

## **Community Services and Environment Scrutiny and Performance Panel**

**27 August 2013**

### **Brownhills Common – Mineral Planning Permission EB233**

**Ward(s):** Brownhills

**Portfolios:** Cllr A Harris – Leisure and Culture

#### **Executive Summary:**

Part of Brownhills Common is subject to a mineral planning permission for clay and coal extraction approved in 1954 (EB233). In response to a request from the Panel, Council officers have considered whether the permission could be revoked. The permission is “dormant” because no mineral working has taken place in recent times. This means the permission cannot be implemented until a set of modern working conditions is in place, so it is unlikely that any mineral working will take place in the short-term. New conditions and other regulatory controls would minimise the effects of working on the SSSI, SINIC and local communities if mineral working does take place, and would ensure that the site was restored to an appropriate standard. While the Council has the power to revoke the permission, it has to take into account development plan policy, the statutory tests for revocation and other relevant issues before taking this step. Anyone affected or who has an interest in the land or in the minerals beneath the land may oppose revocation, cause a public inquiry to be held, and seek compensation. Officers have therefore concluded that it would be best for the Panel to defer any further consideration of this matter until the implications for Council resources and the future planning of the wider Brownhills area have been fully explored. It is recommended that a report be brought back to the Panel early in 2015, when the forthcoming Walsall Site Allocations Document (SAD) is expected to be published, by which time these issues will have been given due consideration.

#### **Reason for Scrutiny:**

The report has been prepared in response to an Action agreed by the Scrutiny Panel at their meeting on 13 May 2013, that the Council’s Development Management section considers revoking the planning permission for mineral extraction at Brownhills Common (Action 3).

#### **Background Papers:**

Mineral permission EB233 (28.01.54): Land at Brownhills - winning and working of clay and coal by underground and surface mining.

Town and Country Planning Act 1990 (as amended)

Revocation of Planning Permission: House of Commons Standard Note SN/SC/905 (22 May 2013), House of Commons Library

National Planning Policy Framework (March 2012), CLG – Sections 9 (Protecting Green Belt Land), 11 (Conserving and Enhancing the Natural Environment) and 13 (Facilitating the Sustainable Use of Minerals) and Annex 2 (Glossary).

Technical Guidance to the National Planning Policy Framework (March 2012), CLG – this includes Minerals Policy on managing the impacts of mineral extraction on the environment and local communities, including control of noise and dust.

Minerals Planning Guidance Note 4 (MPG4): Revocation, modification, discontinuance, prohibition and suspension orders (August 1997), ODPM

Black Country Core Strategy (BCCS) 2011 - Policies ENV1 (Nature Conservation), MIN1 – MIN5 (Minerals) and Minerals Key Diagram

Walsall Unitary Development Plan (UDP) 2005 – “saved” Policies ENV2 – ENV6 (Green Belt), ENV23 (Nature Conservation) and M7 (Birch Coppice)

Conserving Walsall’s Natural Environment Supplementary Planning Document (revised version July 2013), Walsall Council

Walsall Site Allocations Document Issues & Options Report (April 2013) – Chapter 6 (6.1 Open Space), Chapter 9 (Minerals) and Appendices 6a and 9a.

Mineral Planning Factsheets: Fireclay (October 2006) and Coal (August 2010), British Geological Survey and CLG<sup>1</sup>

Walsall Green Space Strategy 2012 – 2017 (August 2012), Walsall Council – Brownhills Common is included in the audit, and has been classified as areas of “natural and semi-natural greenspace” (site references 3029 and 3030)

Chasewater and The Southern Staffordshire Coalfield Heaths Site of Special Scientific Interest (SSSI): SSSI Citation published by Natural England 16.12.10.

### **Citizen Impact:**

It is understood that the request to consider revoking the mineral planning permission has come from local residents. Revocation of the mineral planning permission covering part of Brownhills Common would not have any direct effect on local residents, as it would not change the current use of the land covered by the permission. However, the Council may have to compensate affected parties for the loss of the permission, and it is unclear what effects this could have on the wider Brownhills area or on Council services.

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<sup>1</sup> These factsheets refer to previous national policy guidance on minerals which has now been replaced by the National Planning Policy Framework (NPPF) and the related Technical Guidance.

## **Resource and Legal Considerations:**

The procedures for revoking a planning permission are set out in the Town and Country Planning Act 1990 (as amended). A summary of the main issues is set out below, and Section 2 of the main report explains the process in more detail.

Under Section 97 of the Act, the Council has the power to revoke a planning permission for any development that has not yet been completed, by making an order to that effect. However, when exercising this function, it must have regard to the development plan and other material considerations, and it is implicit that all interested parties must be notified. If the order is opposed, Section 98 requires the Council to refer it to the Secretary of State for confirmation, notifying the land owner, the occupier and anyone else likely to be affected. They have the right to request a public inquiry, and to seek compensation for any abortive expenditure caused, and for any other loss or damage, directly attributable to the revocation of the permission.

The financial costs to the Council of revoking permission EB233 for working of clay and coal on land at Brownhills Common could be very considerable. For example, they could include not only the cost of any financial compensation payable to affected parties, but also legal costs, the cost of a public inquiry, and other costs that could be incurred by the Council in preparing its case. This would also extend to the loss in value of an interest in the land. The staff resources needed to manage the process could also be significant. The Council's Development Management Team currently has a very large caseload of planning applications, and is unlikely to have the capacity to progress a revocation order at the present time. Input would also be needed from Planning Policy, Legal Services, other Council teams and possibly also external advisors.

Further advice has been sought from the Council's Legal Services section on the implications of revoking the permission. It seems highly unlikely, having regard for the parties involved that an order would be unopposed. Added to that, given that the original permission was granted on appeal, Legal Services expect that this would progress to a public inquiry. Given the weight of public interest and the complication that part of the mineral permission relates to common land (the ownership of part of which is currently unknown) the costs and the complexities of the case are likely to be significant. It is almost certainly the case that Legal Services would advise the need to retain Counsel for the provision of advice and for dealing with the inquiry and it may well be the case that interested parties do the same.

## **Environmental Impact:**

The revocation of mineral planning permission EB233 would not directly affect the Site of Special Scientific Interest (SSSI) or the proposals for the Draft Heathland Restoration Plan, because the permitted area is outside the boundary of the SSSI. However, it is at present unclear what effects the revocation of the permission could have on other land and the environment in the wider Brownhills area.

Although the permitted mineral extraction site is outside the SSSI, it is within the area covered by the Brownhills Common and The Slough Site of Importance for

Nature Conservation (SINC). The SINC would suffer significant harm through loss of habitat, as well as from noise, dust and vibration and visual impacts, if mineral extraction took place. Mineral working within the permitted site could also have indirect effects on the adjacent areas of the SSSI. However, if the site was restored to a high standard, it could provide opportunities for re-creation of lowland heathland habitats, consistent with the objectives of the SSSI, as well as enabling the site to be brought back into open space/ recreational use.

EB233 is a “dormant” mineral planning permission because no mineral working has taken place in recent times. This means that no mineral working can take place on the site at Brownhills Common until a set of modern conditions governing mineral working, environmental management, restoration, aftercare and after use has been put into place. This provides the Council with a degree of control over any future extraction at the site. Although the mineral permission is old, the conditions required for any extraction to take place in the future would be entirely up to date and would have to take account of all current relevant planning and environmental considerations. At the time this report was prepared the Council had not received any planning applications for new conditions applicable to this site.

An application for new conditions would almost certainly require an environmental impact assessment, and would be expected to include mitigation measures to protect the SSSI, the other parts of the SINC and effects on local people. Once a set of conditions has been approved by the Council they are enforceable, and action can be taken against any infringements. There are also regulatory controls in place covering certain operations at mines and quarries, such as the management of mining and quarry wastes.

Given the types of mineral present (fireclay and coal), it is anticipated that if there were to be any future interest in the use of the extant mineral permission, surface mining (opencast) methods would be used. This is a relatively rapid method of mineral working which may last no more than 2 – 3 years in total, including the restoration phase, limiting the duration of the effects.

At the present time, mineral working at Brownhills Common does not appear to be an imminent prospect. Even in the event that the permission is implemented at some point in the future, new conditions and other regulatory controls would limit the environmental effects of mineral working, and ensure that the site is restored to an acceptable standard and for an appropriate after-use.

### **Performance Management:**

It would not be advisable for the Council to revoke a planning permission without considering the full implications of doing so, including the statutory tests for revocation, the extent of the Council’s liabilities for compensation, the potential effects on future local planning and land use in the area where the permitted site is located, and whether the Council has the resources to implement and manage the revocation process effectively.

The revocation process would need to be carefully managed, to ensure that the legal requirements are complied with and to minimise the risk of unnecessary or abortive

costs, as well as the level of third party costs. If an affected party requests a public inquiry and compensation, the costs will escalate, and may be difficult to control.

### **Equality Implications:**

No direct implications for equality have been identified, arising from the request to consider revoking the mineral planning permission covering part of Brownhills Common.

### **Consultation:**

Earlier this year, the Council consulted the public on “issues and options” for the Walsall Site Allocations Document (SAD). One of the key roles of the SAD will be to define the boundaries of areas identified for development in the Black Country Core Strategy (BCCS), including the four “areas of search” for potential future mineral extraction in Walsall identified on the BCCS Minerals Key Diagram.

The SAD Issues & Options Report (April 2013) summarises the issues relating to future mineral supply, including the need for fireclay and coal. It contains maps showing the location of existing permitted mineral extraction sites, including the one at Brownhills Common, and suggested boundaries for the “areas of search” identified in the BCCS.

Although no formal comments have been received about Brownhills Common in response to the recent consultation, the following comments were made verbally at public events and meetings in Walsall Town Centre and in Brownhills:

- Leave Brownhills Common alone;
- Should stop Brownhills Common being dug up for minerals; and
- Keep Brownhills Common the same – no need to cut down the trees.

It is clear from this that there is public concern about the prospect of mineral working at Brownhills Common, as well as concerns about the cutting down of trees, which was the subject of a separate report to the Panel in May. Council officers will take these comments into account when developing the proposals for future land use in the Brownhills area. A draft version of the SAD is expected to be published for public consultation during 2014, followed by a final draft early in 2015. The public will therefore have further opportunities to have their say about the future proposals for the Common and the wider Brownhills area.

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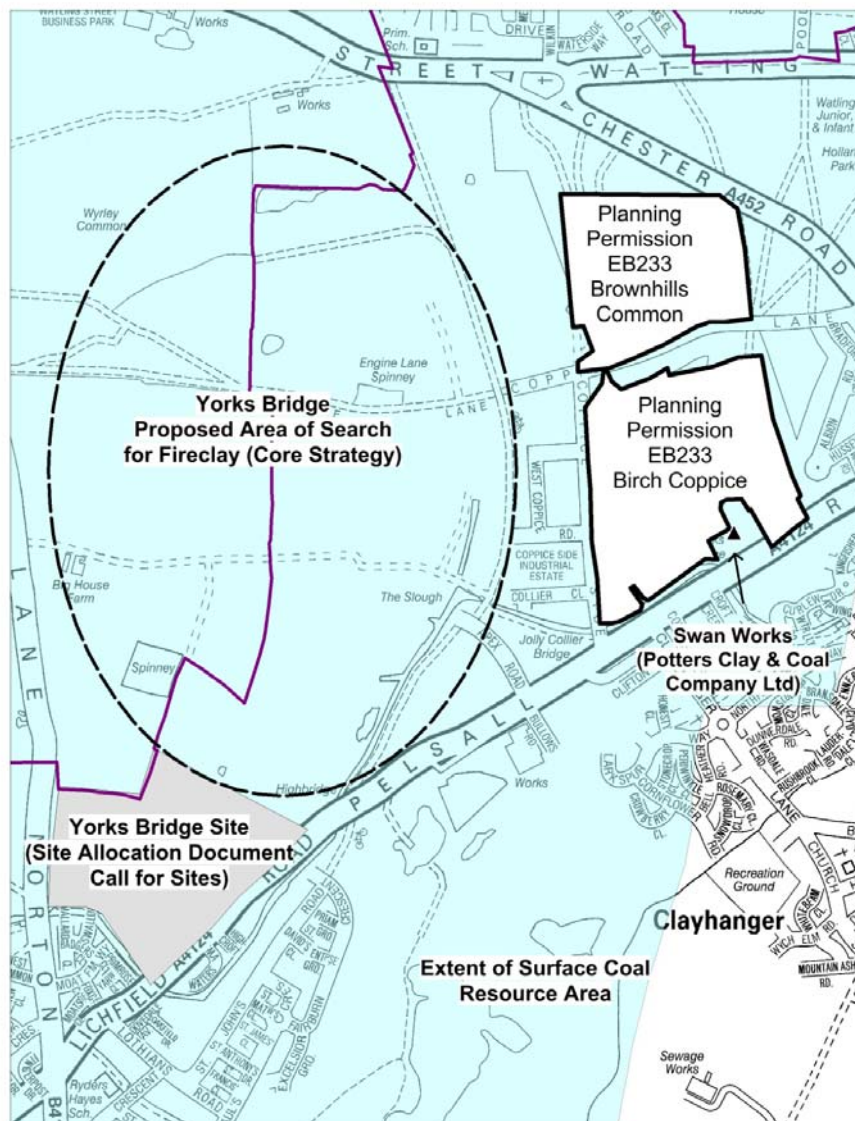
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# 1. Mineral Planning Permission EB233: Land at Brownhills

1.1 Part of Brownhills Common is subject to a mineral planning permission for clay and coal extraction (EB233) on Land at Brownhills, approved by the Secretary of State in 1955 following an appeal. The permission covers two sites, one to the south of Coppice Lane, called “Birch Coppice” and the other to the north of Coppice Lane, called “Brownhills Common.” The boundaries of the two areas covered by permission EB233 are shown on Figure 1 below.

**Figure 1: Brownhills – Mineral Resources and Potential Mineral Working Areas**



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Surface Coal Resource Data produced under licence from the Coal Authority (2011)

(Not to scale)

- 1.2 Clay and coal extraction took place on the “Birch Coppice” site many years ago, and the site has now been mostly restored to woodland, although the final phase of restoration has not yet been completed. A small stockpile of clay extracted from this site still remains and is held by Potters Clay and Coal Company Ltd, a supplier of pot clay blends, who were the applicant of the planning permission. The company has a factory and supply outlet in Brownhills called Swan Works, adjacent to the Birch Coppice site on Pelsall Road. The location of Swan Works is indicated on Figure 1.
- 1.3 As no mineral working has taken place on either the “Birch Coppice” site or the “Brownhills Common” site in recent times, the permission is classified as “dormant.” Under the Environment Act 1995 (as amended), no mineral working can take place at a “dormant” site until a set of modern conditions covering mineral working, environmental management, restoration, aftercare and after use is in place. At the time this report was prepared, the Council had not received any planning applications for new conditions covering mineral working on the “Brownhills Common” site.

## **2. Revocation of Mineral Planning Permissions**

- 2.1 The procedures for revocation of a planning permission are set out in the Town and Country Planning Act 1990 (as amended). The procedures are also summarised in a useful briefing note published by the House of Commons Library in May 2013 (see list of Background Papers).
- 2.2 Section 97 of the Act allows a local planning authority or a mineral planning authority to revoke a planning permission for any development that has not yet been completed, if it considers it “expedient” to do so. However, this is not an unlimited power - in exercising this function, the planning authority must have regard to the development plan and other “material considerations.” which will include the question of whether it is expedient to revoke the permission, having regard for the fireclay reserves on site. Current development plan policy and other “material considerations” that could be relevant in this case are outlined in the next sections of this report. There are also special provisions in Schedule 5 (Part II) of the Act, concerning the revocation of mineral permissions. This allows the Council to include aftercare conditions in the revocation order, if the permission includes conditions relating to restoration of the site.
- 2.3 Where a revocation order is opposed, by the land owner, occupier or another interested party; the Council must seek confirmation of the order from the Secretary of State. The procedures for this are set out in Section 98 of the Act. The Secretary of State’s confirmation is also required where the original permission was granted by him. As this permission was granted on appeal, any order will require confirmation. The Council must serve notice that the order has been referred on the land owner, the occupiers and “any other person who in their opinion will be affected by the order,” giving them at least 28 days to request that a public inquiry be held. This includes any party with an interest in the mineral rights. The setting of an inquiry may take some

months. Following the inquiry (if one is held) or following consideration of the written papers by the Secretary of State, the decision to confirm a revocation order rests with the Secretary of State, who may modify it if he considers it “expedient.”

- 2.4 Under Section 107 of the Act, the planning authority is also liable to pay compensation for any abortive expenditure caused, and for any other loss or damage directly attributable to the revocation of the permission. This can include compensation for expenses incurred in drawing up plans for development, and for depreciation in the value of the interest in the land. In the case of a mineral permission, a mineral planning authority may have to compensate not only the land owner, but also any other parties with an interest in exploiting the mineral resources likely to be present on the site.
- 2.5 As the mineral extraction operations covered by permission EB233 have not yet been fully completed, the Council does have the power to revoke the permission. However, it would not be prudent for the Council to do so without considering the full implications, including the potential costs. For example, the revocation procedure would require significant staff resources to implement, and it is doubtful that the Council’s Development Management Team has the capacity to deal with this at the present time, due to an increase in the number of planning applications.
- 2.6 Revoking a planning application could also be very costly for the Council if a public inquiry has to be held, and as the final decision would rest with the Secretary of State, the outcome would not be certain to result in complete revocation of the permission. Even if the order was confirmed, the land owner, occupier and other affected parties would have the right to claim compensation from the Council for any abortive costs or other loss or damage incurred due to the loss of the permission, which could have significant financial implications for the Council.

### **3. The Development Plan - Current Local Plan Policy**

- 3.1 The statutory development plan for Walsall – also referred to as the “Local Plan” in national policy guidance – is made up of the following documents:
  - Black Country Core Strategy (BCCS) 2011; and
  - Walsall Unitary Development Plan (UDP) 2005 – “saved” policies, Proposals Map and Town and District Centre Inset Maps.

The BCCS establishes a long-term framework for future development in the Black Country, and includes “Key Diagrams” which show the broad pattern of development expected to take place between now and 2026. The Walsall UDP is an older plan, part of which has been replaced by the BCCS. However, some UDP policies are still in place. The UDP Proposals Map, which allocates specific sites for development, identifies important environmental assets to be protected, and defines the Green Belt boundary, is also still in effect.



- 3.2 In addition to the Local Plan, the Council also has to have regard to the guidance contained in the National Planning Policy Framework (NPPF) and supplementary national technical guidance on relevant issues, when making planning decisions. Where Local Plan policy is out-of-date, the guidance in the NPPF may take precedence over the Local Plan.

#### Environmental Designations

- 3.3 The sites covered by permission EB233 are both in the Green Belt, as defined on the “saved” UDP Proposals Map. Development in the Green Belt is strictly controlled, and limited to what is defined as “appropriate” in the NPPF and in the Local Plan.
- 3.4 Current planning policy generally rules out built development, except for extensions and alterations to existing buildings, replacement of existing buildings, or new buildings needed for the purposes of agriculture, forestry and outdoor recreation (NPPF paragraphs, “saved” Walsall UDP Policies ENV2 – ENV6). However, the NPPF regards mineral extraction, engineering operations and certain other developments as “not inappropriate in Green Belt provided they preserve the openness of the Green Belt and do not conflict with the purposes of including land in Green Belt.” Therefore, a Green Belt designation is not in itself a barrier to mineral extraction.
- 3.5 The “Brownhills Common” site is also within a Site of Importance for Nature Conservation (SINC) identified on the “saved” UDP Proposals Map. This is also identified as a proposed Local Nature Reserve (LNR), which has not yet been declared. Since the UDP was adopted, some parts of the SINC to the north of the site have been designated as a Site of Special Scientific Interest (SSSI) by Natural England (Chasewater and The Southern Staffordshire Coalfield Heaths SSSI, designated in 2010).
- 3.6 Because of the nature conservation designations, any proposals for modern conditions for mineral working on the “Brownhills Common” site would be subject to relevant Local Plan nature conservation policy, in particular, BCCS Policy ENV1 and “saved” UDP Policy ENV23, and the revised Natural Environment SPD which supports these policies (revisions to the SPD were adopted by Cabinet on 27 July 2013). They would also be expected to comply with relevant national policy guidance on conserving and enhancing the natural environment (NPPF paragraphs 109 - 125).

#### Mineral Planning Policy

- 3.7 The Brownhills area contains important mineral resources, which are to be safeguarded under BCCS Policy MIN1. The BCCS identifies that the main resources present in this area are coal and fireclay, which are identified in the NPPF as “minerals of local and national importance” (see NPPF paragraph and Annex 2: Glossary). The British Geological Survey (BGS) has produced a Mineral Planning Factsheets on Fireclay and Coal, explaining where these resources are found, how they are worked, and their uses. Figure 1 above shows the broad extent of surface coal resources in the Brownhills Common

area, based on information provided by the Coal Authority (the area shaded in pale blue). Deposits of fireclay are present beneath the coal seams.

- 3.8 Fireclay is a nationally scarce type of clay, whose importance as an industrial mineral is highlighted in the NPPF (paragraph 146). Viable deposits of fireclay are usually found beneath surface coal seams, which are coal seams that occur relatively close to the ground surface. This means they have to be worked at the same time as coal, using surface mining (opencast) methods. The main use of fireclay is in the manufacture of bricks but it also has other uses. All three of Walsall's brickworks (Aldridge, Atlas and Sandown) use some of this material, and it is also used in the manufacture of pot clay blends by Potters Clay & Coal Company Ltd. The only fireclay resources that currently exist in Walsall are the small stockpile held by Potters Clay & Coal Company Ltd at Swan Works, from the former Birch Coppice site. Walsall's brickworks are currently entirely reliant on importing fireclay from other areas.
- 3.9 The BCCS acknowledges the importance of fireclay to the local brick industry, and includes policies to guide any future extraction of clay and coal in the Brownhills area (Policies MIN3 and MIN4). It recognises that planning permission already exists for clay and coal working at Brownhills Common and the location of the "dormant" permitted site is shown on the Minerals Key Diagram. The Key Diagram also identifies the location of a potential "area of search" for fireclay extraction at "Yorks Bridge," near to Brownhills Common – the location of this is shown on Figure 1 above. There is believed to be significantly more fireclay than coal present within this area. The "area of search" was only included in the BCCS because it was recommended in the Inspectors' Report in response to representations made by Wyrley Estates and Potters Clay & Coal Company Ltd.
- 3.10 The "Birch Coppice" site is still subject to "saved" UDP Policy M7 which relates to completing the restoration of the site. The policy was retained because the site has not yet been fully restored.

#### **4. Walsall Site Allocations Document (SAD) – Emerging Local Plan Policy**

- 4.1 The Council is currently preparing two new plans for Walsall, an Area Action Plan (AAP) for Walsall Town Centre, and a Site Allocations Document (SAD) which will identify sites for development in other parts of the borough. The SAD will be expected to deliver the targets for new housing, industry, shopping and other development identified in the BCCS. Another key role of the SAD will be to define the boundaries of the areas identified for development on the BCCS Key Diagrams, which are only shown as broad locations and not as specific sites or areas. These include four "areas of search" for potential future mineral extraction in Walsall, whose general location is shown on the Minerals Key Diagram. As noted above, one of these areas is an area of search for fireclay at Yorks Bridge in Brownhills.
- 4.2 Both plans are at an early stage in their preparation. In April 2013, the Council published Issues and Options reports for public consultation, identifying the key issues that the plan needs to address and the options for delivering the

targets for development identified in the BCCS. The SAD Issues and Options report summarises the issues relating to future mineral supply requirements, including the need for fireclay and coal.

- 4.3 The Issues and Options reports contain maps showing sites and areas with potential for future development, including sites with existing planning permission. These include sites with permission for mineral extraction, such as the sites covered by permission EB233. The maps also identify possible boundaries for each of the mineral “areas of search” identified in the BCCS. Three alternative boundaries for the “area of search” at Yorks Bridge have been identified in the Issues and Options report. These reflect the boundaries put forward by different people during the preparation and examination of the BCCS. These boundaries are shown on Minerals Inset Map 1, in Chapter 9 of the SAD Issues and Options report.
- 4.4 Other potential development sites shown in the Issues and Options report have been identified through a “call for sites” during 2011, when land owners and developers were invited to put forward sites for the Council to consider. One of these sites is at Yorks Bridge, to the south of the proposed “area of search.” This site is shown on Figure 1 above. It has been suggested as a possible site for various land uses, including housing, employment, waste management, open space and mineral extraction.
- 4.5 The publication of the Issues and Options reports marked the first stage in the process of developing the SAD and AAP. The Council’s Planning Policy Team is currently considering the comments received during the consultation earlier this year, including those relating to Brownhills Common, and will reflect these comments in the draft plans (“preferred options”), which are expected to be published for a further round of public consultation in 2014. There will be a further chance for people to comment on the final draft plans when they are published early in 2015. During this period officers will be having further discussions with developers, land owners, local communities, local businesses, environmental bodies, and neighbouring authorities about specific sites, or how particular development needs should be met.
- 4.5 As the SAD is at an early stage, there are considerable uncertainties about where mineral extraction and other development could take place in the Brownhills area, and how much land is needed for different types of development to meet the targets in the BCCS. There will be opportunities for the relevant issues to be fully explored, and for discussions to take place with the relevant interested parties as the preparation of the SAD progresses. However, until these discussions have taken place, and the proposals for future development and land use in Brownhills become clearer, it would be premature to take the step of revoking planning permission EB233.

## **5. Other Material Considerations**

5.1 Officers have identified the following material considerations that the Council would need to take into account if it was minded to revoke the permission:

- The likelihood that any mineral working scheme will ever come forward on the “Brownhills Common” site, and the potential for the continued uncertainty to compromise the future planning of the Brownhills area;
- The potential for surface working of clay and coal to cause irreversible harm to the SINC and SSSI, and to compromise the implementation of the Draft Heathland Restoration Plan for the SSSI;
- The extent to which mitigation measures associated with a surface mineral working operation would be effective enough to limit the effects of operations on the SINC and SSSI, the local landscape, and local people, so that they are kept to an acceptable level;
- The impact upon any need for the fireclay reserve; and
- The likelihood that following mineral extraction, the site would be restored to a similar standard to its current condition, and returned to a beneficial nature conservation and open space use.

5.2 The House of Commons briefing note indicates that in the light of a recent ruling by the Supreme Court in 2012, when deciding whether or not to revoke a planning permission, a local planning authority is also entitled to take into account the potential cost of compensation they could have to pay.

## **6. Conclusions**

6.1 Officers consider that revoking the mineral planning permission covering part of Brownhills Common would be inappropriate at the present time, because of the uncertainties concerning the potential impacts on Council resources, and the uncertainties about the future strategy for planning and land use in the wider Brownhills area. It is therefore recommended that a report be brought back to the Panel early in 2015, when the forthcoming Walsall Site Allocations Document (SAD) is expected to be published, by which time these issues will have been given due consideration.