

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

**RECONSIDERATION OF PLANNING APPLICATION 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 Fford Ty Newydd off Ffordd Talargoch (A547), Meliden, Prestatyn

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

September 2019 Planning Committee

1.1. The planning application for the link road to service the proposed 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 the 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 this October meeting. In brief:

\* There were public speakers expressing comments in objection to, and in support of the application.

\* Councillor Peter Evans (local member) spoke against the application. Residents were opposed to the development of the road. Clarification was sought as to whether any drilling had been carried out on the site, and whether the applicants owned the land. It was questioned whether there was any point in dealing with the

application as the housing site application had been refused, meaning this would effectively be a 'road to nowhere'.

\*In debate, other Members raised questions on:

- whether the land was within the Local Development Plan boundary.
- ownership of the land and the implications if the land owner refused to sell the land
- the submission of two applications as it was considered the proposals should be in a single application.

\*Officers responded to questions raised, confirming that –

- the land was not within the Development Boundary for Prestatyn and Meliden, but this did not mean the development was necessarily unacceptable as a consequence.
- the applicant did not own the land, but this was not a matter which should influence any decision on the proposals.
- in relation to comments on the refusal of the permission for the housing site, this decision could be subject to appeal and that the road application should be dealt with on its planning merits. Concerns over the road being developed as a standalone scheme were addressed through the suggested condition and legal agreement which would prevent any work being carried out until there is a planning permission in place for the housing development.
- Ground investigation to determine the presence of contaminated land and the need to address any land instability would be required prior to any works of construction.
- The applicants were acting within their rights by submitting two applications, and it was a matter for the Authority to deal with them on their respective planning merits.

\* At the end of the debate, Councillor Merfyn Parry proposed the application be refused on the grounds the road was being developed outside the Local Development Plan and in the open countryside, and the road would not lead to any development. This was seconded by Councillor Peter Evans.

The vote was 1 to grant permission, and 11 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 link road 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.

- To address the issue of the link road being outside the development boundary -

### **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. 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 a possible reason for refusal based on the resolution of Members at the Committee. The first draft is set out below:

*"It is the opinion of the Local Planning Authority that the construction of a new road in open countryside outside the development boundary of Meliden would represent an unacceptable form of development and cannot be justified in the absence of a permission for any associated residential development."*

- 2.2. As with the report on the preceding item, in respecting the resolution of Committee, Officers have considerable reservations over the chances of successfully defending the reason put forward for refusal, should a subsequent appeal be lodged. Consequently, 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 reason put forward for refusal. These concerns arise from a review of the basis of the refusal as this does not identify a specific harm which may arise from the development in terms of material planning considerations and / or relate the harm to policies of the Development Plan, Planning Policy Wales, etc..
- 2.3. We repeat that as Officers we are fully 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 remains 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 contain commentary on the issues arising in relation to the link road proposal, and on matters raised prior to and following the vote to defer at the October Committee. The report requests Members to reassess the application, and if the Committee remain opposed to the grant of permission, that due consideration be given to the precise wording of the reason, given the scrutiny to which it would be subjected at any appeal.

### 3. ADDITIONAL INFORMATION RECEIVED

3.1. Significant additional material has been received in relation to the link road 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 link road 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.

- 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.

#### **Land ownership questions**

- 4.6. Questions have been raised previously at Committee over the land being outside the applicant's ownership, and over the implications if the owner refused to sell. Officers attention has also been drawn to a 2015 Developer Guidance Note produced by the Council in relation to proposals for residential development outside Development Boundaries for housing justified on the basis of a shortfall in housing land supply, and whether mention in this that sites should be free from ownership constraints is applicable to the current application.
- 4.7. To assist Members' deliberations, Officers would advise as follows in relation to land ownership considerations in connection with planning applications:
- Specific provision is made in planning legislation for applications to be made which involve developments / uses on land outside the ownership of applicants. The process does not require that an applicant has to own land or prove that an owner is willing to allow a particular development to take place, in order to make a valid application.
  - To constitute a valid planning application, a formal statement has to be made on the application forms over the ownership of any part of a site. In the instance of the link road application, the Ownership Certificate section of the application forms has been completed to confirm that the applicants have followed what is termed the 'Certificate B' procedure, this being applicable to circumstances where any part of a site involves land outside an applicant's ownership and the names of the owners are known. The form confirms the applicants have given the requisite notice to everyone who was the owner of any part of the land to which the application relates, and states the owners are Nicola Williamson, The Paddock, Dyserth Hall Farm; and Denbighshire County

Council.

- If an application is valid, the Council has a duty to determine it on its relevant land use planning merits. The issue of landownership is not a consideration relevant to the planning merits of an application.
- In circumstances where land involved in a development is in third party ownership, and planning permission is granted, that development can only take place if the owner(s) are willing to co-operate with the applicants to allow it to proceed – if they choose not to do so, then that would mean a permission is unimplementable. This part of the process is entirely out of the hands or influence of the Local Planning Authority.

4.8. In relation to the Developer Guidance note referred to, Officers respectfully suggest this is of limited relevance to the link road application:

- The guidance is dated November 2015 and was drafted specifically to assist applicants considering Housing Development proposals on unallocated land outside Local Development Plan Development Boundaries, on the basis of addressing the Council's housing land supply situation.  
The housing development to which the link road relates is on land allocated for housing in the Local Development Plan, and is within the current Development Boundary.
- The guidance refers to the contents of Planning Policy Wales (Edition 7) which was in place at that time, and to Section 9.2.3 requiring Local Planning Authorities to ensure as part of the Development Plan process that there is sufficient land to provide a 5 year supply of land for housing. The Planning Policy Wales tests were applied in the Developer Guidance to ensure that proposals for new housing on land outside development boundaries was fully justified and included sufficient information including a requirement that the developers on such sites should be clearly identified, and that "...sites must be free, or readily freed, from planning, physical, and ownership constraints, ....."  
Edition 7 of Planning Policy Wales has since been superseded. Edition 10 repeats the requirement to ensure that sufficient land is available to provide a 5 year supply of land for housing. The allocation of the Mindale housing land was approved as part of the adopted Development Plan in 2013 to assist in meeting the demand for housing land. In relation to the consideration of individual planning applications in 2019, there is no requirement in planning legislation for an applicant to prove there are no ownership constraints on land which is the subject of a planning application.

4.9 Officers' advice on the matter of landownership matters is therefore that provided an application is technically valid, the Council has to determine it against relevant policies and material considerations, irrespective of the intentions of a landowner over consenting to a developer proceeding should permission be granted.

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

- 4.10 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.
- 4.11 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.

- 4.12 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.
- 4.13 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.
- 4.14 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.
- 4.15 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 REASON(S) FOR REFUSAL

5.1 As noted above, the grounds on which members resolved to refuse permission were that the proposals involve an unacceptable form of development outside the development boundary, in open countryside, and that the road would not lead to any development. Officers respectfully suggest that other matters raised at Committee and in consultation responses are not of such significance as to justify a refusal of permission, and are ones which could be dealt with satisfactorily by the imposition of conditions in the event of a permission being granted.

5.2 To assist deliberations, the Officer report to the September Committee is attached in Appendix 1, 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 330-336)
- A summary of events leading to the refusal of the 2016 Mindale Farm application, Code no. 43/2016/0600 (Section 1.3.7 – 1.3.8, pages 348 and 349)
- The highway reason for refusal of application 43/2016/0600 (Section 1.3.8, pages 348 and 349)
- A summary of the subsequent planning appeal and the conclusions of the Appeal Inspector in her Decision letter in relation to the highway issues (Section 1.3.8, page 349)

With regard to the Committee resolution to refuse the current application, 43/2018/0751, the Officer report contains the:

- Officer assessment of the principle of the development (Section 4.2.1, page 352)
- Officer assessment of the highway issues (Section 4.2.3, pages 353-357)
- Officer commentary on the submission of two applications (Other matters, page 371)
- Officer assessment of the visual amenity, AONB and landscape impacts (Section 4.2.4, pages 357-359)
- Officer assessment of the use of agricultural land (Section 4.2.9, pages 366 and 367)
- Officer assessment of the issues of contaminated land and land stability (Section 4.2.1, pages 368 and 369)

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

### **In relation to the application involving development outside the development boundary, in open countryside**

5.4 Officers interpretation of the resolution at Committee is that the primary ground for refusal is that the construction of the road is unacceptable as it is development outside a development boundary, and in open countryside. The drafted reason for refusal in paragraph 2.1 attempts to encompass these concerns.

5.5 In acknowledging Members' reservations, the basis of Officers' unease over the resolution to refuse permission on the grounds outlined are :

- *The link road is proposed to serve a major housing site allocated in the Local*

## *Development Plan*

- 5.6 Whilst the allocation of the Mindale Housing site land in the Development Plan cannot automatically guarantee the grant of planning permission for its development or associated works in the form of a link road to access it, this would be a significant matter at appeal should the link road application be refused. An Inspector is likely to attach weight to the need to develop an allocated site, and would need to be convinced that the particular detailing of a link road to serve it is unacceptable on clear land use planning grounds.
- 5.7 Also relevant to this point is the fact that there appears to be no realistic or feasible alternative route to connect the Mindale site to the public road network. The 2017 refusal confirmed the extent of local opposition to the use of the existing road network along Ffordd Gwilym / The Grove, and the Inspector's reservations over the detailing of the link from the end of Ffordd Gwilym into the site and the emergency access proposals. This is a matter which may also carry weight at appeal.
- 5.8 It is also pertinent that the description of the application makes specific reference to the construction of the link road being ... "in association with application 43/2018/0750 for residential development on housing land allocation". It is clearly intended to service the development of the Mindale Farm land.

- *There is no clear harm identified from the construction of the link road*

- 5.9 In respecting the point that the link road would be constructed on land immediately to the west of, but outside the Development Plan boundary for Meliden, Officers would caution against a refusal simply on the grounds that it involves development outside a development boundary, in open countryside. If this is considered unacceptable, then clear material planning reasons need to be identified to qualify / quantify the harm which the particular development would give rise to, as there is no obvious Local Development Plan policy basis for such a refusal.

## *Landscape impact*

- 5.10 If the concern is over the link road extending the settlement further into open countryside, with unacceptable landscape / visual impact, Officers would draw attention to comments of NRW and the AONB Committee in the Committee report in Appendix 1. Whilst there is acceptance that there would inevitably be some visual amenity impacts, neither have raised objections to the application.
- 5.11 In relation to impact on the AONB landscape, NRW considered the information provided as part of the application gives some confidence that the proposed access road could be accommodated below Graig Fawr, and within the AONB, with slight/moderate adverse effect on the setting and views from the AONB, which would be acceptable.
- 5.12 The AONB Committee note that the new road will extend the built envelope of the existing settlement into surrounding farmland and will change the open character of this area, but consider the comprehensive LVIA submitted with the application acknowledges this and considers the significance of prominent views from the AONB, which has influenced the scheme design and landscaping to help integrate the new road into its landscape setting. The AONB Committee agree with the LVIA's conclusions that the overall effect on landscape character and visual impact will be 'minor adverse', and, subject to implementation of a comprehensive landscaping scheme comprising native local species, including arrangements for long term management of the area, the Committee does not consider the development will

cause unacceptable harm to the setting of the AONB.

The comments of NRW and the AONB Committee offer little to support a landscape / visual impact refusal on the link road application.

*Agricultural land*

- 5.13 Should it be considered that use of agricultural land is a basis for refusal, Officers would refer to the assessment in section 4.2.9 of the report to Committee in *Appendix 1*. Officers do not consider there is clear conflict with the contents of Planning Policy Wales advice on the protection of the Best and Most Versatile Agricultural Land. It is considered that some weight has to be attached to the fact that the route of the road appears to be the only feasible one capable of accessing the Mindale Farm land, and as this is an allocated site in the Local Development Plan, and there is pressure on the County to release sites to meet housing targets, there are grounds for considering there is overriding need for the development, outweighing the agricultural considerations in Planning Policy Wales.

*Contaminated land and land stability*

- 5.14 These issues are covered in Section 4.2.11 of the report. On the basis of the submitted information and consultation responses, Officers do not consider there is significant risk likely to arise from contaminated material in relation to existing or proposed development. If permission were to be considered, standard 'precautionary' contaminated land conditions could be attached to cover the situation where contaminated land is encountered in the course of development works, requiring full investigation to be undertaken, the submission and approval of mitigation measures by the Council, and the implementation of those measures in association with the development. Additional conditions were suggested for inclusion on any permission, in the Late Information Sheets circulated for the October Committee meeting, included in *Appendix 4*.
- 5.15 In terms of the stability of the land, information in front of the Authority suggests there is no clear evidence of subsidence arising from past mining activities which would suggest an immediate risk to the construction of a new road in this location, or that the construction of a road and its subsequent use by traffic would give rise to subsidence affecting existing nearby dwellings along Ffordd Ty Newydd. The detailed road design would need to take account of ground conditions in the areas close to past mine workings and demonstrate construction methods suitable to deal with any potential for subsidence.

*In relation to the road 'leading to nowhere'*

- 5.16 Members resolution to refuse permission followed refusal of the housing land application and consequently raised questions over the link road effectively running through a field to 'nowhere'.
- 5.17 Officers responded to this at Committee by advising that the applicants were acting within their rights to submit separate applications for the housing land and for the link road, and whilst this was an unusual approach, the Council was nonetheless obliged to determine both applications on their respective planning merits. As noted above, the description of the application specifically refers to the construction of the new road 'in association with application 43/2018/0750 for residential development on housing land allocation', hence is submitted as a 'linked' development to the housing site proposal.
- 5.18 Officers suggest concerns over the road being constructed as a standalone scheme can be adequately addressed through the recommended condition (No.1) and if

necessary through the terms of a legal agreement which would prevent any development on the road being carried out until there is a planning permission in place for the housing development. Condition 1 is worded as below:

1. The development to which this permission relates shall be begun no later than (INSERT DATE), with the proviso that no development shall be permitted to take place in connection with the link road until there is a planning permission in place for the residential development of the Mindale Farm land.

Reason : To comply with the provisions of Section 91 of the Town and Country Planning Act 1990, and to ensure the development can not proceed irrespective of a consented scheme for the residential development of the Mindale Farm land.

## Conclusion

5.19 Taking the above into account, Officers recognise that there will be impacts arising from the construction of a link road in this location, but given the need to service an allocated site and in the absence of objections from key technical consultees – highways, drainage, landscape (NRW and AONB), and the Public Protection officers, it is questioned 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 refusal based simply on the ‘principle’ of development outside a development boundary.

It is not therefore recommended that the Committee pursue a refusal of permission based on the grounds outlined at the September Committee.

5.20 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 clarity on the harm it is concluded would arise along with the conflicts with planning policy and guidance, as these would form the basis of the Council’s case at any subsequent appeal.

## 6 POTENTIAL COSTS TO THE COUNCIL 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 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 link road application 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 accordance 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 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 final wording of the grounds of refusal, and the type of appeal process, this could involve employing specialist consultants to provide technical highway, drainage, landscape, and agricultural land 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. It is difficult to quantify the potential costs this might involve for the Council, given the initial draft wording of the refusal, but in Officers' opinion, for each additional specialist input necessary to defend a refusal, an outlay of between £5,000 and £10,000 would be involved, on top of the costs estimated to defend the housing site refusal.

6.6 Having regard to the circumstances relevant to the link road application, Officers respectfully suggest that refusal of permission on the grounds cited at the September Committee would put the Council at risk for a successful cost claim at appeal on the basis of unreasonable behaviour, potentially in respect of at least 2 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 development outside a development boundary, 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 11 as set out in the Late Information Sheets for 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.
  - 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 43/2018/0751, 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**

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

**EMLYN GWYNEDD JONES**

**HEAD OF PLANNING & PUBLIC PROTECTION**