

**SUPPLEMENTARY REPORTS BY THE HEAD OF PLANNING AND PUBLIC  
PROTECTION**

**RECONSIDERATION OF MINDALE FARM, MELIDEN PLANNING  
APPLICATIONS**

**APPLICATIONS 43/2018/0750 AND 43/2018/0751**

**43/2018/0750**

**Demolition of existing dwelling and outbuildings, erection of 133 dwellings, construction of internal estate roads, sewers, SUDS drainage and open spaces, strategic and hard/soft landscaping and ancillary works, in association with application 43/2018/0751 for new link road to Ffordd Talargoch (A547)**

**Land to the north, west and east of Mindale Farm, Ffordd Hendre, Meliden, Prestatyn**

**43/2018/0751**

**Construction of new road (approximately 400m in length) from Ffordd Talargoch (A547) to land at Mindale Farm, in association with application 43/2018/0750 for residential development on housing land allocation**

**Land south west of Ffordd Ty Newydd off Ffordd Talargoch (A547), Meliden, Prestatyn**

**1. INTRODUCTION - PURPOSE OF REPORTS**

- 1.1. This introduction prefaces two separate 'Supplementary' reports seeking the resolution of Planning Committee on the two planning applications detailed above, which were originally considered at the Committee on 4<sup>th</sup> September 2019. Members resolved to refuse permission contrary to Officer recommendation on both applications.
- 1.2. As members will be aware, Supplementary reports on these items were presented to Planning Committee in October 2019, following deliberations by the Head of Planning and Public Protection in consultation with the Monitoring Officer, and in accordance with Part 2, Section 2.1.9 b) of the current Scheme of Delegation, as it is considered the grounds of refusal put forward at the September Committee on both applications give rise to a significant risk of costs being awarded against the Council at any subsequent appeal or legal

challenge.

- 1.3. At the October Committee, Members voted to defer consideration of the items to:
  - a. seek a clear understanding of the cost and risk implications of a refusal of permission on the grounds referred to at the September meeting
  - b. request the applicants to submit full drainage details to address flood risk matters.
  - c. request the applicants to consider the submission of a single planning application for the access and housing site.
  - d. address the issue of the link road being outside the development boundary
- 1.4. Following the deferral of the items at the October meeting, and receipt of additional information, Officers have redrafted the Supplementary reports which follow, to provide Members with feedback on the matters raised, and clarification of the reasons Officers are requesting the reconsideration of the applications.
- 1.5. The reports on the two items have been restructured to include:
  - The background to the current situation
  - The reasons for referral back to Committee
  - Additional information received
  - Update on matters raised at Committee in October and additional information received
  - Commentary on the grounds of refusal
  - Potential costs to the Council in defending a planning appeal
  - Recommendation

There are appendices attached to both Supplementary Reports, containing important background documents.

**SUPPLEMENTARY REPORT BY THE HEAD OF PLANNING AND PUBLIC PROTECTION**

**RECONSIDERATION OF PLANNING APPLICATION 43/2018/0750**

**Demolition of existing dwelling and outbuildings, erection of 133 dwellings, construction of internal estate roads, sewers, SUDS drainage and open spaces, strategic and hard/soft landscaping and ancillary works, in association with application 43/2018/0751 for new link road to Ffordd Talargoch (A547)**

**Land to the north, west and east of Mindale Farm, Ffordd Hendre, Meliden, Prestatyn**

**1. THE BACKGROUND TO THE CURRENT SITUATION**

**September 2019 Planning Committee**

- 1.1. The planning application for the housing development at Mindale Farm was recommended for grant of permission by Officers, having regard to current planning policies, consultation responses and representations, and the background history including a refusal of permission for a 133 dwelling scheme and the conclusions in a Planning Inspectorate decision on the appeal against that refusal in 2017.
- 1.2. For information and reference, a copy of the Officer report to the September 2019 Committee is attached as *Appendix 1* to this item. *Appendix 2* is the relevant extract from the late information sheets on the item for that meeting, which contained material received between the drafting of the original report and the date of the Committee meeting itself. *Appendix 3* is the Planning Inspector's Decision letter on the 2017 appeal. *Appendix 4* is the Late Information on the item as presented prior to the October 2019 Committee. *Appendix 5* attaches a response from the applicant's Planning Consultant and Counsel Advice received in late October 2019.
- 1.3. Members may recall there was debate on a number of issues at the Committee in September. The minutes of the debate were included in Item 4 of the agenda for the October meeting. In brief:
  - \* There were public speakers in objection to, and in support of the application.
  - \* The Planning Case Officer offered a short introduction referring to the context set by the 2017 application, Committee refusal and subsequent Planning Appeal decision.
  - \* Councillor Peter Evans (local member) spoke against the application and expressed concerns over its impacts having regard to the inadequacies of local infrastructure – in particular the highway network - and over the drainage implications, as there were concerns over flooding issues in this

area. Questions were raised over Welsh Government's position on the calculation of housing land availability figures and the approach to determining the education contribution, including the mechanism of securing extensions / alterations to Ysgol Melyd.

\*In debate, other Members referred to:

- concerns over highway impacts, including on the B5119
- questions over the need for new housing in this location
- confusion with the submission of separate applications for the housing development and the link road to the A547
- the potential presence of contaminated land, in connection with which it was suggested that condition(s) would be necessary to oblige pre-commencement investigation and mitigation
- management arrangements / the adoption of drainage systems, and the relevance of the SuDS and SAB processes
- the need for 2 bedroom accommodation and affordable housing in the area
- the Section 106 agreement mechanism and whether the terms of any agreement could be varied at a later date
- the need for contributions to improve other local services

\*Officers responded to questions raised, drawing attention to specialist consultee responses and offering interpretation / comment on points of detail. It was indicated that the need to increase housing supply remains a Government and Council policy.

The Highway Officer outlined considerations given to impacts on the road network, including capacity issues; confirming the submitted Transport Assessment had been thoroughly reviewed by highway officers, and there was sufficient information to allow full assessment of the application. It was recognised that the same basic proposals had previously been before planning committee and that permission had been refused, including on highway grounds, and that a subsequent appeal was dismissed on grounds relating to visibility and emergency access arrangements, but these had now been addressed. The Appeal Inspector had considered the highway infrastructure to be capable of safely accommodating the development. It was considered the highway network could accommodate the additional traffic generated, subject to conditions. Assessment of accident data did not show the highways were inherently dangerous for road users, including pedestrians. It was considered with the likely proportional split of vehicle journeys, any increase in traffic on the B5119 would be negligible.

\* At the end of the debate, Councillor Peter Evans proposed refusal of permission. This was seconded by Councillor Merfyn Parry. Councillor Evans put forward the following grounds for refusal:

- Inadequate infrastructure, in particular on the A547 (Councillor Brian Jones asked to add reference to the B5119)
- Flooding implications
- Impact on local amenities and the character of the village

Councillor Merfyn Parry proposed that contamination be added to the grounds of refusal.

It was proposed that the wording of the reasons be agreed in consultation with the Local Member.

\*In summing up, the Development Manager drew members' attention to the need to consider the risks to the Authority in refusing permission without clear evidence to support the grounds of refusal, and commented on the reasons as outlined.

Members subsequently accepted that the refusal should not include reference to contaminated land and impact on amenity.

It was proposed and accepted that a Recorded Vote be taken on this item.

The vote was 3 to grant permission, and 10 to refuse permission.

### **October 2019 Planning Committee**

- 1.4. A detailed report was presented to the October Committee setting out the reasons why Officers were requesting reconsideration of the item, following deliberations by the Head of Planning and Public Protection in consultation with the Monitoring Officer. Members were also made aware of a number of additional representations which had been received (reported in the Late Information Sheets), including from private individuals and the applicant's planning consultant. The relevant extract from the Late Information Sheets for the October meeting is attached in *Appendix 4*.
- 1.5. As noted in the cover report for the two Mindale applications, Members resolved to defer consideration of the items at the October Committee with a request that further information / clarification be sought. Of specific relevance to the housing site application, this was:
  - To seek a clear understanding of the cost and risk implications of a refusal of permission on the grounds referred to at the September meeting
  - To request the applicants to submit full drainage details to address flood risk matters.
  - To request the applicants to consider the submission of a single planning application for the access and housing site.

### **Developments since the October Planning Committee**

- 1.6. Officers have acted on the resolution of Planning Committee and have contacted the applicants on the above matters. The response from their Planning Consultant and the Counsel advice they have obtained on the situation is attached in *Appendix 5*. The substance of the Counsel advice is referred to in Section 3 of this report, with commentary on the contents in Section 4. In brief, the conclusions are:
  - the applicants have provided enough evidence to support both applications
  - the Authority's request for more information has no technical support
  - the Authority must discharge their statutory obligation to determine the applications
- 1.7. Additional representations have been received from private individuals in relation to the proposals. These are also referred to in Section 3 of the report,

with commentary in Section 4.

## 2. THE REASONS FOR REFERRAL BACK TO COMMITTEE

2.1. Subsequent to the September Committee, Officers attempted to draft the wording of possible reasons for refusal based on highway and drainage grounds, based on the resolution of Members at the Committee. The first drafts of the reasons closely mirror the two grounds of refusal on the 2017 Mindale Farm application, and are set out below:

### Reason 1

*"It is the opinion of the Local Planning Authority that the scale of the development would have an unacceptable impact on the character of the village and its infrastructure, in particular in relation to the highway network, as in combination with other committed and proposed developments on allocated sites, it would add to unacceptable levels of peak time congestion and dangers to all road users. This would have a negative impact on the wellbeing and quality of life for existing and proposed residents using the highway infrastructure. The development is considered to be contrary to the adopted Site Development Brief 'Residential Development – 'Residential Development at Ffordd Hendre and Maes Meurig, Meliden, Local Development Plan policy RD 1 'Sustainable development and good standard design' criteria vii),viii) and ix), Technical Advice Note 18 'Transport' and Planning Policy Wales 10.*

### Reason 2

*It is the opinion of the Local Planning Authority that the proposals do not adequately demonstrate that surface water run-off from the site and higher land above it can be managed without increasing the risk of additional discharge to watercourses leading to the Prestatyn Gutter, and hence increasing the potential for flooding downstream. Accordingly it is considered that the proposal fails to comply with the adopted Site Development Brief 'Residential Development at Ffordd Hendre and Maes Meurig, Meliden', Local Development Plan policy RD1 'Sustainable development and good standard design' criteria xi), Policy VOE 6 'Water Management', Technical Advice Note 15 'Development and Flood Risk' and Planning Policy Wales 10.*

2.2. In respecting the outcome at Committee in September, on scrutiny of the actual grounds on which it was resolved to refuse permission, Officers have considerable reservations over the chances of successfully defending these, should a subsequent appeal be lodged. Following consultation with the Monitoring Officer, it is considered that this is a case where there is a clear prospect of a cost award at appeal against the Council for acting unreasonably and essentially wasting any party's time and costs of having to respond to the particular reasons put forward for refusal. These concerns are in the context of the detailed responses received from the Council's Highway officers and drainage consultants, and the conclusions of the Planning Inspector in her decision letter on the 2017 appeal.

2.3. As Officers we are always respectful of the views of Members, and we acknowledge the conclusive vote of the Committee to refuse planning

permission in this case. Notwithstanding this, it is our duty to ensure key issues of interpretation in relation to the determination of applications are thoroughly examined before a final decision is made, and to provide you with our professional advice, even though it may be at odds with the resolution of Planning Committee.

- 2.4. The following sections of the report therefore provide further commentary on the issues arising in relation to the housing site proposal, and on the matters raised prior to and following the vote to defer consideration at the October Committee. The report requests Members to reassess the application, and if the Committee remain opposed to the grant of permission for one or more reasons, that due consideration be given to the precise wording of the reason(s), given the level of scrutiny to which they would be subjected at any appeal.

### 3. LATE REPRESENTATIONS / ADDITIONAL INFORMATION

- 3.1. Significant additional material has been received in relation to the housing site application since deferral of the item at the October Committee which has to be drawn to members' attention as it has direct relevance to the consideration of the proposals. Factually, this is:

**The response from the applicants to the deferral at the October Committee and the basis of the reasons for refusal put forward at the September Committee**

- 3.2. The response is attached as *Appendix 5*. It consists of a cover letter from a Planning Consultant introducing a 10 page Counsel advice document on the situation.

*The cover letter* respectfully refers Committee to the Counsel advice to assist in focussing on the key issues. It explains that in circumstances where permission is refused, the applicants would have no option other than to appeal; on the basis of the grounds of refusal suggested, it would require witnesses to deal with planning, highway, and drainage, which would indicate the need for an inquiry lasting several days and a substantial scale of costs. It draws attention to the allocation of the site in the adopted Development Plan, the conclusions of the previous appeal inspector in expressing no highway objections to the scale of traffic generated by the development, the conclusions of the drainage professionals on the acceptability of the drainage design, and the ability to address outstanding detailed design matters through planning conditions.

*The Counsel advice* reviews the background as this is considered to be a key element bearing on the merits of the case and costs recovery. It states any appeal should succeed and that the prospect of a costs recovery in such circumstances are very high, with a figure in the order of £150,000 referred to.

The advice refers to the conclusions of the appeal inspector in accepting the principle of developing an allocated housing site, and expressing no

objections in terms of its locational sustainability and the highway impacts.

In respect of the submission of two applications, the advice refers to the duty of Members to determine the applications before them, and that it is 'no part of their remit to require applications which are legally valid to be reformulated in any way'. If there are concerns over a road going 'nowhere', then it is stated the situation is remedied by way of a condition that prevents development of the road until a planning permission is in place for the development of the housing site which is dependent on the road for access. There is reference to the content of the Development Management Manual which indicates that to refuse planning permission on a ground that could be properly resolved by way of a condition is to be regarded as unreasonable behaviour.

The advice touches on detailed matters raised in relation to accident incidents and highway concerns, suggesting there is no evidence that the development of the application site would make any difference to the risk of similar incidents materially more likely, or that local junctions have an above average accident history. In respect of concerns that the Authority should not consent any more development that may place any additional traffic on the A547 in the vicinity of the site, this position is considered unsustainable, not least given the Planning Inspector's findings that the A547 in the vicinity of the site operates in an acceptable fashion.

In relation to Archaeology / Mining issues, the advice refers to the shafts identified in the geophysical assessment and suggests that any residual concerns can be dealt with through imposing suitable planning conditions requiring further investigation of the need for remedial measures and approval of such measures.

The advice then touches on the deferral at the October meeting and draws attention to sections of the Officer report to highlight conclusions on drainage and highway considerations.

The final sections of the advice refer to Welsh Government guidance on the award of costs in planning appeals, and state as below:

- 'In this case a costs award is likely to follow any refusal because:
- In respect of the housing application it will involve going behind the Council's own Development Plan;
  - In respect of highways (housing scheme) it will go behind both Inspector Sheffield's Decision Letter and the advice of their own Officers. There is no evidence that the A547 is operating in an objectively unacceptable manner;
  - In respect of drainage/flooding (housing scheme) it will go behind their own internal flood advice and the advice of their own independent consultants;
  - In respect of the access road scheme there is no evidence of landscape harm - the most powerful evidence of that is the absence of any objection from NRW and the AONB Committee



who have clearly considered this in depth.

In addition, the refusal will be seen as vexatious given the fact of a 1.55 year housing land supply. A 5 year housing land supply is still a national objective and the shortfall in this case is critical. I note in passing the consultation paper on Housing Delivery in Wales that contemplates abolishing the 5 year housing land requirement. That may or may not happen, but if it does it can only help my client. The paper proposes to meet housing needs by way of generous allocations in development plans and thus reduce speculative applications on non-allocated sites. My clients site is allocated and thus the very type of site the paper seeks to allow.'

**Further representations from private individuals:**

- 3.3. Comments have been received from A. Tomlin, 58 Nant Hall Road, Prestatyn. The basis of the representations is that reference should be made to a 2005 refusal of permission at Mindale and the subsequent Planning Inspector's report, as this has relevance to the current proposals with reference to the site's rural aspect, the village status, its location, and highway issues at a time the A547 was less busy.

**4. UPDATE ON MATTERS RAISED AT COMMITTEE IN OCTOBER AND ADDITIONAL INFORMATION RECEIVED**

**Costs**

- 4.1. Additional information on the risk of costs in relation to defending a refusal of permission of the housing site application on the grounds cited at the September meeting is provided in Section 5 of the report.

**Drainage detailing**

- 4.2. Officers approached the applicants to request submission of the drainage details which Waterco had recommended be the subject of planning conditions, so the acceptability of the proposals could be fully assessed. The responses from the applicant's Planning Consultant and the Counsel advice referred to earlier in the report make clear that they consider outstanding matters of detail can be addressed by way of planning conditions, in accordance with Welsh Government Guidance. No additional drainage details are to be submitted at this stage. The Planning Consultant had previously submitted additional information immediately prior to the October Committee (attached to *Appendix 2*) in respect of member concerns over adoption of the surface water drainage system, in respect of use of a private Management Company, reinforcing the point that these are matters routinely dealt with by planning conditions.
- 4.3. As the applicants will not be submitting additional drainage details, the application has to be determined on the basis of information submitted with the application, in the context of the Welsh Government Guidance on the use of conditions, responses received from Waterco and the Council's Lead Flood Officer on the acceptability of the drainage scheme, with due regard to other representations. Having regard to the responses of the technical consultees, Officers remain of the view that remaining matters of detail can be properly controlled through planning condition, and that it would be

unreasonable to refuse permission on grounds that the proposals do not adequately demonstrate surface water can be managed without increasing flood risk elsewhere.

#### **Submission of a single application**

- 4.4. Officers informed the applicants of the Committee's wish to consider the submission of a single planning application for the access and housing site. The Counsel advice to the applicants points to the duty of Members to determine the applications before them, and that it is 'no part of their remit to require applications which are legally valid to be reformulated in any way'. The applicants are not considering withdrawing either application or resubmitting their proposals as a single application.
- 4.5. Officers acknowledge that the submission of two applications dealing with interrelated developments is an unusual approach, but as the respective applications are valid submissions, the Council has a duty to make a formal determination on them. The original Officer reports on the applications made the point that there are no procedural grounds to justify refusing them as submitted, the important point being how they are considered and determined, and how issues arising from this approach are dealt with.

#### **In relation to the Planning history at Mindale Farm**

- 4.6. With reference to a 2005 refusal of permission at Mindale, Officers are happy to provide factual information on this to provide a complete picture of the background history at Mindale.
- 4.7. In respecting the point that the original Officer report should have included reference to the application and a subsequent appeal decision, it was not referred to in the planning history sections of the original reports as the size of the site (0.27 hectares) was only a fraction of the size of the current site (4.8 hectares), the land was outside the development boundary as defined at that time in the Denbighshire Unitary Development Plan, and the main vehicular access was proposed off Ffordd Hendre onto Ffordd Ty Newydd, which is not what is now proposed.
- 4.8. For the record, nonetheless, the 2005 application was code no. 43/2005/0767 and was for outline consent for the development of 0.27 hectares of land for residential purposes involving alterations to an existing vehicular access. This land included the existing building complex at Mindale (dwelling, stables and outbuildings), and illustrative plans showed ideas for 14 units in 2 terraces, one with 8 dwellings and one with 6 dwellings.
- 4.9. Prestatyn Town Council raised no objections to the 2005 application. The Highway Officers objected on the basis of a substandard approach road (Ffordd Hendre). Planning permission was refused on 5th October 2005 on the following grounds:
1. The site lies within the open countryside outside of the development boundary and does not lie within a group of dwellings. As such, the site therefore cannot be assessed as being within a group of houses and

the proposal is contrary to Policy GEN 3, Policy HSG 5 and Policy HSG 6 of the adopted Denbighshire Unitary Development Plan.

2. The site is approached via an access which is considered substandard in width and junction layout to serve as a means of access to residential development, with consequent risk of additional danger to all users of the highway and interference with the free flow of traffic. As such, it is considered unacceptable and contrary to Policy GEN 6 and Policy TRA 6 of the adopted Denbighshire Unitary Development Plan.

4.10 The refusal decision was subsequently challenged at appeal. The Inspector's Decision Letter dated 3rd August 2006 dismissed the appeal. The Inspector considered the main issues were whether the proposal would be contrary to the settlement policies of the Unitary Development Plan to protect the character and appearance of the rural area, and whether the development would be likely to endanger and inconvenience other road users to an unacceptable degree.

- On the first issue the Inspector noted the site was adjacent to, but outside the development boundary of Meliden in the Unitary Plan. He considered the proposal would encroach into the open countryside to the detriment of its character, and that an urban housing layout would not enhance the rural surroundings, contrary to planning policy.

- On the second issue, the Inspector concluded that as the width of the track onto Ffordd Ty Newydd (Ffordd Hendre) could only accommodate one way traffic, on occasions this would compel vehicles to reverse into the adjoining highway, inconveniencing and endangering all other road users, including pedestrians at the junction with Ffordd Ty Newydd.

4.11 It is for members to consider whether to attach weight to this background history. In respecting the comments that the 2005 refusal may have relevance to the current application, Officers' opinion remains that the significant changes in circumstance since 2005 (subsequent allocation of the whole of the Mindale land in the development boundary in the Local Development Plan in 2013) and the different access proposals in the current applications (a new link road to the A547) provide limited obvious comparison between the proposals. Significantly, there is no reference in the 2006 Inspector's decision letter to the impact of the proposed development on the A547, his comments being exclusively focussed on the adequacy of the access onto Ffordd Ty Newydd.

## **5 COMMENTARY ON THE REASONS FOR REFUSAL**

5.1 As noted in paragraph 2.1, the proposition to refuse permission in September was based on concerns over the highway and drainage impacts of the proposed housing development. Officers respectfully suggest that other matters raised at Committee, in consultation responses and in late representations are not of such significance as to justify a refusal of permission. Many points of detail can be dealt with satisfactorily by the imposition of conditions in the event of a permission being granted. This includes additional / revised conditions requiring the investigation of the potential for the presence of contaminated land prior to the commencement of development, which was raised in debate on the item.

## **Background information pertinent to the issues**

### **Officer report to the September Planning Committee**

- 5.2 The Officer report to the September Committee is attached in *Appendix 1*, as a basic reference, along with the relevant extract from the Late Information Sheets in *Appendix 2*. Of relevance to what Officers believe to be the main issues, Members are advised that the Officer report contains the following:
- A summary of the consultation responses received on the application (Pages 162-171)
  - A summary of events leading to the refusal of the 2016 Mindale Farm application, Code no. 43/2016/0600 (Section 1.5.3 – 1.5.5, pages 191 and 192)
  - The 2 reasons for refusal of application 43/2016/0600 (Section 1.5.6, pages 192 and 193)
  - A summary of the subsequent planning appeal process and the conclusions of the Appeal Inspector in her Decision letter (Section 1.5.7, pages 193 and 194)

With regard to the highway and drainage reasons for refusal of the current application, 43/2018/0750, the Officer report contains the:

- Officer assessment of the highway issues (Section 4.2.8, pages 215-222)
- Officer assessment of the drainage issues (Section 4.2.7, pages 210-215)

- 5.3 It is suggested that the key issues are dealt with in the sequence which follows in the report.

### **In relation to the highway / infrastructure reason for refusal –**

- 5.4 Officers reading of the concerns expressed in debate at Committee in September are that the additional traffic movements from the development would increase pressure on the local road network, and in combination with additional traffic movements from housing sites under construction and from developments on allocated sites in the Local Development Plan, would give rise to unacceptable levels of congestion and dangers to all road users; all impacting adversely on the health and well-being of residents. The drafted reason for refusal No.1 in paragraph 2.1 attempts to encompass these concerns and cites the planning policy and guidance which may be relevant to highway considerations.
- 5.5 There is no dispute here that highway impacts are a legitimate land use planning consideration, and that these justify serious assessment in relation to housing proposals of the scale involved in the Mindale applications.
- 5.6 In recognising members' concerns over the local highway infrastructure, the basis of Officers' unease over the resolution to refuse permission on highway related grounds are :
- The site is allocated in the Local Development Plan*
- 5.7 Whilst allocation of land in a Development Plan does not guarantee the grant of planning permission, since local impacts of a development have to be addressed in every instance, it inevitably accords some status to the

land as it means the principle of development has been recognised as acceptable by the Council when adopting the Plan. Implicit in this process is that the general impacts of the scale and nature of development have been taken into account and are deemed acceptable.

- 5.8 Should the application be refused and taken to appeal, the fact the site is allocated for housing in the Development Plan is a matter which is likely to be accorded weight by a Planning Inspector. The 2017 appeal Inspector commented that as the site lies within the development boundary as defined in the adopted Plan and is allocated for residential development, the principle of the proposed development is therefore established. She was aware of concerns over the late inclusion of the site in the LDP and that local population growth had been lower than predicted, but made it clear that it was not within her remit to review the allocation.

*The significance of the 2017 Appeal Inspector's detailed conclusions*

- 5.9 Officers believe the Planning Inspector's Decision letter on the 2017 appeal is a significant material consideration, and in particular in respect of the impacts of the Mindale development on the highway network, since the proposals now in front of the Council are effectively for the same nature and scale of development, involving a total of 133 dwellings. The main difference is that the vehicular access to the site is now proposed from a separate link road off the A547, and not via the existing road network and Ffordd Gwilym.
- 5.10 The appeal Inspector had regard to the proposals for the access off Ffordd Gwilym, the nature of the approach highway network, speed limits, footway gradients, the proposed emergency access, the Transport Assessment, junction capacities, the distance from local facilities, and impacts on those facilities. Significantly, she concluded the local highway infrastructure could accommodate the increased traffic generated by the development without harm to highway safety. The Inspector's concerns over the highway implications of the 2016 application were confined to the detailing of the section of road as it entered the site off Ffordd Gwilym, and the proposals for an emergency access; matters which are now not relevant given the proposals for an entirely separate main access road, and an emergency access in a different location.
- 5.11 In respect of the more general impacts on infrastructure, the Planning Inspector concluded there was no substantive evidence that local services and facilities could not accommodate future residents of the proposal, and the matter of primary school places was one which could be addressed by way of a financial contribution via a legal agreement. She did not consider the development would harm the character of the area.
- 5.12 Should the housing site application be refused and be subject to an appeal, the appointed Inspector would have full regard to the considerations and conclusions of the 2017 Inspector on these matters. In the absence of any material changes in the nature and scale of the development now in front of the Council, or new evidence to point to the harm it would bring about, it is difficult to see how a new Inspector could

come to a completely different conclusion.

*The basis of the Highway Officer's assessment*

- 5.13 The Highway Officer's detailed assessment of the application dealt with the capacity of the existing road network, accessibility, site access, layout and parking issues, and had regard to the Transport Assessment and the conclusions of the 2017 Planning Inspector's appeal decision. His considered opinion is that there are no highway reasons which could be substantiated to justify refusal of permission, and matters of detail are capable of being covered through the imposition of suitable conditions on a permission.
- 5.14 In response to Members' questions at the September Committee, the Highway Officer reaffirmed that there was sufficient information to allow full assessment of the proposals, and that the conclusion that the highway network was capable of accommodating the additional traffic generated was consistent with the conclusion of the 2017 Appeal Inspector on the highway infrastructure. In respect of accident information, it was considered this did not show the highways were inherently dangerous for all road users, and in relation to the impacts on the B5119, it was considered the potential increase in traffic would be negligible.
- 5.15 The Highway Officer has offered detailed advice in the formal response to consultation on the application and to questions at Committee. This is based on reference to objective parameters, consideration of the issues and from observation of local conditions. As the Council's main technical consultee on highway matters, Members are requested to give due credence to the professional advice offered, which respectfully provides limited support for a highway based reason for refusal.

**Conclusions**

- 5.16 Taking the above into account, Officers recognise that there will be additional impacts arising from the vehicle movements associated with a 133 dwelling development, but question whether the extent of those impacts would be such that a refusal could now be justified and subsequently defended. The background offers no professional / technical basis of support for a highway reason for refusal of permission based on impacts on the local road network. It is also likely at appeal that an Inspector would have regard solely to the impacts of the Mindale development on the road network (not potential future developments, as these are not in front of the Council or an Inspector), Consequently, it is not recommended that the Committee pursue a refusal of permission on the highway grounds outlined at the September Committee.

**In relation to the drainage reason for refusal –**

- 5.17 Officers interpretation of the concerns expressed in debate at Committee are that there remain reservations over the drainage of the site, run off from higher land, and the potential for run-off from the site increasing the risk of additional discharge to watercourses leading to the Prestatyn Gutter, hence increasing the potential for flooding downstream. The drafted reason for refusal No.2 in paragraph 2.1 encompasses these

concerns and cites the planning policy and guidance which are relevant to drainage considerations.

5.18 Drainage implications are a legitimate land use planning consideration, and it is recognised that there are local factors which require serious assessment in relation to the development of the Mindale land for a housing scheme of the scale involved.

5.19 In noting the Committee's deliberations, the basis of Officers' concerns over the resolution to refuse permission on drainage / flooding grounds are:

*The conclusions of the 2017 Appeal Inspector*

5.20 The Inspector reviewed the information submitted with the 2016 planning application, including proposals for attenuation ponds, a Flood Consequences Assessment, the responses of Natural Resources Wales and other consultees, and evidence submitted by the Council's consultants (Waterco). She concluded on the basis of the evidence before her that a more thorough understanding of the groundwater regime and any associated risk together with further consideration of the surface water drainage and the design of the attenuation ponds was required. She took the view that in these circumstances, and the precautionary approach outlined in TAN 15: Development and Flood Risk, that insufficient information had been submitted in order to demonstrate that the scheme would not give rise to flooding, contrary to relevant policies, TAN 15 and Planning Policy Wales.

5.21 In basic terms, the Planning Inspector's conclusions on the issue were that the information in front of her was insufficient to give an adequate understanding of the groundwater / drainage situation and potential risk of flooding. She did not conclude the site was undevelopable or that it was not possible to provide further details to allow for a proper understanding of the drainage situation and whether a scheme could be designed to address any risk of flooding. This left it open for the applicants to reconsider the level of technical information necessary to support any subsequent application to develop the site.

*The assessment and conclusions of the Council's Drainage Consultants*

5.22 Members will be aware that Waterco were commissioned by the Council as Drainage Consultants to assess the current submission. Waterco were asked to advise on the land drainage implications of developing the housing site, particularly with regard to the 2017 appeal, in which they successfully assisted the presentation of the Council's case at the Hearing, and persuaded the Planning Inspector to take a precautionary approach in respect of the adequacy of details submitted to assess the drainage implications.

5.23 Waterco requested additional details from the applicants in order to assess the acceptability of the drainage proposals, and reviewed this information provided in order to make their recommendations on

application 43/2018/0750.

- 5.24 Officers believe the final response from Waterco is critical to deliberations on the current application. In respecting Member concerns over the drainage / flooding implications, Waterco have stated that their assessment has found no substantive reasons to refuse the application on flood risk or drainage grounds. Whilst they advise further work is required to finalise the surface water drainage proposals for the development, they consider there is suitable evidence provided to confirm that a viable surface water drainage scheme for the main site, which does not increase flood risk elsewhere, is achievable. They consider further works can therefore reasonably be conditioned, if planning permission is granted, amongst which is the use of up to date methodology for calculating run-off rates, further flow and drainage detailing to deal with run off from land to the south east, further permeability testing, resizing of detention basins, revised flow control rates to ensure greenfield run-off rates are not exceeded, and revisions to flow controls from 3 plots to avoid issues close to dwellings.
- 5.25 Waterco also advised, as requested, in relation to the 5 concerns of the Planning Inspector as outlined in the decision letter on the 2017 appeal, concluding 3 are addressed in the submissions, one can be addressed through revisions to layout and calculations, and the other requires additional detail at detailed design stage. The conclusion is that these are matters which can reasonably be dealt with through imposition of planning conditions.
- 5.26 Officers believe these are significant conclusions by a key technical consultee and that they provide very limited support for a refusal of permission on drainage grounds in this instance.

*The assessment and conclusions of the Council's Lead Flood Officer*

- 5.27 The Council's Lead Flood Officer is satisfied that the developer has carried out due diligence in appointing a suitably qualified and experienced consultant to carry out the surface water drainage design for the development. He notes that whilst it is not a mandatory requirement for this particular development, the design of the system follows sustainable drainage principles, which are applauded. As discharge rates from the site are designed to be lower than greenfield runoff rates, this should result in less water entering Prestatyn Gutter than at present. Information provided by the applicant suggests that in the scenario of a rainfall event of 1 in 100, there will no flooding of property within the development and no additional flooding of property beyond the site boundary.

*Welsh Government guidance on the use of conditions*

- 5.28 It is relevant in the context of the matters raised over the adequacy of surface water / drainage information that Welsh Government guidance remains clear that Local Planning Authorities should consider the possibility of imposing planning conditions in order to enable development to proceed. This is made clear in the Development Management Manual



and Welsh Government Circular 016/2014 - The Use of Planning Conditions for Development Management. Annex 12 to the Development Management Manual sets out circumstances where on appeal a planning authority would be at risk of an award of costs against them for unreasonable behaviour, section 3.11 making specific reference to:

**(c) Refusing permission on a ground clearly being capable of being dealt with by way of condition, where it is concluded that suitable conditions would enable the development to proceed;**

- 5.29 In respecting local concerns over drainage issues in this area, the advice from the Council's Drainage consultants is clear, that the proposals for the surface water system in the current application address the reservations of the 2017 Appeal Inspector, and the remaining matters of detail relating to elements of the system are ones that can satisfactorily be covered by planning conditions on any permission. The conditions dealing with drainage detailing are numbers 15 -17 in the Officer report to the September Committee, on pages 226 and 227. Officers would recommend against refusal of permission in circumstances where matters of detail can reasonably be dealt with through imposition of planning conditions.

### **Conclusions**

- 5.30 Officers are fully appreciative of Members' reservations over the drainage / flooding implications of developing the Mindale site. However, having regard to the conclusions of the 2017 Planning Inspector, and the information now submitted in support of the current application, it is clear from the responses of the 'technical' consultees (Waterco and the Council's Lead Flood Officer) that the applicants have provided suitable evidence to confirm that a viable surface water drainage scheme for the main site, which does not increase flood risk elsewhere, is achievable; and that outstanding matters of detail can be dealt with through the imposition of planning conditions, including securing arrangements for the adoption and future management / maintenance of the drainage systems, and arrangements to cover the failure of a Management Company.
- 5.31 On the basis of the consultee responses, Officers would therefore recommend strongly at this point against a refusal based on drainage / flooding potential, as it is considered the reservations which led the 2017 Planning Inspector to take a precautionary approach in respect of the drainage information have been fully addressed, and remaining matters of detail are capable of being covered by imposition of planning conditions.
- 5.32 Should Members ultimately resolve to refuse permission, Officers would request that the Committee give due consideration to the precise wording of the reason(s), so there is no ambiguity over the actual harm it is concluded would arise, or what conflicts there are with planning policy and guidance, as these would form the basis of the Council's case at any subsequent appeal.

## **6 THE RISK OF COSTS IN DEFENDING A PLANNING APPEAL**

- 6.1 One of the reasons for deferral of the item at the October Committee was to seek additional information on the risk of costs arising from the highways and drainage grounds for refusal cited at the September Committee.
- 6.2 In terms of general principle, any decision of the Council involving the refusal of planning permission or the imposition of conditions on a permission is open to challenge through established appeal processes. At appeal, there is provision for the award of costs where any party has behaved 'unreasonably'. Section 3.11 of The Development Management Manual Annex 12 provides specific advice on the circumstances in which costs can be awarded at appeal, and includes a number of examples of substantive 'unreasonable' behaviour that may lead to an award of costs against appeal parties. The examples highlighted in bold type seem to be the most relevant to the circumstances arising in relation to the housing site application at Mindale and need to be borne in mind:

"3.11 Local planning authorities are at risk of an award of costs being made against them if they behave unreasonably with respect to the substance of the matter under appeal or subject to a call-in or application directly to the Welsh Ministers. Examples of this include:

Substantive:

- (a) Preventing or delaying development which should clearly be permitted, having regard to its accordence with the development plan, national policy and any other material considerations;**
- (b) Failure to produce evidence to substantiate the impact of the proposal, or each reason, or proposed reason for refusal (i.e. taking a decision contrary to professional or technical advice without there being reasonable planning grounds to do so);**
- (c) Refusing permission on a ground clearly being capable of being dealt with by way of condition, where it is concluded that suitable conditions would enable the development to proceed;**
- (d) Acting contrary to, or not following, well-established case law;
- (e) Refusing or objecting to particular elements of a scheme that the Welsh Ministers or Planning Inspector have previously indicated or determined to be acceptable;**
- (f) Not determining or providing a position on similar cases in a consistent manner where there has been no material change in circumstances;
- (g) Failing to grant or support a further permission for a scheme that is the subject of an extant or recently expired permission, where there has been no material change in circumstances;
- (h) Refusing to approve or support reserved matters when the objections relate to issues that should have been considered at the outline stage;
- (i) Imposing a condition that does not comply with the tests set out in WGC 016/2014: The Use of Planning Conditions for Development Management;
- (j) Where there is a lack of co-operation relating to any planning obligation;
- (k) Pursuing unreasonable planning obligations (i.e. section 106 agreements) in connection with a granting of planning permission, where

it is not justified and does not accord with the law or relevant policy;  
(l) Where an enforcement appeal could have been avoided due to inadequate investigation or insufficient communication on the part of the local planning authority; and / or  
(m) Refusal to offer pre-application services, or to provide reasonably requested information, when a more helpful approach is likely to have avoided an appeal or narrowed the issues considered as part of an appeal or application (such as the failure of a local planning authority to provide information such as site history and constraints where knowledge of that information may have avoided an appeal). “

- 6.3 As members will be aware, the circumstances in which unreasonable behaviour may be found includes where a Local Planning Authority is unable to produce evidence to support each of the reasons for refusing planning permission. Factually, where unreasonable behaviour is found, cost claims can be based on expenses incurred in preparing for an appeal (e.g. drafting of statements, assembling technical evidence to rebut reasons for refusal); expenses for attending a hearing or inquiry (e.g. barristers conducting a case), the use of consultants to provide detailed technical advice, and for witnesses if they are paid.
- 6.4 The issue of costs is raised in the applicants' Counsel advice, set out in full in Appendix 5 and summarised in Section 3 of this report. Based on the grounds of refusal as outlined in the September 2019 Committee, the costs recovery for the applicants is stated as in the order of £150,000. The applicants would make a costs claim at any appeal. If the Council cannot defend the reasons for refusal, the risk of a costs award is significant.
- 6.5 Regardless of the potential for a costs claim from the applicants at appeal, the Council has to meet its own costs for defending any appeal. Dependent on the grounds of refusal, and the type of appeal process, this could involve employing specialist consultants to provide technical highway and drainage evidence to defend a refusal and to appear as witnesses; a Planning Consultant to co-ordinate the case and a Barrister to oversee its presentation and to front the case at an Inquiry. In Officers' opinion, the cost of defending a refusal based on highway and drainage grounds would mean an outlay in excess of £30,000.
- 6.6 Having regard to the circumstances relevant to the housing site application, Officers respectfully suggest that refusal of permission on the grounds cited at the September Committee would put the Council at risk of a successful cost claim at appeal on the basis of unreasonable behaviour, potentially in respect of at least 4 of the examples highlighted in the extract from Annex 12 of the Development Plan Manual in paragraph 6.2 above.

## **7 RECOMMENDATION**

- (A) Having regard to the contents of the report, and in acknowledging Members' concerns over the impacts of the development on the highway network and on drainage / flooding potential, it is recommended that Planning Committee adopt

the original recommendation of the Planning Officer and **GRANT** planning permission for the development, subject to the conditions set out in the September 2019 report, with appropriate revisions to condition 24 (as outlined in the Late Information Sheets to the October Committee) to require the carrying out of appropriate contaminated land assessment prior to the commencement of development.

- (B) In the event that the Committee resolves to refuse permission, Members are requested:
- i. To confirm the detailed wording of the reason(s) for refusal to be included on the Certificate of Decision.
  - ii. To nominate 2 Members to represent the Committee at any subsequent appeal, to assist in defending the reason(s) for refusal (normally the proposer and seconder of the motion to refuse).
  - iii. To agree to employing relevant consultants and a barrister to assist in the preparation of the Council's case and to appear at any Inquiry / Hearing to defend the reason(s) for refusal.

## **APPENDICIES TO THE REPORT**

***Appendix 1 – Officer report on application 43/2018/0750, September 2019 Committee***

***Appendix 2 – Late Information Sheet, September 2019 Committee***

***Appendix 3 – Planning Inspector's Decision letter, 2017 appeal***

***Appendix 4 – Late Information Sheet, October 2019 Committee with late response from applicant's Planning Consultant***

***Appendix 5 – Response from applicant's Planning Consultant and Counsel Advice, October 2019.***

**EMLYN GWYNEDD JONES  
PROTECTION**

**HEAD OF PLANNING & PUBLIC**