

REBUTTAL PROOF OF EVIDENCE OF
TMOOTHY ANDEW SHATTOCK

ENFORCEMENT NOTICE APPEAL REFERENCE APP/X2410/C/24/3347294
LOCAL PLANNING AUTHORITIES REFERENCE E/18/0476

Land adj Moor Lane, Loughborough,
Leicestershire

Local Planning Authority: Charnwood Borough Council

Appellant: Mr and Mrs Gallagher

1. INTRODUCTION

- 1.1. In this rebuttal, I have not sought to provide a comprehensive response to the Council's evidence but attempted to provide evidence which the Inspector may find helpful to have in writing in advance of the inquiry. If I have not responded to or referred to other points in the Council's evidence, it is not because I have accepted these points.
- 1.2. This rebuttal also seeks to avoid repetition of my main proof of evidence and so should be read in conjunction with my main proof of evidence.
- 1.3. For ease of reference, I have addressed the respective points in relation to the separate proofs of evidence submitted on behalf of the Council

2. PROOF OF SARAH HALLAM ("SH")

- 2.1. I note that it is unclear whether SH has visited the Site over the key time periods relevant to the appeal. As such, it is unclear whether any of the Council's witnesses have direct knowledge of the Site in 2015, 2018, 2019 or any period before the issue of the Notice.
- 2.2. At paragraph 4.1 of SH's proof, reference is made to the Council being made aware of the soil being stockpiled in 2018 yet the Council has submitted photographs from February 2017 (CD5.2.17) showing the increased levels. There must have been a reason why the Council attended in February 2017 and that reason is unclear as the Council has not explained it.
- 2.3. Also at paragraph 4.1 of SH's proof, it is identified that the Council considered the Site to be lawfully used as a compound in relation to the construction of the wider residential development. This is inconsistent with the Council's allegation in relation to the requirement to replant the removed trees and vegetation given that the use of the site for a compound would have involved clearing those trees and vegetation; the Council concludes that the compound use was lawful and so the tree removal could not have been part of the alleged breach of planning control. This is because, on the Council's position, there was no breach at the time the Site was cleared and being used for a site compound.
- 2.4. At paragraph 4.3, it is confirmed that the Council knew that the site levels had already been increased by January 2019 as it had undertaken its own survey (which has since been misplaced). This is consistent with the Appellant's evidence that the levels had been increased in 2015.
- 2.5. In paragraph 4.8, SH refers to the September 2019 aerial image showing a marked lack of vegetation. This was a result of the works undertaken in 2019. It is noted that the April 2016 aerial image shows all vegetation was cleared by that point in time.
- 2.6. SH relies on Sarah Street's ("SS") proof in relation to identifying the Site as being in the floodplain. I consider this further below in relation to SS's proof albeit it is worth noting that the plan attached to the Enforcement Notice clearly identifies those parts of the site which are in the functional floodplain.
- 2.7. Contrary to SH's paragraph 8.3, the s106 Agreement did require "clearance" of the Site, which must mean to include the removal of trees and vegetation, and did require operations on site which would involve the change of ground levels.

- 2.8. It is noted that the photographs dated February 2017 and referred to in SH's proof at paragraph 9.6 do not show any ongoing works on site. This is entirely consistent with the fact that the ground levels had already been increase by that point in time.
- 2.9. The June 2019 photographs show the works of creating the bund in progress. As referenced previously, the design of the bund is of a shallow gradient from one side to a steep edge on the other side to prevent a gap being easily "punched" through it for vehicular access. This profile can be seen on the sections submitted by James McCloy and attached to my proof.
- 2.10. It is considered that a lot of the Appellant's and Council's evidence is consistent with what has happened at the Site in that works of ground raising were undertaken and virtually completed by December 2015, certainly more than 4 years before the issue of the enforcement notice in 2023. There was then a gap of a significant period of time before the works comprised in the removal of the spoil heap and creation of the bund were undertaken in 2019. These were clearly different operations although the Council contends that they were one very long operation.
- 2.11. In paragraph 9.25, SH asserts that the raising of ground levels to create developable land was the Appellant's intention all along. This is factually incorrect as can readily be seen from my email dated 21 May 2019 (CD5.3.2) within which I remind the Council that "the onus is on them to either purchase the land from the [Appellants] and build a community building, and develop a park type settings or leave it as it is". I specifically state in that email that I think they had about 12 months to do this and I reminded the Council that, if the Council does nothing, the land would remain with the Appellants. I also would not have spent many months talking to the Council about the Community Building on the Site. Clearly, if the intention was to raise the levels to create a development platform, I would not have sent that email in May 2019 nor wasted my time in discussions with the Council.
- 2.12. The allegation by SH all indicates in my view that a primary driver for the Council's enforcement action is because the Council failed to secure ownership of the Site by failing to comply with the requirements of the s106 Agreement.
- 2.13. It transpires, from SS's proof, that the Council has had access to LiDAR data, on a yearly basis, since at least 2008. It is unclear why the Council therefore is seeking a return to the levels of the Site at 2004 when it could seek a requirement to return to the levels of 2013 based on LiDAR data. The Council must release this data. This is important given that all parties agree that increases in ground levels were not undertaken until 2014 and that the previous scrapyards use of the site could well have led to change in levels before the 2014 works. The Appellant does not have access to the 2013 LiDAR but has undertaken a comparison based on the 2010 data (attached at Appendix 1 to this Rebuttal) which shows changes between 2004 and 2010 meaning that around 3,000 cubic metres less earth (around 11,000 cubic metres compared to over 14,000 cubic meters based on the BWB data at appendix 6 of my Proof) would need to be removed to revert to the levels at 2010.
- 2.14. It is considered that this demonstrates that the steps in the notice are excessive:
- 2.14.1. They should be limited to a reduction in levels to 2018 levels (due to the previous engineering operations now being immune); or
 - 2.14.2. If a conclusion is reached that the 2018 levels are not lawful; to a reduction in levels to 2004 levels only in those parts of the site within the 1 in 20 flood level (as set out in my main proof); or
 - 2.14.3. If the above is not accepted, to a reduction in levels only those parts of the site in Flood Zone 3b as shown on the plan attached to the Enforcement Notice at Appendix A; or

- 2.14.4. A reduction in levels to the 2013 LiDAR data which the Council must make available.
- 2.15. At paragraph 10.7, SH acknowledges that there will be an impact locally arising from the removal of earth but considers this will be short-term. The evidence submitted by James McCloy (“JM”) (CD5.6.2) indicates that over 13,000 cubic metres of earth will need to be removed and transported off site. I consider this to be a significant impact which does not appear to have been assessed by the Council in considering the enforcement notice.
- 2.16. The factual error of the incorrect date of the aerial image attached to the Notice being given as 2018 is acknowledged at paragraph 10.9. It is noted that the Council consider a correction of the Notice to refer to the date of the aerial image to 2011 would not cause prejudice. However, it is noted that the basis and reasons for taking enforcement action (as set out in the Delegated Officer’s Report, CD1.2) rely on the aerial image showing the position of the site in 2018 and so clearly influenced the decision to take enforcement action. I also have concerns as to why the Council is seeking to revert to an aerial image of 2011 when the proof of Rupert Simms (“RS”) relies on the aerial image of 2015. 2011 is also many years before the alleged breach of planning control and the Council accepts that lawful development continued for many years after 2011, including the continued use of the Site as a scrapyards (until 2014) and the use as a temporary storage yard, all of which would have impacted lawfully on the trees.
- 2.17. I have commented on the lawful removal of the trees above.

3. PROOF OF SARAH STREET (“SS”)

- 3.1. As with SH, it is unclear whether SS has visited the Site and over what period of time.
- 3.2. SS confirms that the LiDAR capture programme operates each year at paragraph 3.4. It is very difficult to see why the Council has therefore chosen only to release certain years (2008, 2010, 2018 and 2020) when it clearly would be in all parties’ and the Inspector’s interest to have released the data for all years from at least 2013 until the present day to enable the history of the site to be fully understood. Of particular concern is the decision of the Council to require a return to 2004 levels in the Notice when it appears that it has available levels from 2013 and so before the alleged breach of planning control is alleged to have commenced.
- 3.3. At paragraph 3.8, SS states that the whole site is located in Flood Zone 3b as it is shown as such on the Council’s Strategic Flood Risk Assessment. However, this ignores the obvious point that the drawing attached to the Notice itself at Appendix A (CD5.1.2) details the extent of the Flood Zone 3b. Anyone reviewing the Notice would therefore understand the extent of Flood Zone 3b to be that shown in the plan attached to the Notice. It also ignores the caveat in the Strategic Flood Risk Assessment, on page 21, which states, with my emphasis:

Important note on Flood Zone information in this SFRA

*The Flood Zones presented in Appendix A Geo-PDFs are the same as those shown on the Environment Agency’s ‘Flood Map for Planning’.
The Environment Agency Flood Zones do not cover all catchments or ordinary watercourses. As a result, whilst the Environment Agency Flood Zones may show an area is in Flood Zone 1, it may be that there is actually a degree of flood risk from smaller watercourses not shown in the Flood Zones.*

*Functional floodplain (Flood Zone 3b) is identified as land which would flood with an annual probability of 1 in 20 years; where detailed hydraulic modelling exists, the 1 in 20-year flood extent has been used to represent Flood Zone 3b (provided by the Environment Agency). **For areas outside of the detailed model coverage, this is represented by Flood Zone 3a as a conservative indication. Further work should be undertaken as part of a detailed site-specific Flood Risk Assessment to define the extent of Flood Zone 3b where no detailed modelling exists.***

- 3.4. The Site appears to be outside of the detailed model coverage and, as such, the Strategic Flood Risk Assessment itself requires site-specific assessment.
- 3.5. With regard to the definition of “floodplain”, at paragraphs 3.9 and 3.10, SS appears to suggest that Flood Zones 2, 3a and 3b are all floodplain simply because the NPPG requires a flood risk assessment for all development in those zones. However, it is clear that the NPPG does not contain such a definition of “floodplain” with floodplain only used in the context of Zone 3b “the functional floodplain”.

4. PROOF OF JAMES MCCLOY (“JM”)

- 4.1. The information contained in JM’s proof appears largely factual with any differences between the parties likely to be as a result of the accuracy of the available data although significant concerns are raised with the decision to rely on the 2004 survey levels when it is clear the Council has access to the 2013 levels. The LiDAR data for all years since at least 2013 has been requested and it is considered that it would assist the Inspector for the cut and fill exercise to be undertaken to provide a comparison between the 2013 and 2018 levels and the 2013 and 2022 levels.

5. PROOF OF RUPERT SIMS (“RS”)

- 5.1. At paragraph 3.1, RS states that the appropriate baseline for the ecological assessment is the aerial image from 2015. This is dated March 2015. This raises the question as to why the Notice seeks a return to the position as shown in the 2011 aerial image attached to the Notice at Appendix B in relation to tree and vegetation replanting which I do not consider reasonable.
- 5.2. The proof of RS fails to consider what the impact of, what the Council considered lawful, use of the site as a temporary site compound. Clearly, works associated with that use (which the Council considered lawful) would have detrimentally impacted on the ecology at the site and should have been taken into account by RS

6. CONCERNS WITH THE VALIDITY OF THE NOTICE

- 6.1. As set out above, the proofs of evidence of the Council have highlighted several concerns with the notice and its issue. Whilst matters for submissions, these include:
 - 6.1.1. A failure to assess the likely significant impacts of the steps required to comply with the Notice
 - 6.1.2. The fact that the Council has LiDAR data for just before the alleged breach of planning control (2013) but is seeking a return to 2004 levels;

- 6.1.3. The plan attached to the Notice in Appendix A shows Flood Zone 3b but the Council's evidence states that the whole of the site should be treated as Flood Zone 3b;
- 6.1.4. The plan attached to the Notice at Appendix B is misdated and requires steps, in relation to tree and vegetation planting, to replicate the position in 2011 yet the proof of RS relies on a baseline of 2015;
- 6.1.5. The Notice itself refers to the alleged breach being within the last 4 years when, as a matter of agreed fact, this is not true. Whilst this may not prevent the Council issuing the Notice, it means the Notice is factually incorrect

7. REBUTTAL SUMMARY

- 7.1. Overall, there is nothing in the Council's proofs which lead me to a different conclusion to that which I have reached in my proof of evidence.