



STATEMENT OF CASE (V.1)

BERSHAM BANK COLLIERY TIP, PLAS GRONO ROAD, RHOSTYLLLEN, WREXHAM

**Variation of Conditions 6 and 26 of Planning
Permission P/2015/0337 - Site Working Plan
and Vehicular Movement Restrictions**

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1. INTRODUCTION

Background

- 1.1 This Statement of Case is prepared by Joe Nugent MRTPI of Brownshore Management against the refusal by Wrexham County Borough Council (“the Council”) of an application for a S73 Variation of Conditions (“the proposal”) on Bersham Bank Colliery Tip, Plas Grono Road, Rhostyllen, Wrexham LL14 4EG (“the Appeal site”).
- 1.2 For reference purposes the planning application details on the Council’s Public Access state:

Application Number: 19/00897/LUE

Proposed: variation of conditions 6 and 26 of planning permission P/2015/0337 - site working plan and vehicular movement restrictions

Location: Bersham Bank Colliery Tip, Plas Grono Road, Rhostyllen, Wrexham LL14 4EG

Validation

- 1.3 The application was received by the LPA on 22 July 2020.
- 1.4 The consultation process was undertaken, and the LPA Public Access confirms:
- a) Public Protection – No Comments
 - b) Natural Resources Wales – No Objection

Determining the planning application – Decision Notice

- 1.5 The Decision Notice was received from the LPA dated 30 October 2020.
- 1.6 The refusal reason provided by the LPA states:
The proposals represent a significant material change to the extant planning permission and therefore fall outside of the scope of matters that can be dealt with via an application submitted under Section 73 of the Town and Country Planning Act 1990
- 1.7 In planning terms this refusal reason is not related to the planning policies stated in the Decision Notice, the refusal reason relates to the assessment and recommendation of the Case Officer and the decision of the LPA.

2. APPLICATION DOCUMENTS

- 2.1 The planning application was submitted to the LPA and accompanied by the necessary level of documents including:
- a) Application Form
 - b) Planning Statement
 - c) Design & Access Statement
 - d) Location Plan
 - e) Profile View From East And West Of Proposed Plant - Page 2 OF 2DWG. No.: ENERJ8_D_M_BERPNT_0001_7
 - f) Plant Layout General Arrangement Internal Building Plan View - DWG. No.: ENERJ8_D_M_BERPNT_0002_7
 - g) Site Plan With Profile View From South East Page 1 of 2 - Dwg. No.: ENERJ8_D_M_BERPNT_0002_7
- 2.2 During the initial submission and validation of the application the Case Officer challenged the nature of the application and that it should not be validated.
- 2.3 This matter was discussed between the Planning Agent and the Case Officer and the agent clarified that the validation checklist (national and local) had been met with the required documents submitted to the LPA. Also, that the validation of an application is different to the assessment of the application.
- 2.4 The Case Officer confirmed the application would be validated and the consultation process was undertaken.
- 2.5 The LPA Public Access confirms:
- c) Public Protection – No Comments
 - d) Natural Resources Wales – No Objection

3. GROUNDS OF APPEAL

Introduction

- 3.1 The grounds of appeal are predicated on the decision of the LPA and this states:

The proposals represent a significant material change to the extant planning permission and therefore fall outside of the scope of matters that can be dealt with via an application submitted under Section 73 of the Town and Country Planning Act 1990

- 3.2 This refusal by the LPA is not based upon planning policies, planning guidance or the potential for adverse socio-economic / environmental effects. The decision has been taken on that the proposals represent a significant material change to the extant planning permission and therefore fall outside of the scope of matters that can be dealt with via an application submitted under Section 73.
- 3.3 However, the Case Officer and the LPA do not provide any detailed assessment or reasoning to explain their conclusion that the threshold for the scope of a S73 has been exceeded.
- 3.4 Therefore without a concise and sound reasoning by the LPA of the extent of the scope of matters that can be dealt with under S73 it is necessary to review this matter.

Case Law

- 3.5 To explore and seek to establish the scope of a S73 application, as it is not defined in the Town and Country Planning Act 1990, selected planning case law is referred to.
- 3.6 The leading case concerning the operation of s73 TCPA is *Finney v Welsh Ministers & Others* [2019] EWCA Civ 1868 where the Court of Appeal considered solely the question of the scope of the statutory provision.

The case concerned a planning permission for the development of two wind turbines, the original description of the development provided “*Installation and 25 year operation of two wind turbines, with a tip height of up to 100m, and associated infrastructure*”.

The original permission was granted subject to conditions including Condition 2 which required that the development be carried out in accordance with various specified plans including an elevation plan which showed the turbines being 100m in height.

Following the grant of permission Energiekontor (the applicant) made a further application to the LPA seeking to amend Condition 2, by substitution of a new elevation plan, such that the turbines would be increased in height to 125m to tip. The application was refused by the LPA and on appeal the appointed Inspector, having considered the planning objections to the proposed amendment, found the amended development to be acceptable in planning terms. The appeal proceeded solely on the basis of the planning merits of the proposed amendment, no party raised the issue of whether the proposed amendment was within the scope of s73.

The Inspector allowed the appeal and amended the description of the development including the removal of the reference to the 100m tip height.

In giving the leading judgment Lewison LJ considered the preceding case law. The distinction between the description of a development and the conditions attached to it was set out in *Cotswold Grange Country Park LLP v SSCLG* [2014] EWHC 1138 (Admin) by Hickinbottom J:

“...the grant identifies what can be done – what is permitted – so far as use of land is concerned; whereas conditions identify what cannot be done – what is forbidden”

The challenge raised in *Finney* was that the Inspector *“...had no power to allow the appeal and to grant planning permission for development that was not covered by the description of the development in the body of the original planning permission. The only power was to vary the conditions...”* [10].

Lewison LJ reviewed the three relevant High Court decisions:

- (i) In *R v Coventry CC ex p Arrowcroft Group plc* [2001] PLCR 7 the description of development included *“...1 variety superstore...”* which was the subject of a s73 application to amend the proposed to provide six variety stores. The grant of the s73 application was successfully challenged on the basis that there was *“...a fundamental inconsistency between the conditions and the description of the development contained in the notice of permission”*. Sullivan J in upholding the challenge said [33]:

“...the council is able to impose different conditions upon a new planning permission, but only if they are conditions which the council could lawfully have imposed upon the original planning permission in the sense that they do not amount to a fundamental alteration of the proposal put forward in the original application”;

- (ii) In *R (Vue Entertainment Limited) v City of York Council* [2017] EWHC 588 (Admin) the description of the permitted development included a *“...multi-screen cinema...”*. Condition 2 of the permission required the development to be carried out in accordance with specified plans which showed a 12 screen cinema with a capacity for 2,000 viewers. A s73 application was approved to amend Condition 2 to provide a new plan showing a 13 screen cinema with a capacity of 2,400. The description of the development provided a limit of 8,000 capacity for the stadium element of the proposal but no limit upon the cinema element. Following the principle established in *Arrowcroft* Collins J considered that the s73 application did not seek to amend the description of the permission, but simply a condition, and dismissed the claim;
- (iii) In *R (Wet Finishing Works Ltd) v Taunton Dean BC* [2017] EWHC 1837 (Admin) the original permission allowed for 84 dwellings, a subsequent s73 application was approved to increase the number to 90. Singh J considered *Arrowcroft* but

not *Vue* and proceeded upon the basis that different conditions may be imposed where they do not amount to a fundamental alteration to the proposal and that such a decision was one of fact and degree involving planning judgment susceptible to challenge only where that judgment was irrational.

Lewison LJ held that the analysis of Collins J in *Vue* was the correct approach and that the approach taken by Singh J in *Wet Finishing* was wrong.

Applying that analysis to the development proposed by Energiekontor the amendment would be incompatible with the description of the development (which cannot be altered) as it specifically provided for turbines of 100m height. In consequence there was no power for the Inspector in that case to allow the s73 application as it was inconsistent with the description of the development and that the description cannot be altered.

In the present case the description of the development provides no such limitation. There is no inconsistency between the description of the development and the proposed amendments to Conditions 6 and 26.

When properly considered the proposals fall within the description of the development as originally permitted for the reasons explained in the Planning Statement submitted with the application. The original permission allows for the “*..reclamation of colliery spoil together with associated works, including the siting of temporary structures and the installation of rail freight sidings*”. Plainly the proposed amendment allows for the reclamation of the colliery spoil (the method of which is not described in any way in the description of the development) and the block making facility is simply one of a number of temporary structures to facilitate that operation (again those structures are not detailed in any way in the description of the development).

In *Vue* the claimant had argued that the increase in the size of the cinema element of the scheme was a ‘fundamental change’, Collins J said [16] “*When one is concerned with fundamental variations, one must look, it seems to me, to the permission as a whole in order to see whether there is in reality a fundamental change, or whether any specific part of the permission as granted is sought to be varied by the change of condition*”.

Looking at the permission as a whole, which allows for the reclamation of 5 3/4 million tons of spoil along with all necessary infrastructure (including rail freight sidings) to achieve that objective it is clear that the proposed plant is simply a functional part of the permitted development. There is no fundamental change proposed to that which is permitted.

Collins J, whilst satisfied that the proposed change to the cinema was not a fundamental change, considered at [19] “*It is, I suppose, possible that there might be a case where a change of condition, albeit it did not seek to vary the permission itself on its face, was so different as to be what could be properly described as a fundamental variation of the effect of the permission overall...*”. For the reasons already outlined the present case is not one which falls into that extreme category of a ‘fundamental

change'. The spoil tip will still be reclaimed, the product of it will still be exported from the site, the mode of processing the spoil prior to exportation is not a matter which is contemplated in the description of the development nor was it controlled by any specific detailed condition (hence a working method had to be submitted to the LPA *after* permission had been granted for its approval).

The Council have misdirected themselves in their consideration of the application by making the erroneous assumption that the *only* permitted method for reclaiming the colliery spoil is to remove it from the site in its existing form. That is an entirely mistaken approach as the scope of reclamation is broad – it does not equate simply to disposal. Compounding that error, the Council have failed to properly consider the application on its merits.

Given that conclusion, and that the proposed amendments fall well within the bounds of the existing description, the proper basis for consideration is whether or not the proposed amendment is acceptable in planning terms. It is plain that the proposed amendments give rise to environmental, social and economic benefits such that it is acceptable in planning terms as set out in the planning statement submitted with the application. Accordingly, it is respectfully submitted that this appeal should be allowed and the application approved.

Planning Permission of Bersham Colliery Spoil Tip

- 3.20 The Planning Statement confirms that the extant planning permission has been established to accord with the relevant planning policies and site allocations in the adopted Local Plan.
- 3.21 The development proposal states the “*reclamation of colliery spoil together with associated works, including the siting of temporary structures and the installation of rail freight sidings*”.
- 3.22 The extant planning permission allows for the reclamation of colliery spoil, this is the overriding principle and goes to the heart of the permission. The planning permission and the attached conditions do not state, require, or limit the operations and processes of reclaiming the spoil material. This allows an operator flexibility in terms of extracting the material, wash plants, reclamation processes, and export routes (including methods of transportation).
- 3.23 The operator for the site has undertaken block making testing with material from the spoil tip. These technical processes include:
- a) Compressive strength of blocks
 - b) Frost resilience
 - c) Breaking load
 - d) Moisture content and dry density
 - e) Slip resistance of pedestrian surface materials

- 3.24 The result of the professional testing is that the material at the site can be used for block making purposes and the resultant block meet with the testing requirements as set out above.
- 3.25 It is therefore a tested function, permissible within the extant planning permission, to use the spoil material for block making purposes. The conditions attached the extant planning permission facilitate this process through the “reclamation of colliery spoil together with associated works, including the siting of temporary structures...”.
- 3.26 Condition 6 of the extant planning permission requires a working plan, this relates to a broad range of matters and is not defined within the condition as to the scope of the operations able to be carried out under the working plan.
- 3.27 With a confirmed technical assessment of the block making at the site being fit-for-purpose it is therefore a functional and intrinsic element of the working plan at the site to utilise block making in the reclamation of the material. This forms part of the development proposal, and the requirements of Condition 6.
- 3.28 Therefore the extant planning permission, the S73 application, and this appeal, includes block making. This element of the development is not creating a new development as the plant would be intrinsically linked to, and within the extant planning permission via Condition 6.
- 3.29 The function and purpose of the block making plant is to facilitate reclamation of the spoil material. The reclamation process of the spoil material is not defined within the planning permission and the scope of the reclamation process is able to establish a broad range of operational functions.
- 3.30 Similar to on site screening, washing and associated processes the sole function of the block making plant is to facilitate the receipt of the spoil material, process it, and the final product exported from the site. The existing planning permission requires the reclamation and export of the material, on site processing forms a required element of the reclamation process.
- 3.31 The extant planning permission permits associated works and the siting of temporary structures, the scope (scale, mass and function) has not been defined in the permission or in the attached conditions. Recognising the scale of the extant planning permission in terms of reclaiming 6 million tonnes of colliery spoil and significant levels of infrastructure, the block making plant for the duration of the reclamation processes is proportionate in scale, mass and function.
- 3.32 The principle of the reclamation processes has been established by the extant planning permission, there is no material change to the development in this instance. It is proposed to include a function and process to facilitate the delivery of the reclamation process, and this also relates to the associated works and the siting of temporary structures.

Socio-Economic and Environmental Benefits (Planning Balance)

- 3.33 The principle of the reclamation processes has been established by the extant planning permission. The permission supports the reclamation of the spoil material, the exportation of the material and end-use (recognising the age of the permission) remains broad and generates transportation and varied end uses.
- 3.34 The block making at the site (that does not require planning permission) within the reclamation process provides a sustainable use of the spoil material, providing direct and indirect employment through the block making process, reduces exportation and travel related effects, and achieves environmental improvements through the removal of the spoil tip.
- 3.35 The block making plant offers a more efficient, effective, and timely use of the spoil material. This is not creating a new land use; it is making an extant land use and process more efficient and able to reclaim the spoil tip in a timelier manner. The socio-economic and environmental benefits of the development (including the block making plant) uses an extant use and delivers significant benefits outweighing the potential effects arising for the development.

4. SUMMARY AND CONCLUSION

- 4.1 This Statement of Case is submitted based on the technical challenge that the LPA has failed in their determination of the application as no assessment or reasoning is provided to justify and uphold their decision.
- 4.2 It has been established that blocks can be made from the spoil material, and that this process falls under the reclamation process and the working method within Condition 6. The block making at the site therefore does not require planning permission.
- 4.3 In planning terms the question is therefore not the land use (block making) but focuses on the block making plant. The plant provides an all-year environment for the block making at the site and the facility remains entirely ancillary to the extant planning permission for the reclamation of the spoil material.
- 4.4 The block making process provides a sustainable use of the spoil material, providing direct and indirect employment through the block making process, reduces exportation and travel related effects, and achieves environmental improvements through the removal of the spoil tip.
- 4.5 As a conclusion, block making is not creating a new land use; it is making an extant land use and process more efficient and able to reclaim the spoil tip in a timelier manner. The socio-economic and environmental benefits of the development (including the block making plant) uses an extant use and delivers significant benefits outweighing the potential effects arising for the development.
- 4.6 On this basis it is requested that the Planning Inspector support the appeal and recommends a positive decision.



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