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## Appeal Decision

Inquiry opened on 28 November 2017

Site visit made on 4 December 2017

**by KA Ellison BA, MPhil, MRTPI**

**an Inspector appointed by the Secretary of State**

**Decision date: 5<sup>th</sup> March 2018**

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**Appeal Ref: APP/U1050/W/16/3166227**

**Hilltop Farm, Derby Road, Clay Cross, Chesterfield S45 9AG**

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a failure to give notice within the prescribed period of a decision on an application for planning permission.
  - The appeal is made by Provectus Remediation Ltd against Derbyshire County Council.
  - The application Ref CM4/1215/125 is dated 25 January 2016.
  - The development proposed is a surface coal mining scheme with restoration to agriculture with nature conservation benefits.
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### Decision

1. The appeal is dismissed and planning permission is refused for a surface coal mining scheme with restoration to agriculture with nature conservation benefits.

### Preliminary matters

2. A pre-inquiry meeting was held on 28 November 2017 to discuss the procedural and administrative arrangements relating to the inquiry.
3. The inquiry opened on 28 November 2017 and sat for seven days.
4. A draft Planning Obligation was discussed at the inquiry and a timetable agreed for its submission. In the event, the completed Obligation was not received until 19 January 2018. I have, nonetheless, taken it into account in this decision.
5. The proposal represents EIA development under the terms of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011. The Environmental Statement (ES) comprises the original ES; further information provided in response to a request under Regulation 22 from the County Council; and information submitted prior to the inquiry, partly in response to a request under Regulation 22 from the Planning Inspectorate but also as an update to the LVIA. The ES provides a clear description of the likely significant effects of the proposal. I am satisfied that it complies with the Regulations and that sufficient information has been provided to assess the environmental impact of the proposal.
6. The North East Derbyshire District Local Plan Publication Draft was published for consultation on 21 February. The main parties were given the opportunity to make comments and I have taken them into account in this decision.

## **Main Issues**

7. The main issues in this appeal are:
  - (i) Whether the impact of the proposal on the environment would be acceptable, or could be made so, with particular regard to landscape character, visual effects, noise and dust
  - (ii) The effect of the proposal on the progress of the economic regeneration of Clay Cross
  - (iii) In the event that any residual adverse impacts are identified, whether these would be clearly outweighed by the benefits of the proposal, so as to accord with relevant local and national planning policies for the extraction of coal

## **Policy context**

8. The Development Plan includes the Derby and Derbyshire Minerals Local Plan 2002 and the North East Derbyshire District Local Plan (2005) (the Local Plan).
9. The Local Plan contains locational policies such as GS1 and GS6 and landscape and countryside protection policies such as NE1, NE6 and NE7. However, these are concerned with general development considerations and do not allow for the fact that minerals can only be worked where they are found, so that they are of limited assistance in assessing this proposal. Also of note are policies which affect the former Biwaters site (now known as Egstow Park), a mixed housing and commercial area currently under development on the opposite side of the A61. These include policies E1 and E5, which allocate it for mixed uses. The North-East Derbyshire Local Plan Publication Draft, policy SS4, allocates land at the former Biwaters site as a strategic site for mixed use development.
10. Within the Minerals Local Plan (MLP), policy MP1 contains general criteria for the assessment of proposals for mineral development, including effect on local communities by reason of noise and dust, visual effect and effect on the character and quality of the landscape. Policy MP3 has regard to various measures to reduce environmental impact including duration. Under policy MP4, mineral development will not be permitted where irreparable or unacceptable damage would result, including in relation to unacceptable cumulative impact on an area.
11. The most directly relevant policy is MP27. This states that proposals for coal extraction will not be permitted unless the impact on the environment is acceptable, or capable of being made acceptable (MP27(A)(1)). It goes on to say that, if not, the impact should be clearly outweighed by local or community benefits that the development would provide (MP27(A)(2)). Factors to be considered include the extent to which the proposal would adversely affect efforts to attract or retain investment in an area. In the overall balance, importance should be given, amongst other things, to the extent to which the proposal would provide employment opportunities or other economic benefits.
12. Policy MP27 differs from paragraph 149 of the National Planning Policy Framework (NPPF) in that it does not allow for national benefits to be taken into account. Even so, the policy is consistent as regards the requirement that a proposal should aim to be environmentally acceptable as well as the

particular balance to be applied when weighing any remaining harm against other benefits. At paragraph 215, NPPF states that due weight should be given to relevant policies from development plans according to their degree of consistency with its policies. Greater weight should be given, the closer the policy is to the policy in NPPF. It seems to me that the requirement that a proposal should be made environmentally acceptable and that any remaining harm should be clearly outweighed are the key policy elements within NPPF paragraph 215, since they instruct the decision-maker as to the approach to be taken. The requirement to take into account national benefits, although important, gives rise to only a limited degree of inconsistency<sup>1</sup> between policy MP27 and national policy since the same approach lies at the heart of both policies. In line with NPPF paragraph 215 therefore, I consider that any conflict with policy MP27 should attract substantial, although not full, weight.

13. The Appellant contends that MLP policy MP2, which requires need to be demonstrated, is an outdated approach which has infected the wording of policy MP27 resulting in the omission of the reference to national benefits. It is also argued that policy MP27 is premised on a sequential approach, since MP27(C) gives importance to benefits that cannot be delivered on another site. This, in turn, makes policy MP27 inconsistent with NPPF paragraphs 142 and 144, which recognise the essential character of minerals and expect the decision-maker to give great weight to the benefits of mineral extraction.
14. I do not agree with this somewhat convoluted analysis for the following reasons. Insofar as policy MP2 has more than general relevance to this proposal, it expects the decision-maker to take into account local, regional and national demand as appropriate. The supporting text to the policy, at MLP paragraph 3.9, notes that need considerations vary according to the type of mineral and this is to be reflected in subsequent chapters of the plan. To my mind, this indicates that the strategic approach contained in policy MP2 is to be applied according to the mineral in question. In this respect, MLP paragraph 13.15 records that the policies for coal extraction were based on the tests set out in (then current) national policy which, indeed, did not require consideration of national benefits. Moreover, read as a whole it is clear from NPPF paragraphs 142-149 that current national policy continues to apply different considerations to different types of mineral.
15. Nor do I agree that policy MP27(C) imposes a sequential approach in relation to the benefits to be delivered. MP27(C) states that importance will be given to 'benefits that would be unlikely to be achieved by any other means'. Amongst other things, the subsequent clauses to this part of the policy refer to reclamation of despoiled land and the need to avoid sterilisation of the mineral reserve. As I read it, this part of the policy seeks to address the legacy of past coal mining rather than to apply a sequential approach.
16. A further point is made that the MLP as a whole is inconsistent with NPPF paragraph 143 and the associated advice in Planning Practice Guidance (PPG) Minerals 27-008, which expects a plan to provide for a steady and adequate supply of a mineral. However, such a point appears to go beyond

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<sup>1</sup> As in the case of *Pertemps Investments Limited* [2015] EWHC 2308 Admin

the matters covered by NPPF paragraph 215, where the test is framed in terms of 'relevant policies', rather than the plan as a whole.

## **Reasons**

17. The appeal site consists of some 28ha of agricultural land which is broadly linear in form and lies between Clay Cross and Tupton. To the east it borders the A61 and to the north, west and south it is mainly bordered by areas of housing and open space. The proposal concerns the extraction of some 175,000 tonnes of coal in 19 cuts working from north to south and is expected to last for a period of 42 months, including restoration. Access would be taken from the A61 via a roundabout which also serves Egstow Park.

### ***Impact on the environment – landscape***

18. The updated LVIA subdivides the various stages of the proposal into six phases, with the area to be worked being divided into four, Q1-Q4. Separately, it identifies cut 8, which would be on land next to the A61 to the south of Hilltop Farm. The coal processing area would be situated in the central part of the site, between Q2 and Q3, with lagoons and bunds being placed to the west of Q3 and Q4. As coal extraction would begin on the northern part of the site, the bunds to areas Q1 and Q2 would be the first to be constructed, as well as those around the coal processing area and the overburden storage area.
19. The *Guidelines for Landscape and Visual Impact Assessment* (GLVIA) note that duration and reversibility are separate but linked considerations (paragraphs 5.51-52) and that there is no fixed rule for duration. The submitted LVIA takes short term to be 0-3 years and medium term 3-10 years, which is a reasonable approach in this instance. Since the proposal includes restoration, I agree, also, that reversibility is a relevant consideration.

#### Landscape effects - character

20. The appeal site lies on the eastern edge of *National Character Area (NCA) 50, Peak Fringe and Lower Derwent*, although nearby Clay Cross and Tupton are both within NCA 38, the *Nottinghamshire, Derbyshire and Yorkshire Coalfield*. Given its location between the Peak District National Park and the coalfields, NCA 50 is described as an area of transition. A similar division is identified at county level where, according to *The Landscape Character of Derbyshire*, the site itself lies within the *Wooded Farmlands* character type whereas Clay Cross and Tupton are both within the *Coalfield Village Farmlands* character type. As a result, whilst the key characteristics of the *Wooded Farmlands* character type are well-represented on the site, such as in its undulating landform and irregular fields enclosed by hedgerows, the context for the site is very much the patchwork of land uses which characterises the former coalfield, especially its proximity to quite sizeable areas of residential development.
21. The Council points out that the site lies within an area of Secondary Sensitivity, according to its *Areas of Multiple Environmental Sensitivity (AMES)*. This approach seeks to establish commonalities between landscape units and areas assessed as of value for ecological or heritage reasons. However, since the site itself is not identified as of notable value for either heritage or ecology reasons, I consider this designation to be of limited assistance in assessing the landscape effects of the appeal proposal.

22. The LVIA records that all of the agricultural land and all of the hedgerows within the footprint of the proposed development would be lost or removed over the course of the development, along with nine mature trees and five groups of smaller trees. I consider that this change, along with the introduction onto the site of machinery and screening bunds, which would have an engineered appearance despite being vegetated, would be substantially different from the current, undulating farmland. However, as the LVIA points out, the removal of these landscape components would be a short term interruption. Provided the scheme proceeds as outlined, the northernmost section (Q1) would be restored to grass by month 12 and the next section (Q2) by month 18. The effects on the central part of the site around Q3 would be the most long-lasting, since this area would be affected for almost the whole of the period from months 1-36. However, work would not begin on the southernmost section (Q4) until after month 12 and it would be restored by month 36.
23. Undoubtedly, the period of extraction would be extremely harmful due to the changes in landform, land cover and land use. The fact that restoration would be got underway relatively quickly would provide considerable mitigation, since it would help to minimise the period of interruption to the existing landscape character. In addition, the restoration scheme would provide modest benefits in terms of the additional number of replacement trees to be planted which would also screen the adjacent industrial estate, as well as the introduction of areas of species rich grassland. The negative effects of the proposal would probably persist for some 5-10 years post-restoration until, for example, functional hedgerows and replacement trees had become established. However, as the features to be reinstated mainly consist of fields and hedgerows, I consider that there would be relatively little loss of maturity overall. Beyond the medium term therefore, there would be only a minimal effect on landscape character.

#### Landscape effects – visual

24. The assessment within the LVIA is based on some 18 locations selected to represent views from residential areas and footpaths as well as the A61. Of the sources of visual effects identified, it seems to me that the most significant would be those associated with the periods of site preparation and restoration, as well as the presence of the various perimeter bunds and storage mounds, rather than direct views of the extraction activity itself. Given the process of extraction and restoration, it is inevitable that the degree to which the representative viewpoints would be affected would change considerably over the course of the development, depending on the phase it had reached. The LVIA addresses this by assessing each viewpoint on the basis of the six phases before concluding with the situation after restoration, thus also allowing reversibility to be considered.
25. Except for road users on the A61, all of the viewpoints are assessed as being of high sensitivity, since they represent residential areas or recreational users of public footpaths. As illustrated by Table JM3<sup>2</sup>, nine of the viewpoints would experience major or moderate-major adverse effects at one stage of the development or another. The areas around Riber Crescent and North Street would be most affected. These properties lie to the west of the site and

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<sup>2</sup> Proof, J Mason, p72

- generally sit at a slightly lower level. They are represented in the LVIA by viewpoints C, D and E.
26. About 8 properties on Riber Crescent (viewpoint D) have views towards and across the appeal site. There would initially be views of soil stripping after which there would be a 5m noise attenuation bund at a distance of some 100m. Beyond the lagoons there would be areas of topsoil and subsoil storage as well as an overburden mound some 10m high. Except for the period while the bund was being formed or removed, the change in view would mostly consist of its slopes, which would be vegetated.
27. There are also some 48 properties on North Street (viewpoint C) which look across an area of public open space and allotments towards the same part of the appeal site. The views of the activities on the site would be similar to those from Riber Crescent, although some properties would be nearer, as the 9m bund along the western edge of Q4 would run broadly parallel to the rear gardens. In due course, the bunds would appear as green slopes. Even so, I consider that they would appear highly intrusive, particularly compared to the existing open space in the foreground. To my mind, they would appear noticeably different from the rolling character of the existing fields. Since the coal processing area would be located on this side of the site, these views would all be affected to some degree for the entire period of the proposal. Even though there would be some changes to the height and position of the stockpiles and bunds, they would represent clear visual evidence of the coal extraction activity and would be visible for the whole period of working, except when restoration of Q4 was well advanced. When taken together, these changes would endure for a period of three years or so.
28. Given the residential character of the adjoining area, the considerable number of properties which would be affected and the fact that the effects would be at such close range, this represents a substantial adverse effect. To my mind, this would amount to a lengthy period of time over which residents would experience often quite pronounced adverse effects. Thus, even though the changes would be of limited duration and largely reversible, in my judgement they would still amount to a considerable adverse visual effect.
29. The adverse effects in relation to other groups of residential properties would also be substantial, although for shorter periods of time. For example, on higher ground to the north of the site a 3m bund would be constructed some 100m from the rear boundaries of about 12 properties on Ashover Road (viewpoint K). This would be in place for about 12 months. Another 6 nearby properties on the A61 would be similarly affected. At a time where adverse effects were easing for properties to the north of the site, they would be intensifying for those further south. Bunds and site activity would become visible for some 25 properties on Peters Avenue and High Street (viewpoint G). During phase 5, coal extraction would come to within around 70m of properties on Peters Avenue. Although the bund would be 3m high, it would be on rising ground at a distance of around 50m from property boundaries. As such, it would appear as a highly intrusive feature.
30. The site is crossed by footpath 23, which runs between Woodland Way and the A61 and, further south, footpath 26, which links North Road with the industrial estate and thence to the A61.

31. The assessment of impact in relation to footpath 23 (viewpoint B) is directed towards the visual effects which would be experienced at the viewpoint itself. However, footpath users would be moving through the landscape. Users would have to cross the haul road which would be in place for an eighteen month period while the northern part of the site was being worked and restored. During that time they would also have views towards the coal processing area. Existing views of agricultural fields would be foreshortened, whether by bunds or fences.
32. Just as the area near one footpath was being restored, the effects of the development would become increasingly visible from the other. During the early phases, users of footpath 26 (viewpoints F and L) might only be generally aware of the activity further north. However, from Phase 3 onwards there would be views of the stockpile to the west of Q4. From Phase 4, the footpath would be diverted around the edge of the site to allow Q4 to be worked and would not be reinstated until the final months of the scheme.
33. At present, there are clear views across the northern part of the site (Q1 and Q2) from the A61. During the first 12-18 months of operations, these would change from a view of open fields to one of screening bunds and, from time to time, large vehicles and the occasional view of extraction activities. Again, although the bunds would generally screen the work taking place beyond them, they would still be prominent features, out of keeping with the rolling character of the wider countryside.
34. While they endured, the adverse visual effects would be substantial and would affect a large proportion of the surrounding residential area as well as the public footpaths. Thus, even though the visual changes would be for a limited period of time and the restoration scheme would deliver some modest benefits I consider that, taken as a whole, the proposal would result in a substantial adverse effect on the surrounding area. It would not, therefore, be acceptable in this regard.

### ***Impact on the environment – Noise***

35. The Explanatory Note to the Noise Policy Statement for England (NPSE) provides a definition of noise as unwanted sound that causes or contributes to some harmful or otherwise unwanted effect such as annoyance or sleep disturbance. It also notes that noise pollution depends not just on the physical aspects of the sound itself, but also the human reaction to it. NPPF paragraph 123 states that decisions should aim to avoid noise from giving rise to significant adverse impacts on health and quality of life as a result of new development. They should mitigate and reduce to a minimum other adverse impacts arising from noise, including through the use of conditions.
36. In relation to noise from mineral development, the PPG (27-021-20140306) refers to the need to take account of the prevailing acoustic environment when reaching a view as to noise effects, which should be assessed as significant adverse, adverse or a good standard of amenity. This includes identifying whether the overall effect would be above the significant observed adverse effect level for the given situation. The next paragraph in the PPG states that planning conditions should aim to establish a noise limit that does not exceed the background noise level by more than 10dB(A) during normal working hours. It goes on to state that where this would impose unreasonable burdens on the operator, the limit should be as near that level as practicable. In any

event, the total noise from the operations should not exceed 55dB(A) $L_{Aeq,1h, free field}$ . Notwithstanding the phrase 'in any event', the PPG makes clear that these are suggested values and specific circumstances may justify some small variation. The possible use of a temporary limit of 70dB(A) $L_{Aeq,1h free field}$  for specified periods could be seen as an example of this.

37. For the Appellant, it is argued that where noise effects are less than or equal to both 55dB(A) $L_{Aeq,1h}$  and 10dB(A) above background, this should be taken to represent a good standard of amenity. An adverse effect would not occur until noise effects were at 55dB(A) $L_{Aeq,1h}$  or more and 10dB(A) above background. This seems to me to set the numerical thresholds rather higher than indicated in PPG, as the baseline position of 55dB(A) means that the prevailing acoustic environment would only be taken into account if it was measured at 45dB(A) or above. On the other hand, the Council's assessment that an effect which was more than 10dB(A) above background would of itself represent an adverse effect would likewise fail to take proper account of the prevailing acoustic environment since the application of a threshold-based approach does not allow for objective consideration of the resulting acoustic environment.
38. The PPG also advises that temporary daytime noise limits of up to 70 dB(A) $L_{Aeq, 1h (free field)}$  may be appropriate for periods of up to eight weeks in a year, mainly to allow for site preparation works and bund construction. The difficulty in this appeal is that this is a relatively small site which sits close to a large number of residential properties. Under a process of progressive extraction and restoration, essential site preparation and/or restoration work would be underway on one part of the site or another for a substantial proportion of the period during which works were taking place. Consequently, whilst this provision is of some relevance, it is of limited assistance in assessing whether the appeal proposal can be made acceptable in relation to noise.
39. Reading this part of the PPG as a whole, I consider that the absence of a clearly defined numerical standard is intended to facilitate a qualitative judgement on the basis of the specific circumstances of a proposal rather than relying too heavily on thresholds. As such, whilst an overall limit of 55 dB(A) $L_{Aeq,1h}$  might have been found to be appropriate in one case<sup>3</sup>, it would not necessarily be appropriate in another. It seems to me that the advice in the PPG indicates that a 'good standard of amenity' should be taken to lie in the realm of up to 10dB(A) above background, depending on context. It follows, therefore, that an adverse effect would normally be somewhere above that, with a level of 10dB(A) above background indicating a need to make a judgement taking into account other relevant factors. In this appeal, I consider the relevant factors to be the level and characteristics of the predicted noise compared to the existing context, the period of time that the elevated noise levels would be experienced and the extent to which the surrounding area would be affected.
40. The Noise Assessment Report provides details of calculated site noise levels at 10 locations, all of which are outside the site except for Hill Top Farm itself. Written evidence has been provided to show that the present occupants of Hill Top Farm have an interest in the appeal scheme. The living conditions of occupants of that property deserve no less consideration than those of other properties nearby and this would be relevant in relation to conditions which might be imposed, were the appeal to succeed. However, I accept that due to

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<sup>3</sup> APP/P2935/A/11/2164056 Halton Lea Gate



this interest, any noise would be less likely to be perceived as unwanted sound, notwithstanding the very high predicted noise levels in this location.

41. The Noise Assessment Report notes that the site would be worked by way of 19 cuts using two teams. It divides the process into six phases depending on the location of the cuts and uses two scenarios to reflect the varying depths at which work would take place. The Statement of Common Ground (Noise) records that the calculated site noise levels as shown in Tables J1-J20 of the report are agreed.
42. According to the Report, the existing noise climate includes distant road traffic, birdsong, aircraft and gardening activity, as well as noise from industrial units in some locations. This would be in line with my own observations during my visits to the area. Those areas to the north, west and south of the site appeared, for the most part, to be quiet residential streets, although road traffic noise becomes more noticeable as one moves closer to the A61.
43. The calculations in the Noise Assessment Report indicate that all locations would experience noise levels more than 10dBA above existing background at some stage of the development. Two locations, Hilltop Farm and Peters Avenue, would be affected at all stages whilst others would be affected for lesser periods.
44. Areas bordering the northern part of the site would be most affected during the initial stages of the development. Under scenario 1, the working of cuts 1-3 is expected to generate a daytime noise level of 54dB<sup>4</sup> at Woodland Way (location 5). This would rise to 56dB during cuts 4-7 when, even under scenario 2, it would be 53dB. At this stage, temporary noise levels of up to 65dB would be experienced. During cuts 9-12, noise levels would rise once again, this time to 54dB. All of these would be against a background noise level of 42dB. Since noise sources would be predominantly from vehicles moving around the site undertaking soil stripping and excavation, these levels would persist for lengthy periods of the working day. Given the relatively low background noise level and its characteristics, I consider that noise from the operations on site would be extremely intrusive. According to the Appellant's information (CD66) the Woodland Way location represents 20 dwellings. The Appellant also estimated that some 30 dwellings in this general location would experience noise levels greater than 10dB above background, this for some 24 weeks in total. Russell Gardens (location 6), which represents a further 12 dwellings, would experience levels of 57dB and 54dB during cuts 1-3 and 4-7 respectively for some 13 weeks in all. An estimated 25 dwellings in total would probably experience noise levels more than 10dB above background.
45. The location at Riber Crescent (location 3) represents the point nearest to the coal processing area, where the Noise Assessment Report indicates elevated noise levels would be a persistent feature during the scheme. Against a background noise level of 39dB, this area would experience noise levels of 49-54dB throughout almost the whole of the period that the site was being worked under scenario 1 and 48-51dB under scenario 2 (36 out of an estimated 42 weeks). At times, this would rise to 62dB while cuts 9-12 were being worked.

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<sup>4</sup> To aid the flow of the decision, I have quoted only the decibel level in this part of the decision. However, all of the calculated noise levels in this section are taken from tables J1-20, which refer to dB, L<sub>Aeq,1h,free field</sub>. Background noise levels are L<sub>A90,15min/1hr</sub>

- Riber Crescent represents 10 dwellings but an estimated 90 dwellings in all could experience noise levels more than 10dB above background.
46. Thus the Noise Assessment Report estimates that, during cuts 1-7, noticeably elevated noise levels would be likely to persist for substantial proportions of a particular working day and possibly for several days at a time. Although not constant, these levels would be sufficient to intrude upon day to day lives and would affect at least some 40 dwellings, with possibly as many as 145 dwellings being affected in total. Such noise levels over such a period of time would, in my opinion, cause substantial disturbance to local residents and would represent a significant adverse effect on the quality of life in the locality.
  47. The position is equally concerning in relation to the areas to the south and west of the site. Due to the gap in the bund to allow for the haul road, elevated noise levels would probably be experienced on parts of Peters Avenue (location 1) throughout the 42 week period that the site was being worked. Under both scenarios, noise levels would be in the region of 44-55dB, against a background level of 34dB. This would rise to 65dB while cut 19 was being worked. The location represents 10 dwellings but the Appellant confirms that up to 55 dwellings in the immediate area could experience noise levels more than 10dB above background.
  48. North Street, to the south west of the site, would also be particularly affected during the latter part of the development for an estimated 11 week period in total. It could be affected by noise levels of 51dB and 55dB during cuts 9-12 and cut 19 respectively under scenario 1, with temporary levels of 64dB during cuts 13-18. The North Street location represents 30 dwellings but up to 90 dwellings in this area could experience noise levels more than 10dB above the background level of 38dB.
  49. Thus, the works on the southern part of the site would also be likely to have a substantial effect on the surrounding area, although in this case it would be to different groups of properties. This would also represent a significant adverse effect on the quality of life for local residents.
  50. In view of the noise calculations, the Noise Assessment Report notes that a condition which imposed a noise limit at the nearest noise sensitive property of no more than 10dB(A) above background would impose unreasonable burdens on the operator. For example, even with a bund height of 6 metres, the noise level for routine operations at Peters Avenue would be 51dB, well in excess of the measured background noise level of 34dB. As the Appellant points out, the use of higher bunds would require longer periods of working close to residential properties. In addition, this might affect the acceptability of the proposal in other respects, since higher bunds would have a greater visual effect. It would also have implications for the amount of coal which could be recovered. For these reasons therefore, I accept that more stringent controls on noise could not reasonably be imposed.
  51. I recognise that noise from the site would vary according to factors such as the plant in use and the depth at which it was operating, so that the adverse effects due to noise would not be continuous. I also note that the methodology assumes there would be no attenuation where a bund contained a gap such as for the haul road even though, in reality, the bund would probably be partially effective in those circumstances, such as at Peters Avenue. As such, I am mindful that the noise levels represent a 'reasonable worst case' assessment.

Even so, the calculations indicate that throughout the period of development, considerable numbers of properties in one part of the surrounding area or another would be experiencing significantly elevated levels of noise. To my mind, this would fall within the category of a significant observed adverse effect level for this locality. The proposal would not therefore be acceptable in relation to its noise effects.

### ***Impact on the environment – dust***

52. The Air Quality Assessment in the ES was prepared in line with *Guidance on the Assessment of Dust from Demolition and Construction 2014*. However in 2016 "*Guidance on the Assessment of Mineral Dust Impacts for Planning*" was published and this provides the most appropriate basis for the assessment of the appeal proposal.
53. Taking into account mitigation measures such as the use of misting in dry conditions, it seems reasonable for the risk of the Residual Source Emissions for the proposal to have been assessed as medium. Weather data indicates that winds are predominantly from the south west, so that the area most at risk of disamenity dust would be the group of some 20 properties to the north east of the site, at Old Tupton. This would be during cuts 1-3, which relate to the earliest period of extraction. Thus, the period of greatest risk would be the 18 month period while the northern part of the site was being worked and restored. The proposed Dust Monitoring and Management Scheme identifies various actions to avoid excessive dust dispersion, particularly the use of watering equipment to dampen down materials and haul roads. It also provides for continuous monitoring of total particulate matter, including downwind of the processing plant, as well as weather conditions.
54. I recognise there is a high level of concern among residents, bearing in mind the very substantial number of properties which lie within 100m of the site, with an even greater number within 200m. However, only a small proportion of these are both close to the site and downwind of the prevailing wind direction. In view of the controls proposed in the Dust Monitoring and Management Scheme, I consider that conditions could be imposed to control any effects from dust. As such, I consider that the proposal would not have an unacceptable effect on the surrounding area in this respect.

### ***Impact on the environment – conclusion***

55. In relation to landscape character, I consider that the restoration proposals would be sufficient to make the proposal acceptable, especially having regard to the limited duration of the scheme and the largely reversible nature of these effects. However, despite the screening provided by the bunds, I consider that the proposal would cause substantial visual harm, particularly in relation to the residential areas to the north, west and south. In addition, the surrounding area would be affected quite extensively by high levels of noise. I am satisfied that controls could be put in place to manage the effects of dust to an acceptable degree. However, many of the surrounding residential areas would be subjected to substantial adverse effects in relation to both noise and visual impact at the same time, according to their proximity to a given phase of the development. I take the point that "acceptable" implies an approach that looks to whether the environmental impacts might be regarded as tolerable<sup>5</sup>.

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<sup>5</sup> As discussed in Appeal Decision APP/X1355/W/14/3001645, Field House Quarry

However, in this instance the effects would require an excessive degree of forbearance on the part of this local community, taken as a whole. As such, I consider that despite the measures proposed to mitigate the impacts, the proposal is not capable of being made environmentally acceptable by planning conditions or obligations.

***Issue 2: the economic regeneration of Clay Cross***

56. The Clay Cross Regeneration Framework 2013 notes that industrial decline has left many vacant sites and that the town suffers from low land values and a poor environment. North East Derbyshire District Council reports that it has been actively addressing the legacy of past industrial and mining activity in the town. As part of this, Clay Cross has been earmarked to make key contributions to the District's strategies both for economic growth and housing. In this context, the District Council's ambitions for Egstow Park represent a key element in the overall regeneration strategy not only for the town but also for the District. This site of some 28ha has planning permission for a mixed development of 980 dwellings as well as employment, retail and leisure uses. It is intended to serve as an urban extension and would increase the town's population by some 25%. It is identified as a strategic site in the recently published North East Derbyshire Local Plan, Publication Draft.
57. At the time of the inquiry, it was clear that development was beginning to take place, with a pub in operation and construction of some houses underway. However, the site has taken a considerable time to come forward. As an indication of the continuing difficulties and the marginal nature of the Egstow Park scheme, the developer, St Modwen, points out that it is currently seeking a reduction in the proportion of affordable housing to be delivered, on the basis of viability.
58. Both the developer and the District Council, supported by the County Council and the local Member of Parliament, contend that the appeal scheme would have a negative impact by way of market sentiment and perception. If that was to be the case, this could delay or deter decisions by other existing and potential investors in the town.
59. The likelihood of a shift in market sentiment is a difficult effect to demonstrate. The case studies which have been provided seem to me to have very little bearing on the situation in Clay Cross. That which concerned the impact of surface coal mining on property prices found that, in the United States, there was a measurable effect. However, those findings were made in the context of a materially different method of surface mining and different requirements as to the condition of the land once mining was complete. As to the visual impact of wind turbines, these concern a much longer timespan than that being considered here. At best, it can be said that the two studies provide some support for the overall professional judgement that developments with a poor general image may well have some adverse effect on property values. In this respect, I note that the Appellant's own witness on this matter acknowledged that he would regard the existence of a planning permission for a surface coal mining scheme as a negative rather than a positive factor. This point is implicitly recognised in MLP policy M27(B), which requires consideration of whether a proposal would adversely affect efforts to attract or retain investment in an area. However, in spite of this general view, it does not necessarily follow that this particular proposal would have a measurable

- adverse effect on the progress of the Egstow Park scheme, so it must still be assessed on its own merits.
60. The nearest comparator is that of the coal extraction which took place on the Biwaters site during 2009-2011, when the site was being remediated. During that time, the Appellant points out, house prices in Clay Cross not only increased but they also outperformed the wider North East Derbyshire region. However, given the limited number of sales, the evidence is not sufficient to demonstrate convincingly the absence of an adverse effect, particularly in view of the potential fall in value which the data suggests may have occurred amongst new-house sales.
  61. In the absence of convincing evidence either for or against market sentiment, it seems to me that it would be the environmental effects which would provide the better indicator of the likelihood of an effect.
  62. I note the concerns of St Modwen that the proposal might endure beyond the stated period of 42 months. Clearly, some level of uncertainty must exist in relation to factors such as geological faults, ground conditions and contamination. Nevertheless, a substantial amount of information has been obtained about the site. Even allowing for the apparent complexity of the working method, it seems to me to be reasonable to expect that the process would be completed broadly in line with the estimated working period.
  63. During this period, the fields directly across the A61 from Egstow Park would undergo extraction and restoration. Whilst there would be few direct views of the extraction process, bunds would be in place at various locations around the site. Also, the Noise Assessment Report estimates that noise from the appeal site would not be likely to be unduly intrusive, except while cut 8 was being worked. Outside of that period therefore, it is unlikely that the effects within the Egstow Park site would be particularly noticeable. In my opinion, the appeal scheme would not be likely to directly cause Egstow Park to be noticeably less attractive to potential residents.
  64. However, if prospective house buyers were to take a look around the general area, they would be likely to perceive the visual and acoustic effects of the appeal scheme. To my mind, it is entirely plausible that such effects might lead prospective house buyers to either defer their purchase or seek to buy elsewhere. Irrespective of the intangibles of market sentiment or perception therefore, I would expect there to be a small negative effect associated with the appeal scheme, at least for the period it is in operation.
  65. In relation to commercial investors, although research might identify the scheme as a negative factor, this would have to be weighed against the range of other considerations which would normally inform any long term investment decision. Consequently, I would expect any effect in this regard to be marginal also.
  66. On that basis, it seems unlikely that the appeal proposal would be the sole cause of any decision on the part of St Modwen to scale down activities on Egstow Park or withdraw from the scheme altogether. The latter site is considerable in size and would contain a mix of uses so there are likely to be a range of factors to be taken into account when deciding whether and in what form to continue with the investment. Thus, whilst the appeal scheme might have some adverse effect on the Egstow Park scheme, it seems to me it would

be likely to be modest in scale, given the relatively short period during which the site would be operational and the much longer timescale and more complex nature of the Egstow Park site. As such, even if the appeal proposal was to have some adverse effect, it would be disproportionate to make a direct comparison between the scale of investment, job creation and benefit to the local economy from Egstow Park and the appeal scheme.

67. Overall therefore, I consider that the appeal proposal would have a modest adverse effect on the regeneration of Clay Cross.

***Issue 3: whether the adverse impacts would be clearly outweighed by the benefits***

68. I have found that, owing to substantial harm in relation to visual effects and noise, the impact of the development on the environment is not capable of being made acceptable. In addition, the proposal would be likely to have a modest adverse effect on efforts to attract and retain investment in Clay Cross. Under the terms of policy MP27 therefore, these stand to be weighed against the local and community benefits of the scheme.

69. The proposal would provide employment in the form of 15 jobs on site as well as economic and employment benefits for the wider local economy. This represents a modest benefit. The Planning Obligation makes provision either to deliver a Multi-Use Games Area or to make a contribution of £52,500 to a community fund. Provision of such a facility has, in the past, been sought by the local Residents Association and Clay Cross Parish Council. I note that, at the inquiry, a representative from the Parish Council advised that it no longer favoured a Multi-Use Games Area on Parish Council land. Nevertheless, whether the monies were put towards a Multi-Use Games Area in a different location or towards another scheme of value to the community, this represents a modest benefit which counts in favour of the proposal. The Planning Obligation also undertakes to provide land to facilitate a multi-user trail and a footbridge over the A61. However, in the absence of any firm proposals for the actual provision of such facilities, this can carry very limited weight. There would also be some slight benefits to the landscape, biodiversity and hydrology as a result of the proposed restoration measures, which include additional woodland planting, species rich grassland and field drainage.

70. These benefits are not sufficient to outweigh the very substantial harm in relation to visual effects and noise and the modest harm to regeneration. The proposal would therefore conflict with policy MP27. It would also fail to satisfy the relevant requirements within policies MP1 and MP3 as regards effects from noise or visual effect. As a result, the proposal would be contrary to the Development Plan as a whole.

71. However, NPPF paragraph 149 expects national as well as local and community benefits to be weighed in the balance. Some 175,000 tonnes of coal would be extracted. In line with paragraph 144, this should attract great weight, notwithstanding the recent Written Ministerial Statement concerning the aim of decarbonisation. In addition, there would be some sustainability benefit as a result of the reduction in distance travelled, if the coal obtained at Clay Cross was to displace imported coal.

72. On the other hand, NPPF paragraph 19 expects that significant weight should be placed on the need to support economic growth and paragraph 123 seeks to

avoid significant adverse impacts in relation to noise. Also, a good standard of amenity is part of the core planning principles. Given the extent of the adverse effects associated with this proposal I consider that, even taking into account these national benefits, the sum total of benefits associated with the proposal would not be sufficient to clearly outweigh the likely impacts. Thus, the benefits are not sufficient to justify the grant of planning permission.

73. The Appellant contends that, as the relevant policies should be regarded as out of date, the proposal should be considered on the basis of the presumption in favour of sustainable development, meaning that the adverse impacts should be shown to significantly and demonstrably outweigh the benefits. However, such an approach would be in direct conflict with the balance set out at NPPF paragraph 149, which requires the benefits to clearly outweigh the likely impacts. Thus, even if MLP policy MP27 was to be found out of date, I consider that the tilted balance contained in the presumption in favour of sustainable development would not apply in this instance.

### **Other matters**

74. In relation to other matters which were raised by or on behalf of local residents, I note the concerns as to the implications for the local area if the water main through the site was to be diverted. However, that matter would not be of sufficient weight to alter the overall planning balance. As for concerns over hydrology, I am satisfied that in view of the technical assessment within the ES, the proposal would not adversely affect nearby Kenning Park. Although the objection from Network Rail relating to the potential effect on Clay Cross tunnel has been maintained, I consider that the measures outlined in the Planning Obligation would have been sufficient to address this. Concerns as to whether the site would be restored satisfactorily would also have been addressed through the Planning Obligation, which also made provision for a Restoration Security Bond.

### **Conclusions**

75. The proposal is contrary to the Development Plan and, having regard to NPPF, I have identified no other considerations which indicate that planning permission should be granted.
76. For the reasons given above, I conclude that the appeal should not succeed and planning permission should be refused.

*K.A. Ellison*

Inspector

## APPEARANCES

### FOR THE LOCAL PLANNING AUTHORITY:

Richard Kimblin QC

He called Gary Ellis BSc (Hons), Dip LA	Landscape Architect, Derbyshire County Council
Kieran Gayler BSc (Hons), CSci, CEnv, MIEnvSc, MIEMA, MIOA	Sharps Gayler LLP
Bryan Harrison MSc, MA	Snr Regeneration Officer, North East Derbyshire District Council
Justine Proudler BSc (Hons), MSc	Snr Planning Officer, Derbyshire County Council

### FOR ST MODWEN DEVELOPMENTS LTD:

Satnam Choongh, of Counsel

He called Mark Walton BSc, DipTP, MRTPI	Director, WYG Environment, Planning and Transport Ltd
Adrian Willet, BSc (Hons), FRICS, FCIH	Snr Director, CBRE Ltd

### FOR THE APPELLANT:

James Corbet Burcher, of  
Counsel

He called Jonathan Mason BSc (Hons), Dip LA, CMLI	Technical Director, Axis
Dr Paul Cockcroft BEng, PhD, CEng, MIMMM, FIOA	Snr Partner, Walker Beak Mason Partnership
Chris Wheaton BSc (Hons), MRICS	Director, Quod
Simon Edwards BSc (Hons), CPhys, MInstP, AMIOA, FRMetS	Director, IDOM Merebrook Ltd

### INTERESTED PERSONS:

Lee Rowley MP	
Francis Muldoon	Local resident
John Gregory	Hilltop Action Group
Pat Walton	Local resident
Richard Wright	Local resident
George Stevenson	Vice Chair, Kenning Park Community Group



Anne Harris	Coal Action Network
Colin Reed Aspley	Local resident
Cllr Mansbridge	Ward member
	North East Derbyshire District Council
Mr R Garnett	Local resident

#### DOCUMENTS

- 1 Derbyshire CC response to Inspector's Q3
- 2 Provectus response to Inspector's Q1 & Q2
- 3 Opening submissions on behalf of the Appellant
- 4 Leics County Council v SSCLG [2007] EWHC 1427 (Admin)
- 5 Stroud DC v SSCLG [2015] EWHC 488 (Admin)
- 6 FPCR photomontages – A3 size
- 7 Opening statement on behalf of Derbyshire CC
- 8 Opening submissions on behalf of St Modwen Developments Ltd
- 9 Statements from interested parties
  - 9.1 Hilltop Action Group
  - 9.2 Mrs P Walton
  - 9.3 Mr Muldoon
  - 9.4 Mr G Stevenson, Vice Chair, Kenning Park Community Group
  - 9.5 Ms A Harris from the Coal Action Network
  - 9.6 Mr R Garnett
- 10 Inspector's note on noise evidence 29/11/17
- 11 St Modwen objection to EfW 17/3/15
- 12 St Modwen first objection 2/3/16
- 13 St Modwen second objection 18/3/17
- 14 Suggested conditions
- 15 Conditions - differences between the parties
- 16 Planning Obligation – Draft
- 17 Hopkins Homes Ltd [2017] UKSC 37
- 18 Pertemps Investments Limited [2015] EWHC 2308 Admin
- 19 Suggested conditions – Hilltop Action Group
- 20 agreed list of plans and drawings; condition 50
- 21 Extent of coal extraction area – Biwaters site
- 22 Closing submissions on behalf of St Modwen Developments Ltd
- 23 Closing submissions on behalf of Derbyshire County Council
- 24 Closing submissions on behalf of Provectus Ltd

#### DOCUMENTS RECEIVED AFTER THE INQUIRY

- 25 Planning Obligation dated 19 January 2018
- 26 Responses arising from the North East Derbyshire Local Plan -  
Publication Draft from:
  - 26.1 St Modwen Developments Ltd
  - 26.2 Provectus Ltd
  - 26.3 Derbyshire County Council