



Appeal Decisions

Inquiry held on 26 and 27 March 2024

Site visit made on 27 March 2024

by A Walker MPlan MRTPI

an Inspector appointed by the Secretary of State

Decision date: 24 April 2024

Appeal A Ref: APP/K2420/X/22/3311456

Land south of Lindley Wood, Fenn Lanes, Fenny Drayton, Nuneaton CV13 6BJ

- The appeal is made under section 195 of the Town and Country Planning Act 1990 (as amended) against a failure to give notice within the prescribed period of a decision on an application for a certificate of lawful use or development (LDC).
- The appeal is made by Mr S Chaudry on behalf of MAC Developments & Construction Ltd against Hinckley and Bosworth Borough Council.
- The application ref 22/00804/CLE is dated 22 August 2022.
- The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended.
- The use for which a certificate of lawful use or development is sought is the use of land for commercial storage of plant, machinery and skips.

Summary of Decision: The appeal is dismissed.

Appeal B Ref: APP/K2420/W/22/3312970

Land south of Lindley Wood, Fenn Lanes, Fenny Drayton, Nuneaton CV13 6BJ

- The appeal is made under section 78 of the Town and Country Planning Act 1990 (as amended) against a refusal to grant planning permission.
- The appeal is made by Mr S Chaudry against the decision of Hinckley and Bosworth Borough Council.
- The application Ref is 22/00725/FUL.
- The development proposed is the erection of palisade fencing.

Summary of Decision: The appeal is dismissed.

Appeal C Ref: APP/K2420/C/23/3317487

Land south of Lindley Wood, Fenn Lanes, Fenny Drayton, Leicestershire, CV13 6BJ

- The appeal is made under section 174 of the Town and Country Planning Act 1990 (as amended). The appeal is made by Mr Shaan Chaudry against an enforcement notice issued by Hinckley and Bosworth Borough Council.
- The notice was issued on 26 January 2023.
- The breach of planning control as alleged in the notice is without planning permission the erection of palisade fencing.
- The requirements of the notice are to remove the fencing in its entirety, remove the resulting debris from the Land and restore the Land to its condition before the breach took place.
- The period for compliance with the requirement is three (3) months.
- The appeal is proceeding on the ground set out in section 174(2)(f) of the Town and Country Planning Act 1990 (as amended).

Summary of Decision: Subject to variations, the appeal is allowed and the enforcement notice is upheld

Preliminary Matters

1. Oral evidence on matters of fact was given under affirmation.
2. The proof of evidence of Mr Aslam states that the use of the land in relation to Appeal A has 'only taken place continuously on the open area of the site (the area outlined in red on exhibit KA1)'. At the Inquiry, it was confirmed by the appellant that the appeal site in relation to Appeal A should be amended to reflect exhibit KA1. On the basis that this area forms part of the land in the LDC application and includes no additional land, I am satisfied no injustice would be caused to any parties by amending the appeal site as such. I have determined the appeal on this basis.
3. Prior to the Inquiry, I viewed the site from the access road leading to it. I noted the layout of the fence did not correspond with the layout of the fence on drawing A847 03 Rev B attached to the planning application for the fence (Appeal B). Notably, on site there was a gated entrance into the area known as 'Marble' (southeast section); there was a gap in the fence in the southern corner and no fence along the northeast boundary of the area known as 'Limestone' (northwest section); and, the area known as 'Granite' (southwest section) was entirely enclosed with a gated entrance onto the access road. Consequently, in the event I allow Appeal B, not all of the fence and gates in situ would benefit from the planning permission. This matter was raised with the main parties during the Inquiry. They confirmed they understood the implications. For the avoidance of doubt, I have determined Appeal B on the basis of the drawings submitted with the planning application, not what has been erected on site.

Appeal A – The certificate of lawful development (LDC) application

Main Issue

4. The main issue is whether, if the Council had refused to grant a Certificate of Lawful Use or Development (LDC), that refusal would have been well-founded.

Reasons

5. The onus is on the appellant to demonstrate that, on the balance of probabilities, the use was lawful at the time of the LDC application. A development is lawful under the provisions of section 191(2)(a) and (b) of the Act if no enforcement action may be taken because it did not involve development requiring planning permission, or because the time for enforcement action against the use has expired; and, providing it does not constitute contravention of any requirement of any enforcement notice then in force. If the Council has no evidence of its own, or from others, to contradict or otherwise make the appellant's version of events less than probable, there is no good reason to dismiss the appeal, provided his evidence alone is sufficiently precise and unambiguous.
6. The application sought a Certificate of Lawful Use or Development (LDC) for the use of the appeal site for commercial storage of plant, machinery and skips. For the use to be lawful through the passage of time, the appellant must show that the use of the appeal site materially changed to a use for commercial storage of plant, machinery and skips at least 10 years prior to the date of the application, namely 22 August 2012, and the use then continued for at least 10 years thereafter, without significant interruption.

7. The appellant states they bought the appeal site in February 2008 and Crown Waste Management (Crown) subsequently acquired a license to occupy the site from MAC Development and Construction Ltd (the appellant) to use the site in connection with its business for storage of its plant, machinery and skips. A copy of the License to Occupy is dated 15 December 2008.
8. A number of bank statements ranging from January 2011 to March 2022 show monthly standing order payments from Crown to MAC Development and Construction Ltd (the appellant), which the appellant states are rental payments. Although these statements do not indicate payments going back to 2008, they do cover the requisite 10 period prior to the date of the LDC application. Nevertheless, they do not indicate what the site was actually used for or that it was indeed used at all during this time.
9. A planning application was submitted in August 2008 for the use of the site as a windrow composting site. This was accompanied by a Supporting Statement prepared by Silkstone Environmental Limited. This statement sets out the history¹ of the appeal site. It was used in association with the electricity supply to RAF Nuneaton and then most of the buildings previously on the site were demolished in 1968. RAF Nuneaton was subsequently developed into the MIRA testing grounds and the site appears to have remained derelict during the period to the date on which the statement was drafted. The statement then goes on to state that the site location was derelict at the time². However, this statement predates the occupation of the site by Crown in December 2008 and therefore does not contradict the appellant's case.
10. A second planning application for a windrow composting facility was submitted in June 2009, which was refused and the decision subsequently appealed.³ Whilst the Inspector's decision made no reference to the existing use of the site, I do not consider that this means there was no use taking place at the time. There is equally no description of the physical characteristics of the site. It would be perverse to conclude that this meant the site had no physical characteristics. It is reasonable to conclude that it was simply the case that the use of the site at the time had no bearing on the Inspector's consideration of the appeal and therefore they did not need to address it.
11. A further planning application for a windrow composting facility was submitted in 2011. This was accompanied by a Supporting Statement by Silkstone Environmental Ltd, dated March 2011. The site history set out in this statement⁴ is word-for-word identical to that set out in the 2008 statement⁵. This could be because the site experienced no change between the two statements being prepared. Similarly, the identical wording suggests this section in the 2011 statement was cut-and-paste from the 2009 statement without any additional visit being carried out by the author. As a consequence, I am not satisfied that the 2011 statement can be relied upon to demonstrate the site was not in use at the time, but the onus remains on the appellant.
12. The Council provides a number of photographs taken of the site over the years since the appellant's ownership of it. Photographs dated 3 October 2011

¹ Paragraph 4.3.1

² Paragraph 4.5

³ Appeal reference APP/M2460/A/10/2128382

⁴ Section 5.2

⁵ Section 4.3

appear to show two diggers on the site in use for site clearance and the creation/maintenance of bunds. Whilst some of the bunds in the photographs have vegetation growing on them, suggesting they were created some time prior to the photographs being taken, others depict bunds with bare earth on them suggesting they were recently constructed/maintained. I note the appellant's argument that maintenance work is often carried out on the site using plant and machinery that is stored on the site at the time. However, in respect of these photographs there is no other plant, machinery and skips on site other than the two diggers that appear to be carrying out the site clearance and bund works, suggesting the primary purpose of them being on the site was to carry out works to the land, not for storage.

13. The September 2011 aerial photograph appears to depict some sort of plant and machinery in the southern corner of the site. Notwithstanding the lack of certainty as to what these items are, based on their location within the site and their apparent colour (light red and dark red) it is reasonable to conclude that these are the same two machines depicted in the 3 October 2011 photographs that appeared to be in use for works carried out on the site. Therefore, it is unclear whether the items in the 2011 aerial photograph were in storage on the site or on the site to carry out works.
14. Photographs were also taken in June 2012 by the Council during their investigation into alleged engineering operations to widen the access track and siting of a portacabin and metal shipping container on the site. These depict a single digger, which appears to be carrying out excavation/clearance works on the site. There is also a small orange van and a single detached digger bucket. There is nothing to indicate these items were being stored on site, rather than used in connection with the excavation/clearance works. . There is also a small pile of aggregate on site, which the appellant states were road planings stored on the site. However, this is only on a very small portion of the site. In addition, there is a blue container and a portacabin sited adjacent to the derelict building. Again, these are located on only a very small portion of the site.
15. A Planning Contravention Notice (PCN) was served on the appellant in September 2012. Question 12 of the PCN asked 'Are the activities on the land covered by a waste management licence or exemption? If not please state why you consider that such a licence is not required'. The appellant's answer to this question was 'There are no activities on the land'. The appellant confirmed in the Inquiry that this answer was in the context of the matters alleged in the PCN, ie the importation of waste materials and the widening of a track; the siting of a portacabin and metal shipping container; and, the holding of outdoor raves. They argue 'no activities' meant none of these alleged activities. However, if the storage of plant, machinery and skips was taking place on the site at the time, the wording of the answer is very unusual, even in the context of the alleged matters in the PCN. A more likely response would have perhaps been 'these activities are not taking place on the land' rather than being so absolute by stating 'no activities'.
16. Therefore, the answer given to question 12 of the PCN suggests there was no storage of plant, machinery and skips taking place on the site at the time. This is supported by the absence of such a use in the matters alleged in the PCN; there is no mention of the storage of plant, machinery and skips.

17. The appellant's email to the Council on 8 February 2013 provides a comprehensive description of the physical characteristics of the site and suggests potential development opportunities for the site, one being open storage. The absence of any reference to the use of the site for storage of plant, machinery and skips does not mean that it was not taking place at the time. Nevertheless, given the email lists suggestions for the development of the site, if there was an existing use taking place then one would perhaps expect there to be reference to it and the potential regularisation of it.
18. The Council carried out a further site visit in July 2013. The photographs from this visit show a single digger on the site adjacent to a bund that appears to be constructed of/covered with freshly disturbed earth (no vegetation on it), suggesting the digger was there to carry out maintenance of the site rather than it being stored there. The blue container and portacabin sited adjacent to the derelict building were still present at that time as was the small pile of road planings. Based on these photographs, it could not be said the site was used for storage of plant, machinery and skips at the time the visit took place.
19. A planning application for the site was submitted to the Council in December 2013 for a change of use to a plant storage yard. On the appeal form, Mr Lee (agent) confirmed that the existing use was 'Redundant former air base' and the site was currently vacant. In his witness testimony, Mr Lee stated the site was vacant to the best of his knowledge and does not recall discussing the existing use of the site with Mr Aslam (Crown) at the time. Notwithstanding this, the Planning Statement accompanying the application referenced containers on the site. However, under cross examination Mr Lee clarified that these were the blue container and portacabin adjacent to the derelict building, not skips.
20. An Ecological Appraisal carried out by Abigail Bridge Ecological Services, dated 28 February 2014 includes a number of photographs. The Extended Phase 1 habitat survey of the site was carried on 13 February 2014. There is no evidence of storage of plant, machinery and skips in any of these photographs and no reference to such a use in the appraisal itself.
21. In 2015, Kiely Brothers rented the site and two skips. However, this was only for a short period of three weeks.
22. The Council carried out a further visit on 13 March 2017 regarding alleged dumping of waste. There is no evidence of storage of plant, machinery and skips in the photographs taken during this visit. The blue container and portacabin are also no longer on the site.
23. The Delegated Report for the application for the approval of reserved matters⁶ in relation to the outline planning permission for 11 dwellings on the site granted on dated 7 October 2016⁷ states 'There are storage containers on the site and commercial vehicles', which suggests there was some activity taking place on the site at that time. However, there is no evidence of how many containers and vehicles were on the site; what exactly they were; what their purpose was for being on site; where they were located on site; or, how long they had been on the site.

⁶ Council reference 19/00462/REM

⁷ Council reference 15/00037/OUT

24. Mr Aslam has provided a photograph which appears to have been taken on 15 September 2018 and depicts a digger arm and bucket with a lorry and a bulldozer in the background. However, there is no context to the photograph. It is not clear where within the appeal site this photograph was taken; what the plant was doing there, ie carrying out works or being stored; or, how long they were on the site for. Mr Aslam confirmed they were being stored on the site, although he could not confirm how long they were stored there for.
25. Mr Aslam has also provided undated photographs which it is stated were taken recently. These photographs depict various plant and machinery on the site as well as a small number of skips, including a small stack of skips positioned to the front of one of the diggers. There are also several piles of earth and road planings. Some of the earth appears to have been recently screened whereas the smaller piles appear to be unscreened. One skip is located centrally within the site, adjacent to a pile of what appears to be tree roots and branches, suggesting it is to be loaded into the adjacent skip to be taken from the site. Mr Aslam confirmed that the plant and machinery were stored on the site and then used for maintenance works on the site when they were not in use elsewhere. However, he could not confirm how long these particular plant, machinery and skips were on the site for prior to them being used for the maintenance works.
26. In 2021, construction works commenced on the dwellings approved under planning permission 15/00037/OUT to the extent that foundations were laid. These works occupy a very small portion of the site and would not restrict the use of the site for the storage of plant, machinery and skips. The Council initially argued that the commencement of these works would have resulted in a material change in the use of the site and therefore started a new chapter in its planning history. However, in the case of *Jennings Motors Ltd*⁸ it was held that a new chapter in the planning history of a site 'may take place when there is a radical change in the nature of the buildings on the site or the uses to which they are put – so radical that it can be looked upon as a fresh start altogether in the character of the site'. Under cross-examination, Miss Zacharia conceded that the laying of the foundations had not resulted in a radical change in the character of the site and therefore a new chapter in the planning history of the site had not occurred as a result of these works. I find no reason to conclude otherwise.
27. Mr Sutton confirms that he regularly, approximately once a month, visits the site as his company, Agri Plant Solutions, are often sub-contracted by Crown to carry out construction works and pick up and drop off plant and machinery at the site. Mr Sutton's proof of evidence includes invoices for a range of works carried out for Crown Waste between 2013 – 2020. Mr Sutton confirmed that these were just a sample of invoices collected and that there are many more on his work's database. However, these are not before me and I so I can give them no consideration. Under cross examination, Mr Sutton confirmed that after the foundations were laid, the site 'closed down' and there has been no storage since then. None of the invoices are dated post 2021, supporting this statement.
28. Quadrant Building Control carried out a site inspection of the foundations on 8 December 2021. The Site Inspection Report contains a number of

⁸ *Jennings Motors Ltd v SSE & New Forest DC* [1982] 2 WLR 131; [1982] JPL 181

- photographs of the foundations. Whilst these photographs do not capture the whole site, they do cover a large section of it. There is no evidence of any plant, machinery or skips stored on the site.
29. The Council carried out a site visit on 31 March 2022. Photographs taken during this visit show no plant, machinery and skips stored on the site. There is a yellow roll-on roll-off skip clearly visible in one of the photographs. However, this appears to be located outside the appeal site, on the opposite side of the access track. Although not as clear, there is a yellow item in the background of a number of photographs taken looking north westerly along the access track with various vehicles and items in the adjacent site (Granite). It is reasonable to conclude that this yellow item is the skip.
30. In addition to the September 2011 aerial photograph, there are Google aerial photographs dated April 2015, April 2016, April 2018, April 2020 and May 2023. None of these photographs show any plant, machinery or skips on the site. Mr Aslam argued that the 2015 photograph shows marks on the ground where the stored items have left an in-print. However, the light grey rectangular shapes along the southeast boundary of the site correspond with the areas of broken concrete hardstanding I saw on site.
31. The appellant contends the site is used as an overspill site to Crown's main site. It is typically only used for storage during the winter months. The rest of the year, the plant, skips and machinery are in use on sites and are only brought to the appeal site for maintenance and repairs for brief periods of time.
32. The testimony of the appellant's witnesses all confirmed that they had observed plant, machinery and skips on the site over the years, with some having used the site for such a use themselves. Almost all witnesses stated the site was mainly used during the winter months when the plant, machinery and skips are not in use and during the warmer months there would only be a small amount of plant, machinery and skips on the site at any one time. However, the aerial photographs of 2015, 2016, 2018, 2020 and 2023 show no items on the land, not even a single item that could be described as plant, machinery or skips.
33. Furthermore, photographs were taken during the winter on 8 December 2021 by Quadrant Building Control; 13 February 2014 contained within the 2014 Ecological Appraisal; and, by the Council on 13 March 2017. These were taken when, based on the witness accounts, one would expect the site to be in the peak of its use. However, they show no sign of any storage of plant, machinery or skips on the site.
34. I acknowledge the argument that there would be no reason for employees or visitors to the site to be taking photographs as they are going about their work, hence the lack of photographic evidence submitted by the appellant. Moreover, I accept that records are not kept of what equipment is stored at which site at any one time. Nevertheless, Mr Aslam confirmed that Crown has approximately 2500 skips and 55 vehicles. Given the scale of the business it is surprising that none of the numerous photographs taken of the site by Council Officers and consultants commissioned to carry out appraisals, shows any unambiguous evidence of storage. Even more surprising is the fact no storage is seen in the aerial photographs, with the exception of 2011, which coincides with what appears to be site maintenance, rather than storage, taking place in

the Councils 3 October 2011 photographs. I acknowledge photographs are only a snapshot in time. However, given the claim that there is typically something stored on the site all the time, one would expect to see significantly more evidence of storage in the photographs than they depict.

35. Whilst there are some photographs depicting plant and machinery on the site these appear to be carrying out maintenance works rather than being stored on the site. In each instance, it cannot be confirmed how long they had been on the site for. There is only one instance where skips can be seen on the site. Some of these appear to be in use as part of the maintenance works of the site rather than stored there. For those that it could be argued were stored on the land, the duration of their storage cannot be confirmed.
36. I acknowledge the witnesses that support the appellant's case and I do not doubt the reliability or truthfulness of their evidence. Whilst their recollection of particular dates when plant, machinery and skips were stored on the site was limited, I acknowledge the argument of why would someone remember a particular digger or skip being stored on the site. Similarly, given the nature of the use, I accept that records are not kept of the location of items at any one point in time. However, their evidence is not precise or ambiguous as to the amount of plant, machinery and skips stored on the site; when it was stored on the site; the duration it was stored on the site; or to what extent of the appeal site was used for the storage.
37. Moreover, there are documents that have been submitted to the Council by/on behalf of the appellant over the years in which it would not be unreasonable to expect the use of the site for plant, machinery and skips to have been referenced in some way if it was taking place. These include the 2009 and 2011 planning applications for the windrow composting facility; the 2012 PCN and the appellant's response; the appellant's email to the Council on 8 February 2013; the 2013 planning application for the plant storage yard; and, the 2014 ecological appraisal. I do not take the view that the lack of reference to the use in these documents equates to the use not occurring at the time they were written. However, its absence casts further doubt or ambiguity over the appellant's case. The Delegated Report for the application for the approval of reserved matters refers to 'storage containers on the site and commercial vehicles'. This is in itself imprecise and ambiguous. It provides no explanation of what the purpose of these containers and vehicles on the site was.
38. Overall, I find that the storage of plant, machinery and skips has likely taken place on the appeal site on occasion since 2008. However, this appears to have been on a limited scale and on an irregular basis. The evidence before me is not sufficiently precise and unambiguous to demonstrate that the appeal site materially changed to a use for commercial storage of plant, machinery and skips at least 10 years prior to the date of the application, namely 22 August 2012, and the use then continued for at least 10 years thereafter, without significant interruption.

Conclusion on Appeal A

39. For the reasons given above, I conclude that if the Council had refused to grant a Certificate of Lawful Use or Development, that refusal would have been well-founded.

40. Council's deemed refusal to grant a certificate of lawful use or development is well-founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act.

Appeal B – The planning application

Main Issue

41. The main issue is the effect of the fence on the character and appearance of the area.

Reason

42. The appeal site is located within an area of open countryside bounded by woodland to the southeast, northwest and partly to the west; and, open fields to the northeast and partly to the southwest. Beyond the woodland to the east and southeast is the MIRA Technology Park. The site is well-screened from public views by the surrounding woodland. Notwithstanding the existing palisade fencing, the appeal site is largely open in character and makes a positive contribution to the spaciousness of the area.
43. The proposed palisade fencing would be constructed of identical materials to the fence currently in situ and be 2.4m in height and would encompass almost the full extent of the three areas, 'Marble', 'Granite' and 'Limestone'. The existing fence provides a good indication of the effect the proposed fence would have on the character and appearance of the area.
44. A Landscape Statement (the LS) was carried out by Blue Hill Landscape Design to assess the visual impact of the development. In considering the impact on the wider landscape, the LS identifies that the site lies within the 'Sence Lowlands' area, as defined by the Hinckley & Bosworth Council's Landscape Character Assessment 2017. However, the LS does not identify the study area for the assessment. It appears that it has taken the approach of simply considering the features of the site itself and not the landscape it forms part of, making a finding that it is 'atypical of the area due to the dense presence of woodland on all sides of the site'. However, that is not the case. The northeast boundary of the site is bounded by an open field, on the opposite side of which is woodland. Moreover, the 'gap' along the southwest boundary is adjacent to an open field with long, generally uninterrupted views of flat open fields. It offers little justification as to how it arrives at the finding that the fence would have very limited impact on the landscape's character.
45. The LS baseline study appears to have taken into account the existing fence. Therefore, it is difficult to fully consider what the findings of the LS would have been if it had assessed it without the fence in situ. The LS assessment identifies local receptors as Lindley Hall Farm, Marlcroft and a nearby public footpath. It finds that the visual impact on these would be negligible. It also identifies the access track as being a receptor. However, it does not make any finding of the visual impact on this receptor, seemingly dismissing it because it is a private track used by adjacent landowners and not the public.
46. Under cross-examination, Mr Smeedon agreed that receptors can take into account private views and this can include a private access track used to access properties. As a consequence, the assessment of the Sensitivity of the access track as a receptor would place it somewhere between medium to high. Mr Smeedon argued that it would be closer to medium, whereas the Council

argues it to be High. Given the view from the track is only noticeable whilst travelling along it and the track is not used for recreational purposes such as a public right of way, I consider the Sensitivity would be medium rather than high.

47. With regard to the Magnitude of the effect, when travelling along the stretch of the access track that abuts the fence line, the fence forms a significant and immediately apparent element of the scene and would affect the overall impression of the view. As such, the Magnitude would be large. By combining the grading for the Sensitivity and the Magnitude, the impact significance would be Moderate. This is a significant factor that the LS fails to recognise.
48. As a result of its height, extent and utilitarian design, the fence appears incongruent in the context of the surrounding rural landscape. Its commercial form is in stark contrast to the surrounding agricultural landscape within which it is read, thus detracting from the character and appearance of the area.
49. Whilst it is not readily visible from public views, it is visible from private views, notably neighbouring properties such as Marlcroft, from which the fence line adjacent to the access track is viewed as a jarring feature across the intervening open fields.
50. The fence is even more discernible to the neighbouring residents that use the access track to access their properties. The proximity of the fence to the track; its height rising significantly above it; the significant length of it; and, its hard, utilitarian design creates an unpleasant sense of feeling that one is driving past an industrial estate to access their residential property.
51. I do not find the proposed fence layout would have a materially different effect on the character and appearance of the area than the existing.
52. I have had regard to the appellant's suggested measures to mitigate the harm the proposal would have. These include planting to screen the fence. The details I have of such measures are very limited. In any event, such planting would likely take a considerable amount of time to establish, and I am not satisfied that it would adequately screen the fencing. Moreover, I have considered the suggestion that the fence could be painted a different colour. Whilst this could reduce its visual impact from distant views, it would do little to mitigate its dominant and incongruent appearance when viewed from the access track. Consequently, it has not been sufficiently demonstrated that measures could adequately mitigate the harm the fence would have on the character and appearance of the area.
53. I find therefore, the proposed fence would have a significantly harmful effect on the character and appearance of the area. As such, it would be contrary to Policies DM4 and DM10 of the Hinckley & Bosworth Borough Council Local Plan Site Allocations and Development Management Policies DPD 2016 (the DPD), which seek to protect the intrinsic value, beauty, open character and landscape and ensure development complements or enhances the character of the surrounding area with regard to scale, layout, density, mass, design, materials and architectural features. In addition, it would fail to accord with the design objectives of the National Planning Policy Framework (the Framework).

Other Matters

54. The appellant argues that a fence could be erected of a similar design up to 2m in height in accordance with the permitted development rights set out in the Town and Country (General Permitted Development) (England) Order 2015 (the GPDO). During the Inquiry, Miss Zacharia confirmed that the access track is a private access, not a highway for the purposes of the GPDO. Therefore, the full extent of fencing as proposed could be erected up to 2m in height under permitted development rights.
55. It is argued there are trespass issues in the area and the site has an ongoing issue with fly-tipping and therefore the fence is necessary to secure the site to deter such anti-social behaviour. Given the relatively secluded location of the site and its expansive open space, I acknowledge that it would be attractive to potential wrong-doers to carry out such anti-social behaviour. Consequently, the proposition that in the event I dismiss the appeal the appellant would exercise permitted development rights by erecting a similar 2m high fence to secure the site is more than a theoretical possibility. Accordingly, this fallback position is a significant material consideration.
56. However, the proposed fence would be 2.4m in height, which is materially higher than a 2m high fence erected under permitted development rights. Therefore, the proposed fallback position would likely have a materially lesser harmful effect on the character and appearance of the area than the proposed fence, even taking into account the proposed mitigation measures.

Planning Balance and Conclusion on Appeal B

57. As the fallback position would likely be less harmful to the character and appearance of the area than the proposal, it does not weigh in favour of the appeal. Having had regard to the development plan as a whole and all material considerations, including the fallback position, I find no reason to justify allowing the proposal contrary to the development plan.
58. The appeal is therefore dismissed.

Appeal C – The Enforcement Notice

The ground (f) appeal

59. This ground is that the enforcement notice (the notice) requirement is excessive. Depending on the purpose of the notice, this can be assessed against the question of whether the requirement exceeds what is necessary to remedy the breach of planning control; or, any injury to amenity. Given the notice seeks the complete removal of the fence, the purpose of the notice must be to remedy the breach.
60. Reducing the height of the fence to 2m in height would not result in the fence becoming permitted development. Permitted development rights cannot be applied retrospectively. The requirement of the notice does not, therefore, prevent development that would otherwise be lawful, ie the erection of a fence under permitted development rights. Consequently, it does not exceed what is necessary to remedy the breach of planning control, in this regard, by requiring the removal of the fence in its entirety.

61. The appellant contends the requirement of the notice should be varied to require the fence to be reduced in height to 2m, which would be the maximum height allowed under permitted development rights. I have not been provided with any drawings or methodology setting out how the fence would be reduced in height. Mr Aslam confirmed under cross examination that the top rail could be removed, the pales and posts cut to height, new holes drilled and then the rail reattached. Given the design of the fence is relatively simple I find this seems a realistic method of reducing the height of the fence. Whilst the task may be time consuming, it would unlikely take a substantially longer time to complete than removing the fence altogether.
62. As I have set out in my consideration of Appeal B, there is a more than theoretical possibility that a new, 2m high fence would be erected under permitted development rights if I dismissed the appeal. Therefore, requiring complete removal of the existing fence would be unlikely to achieve anything and would therefore be excessive, because the grant of planning permission under the GPDO represents a realistic fallback position and is an obvious alternative. The reduction of the existing fence to 2m in height could be achieved with less cost and disruption than requiring the existing fence to be completely removed only for it likely to be replaced with a new, 2m high fence.
63. I am satisfied the requirement can be varied to ensure there is enough precision that the appellant knows what they have to do, ie, reduce the height of the fencing to no more than 2m in height measured from ground level. I shall therefore vary the notice accordingly, prior to upholding it, by exercising my powers of variation under s176(1)(b) of the 1990 Act.
64. The ground (f) appeal succeeds to the extent explained.

Formal Decisions

Appeal A

65. The appeal is dismissed.

Appeal B

66. The appeal is dismissed.

Appeal C

67. It is directed that the enforcement notice is varied by the deletion of 'Remove the fencing in its entirety, remove the resulting debris from the Land and restore the Land to its condition before the breach took place' and its substitution with 'Reduce the height of the fence to 2m in height measured from the ground level and all resulting waste and debris shall be removed from the Land'.
68. Subject to the variation, the appeal is allowed and the enforcement notice is upheld.

A Walker

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

David Manley KC instructed by Katheryn Lucas on behalf of the appellant

He Called:

Roger Lee	Agent for the appellant
Mark Smeeden	Chartered Landscape Architect, Smeeden Foreman Limited
Kashan Aslam	Managing Director, Crown Waste Management Limited
Shaan Chaudry	Managing Director, MAC Developments & Construction Ltd
Nabeel Ashraf	Quarry Manager, Crown Aggregates Limited
Carl Brown	Witness
Daryl Taylor	Witness
Ken Fisher	Director, Lindley Hall Farms Limited
Marcus Sutton	Director, Agri Plant Solutions Limited
Linda Rowntree	Witness
Steve Rowntree	Witness

FOR THE LOCAL PLANNING AUTHORITY:

James Corbet Burcher Counsel instructed by Hinckley and Council Bosworth Borough Council

He Called:

Christine Zacharia	Team Leader, Planning Enforcement Hinckley and Bosworth Borough Council
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INTERESTED PARTIES:

Peter Bridgewater	Local Resident
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INQUIRY DOCUMENTS:

1. Opening statement by the appellant
2. Opening statement by the Council
3. Closing statement by the Council
4. Closing statement by the appellant