

APPENDIX 2

APPEAL DECISION APP/H6955/A/08/2082561



Adroddiad

Ymchwiliad a agorwyd ar 13/10/09
Ymweliad â safle a wnaed ar 15/10/09

Report

Inquiry opened on 13/10/09
Site visit made on 15/10/09

gan/by Clive Nield BSc (Hons) CEng MICE MCIWEM

**Arolygydd a benodir gan Weinidogion
Cymru**

**an Inspector appointed by the Welsh
Ministers**

Dyddiad/Date 19/11/2009

TOWN AND COUNTRY PLANNING ACT 1990 SECTION 78

Appeal by Bersham (Glenside) Ltd

Bersham Bank Colliery Tip, Plas Grano Road, Rhostyllen, Wrexham

File Ref: APP/H6955/A/08/2082561

Site address: Bersham Bank Colliery Tip, Plas Grano Road, Rhostyllen, Wrexham, LL14 4EG

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
- The appeal is made by Bersham (Glenside) Ltd against the decision of Wrexham County Borough Council.
- The application Ref P/2008/0266, dated 28 February 2008, was refused by notice dated 28 July 2008.
- The development proposed is the reclamation of colliery spoil together with associated works, including the siting of temporary structures and the installation of rail freight sidings.
- The inquiry sat for 2 days on 13 and 14 October 2009.

Summary of Recommendation: The appeal be allowed, and planning permission be granted subject to conditions.

Preamble

1. This report includes descriptions of the site and surrounding area, the proposed development, the relevant planning policies and statutory tests, the gist of the representations made, my appraisal and conclusions and my recommendation. Document references are shown in brackets, and in my conclusions the numbers in square brackets indicate the relevant paragraphs of my report. Details of the people who took part in the public inquiry and comprehensive lists of documents and plans are attached at the end of the report. Possible planning conditions are attached as an Annex.

Procedural and Background Matters

2. An application was first made for reclamation of the colliery spoil tip on the appeal site on 20 February 2007 (Ref. P/2007/0239), and that application was refused for 3 reasons on 1 October 2007. A second application was made addressing 2 of those reasons but was still refused (for the same third reason), and it is that application that is the subject of the current appeal. An appeal (Ref. APP/H6955/A/08/2070894) was also made against the refusal of the first application but that appeal was withdrawn by letter dated 26 August 2009.
3. On 28 May 2009 the appeal was recovered for determination by the Welsh Ministers. The reason for this direction is that the appeal relates to a major proposal involving the winning and working of minerals (some 6 million tonnes).
4. An Environmental Statement was submitted with the application (Documents 16.1 & 16.2), and the adequacy of this was assessed when the appeal was first submitted to the Welsh Assembly Government. In August 2008 additional information was requested under Section 19 of the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999, and this was submitted during October and November 2008 (see bundle of papers at Document 16.3). More recently, the proposed scheme has been amended to retain a small proportion of the tipped material, and parts of the Environmental Statement have been appropriately amended (see bundle of papers at Document 16.4).

5. The Council has submitted that this amended scheme should not be considered through this appeal. Its legal submissions are reported below, as are the response made on behalf of the Appellant and my conclusions on this matter. My report covers both the original and the amended scheme.

Site and Surroundings (Documents 8.1 & 16.1)

6. The appeal site comprises some 13 hectares of land immediately to the south of the village of Rhostyllen. The Glan-yr-afon Brook runs along its northern boundary, the A483 dual carriageway trunk road along its western boundary, and the railway line along its southern boundary. To the east of the site is Plas Grano Road with the Bersham Enterprise Centre on the opposite side of the road. This is based on the former buildings of the Bersham Bank Colliery and the associated shaft headgear, which include a Scheduled Ancient Monument (which is also a Grade II* Listed Building) and 2 Grade II Listed Buildings. The wider area comprises mixed farmland to the south, east and west. Plan A (Figure 1.1 of Environmental Statement) shows the site location.
7. The site contains the former colliery spoil tip (see photograph on front cover of Environmental Statement (ES)), which rises to a level some 50 metres above the surrounding ground level. It contains approximately 6 million tonnes of material, comprising about 60% unburnt black shale and 40% burnt red shale, together with small quantities of rock from the headings and gravel-size coal particles. The shape and levels of the tip are shown on Plan D (Figure 1.3 of ES).
8. The colliery was first sunk in 1867 and closed in 1986. The tip was authorised by planning permissions in 1955 and 1960, though it was in use much earlier than that. Some tree planting has been carried out in the past to partially screen it from the colliery buildings to the east, and much of its lower levels have been partially naturally vegetated with trees, shrubs and sparse coarse grass.

Proposed Development (Document 16.1)

9. The proposal is to reclaim the tipped materials, mainly for use for construction purposes. The development would be carried out in phases, as illustrated in Figures 1.2-1.9 of the Environmental Statement and summarised on Plan C (ES Figure 1.2). The final landform would be landscaped to provide an informal amenity area (see Plan F, Landscape Masterplan – ES Figure 1.10), though it is also acknowledged that an alternative end use may be sought through the Local Development Plan consultation process.
10. Following consultation with appropriate bodies over the past year or so, an amended proposal is now put forward for consideration at the appeal stage, which makes allowance to retain part of the tip close to the former colliery buildings to provide a setting for them. Some ¼ million tonnes of material would be retained to provide a smaller tip on the eastern side of the site, and amended plans for this are included in the amendments to the Environmental Statement (Document 16.4). Amended Figures 3.10-3.13 illustrate the amended final landform and landscape masterplan proposals. Document 2 lists the application plans and the amendment plans.
11. The Appellant Company estimates that removal of the spoil would take about 7-9 years. The first phases would comprise clearance of the southern part of the site,

which would enable rail freight sidings to be introduced, and thereafter it would be proposed to transport much of the material by rail (subject to arrangement of suitable supply contracts). Temporary buildings and facilities needed for the work would be constructed in a compound in the south-eastern corner of the site next to Plas Grono Road and the railway line (see Plan C – ES Figure 1.2).

12. Some of the material would be transported from the site by road, and the proposals include the provision of an improved access on to Plas Grono Road and some improvements to that road between the site access and the bridge over the Glan-yr-afon Brook. Details are shown on plans F06037/01A and F06037/04 in Chapter 6 of the Environmental Statement.
13. In connection with the proposed development the Appellant has entered into a Section 106 Undertaking (Document 25 - detailed later in report) to make a substantial financial contribution towards the costs of refurbishing the former winding gear house (a Grade II Listed Building) and either restoring it to use as a museum or building a new colliery museum to illustrate the coal mining history of the area (including a contribution towards the first few years' running costs).

Planning Policy (Documents 8.1, 8.2, 15.1 & 16.1)

14. The adopted development plan is the Wrexham Unitary Development Plan 1996-2011 (UDP), adopted in February 2005. Supplementary planning guidance is provided in the Wrexham Landscape Character Area Guidance (Wrexham LANDMAP), adopted in February 2007. Relevant parts of these are included in Document 8.2.
15. Relevant National Policy is contained in Planning Policy Wales (March 2002) and Minerals Planning Policy Wales (December 2000), supplemented by further guidance in Minerals Technical Advice Notes (Wales) 1: Aggregates and 2: Coal. The Planning (Listed Buildings and Conservation Areas) Act 1990 and Welsh Office Circulars 60/96 (Planning and the Historic Environment - Archaeology) and 61/96 (Planning and the Historic Environment – Historic Buildings and Conservation Areas) are also relevant.
16. The Council's refusal notice referred only to Planning Policy Wales paragraph 6.5.1 and UDP Policy EC11. Policy EC11 states: "*Development which would adversely affect the site or setting of a Scheduled Ancient Monument or archaeological site of national significance will not be permitted.*" It further goes on to provide protection to non-scheduled sites of archaeological importance and their setting. This is consistent with PPW paragraph 6.5.1, which states: "*Where nationally important archaeological remains, whether scheduled or not, and their settings are likely to be affected by proposed development, there should be a presumption in favour of their physical preservation in situ*". Section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 requires that, when considering planning applications, special regard is to be had to the desirability of preserving a listed building or its setting or any features of special historic interest, and Welsh Office Circulars 60/96 and 61/96 further reinforce these aims.
17. The Council's LANDMAP guidance includes Bersham Colliery and tip as landmarks that are key characteristics of the visual character of the area and Bersham Colliery, with its coal spoil tip and remaining headgear, as a key characteristic of

particularly high value to the historical character. As part of the landscape management strategy it aims to "*preserve, maintain and repair mining remains, especially the winding house, headgear and tip at Bersham*".

18. Various policies, other than conservation, are also relevant. In particular, UDP Policy EC16 identifies the former Bersham Colliery spoil tip as one of several sites to be reclaimed and restored for beneficial use, with amenity as its proposed after-use. Supporting text explains that, although large areas of dereliction have already been reclaimed, much remains to be done to enhance land and buildings that seriously injure local amenity and environmental quality, and that the re-use of derelict land reduces pressure for development on greenfield sites. This is supported by UDP Policy MW7, which permits the reworking of mineral waste for purposes of mineral extraction, subject to criteria to safeguard ecological, archaeological, environmental and amenity matters. These are consistent with the aims of national policy to support the re-use of derelict land and the sustainable re-use of secondary materials, subject to similar safeguards.
19. Although there is little dispute between the Appellant and the Council on such matters, there are a range of development plan and national planning policies on ecological, environmental, amenity, highway safety and other matters that are relevant to consideration of the proposal. However, as they are typical of such policies, I shall not describe them in detail here.

Case for Bersham (Glenside) Ltd

The material points are:

Consideration of Amended Scheme (Verbal submissions)

20. The Council has submitted that the amended scheme (where part of the tip would be retained to continue to provide a setting for the nearby former colliery buildings) should not be considered as part of the current appeal because suitable consultation with statutory bodies and local people has not been carried out. It refers to the judgement in *Wheatcroft v S of S for Environment, 1980 [PCR 43]* and to the requirements of the EC Directive on environmental assessment (Documents 12.2 & 12.3 respectively). However, there is no sound basis for the Council's submissions.
21. The Appellant developed its amended proposal to retain a small part of the tip in particular consultation with Cadw, and this was referred to in correspondence with the Welsh Assembly Government (WAG) as early as 24 November 2008 (see Document Bundle 16.3). The amendments to Chapter 3 of the Environmental Statement were submitted to WAG on 5 February 2009 (see Document Bundle 16.4) and were specifically referred to in the Council's letter of 30 April 2009 (Document 17) issued to the same 160 consultees as the original planning application. That letter was a follow-up to the letter of 24 April 2009 informing consultees of the appeal, the intended public inquiry and the procedure for submitting comments to the Planning Inspectorate. Those letters resulted in the submission of only 13 letters to the Planning Inspectorate, of which 11 were objections from local residents and the Community Council (see Document Bundle 24).

22. The matter was not considered again by the Council until its meeting on 1 June 2009 when the Chief Planning Officer recommended that the appeal not be defended. However, the Council chose not to consider the amended proposals at all and resolved, instead, to put forward the legal challenge.
23. The Council has been selective in its references to the *Wheatcroft* judgement. The judgement also acknowledges the powers available to the Secretary of State (in this case the Welsh Ministers) when considering an appeal, i.e. that the appeal may be dealt with as if the application had been made to the SoS/WAG in the first place and that conditions may be imposed on a grant of planning permission for regulating the development so far as it appears to be expedient. The key factor is whether or not the amendment and the application of an appropriate condition on it would make the scheme a substantially different proposal. The *Wheatcroft* judgement made reference to an earlier judgement, *Kent County Council v Secretary of State for the Environment, 1976 [PCR 70]*, which said there was power to modify the application provided that: "(a) the scope of the development was not enlarged; (b) the essential nature of the development was not altered; and (c) any persons affected were given a chance to make representations." All 3 of these tests are met.
24. The *Wheatcroft* judgement further went on to decide that the test for substantial difference should be firmly based on the broad principles of the well known *Associated Provincial Picture Houses v Wednesbury Corporation, 1948 [KB 223]* judgement. The amended proposal is entirely reasonable in this respect, and the Council's submission is hopeless.
25. Turning to the argument about the Environmental Impact Assessment Regulations (and Directive), there are 2 possible scenarios. The first is that the proposed amendment was submitted in response to WAG's letter of 18 August 2008, requesting additional environmental information under Regulation 19 of the EIA Regulations 1999. The amendments to Chapter 3 of the Environmental Statement (Landscape and Visual Issues) were a direct result of the amended scheme discussed with Cadw for retention of a small part of the tip. WAG's letter of 18 August 2008 made it clear that the further information sought was for the purposes of a public inquiry and so Regulations 19(3)-(9) of the 1999 Regulations do not apply (see Regulation 19(2)). Thus further publication of the amended Environmental Statement was not necessary, as the requirement for consultation is considered to be covered by the procedures for the public inquiry.
26. The second scenario is that the Appellant has quite separately amended the proposal. Even though it is considered that the Council's letters of 24 and 30 April 2009 (see above) provided adequate consultation and opportunity for interested people to participate in the decision-making process (as required by Article 6(4) of the EC Directive), the Appellant has taken the prudent decision to undertake formal advertisement of the amendments to the Environmental Statement. Accordingly, an advertisement was placed in the Wrexham Leader on 12 October 2009 (Document 18), which allows ample time for responses to be made and taken into account by the Welsh Ministers when making their decision on the appeal. Any letters received will be sent directly to WAG.

27. Notwithstanding this additional advertisement, it is considered that requirements for public consultation have already been adequately met and that no one has been deprived of that opportunity. Further, the amendment does not result in the scheme being substantially different from the original planning application, and it is entirely reasonable for it to be considered as part of the appeal proposals and be specified by condition if permission is granted.

Effects on Heritage Buildings and Structures (Documents 15.1, 15.2 & 16.1)

28. The Council's reason for refusing the application was that it would result in the removal of the last surviving example of a substantial "conical" tip in the Denbighshire Coalfield and would thus have a significant impact on the setting of the Bersham Colliery Headgear, a Scheduled Ancient Monument and a Listed (II*) Building, and the other Grade II former colliery buildings. It is not disputed that the tip would be removed or that it is of some importance as a heritage structure, having been an important part of the mining history of the area. However, the Council is attributing too much importance to it and not enough to the benefits that the scheme would bring.
29. Bersham Colliery began coal production in 1874 and at its peak in about 1954 employed over 1,000 workers. It closed in 1986, and the spoil tip represents waste material accumulated over a period of more than 100 years. Whilst the Council has tried to make a case that the tip itself is of such intrinsic value as to warrant retention, in fact it is not scheduled or listed at all.
30. Unitary Development Plan Policy EC16 (Document 8.2) casts light on the Council's recent intentions for the tip. It lists the tip as one of 14 sites to be reclaimed and restored for beneficial use (in this case, use for amenity purposes). The Council argues that this could be achieved without removing the material – in fact, by doing very little. However, the only reasonable reading of that policy is that it was the Council's intention that the material should be reclaimed. The Policy can be read along with Policy MW7 which permits the reworking of mineral waste for the purpose of mineral extraction. The UDP was adopted in February 2005, and it is reasonable to assume that the Council drafted Policy EC16 in full knowledge of the history of the tip. It now seeks to change its mind.
31. Since refusing the application the Council has employed a consultant archaeologist who has assessed the history and value of the tip. He argues that the tip is of national importance and is an ancient monument, albeit not one that is scheduled (Document 6.1). However, the Bersham tip is not unique, and there are a number of other significant colliery spoil banks within the former Denbighshire Coalfield, including those at Llay, Hafod, Brymbo, Plas Power and Vron collieries.
32. The tip's main value is as a setting for the main colliery buildings and structures, and this group value is recognised in LANDMAP, the Council's supplementary planning guidance (Document 8.2). It identifies "*Bersham Colliery, with its coal spoil tip and remaining headgear*" as of particularly high historic value, and its overall management strategy states: "*Preserve mining remains, especially winding house, headgear and tip at Bersham, maintain and repair*". Although the original scheme would have removed the whole of the spoil tip, the amended

scheme would retain a substantial part of it adjacent to the main colliery complex, and it would continue to contribute to the setting of that complex.

33. At that location the shaft headgear is a Scheduled Ancient Monument and Grade II* Listed Building and the winding gear engine house and baths/canteen/offices building are Grade II Listed Buildings (see paragraphs 5.6.1 and 5.6.21 of the Environmental Statement for photographs of the headgear and winding gear engine house – Document 16.1). More importance is attributed to their preservation and enhancement than to that of the tip itself.
34. At present the winding gear engine house is in poor condition; it is no longer weatherproof and will continue to deteriorate if remedial measures and refurbishment is not carried out in the near future. In the past that building was used as an informal museum and entertained school visits to familiarise the children with the mining heritage of the area. However, it is no longer safe to visit or capable of protecting exhibits from the weather. If planning permission were granted, the Appellant would make a substantial financial contribution to enable that building to be repaired and refurbished, thus safeguarding the integrity of the group of buildings/structures at the colliery site (see S106 Undertaking and Building Inspection Report at Documents 25.1 & 25.3). The Council has acknowledged that it would be unlikely to be able to carry out that work with its own resources in the foreseeable future, even though it is the owner of the building and thus has a statutory responsibility to maintain it.
35. Furthermore, the Appellant would also make a substantial financial contribution towards the establishment and operation of a mining museum either within the refurbished winding gear engine house or another building on the colliery site. Although a multitude of artefacts and memorabilia on the mining history of the area is known to exist in storage at various premises, there is no proper facility for their display, and there is widespread support for the establishment of such a museum. The Council's own Chief Leisure, Libraries and Culture Officer expressed support for this when responding to consultation at the time of the planning application (letter dated 10 July 2008) and even offered that, provided it was properly funded, the benefits of providing such a museum would be of sufficient heritage value as to outweigh the damage done by the removal of the tip.
36. Cadw and the Clwyd Powys Archaeological Trust (CPAT) are also of this view. Although both opposed the original application, Cadw has now expressed support for the amended scheme on the basis that part of the tip would be retained to continue to provide a setting for the former colliery headgear and associated buildings and that sufficient funding would be provided for conservation of the winding gear engine house and the creation of a museum. Cadw considers this to represent a reasonable compromise (see letters of 11 February 2009 and 19 May 2009 in Document Bundle 24). CPAT has expressed a similar view.
37. The Council has remarked that it cannot understand why Cadw has changed its view. However, inspection of Cadw's earlier comments shows that the retention of part of the tip has consistently featured in Cadw's suggestions for how the proposed development might be made more acceptable. For example, in its letter to the Council at the time of the original consultation (letter dated 28 March 2008 in Document Bundle 24) Cadw said "*We consider that the retention*

of part of the tip, if properly and professionally undertaken, could well assist in enhanced appreciation of the function and appearance of, and the processes undertaken within, the retained mine buildings and headgear". Clearly Cadw has been entirely consistent in its advice.

38. In conclusion, it is submitted that the preservation of the waste tip must be considered of secondary importance to the preservation of the Scheduled Ancient Monument and associated Listed Buildings at the former colliery site and the establishment of a museum to display the extensive coal mining collection that currently has no facility for display. On balance, the proposal would be consistent with the relevant development plan and national policies on heritage conservation and enhancement.

Effects on Matters Raised by Third Parties (Documents 15.1 & 16.1)

39. Whilst the only matter in dispute with the Council is the effects on archaeological remains and coal mining heritage, local residents have raised concerns on a range of other matters. Many of these have been addressed in the Environmental Statement (Document 16.1). An investigation of ecology and nature conservation was carried out and its conclusions were that: although there would be the loss of some habitat, it would not significantly affect any protected species; any loss would be temporary and would be mitigated by a restoration scheme that included a comprehensive planting and habitat creation strategy to retain and enhance the biodiversity of the site. This assessment has been reviewed recently in response to queries raised by the Welsh Assembly Government (see Document Bundle 16.3).
40. Risks associated with air pollution, particularly dust, and noise have also been assessed. Clearly the development would have the potential to generate airborne dust. However, a suite of measures would be implemented to control and minimise any dust, and these measures (such as the damping down of haul routes and working faces, the sheeting of vehicles, and wheel wash provision), could be ensured by appropriate planning conditions in the permission. Subject to these preventative measures, it is concluded that the overall impact on air quality would be low. Similar conclusions are reached in regard to noise. Surveys of the present noise levels were carried out and projections of noise from the proposed workings were modelled. With good working practices to prevent unnecessary noise, noise levels at the nearest sensitive receptors would be within acceptable national standards.
41. So far as the effects of traffic are concerned, several minor improvements would be carried out on Plas Grano Road (see plans in Chapter 6 of the Environmental Statement) and, subject to restriction of the number of vehicle movements (by means of planning condition), the Council's Highways Adviser has raised no objections. The length of Plas Grano Road affected already serves several industrial users, and the additional HGV traffic would not materially affect its character. There is potential for a useful benefit in improvement of the footway facility over the Glan-yr-afon Brook bridge, which at present is too narrow for wheelchair use. Once the railway sidings were constructed, road traffic levels would be expected to be significantly reduced, and a suitable planning condition could ensure the sidings were implemented within, say, the first 2 years.

42. On the question of scheme viability and the Company's financial reliability, several factors contribute to providing assurance on these matters. The Company has already invested some £½M on bringing forward this proposal and is confident in the value of the spoil materials and the viability of the scheme. Economics have changed significantly since the failed initiative (by another company) at Hafod tip some 10-20 years ago, and there is now a much better market for recycled aggregate materials. It is not possible to establish firm customers until planning permission provides some assurance that the development is to go ahead. Nevertheless, provisional expressions of interest have been received (see Documents 20.1 & 20.2).
43. With regard to liability in the event of accidents (e.g. combustion or pollution incidents), the Appellant already carries insurance for such risks (see Policy at Document 21), and a similar policy is being negotiated to cover the extraction operations if planning permission is granted. Suitable insurance policies were a condition of the Appellant's purchase of the land from British Coal. In addition, the Section 106 Undertaking makes provision for a financial bond, which would be sufficient to ensure stabilisation and restoration of the disturbed land in the unlikely event of the Appellant Company failing to complete the scheme. The Community Council's suggestion that provision be made for a £5M bond was based on several unreasonable assumptions, as acknowledged at the public inquiry. The much lesser sum provided for (£50,000) is perfectly adequate.

Benefits of Proposed Development (Document 15.1)

44. Several benefits would flow from the proposed development and they amount to a significant factor in the balance of considerations for granting planning permission. The main benefit is that reclamation of the site would support a sustainable approach to the re-use and recycling of substantial quantities of mineral waste, which is entirely in accordance with development plan (policies EC16 and MW7) and national policies to maximise the use of secondary materials in order to reduce reliance on virgin natural materials. Some 6 million tonnes of waste materials would be recycled (5¾ million tonnes in the amended scheme).
45. Policy MW7 also includes other relevant criteria, particularly the removal of significant hazards, and assimilation of the waste into the landscape. It is not disputed that removal of the tip would also remove several potential health and safety and environmental hazards, such as slope stability and pollution risks, though a major hazard nowadays is that the steep slopes of the tip are regularly used for unofficial motorbike scrambling, a dangerous activity that has resulted in several serious accidents in recent years. Furthermore, the tip has not been assimilated into the natural landscape, and can be seen from miles away as an unnatural feature. Removal would be beneficial in these matters.
46. The scheme would also contribute towards nature conservation and biodiversity by providing a supportive landscaped amenity area with potential for much greater ecological richness than the present poor quality habitat. The final amenity area would be a benefit to the local community, and the rail siding would also have potential to be a valuable planning gain and could be converted into a passenger facility.

47. The most important benefit so far as Cadw is concerned would be the financial contribution that would be made towards the refurbishment of the winding gear engine house, a Grade II Listed Building that is in poor condition and deteriorating due to weather ingress, and towards the establishment of a mining museum at the former colliery. Generous financial contributions towards these initiatives would be secured by means of a Section 106 Undertaking (Document 25.1). Whilst not sufficient to fully fund the museum, the contribution would be a substantial sum sufficient to seed the raising of additional money (e.g. through grant applications) and the motivation of other interested parties.
48. Despite the Council's apparent lack of interest, many parties see this to be a benefit of such importance as to, by itself, justify the loss of the tip. The setting up of the museum would make an important contribution towards appreciation of the extensive mining heritage of the area. In this respect the proposal would also support the aims of policies and legislation for preserving and enhancing the listed building. The Council acknowledges that, without the proposed scheme, there is not expected to be any funding available for repair of the winding gear engine house in the foreseeable future. However, it still prefers to resist the current proposal and "hope that something turns up" to enable it to meet its statutory duty to safeguard the Grade II Listed Building.
49. The Council has been entirely negative in discussions on the S106 Undertaking and merely reiterates its objection that the financial contribution offered would be insufficient, on its own, to fund the creation of a mining museum. The Appellant does not dispute that. However, it would be a substantial contribution (£380,000 in total) that would be likely to attract additional grant funding and provide the incentive for the Council and local volunteers to take the scheme forward. Without the Appellant's funding the chances of that occurring are negligible.

Overall Balance (Documents 13 & 15.1)

50. There is a clear balance in favour of granting planning permission for the proposed development. The extensive benefits have been explained above, and the only argument against it is in connection with the loss of the tip itself and its archaeological and heritage value. This cannot compare with the benefits of preserving and enhancing the Grade II Listed Building, which would be likely to continue to deteriorate rapidly if the appeal scheme does not go ahead. In this respect the proposal is supported by a wide range of development plan and national policies.
51. The clear balance in favour is well illustrated by the views expressed by many of the parties involved. The original application was recommended for approval by the Chief Planning Officer, even though it had been opposed by Cadw and the Clwyd Powys Archaeological Trust (CPAT); the Council Members disagreed. Clearly, the Chief Planning Officer gave considerable weight to the benefits of the scheme.
52. When the Appellant put forward an amended proposal to retain part of the tip in order to continue to provide a setting for the Scheduled Ancient Monument and Listed Buildings at the former colliery, both Cadw and CPAT supported the proposal because of the benefits to the Grade II Listed winding gear engine

house and the appreciation of local mining heritage resulting from the museum scheme. When the amended proposal was put to the Council's planning committee in June 2009, the Chief Planning Officer expressed the view that *"serious consideration should be given to not defending the appeal provided appropriate planning conditions are attached to any decision and a 106 legal obligation providing a financial contribution towards...."*. However, the Council resolved to seek a new application for the amended scheme and to make legal submissions against consideration of the amendment as part of the current appeal (Document 11).

53. The Council now relies heavily on the evidence of its archaeological expert witness, who was appointed after the Council's refusal of the application and whose terms of reference did not even include consideration of the benefits of the proposal. His conclusions did not take this into account at all. When all matters are taken into account it is considered there is a clear balance in favour of granting permission for the proposals, either with or without the amendment.

Case for Wrexham County Borough Council

The material points are:

Consideration of Amended Scheme (Document 12.1)

54. Since the Council refused the planning application and the subsequent appeal was made an amended scheme has been put forward, which allows for the retention of part of the tip. This scheme has not been considered by the Council, and it is submitted it would be inappropriate for the Welsh Ministers to take it into account in the appeal. Particular reference is made to the Queen's Bench Division judgement of *Wheatcroft Ltd v S of S for Environment, 1980 [PCR 43]* (Document 12.2).
55. The *Wheatcroft* judgement was in connection with the possible consideration of a proposal for 250 dwellings on 25 acres (10 hectares) of land as an alternative to the original proposal for 420 dwellings on 35 acres (14 hectares) of land. In that case both parties accepted that a planning permission could be limited by a suitable condition provided it did not alter the substance of the application and that, in considering whether it was right to grant permission subject to such a condition, it was necessary to have regard to the underlying purposes of the provisions in the 1971 Act for adequate consultation to take place and a proper opportunity for public comment and participation. The 1990 Act contains similar provisions. Where the amendment did alter the substance of the development for which the planning application had been made, it was concluded that such a limiting condition could not be legitimately imposed because there had been no opportunity for the necessary consultation.
56. The judgement continued by addressing the tests for substantial difference and concluded that *"the effect of a conditional planning permission should not allow development that is in substance not that which was applied for"* and that the judgement to be exercised is *"whether the development is so changed that to grant it would deprive those who should have been consulted on the changed development the opportunity of such consultation"*. The principle of consultation opportunities is directly relevant to the current appeal.

57. The shortcomings are exacerbated in this case because the proposed development is EIA development within the context of the European Council Directive (85/337/EEC) on environmental assessment (see Document 12.3). Article 6 of the Directive places particular emphasis on public consultation, and that is reflected in the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999. Paragraph 4 of Article 6 says "*the public concerned shall be given early and effective opportunity to participate in the environmental decision-making procedures*". It is not sufficient to argue (as the Appellant does) that notification of the amendment to some 160 people and last-minute advertisement in a newspaper is sufficient for such a significant amendment to the Environmental Statement.
58. The amount of material that it is now proposed to leave in place is a substantial amount ($\frac{1}{4}$ million tonnes), and the change was so significant that it led the statutory consultees on heritage matters to change their position. Cadw and the Clwyd Powys Archaeological Trust (CPAT) were consulted some time ago and received amended proposals for consideration. However, an amended Environmental Statement was not provided until very recently. Consequently, people have not had a proper opportunity to comment on the effects of the proposed amendment or on the revised views of Cadw and CPAT.
59. In conclusion, the amended scheme is substantially different from the original application scheme, the principles of the *Wheatcroft* judgement are applicable, these principles are enhanced by the requirements of the EIA Directive, and the requirements for properly structured public consultation have not been achieved. It would be inappropriate to bypass the proper process and to consider the amended scheme as part of the appeal. The proper procedure would be for a new application to be made to the Council.

Effects on Heritage Buildings and Structures (Documents 6.1, 8.1 & 12.1)

60. The Council recognises the potential benefits of the scheme but maintains that the harm caused by the removal of the historic tip would outweigh the benefits. The Appellant has submitted little evidence of its own on the archaeological importance of the spoil tip, whilst the Council has employed an expert archaeological consultant to make that assessment. He has researched the history of the Bersham Colliery and tip and, on the basis of that research and experience gained in carrying out a structured assessment of many spoil banks in South Wales (for the CCW), it is clear that substantial importance should be placed on the retention of the tip.
61. The Appellant's own Environmental Statement (Document 16.1) acknowledges: "*The tip is a major landmark and is one of the last remaining examples of a major coal tip in the Wrexham area....As such the mound provides an appropriate setting for the intact Bersham Colliery headgear and winding room house*". There is a close association between the headgear and the tip, both geographically and historically. The present engine house was constructed in 1933, and the steel lattice girder head frame was installed in 1935. The spoil tip grew rapidly over the next few decades and is itself of historical interest due to the range of different methods employed for its construction: the Solway aerial ropeway, a conveyor belt method, an inclined railway and latterly tipper lorries. These tipping methods have given the tip its distinctive conical shape.

62. Bersham Colliery tip has been referred to in several publications, reflecting its importance. Although a limited amount of material was removed in connection with construction of the adjacent A483 dual carriageway, the tip is substantially in its original form and is characteristic of its main period of construction, the intense and highly mechanised phase of Welsh coal mining in the 20th century. In the light of what is now known about its form and evolution, the tip is of national importance as the best surviving example of a large scale 20th century spoil bank in the North-East Wales coalfield. It is an important ancient monument even though it is not a Scheduled one.
63. The evolution of the tip is well documented, and it remains in substantially the same form as when the associated structures and buildings at the colliery site were scheduled and listed. Its integrity as a setting for those structures and buildings would be lost if most of it were removed, and it is not considered that its removal can be justified for any reason other than health and safety.
64. The tip has a strong visual relationship with the surrounding landscape, and its loss would be an unacceptable attrition of the historic landscape. The Erddig Estate, with Grade I listing for its grand formal gardens, is situated within this landscape about 2 km east of the appeal site. The tip is also an important memorial to the miners who laboured in the mine over many years, and even its substantial size is relevant in helping towards an appreciation of the scale of mining operations that are an important part of the heritage of the Wrexham area.
65. The Appellant has placed its faith in the latest comments from Cadw and the Clwyd Powys Archaeological Trust (CPAT), who both withdrew their original objections to the scheme when an amended proposal was put forward to retain part of the tip. However, they did not have the benefit of the results of the latest research carried out for the Council, which demonstrates the importance of the tip in its own right. Their views may have changed in the light of this new evidence.
66. Much was made at the public inquiry of the limited terms of reference of the Council's expert archaeological witness, who was not called upon to consider the wider balance of harm and benefits. However, the Council itself has given full consideration to these matters. The Appellant emphasises the possible benefits towards refurbishment of the winding gear engine house and the establishment of a mining museum. However, these have not been fully researched and should be treated with some reservations.
67. Although the building is not currently in a state that allows public access and the Council has no current provisions for its refurbishment, it should not be assumed that allowing the current appeal is the only way that refurbishment can be achieved. The Council spent £88,000 in the late 1990s on the repair and painting of the shaft headgear (see Document 10), which illustrates that it takes its responsibilities seriously for the maintenance of these importance historical assets. In addition, the Council has recently been successful in gaining funding for and implementing other museum projects, including major improvements currently in hand at the Wrexham Museum. This similarly illustrates that allowing the current appeal is not the only means by which a mining museum may be re-established at the former Bersham Colliery.

68. It is also important to appreciate that the Appellant's financial contributions would fall far short of the level of funding needed to adapt and improve the building and for the interpretive and display equipment and facilities needed to establish a mining museum. The Council's estimate for this work is £¾M - £1M, and the Council remains concerned about both the reliability of the contributions and their adequacy (see comments on the S106 Undertaking in Document 26). Cadw's original objection was withdrawn on the understanding that the Appellant would provide funding sufficient for conservation of the colliery winding gear house and the creation of a colliery museum (letter of 11 February 2009 in Document Bundle 24). The S106 Undertaking would fall well short of achieving this.
69. In conclusion, it is maintained that the spoil tip is of such importance that it should be retained in its current form, regardless of other possible benefits to the coal mining heritage of the area.

Effects on Other Matters

70. The Council takes no issue with any other matters. It is satisfied that suitable planning conditions would provide sufficient control to ensure that all other matters would be acceptable. This is explained in the original committee report and reflected in the fact that the only reason for refusal related to loss of the tip and its effect on the setting of the Scheduled Ancient Monument and Listed Buildings at the adjacent former colliery site.
71. However, the Council is concerned on a related matter – the risk of the Appellant company failing to complete the removal of all of the permitted materials, for whatever reason. The Appellant's provisions for a £50,000 bond would not be sufficient to fund necessary landscaping works needed should the scheme be abandoned part way through.

Benefits of Proposed Development (Document 8.1 & 12.1)

72. The Council does not take issue with most of the benefits claimed by the Appellant. However, it does disagree with the weight to be attributed to the repair and refurbishment of the winding gear engine house. It is not a fair representation to argue, as the Appellant does, that the only way to achieve this work is to grant permission for the current proposal. The Council is well aware of its responsibilities for maintaining these important heritage assets, as is illustrated by the fact that it spent £88,000 in the late 1990s to make structurally sound and paint the shaft headgear (see Document 10). It has also been successful recently in gaining substantial grant funding for other museum projects, particularly in Wrexham.
73. Despite the Appellant's interpretation of UDP Policy EC16 (Document 8.2), it is not part of the development plan that the restoration of the Bersham Bank tip should be achieved by its removal. The high value placed on the retention of the tip further confirms this and leads to a different balance of the appeal considerations.

Overall Balance (Documents 8.1 & 12.1)

74. Both the development plan and national policies provide strong support for the retention of significant parts of Wales' industrial heritage. Both main parties acknowledge that the tip is an important part of that heritage but the Council is of the view that it is of outstanding importance. It is a memorial to the many poor and hardworking men who toiled in the mining industry in North-East Wales, and that is as important as a memorial statue to the rich and famous. National policy acknowledges that not all important ancient monuments are scheduled, and the tip is such a case.
75. The Council maintains that the high heritage value of the tip itself is a very strong argument in support of refusing the proposal. It also gives less weight to the Appellant's argument that granting planning permission is the only way that the benefits claimed for repair and refurbishment of the winding gear engine house and the creation of a mining museum at the former colliery can be achieved.
76. For these reasons it is considered the appeal should be dismissed.

Third Party Representations

77. Written representations have been submitted by 11 local residents or their representatives, and 5 people presented evidence at the public inquiry. The written representations were all opposed to the proposal. At the inquiry Cllr Pritchard, Mrs Gosmore and Mr Drew spoke against it, whilst Cllr Wynn and Mr Allmand spoke in support. The material points are:

Opposition to the Proposals (Document bundle 24)

78. The spoil tip is a much-loved local landmark that does much to define Rhostyllen itself and is a lasting monument to the mining heritage of the area. Trees and plants have become well established on much of the bank, and the tip is now a haven for wildlife and contributes towards improving wildlife provision in the locality. The Environmental Statement is based on ecological surveys carried out in 2005, which are now out of date.
79. Removal of the material would be a major operation, which would be likely to generate noise, dust and air pollution to the detriment of nearby occupants. Planning permissions have recently been granted for some 300 houses on land just to the north and east of the site, and those properties would be seriously affected, as would nearby businesses and existing residents. The occupants of Plas Grano Farm are particularly concerned about possible noise from the rail sidings. In addition, there is concern about the risk of combustion arising as the tipped materials are disturbed. There have been several incidents of combustion within the tip over the past few years, and the disturbance would be likely to cause re-ignition of the unburned shale material within the tip.
80. Local residents have little confidence that the promised rail sidings would be constructed and used. Transportation by road would cause a substantial increase in HGV traffic in the area, particularly along Plas Grano Road, which is narrow and winding and includes a narrow bridge over the Glan-yr-afon Brook where lorries would have to give way to oncoming traffic (see photographs at

Document 23). Sight distances along parts of the road are poor, including on the approach to the bridge from the direction of the site, and the substantial increase in HGV traffic levels would give rise to increased risks to highway safety. There are also concerns about the capacity of the bridge to withstand the weight of the laden lorries as it already shows signs of cracking and inadequate strength (see photographs at Document 23).

81. There are various concerns about the viability of the scheme and safeguards should the Appellant Company fail whilst the scheme was only partially complete. Firstly, the Company has no assured markets for the tip materials, and mention of possible markets in the past has proved to be unfounded. Should the scheme be abandoned part way through, the public authorities would incur substantial costs in completing it and carrying out the restoration of the site. Some 10-20 years ago a similar scheme for the reclamation and restoration of the nearby Hafod tip was abandoned, and the local authority incurred costs of about £1M to put the site in an acceptable form.
82. To guard against this it is suggested that a bond of about £5M should be required (made up of estimates of £2M for the rail sidings, £1M for site restoration, over £1M for the museum, and additional sums to cover liabilities for accidents, such as combustion or pollution). It should be noted that several discussions have been held with the Appellant Company over the past few years, and no assurances along these lines have ever been offered.

Support for the Proposals (Document 22)

83. Many local residents, including many former mining employees, would be keen to see a properly resourced museum set up to commemorate the area's mining heritage. There is a wealth of memorabilia available just waiting to be collected together and used. There is also an untapped enthusiasm for driving forward such a scheme. In the past it was recognised that a Trust involving a group of volunteers would be needed to see a museum become a reality but little actually happened. However, there has been a resurgence of interest in the past few months (due to the 75th anniversary of the disaster at the nearby Gresford Pit, where 266 miners lost their lives).
84. Whilst there is much to be said in favour of retaining the tip, there is a widespread view that it would be worthwhile sacrificing it if doing so would lead to the setting up of the museum. Cadw has also come to this view, provided also that part of the tip were left as a setting for the scheduled and listed buildings and structures at the colliery complex. Much would depend on the financial commitment made towards the museum by the Appellant Company. A Trust could be a driving force behind the museum and, as has happened at the main Wrexham Museum, could be an important factor in gaining additional funding. Provided the Appellant's financial support achieved a reasonable likelihood of the museum project going ahead, then many local people would accept the loss of the tip (or most of it) and support the current appeal.

Conditions and S106 Undertaking

85. At the inquiry a discussion was held into possible conditions it might be appropriate to attach should the Welsh Ministers be minded to grant planning permission. The conditions included in the Council's original committee report

(reproduced in Document 3.3) were used as the basis for the discussion along with comments in the Appellant's draft "Statement of Common Ground" and the Council's response to that (Documents 3.1 & 3.2). In the paragraphs below reference is made to the numbers of those draft conditions.

86. It was agreed that Conditions 1 and 2 would be needed to define the start and end of the works on site, though Condition 2 needs to be reworded to improve its clarity. Conditions 3 and 4 would be needed to ensure an adequate level of highway safety on Plas Grono Road and reflect the improvements already indicated on plans F06037/01A and F06037/04 in Chapter 6 of the Environmental Statement (Document 16.1). For the same reason improvements would be needed to the Glan-yr-afon footbridge (Condition 35). Conditions 5 and 6 make provision for the sheeting of lorries and wheel wash facilities as part of a wider scheme for dust control and monitoring covered by conditions 18 and 19, and it was agreed that, subject to some improvement, these conditions would be necessary. Draft Condition 20 would largely duplicate these controls and is unnecessary.
87. There is some confusion in the draft conditions about various types of working and management schemes to be approved and followed, and it was agreed these could be simplified. An approved Working Plan would cover: the methodology of working; the phasing programme; contamination, combustion and stability matters; and haul roads (draft Conditions 7, 9, 13, 14, part of 32, and 45). An approved Landscape Plan would cover the after-use layout details, including amenity and nature conservation, and tree planting (draft conditions 27, 29, 30 and 43) and would be supplemented by conditions to control premature completion of the restoration works and aftercare management (draft Conditions 31 and 44). An Arboriculture Method Statement would safeguard trees, as necessary, during the works (draft Conditions 16, 41 and 42). A scheme to assess and deal with risks associated with land contamination would also be needed, though draft Conditions 10 and 11 would need to be reworded.
88. It was agreed a raft of conditions would be needed to safeguard railway interests, though some need amendment or may be deleted due to overlap with other conditions (draft Conditions 24-27). A scheme of provisions for restricting levels of noise and for noise monitoring would be needed (draft Conditions 8, 32, 33, 36, and 37). Another condition would cover procedures for responding to complaints about noise or dust (draft Condition 21), and hours of work would be regulated for amenity purposes (Condition 17). Suitable arrangements would need to be made for drainage associated with the temporary buildings and central compound (draft Condition 12). In addition, a condition would be needed to avoid the import of contaminated materials in case materials were needed, e.g. for haul roads (draft Condition 15).
89. One of the main means of minimising risks to highway safety and amenity would be by the implementation of the rail sidings, and a form of condition was agreed to ensure their early provision, supported by conditions to limit the number of lorry movements and to keep records of materials deliveries (draft Conditions 22, 39 and 40). Conditions for a further ecological survey and for a photographic record of the tip would also be worthwhile contributions towards safeguarding these important matters (draft Conditions 34 and 38). Finally, draft Conditions 14, 20, 23 and 37 are considered to be unnecessary.

90. Turning to the Section 106 Undertaking (Document 25.1), the Appellant has committed to paying substantial sums of money to benefit the repair and refurbishment of the winding gear engine house and the setting up of a mining museum in the event that planning permission is granted and the scheme goes ahead. The provision comprises:

- Funding (included in total below) for immediate temporary works to make the winding gear engine house weather tight;
- £10,000 for an initial regeneration study, which will examine the feasibility of upgrading the winding gear engine house to create a museum or the need for and design of a new associated building for the museum and the availability of grant funding;
- £300,000 regeneration sum (in 3 phases) to fund the immediate temporary works above and the works recommended by the regeneration study;
- £10,000 per annum for 5 years towards the cost of providing a curator for the museum;
- £20,000 contribution towards the costs of providing the necessary services to the museum.

91. The Section 106 Undertaking also makes provision for a £50,000 bond to cover the costs of any safety or temporary restoration works needed in the event that the planning permission was not fully implemented, e.g. if the Appellant company were to cease to trade for any reason.

Conclusions

[The numbers in square brackets indicate the relevant paragraphs of the report.]

Consideration of Amended Scheme

92. It is first necessary to consider whether the Welsh Ministers have the powers to consider the amended scheme put forward by the Appellant as part of the appeal. The amendment comprises the retention of part of the tip to provide a setting for the former colliery buildings and structures. In arguing that a new application should be made to the Council for the amended scheme, the Council has made reference to previous legal judgements, particularly that of *Wheatcroft v S of S for Environment, 1980 [PCR 43]*, and to the EC Directive requirements for advertisement of Environmental Statements. [5, 20, 54]
93. I do not consider the *Wheatcroft* judgement supports the Council's case. It clearly establishes that the scope of a development may be varied at the appeal stage provided it is not enlarged or substantially different from the original application and that anyone who may be affected is given an opportunity to make representations. In this case the proposed amendment would reduce the amount of development and would not substantially change the nature of the development. Changing a scheme for the removal of 6 million tonnes of material to one for 5¾ million tonnes is not a substantial change. Whilst ¼ million tonnes may be seen to be a substantial amount of material, in the context of the scale of these operations it is not. [7, 10, 23, 24, 27, 55, 56]
94. The Council also submits that the amendment is significant because it has caused Cadw and the Clwyd Powys Archaeological Trust (CPAT) to change their positions from opposition to the scheme to support for it. In that respect, the amendment is certainly "significant", as it has changed the balance of factors considered important by Cadw and CPAT. However, that is not the same as a scheme that is "substantially" changed. My conclusion is that the essential nature of the scheme has not changed. [23, 58]
95. The second question is whether or not interested parties have been adequately consulted and been given an opportunity to make representations, particularly bearing in mind the important provisions for public participation contained within the EC Directive on the environmental assessment of certain public and private projects (85/337/EEC). Article 6(4) of the Directive says that "*The public concerned shall be given early and effective opportunities to participate in the environmental decision-making procedures*", and the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 prescribe procedures for the advertisement of Environmental Statements and further information provided in support of them, which I take to include limited modification of the proposals, as has occurred in this case. [25, 26, 56, 57]
96. It is not disputed that the proposed amendment to the scheme was put forward at least 8-9 months ago and that the Council notified some 160 consultees and local residents in April 2009 (the same as notified of the original application) that the amended scheme would be considered at the public inquiry and that representations on the amendment could be submitted to the Planning Inspectorate. I consider that to be perfectly adequate provision to meet the aims

and requirement for public consultation and for giving an early and effective opportunity for public participation. That is illustrated by the fact that 13 letters were subsequently submitted to the Planning Inspectorate and 5 local residents or their representatives gave evidence at the public inquiry. [21, 27, 57, 58]

97. The EC Directive does not prescribe detailed procedures for consultation, and there can be no doubt that the aims of the Directive have been satisfactorily met by the procedures described above. It is the 1999 Regulations that prescribe specific procedures for advertisement of environmental information, and it is arguable that those have already been adequately met in respect of the amended proposal, with or without the additional advertisement recently carried out by the Appellant. However, if there were any doubt, then the recent formal advertisement of the amended proposal would allay any concerns. The Welsh Ministers will be able to take into account any resulting representations in making the appeal decision. [25, 26, 57]
98. My conclusion as a whole is that the proposed amendment to the scheme would not enlarge or change the nature of the development for which permission has been applied and that adequate provisions have been made to consult interested people and to give them an opportunity to make representations on both the original scheme and the proposed amendment. Accordingly, I conclude that it is within the powers of the Welsh Ministers to consider both the original scheme to remove all of the tipped material and the amended proposal to retain part of it. [23, 24, 59]

Main Considerations

99. In my view the main considerations in this appeal are: firstly, whether the loss of the bulk of the tip and the harm caused to the setting of the scheduled ancient monument and listed buildings at the former colliery would be outweighed by the benefits of the scheme, in particular the financial support to enable the Grade II Listed winding gear engine house to be repaired and refurbished and for the promotion of a mining museum and the sustainability benefits of beneficial use of the waste materials; and secondly, the effects of the scheme on the health, safety and amenity of nearby residents and road users.

Effect on Setting of Scheduled Ancient Monument and Listed Buildings

100. It is not disputed that loss of the tip would harm the setting of the adjacent Bersham Colliery headgear and buildings. The headgear is a Scheduled Ancient Monument and Grade II* Listed Building, the winding gear engine house is a Grade II Listed Building and the baths/canteen/offices building is also a Grade II Listed Building. In this respect the proposal to entirely remove the tip would be contrary to development plan and national policy. [17, 28, 32, 63]
101. In response to objections in this regard by Cadw and the Clwyd Powys Archaeological Trust (CPAT) the Appellant has put forward an amended scheme to retain part of the tip next to those buildings and structures. This would continue to provide a suitable setting for general appreciation of the mining heritage features, albeit that the tip itself would be much smaller and not in its original scale and form. Cadw (and CPAT) have considered this to be an acceptable compromise, taking into account the benefits offered by the scheme. [32, 37, 63, 65]

102. I value the advice provided by Cadw and CPAT and conclude that, whilst the partially retained tip would not provide a setting that is entirely original, it would continue to provide a form of setting that would allow Bersham Colliery's mining heritage to be substantially appreciated. Whilst not fully in accordance with policies to preserve the setting of listed buildings (e.g. UDP Policy EC11 and PPW paragraph 6.5.1), I consider the policy conflict of the amended scheme in this regard to be significantly less than that of the original proposal. [16, 17, 33, 36, 38, 65]
103. The Council has also referred to the tip's visual relationship with the wider landscape, including the presence of other listed buildings in the vicinity and particularly the Erddig estate. I consider the latter to be sufficiently far away that any effects on its setting would be negligible. In assessing the wider visual effects, one must also remember that most of the tip has been deposited during the 20th Century and appears as an alien feature in the original landscape of relatively flat agricultural land. In this respect its removal might be seen to improve rather than detract from the older historic landscape. [14, 64]

Importance of Loss of Tip Itself

104. The Council maintains that the tip has an intrinsic historic value on its own account, and it is not disputed that it is one of the last remaining tips of its type in the former North-East Wales coalfield. Unlike the headgear and buildings on the main colliery site, the tip is not a Scheduled Ancient Monument or a Listed Building, though the Council argues it should be considered to be an unlisted ancient monument. It puts forward 2 arguments for this: firstly, the fact that its shape and form reflects its history and the various methods used over the years to deposit waste materials on it; and secondly, that its scale and mass give even a casual observer a clear appreciation of the substantial scale of the area's mining history and of the underground operations carried out by thousands of miners over a period of many years. [29, 31, 60-62, 78]
105. These are important considerations, and I am aware that national policy requires decision makers to take into account ancient monuments and buildings whether they are scheduled/listed or not. Removal of the tip would without doubt involve the loss of an important historic feature of the former mining industry, and that is a matter to be balanced against the benefits of the scheme. However, the support provided by the relevant development plan policies is also noteworthy. UDP Policy EC16 identifies the tip as one of several sites to be reclaimed and restored for beneficial reuse, and Policy MW7 supports the reworking of mineral waste for mineral extraction. I do not share the Council's interpretation of Policy EC16 that reclamation and restoration of the tip need not involve the removal of the material; I consider removal was clearly the Council's intention when that policy was adopted in 2005. [18, 30, 73]

Effects on Health, Safety and Amenities

106. Although not an issue between the Council and the Appellant, local residents and their representatives have raised concerns about a number of other matters that could potentially have an important bearing on the acceptability of the appeal proposals. Firstly, mention has been made of the presence of wildlife on the tip and the need to avoid ecological harm. However, several surveys have

been carried out by the Appellant (and reported in the Environmental Statement) and no significant species or habitats have been identified. These have been reviewed recently and would be the subject of further surveys should the scheme go ahead, and there is nothing to indicate any unacceptable impact that could not be satisfactorily mitigated. [39, 70, 78, 87]

107. With the proposal to excavate such a large quantity of material, the potential for noise, dust and air pollution is an inevitable concern. However, again these are satisfactorily addressed in the Environmental Statement, and I have no doubts that they could be adequately controlled to avoid unacceptable risks to health and safety and harm to the amenity of nearby residents. Many effective techniques and procedures are standard practice in modern mineral extraction operations, and I consider these matters could be acceptably addressed by suitable planning conditions to ensure appropriate state of the art techniques and procedures were adopted. [40, 79, 86, 88]
108. Turning to transport of the material from the site, the proposal would rely solely on road haulage for the first 2 years, though the number of HGV movements could be limited by condition. Conditions are also proposed to ensure safe access on to Plas Grano Road and some modest improvements to that road. Existing commercial enterprises already give rise to HGV movements along the road concerned; if the appeal proposal were to proceed, the number of HGV movements would be considerably increased. However, provided numbers were limited by the suggested condition, I consider the effects on highway safety would not be significant. [12, 41, 80, 86, 89]
109. Particular concern has been expressed about the width and strength of the bridge over the Glan-yr-afon Brook. My attention has been drawn to cracks in the sides of the bridge. However, these are only in the mortar between the bricks and give no indication of deformation or structural problems. Furthermore, the Council's highways officers have raised no concerns about the structural adequacy of the bridge, and I have no reason to doubt its capabilities. So far as width is concerned, it is likely that the drivers of HGVs would avoid passing one another on the bridge but, provided suitable signs were provided (as proposed), I do not consider that would raise any unacceptable risk to safety. It would be proposed to widen the footbridge at the side of the road bridge as it is inadequate at present. That would be a positive benefit to safety. [41, 80, 86]
110. Doubts have also been expressed about the likelihood of the rail sidings being constructed and used, the possibility of the developer failing to complete the scheme and the risks of combustion and other accidents occurring. Installation of the rail sidings within the first 2 years could be ensured by use of a suitable condition and, although it would be impractical to enforce their use, once that substantial investment had been committed the financial advantages of rail haulage would provide a significant incentive towards maximisation of its use. [11, 41, 80, 89]
111. The tip has a history of combustion within its body, and clearly there would be a risk of accidents occurring when the material was disturbed. However, the Appellant would carry appropriate insurance against such events, and I do not consider that would put the viability of the scheme at risk. Furthermore, I have no reason to doubt there would be a market for the materials extracted. The

Government' sustainability incentives favour the recycling of secondary aggregate materials, and I attribute no significance at all to the fact that firm markets have not yet been arranged. [42, 43, 79, 81]

112. Finally, there is the possibility that the Company may fail to complete the restoration of the site (for example, if it were to go into liquidation), and a financial bond would be needed in the usual way to safeguard against this possibility. The bond would need to be sufficient to ensure the remaining part of the tip could be made safe and suitably landscaped without incurring public expense. The Community Council has suggested this should be set at some £5M, though at the inquiry it acknowledged this to be somewhat excessive. The Appellant's Section 106 Undertaking makes provision in the sum of £50,000, which I consider to be somewhat light, though not excessively so. [43, 71, 81, 82, 91]
113. In conclusion, I consider all of the other health, safety and amenity factors raised by third parties could be adequately safeguarded by the use of suitable planning conditions, by provisions in the Section 106 Undertaking or by prudent, standard commercial practice.

Benefits of Scheme

114. As it is not disputed that removal of the tip would cause harm to matters of historic and cultural importance, the key consideration is whether or not this would be outweighed by benefits. Those benefits are of 2 kinds: benefits towards safeguarding and appreciating the heritage features; and wider more general benefits. [72]
115. Firstly, I have concluded above that the amended scheme would retain part of the tip and provide an appropriate setting for the headgear, winding gear engine house and other buildings at the adjacent former colliery site. This is an important benefit in comparison with the original scheme to remove the whole tip and was the factor that, in Cadw's view, tipped the scales in favour of granting planning permission. I also consider the amendment necessary to balance the factors against granting planning permission. [32, 36, 68]
116. The Section 106 Undertaking makes provision for a substantial financial contribution (of some £380,000 in total) to enable the winding gear engine house to be repaired to prevent further deterioration due to weather ingress, to partially fund further refurbishment and possibly construction of an additional building to enable a mining museum to be set up, and to partially fund the first 5 years operation of the museum. Whilst this would only go part way towards the total funds needed for such a project, it would provide an important seed that could form the basis for applications for further funding and the motivation to see the project come to fruition. [13, 34, 47, 49, 66, 68, 90]
117. Although these aims could perhaps be achieved by other means, it is acknowledged that there is little prospect of the necessary funds being made available in the foreseeable future without the appeal proposal. The winding gear engine house is in poor condition and is deteriorating rapidly. Immediate funds from the Appellant would secure the building and meet the minimum policy requirement of preserving this Grade II Listed Building. This would be an important benefit. [34, 48, 67, 72]

118. The further funding towards the creation of a mining museum (either within the refurbished winding gear engine house, a new building or a combination of the two) would allow extensive local mining memorabilia and artefacts to be recovered from storage and presented for public appreciation. It is reported that in the past visits for groups of school children were organised to the shaft headgear and winding gear engine house, which at that time contained displays of mining memorabilia. The creation of a new museum would allow that to be resumed, and it is submitted that it would be the best way of explaining to the wider public the significance of the coal mining industry in the history and culture of the Wrexham area. [35, 47, 83, 84]
119. All parties support this aspiration, including Cadw. However, the Council considers the funding offered by the Appellant to fall far short of that required to bring it to fruition. That is undoubtedly true. However, it is clear that there is much support for the project amongst local people and that, if the project could be seeded, a trust would be likely to be set up to drive it forward. It is difficult to judge how successful this might be, particularly as implementation would to a large extent rest with the Council, which has reservations about its viability. However, without the funding offered by the Appellant, the chances of a museum being created in the foreseeable future are remote. With the funding there is a distinct possibility of success. In my view, that would be a worthwhile and valuable benefit. [35, 48, 49, 67, 68, 83, 84]
120. Turning to the wider benefits, the re-use and recycling of some 5¾ million tonnes (in the amended scheme) of mineral waste for beneficial use would be a valuable benefit, supported by development plan and national policies for sustainability. They promote the maximisation of use of secondary materials in order to reduce reliance on virgin natural minerals. [44]
121. There would also be benefits in terms of health and safety and environmental hazards, such as slope stability and pollution, the provision of an amenity area for use by local people and providing improved natural habitats, and the provision of rail sidings with potential for wider use in the future. [9, 45, 46]

Overall Conclusions

122. I have taken into account the special regard to be given to the desirability of preserving the setting of listed buildings and all other matters raised, including the Environmental Statement and the additional environmental information provided in response to the Welsh Assembly Government's requests. I am satisfied that all health, safety and amenity impacts could be satisfactorily managed and their acceptability ensured by suitable planning conditions. The remaining key consideration is the balance between harm to historic and cultural features and the benefits of the proposal. [4]
123. My conclusion in respect of the un-amended original scheme (i.e. complete removal of the tip) is that the harm to the setting of the Scheduled Ancient Monument and Listed Buildings would be so severe as to be unacceptable, and that harm would not be outweighed by other benefits. [51]
124. However, my conclusion for the amended scheme is that the benefits would substantially outweigh the harm. Harm would be caused by the loss of the tip itself, which is an important heritage feature both as a setting for the main

colliery buildings and structures and in its own right. The harm to the setting would be substantially offset by the amended scheme and, although it would not preserve it, for that scheme I do not consider the harm to the setting would be unacceptable. Although not a scheduled ancient monument, the loss of the tip in its own right would amount to substantial harm to this heritage feature, albeit one that is not formally designated. [50, 52, 74]

125. On the other hand, I consider the benefit of repair of the Grade II listed winding gear engine house to be of considerable weight, the real possibility of setting up a mining museum at the colliery site to be of considerable value (even though its achievement would not be assured), the sustainability benefits of the re-use of the waste materials to be of considerable weight, and the other benefits to provide additional support. These would substantially outweigh the harm caused by the proposed development, and on balance it would be in accord with development plan and national policy. I conclude that the appeal in respect of the amended scheme should be allowed. [52, 53, 69, 72, 75]
126. I have considered the need for conditions to be attached to the permission, on the basis of the discussion held at the public inquiry, and I have simplified and improved several of the draft conditions put forward by the parties. I attach an Annex of conditions that I consider pass the tests prescribed in Circular 35/95, The Use of Conditions in Planning Permissions. [85-89]

Recommendation

127. I recommend that the appeal be allowed and planning permission be granted for the reclamation of colliery spoil together with associated works, including the siting of temporary structures and the installation of rail freight sidings at Bersham Bank Colliery Tip, Plas Grono Road, Rhostyllen, Wrexham, LL14 4EG, in accordance with the application ref. P/2008/0266, dated 28 February 2008, as amended by letter dated 5 February 2009 to the Welsh Assembly Government for retention of part of the tip (approximately ¼ million tonnes material) adjacent to the headgear and winding gear engine house complex, subject to the conditions detailed in the attached Annex.

Clive Nield

Inspector

APPEARANCES

FOR THE LOCAL PLANNING AUTHORITY:

Mr Richard Kimblin of Counsel Instructed by Mr Aled Rowlands, Solicitor,
Wrexham CBC.

He called:

Dr David Gwyn, Consultant Archaeologist.
MA(Cantab), PhD,
FSAL, MIFA

Mr Robert Dewey, Planning Control Manager, Wrexham CBC.
BA(Hon), MBA,
MRTPI

FOR THE APPELLANT:

Mr Jeremy Cahill QC Instructed by Mr Jerry Sheedy, Eversheds LLP,
Birmingham.

He called:

Mr Michael Killett, BEng Technical Director, Bersham (Glenside) Limited.

INTERESTED PERSONS:

Cllr Phil Wynn	County Councillor, Wrexham.
Cllr Mark Pritchard	Ward County Councillor, Rhostyllen.
Mrs Sally Gosmore	Local resident, close to site.
Mr John Drew	Chairman, Esclusham Community Council.
Mr Martin Allmand	Local resident, Gwersyllt.

DOCUMENTS

1.1-1.2	Letters of Notification and lists of persons notified.
2	Agreed List of Application Plans.
3.1-3.3	Appellant's draft "Statement of Common Ground"; Council's Response; and set of draft conditions.

COUNCIL'S EVIDENCE

- 4 Opening Statement on behalf of the Council.
- 5 List of Appearances on behalf of the Council.
- 6.1-6.2 Dr Gwyn's Statement of Evidence and Appendices.
- 7 WAG/CADW publication "Heritage Minister's Ambition for the Welsh Historic Environment.
- 8.1-8.2 Mr Dewey's Statement of Evidence and Appendices.
- 9 Extract from Environmental Statement for Castle Cement's Llay Tip scheme.
- 10 8 October 2009 Email from Hazel Hawarden, Council's Heritage Officer, to planning officer.
- 11 Paper & Minutes for Planning Committee Meeting on 1 June 2009.
- 12.1-12.3 Closing Submission on behalf of the Council, with copies of Wheatcroft judgement and EC Directive 85/337/EEC on environmental assessment.

APPELLANT'S EVIDENCE

- 13 Opening Statement on behalf of the Appellant.
- 14 Details of Appellant's Witness, Mr Killett.
- 15.1-15.2 Mr Killett's Statement of Evidence and Summary.
- 16.1-16.4 Environmental Statement, Volumes 1 & 2; bundle of responses to Regulation 19 request for additional environmental information; and bundle of amendments to Environmental Statement w.r.t. revised scheme to retain part of mound.
- 17 Copy of Council's letter of 30 April 2009 notifying consultees of revised proposal.
- 18 Newspaper advertisement (12 Oct 2009) of revisions to Environmental Statement w.r.t. proposal to retain part of mound adjacent to the colliery head-frame etc.
- 19.1-19.2 First & Second Drafts of S106 Undertaking.
- 20.1-20.2 Letters expressing interest in use of the tip materials.
- 21 Appellant's Pollution Legal Liability Insurance Policy.

THIRD PARTY EVIDENCE

- 22 Cllr Wynn's Email offering conditional support for scheme.
- 23 Mr Drew's photographs of Plas Grano Road and bridge.
- 24 Bundle of third party letters to the Planning Inspectorate.

SUBMISSIONS AFTER CLOSE OF INQUIRY

- 25.1-25.5 Final version of S106 Undertaking, with accompanying submissions: covering letters; survey of winding gear engine house; correspondence between Appellant and Council; and Land Registry View.
- 26 Council's comments on final version of S106 Undertaking.

PLANS SUBMITTED WITH APPEAL

- A Site Location Plan (Figure 1.1 in Environmental Statement).
- B Proposed Site Access Layout.
- C Proposed Phases & Site Access and Facilities, BGL-001A (Completion phase subsequently amended).
- D Commencement of Phase 1 Plan and Profiles, BGL-002A.
- E Commencement of Phase 2 Plan and Profiles, BGL-003A.
- F Landscape Masterplan, 2852/01 Rev 01 (subsequently amended).
- G Landscape Sections, 2852/03 Rev 01 (subsequently amended).

ANNEX of Recommended Conditions

1. The development hereby permitted shall commence not later than the expiration of 5 years from the date of this permission. Written notification of the date of commencement (defined as any operations associated with the engineering of the site for reclamation) shall be given to the Minerals Planning Authority within 7 days of such commencement.
2. The development hereby permitted shall cease not later than 9 years from the date of commencement of the development hereby permitted unless otherwise previously approved in writing by the Minerals Planning Authority, and the site shall be restored in accordance with the approved Landscape Master Plan or any variations approved in advance by the Minerals Planning Authority.
3. Notwithstanding the approved plans and documentation full details of the proposed site access shall be submitted in writing for the further approval of the Minerals Planning Authority. The access as approved shall be implemented prior to the first use of the site hereby approved and retained thereafter for the duration of the reclamation works.
4. Notwithstanding the approved plans and documentation, full details of a scheme of highway improvements along the link between Glan-yr-afon Bridge and the proposed site access shall be submitted in writing for the further approval of the Minerals Planning Authority. Details shall include road widening at the southern bend in the carriageway, road markings between the proposed site access and Glan-yr-afon Bridge, clearance of foliage to improve forward visibility at the northbound approach to the bridge and advance warning signage either side of Glan-yr-afon Bridge. The works as approved shall be provided prior to the first use of the site hereby approved and maintained thereafter.
5. No works shall commence until details of a widened footway over the river at the Glan-yr-afon Bridge have been submitted to and approved in writing by the Minerals Planning Authority. The works shall be completed prior to any material being taken off the development, unless otherwise approved by the Minerals Planning Authority.
6. Prior to commencement of development a detailed Working Plan shall be submitted to and approved in writing by the Minerals Planning Authority. This shall include detailed consideration of working phases and methods which will maximise the retention of peripheral mounds and vegetation to mitigate noise and visual disturbance of the site clearance works, contamination, combustion and stability issues and provision of periodic reviews of working procedures. The works shall be carried out strictly in accordance with the approved Working Plan unless otherwise approved in writing by the Minerals Planning Authority.
7. Prior to commencement of the various stages of the development hereby approved, a detailed scheme to deal with the risks associated with contamination at the site shall be submitted to and approved in writing by the Minerals Planning Authority. The scheme shall include the following elements unless specifically excluded in writing by the Minerals Planning Authority:

- a desk study identifying all previous uses, potential contaminants associated with those uses, a conceptual model of the site indicating sources, pathways and receptors, and identification of any potentially unacceptable risks arising from contamination at the site;
 - a phased site investigation scheme based on the results of the desk study to provide information for an assessment of the risk to all receptors that may be affected, including those off site;
 - the results of the site investigations and risk assessments and a method statement based on those results giving full details of the remediation measures required and how they are to be undertaken; and
 - a verification report on completion of the works set out for each phase, confirming the carrying out of the remediation measures in accordance with the method statement and setting out measures for maintenance, further monitoring and reporting.
8. If during development, contamination not previously identified is found to be present at the site, no further development (unless otherwise approved in writing by the Minerals Planning Authority) shall be carried out until the developer has submitted to, and obtained approval in writing from the Minerals Planning Authority, an amendment to the above method statement detailing how this unsuspected contamination is to be dealt with.
 9. Prior to the commencement of operations on the site, a detailed Dust Management Scheme shall be submitted to and approved in writing by the Minerals Planning Authority. The Dust Management Scheme shall be carried out as agreed throughout the period of operations on the site.
 10. No loaded lorries shall leave the site unless their loads have been trimmed and sheeted so as to prevent spillage.
 11. All haulage vehicles leaving the site shall pass through a wheel wash facility which has previously been approved in writing by the Minerals Planning Authority. The facility shall be provided prior to any haulage vehicles leaving the site and retained thereafter for the duration of the works hereby approved. Vehicles shall only leave the site when their wheels and chassis are clean.
 12. Prior to commencement of operations on the site a detailed Dust Monitoring Scheme shall be submitted in writing for the approval of the Minerals Planning Authority. The approved scheme shall be maintained through the entirety of the reclamation works.
 13. During normal operations the level of noise emitted from the site shall not exceed 55 dB(A) Laeq(1 hour) as measured at any noise sensitive receptor outside the site. Noise in excess of this limit, up to a limit of 70 dB(A) Laeq(1 hour), may be emitted for up to 8 weeks in any year in connection with short-term activities such as the construction of screening mounds, temporary haul roads, and permanent landforms. The Minerals Planning Authority shall be notified in advance of such periods.
 14. Prior to commencement of development a detailed scheme of compliance noise monitoring, to include frequency and procedures shall be submitted to and

approved in writing by the Minerals Planning Authority. The scheme shall be carried out as approved, and the Minerals Planning Authority shall be advised 14 days in advance when noise monitoring is to be carried out. Where noise levels are found to exceed the specified noise limits, additional mitigation measures shall be put in place in accordance with details submitted to and approved by the Minerals Planning Authority.

15. Prior to the commencement of operations details of procedures for effectively responding to dust complaints and noise complaints, including provision for identifying the source of dust and noise and a review of mitigation measures as appropriate, shall be submitted to and approved in writing by the Minerals Planning Authority. The approved procedures shall be in place throughout the reclamation works.
16. Notwithstanding previous surveys, prior to the commencement of each phase of development a comprehensive Ecological Survey shall be undertaken. The report of the survey, including details of any mitigation measures required, shall be submitted to and approved in writing by the Minerals Planning Authority before that phase of development is commenced. Any mitigation measures required shall be carried out as approved.
17. Development shall not begin until an appropriate photographic survey of the colliery spoil and its relationship with colliery buildings has been carried out in accordance with details to be submitted to and approved in writing by the Minerals Planning Authority. The resulting photographs shall be deposited with the County Sites and Monuments Record, operated by the Clwyd Powys Archaeological Trust, 7a Church Street, Welshpool, Powys, SY21 7DL.
18. No materials shall be removed from the site until a detailed Landscape Master Plan and specification has been submitted to and approved in writing by the Minerals Planning Authority. Details shall include hard and soft landscaping works, ecological habitat creation, recreation provision, areas of vegetation to be retained and removed, proposed landform, phased areas of implementation and an implementation timetable. The Plan as approved shall be fully implemented in accordance with the approved timetable.
19. In the event that site excavation works substantially cease for a continuous period of two years, within 12 months an alternative scheme and programme of implementation for the interim restoration and aftercare of the site shall be submitted to and approved in writing by the Minerals Planning Authority. The approved scheme shall be implemented in accordance with the approved programme.
20. No development hereby approved shall be commenced until a Landscape and Ecological Aftercare Management Plan has been submitted to and approved in writing by the Minerals Planning Authority. The plan shall include management of existing landscape features, the establishment, maintenance and management of all new planting, ecological habitats and recreational spaces, and a management timetable and shall cover a 5 years period of aftercare. Works shall be carried out strictly in accordance with the details as approved and shall be retained thereafter.

21. Any vehicles or machinery operating on the site which is fitted with a reversing warning shall only have an inaudible type or other reduced noise device which has previously been approved in writing by the Minerals Planning Authority.
22. No development hereby approved shall be commenced until a scheme for the disposal of foul and surface waters from the temporary buildings and compound area has been submitted to and approved by the Minerals Planning Authority and fully implemented in accordance with that scheme. The works as approved shall be maintained for the entirety of the scheme of reclamation.
23. No development shall take place until an arboricultural method statement to carry out the works in accordance with BS5837 has been submitted to and approved in writing by the Minerals Planning Authority. The works shall be carried out strictly in accordance with that approved method statement.
24. No working, except for essential repair and maintenance, shall be carried out outside the following hours, unless otherwise approved in writing in advance by the Minerals Planning Authority:
 - 0730 hours to 1730 hours (Monday to Friday)
 - 0800 hours to 1300 hours (Saturday)No working shall take place on Sundays and Bank Holidays, except for essential repair and maintenance.
25. Nothing other than uncontaminated, inert, non-polluting materials shall be imported into the site.
26. Deliveries of excavated material from the site by road shall be restricted to 54 vehicle movements per day (54 in and 54 out).
27. Written records shall be maintained of all deliveries of material from the site and these records shall be available for inspection by the Minerals Planning Authority at all reasonable times.
28. The proposed rail freight sidings shall be operational within 2 years of commencement of the development, unless previously approved in writing by the Minerals Planning Authority. Thereafter the operator shall use its best endeavours to maximise the use of railborne freight.
29. Prior to the first use of the proposed rail freight facility, a scheme of noise mitigation measures with regard to loading of rail trucks and the additional noise impact as a result of the additional rail freight shall be submitted to and approved in writing by the Minerals Planning Authority. The approved mitigation works shall be implemented prior to the first use of the rail sidings and maintained for the duration of the development hereby approved.
30. No extractive operations, other than that associated with the construction of the rail sidings and with the prior agreement and approval of Network Rail, shall take place within a lateral distance of 10 metres from the railway boundary and no overburden must be tipped or any buildings erected on the 10 metres berm between the edge of the excavation and the railway boundary.

31. Cranes and jibbed machines used in connection with the works must be so positioned that the jib or any suspended load does not swing over railway property or within 3 metres of the nearest rail if the boundary is closer than 3 metres. All cranes, machinery and constructional plant must be so positioned and used to prevent the accidental entry onto railway property of such plant, or loads attached thereto, in the event of failure.
32. There shall be no interference with any drain or watercourse belonging to Network Rail and no interference to any existing drainage rights enjoyed by Network Rail.