Bettws Newydd Opposition Group
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13th April 2010

Dear Committee Member,

Re: Application for retrospective permission to retain and finish Bettws Newydd NP/10/033

I am writing on behalf of our many hundreds of members and petitioners, to provide you with information that we feel is highly relevant in making this important decision. We respectfully request that you consider the content of this letter and ask you to refuse this application.

Full details of what we have to say are in the following pages, at first summarised in bullet points, and afterwards explained in detail with background references attached, in an appendix.

The current plans show no change to the structure of the building; merely additional landscaping which we have only recently been informed will involve the importation of about 60 to 70 lorry loads of material (itself a breach of planning policy). The application is otherwise very similar to the previous application which was resoundingly rejected by the Committee in June 2009.

The application is still in conflict with JUDP policies 56, 67, 76 and with several other important policies.

It is on this basis, against JUDP policies, that the application must again be judged. The existence of the 2006 planning consent is not a reason to approve this application, especially since the as-built/as proposed development is very different from the stamped approved amended plans and this is now even more so than previously thought due to confirmation that the location on site was changed. (See the plan on page 21 of the Developer's Design and Access Statement).

This is a matter of principle going far beyond this one building. Give a green light to this, and you will encourage other developers to think they can get away with building a larger building in a different place to that for which permission was given, and to ignore conditions.

We ask the Committee to reach a decisive and final decision on this unauthorised development as follows:

1. Reject the current planning application (consistent with your previous decision and also in accordance with the professional external planning advice received at the October DMC meeting).

2. Immediately issue the planning enforcement notice, approved in draft last October, requiring removal of the present structure on site and levelling of the ground.

3. Revoke the flawed planning consent granted in 2006 (by delegated authority) as you have the power to do, by issuing a notice under s.97 of the 1990 Act, since this is "expedient in the circumstances" See items 9 and 10 below.

If anything in this letter is unclear, then we hope you will contact us directly for clarification.

Yours sincerely,

Reg Atkinson, Chairperson, Bettws Newydd Opposition Group http://parrog.org.uk

Comments from the Bettws Newydd Opposition Group on the application NP/10/033

1. A previous retrospective planning application, made in almost identical terms, was considered at great length by the Committee a year ago, and was refused by an overwhelming vote, despite the contrary recommendation of Officers. The Developer had the opportunity to appeal that refusal but has chosen not to do so.

2. Minuted grounds for the decision to refuse retrospective consent show that the dwelling-house "as built" failed to comply with at least three separate aspects of the development plan, including especially its 'visual intrusiveness' as compared to the 'original' dwelling house which it replaced.

3. The present retrospective application proposes no alteration what so ever to the size, height, appearance, aspect or indeed any feature of the replacement dwelling-house 'as built', but is limited instead to landscaping and planting proposals.

4. The Authority subsequently sought at public expense, and has received, independent professional planning advice, to the effect that the only appropriate remedy to the planning breach, represented by this development, is the complete removal of the present structure and levelling of the site.

5. The Committee also resolved, in deference to planning guidance, to permit the Developer the opportunity of one month to propose alternate remedial steps by way of planning enforcement. He has chosen not to do so.

6. Instead, and seemingly acting on advice of Officers, the developer has merely turned the clock back and begun again with this latest retrospective planning application, which, contrary to an Officer's stated position, is a procedure not supported by any written counsel's advice we have seen offered to the Authority.

7. The Officers have stressed the significance of the so-called 'fall-back' position, by which they mean that the developer could construct another building which correctly implements the 2006 planning consent. However, there is no suggestion that the development, contemplated by that Consent, in any way what so ever permits any departure (even in the smallest degree) from the policy provisions of the Development Plan.

8. Moreover, were a developer to seek at a future date to lawfully implement that consent, it would provide the Authority with the perfect opportunity to monitor and enforce compliance with the original attached conditions, which by its own admission, it has lamentably failed to do to-date - Conditions including such vital matters as (a) development carried out in accordance with approved plans (b) prior approval of profiled levels (c) prior approval of a scheme of fenestration and finishes, (d) prior approval of landscaping including preservation of the wetlands.

9. Finally, if the Committee is to have proper regard to the legal significance and materiality of the so-called 'fall-back' consideration ; then in fairness and basic justice, it must also consider its statutory powers (under s.97 of the 1990 Act) to revoke that consent instead, wherever it is considered "expedient" to do so.

10. Not only is that power still capable of being exercised, in spite of the current substantial completion of the dwelling-house, moreover, because those building works have been undertaken in breach of planning, the Authority would not be liable to pay compensation for those works in the event of a revocation.

Each of the above 10 points is further explained in the appropriate numbered paragraph in the Appendix below.

Appendix: Further explanatory material.

1) **A previous retrospective planning application, made in nearly identical terms, was considered at great length by the Committee a year ago, and refused on an overwhelming vote, despite the contrary recommendation of Officers. The Developer had the opportunity to appeal that refusal but has chosen not to do so.**

Considerably over a year ago (Jul.08) this Developer previously sought retrospective[1] planning permission to '*retain and finish'* this development, which was later clarified as an application[2] to *'remove a prior condition'*. That condition required instead that he comply with the plan drawings, as approved and attached to a planning permission in 2006[3], and which by common assent he has simply ignored.

After detailed and thorough consultation and deliberation, taking more than 6 months, in June last year, and despite the contrary recommendation of your Officers, the Committee considered and decided to refuse that application. Only two members voted to approve[4]. This Developer then had a full further six months thereafter, in which to submit an appeal against that decision to the Welsh Planning Inspectorate. He has chosen not to do so.

The Developer now again seeks retrospective permission for the same development under the same statutory provision, the only difference being that he now accepts that he has the benefit of no current planning permission at all, and is not now seeking only the retrospective alteration of a previous planning condition[5].

2) Minuted grounds for the decision to refuse retrospective consent show that the dwelling-house "as built" failed to comply with at least three separate aspects of the development plan, including especially its '*visual intrusiveness*' as compared to the 'original' dwelling house which it replaced.

Ground 1 of the minuted reasons for that resolution stated[6] :

> *1. The dwelling as constructed does not achieve an acceptable level of integration with the land form and setting of the site.* ***As a result, it is significantly more prominent and visually intrusive than both the original dwelling and the replacement dwelling approved under permission NP/06/076****. It does not reflect the proportions of other buildings on The Parrog and* ***it is therefore in conflict with criteria (i), (ii) and (iv) of Joint Unitary Development Plan (JUDP) Policy 67 (Conservation of the Pembrokeshire Coast National Park), criterion (iv) of JUDP Policy 56 (Replacement Dwellings) and JUDP Policy 76 (Design).***
>
> (emphasis added)

3) The present retrospective application proposes no alteration what so ever to the size, height, appearance, aspect or indeed any feature of the replacement dwelling-house 'as built', but is limited instead to landscaping and planting proposals.

The current application, made under the exact same statutory provision[7], seeks now to reiterate that process nearly precisely, including especially no reduction whatever in the height of the dwelling house as built.

Instead the current application now seeks permission, contrary to the well established policy of the Authority, to import onto the site no less than "*60 to 70 lorry loads*"[8] of fill material in order to build up the

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[1] Under s.73of the 1990 Town & Country Planning Act (as amended).
[2] Application NP/08/361
[3] Condition #2 to the 2006 Consent (NP/06/076)
[4] See minute @ p.9 of adopted Committee Minutes for 17th June 2009
[5] Compare the terms of subs.(2)(*a*) with (2)(*c*) of s.73A (*Retrospective Consent*) ibid.
[6] See ibid f.nt.4 above
[7] See ibid f.nt.1 above

surrounding ground level, most especially against the eastern elevation. This is in order to give an impression on paper, closer to that afforded by the approved drawings attached to the 2006 Consent, but which had clearly contemplated instead the dwelling-house structure being "*sunken*" into the surrounding ground level, by at least a full storey[9].

4) The Authority subsequently sought at public expense, and has received, independent professional planning advice, to the effect that the only appropriate remedy to the planning breach, represented by this development, is the complete removal of the present structure and levelling of the site.

Since that June '09 decision, however, the Authority has, at considerable public expense, retained outside professional planning consultants to advise on the extent of the present planning breach and the appropriate remedy. The Report to the October 2009 Committee incorporating their findings concluded that the only appropriate remedy in these circumstances was the complete removal and levelling of the site. This naturally would be without prejudice to the subsequent possibility of a restart in a lawful implementation of the '06 consent. A draft enforcement notice attached to that Report, set out language describing those steps[10].

5) The Committee also resolved, in deference to planning guidance, to permit this Developer the opportunity of one month to propose alternate remedial steps by way of planning enforcement. He has chosen not to do so.

The Committee whilst adopting that Report and its recommendations, also resolved, on the suggestion of the Officers, to give the Developer a further calendar month alone, in which to allow him a last opportunity to suggest alternative enforcement steps instead which he considered could remedy that breach of planning[11].

> *"However, in line with TAN9 advice, the option should be given to the owner to attempt to secure such modifications before concluding that they are not feasible and before, therefore, taking enforcement action, to remove the building. In the event that the owner does demonstrate that there are acceptable modifications possible, they could then be included as the specific steps to be taken in the Enforcement Notice."*
>
> (emphasis added)

This notwithstanding the clear advice of the consultants that

> "*...the changes to the 2006 approved scheme are such that modification to the current scheme is not considered possible without complete demolition and rebuild. ...Equally it is not considered that the dwelling as built can simply be modified so as to remedy the harm sufficient to render the development acceptable".* [12]

That last opportunity has also been ignored by this Developer.

6) **Instead, and seemingly whilst acting on the advice of Officers, he has merely turned the clock back and begun again with this latest further retrospective planning application, which, contrary to an Officer's stated position, is a procedure not supported by any written counsel's advice we have seen offered to the Authority.**

Most regrettably, this has seemingly been done on the advice and with the collusion of the relevant Officers, who have advised us that, in turn acting '*on the advice of counsel'* the Authority was obliged to permit this

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[8] See "Bettws Newydd: Earthworks: Construction and Establishment. Soltysbrewster 12/03/10
[9] See approved drawings attached to '06 Consent, in particular giving a 3D perspective view.
[10] See Appendix 2 @ Para.6 attached to the Officer's Report on Enforcement to October 09 DMC
[11] See @ para 3.30 on p.20 of the Officer's Report on Enforcement to October 09 DMC
[12] See para 3.25 of October 09 Report @ p.18

Developer an opportunity to make a further third application, instead of proceeding forthwith to take the enforcement measures already approved in principle last October.

This is, of course, a nonsense. We invite you to examine in detail the written advice of counsel actually given to the Authority in August last year. He naturally refers to well known government guidance, that planning enforcement measures should only ever be undertaken in order to rectify planning breaches and unauthorised development, which result in either detriment to the public amenity or failure to conform to the development plan, rather than in order to '*punish*' a developer for not keeping to the planning permission[13].

However, he makes no hint of a suggestion in that Advice to the effect that the Authority was not at liberty last year to proceed to take the appropriate and recommended enforcement action, by way of the Notice approved in draft in October.

Clearly, where a local planning authority is satisfied (a) that a flagrant and material breach of planning has occurred, (b) that remedial action by way of a planning enforcement notice is warranted and is not any mere punitive measure, and finally (c) that the developer has failed to respond to a further opportunity to suggest alternate remedial enforcement steps; it makes a plain mockery of the statutory enforcement regime to suggest that in place of proceeding with that appropriate enforcement, the authority must instead stay its hand and afford the developer yet a further opportunity to obtain retrospective permission for his transgressions a second time.

7) Additionally, Officers now exhort the significance of the so-called 'fall-back' position, whereby they refer to the prospect of the future lawful implementation of the 2006 planning consent instead. However, there is no suggestion that the development, contemplated by that Consent, in any way what so ever permits any departure (even in the smallest degree) from the policy provisions of the Development Plan.

In their final effort to urge approval for this development "*as built*", those same Officers today now seek to retreat to the so-called "*fall-back position*", by which they try to make much of the fact that, whatever enforcement action the Authority is now at liberty to take, it cannot prevent this Developer in future seeking to implement the development as was permitted back in 2006. So be it. There was no suggestion, either in the formal notice of consent, or the committee's resolution to delegate powers in '06[14], that that permission was for any development otherwise than in strict compliance with the development plan in the usual way. In other words, that permission was not then considered as, or granted as, an *'departure application"'* as instead properly describes the character and nature of the current application [15].

8) More over were a developer to seek at a future date to lawfully implement that Consent, it would provide the Authority with the perfect opportunity to monitor and enforce compliance with the original attached conditions, which by its own admission, it has lamentably failed to do to-date - Conditions including such vital matters as (a) development carried out strictly in accordance with approved plans (b) prior approval of profiled levels (c) prior approval of a scheme of fenestration and finishes, (d) prior approval of landscaping including preservation of the wetlands area.

There were no specific dimensions provided by the Developer in 2006. Most regrettably neither were they sought by the Authority. Consequently the approved drawings, and especially the subsequent approval of conditional matters, including the prior approval of site profiles of external ground and internal floor levels etc. - which would inevitably have to be re-visited in the event of any 'fall-back' to a future implementation of the 06 consent - can only be capable of such lawful carrying out, in a manner which interprets those approved drawings as fully complying with and respecting the Development Plan policies.

The so called *'fall-back'* therefore in reality only gives the Authority the future opportunity to strictly and carefully monitor and enforce those planning conditions, specifically in order to uphold those plan policies,

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[13] See esp. Paras 6 in TAN 9 quoted @ para.15 of the August Advice
[14] See minute of DMC resolution taken in (Mar) 2007 (?)
[15] See the Authority's advertisement in the Western Telegraph of 15 March 2010.

in a manner which it so lamentably, and by its own admission[16], failed to do the first time around. See in particular:

> *Condition 2 : "The development hereby permitted shall be carried out, and thereafter retained, strictly in accordance with the amended plan received by the National Park Authority on 24 July 2006 and subject to any (SiC) following conditions"*
> *Condition 3 : Following site clearance and **prior to the commencement of any construction work**, site profiles of the external ground and internal finished floor levels shall be set out on site for approval by the National Park Authority.*
> *Condition 5 – A schedule of external finishes and colours, to be submitted to the National Park Authority for approval, in writing, **prior to the commencement or work**.*
> *Condition6 – Full details of all windows and doors (including their means of opening, glazing bars and framing), dormas, soffits, facias, and verges shall be submitted to the National Park Authority for approval in **writing prior to the commencement to the construction of the dwelling.***
> *Condition 7 – A suitable and comprehensive scheme for the soft and hard landscaping of the site shall be submitted to the National Park Authority for approval, in writing, **prior to the commencement of work**. Such a scheme shall take full account of the natural tree and shrub species on the site and in the area in general. The scheme should also include measures for the retention and management of the wetland scrub on the site. "*
> (e*mphasis added*)

9) Finally, if the Committee is to have proper regard to the legal significance and materiality of the so-called '*fall-back*' consideration ; then in fairness and basic justice, it must also consider its statutory powers (under s.97 of the 1990 Act) to revoke that consent instead, wherever it is considers it "*expedient*" to do so.

If it is appropriate for the Officers to remind the Committee of the material character of the so-called *'fall-back'* consideration, then simple fairness demands that they should also advise you, on the other hand, that you retain the statutory power to formally revoke that '06 planning permission instead, wherever you consider it "*expedient*" to do so.

S. 97(1) of the 1990 Act provides as follows:

> *" If it appears to the local planning authority that it is expedient to revoke ... any permission to develop land granted on an application made under this Part, the authority may by order revoke ... the permission to such extent as they consider expedient."*

10) Not only is that power still capable of being exercised, in spite of the current substantial completion of the dwelling-house, moreover, because those building works have been undertaken in breach of planning, the Authority would not be liable to pay compensation for those works in the event of a revocation.

> *(a) where the permission relates to the carrying out of building or other operations, at any time before **those** operations have been completed;*
> ***....***
> *(4) The revocation or modification of permission for the carrying out of building or other operations shall not affect so much of **those** operations as has been previously carried out. (emphasis added)*

[16] See for example pages 42 to 47. of the Monitoring Officer's Report '110509' presented to the Scrutiny Committee 05/02/10

We have ourselves taken advice of counsel on the legal interpretation of these provisions, and have in short been assured that, where in the section reference is made to "*those*" operations (as emphasised above) the operations concerned must themselves be such as were permitted by the relevant planning consent; and in particular such construction would be subject to the well established rule, as to which see the well known authority of *Whitley and Sons -v- Secretary of State for Wales [1992] 64 P & CR 296*[17], such that to be valid, those operations must have been lawfully carried out, in the sense of complying with all the conditions attached to that consent.

This interpretation is consistent with the advice given by your Officers when previously addressing you on this issue back in Oct '07 when, according to the minutes, you were then advised that:

> "... *Thus the fact that the steel structure has been erected in accordance with the approved plan means that that part of the permission having been implemented could not now be revoked."*
>
> *(emphasis added)*

However, at this later date, it is now accepted, even by the applicant himself, that far from the dwelling-house having been "*erected in accordance with the approved plan"* this structure has been erected wholly outside of those approved plans, hence necessitating his repeated subsequent attempts at retrospective planning permission. Indeed, and merely for example, the current application concedes that the entire footprint of the development structure has been moved some 5 metres further up the slope[18].

It, therefore, follows that:

(a) none of the building operations having been carried out to-date in accordance with conditions implementing the approved drawings, there is, in fact, no bar on the exercise of the power to issue a full s.97 Revocation Order, even at this late date ; and

(b) since the building operations carried out to-date have been unauthorized, in the *"Whiteley*" sense of being carried out in breach of conditions, the Developer would not even be eligible to compensation from the Authority, for his expenditure in that regards, were a Revocation Order to issue[19].

Accordingly, we forcefully submit that were the Committee to be persuaded by its Officers that future lawful implementation of the '06 consent would constitute, by itself, a significant re-iteration of much of the planning harm and objection, as currently presented by the 'as built' development (which is not conceded) then the appropriate remedy for that is to simply revoke that consent, in addition to taking enforcement action against the 'as built' development.

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[17] In which it was established that timely implementation of a planning permission, subject to a 5 year condition on commencement, does not occur as a result of otherwise timely material operations which are in the event themselves carried out in breach of other attached conditions.

[18] See site plan details @ para.4.27 on p.21 of the accompanying Design & Access Statement.

[19] See in particular s.103 of the 1990 Act (as amended)