



Llywodraeth Cynulliad Cymru  
Welsh Assembly Government

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Adran yr Amgylchedd, Cynaliadwyedd a Thai  
Department for Environment, Sustainability and Housing

Eich cyf . Your ref: PS/JOG-1  
Ein cyf . Our ref: A--PP152-23-001  
Dyddiad . Date: 6 December 2007

Dear Sir

**TOWN AND COUNTRY PLANNING ACT 1990 – SECTION 100  
REQUEST FOR A REVOCATION ORDER IN RESPECT OF THE PLANNING  
PERMISSION FOR THE FFOS-Y-FRAN LAND RECLAMATION SCHEME,  
INCORPORATING THE EXTRACTION OF COAL BY OPENCAST METHODS,  
AND BEING THE FINAL PHASE OF THE EAST MERTHYR RECLAMATION  
SCHEME  
PLANNING APPLICATION Ref. 030225**

1. I refer to your letter of 1 June 2007 in which you ask the National Assembly for Wales/Welsh Assembly Government to revoke the planning permission granted on 11 April 2005 (the 2005 permission), by a Planning Decision Committee established by the National Assembly for Wales, for the Ffos-y-Fran Land Reclamation Scheme (the Ffos-y-Fran Scheme), incorporating the extraction of coal by opencast methods, and being the final phase of the East Merthyr Reclamation Scheme.

2. Under the provisions of the Government of Wales Act 2006, the powers under Section 100 of the Town and Country Planning Act 1990 (the 1990 Act) for the revocation a planning permission have been transferred to the Welsh Ministers. I am authorised by the Minister for Environment, Sustainability and Housing to determine whether an Order for the revocation of the 2005 Permission should be made.

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### Planning history

3. Planning permission for the Ffos y Fran Scheme was granted on 11 April 2005 by a Planning Decision Committee established by the National Assembly for Wales.

4. The application, made by Miller Argent (South Wales) Limited, was for a land reclamation scheme incorporating the extraction of coal by opencast methods on land at Ffos y Fran, East Merthyr. It was called in for decision by the National Assembly for Wales because it was considered to raise issues of more than local importance.

5. The decision to grant planning permission for the scheme was successfully challenged in the High Court but the subsequent appeal by the National Assembly for Wales was upheld by the Court of Appeal. Following that the claimants petitioned the House of Lords seeking leave to appeal against the decision of the Court of Appeal but this was refused.

### Revocation/modification

6. Section 100 (read together with Section 97) of the 1990 Act provides that, if it appears to the Secretary of State (now the Welsh Ministers) that it is expedient to revoke or modify any permission to develop land granted on an application made to a local planning authority or to the Welsh Ministers or granted by the Welsh Ministers on appeal, they may by order revoke or modify the permission to such extent as they consider expedient.

### Welsh Assembly Government's policy on revocation/modification

7. Decisions in respect of planning proposals are primarily the responsibility of the local planning authority. Both the revocation/modification powers are, in the 1990 Act, conferred initially on the local planning authority and supplemented by default powers conferred on the Welsh Ministers. The Welsh Assembly Government's policy (set out at Planning Policy Wales paragraph 4.10) is that a revocation or modification order will only be made if the planning permission (the original decision) is judged to be grossly wrong, so that damage would be done to the wider public interest.

8. In considering the application of this policy to the planning consent in this case, examples of damage to the wider public interest which might justify the making of a revocation or discontinuance order include circumstances where:

- The development poses a very significant threat to an important wider planning objective
- Issues of wider public safety are at stake.

9. Where the development for which permission was granted complies with one or more policies in the development plan (and does not contravene any other development plan policies) it will be necessary to consider whether "other material considerations" support the case for revocation or modification.

### Bases of requests for revocation of the planning permission

10. The principal reasons, set out in your correspondence, for requesting revocation of the 2005 permission are that the decision was grossly wrong and that damage is likely to be done to the local community and the wider public interest for reasons including:

- that there was a failure to properly assess the extent of the opencast coal mining anticipated at Ffos-y Fran;
- that, as early as November 2003, the Welsh Assembly accepted that its planning policy requires buffer zones between operational activity and sensitive areas but has, since 2004, been failing to recognise this;
- that the developer has denied or failed to mention that excavation will be carried on right up to the site boundary. This is significant because in some instances, the site boundary is only 36 metres from homes;
- the decision did not properly take account of health impacts to the local community;
- that the local council has stated that it will not be able to properly regulate the development when it gets up and running; and
- that there has been a failure to consider the significant impact that opencast coal extraction and subsequent burning of this coal will have on climate change.

Documentation submitted in support of the request for revocation of the Ffos-y-Fran Scheme included the Ffos-Y-Fran Health Impact Assessment Final Report, June 2007, by the Ffos-Y-Fran Health Impact Assessment Steering Group (the June 2007 Health Impact Assessment). Correspondence submitted in support of a review of the Scheme included references to the need for a 500 metre buffer zone between communities and operations.

### Consideration of the request

11. In considering the requests for revocation I have had regard to all matters raised in the requests and all other representations which have been submitted to Planning Division, as well as the letters dated 29 October 2007 and 8 November 2007 you submitted in connection with the pre-action protocol you commenced on 29 October 2007, in respect of the potential judicial review of the Welsh Ministers not yet having made a decision on your revocation request.

## **Petition from Mrs Vivienne Hadley**

12. The representations included a petition submitted by Mrs Vivienne Hadley considered by the National Assembly for Wales Petitions Committee at its meeting on 21 September 2007.

13. The petition considered by the Petitions Committee declared that the residents of Merthyr Tydfil are currently not afforded the protection of a 500 metre buffer zone between the working face of opencast mines and schools and homes. The petitioners requested that the National Assembly for Wales instruct the First Minister to allow the Planning & Environment Minister to use powers to either reverse the planning decision affecting the Ffos-y-Fran site at Merthyr Tydfil or to ensure that any revised application would be bound by law to include a 500 metre buffer zone between this site specifically and homes and schools. The petitioners also requested that the First Minister use any discretionary powers to create a 500 metre buffer zone between this site specifically and homes and schools.

14. The Chair of the Petitions Committee formally referred the petition to the Minister for Environment, Sustainability and Housing for consideration. By letter dated 18 October 2007 the Minister indicated that the Assembly Government had received a request to revoke the planning permission for the Ffos-y-Fran Scheme, and also a request for the introduction of a 500 metre buffer zone retrospectively, and that these requests would be considered at the same time and the petition taken into account as part of that process.

### **Consultations**

15. Consultations were carried out not only with appropriate professional officers within the Welsh Assembly Government but also with appropriately qualified officials and bodies, including the Local Planning Authority, outside of the Welsh Assembly Government.

16. Consideration was given to whether all those who had made representations on the original planning application should be consulted. In determining the revocation request, however, the Welsh Ministers are not considering the general planning policy merits of the matter afresh but are considering whether the application should be revoked on the basis of the test set out in Welsh Assembly Government policy i.e. whether it was grossly wrong so that damage would be done to the wider public interest. In view of this the level of publicity and consultation used for a planning application was considered to be inappropriate.

### **The responses to consultations made by the Welsh Assembly Government Planning Division Decisions Branch on the requests for revocation and the accompanying submissions :**

#### The comments of the Local Planning Authority, Merthyr Tydfil County Borough Council (the Council)

17. The Council noted that the Planning Decision Committee agreed with the Inspector who held the September 2004 public inquiry that the scheme would be in

accordance with the adopted development plans and, overall, considered that the substantial benefits associated with the scheme far outweighed the stated objections to it. It was also noted that, notwithstanding the fact that the decision was subsequently quashed by the High Court on a Welsh Assembly Government procedural error, both the High Court and the Appeal Court found no fault with the planning merits and the Appeal Court confirmed the original planning decision to approve. The Council considered it of significance, especially for the purposes of Sections 97 - 104 of the 1990 Act, that the Courts had confirmed that there were no grounds for challenging the planning merits of the original decision to grant planning consent. The Council further noted that the House of Lords determined that there were no grounds for further appeal and refused the petition of the objector to the scheme.

18. The Council confirmed that the site is not within a green belt, was not fine countryside, but derelict land, and not on the coastline. It indicated that both the report considered by the Council on 30 June 2004 and the Inspector's report considered by the Planning Decision Committee referred in detail to, and took due cognisance of, all interests of acknowledged importance, including ecology, archaeology and historic landscape.

19. For the above reasons the Council are opposed to any application in respect of revocation, modification or discontinuance. It considered that the matter had been considered exhaustively both by the Inspectorate and the Courts and did not consider that the decision was grossly wrong, so that damage would be done to the wider public interest. It was also considered that the approved development which was well under way should be allowed to progress towards completion in the public interest.

20. The Council acknowledged that the question of any revocation and subsequent compensation arising therefrom was not a material consideration and should not be taken into account but, nevertheless, indicated that this would effectively bankrupt the authority with implications for the Welsh Assembly Government.

#### The comments of the Welsh Assembly Government's Planning Division Policy Branch

21. The Welsh Assembly Government's Planning Division's Policy Branch considered that the extent of opencast coal mining permitted, including the proximity of excavation to the site boundary, would be consistent with the information available for public consultation and at the inquiry. This view was reached having regard to the condition recommended by the Inspector which requires the development to be carried out in accordance with submitted documents. As regards questions raised about the position of the Welsh Assembly Government on the question of buffer zones, the Branch noted that buffer zones were identified in Minerals Planning Policy Wales 2000 and that the issue was dealt with by the Inspector in his conclusions set out at paragraph 319 of his report. The Branch also noted that the Inspector's report recorded the cases presented to the inquiry on the issue of health and that this matter was dealt in his conclusions at paragraphs 315 to 328 of the report. The Branch did not consider that the June 2007 Health Impact Assessment appeared to raise significant issues other than those identified in the Inspector's report. As

regards the question of the impact of opencast coal extraction and burning on climate change, the Branch noted that this issue was raised at the inquiry and dealt with in the conclusions in the context of energy policy. The Branch noted that the emission of methane as a result of extraction was not raised but considered that this issue was not itself highly significant. Overall, the Branch did not consider that there was evidence that the decision of 11 April 2005 was grossly wrong so that damage would be done to the wider public interest.

22. The Branch also provided advice on modification orders. Reference was made to the importance attached by the Government to the need for the planning system to maintain certainty and for planning decisions to be reliable and robust. It was noted that the Environment Act 1995 established the principle that permissions for minerals development should be reviewed every 15 years, a period which provides certainty for those making investment decisions based on planning permissions and which should not be undermined. As such Mineral Planning Authorities should not use their order making powers as substitute for, or to supplement, periodic reviews. Nevertheless there may be cases where orders are necessary, including where a material change in circumstances make it unacceptable for the development to continue on the existing terms and conditions of the planning permission.

The comments of the Welsh Assembly Government's Environmental Science and Research Branch

23. The Welsh Assembly Government's Environmental Science and Research Branch indicated that it was satisfied that the inquiry took account of the information available at that time and would not consider the original decision to be grossly wrong. As regards the reference to the Newcastle study not being appropriate, attributed to one of its authors, the Branch noted that the context in which the comments were made was unclear. The Branch also noted that the Newcastle study was peer reviewed by COMEAP, who agreed as a precautionary measure that planning processes needed to take account of the study findings. The Branch did not consider that the June 2007 Health Impact Study raised any "significant" data.

24. With regard to potential modification of the planning permission, there was no awareness of any changes to the evidence base on separation distances beyond those on which the Inspector based his decision.

25. Reference was made to the revised Air Quality Strategy published in July 2007 which sets an objective PM<sub>2.5</sub> level for the first time. It was noted that the Inspector focused on PM<sub>10</sub> concentration and it was considered that he correctly deduced that this included consideration of PM<sub>2.5</sub> levels.

## The views of Welsh Assembly Government's Public Health Strategy Division (PHSD)

26. The above Division commissioned advice from the Health Protection Agency (HPA) and National Public Health Service (NPHS). The HPA advised that it was satisfied that there was nothing new in the submission which was not considered in the public inquiry and therefore the "grossly wrong test" has not been met. There were no grounds it could find for supporting the application for revocation of the permission. The NPHS was content with the HPA expert evaluation.

27. Additionally, the comments of the Council's Head of Public Health were sought in response to the residents' petition on rats in Blaendowlais, who indicated that there was not an on-going infestation in the area.

### **The development plan**

28. In reaching my conclusions I have also had regard to the development plan. The 1996 Mid Glamorgan (Merthyr Tydfil County Borough) Replacement Structure Plan 1991-2006 (the Structure Plan) and the 1999 Merthyr Tydfil Borough Local Plan 1996 -2006 (the Local Plan) comprise the development plan for the area.

29. In his report on the 2004 inquiry held into the application (the Inspector's report) the Inspector identified Policy EV13 of the Structure Plan as of particular relevance as it seeks to clear all major dereliction in the County within the planned period and recognises land reclamation as a key step in the regeneration process. The Inspector noted its explanation that the Mid Glamorgan Regeneration Programme, which includes the East Merthyr Land Reclamation Scheme, has expanded to include not only dangerous dereliction but also landscape improvement of derelict areas. He also referred to the aim of the Local Plan to ensure that the majority of the Land Reclamation Scheme is completed within the plan period and its promotion of a pragmatic means of treating the derelict land by financing it through co-operation with a private coal company. The Inspector also noted that Local Plan policy GR1 and other policies specify criteria that a proposal would have to satisfy including the effects on amenity and the natural and built environment and restoration and aftercare provisions.

30. The Structure Plan and Local Plan referred to above remain in place and form the current development plan for the area. The emerging Merthyr Tydfil County Borough Council Local Development Plan is currently at pre-deposit stage. The Preferred Strategy has been subject to a public consultation and the Deposit Plan is currently being prepared. The Preferred Strategy provides at paragraph 7.40 that existing mineral resources will be safeguarded so that the proposed Ffos-y-Fran land reclamation scheme can be facilitated.

### **Conclusions**

31. As indicated above, in determining the request for revocation of the planning permission I am not considering the general planning merits of the matter afresh but only whether a revocation should be made on the basis of the "grossly wrong" test identified in paragraph 4.10 of Planning Policy Wales.

32. I have considered the submissions made in support of the request for the revocation of the permission and am of the opinion that the material presented is largely reiterative of that placed before the Inspector at the 2004 public inquiry and which was before the Planning Decision Committee when it took its decision.

33. The decision to grant planning permission was subjected to judicial review and, while one of the grounds of review related to allegations of bias on the part of the then Minister for Environment, Planning and Countryside, all the other grounds related to planning issues raised by the case. Those planning issues were examined in great detail by the High Court and the Court of Appeal and neither Court found fault with the way in which those issues had been assessed or the decisions reached on them.

34. I acknowledge that a number of supporters of revocation have argued that the Courts ruled on technicalities only and not on any issues such as local residents' quality of life or on any health issue. Those 'technicalities', however, related to whether evidence covering issues such as residents' quality of life and health had been correctly and appropriately assessed and whether there had, in law, been any errors made by the Planning Decision Committee in carrying out those assessments and in reaching its decision which would warrant the decision being quashed and the matter sent back for redetermination.

35. In these circumstances I do not consider that the substance of the original decision or the process followed could form the basis for revocation of the planning permission. I have, however, considered whether the evidence submitted by you and others in support of the request for revocation questions whether the carrying out of the development is still in the public interest.

36. As to the main issues referred to in paragraph 10 above, I consider, for the following reasons, that they do not provide any additional information, individually or collectively, that would warrant revocation of the permission

37. I take the view that the extent of the opencast coal mining anticipated at Ffos-y-Fran was properly assessed. It was considered at the inquiry and by the Inspector and Planning Decision Committee and, while I appreciate that you consider their assessment was not as it should have been, that assessment was not found by the Courts to be flawed.

38. Welsh Assembly Government planning policy acknowledges the principle of the provision of buffer zones and that the size of any zone to be provided will depend on a number of factors. The issue of, among others, a 500 metre buffer zone, was considered at the public inquiry and by the Inspector and the Planning Decision Committee and their conclusion was that, for the reasons they gave, it would not be appropriate to require a buffer zone. The Courts were satisfied that the relevant policy in respect of buffer zones had been both properly understood and taken into account by the Inspector and Planning Decision Committee and they did not find fault with the conclusion that no buffer zone should be imposed. I do not consider that any evidence has been provided which would justify a different conclusion to that reached by the Inspector and Planning Decision Committee.



39. The extent of working and the fact that the site boundary was, in some instances, only 36 metres from homes was raised at the inquiry and taken into consideration by the Inspector and Planning Decision Committee. This was recognised by the Courts.

40. The decision clearly took account of the health impacts of the development on the local community and this is also recognised by the Courts. You have expressed the view that the health impacts have not been 'properly' assessed but there is nothing in the papers before me or in the Court action to support that view. The Health Impact Assessment submitted in June 2007 has, as detailed above, been the subject of an extensive consultation exercise with appropriate bodies within, and outside of, the Welsh Assembly Government. The advice of those bodies was that there was nothing new in the Assessment which was not considered at the public inquiry and that it does not raise any significant data or new evidence that would justify the making of a revocation order and I see no reason to disagree with that advice.

41. You refer to the local planning authority having stated that it will not be able to properly regulate the development when it gets up and running. It is a matter entirely for the local planning authority as to how it organises and exercises its enforcement function and I do not consider that any issues in that respect, perceived or actual, could justify revocation of the planning permission on the basis that its granting was grossly wrong.

42. The impact of the development on climate change was discussed at the inquiry and I do not share your opinion that there has been a failure to consider this issue. You referred to the publication on 17 November 2007 of the final part of the Intergovernmental Panel on Climate Change (the Synthesis Report) and, having considered that Report, I do not consider that it raises any issues which cause me to take the view that climate change issues were not properly addressed at the inquiry.

43. Having had regard to all the submitted representations, the advice of consultees, the provisions of the development plan and all other material considerations, I do not consider that it has been shown that the planning permission for the development at Ffos-y-Fran was grossly wrong so that damage would be done to the wider public interest. I have also considered whether the information before me indicates any other reason which would make it expedient to make an order to revoke the planning permission but have concluded that there are none. For these reasons I take the view that it would not be expedient to make an order for its revocation.

44. I have also considered whether there is any justification for modification of the permission to provide for a 500 metre buffer zone, as some correspondents have suggested, or any other size buffer zone. In relation to this matter I have had regard to the Draft Coal Mineral Technical Advice Note (MTAN) issued for consultation in January 2006. This includes a proposal for the MPA to show a 350 metre buffer zone in the LDP around permitted working, from the operational boundary. This requirement to show such a buffer zone in the LDP does not, however, alter the concepts and policy on buffer zones contained in MPPW and which were considered at the inquiry viz. whether a buffer zone should be imposed and, if so, to what size,

will depend on the nature of the particular operation. In this instance, and having regard to the reasons for not imposing a buffer zone, I do not consider failure to set a buffer zone as proposed by the MTAN would render the 2005 permission so grossly wrong that damage would be done to the wider public interest. Earlier in the letter (para. 38) I indicated my views on the provision of a 500m buffer zone and I do not consider that the evidence submitted with and after the request for revocation justifies overturning those views and modifying the planning permission to introduce a buffer zone of 350m, 500m or any other size.

45. The Council referred to the possible financial consequences for them were the permission to be revoked and some supporters of revocation have submitted that that would weigh heavily, and unfairly, against the case for revocation. The financial consequences of revocation, or modification, are not issues that are relevant to the consideration of whether planning permissions should be revoked or modified and, as such, have played no part in my deliberations.

#### **Formal decision**

46. For the reasons given above, and in exercise of the authority referred to in paragraph 2 above, I hereby refuse the request made to the Welsh Ministers for a revocation order in respect of the planning permission granted by the National Assembly for Wales Planning Decision Committee on 11 April 2005 and referred to in paragraph 3 above.

47. Copies of this decision letter have been sent to the Head of Town Planning, Merthyr Tydfil County Borough Council and to those who have submitted individual representations.

Yours sincerely



**Rosemary Thomas**  
Head of Planning Division

Signed under authority of the Minister for Environment,  
Sustainability and Housing,  
one of the Welsh Ministers