inserted into the bund and that trees had been removed to enable construction of the bund. These allegations were untrue and have been withdrawn. However, they were still in place when the application was considered by the PC. I have noted these submissions and accept that the allegations were untrue and clearly cannot be afforded any weight in my consideration of this appeal. Neither have I afforded any weight to the references of other enforcement investigations relating to the site, although there is no dispute that these actions formed part of the planning history of the site.

12. With regard to the asbestos contamination, it would appear that although the sheet asbestos was removed from the site, for whatever reason, some cut-off and smaller pieces of waste asbestos material had been left between the storage buildings when they were re-clad. This waste asbestos material had later ended up as part of the other earth and rubble material taken from between the buildings and used to form the bund.

13. I have noted the reports commissioned by the appellant via Nationwide Rail (Idom Merebrook) and by the Environment Agency- EA (Alder and Allan – A+A) to assess whether or not any of the material in the bund presented a risk to health. Basically the reports concluded that, with appropriate mitigation, which could have been secured by planning conditions, the risk associated with the traces of asbestos were minimal. The reports were submitted as part of the 2017 application for retention of the bund. However, at the planning committee meeting it is indicated, on behalf of the appellant, that the *majority of objections made to Committee were based on the untrue allegations*' made by the third party that sheets of asbestos had been buried on the land.

14. Clearly, I am not empowered to deal with the matters relating to the untrue allegations or the outcome of the Committee decision not to grant approval which was not appealed. However, it is a fact that the PC was entitled not to accept Officer recommendations for approval for the bund. Any further grievances by the appellant in relation to how the application was dealt with are matters between the appellant and the Council. I have already indicated above that no weight can be given to any other enforcement investigations at the site and have dealt with this appeal on its merits and in accordance with the grounds pleaded.

15. With regard to whether or not planning permission should be granted for the retention of the bund, I am empowered to deal with the ground (a) appeal against the notice. In reaching my decision on this ground and the others pleaded, I have taken into account only the relevant material considerations. The allegations referred to above and any misinformation presented to the PC cannot carry any weight whatsoever in my consideration of this appeal.

16. In essence I have dealt with the appeal on its planning merits. In doing so the starting point is the development plan and the material considerations include the

latest version of the NPPF. I have not afforded any weight to matters which lie outside of the material planning considerations which relate to this appeal.

Relevant Policy

17. The most relevant development plan policies are contained within the Wiltshire Core Strategy (WCS). These are Policy CP50 (Biodiversity and Geodiversity); Policy CP51 (Landscape); Policy 56 (Contaminated Land) (Landscape) and criteria ii, iv and vi of Policy CP57 (Design and Place Shaping), The National Planning Policy Framework (NPPF) is a major material planning consideration and references were initially made to earlier versions than the current February 2019 version. There are some differences relating to biodiversity issues between the documents, in that the latest version strengthens to some extent the relevant policies relating to the protection and conservation of the natural environment. The most relevant Policies in the NPPF are set out within Section 2 (Achieving sustainable development); Section 12 (Achieving well-designed places) and Section 15 (Conserving and enhancing the natural environment). I have also had regard to relevant guidance in Planning Policy Guidance (PPG).

18. The Council has also referred to Policy C6 of the Salisbury District Local Plan (SDLP) and the SLA. The Council indicates that this policy formed part of the policies covered by the SDLP and became a 'saved' policy for the purposes of the adopted WCS. It is clear from the policy that the whole of the wider rural area, including the appeal site lies within the SLA. As such, although dated, I have afforded Policy C6 due weight in relation to this particular appeal on ground (a). The Council's GIS mapping diagram, although not an accurate mapping of the bund itself, clearly indicates that it lies partly within the CWS and partly within the AW.

The appeal on ground (c)

Introduction and the gist of the cases on this ground

19. It is contended on behalf of the appellant that the formation of the bund constitutes permitted development under Class A, Part 2, Schedule 2 of the Town and Country Planning (General Permitted Development)(England) Order 2015 (GPDO). Having seen the bund and having considered all of the submissions, it is my view that the works carried out is 'development' for the purposes of Section 55 of the 1990 Act. There is no dispute that this is the case and a planning application has already been made and refused. It is also a fact that a Lawful Development Certificate (LDC) was refused for the bund as formed. The CPRE and PW contend that the bund falls under the constraints of Part 6 Class B of the GPDO. However, I have considered it on the same basis as the Council and the appellant company under Class A, Part 2.

20. Notwithstanding the planning history, the appellant is entitled to appeal the enforcement notice on ground (c) as set out in Section 174 (2) of the Act. To be successful on this ground it must be shown that the development carried out does not constitute a breach of planning control. Thus, in the absence of any express planning permission, the appellant needs to show that the works carried out are permitted by virtue of Class A Part 2 of Schedule 2 to the GPDO. Both the Council's submissions and those of the appellant have set out in full the above part of the GPDO. There is no need to repeat it here. Basically, the question to be asked is whether or not the bund as formed constitutes '*The erection, construction, maintenance, improvement or alteration of a gate fence wall or other means of enclosure*' (my underlining) as set out in '*Class A - Gates fences and walls etc*' and also does not contravene any of the conditions (a), (b), (c) or (d) as set out in '*A.1 Development not permitted*'.

21. It is evident that the development carried out is not physically a gate, a fence or a wall and the case turns on whether or not, as a matter of fact and degree, it can be defined as being a means of 'enclosure' for the purposes of the GPDO. On behalf of the appellant it is indicated that the formation of the bund satisfies all of the requirements of this part of the GPDO. In particular it is indicated that no part of the bund is adjacent to a highway; that it does not exceed the maximum height of 2m above ground level and does not compromise development within the curtilage of a listed building.

22. It is further indicated that the bund was built within 3 or 4 days by the same contractors who were carrying out works to the existing storage buildings on the land and that the same machinery was used. Thus the material for the bund came from within the site. It is indicated that the bund had been built in this specific location in order to protect the land from trespassers, dogs and nearby holiday-makers. In addition it is stated that the bund formed a 'safety barrier' for any stray shots arising from the appellant's deer stalking activities.

23. Reference is made to the Council's refusal of the LDC and in particular to a number of legal cases. These are set out in the Council Officer's delegated report (18/05195/CLE). I have noted all of these cases but again I do not consider it necessary to repeat them all here. However, I agree with the assessment made on behalf of the appellant that, from an analysis of all of the case law, there are situations whereby a bund can comprise an 'enclosure' pursuant to the GPDO and, therefore, benefit from PD rights.

24. I agree with the contention that, of fundamental importance, is whether the bund forms part of an 'enclosure'. In this case it is contended that the bund encloses the yard and business from the neighbouring woodland and that, prior to construction, fencing surrounded approximately only 90% of the site. It is stated that the bund was constructed to close the 'gap' in the existing fencing and therefore to act as a means of enclosure for the hardstanding and storage areas of the site.

25. The case of *Prengate Properties Ltd and Another v SSE and others (1973) 25 P&CR 311* is relied upon, whereby it was held, amongst other things, that it was necessary for a wall to have 'some function of enclosure'. Reference is also made to an appeal (reference APP/Y9507/X/2202668) whereby an Inspector concluded, in those particular circumstances, that 'the bund would enclose the land'.

26. In this appeal it is stressed that the bund as constructed encloses the property from the woodland and does not form a free-standing bund within the site. It is further indicated that the fence, which has been erected in front of the bunds, was a further necessary barrier to prevent trespassers and that this fence and the bund perform different functions. The function of the bund was, amongst other things, to ensure that pigs were kept an appropriate distance from the rest of the site.

27. In support of the contention that the bunds constitute 'Other means of enclosure' the cases of *Ewen Developments Ltd v SSE and Norfolk District Council [1980] JPL 404* and *Wycombe DC v SSE [1994] EGCS 61 (QBD)* are also referred to. The first case considered whether an embankment could be considered to be a means of enclosure. It was held that this could be the case if the embankment did not 'just go from one point to another' but 'went round in a rough circle and produced an enclosure'.

28. In the second case the *Ewen* judgement was considered, where it was held that 'A means of enclosure had to provide some way of closing in an area, so that it became enclosed. That function of closing in necessarily imported a character of surrounding the area. When that character was achieved there need not be a perfect surrounding. There might be gaps in the overall enclosure, but it would be a matter of

fact and degree whether such gaps took the operations outside the essential character of surround and so outside of enclosure’.

29. It is indicated that when the bund originally *‘bridged the gap in the fencing’* it was intended to enclose the area leading to the yard and therefore filled the function of enclosure that is akin to a gate, fence or wall. It is contended that the bund still satisfies this criterion in that it is a substantial structure which had the aim of enclosing the property and dividing it from neighbouring woodland as an additional security obstacle. Due to the bund being constructed in just 3 to 4 days from materials on site it is argued that the work constituted *‘Minor Operations’*.

30. The Council’s case is essentially the same as that set out in the delegated report relating to the LDC application. As well as referring to the *Prengate; South Oxfordshire; Ewen and Wycombe cases*, the Council also refers to the cases of *R. (Dennis) v Sevenoaks DC [2005] 2 P&CR 4* and *Lovejoy v SSETR 91999) 78 P&CR*. References are also made to several appeal cases between 2009 and 2013 where it was concluded that in the particular circumstances of the cases, it had been found, as a matter of fact and degree, that the earth bunds/embankments in question did not fall within the GPDO category of being PD. Another appeal in 1996 was also referred to where the opposite was found to be the case. The Council accepts that it is necessary to assess all of the circumstances in this case as to whether this earth bund constitutes permitted development.

31. With regard to its height, the Council accepts the appellant’s assertion that it does not exceed 2m in height and that it complies with paragraph A.1 (a) and (b) of Class A, Part 2 of the GPDO. The Council refers to the overall scale of the bund in terms of whether it can be considered a *‘minor operation’* under Part 2. It accepts that the scale of the works suggests that the operation could be undertaken in a time-frame of days or weeks if carried out in a single operation. However, it also indicates that whilst the length of the bund could not rule it out being considered under Part 2, due to its overall form and width, it is not insubstantial in scale and is considered, as a matter of fact and degree, to fall outside the definition of a *‘minor operation’*.

32. The Council indicates that based on the principle of *‘ejusdem generis’* (the general definition of which is being of the same kind, class or nature), it is difficult to assert that the bund is clearly similar to a fence or wall in terms of its width. It is contended that although the bund might provide some measure of physical protection by reason of its shape or form, it is the fence inside that clearly provides a more obvious added measure of security similar to the existing fencing around the wider site. Otherwise, it is argued that if the bund is the *‘enclosure’* there would be no reason for the fence.

33. It is accepted by the Council that the fact that the bund was constructed before the fence, raises the question of whether the bund alone could have fulfilled the necessary function of enclosure. However, it is stressed that although shaped as a curve, the bund is not a gate fence or wall and cannot be said to be akin to such. When viewed from outside of the site it is argued that its appearance is even less coherent or obvious as a means of enclosure akin to a fence or wall. It is considered that the primary reason for constructing the bund was the need to remove soil and other materials from between the storage buildings in order to avoid transporting material from the site.

34. At the time of the LDC application the Council was of the view that the evidence submitted did not demonstrate that the primary purpose of the bund was to form an enclosure under PD rights in order to assist in securing the site. Again it is argued that if this had been the case then there would have been no need for the fence. In summary it is contended that as an engineering operation the works constitute

development under section 55 of the Act. Due to its overall nature and the manner in which it was formed, it is not considered to be an *'other means of enclosure'* constituting PD under Class A Part 2 of the GPDO.

My Assessment on ground (c)

35. I agree with the main parties that the works carried out constitute development under section 55 of the Act. Like the Council it is my view that the works amount to an engineering operation. The work was carried out by a contractor using some form of machinery; the materials used to form the bund were moved from one part of the site to their current location and the overall result has been to materially change the character and appearance of this part of the site. Although only taking a few days to build the bund is a significant and noticeable new feature, or land formation, within the overall context of the CWS and AW.

36. The main message from all of the relevant submitted case law and appeal examples is that, whether or not a 'bund' or 'embankment' forms a *'means of enclosure'* for the purposes of Class A Part 2 of the GPDO, is a matter of fact and degree relating to the specific circumstances of the case. In reaching my conclusion on this ground of appeal I have taken into account all of the examples referred to by the parties. Whilst some cases and appeal examples assist, others are not so directly relevant. However, each case must be assessed on its merits and this is how I have dealt with this appeal.

37. The bund was clearly formed from material already on the land. Nevertheless it has changed the profile of the land and, as indicated above, this has materially affected its character and appearance. At first sight, it seems to me that the first aim and objective of the operations on site was to remove the materials (including some asbestos cuttings) from between the two buildings in order to gain access to them for maintenance purposes. Clearly there were two basic options; to remove the material from the site, (along with the sheets of asbestos) or to store or place the various materials somewhere within the appellant's land.

38. In choosing the latter option the appellant decided to position the bund in a specific location within the site. Although it is contended that the position was specifically related to a need for security, from my inspection of the site, it would appear that the structure, in itself, could only provide limited security. I acknowledge that the bund was constructed before some of the fencing but, in my view, it would have had minimal effect in keeping people, or pigs for that matter, out of the site.

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.

42. In conclusion I find that an engineering operation has been carried out. On the basis of all of the submissions and my site visit and as a matter of fact and degree, I do not consider that this particular bund forms a means of enclosure for the purposes as set out in the GPDO. The bund as formed does not, therefore, constitute permitted development and there is no express planning permission in place for its formation. It follows that there has been a contravention of planning control and the appeal must fail, therefore, on ground (c).

The appeal on ground (a)

43. The main issues in this case are the effects of the bund:

- On the character and appearance of the landscape in this part of the CWS.
- On the ecology and natural habitats of the Ancient Woodland.
- On the land itself with regard to contamination and
- On residential amenity.

44. The decision as to whether or not planning permission should be granted for the bund as formed must be determined in accordance with the development plan, unless the material considerations indicate otherwise. The relevant policies of the WCS are set out above including saved policy C6 and the current NPPF is a major material consideration. I have also taken into account relevant Planning Policy Guidance (PPG)

Effect on the character and appearance of the landscape in this part of the CWS

45. Policy CP51 of the WCS as well as saved policy C6 (SLA) seek to protect, conserve and where possible enhance the character of the Wiltshire landscape. Policy CP57 seeks to ensure that any development protects valuable features and characteristics by ensuring high quality design and place shaping outcomes. Irrespective of the comments made on behalf of the appellant company, the bund lies within the SLA and also on part of the AW and the CWS. This is evident from the definitive maps of the SDLP and the Council's GIS diagram. Policy C6 allocates the whole of the wider rural area, including the appeal site, area as SLA. Thus there is a definite link between this policy and CP51 which also relates to other landscape designated areas in the County.

46. The NPPF seeks to ensure that any development should contribute to and enhance the local environment by, amongst other things, protecting valued landscapes; by recognising the intrinsic character and beauty of the countryside; by minimising impacts and providing net gains for biodiversity and by remediating and mitigating contaminated land where appropriate.

47. The Council accepts that the bund is not 'readily visible' in the wider landscape of the SLA. Having viewed the bund in its overall context I agree with the Council that this is the case. The photographs, taken immediately following its formation showed a rather stark mounding of earth and material. It bears little if any relationship with the form and ground cover of this part of the AW and forms a somewhat random mounding of material which originated from between the storage buildings. Clearly

over the last 2 to 3 years, the grasses, weeds, thistles and other vegetation which now cover most of its surface, have resulted in a maturing or greening of its appearance. Thus from a distance I acknowledge that it has started to be perceived as a more natural part of the landscape on the edge of the AW.

48. However, although this visual impact is minimal, I agree with the Council's point that the SLA is still '*intrinsically affected*' by development in this part of the open countryside. Furthermore, the mounded bund cannot, in my view, be said to have enhanced the landscape and, in terms of the materials placed on the land together with the loss of trees (albeit it just 3), I do not consider that it can be said to have protected this part of the AW within the SLA and the CWS. It cannot be the case that, just because a development is screened, or cannot be seen from public viewpoints, it is acceptable. Any development, however screened, can still result in harm being caused to a designated or protected area of landscape. The NPPF also recognises the need to protect the intrinsic character and beauty of the countryside.

49. I find it difficult to accept that the bund '*relates positively to its setting*', or that it is an '*attractive buffer*' between the rest of the property and the woodland. Instead, and despite its '*greening*', when viewed from within the woodland area it is perceived as a U or L-shaped mound of weeds, thistles and grasses that are distinctly different in character and appearance to the mature woodland ground cover and trees beyond. I agree with the Council that it has resulted in an '*unnatural landform*' which is detrimental and unsympathetic to the natural environment of the AW. I do not consider that the bund conserves the character of the landscape.

50. I also find it difficult to accept the initial officer view that the physical impact on the woodland is limited. I acknowledge that Wiltshire Council's Ecology Officer (WCEO) also judged the overall impact to be limited. However, the facts that only a small number of trees have been lost; that the bund is on the periphery of the woodland and that this part has already been affected by the adjoining land use does not, in my view overcome the overall negative visual impact of the bund as formed. I deal below with the other ecology and biodiversity matters raised by WSE.

51. Having seen the bund in situ I do not consider that it enhances this existing important woodland landscape setting within the SLA. I have concluded above that the bund cannot be said to form an enclosure for the purposes of the GPDO and that its main purpose was seemingly to provide an on-site repository for materials (some contaminated) from another part of the site. It cannot, therefore, be said to have been taking an opportunity to enhance biodiversity or to create a wildlife corridor as referred to in criterion ii of Policy CP57. I accept that the formation of the bund has resulted in it being colonised by some species, but in my view, it is far from sympathetic to the conservation of the historic landscape as required by criterion iv. Nor, in my view, does it meet the requirement of criterion vi, whereby it would need to take account of the characteristics of the site to deliver appropriate development which relates effectively to its immediate setting and the wider character of the AW.

52. In summary on this first issue, therefore, I consider that the development of the bund in this particular location is contrary to Policies CP51 and CP57 of the WCS; to saved policy C6 and to policies within sections 12 and 15 of the NPPF.

Effect on the ecology and natural habitat of the ancient woodland

53. I have referred above to the fact that the bund has affected the character and appearance of this part of the AW. This has occurred due initially to the loss of 3 trees, followed by the formation of the unnatural mounding of the bund. The bund clearly extends to the north and west of concrete hardstanding and the boundaries between the bund and the woodland were evident at the time of my visit.

54. In paragraph 175 of the NPPF it is indicated that development resulting in the loss or deterioration of irreplaceable habitats (such as AWs or veteran trees) should be refused unless there are wholly exceptional reasons and a suitable compensation strategy exists. At footnote 58 '*wholly exceptional reasons*' are set out and relate to nationally significant infrastructure projects (NSIPs), where public benefit would clearly outweigh the loss or deterioration of habitat. PPG also makes it clear that the condition of the woodland cannot be taken into account when deciding whether damage would be caused to any AW. As indicated by the Council, the formation of the bund does not meet the criteria set out in paragraph 58 of the NPPF and it is contended that the decision to refuse planning permission accords with the policy in the NPPF and the guidance in PPG.

55. Policy CP50 of the WCS refers to Local sites and CWSs and states, amongst other things, that sustainable development will avoid direct and indirect impacts on local sites through sensitive site location and layout and that damage or disturbance to local sites will generally be unacceptable. The policy does list '*exceptional circumstances*' where such disturbance might be acceptable but none of these apply in this case.

56. I do not consider that the retrospective application to form the bund demonstrated how the ancient woodland would be protected or buffered in order to maintain its ecological value, connectivity and functionality in the long term. Nor is there any such evidence at this stage to indicate that this would continue to be the case, save for the mitigation measures of covering the bund with a layer of topsoil. I also agree with the Council that the harm caused by the bund could have been reasonably been avoided. The asbestos cut-offs could have been removed at the same time as the main asbestos sheets. Although the contractor involved clearly failed to remove all of the asbestos waste, the appellant company need not have simply treated it as part of the general rubble which it desired to be removed from between the buildings. The fact that there are no public benefits from the formation of the contaminated bund reinforces my view that the appellant company's actions were unacceptable on planning grounds.

57. In summary on this issue, therefore, I consider that the retention of the bund would be contrary to both local and national policies which seek to protect and enhance the natural environment. As such it would be contrary to the aims and objectives of Policy CP50 (Biodiversity and geodiversity) as well as to policies within the current NPPF. The strengthening of the NPPF policies relating to biodiversity and habitats, since the initial officer recommendation was made, reinforces my view that the Council's eventual decision to refuse the appeal scheme, on the basis that it is contrary to these policies, was justified.

Effect with regard to contamination

58. There is no dispute regarding the findings of the commissioned reports (IM for the appellant and A+A for the Environment Agency) on the asbestos waste material found within the bund. The A+A report referred to 3 trial pits being bored in the approximate 500m³ volume of the bund. The results indicated a top layer of loose, brown, sandy clay on a lower base of stiff brown clay, containing fragments of asbestos cement material ranging from 0.05m to 0.2m in size. Most of these samples were found in the trial pits adjacent to the gates but some fragments were noted on the surface of the bunds. Overall it was concluded that, although concentrations of material in the soil were low, it was possible that the surface material could be mobilised or disturbed during certain weather conditions.

59. The IM report, agreed with the above findings and following a qualitative assessment, concluded that there was a negligible risk to site users from exposure to

airborne asbestos fibres. In liaison with the EA it was recommended that remediation measures, including the capping of the whole area of the bund with 250mm of topsoil be carried out, or that the contaminated material be removed from the site.

60. The Council's Public Protection Officer (PO) raised no objections to the proposed remedial measures but recommended that a planning condition be imposed to ensure that the remedial works were carried out in accordance with the report. However, the WCEO questioned the need for the remedial works and considered that the addition of another layer of topsoil would '*set back the natural colonisation that has already occurred*'. It was also indicated that '*no imported soils grasses or non-native species should be brought on to the site which remains part of an area of ancient woodland*'. The WCEO stated, however, that if the remediation strategy was necessary it would need to be supervised by an on-site ecologist.

61. In their appeal statement the Council refers to this difference in opinion of its officers but also indicates that both the PO and the WCEO still had some issues with the scheme as presented, without further monitoring or the imposition of conditions. The Council, therefore considered that policies CP56 and CP57 of the WCS would not be met unless suitable planning conditions and mitigation measures were carried out.

62. I have referred above to the policies within the NPPF which seek to ensure that any development should contribute to and enhance the local environment by, amongst other things, minimising impacts and providing net gains for biodiversity and by remediating and mitigating contaminated land where appropriate. In relation to these aims there is a perceived conflict in this case.

63. Due to the works having been carried out some time ago, the WCEO indicated that the bunds have naturally colonised and may now support reptiles, birds and even badgers, as well as the various grasses, thistles and other ground cover. The need for remediation was, therefore questioned on the basis that that it would set back the natural colonisation that has already occurred. However, it is clear from the submitted reports that the bund cannot be left in its current state due to the asbestos contamination and in particular that which lies on, or close to, the surface. This leaves two options: to cover the bund with further material and impose the suggested planning conditions or to remove the bund as required by the notice.

64. I find a major flaw in the WCEO's approach of simply leaving the bund as formed. The commissioned reports clearly dictate against this approach and the EA has concluded on the two options referred to above. If an application had been made to form the bund in the first instance and it had been known that there was waste asbestos in the material, it is almost certain that the LPA would not have granted approval, even with the imposition of planning conditions. Although there was an initial officer recommendation for approval, this was after the bund had been formed; after it had been partly colonised and prior to the up-dating of the NPPF relating to biodiversity and ecology issues. Although the NPPF refers to remediation and mitigation measures for contaminated land being carried out where appropriate, it also seeks to ensure net gains in terms of diversity.

65. In this case rather than the development providing a net gain for biodiversity it has resulted, in my view, in a net loss in terms of the biodiversity and ecology of this part of the AW. I have set out above my concerns relating to the effect on the landscape and the woodland itself. I also agree with the case of the Campaign to Protect Rural England (CPRE) and Protect Wiltshire (PW) that the bund has damaged the ancient woodland verge outside of the established and authorised storage area, as well as burying the AW soils and natural ground cover under the contaminated bund.

66. I acknowledge that the proposed mitigation measures would overcome most of the concerns relating to the buried asbestos and also accept the points made by the WCEO relating to upsetting the already colonised bund material. However, I do not consider that these arguments carry sufficient weight to outweigh the overall harm caused by the unauthorised bund. To simply cover the bund with more material, in my view, simply buries the contaminated material and does not overcome the fundamental issue of the contamination of the land in the first place. The soils of the AW would remain contaminated which can only be a further loss in terms of its biodiversity and ecology.

67. The loss of colonisation of the bund which would be caused if it is to be removed would itself result in a loss of habitat for various species in the short term. This is inevitable. However, the material used would not have been accepted on biodiversity or ecological grounds in the first instance and, in my view, the cleansing of the land of all contaminated material will provide a long-term biodiverse and ecological future for this part of the AW. To allow the asbestos waste to remain would result in polluted land in perpetuity. In my view it cannot be justified to allow the bund and waste asbestos materials to remain in-situ, particularly as it would not have been allowed in the first instance if a planning application had been made.

68. I agree with the CPRE and PW that there are no mitigation measures that can be preferable to the complete removal of the bund and the contaminated materials. I also agree that the cut-off asbestos materials should have been removed from the site at the same time as the full asbestos cement sheets. Thus it cannot now be an argument, against removal, that specialist contractors will be required to remove the bund. They were required previously and it is necessary that specialists are needed to finish removing the asbestos waste from the site.

69. In summary, therefore on this issue I consider that the most appropriate course of action is to remove the bund and the contaminated material, rather than leaving it as it is, reducing it in size or further adding to its bulk and massing by covering it with topsoil. I again find in the Council's favour on this issue.

Effect on residential amenity

70. As indicated above I have not given any weight to the matter which is referred to on behalf of the appellant as the '*Improper influence in the Planning Process*' (see above). However I have taken into account all of the other relevant submissions by interested persons and parties.

71. Prior to my actual site visit I walked most of the length of Lucewood Lane and noted the dwellings on either side and in particular those closest to the site. I also viewed the site from the lane and noted the relationship of the bund to the positions of the nearest dwellings. From these observations it seems clear to me that the effect of the bund in terms of its appearance will have had minimal impact on the living conditions of the nearest neighbours. Direct views of the bund are limited. Although it is indicated that one neighbour has cleared trees from his own land, I consider that the boundary treatment; the immediate parts of the woodland and the greening of the material have resulted in minimal visual impact for anyone bordering the appellant company's land.

72. The only possible issue for nearby residents might have been the presence of airborne asbestos fibres resulting from certain conditions, as referred to in the IM/A+A reports. However, the proposed remedial measures would, in my view, have been sufficient to mitigate any risk in this respect. The appeal site is well protected and the risk of any wind-borne particles or fibres affecting nearby residents would be negligible. The two reports reinforce my view that this would be the case. In

conclusion on this issue, therefore, I do not consider that the living conditions of nearby residents would be detrimentally affected by the continued presence of the bund, following remediation.

Overall conclusion on ground (a)

74. Although I have concluded that the retention of the bund (following remedial works) would not be detrimental to the living conditions of those living close to the site, I have nevertheless found against the appellant company with regard to all of the other main issues.

75. For the reasons set out above I have concluded that the retention of the bund would be harmful to the character and appearance of the ancient woodland, the SLA and the open countryside. I have also concluded that it would be counter to the aims and objectives of both local and national biodiversity and ecology policies and that it would also be harmful due to the fact that the contaminated material would remain on the land.

76. I find, therefore, that to grant planning permission for the retention of the bund would be contrary to Policies CP50 (Biodiversity and Geodiversity); CP51 (Landscape) and saved policy C6; CP56 (Contaminated Land) and criteria ii, iv and vi of CP57 (Design and Place Shaping) of the WCS. I also find that it would be contrary to policies set out in Sections 2 (Achieving sustainable development), 12 (Achieving well-designed places and 15 (Conserving and enhancing the natural environment) of the NPPF and relevant biodiversity and ecology guidance in PPG.

77. I do not consider that the material considerations either, singularly or in total, carry sufficient weight to indicate that the bund development as carried out should be allowed to remain in-situ. In reaching this conclusion I have specifically taken into account the reports and the proposed remedial measures; the fact that officers initially recommended approval and the Council's suggested conditions, if I had been minded to grant approval. However, again these matters do not carry sufficient weight to alter any of my conclusions on the main issues under this ground of appeal. The appeal therefore fails on ground (a).

The appeal on ground (f)

78. In support of this ground it is stated on behalf of the appellant company that the steps required exceed what is necessary to remedy the breach of planning control, or to remedy any injury to amenity which has been caused by the breach. However, the only lesser step suggested is that there could be a reduction in the height or width of the bund as formed.

79. The Council's case is that the appellant company has not substantiated its case other than setting out the above suggestion which has not been set out in any detail. The Council has confirmed its contention that the requirements of the notice are reasonable and proportionate to the breach and that no lesser steps could overcome the planning harm caused by the formation of the unauthorised bund.

80. I agree with the Council's position. The lesser steps suggested are vague and no scheme has been submitted to indicate how the bund might be reduced in size. In any case, any interference with its height or width could result in the contamination within the bund being spread out beyond its current location within the bund. This could exacerbate the detrimental effects on the biodiversity and ecology of the AW. However, even if an acceptable scheme had been submitted it would not overcome the harm caused by the bund which I have identified above.

81. I agree with the Council, CPRE, PW and others that it is necessary to remove the bund completely from the land and as specified in the requirements of the notice. I do not consider that any lesser steps would overcome the harm caused and so the appeal on ground (f) must also fail.

The appeal on ground (g)

82. It is argued that the compliance period of 4 months falls short of what should reasonably be allowed for the removal of the bund. It is stressed that the works would require a specialist contractor; that it would take some time for this to be rearranged and that vehicle activity and monitoring would be required. The Council indicates that the appellant company has not specified an alternative timescale.

83. Having considered all of the circumstances of this case it is my view that a 4 month period does fall short of what should be allowed. Considering the specialist advice and planning required for removal, as well as the likely time of the year (following issue of this decision), I consider that a 6 month period is reasonable and appropriate. The appeal succeeds to this limited degree on ground (g) only and I will vary the notice accordingly.

Other Matters

84. I acknowledge that the Committee Report and Minutes placed great weight on the objections received in relation to the previous application and that the Council's Appeal statement justifies the Committee's '*cautious approach*' in determining the application. I have given no weight to the objections made on the basis of untrue allegations and have considered the appeal on its merits and on the basis of all of the relevant material considerations at this time.

85. I accept that officers made a recommendation to allow the previous application but this was clearly a finely balanced planning judgement. There had also been differences of opinion between other officers of the Council on the ecological and biodiversity implications relating to the retention and/or remedial treatment of the bund. In principle the Committee was entitled to disagree with the officer recommendation and to refuse the application. In reaching my decision, whilst noting the circumstances surrounding the both the officer recommendation and the Committee decision, I have considered afresh whether or not permission should be granted retrospectively for the bund works as carried out.

86. In reaching my conclusions on all of the grounds of appeal I have taken into account all of the other matters raised by the appellant company, by the Council, by interested parties and by interested persons. These include the full planning history of the site; the reports by IM and A+A; the detailed statements and appendices; the drawn and photographic material; the submissions of CPRE and PW; letters from others; the final submissions and the related matters set out in the appellant's costs application and the Council's response.

87. However, none of these carries sufficient weight to alter my conclusions on any of the grounds of appeal and nor is any other factor of such significance so as to change my decision that the appeal should be dismissed.

Formal Decision

88. The appeal succeeds to a limited degree on ground (g) only and I direct that the enforcement notice be varied by deleting the figure '4' in part 6 of the notice (TIME FOR COMPLIANCE) and by substituting therfor the figure '6' (six).

89. Otherwise the appeal is dismissed and the enforcement notice is upheld as varied. Planning permission is refused on the application deemed to have been made under section 177(5) of the Act.

Anthony J Wharton

Inspector