

Torbay Council

Burges Salmon Report to Full Council

Date of meeting	18 October 2018
Subject of report	Land to the North and South of Preston Down Road, Paignton: Compulsory Acquisition of Third Party Interests
Town or parish	Paignton

1 BACKGROUND

- 1.1 This report concerns a proposed compulsory purchase order (a “CPO”). The land subject to the proposed CPO (“the Order Land”) comprises two parcels of land to the North and South of Preston Down Road, Paignton.
- 1.2 The Adopted Torbay Local Plan 2012-30, “A Landscape for Success” (“the Local Plan”) identifies the Paignton North and Western Area, including the Order Land, as a Strategic Delivery Area under Policy SDP3 for mixed development, including housing. The Order Land is identified as a potential development site for consideration in Neighbourhood Development Plans for future housing need. The Order Land is shown as sites PNP1 and PNP2 on the Policy Map sheet 15 annexed to the Local Plan.
- 1.3 Torbay Coast and Countryside Trust (“TCCT”) currently manage approximately 1750 acres of land from Torbay Council in the area surrounding the Order Land, and TCCT and Torbay Council are currently in discussion around the possible surrender of several parcels of this land in order to develop the Strategic Delivery Area in accordance with the Local Plan. TCCT has the benefit of a Lease over the Order Land.
- 1.4 Funding has been secured under the Government’s Land Release Fund (“LRF”) to carry out certain enabling works to the Order Land to facilitate housing delivery. The enabling works will comprise detailed site investigations, ecological mitigation and enhancement and highway junction improvements (the “Enabling Works”), which are necessary for residential development to be carried out on the Order Land.
- 1.5 Although the Council has entered into negotiations with TCCT to surrender its lease of the Order Land, powers of compulsory acquisition will be needed to secure the land in the event those negotiations are not successful within the necessary time frame, to allow the Enabling Works to be carried out and the land released for residential development.

2 LAND TO BE ACQUIRED

- 2.1 The Order Land comprises 10.03 acres of land, currently used for mixed low intensity agricultural purposes. The parcel to the North of Preston Down Road comprises approximately 5.21 acres and the parcel to the South of Preston Down Road comprises approximately 4.82 acres. A plan showing the land to be acquired is attached at Appendix 1 (the “Order Plan”). The Order Land is shown edged red on the Order Plan.
- 2.2 The whole of the Order Land is within the Council’s freehold ownership, registered under title numbers DN521239 and DN178565. The whole of the Order Land is also currently leased to TCCT under a Lease dated 11 September 2002, for a term of 60 years commencing on 1 December 1999 (the “Lease”). The Lease does not contain a break clause. Therefore, the first date on which the Lease could therefore be terminated is 30 November 2059.

- 2.3 Utilities searches have been carried out in respect of the whole of the Order Land which have revealed gas pipelines, water distribution, telecommunications and electricity apparatus. The Council will be required to enter into discussions with the relevant utilities companies to ensure that appropriate protective measures and/or relocation of apparatus affected by the proposed development will be carried out. These discussions will be required whether the development is brought forward by CPO or voluntary agreement.
- 2.4 Searches of public rights of way in the vicinity of the Order Land have also been carried out. These searches have not revealed any rights of way which are expected to be interfered with by the proposed development.
- 2.5 TCCT has granted two underleases over the land subject to the Lease, but neither have any rights over or interest in the Order Land. A review of the Council's freehold title has revealed that the Order Land is subject to existing third party rights over the Order Land. These rights can be included in the CPO to the extent that they are affected.

3 OBJECTIVES OF AND NEED FOR ACQUISITION

- 3.1 The Adopted Torbay Local Plan 2012-30, "A Landscape for Success" (the "Local Plan") identifies the Paignton North and Western Area, including the Order Land, as a Strategic Delivery Area for mixed development, including housing. In particular, the Order Land is identified as a potential development site for consideration in Neighbourhood Development Plans – primarily housing.
- 3.2 There is a pressing need for residential development in the Council's administrative area as evidenced by the planning statement attached at Appendix 3. The Adopted Local Plan (Policy SS13) identifies a need to deliver 8,900 new homes in the Torbay area between 2012 and 2030, including 4,280 in the Paignton area alone (paragraph 4.5.50). In the 5-year period between 2017 and 2022, the target figure for Paignton is 1,190 homes (Section 4, Table 4).
- 3.3 The National Planning Policy Framework (NPPF) requires that local authorities maintain a supply of specific deliverable sites sufficient to provide a 5 year housing supply to meet their housing needs. The Council's Planning Department are of the view that Torbay currently has only 4.2 years of housing supply and is therefore failing to adequately meet its needs for deliverable housing sites. Policy SS13 provides for a number of ways for the Council to boost housing supply in these circumstances including bringing forward sites set aside for later in the plan period, allocating further sites for development and considering applications for new housing favourably, providing they are consistent with the Local Plan.
- 3.4 The Council intends to undertake the Enabling Works on the Order Land once it has been acquired. It is currently intended that these Enabling Works will include site investigations, ecological mitigation and enhancement and provision of a new highways junction. It is essential that the Order Land is acquired prior to 1 April 2020 to allow these Enabling Works to be carried out to release the land for housing development.
- 3.5 The acquisition by the Council of the Order Land is necessary to make the Order Land available for the early delivery of housing by the Council in light of the assessment that there is a shortfall in the Council's 5 year housing land supply. The first phase of the scheme of acquisition by the Council will be the carrying out of Enabling Works on the Order Land which will allow it to be made available for the delivery of much needed housing in the area.
- 3.6 The Council will be considering the best way to bring this land forward. This approach aligns with the current guidance on compulsory purchase (Compulsory Purchase Process and the Criche Down Rules) (the CPO Guidance) which confirms that it is appropriate for a local authority to acquire land in advance of the time at which it is immediately required. It states "*It is not essential to show that land is required immediately to secure the purpose for which it is to be acquired, but a confirming minister will need to understand, and the acquiring authority must be able to demonstrate, that there are sufficiently compelling*

reasons for the powers to be sought at this time.” The Council considers that there are sufficiently compelling reasons, as outlined in this report, for the power to be sought at this time. The Council has a clear idea of how it intends to use the land, and has outlined how the necessary resources are likely to be available within a reasonable time-scale. The acquisition is needed in order to deliver appropriate Enabling Works and to allow residential development over the Order Land to proceed.

3.7 Once the Order Land is available, the Enabling Works can be carried out.

4 OPTIONS CONSIDERED

(a) *Do nothing*

Given the difficulties in releasing the Order Land for redevelopment one option available to the Council is to take no action in respect of this land. However, there is a risk that this will delay the provision of urgently needed housing. The LRF funding of £1,100,000 would also be lost in a 'do nothing' scenario. This option has therefore been dismissed in favour of seeking release of the Order Land.

(b) *Negotiations for voluntary acquisition*

The Council has already entered into negotiations with TCCT for voluntary acquisition of the Order Land. These negotiations are still ongoing and it remains possible that terms can be agreed. However, due to the deadline for the delivery of housing using LRF funding, it is considered necessary to progress a CPO in parallel to the negotiations in order to guarantee delivery of the land for residential development. If agreement is reached with TCCT for the acquisition of the land, alternative land will need to be acquired for the benefit of TCCT on which to carry out the agricultural operations currently taking place on the Order Land.

(c) *Not exercising the CPO*

The option of not exercising the CPO if it is confirmed is also being considered. If agreement is reached with TCCT to release the land for housing before it is necessary to exercise the CPO then the decision can be taken not to exercise it.

5 THE COUNCIL'S POWER UNDER THE TOWN AND COUNTRY PLANNING ACT 1990

5.1 The Council is authorised to make the CPO by virtue of s.226(1)(a) of the Town and Country Planning Act 1990.

5.2 This power allows the Council to seek the confirmation of the Secretary of State by making a CPO of land where the Council considers that *“the acquisition will facilitate the carrying out of development, re-development or improvement on or in relation to the land.”* In this case the acquisition of the Order Land will facilitate the carrying out of the Enabling Works which, together with the acquisition of the land, will release the land for residential development.

5.3 S.226(1A) provides that the power of compulsory acquisition in s.226(1)(a) should only be exercised where the authority considers that the development is likely to contribute to one or more of the following objectives:

“(a) the promotion or improvement of the economic well-being of their area;

(b) the promotion or improvement of the social well-being of their area;

(c) the promotion or improvement of the environmental well-being of their area.”

5.4 The Council is satisfied that the development on the land for which the CPO is being made, namely the facilitation of the Enabling Works and subsequent development of the land for residential purposes, contributes to one or more of those objectives in that:

- (a) Significant social benefits will be generated by the provision of new homes incorporating a mix of dwelling types and tenures which will encourage mixed communities and provide a range of local facilities. Educational facilities required to serve the new housing could be provided as part of the wider strategic delivery. It is also envisaged that the new development will offer the opportunity to design out crime within residential layouts and could support the vibrancy of existing local centres.
- (b) Economic benefits generated by the scheme are expected to include provision of affordable housing which is likely to reduce poverty in the area and improve health. Development on greenfield land is expected to be capable of meeting requirements for affordable housing provision. There will be economic benefit to the Council in making the CPO as it will help to ensure that LRF funding conditions can be satisfied.
- (c) The environmental benefits of the proposed scheme include the potential to incorporate extensive energy efficiency and micro renewable measures to offset the overall energy usage increase from the new development. The proposals will also include green infrastructure and it is anticipated that the location could encourage sustainable modes of travel. There will inevitably be environmental impacts as a result of the development of greenfield land, however, any harm can be mitigated by the inclusion of green infrastructure that reflects the character of the area. Comprehensive ecological surveys will be carried out as part of the planning process and appropriate mitigation measures designed into the scheme.

5.5 The CPO Guidance provides advice in relation to use of CPO under section 226 of the Town and Country Planning Act 1990. This states that *“this power is intended to provide a positive tool to help acquiring authorities with planning powers to assemble land where this is necessary to implement proposals in their Local Plan or where strong planning justifications for the use of the power exist. It is expressed in wide terms and can therefore be used to assemble land for regeneration and other schemes where the range of activities or purposes proposed mean that no other single specific compulsory purchase power would be appropriate”*.

6 POLICY FRAMEWORK AND PROPOSED PLANNING APPLICATIONS

6.1 The following paragraphs set out an overview of the national and local planning policy framework relevant to the proposed development of the Order Land.

National Policy

6.2 The NPPF sets out the Government’s planning policies for England and how these should be applied. It provides a framework within which locally-prepared plans for housing and other development can be produced. Section 5 sets out the Government’s objective to “significantly boost” the supply of homes.

6.3 The NPPF requires that local authorities maintain a supply of specific deliverable sites sufficient to provide a 5 year supply of housing to meet their housing needs. Under paragraph 11, there is a presumption in favour of sustainable development and approving development proposals that accord with an up-to-date development plan without delay. Where the policies are out of date or the authority cannot demonstrate a five year supply of deliverable housing sites, the NPPF states that permission should be granted for development proposals unless there are clear policy reasons for refusing the application. As Torbay does not currently have a 5 year supply of deliverable housing sites, there will be a presumption in favour of sustainable development on the Order Land, providing it complies with the policies in the Local Plan.

Local Policy

6.4 The policy support for the development of the Future Growth Area is set out in detail in the Local Plan and Policy SS2 for residential housing.

6.5 The Council's Planning Department considers that the delivery of housing on the Order Land will contribute to delivering and/or be in compliance with the following policies in the Local Plan:

- (a) Policy SS1 Growth Strategy for a prosperous Torbay which provides for the delivery of 8,900 new homes over the plan period.
- (b) Policy SS6 Strategic Transport Improvements. Opportunities should be available as part of the proposed development to contribute to the delivery of strategic transport infrastructure directly and/or indirectly.
- (c) Policy SS8 Natural Environment. The site was assessed as part of the Local Plan Habitats Regulations Assessment and found to be broadly acceptable at a strategic level of assessment.
- (d) Policy SS9 Green Infrastructure. Opportunities should be available as part of the proposed development to contribute to the delivery of strategic green infrastructure directly and/or indirectly.
- (e) Policy SS11 Sustainable Communities. The broad Sustainability Appraisal assessment indicates that there will be opportunities to contribute to sustainable community objectives.
- (f) Policy SS12 Housing. The site will contribute to the need for 8,900 new homes over the plan period.
- (g) Policy SS13 Five Year Housing Land Supply. The delivery of housing will help contribute to 5 year supply (see the Planning Statement at Appendix 3).
- (h) Policy SDP1 Paignton.
- (i) Policy SDP3 Paignton North and Western Area.
- (j) The above list is not intended to be exhaustive and further policy analysis will be carried out as part of the planning process.

6.6 The site at Preston Down Road is not specifically allocated for development in the Local Plan. However, it has been identified as a potential site for housing allocation as part of the Strategic Housing Land Availability Assessment carried out for Local Plan Policy SDP3. The Order Land is identified for potential housing allocation on policy map sheet 15.

6.7 The proposed planning application will need to accord with the planning policy framework outlined above and the Council is not aware of any obvious reason why planning permission would not be forthcoming, recognising that no planning application has yet been made. This approach accords with paragraph 15 of the CPO guidance.

6.8 An application for the Enabling Works will be made by the Council. The Enabling Works will comprise undertaking detailed site investigations, ecological mitigation and enhancement, and the creation of a new highways junction and are necessary for residential development to be carried out on the Order Land. It is anticipated that a planning application for the enabling works will be submitted in 2019. The Council's Planning Department has been consulted and the Council is not aware of any reason why planning would be refused.

6.9 The Council is currently in the course of seeking to enter the land to carry out surveys to inform the application for the Enabling Works. This is explained in further detail in the following section.

7 EXTENT OF ENTRY TO THE ORDER LAND FOR SURVEYS

7.1 Under the Lease relating to the Order Land, the Council is permitted to enter the land to ascertain whether or not the conditions of the Lease have been observed and to view the

state of repair and condition of the premises. While it may be difficult the Council to enter the land under these rights for the purpose of carrying out surveys for a proposed CPO, there are other statutory powers which would allow the Council to enter the land in connection with a proposed compulsory acquisition which are outlined below.

- 7.2 Under section 172 of the Housing and Planning Act 2016, an acquiring authority may enter onto and survey or value land in connection with a proposal to acquire an interest in or right over land, providing the surveys are carried out at a reasonable time and the authority gives the owner/occupier at least 14 days' notice. The owner/occupier may be entitled to compensation for any damage caused to the land as a result of the exercise of this power of entry.

8 FINANCIAL IMPLICATIONS AND VIABILITY

- 8.1 Funding for the enabling works has been secured under the Land Release Fund. Torbay Council (the Council) was awarded £1,100,000 of LRF grant aid by the Ministry of Housing, Communities and Local Government ("MHCLG") on 8 March 2018 for the purposes of securing early release of the land for residential development. This grant shall fully fund the proposed Enabling Works. The LRF grant requires that the sites are delivered to the market by March 2020. To ensure this occurs a decision on acquiring TCCT's leasehold interest, including the option of compulsory purchase acquisition, needs to be made in October 2018 at the latest to ensure that the grant conditions can be met.

- 8.2 The Enabling Works are currently estimated to cost £1,100,000.

- 8.3 Compensation will be payable to any landowner or right holder whose rights are compulsorily acquired. Compensation will be assessed as the value of land to the owner, and any increase in value attributable solely to the development of the Order Land for the Council's scheme must be discounted. The Council has obtained a report from an expert valuer on the likely value of the Order Land if acquired by compulsory purchase.

- 8.4 The compensation liabilities, including the acquisition of TCCT's leasehold interest, will be underwritten by the Council. Funding will be made available to meet any liabilities arising immediately on the making of the CPO if a blight notice were served by any party affected by the CPO, ultimately to be repaid from monies received when the land is released for development.

9 CONSULTATIONS AND LANDOWNER NEGOTIATIONS

- 9.1 The Council has entered into initial negotiations with TCCT surrounding the acquisition of the Order Land.

- 9.2 The Council has entered into initial negotiations with TCCT surrounding the acquisition of the Order Land. As mentioned at paragraph **Error! Reference source not found.** above, negotiations to agree terms with TCCT for the voluntary acquisition of the Order Land are ongoing.

10 RISK MANAGEMENT

- 10.1 Section 226(1) allows the Council to acquire land for the purposes of development, re-development or improvement, so long as it thinks this will contribute to promotion or improvement of economic, social or environmental well-being of the area. This power has been carefully considered and dealt with in this report to minimise the risk that the Secretary of State does not consider that the relevant tests have been met in this case.

- 10.2 A key risk is the failure to acquire the Order Land in a timely manner, which would jeopardise the funding available to deliver the Enabling Works and, in turn, the wider delivery of the land for housing. This risk is will be mitigated through progressing compulsory acquisition.

- 10.3 A further risk is that there is a strong possibility that the CPO will be made in advance of planning permission being obtained for any proposed scheme. Though paragraph 105 of the CPO Guidance makes it clear that planning permission is not required before a CPO can be made, paragraph 15 of the CPO Guidance states that the acquiring authority will need to demonstrate that there are “no obvious reasons why it might be withheld”. This risk will be mitigated by the Council putting forward a compelling case for the CPO in advance of obtaining planning permission, and by demonstrating that, when applied for, planning permission for the proposed scheme will be awarded.
- 10.4 The preparation of a CPO and related documents is a technical and complex area, carrying a risk of challenge. However, the Council has retained experienced and expert external legal advice on this and other issues and will continue to do so.
- 10.5 In considering whether to make the CPOs the Human Rights Act 1998 applies. The relevant rights that have been considered and are set out below.
- 10.6 There is a risk that owners and occupiers will seek sums in excess of the estimates for the costs of land acquisition. This risk has been mitigated through the receipt of professional valuation advice.

11 ENVIRONMENTAL IMPLICATIONS

- 11.1 A strategic environmental assessment has not yet been carried out due to the prematurity of the proposed scheme and difficulties accessing the Order Land to carry out the necessary surveys in advance of the Council progressing the CPO. The Council is being asked to resolve to use statutory powers to enter onto land to carry out surveys in connection with a CPO (as set out in paragraph **Error! Reference source not found.** above) as part of this report.
- 11.2 However, ecologists were appointed in July 2018 and preparatory work is currently being carried out to progress surveys to feed into a strategic environmental assessment. Engineers have also been appointed to prepare a flood and drainage strategy for the Order Land.
- 11.3 Discussions have already taken place with the Council's Planning Department prior to formal requests being made for Environmental Impact Assessment and Habitats Regulations Assessment screening. The relevant application forms are in the process of being prepared.
- 11.4 The site was assessed as part of the Local Plan Habitats Regulations Assessment and was found to be broadly acceptable at a strategic level of assessment.

12 HUMAN RIGHTS IMPLICATIONS

- 12.1 The Human Rights Act 1998 (“HRA 1998”) incorporated into domestic law the European Convention on Human Rights (the “Convention”). Under the HRA 1998, it is unlawful for a public body such as the Council to act in contravention of the Convention.
- 12.2 In resolving to make a compulsory acquisition of the Order Land, the Council will consider the rights of the owners of the Order Land, in particular:
- (a) Article 1 of the First Protocol, which provides that every person is entitled to peaceful enjoyment of their possessions, and that no one should be deprived of his possession except in the public interest and subject to the law; and
 - (b) Article 6 of the First Protocol which protects the right to a fair hearing by a tribunal in the determination of civil rights and obligations.
 - (c) Article 8 of the First Protocol, which provides that every person is entitled to respect for their home and family life.

- (d) Article 14 of the First Protocol which provides for the rights in the Convention to be enjoyed without discrimination on any ground such as sex, race, colour, language, religion political or other opinion, national or social origin, association with a national minority, property, birth or other status.
- 12.3 The Council must be conscious of the need to strike a balance between the rights of the individual and the interests of the public.
- 12.4 It is considered that there is a compelling case in the public interest for the acquisition of the Order Land which outweighs the Convention rights and that the use of compulsory purchase is proportionate. This conclusion is based on the significant benefits generated by the scheme (as set out at paragraph above), which include but are not limited to the following:
- (a) There is an urgent need for additional residential development within the Council's administrative area and specifically within the locality of the Order Land (see paragraph 3.2 to above). The acquisition of the Order Land will enable the Council to deliver the Enabling Works, and release the land for residential development.
 - (b) Further social, economic and environmental benefits that are anticipated as a result of the scheme are set out in in the Council report.