

**TOWN AND COUNTRY PLANNING ACT 1990 SECTION 78 APPEAL AT
BERSHAM COLLIERY TIP PLAS GRONO ROAD RHOSYLLEN**

COUNCIL'S STATEMENT OF CASE

**PLANNING REF: P/2020/0294
PINS REF: 3273722**

1.0 THE SITE

- 1.1 The site comprises of a large colliery spoil tip located on the edge of the village of Rhostyllen.

2.0 PROPOSAL

- 2.1 VARIATION OF CONDITIONS 6 AND 26 OF PLANNING PERMISSION P/2015/0337 - SITE WORKING PLAN AND VEHICULAR MOVEMENT RESTRICTIONS

3.0 HISTORY

- 3.1 P/2008/0266 RECLAMATION OF COLLIERY SPOIL TIP TOGETHER WITH ASSOCIATED WORKS INCLUDING SITING OF TEMPORARY STRUCTURE AND INSTALLATION OF RAIL FREIGHT SIDINGS. Refused 28.2.2008. Allowed on appeal 19.11.2009
- 3.2 P/2015/0337 VARIATION OF CONDITION 1 OF P/2008/0266 (RECLAMATION OF COLLIERY SPOIL TIP TOGETHER WITH ASSOCIATED WORKS INCLUDING THE SITING OF TEMPORARY STRUCTURES AND THE INSTALLATION OF RAIL FREIGHT SIDINGS AT BERSHAM BANK COLLIERY TIP) TO ALLOW FURTHER 5 YEARS TO IMPLEMENT DEVELOPMENT. Granted 10.5.2018

4.0 DEVELOPMENT PLAN – WREXHAM UNITARY DEVELOPMENT PLAN

- 4.1 Outside of settlement limit. Policies PS2, GDP1, EC4, EC6, EC11, GDP1, T6, CLF6, MW7 and MW7 apply.

5.0 COUNCIL'S CASE

- 5.1 The Council's case is that the proposals fall outside of the scope of matters than can be dealt with via a section 73 application.
- 5.2 Section 73 of the Town and Country Planning Act 1990 enables for applications to be determined to develop land without compliance with conditions attached to a previously granted permission. In dealing with such applications, the Local Planning Authority can only consider question of the conditions attached to an extant permission. Section 73 does allow for planning permission to be granted subject to different conditions, therefore providing scope for the substitution of an approved plan for an amended plan. However different conditions can only be imposed if the effect does not amount to a fundamental alteration of the original proposal.
- 5.3 As confirmed in *Lambeth LBC v Secretary of State for Housing, Communities and Local Government*, a permission under s73 can only take effect as an independent permission to carry out *the same development as previously permitted*. As confirmed in the *Finney vs Welsh Ministers Case* (November

2019) it is also not possible to grant a s73 application if the effect amounts to a change in the description of development.

5.4 Paragraph 1.3 of the Supporting Statement accompanying the application subject to the appeal suggests that under condition 06 of the extant permission does not define the scope of on-site reclamation. It is not accepted that this is in fact the case. It is clear from the plans that accompany the extant permission that it was anticipated that little, if any, on-site processing would take place beyond the sorting and grading of material ready for transport. These are included in **Appendix 1**. In addition to the above, no mention is made of on-site processing in by the Inspector when planning permission was originally granted in 2009. The appeal decision is included at **Appendix 2**. The temporary buildings that the extant permission authorises are very clearly of an entirely ancillary nature (e.g. site office, plant maintenance), with there being no provision for buildings or other structures to carry out any processing of materials beyond those required in conjunction with excavation and loading onto road or railway vehicles.

5.5 It is recognised that the extant permission P/2015/0337 is itself a Section 73 decision, however the only condition it varied was the time limits for commencement. The effect of the decision did not change the description of the original permission P/2008/0266. As such the description of the existing permission is therefore as set out on the latter decision notice:

Reclamation of colliery spoil together with associated works including the siting of temporary structures and the installation of rail freight sidings.

5.6 The description of development does not make any reference to the processing of materials on-site in the manner now proposed nor does it refer to the erection of a building for the processing of materials on-site in conjunction with block making, nor do the approved plans permit the erection of such structure.

5.7 Paragraph 1.5.1 of the Environmental Statement submitted with P/2008/0266 also described the reclamation works as shown below.

1.5 Proposed Reclamation Works

1.5.1 The proposed reclamation works have been designed to clear the site of colliery spoil and waste material and is discussed in detail in Appendix 1.3 Method Statement for Reclamation Works. In general terms, the reclamation works involve the following:

- Excavation of the existing materials to a reduced level of 100m AOD;
- Re-distribution of materials generated during excavation and disposal works;
- Construction of a rail freight siding;
- Highway improvements;
- Disposal from site by rail freight;
- Disposal from site by 8 wheeled tipper lorries;
- Disposal from site by articulated lorries;
- The enhancement and development of the Bersham Colliery Museum, and,
- Landscaping for Amenity and Recreational uses including a comprehensive Planting and Habitat Creation Strategy.

- 5.8 The above is repeated in the non-technical summary to the Environment Statement which is included at **Appendix 3**.
- 5.9 The effect of the proposed amendment to condition 06 would be to introduce a change to the description of the extant permission by making explicit provision for on-site processing/block making, including making provision for the erection of a substantial building for that purpose. Had the extant permission been intended to make provision for on-site processing in the form now proposed, it is contended that the description of development of the original permission would have included something along the lines of *including the erection of a building for use as block making plant*. It would also be reasonable to expect that block making and the erection of any building for that purpose would also be discussed in the ES. The absence of any such provision means what is now proposed falls outside of the scope of the extant permission.
- 5.10 Whilst it is recognised that changes to an extant planning permission can be made by way of a Section 73 application and that those changes can be material (as opposed to non-material under s96A of the Town and Country Planning Act) Section 73 can only be used to make minor material amendments to a development. It is contended that Section 73 cannot be used to significantly increase the amount of development originally permitted given that this would amount to a significant material change to a proposed development.
- 5.11 The amendments seek to introduce significant additional development that is not authorised by the extant planning permission. The proposed building has a floor area in excess of 10,000 square metres and therefore constitutes major development in its own right. In addition, the proposals are likely to fundamentally alter the overall reclamation scheme to the point where it amounts to a different development. Instead of materials being excavated, sorted and graded then loaded into road and/or rail vehicles for transport off site, a significant amount of material would instead be utilised in the

production of blocks. Paragraph 3.30 of the supporting statement also suggests that materials such as sand and cement would be imported into the site. Under the extant permission it is highly unlikely that the importing of materials would have been required, at least on a routine basis.

- 5.12 In addition, the block making building will result in the overall reclamation scheme potentially having significantly different impacts in respect of noise, dust, traffic, ecology and landscape/visual impact that were not considered when the original reclamation scheme was granted planning permission. Whilst the application also seeks to vary condition 26 in respect of vehicle movements, with the supporting statement suggesting a significant reduction in the number of movements, this is not detailed by way of a Transport Assessment. Furthermore it is unclear how many vehicle movements would be generated by the import of sand and cement or the transportation of finished product off site. Even if there is a significant reduction in vehicular movements, this would be indicative of a significant material change in the nature of the reclamation proposals.
- 5.13 It is contended that what the appellants are now seeking to do at the site needs to be pursued by a new full application for the reclamation of the colliery spoil tip, including provision for on-site processing or alternatively by pursuing the block making plant by way of a standalone application for full planning permission. By submitting a Section 73 application the appellants have effectively sought to introduce significant additional development by sleight of hand.

6.0 CONCLUSION

- 6.1 The proposals fall outside of the scope of amendments that can be pursued by way of a s73 application. The Council contends that it would be entirely inappropriate to grant permission for the proposals via Section 73 of the Town and Country Planning Act 1990. It therefore respectfully requests the appeal be dismissed.

7.0 CONDITIONS AND OBLIGATION

- 7.1 In the event of the Inspector being minded to allow the appeal and grant permission, the Council respectfully requests that the decision is subject to the same time limit for commencement of development (i.e. 5 years from 10.8.2015) and the same conditions as imposed on planning permission P/2015/0337, subject to conditions 06 and 26 being amended as proposed by the appellants. The decision notice for P/2015/0337 can be found at **Appendix 4**.
- 7.2 The extant planning permission P/2015/0337 is subject to a Planning Obligation, a copy of which is included at **Appendix 5**. If the Inspector is minded to allow the appeal, the Council contends that permission should only be granted if a signed Obligation that secures the same provisions has been submitted.