



# **Charnwood Borough Council**

**Town and Country Planning Act 1990**

**Appeal Statement By**

**Miss S J Hallam**

BSc (Hons), MSc, MRTPI

**Team Leader Planning Enforcement**

**Raising of ground levels within the  
floodplain.**

**at**

**Land adj Moor Lane, Loughborough,  
Leicestershire**

**Local Planning Authority Ref No. E/18/0476**

**Planning Inspectorate Ref No. APP/X2410/C/23/3322569**

This statement and associated documents can be viewed on the Planning Enforcement page of the Council's website

[https://www.charnwood.gov.uk/pages/planning\\_enforcement](https://www.charnwood.gov.uk/pages/planning_enforcement) or in reception at the Council Offices but this is via appointment only by calling 01509 634570

## **1.0 Introduction**

1.1 I am employed by Charnwood Borough Council as Team Leader for Planning Enforcement in Development Control, within Planning and Growth. I am responsible for managing the enforcement team and for the investigation and resolution of suspected breaches of planning control within the Borough of Charnwood. I am a chartered member of the Royal Town Planning Institute and have a Masters in Urban and Regional Planning. I also have the Trevor Roberts Certificate of Continuing Education in Planning Enforcement and have nineteen years' experience working in a planning enforcement role.

## **2.0 The Unauthorised Development**

- 2.1 This appeal relates to the raising of land levels within the floodplain.
- 2.2 Planning permission P/12/2130/2 was granted for the erection of 38 dwellings to phase 1 and outline permission for residential development (phase 2) and community building (phase 3). Planning permission P/16/1054/2 was granted retrospectively for the erection of 62 dwellings as part of development for phase 2 (Reserved Matters – Outline Application P/12/2130/2 refers). Both these applications included the Site that is the subject of this appeal. Within these applications the community building and public car park were intended to be built on the appeal Site (phase 3).

- 2.3 During the construction of the dwellings the developers used the appeal site as a compound for the storage of building materials, plant and machinery and the storage of spoil from the development to construct the dwellings for phases 1 and 2.
- 2.4 When works on the wider development were nearing completion in 2019 the site compound was cleared and the spoil from the site was mounded in some areas and also spread around the site. Within the applications the appeal Site is known as land to the North-East of Moor Lane and also known as the North Eastern Quadrant. According to the Environment Agency (EA) mapping, the South Western third of the appeal Site falls within Flood Zone 2 with the remainder falling within Flood Zone 3. The Council's Strategic Flood Risk Assessment places the whole of the appeal Site within Flood Zone 3b. The site therefore carries a medium to high probability of flooding.
- 2.5 Planning permission has not been granted for the level changes that have taken place which are an engineering operation and amount to 'development' under Section 55 of the Town and Country Planning Act 1990. In addition, no license has been granted by the Environment Agency. The works that have been undertaken are unauthorised and considered to cause a risk to flooding in the area due to displacement of flood water which has already been reported by the Cricket Club adjacent to the site.

### **3.0 The Appeal Site and its Location**

- 3.1 The appeal Site consists of a parcel of land on the northern side of Moor Lane, Loughborough (approximately 1.79 hectares) and is relatively flat with landscape features around its perimeter and is bounded by the Hermitage Brook to the north, with the cricket club pavilion and grounds beyond the site boundary to the east. Beyond the canal to the west is a large brick building (former Herbert Morris building). To the south is a smaller phase of housing development (part of the wider development) which is now occupied. Land to the north and east beyond the cricket field is predominantly agricultural pastureland bound by hedgerows and drainage ditches. For clarity the site, within application documents was referred to as the North Eastern Quadrant but within this report is referred to hereon as 'the Site'.
- 3.2 The Site previously comprised of a yard and skip storage areas at the Moor Lane end associated with a scrap yard. Bordering the watercourses was open scrubland and rough pasture.
- 3.3 The Site is located outside the Loughborough Limits to Development as identified by Policy ST/2 of the Borough of Charnwood Local Plan and is located within the countryside with the limit coinciding with the route of the canal.
- 3.4 The Site is shown on the plan extract attached as Appendix 1.

#### **4. Relevant Planning History**

4.1 The applications that are relevant to this appeal are as follows;

P/12/2130/2 – Erection of 38 dwellings to phase 1 and outline application for residential development and community building. Granted 20 December 2013.

P/14/2230/2 – Discharge of Conditions 3 and 5 of P/12/2130/2. Contamination survey and Materials. – Only materials approved 08 September 2015.

P/16/1054/2 – Retrospective application for the erection of 62 dwellings as part of development phase 2 (Reserved Matters – Outline Application P/12/2130/2 refers). Granted 07 June 2018.

P/16/1027/2 – Discharge of Conditions 6 and 19 of P/12/2130/2 Landscaping scheme. Highway Cleaning during construction. Granted 17 August 2016.

P/18/1832/2 – (Advice) Erection of 29 dwelling houses and mass visitor car parking. Advice provided 22 October 2018.

P/21/0476/2 – Site for the Erection of up to 28 Dwellings (Outline Planning Application). Refused 18 November 2021.

P/21/2673/2 - Certificate of Lawfulness (Existing) for engineering works comprising the releveling of land. Refused 26 October 2022

P/22/2096/2 – Outline application for residential development for up to 28 dwellings (all matters reserved apart from Access and layout) Application still under consideration.

- 4.2 Planning permission P/12/2130/2 was a full planning permission for 38 dwellings to phase 1 (southwest quadrant) and outline permission for residential development on another parcel of land (south east quadrant) and a community building and recreation on a further parcel of land (north east quadrant). The northeast quadrant where the community building and recreation was proposed is the Site subject to this appeal. A copy of the decision notice along with the site location plan detailing the three quadrants is attached in Appendix 2
- 4.3 As part of planning permission P/12/2130/2 a Section 106 agreement was entered into, and this agreement included the delivery of a community building and public parkland on the appeal Site. In section 5.1.2 the Section 106 required that ‘after the cessation of the scrap yard use to remove any buildings, materials and hard surfaced areas from the scrapyards area and the community building and public park land.’
- 4.4 The community building was never realised and therefore the land remained in the ownership of the appellant who currently have an outline

application with the Council for residential development for up to 28 dwellings.

- 4.5 In 2018 it was brought to the attention of the Council that soil was being stockpiled on the site as works were progressing on the southwest quadrant to construct the residential development and as a result the stock piling of soil and materials was taking place. The developers had lawfully under the Town and Country Planning (General Permitted Development) (England) Order 2015 Schedule 2, Part 4 – Class A - Temporary Buildings and Uses, been using the appeal Site as a compound in relation to the construction of the wider residential development.

However, as the development progressed significant piles of soil had been stored on the appeal Site. The Council are of the belief that this was never removed from the appeal Site and was later levelled out which significantly raised the land levels over the appeal Site. Photographs showing the stockpiles of soil are attached in Appendix 3.

- 4.6 In 2018 an informal land survey assessment was undertaken by the Council and at the time this confirmed that the levels had been significantly raised. A letter dated 02 January 2019 was sent to the developer and within that letter it was advised that the southern area of the appeal Site, adjacent to Moor Lane had been raised by approximately 327mm. The northern area of the appeal Site on the original levels



survey showed the ground levels to be between 37.41m and 37.88m, a large part of this area had been raised to around 39.61m. A copy of this letter is attached as Appendix 4. As the Council was concerned that a breach of planning control had occurred a Notice under Section 330 of the Town and Country Planning Act 1990 was served on the developers on 02 January 2019. A copy of the appellant's response is attached in Appendix 5.

4.7 In May 2019 a further site visit was undertaken, and it was confirmed that the developer was continuing to move spoil onto the site and raise the land levels. The works to complete the land level changes on the site were completed sometime after the 18 June 2019 but the exact date is not known. Works were continuing and clearly were not complete at that time. Photographs showing the works in progress and the increase in land levels taken 18 June 2019 are attached in Appendix 6. The Google Earth image dated 21 September 2019 appears to show the groundworks at the Site to have been completed and all plant removed. The furrows / tracks left by plant are clearly visible in the image and there is a marked absence of vegetation. A copy of this image is attached in Appendix 14.

4.8 The Environment Agency conducted a site visit on 9 July 2019 and took photographs of the site. At that time, it appeared that the works were substantially complete. A copy of the email from the Environment Agency and the photographs they took is included in Appendix 7

- 4.9 The Council are therefore of the opinion, based on the photographic evidence and site visits that the works were not complete until sometime after 18 June 2019.
- 4.10 Various discussions and correspondence took place not only with the appellant but also with various partner agencies regarding the increase in the land levels and flooding matters to see whether a resolution could be achieved.
- 4.11 On 29 December 2021 the developers submitted a planning application for a Certificate of Lawful Existing development (P/21/2673/2) for engineering works including levelling of the land as they were of the opinion that the works that had been undertaken to raise the land levels on the site had been present and complete for in excess of 4 years and therefore had gained immunity. For the purposes of that application the Appellant stated that all works concerned with the raising of land levels had been substantially completed by October 2017 [pg 3, para 11 – Statutory Declaration of Roy David Coley submitted for CLUED application]. A copy is attached as in Appendix 8.
- 4.12 This application was refused 26 October 2022 for the following reason:
- “Insufficient evidence has been provided to prove, on the balance of probability, that the development described in the Schedule to this Notice had been substantially completed more than four years prior to the date of this application”

4.13 This decision was not appealed by the appellant indicating that the appellant accepted the Council's decision on the matter. The Enforcement Notice was not served until 6 months after this decision which allowed the appellant ample opportunity to appeal the decision, should they have wished to.

4.14 It is the Council's belief that the raising of the land levels was not complete until sometime after 18 June 2019 and as these works did not benefit from planning permission formal action was taken. Following the refusal of planning permission, the necessary authority was sought for the service of an Enforcement Notice.

4.15 An Enforcement Notice was approved on 18 April 2023 and sent to the appellant and displayed on the site on 20 April 2023. The Notice took effect on 26 May 2023 and was served for the following reasons;

1. It appears to the Council that the above breach of planning control has occurred within the last 4 years.
2. The land is outside the Loughborough Limits to Development as identified by Policy ST/2 of the Borough of Charnwood Local Plan. The site is located within the countryside with the limit coinciding with the route of the canal. For land outside these Development Limits policies CT/1 and CT/2 apply which seek to control development outside a relatively narrow set of criteria. In addition,

CS11 of the Core Strategy limits development to protect the character of the landscape and countryside. Emerging policy C1 of the submitted Local Plan 2021-2037 also aims to protect the countryside by seeking to control development. Policies CS11, CT/1, CT/2, ST/2 and C1 are therefore those that are the most important ones for establishing whether the works undertaken are acceptable in principle. There is no identifiable need or justification in terms of an agricultural or horticultural need, to facilitate the diversification of the rural economy or for a recreation or leisure use and therefore the works to significantly raise the land levels are contrary to these policies and the NPPF.

3. There is no evidence before the Council to show that the development has not caused harm to features of biodiversity, protected species or their habitats and that the appropriate mitigation can be provided. The development is therefore contrary to paragraph 180 of the NPPF which indicates that development should contribute to and enhance the local environment by minimising impacts on biodiversity. In addition, the development is contrary to policy CS13 of the Charnwood Local Plan 2011-2028 Core Strategy, emerging policies EV5 and EV6 of the submitted Local Plan 2021-2037 and the Council's Biodiversity Planning Guidance document 2022.
4. The raising of the land levels has increased the ground levels above all the modelled flood heights in the area, therefore parts of

the site have been taken out the flood plain. This ground raising has removed floodplain storage from the natural floodplain of the Hermitage Brook and River Soar and will be diverting these flood flows elsewhere. This will have increased flood risk to third party land. The development is therefore contrary to policy CS16 of the Core Strategy, Policy EV29 of the Charnwood Local Plan 2004 and emerging policy CC1 of the submitted Charnwood Local plan 2021-2037. At present Policy CC1 can only be attributed limited weight but as the plan progresses more weight will be able to be attributed to this policy. In addition, the development is in conflict with paragraphs 159 and 167 of the NPPF and the Charnwood Level 1 Flood Risk Assessment 2018.

5. The Council does not consider that planning permission should be given as planning conditions could not overcome these objections.

4.16 A copy of the Enforcement Notice is attached in Appendix 9.

## **5.0 Relevant Planning Policies**

- 5.1 The Charnwood Local Plan 2011-2028 Core Strategy was adopted on 9 November 2015. Relevant policies include:

Policy CS1 - Development Strategy - sets out the development strategy for the Borough and the criteria for considering proposals within individual tiers of settlements.

Policy CS2 – High Quality Design\_- requires developments to make a positive contribution to Charnwood, reinforcing a sense of place. Development should respect and enhance the character of the area, having regard to scale, massing, height, landscape, layout, materials and access; protect the amenity of people who live or work nearby.

Policy CS11 – Landscape and Countryside - requires new development to protect landscape character. Protecting our landscape character and allowing acceptable development that supports our rural areas is a delicate balance.

Policy CS12 – Green Infrastructure – sets out how the Council will seek to protect and enhance green infrastructure assets for their community, economic and environmental values. Proposals that enhance leisure and tourism opportunities within the River Soar and Grand Union Canal Corridor will also be supported. We will protect open and undeveloped character of areas of separation unless development clearly maintains the separation between the built-up areas of these settlements.

Policy CS13 – Biodiversity and Geodiversity\_- seeks to conserve and enhance our natural environment to ensure development protects, enhances or restores biodiversity.

Policy CS16 – Sustainable Construction and Energy seeks to direct development to locations within the Borough at the lowest risk of flooding, applying the sequential test and if necessary, applying the exception test. Where development is proposed in flood risk areas mitigation measures must be in place to reduce the effect of flood water.

Policy CS25 – Presumption in Favour of Sustainable Development seeks for the Council to take a positive approach that reflects the presumption in favour of sustainable development.

5.2 The relevant saved policy of the Borough of Charnwood Local Plan (adopted 12<sup>th</sup> January 2004) is as follows:-

Policy EV/1 seeks to ensure a high standard of design for developments, which, inter alia, respects and enhances the local environment, is of a design, layout, scale and mass compatible with the locality and utilises materials appropriate to the locality.

Policy ST/2 - Limits to Development – seeks to restrict development to within the existing Limits to Development boundaries of existing settlements to ensure that development needs can be met without harm to the countryside or other rural interests. The Limits to development distinguish between areas of development and development potential, and areas of restraint.

Policy EV/29 – Access to Watercourse for Maintenance – this states that planning permission will not be granted for development within 8m of the top of the bank or within 8m of the landward toe of a flood bank or other flood defence on all main rivers and other watercourses which would obstruct access for future maintenance.

Policy CT/1 - General principles for Areas of Countryside, Green Wedge and Areas of Local Separation. Development within these areas of generally open land will be strictly controlled.

Policy CT/2 states that development which is acceptable in principle will be permitted where it (inter alia) would not harm the character and appearance of the countryside.

As the Local Plan pre-dates the NPPF, paragraph 219 indicates that due weight should be given to relevant policies according to their consistency with the NPPF. These policies are considered to be broadly consistent with the aims of the NPPF and, as such, should be given significant weight



### 5.3 Submitted Charnwood Local Plan 2021 – 37

This document sets out the Council's strategic and detailed policies for the Borough over the period 2019-37. The local plan was submitted for examination in December 2021 with hearings concluding in February 2023. It is anticipated that the Inspectors will issue a letter setting out the requirement for main modifications to be made to make the plan sound. These modifications will be published for six weeks of public consultation so that the responses can assist the Inspectors in preparing their final report. The precise timings of these events is dictated by the Inspectors although, subject to their report, it is anticipated the Local Plan will be adopted by the Council in Autumn 2023.

In accordance with NPPF paragraph 48, the relevant emerging policies in the plan may be given weight in determining applications, according to:

- (a) the stage of preparation of the emerging plan (the more advanced its preparation, the greater weight it may be given);
- (b) the extent to which there are unresolved objections to relevant policies (the less significant the unresolved objections, the greater the weight that may be given);

(c) the degree of consistency of the relevant policies in the emerging plan to the NPPF (the closer the policies in the emerging plan to the policies in the NPPF, the greater the weight that may be given).

The following policies are considered applicable to this matter, and the weight they can be assigned is addressed in the 'Planning Considerations' part of this report."

Policy DS1 – Development Strategy - this policy details where development will be directed within the Borough

Policy DS5 – High quality design – this policy requires new development to make a positive contribution to Charnwood.

Policy EV5 – River Soar and Grand Union Canal Corridor – this policy aims to protect and enhance the River Soar and Grand Union Canal Corridor.

Policy EV6 – Conserving and Enhancing Biodiversity and Geodiversity – this policy aims to conserve, restore and enhance the natural environment.

Policy C1 – Countryside – this policy aims to manage development in areas of Countryside to protect its largely undeveloped character.

Policy CC1 – Flood Risk Management – this policy aims to direct development to areas in the Borough with the lowest risk of flooding. The sequential test and exception test will be applied where necessary.

Policy LUC1 – Loughborough Urban Centre – this policy aims to support Loughborough Urban Centre in its role as the main economic, social and cultural heart of the Borough.

#### 5.4 Other relevant policies

The National Planning Policy Framework states that the purpose of the planning system is to contribute to the achievement of sustainable development. This is achieved through (inter alia) the application of the policies in the NPPF. It requires that decisions should apply a presumption in favour of sustainable development and therefore planning applications are to be determined in accordance with the development plan unless material considerations indicate otherwise.

The Framework requires that planning decisions should contribute to and enhance the natural and local environment by protecting and enhancing sites of biodiversity value (in a manner commensurate with their identified quality in the development plan) and recognising the intrinsic character and beauty of the countryside.

With regard to enforcing planning legislation the document states that effective enforcement is important as a means of maintaining public

confidence in the planning system. Enforcement action is discretionary and local planning authorities should act proportionately in responding to suspected breaches of planning control.

Paragraphs 7, 8, 10, 11, 15-33, 38, 48, 55, 59 and 159-167 of the NPPF are of particular relevance in this instance.

#### Biodiversity Planning Guidance (2022)

This document was adopted by the Council's Cabinet in June 2022, and it sets out guidance on how to avoid biodiversity loss or how to mitigate it on site, and where this is not possible, the document sets out how compensation can be achieved for mitigation off-site through the securing of developer contributions. The document is a material consideration in the determination of planning applications (and such enforcement matters).

#### Landscape Character Assessment (2012)

The Borough of Charnwood Landscape Character Assessment 2012 explains that the Charnwood Forest Area of Landscape Character is the most complex of the landscape character areas in the Borough such that five sub-areas were identified within the Borough. Its purpose is to provide a framework for the assessment of planning applications and supports Policy CS11. The Soar Valley is described as a flat floodplain with rising valley sides with enriched rural grassland as a result of silt deposits from regular flooding. Former sand and gravel workings have been restored as wildlife wetlands and recreational

water bodies and the valley is a major transport corridor with canalised navigation, railway and road networks.

### The Level 1 Strategic Flood Risk Assessment (SFRA) (2018)

This document was created with the purpose of supporting the production of Charnwood Borough Council's Local Plan 2036.

The key objectives of the Level 1 Strategic Flood Risk Assessment are:

- Inform Charnwood Borough Council's Local Plan by assessing flood risk from all sources, current and future.
- Critically review the Level 1 element of the 2014 SFRA to provide an update, taking into account latest flood risk information and updates to policy.
- Provide an assessment of the flood risk associated with each of the sites identified in the 2018 SHELAA (Strategic Housing and Economic Land Availability Assessment).
- Produce a comprehensive set of maps presenting flood risk from all sources that can be used as evidence base for use in the Local Plan.
- Provide recommendations to inform the development of new policies to be included in the Local Plan, development control and technical issues.

### The Crime and Disorder Act 1998

Places a duty on the local planning authority to do all that it reasonably can to prevent crime and disorder in its area. The potential impact on

community safety is therefore a material consideration in the determination of planning applications and proposed enforcement action.

- 5.5 Copies of the policies and strategy have already been sent to the Inspectorate and were attached to the Council's appeal questionnaire.

## **6.0 Statement of Case - Ground (C)**

6.1 The appellant contends that the works undertaken formed part of the Section 106 agreement for application P/12/2130/2.

6.2 A copy of the Section 106 agreement is included in Appendix 10. Under section 5 'the third owners covenants' 5.1.2 it states 'after the cessation of the scrap yard use to remove any buildings, materials and hard surfaced area from the scrapyard area and the community building and park land area' and at 5.1.3 it states 'to reserve the community building and park land and to carry out site clearance and fencing of the same in accordance with the specification before the occupation of the first dwelling'. At no point does the Section 106 agreement allow for the increase in the land levels on the site or require for the clearance of the trees and vegetation on the site. Indeed, notwithstanding the requirements of the s106 obligation, any works comprising 'development' within the meaning of the TCPA would require planning permission (either by virtue of the permission granted for the wider development or further permissions).

6.3 The Council's own survey in 2018 indicated that the southern area of the Site, adjacent to Moor Lane had been raised by approximately 327mm. In addition, the northern area of the Site on the original land level survey showed the original ground levels to be between 37.41m

and 37.88m, a large part of this area had been raised to around 39.61m and has subsequently been raised further as works continued up until at least 18 June 2019 with works on Site appearing to have reached substantial completion sometime thereafter.

- 6.4 The Section 106 agreement did not permit the increase in the land levels of the site (nor could it). A separate planning permission would have been required for the land level changes to the site as these works are deemed to be development under Section 55 of the Town and Country Planning Act 1990 which states:

“development means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land.”

The land level changes to the site are significant and therefore these works amount to development, in their own right, and there is no planning permission which has been granted for the raising of the land levels on this site.

## **7.0 Statement of Case - Ground (D)**

- 7.1 The appellant contends that the engineering works (other than the bund and removal of spoil heap which were separate engineering operations) were all undertaken and completed more than 4 years ago and so are immune from enforcement action.



7.2 The appellant in their appeal statement provided photographs in Enclosure 3 and a video in Enclosure 4 taken 3 December 2015 and these show that the site was virtually level with the towpath and Moor Lane. There was however evidence of a spoil heap in the northern part of the site towards the Hermitage Brook. The appellant states that since April 2019 no further releveling has been undertaken and only ground works for the provision of the bund to restrict access to the site and the removal of the spoil heap have taken place. The Council strongly dispute this claim which will be discussed in greater detail below.

Further, it is noted that for the purposes of the CLUED application the Appellant stated that substantial completion had been reached in 2017 whereas for the purposes of this appeal the submitted SoC states that substantial completion occurred in 2019.

7.3 The photographs and video evidence provided by the appellant in Enclosures 3 and 4 of their appeal statement show the site in December 2015 to be levelled (save for the spoil piles located in the northern part of the site) and the site was roughly level with the existing road and adjacent towpath. This is significantly different to the land levels currently on the site which have progressively been altered and increased over the years. Works were specifically undertaken in 2018 and 2019, which was highlighted by the concerns raised to the Council. The Council believe the works to complete the land level changes on the site were completed

sometime after the 18 June 2019, but the exact date is not known. Works were continuing and clearly were not complete at that time. Photographs showing the increase in land levels taken 18 June 2019 are attached in Appendix 6. The Environment Agency conducted a site visit on 9 July 2019 and took photographs of the site. At that time, it appeared that the works were complete. A copy of the email from the Environment Agency and the photographs they took are included in Appendix 7. For completeness appended is a full suite of the photographs held by the Council for the period Feb 2017 – July 2019 [Appendix 15]. As can be seen heavy machinery used for the purposes of earth works / re-profiling (i.e. the bulldozer) was operating on the Site at the time of the site visit on 18 June 2019.

- 7.4 The appellant in their most recent application (P/22/2096/2) to develop the Site for residential dwellings submitted an up-to-date survey of the current land levels for the Site. This details the land levels at the towpath to be 39.313, 39.340 and 39.285 and on the road to be 39.953 and 39.432 but within the site the height measurements of the land range from 40.300 to 40.922 indicating that the overall land levels have increased between 1 – 1.6m. A copy of this plan No. WMR-FEA-S1-XX-DP-A-1202 Revision P2 is included in Appendix 11. This is significantly different to the levels detailed in the appellants photographs and video they submitted as part of this appeal which show the site levels to be virtually at the same level as the towpath and road.

7.5 The appellant indicates there is a bund on the site which is difficult to identify on the site however on the land levels plan No. WMR-FEA-S1-XX-DP-A-1202 Revision P2, close to the Moor Lane canal bridge, the towpath and adjacent to Moor Lane land level heights are in the region of 41.00 to 41.226 suggesting that the bund is located in this area.

7.6 The original land levels plan reference NTT2147/Appendix D Revision B which was submitted as part of application P/12/2130/2 and is attached to the Enforcement Notice (attached in Appendix 9) details the levels over the site in 2012. These, on average range from 39.11 to 39.88, but there are a few spot figures 38.59 to 38.97 in the northern area of the site. In the southern area of the site these range from 37.41 to 37.88. These figures indicate that the site was significantly lower than the most recent levels information provided. There is no planning permission on the file for these works to increase the land levels.

Since the submission of the original planning permission on the Site in 2012 there have been several land levels plans submitted by the appellant. For the avoidance of doubt these are as follows:

- Plan Ref. NTT2147/APPENDIX D Revision B Sept 2012 submitted in P/12/2130/2 attached in appendix 9.
- Plan Ref. WMR-FEA-S1-XX-DP-A-1202 (no revision date or revision) submitted with application P/21/0476/2 attached in Appendix 17

- Plan Ref. E2391 P001 Rev A dated 27 Sept 2022 and Plan Ref. WRL-BWB-00-01-DR-G-0001 S2 Revision P1 dated 26 July 2018 submitted with Certificate application P/21/2673/2 attached in Appendix 18.
- Plan Ref. WMR-FEA-S1-XX-DP-A1202 Revision P2 date 2021-01-11 submitted with current application P/22/2096/2 attached as Appendix 11.

The Council note that the two plans submitted as part of application P/21/2673/2 are architects plans which (appear to) incorporate / import topographical survey data. Those plans do not indicate when that topographical survey was undertaken or by whom nor credit or reference in any way the source of the plan which they reproduce.

7.7 The appellant in their appeal statement only appears to rely on evidence for works undertaken in December 2015 which show the site virtually level with the towpath and road, save for the removal of the spoil heap and creation of the bund. They have submitted no evidence as to why or whether the works to increase the land levels since that date have gained immunity. In Appendix 12 photographs taken in 2017, 2018 and 2019 detail the progressive change to the land levels on the site, which is corroborated with land level plan No. WMR-FEA-S1-XX-DP-A-1202 Revision P2 which details the land levels have significantly increased. The photograph dated 18 June 2019 clearly

shows extensive works being undertaken to increase the land levels on the site. The appellant in their appeal statement states, “since April 2019 no further releveling has been undertaken and only ground works on the site relate to the provision of a security bund to prevent access to the site”. It is clear from the site photographs and site visits that this cannot be correct and the Council wholly disagree with the appellant that the current land levels have gained immunity. The works shown in the photograph dated 18 June 2019 are not in the location of the bund. The Council believe the bund is located close to the bridge and road, located roughly where the white mobile building and green portable toilet can be observed in the photograph dated 18 June 2019 attached in Appendix 6.

- 7.8 The Council is of the opinion that the works to increase the land levels on the site, even if these have been undertaken over a period in excess of 4 years were only substantially complete after 18 June 2019. Under Section 171B(1) of the Town and Country Planning Act 1990 “where there has been a breach of planning control consisting in the carrying out without planning permission of building, engineering, mining or other operations in, on, over or under land, no enforcement action may be taken after the end of the period of four years beginning with the date on which the operations were substantially completed.” Therefore, the clock for immunity only starts ticking when the development was substantially complete which the Council would contend was sometime after 18 June 2019. Therefore, when the Enforcement Notice was

served 18 April 2023 the works to increase the land levels on the site had not gained immunity. The Council accepts that “substantial completion” is a matter of fact and degree. In this instance however the Council would contend that substantial completion of the works for the current site levels would have been when the topsoil was laid, sometime between 18 June 2019 and 09 July 2019. Photographs from these two dates are attached as Appendix 13.

- 7.9 The appellant under Ground (d) discusses the removal of the spoil heap suggesting that this could be recreated, if required. The Council is somewhat confused as to the discussion regarding the spoil heap and its recreation as the Enforcement Notice does not request this. The Enforcement Notice requires for the land levels to be reinstated in accordance with topography plan submitted on the 12 March 2013 Plan No. NTT2147/Appendix D Revision B. The Council are not aware that this plan details a spoil heap.
- 7.10 To detail further the changes in land levels comparison photographs are attached as Appendix 16.
- 7.11 In light of the above the Council strongly contend the appellants assertion that the works, at the time of the service of the Enforcement Notice, had gained immunity from enforcement action.

## **8.0 Statement of Case – Ground (f)**

8.1 The appellant contends that the steps required by the Notice are excessive.

- Step 1 - the appellant considers that the levels do not need to be reduced to the March 2013 revision of Plan No. NTT2147/Appendix D Revision B but rather the levels taken July 2018 (Plan Ref. WRL-BWB-00-01-DR-G-0001 S2 Revision P1 dated 26 July 2018) given the Council's suggestion that works continued after this date.
- Steps 2 and 3, the appellant questions the date of the aerial image in the Enforcement Notice and suggests that this is in fact from 2011 and not 2018.
- The appellant highlights the removal of the trees and vegetation was not a breach of planning control and it is not reasonable or appropriate for the Council to require their replanting.
- The bund was not part of the levelling works and so would not be immune and the Appellant would agree to its removal which could be reflected in revised "steps" to be taken. In respect of the spoil heap, however, the Appellant does not see the benefit of recreating this.

8.2 In respect of step 1 in the Notice the land levels have been incrementally changed over the years and substantial completion of

these works only occurred sometime after 18 June 2019. The Council does not agree that the levels taken in 2018 are the levels to which the land must be returned back to. The appellant refers to a land levels plan dated July 2018 which the Council understand to be Plan Ref. WRL-BWB-00-01-DR-G-0001 S2 Revision P1 dated 26 July 2018 which further shows that the land levels are significantly higher than those provide in 2012.

8.3 Steps 2 and 3 in the Notice refer to an aerial photograph. The appellant questions that the 2018 aerial image included in the Enforcement Notice is incorrectly dated and suggests that this is in fact from 2011. The Council would agree with the appellant and can confirm that the aerial photograph included with the Notice is in fact from 2011. The Council do not believe that this error would make it invalid and the date could be amended by the Inspector without causing any injustice to either party.

8.4 The Section 106 Agreement did not require the removal of trees and hedges on the site. The Council accept that the trees were not protected however is of the opinion that these were removed to facilitate the raising of the land levels on the site and therefore in requiring the land levels to be put back to the original levels that the trees and vegetation should therefore be reinstated. The appellant in their appeal statement has confirmed the trees and grassland were removed by 2016, within the timelines when the extensive works to



incrementally increase the land levels on the site commenced. These works however were not completed until sometime after June 2019.

The aerial photographs from 2015 and 2016 are attached in Appendix 14 which details the loss of trees and vegetation on the site.

- 8.5 The appellant indicates that the bund would not be immune from action and therefore they would agree to its removal. The Council are unclear as to where the bund is specifically located on the site as it is not clearly identifiable. The bund, along with the raising of the land levels on the site however does not benefit from planning permission and the Council would maintain that the change in the land levels for the site occurred over a number of years and was only substantially complete sometime after 18 June 2019 therefore all the earth works undertaken should be removed in accordance with the requirements of the Notice.
- 8.6 The appellant refers to the recreation of a soil heap. As detailed earlier in this report the Council is somewhat confused as to the discussion regarding the spoil heap and its recreation as the Enforcement Notice does not request this. The Enforcement Notice requires for the land levels to be reinstated in accordance with topography plan submitted on the 12 March 2013 Plan No. NTT2147/Appendix D Revision B. The Council are not aware that this plan details a spoil heap.
- 8.7 The Council would respectfully request that this appeal be dismissed for the reasons outlined in this statement. The Council accepts that the

date on the aerial photograph within the Enforcement Notice is incorrect however it is considered this could be amended with no injustice to either party.

## **9.0 Conclusion**

9.1 The Council considers that, given all due consideration of the facts of this case, its decision to serve an Enforcement Notice was justified, reasonable and robust and the Inspector is respectfully requested to dismiss the appeal.

## **Appendices**

1. Location plan at 1:1250 scale showing the appeal site
2. Copy of planning decision P/12/2130/2 with site location plan detailing the three quadrants
3. Photographs take in 2018 showing the stock piles of soil
4. Copy of letter with Section 330 Notice attached dated 02 January 2019 regarding land levels
5. Appellants response to Section 330 Notice
6. Photographs taken 18 June 2019 showing land level changes
7. Email from the Environment agency with photographs attached dated 9 July 2019
8. Statutory Declaration of Roy David Coley submitted for CLUED application
9. A copy of the Enforcement Notice & plan NTT2147/Appendix D Revision B
10. Section 106 Agreement attached to P/12/2130/2
11. Plan No. WMR-FEA-S1-XX-DP-A-1202 Revision P2
12. Photographs taken 2017, 2018 and 2019
13. Photographs taken 18 June 2019 and 09 July 2019
14. Aerial photographs 2011, 2015, 2016 and 2019
15. Full suite of photographs held by the Council
16. Comparison photographs
17. Levels plan WMR-FEA-S1-XX-DP-A-1202 (no revision date)

18. Levels plans, Plan Ref. E2391 P001 Rev A dated 27 Sept 2022 and  
Plan Ref. WRL-BWB-00-01-DR-G-0001 S2 Revision P1 dated 26  
July 2018