

IN THE MATTER OF:

LAND AT INGLEWOOD (PREVIOUSLY KNOWN AS WHITE ROCK), BRIXHAM ROAD, TORBAY

ADVICE

- 1 I am asked to advise to Abacus Projects Limited (“Abacus”) in relation to their promotion for residential development of land on the west side of the A3022 Brixham Road, Goodrington (“the Site”).
- 2 I am familiar with the background to this matter have previously advised on divers occasions since February 2017.
- 3 This advice is directed to a significant issue which has recently become manifest, namely, the lawfulness of the process of promotion of the Brixham Peninsula Neighbourhood Plan (BPNP”) before the district planning authority Torbay Council (“Torbay”). This involved the roles played by Brixham Town Council (“BTC”) and Brixham Peninsula Neighbourhood Forum (“BPNF”).
- 4 One matter that has emerged is a report prepared by Dave Chetwyn MRTPI of Urban Vision CIC (“the DC/UV Report”) to support the negotiations between the neighbourhood forums and Torbay on the proposed modifications to the neighbourhood plans. The DC/UV Report concluded that the designation of BPNF was unlawful (see paragraph 3.1 therein). Upon the basis of the material before me that appears correct. The authority to act in relation to neighbourhood plans in areas where a parish council exists is set out in Sections 61F(1), (2) and (4) which make three related provisions:
 - (1) A parish council can act if an area consists of or includes the whole or any part of the area of the council.

- (2) A parish council can act if an area also includes the whole or any part of the area of another parish council, with the consent of the other council.
- (3) However, another organisation or body cannot act if the area consists of or includes the whole or any part of the area of a parish council.
- 5 It is therefore clear that, where a parish council covers part of a neighbourhood area, the only possible body with authority to act is that parish council. In consequence, BPNF could not lawfully be designated as a neighbourhood forum for neighbourhood planning purposes.
- 6 Although the motivations of those involved (in seeking to establish a wider body, including persons from outside the parish) appear understandable, the legislation simply does not provide for such an arrangement. As result, it seems clear that BTC, BPNF and Torbay misdirected themselves on this point (notably in the officer report purporting to deal with the process on re-designation).
- 7 The DC/UV Report goes on, however, to suggest that, *“The designation of that neighbourhood area had the effect of making Brixham Town Council the legitimate body for neighbourhood planning for the additional areas within the boundary of the neighbourhood area... given that the neighbourhood area was designated properly and that Brixham Town Council was the legitimate body to prepare the neighbourhood plan, this should not compromise the plan, providing the issue is acknowledged and any necessary amendments are made”*.
- 8 With respect neither that contention, nor the rationale therefor are made explicit or justified and, in any event are erroneous. That argument would require that (a) the designation of Brixham Peninsula as a neighbourhood area was valid in and of itself, and (b) that BTC in fact prepared the draft BPNP as submitted. Neither proposition hold good.
- 9 The officer report to the forthcoming extraordinary full council meeting seeks to deal with these points at paragraph 1.4, stating: *“The Brixham Peninsula Neighbourhood Plan (‘the Plan’) has been submitted by Brixham Town Council (‘the Town Council’) and prepared by the Brixham Peninsula Neighbourhood Forum (‘the Forum’) who are a subsidiary of the Town Council. The Town Council is a parish council within the terms of the Local Government Act 1972 and is therefore the relevant, or ‘Qualifying Body’, for the purposes*

of section 38A(12) of the 2004 Act. A parish council is entitled to submit to the LPA a proposal for the making of a neighbourhood plan for the whole or part of its area, even though the area extends beyond the Town Council administrative boundary to include the villages of Churston, Galampton and Broadsands. The Town Council is required to ‘lead’ on the Brixham Peninsula Neighbourhood Plan. Therefore whilst the Council designated the Forum as a ‘Qualifying Body’ in December 2012 and re-designated in December 2017 there was not a legal requirement to do so. The Council is satisfied that the Plan was lawfully prepared and submitted by Brixham Town Council and not by a third party, i.e. a separate Neighbourhood Forum. A map of the designated area is shown in Appendix 4. It should be recognised by the Council that the Forum has worked tirelessly to prepare the Plan.”

- 10 With respect, that simply cannot be correct. In relation to the designation of Brixham Peninsula as a neighbourhood area, Section 61G(1) of the Town and Country Planning Act 1990 (as amended) defines a neighbourhood area as, *“an area within the area of a local planning authority in England which has been designated by the authority as a neighbourhood area; but that power to designate is exercisable only where (a) a relevant body has applied to the authority for an area specified in the application to be designated by the authority as a neighbourhood area...”*
- 11 Section 61G(2) defines a relevant body as a parish council or, *“an organisation or body which is, or is capable of being, designated as a neighbourhood forum (on the assumption that, for this purpose, the specified area is designated as a neighbourhood area)”*.
- 12 As identified earlier, BPNF was not an organisation or body which was capable of being designated as a neighbourhood forum. Accordingly, Torbay’s power to designate Brixham Peninsula was only exercisable on an application from BTC.
- 13 That proposition simply does not appear to be supported by the evidence. I note that the original designation application of 2012 did include the logo of BTC and stated that BTC is a relevant body (that statement being expressly made for the purposes of Regulation 5(1)(c)). However, the application is made together with the application for designation of BPNF as a forum, the statement of appropriateness under Regulation 5(1)(b) specifically refers to the existence of BPNF as a factor in the appropriateness of designating the wider

Brixham Peninsula (as opposed to the area of BTC alone), and it would be fundamentally inconsistent for the application for designation of the neighbourhood area to come from a different body from that applying for designation as a neighbourhood forum. In consequence, the only realistic conclusion to draw is that the application was made by BPNF and that Torbay therefore had no power to designate Brixham Peninsula on the basis of the 2012 application.

- 14 I have noted that there was a further application for designation of the neighbourhood plan area in 2017 (styled as a re-designation) made on BTC headed paper and signed by the Town Clerk rather than the Chair of BPNF. However, both the application and the subsequent resolution to re-designate made by Torbay are expressly reliant on the 2012 designation. Hence, it is hard to see how the earlier difficulty, identified above, is thereby overcome. Further, even if it were to be suggested that Brixham Peninsula was successfully designated following the 2017 application (rather than the 2012 application) the draft BPNP would still not be lawful because it was submitted before the 2017 application was even made.
- 15 The basic conditions statement submitted with the draft BPNP, a document (1) required under the Regulations and (2) which forms part of the evidence at all post-submission stages of the neighbourhood plan process must be key for any analysis of BTC's involvement in the preparation of the draft BPNP.
- 16 Reading the document as a whole BPNF state that they are a wholly independent sub-committee of BTC formed under s102(4) of the Local Government Act 1972. However, such a contention is founded upon a fundamental misapprehension. By definition, a sub-committee of a local planning authority (in this case the parish council) cannot be “wholly independent”, as that section provides that:

“A local authority may appoint a committee, and two or more local authorities may join in appointing a committee, to advise the appointing authority or authorities, or, where the appointing authority or each of the authorities operate executive arrangements, any executive of that or those authorities, or a committee or member of that executive, on any matter relating to the discharge of their functions, and any such committee (a) may consist of such persons (whether members of the appointing authority or authorities or not) appointed for such term as may be determined by the

appointing authority or authorities; and (b) may appoint one or more sub-committees to advise the committee with respect to any such matter.”

- 17 Paragraph 015 of the Neighbourhood Planning section of Planning Practice Guidance has stated (since it was published on 6 March 2014), that, *"Where a parish or town council chooses to produce a neighbourhood plan or Order it should work with other members of the community who are interested in, or affected by, the neighbourhood planning proposals to allow them to play an active role in preparing a neighbourhood plan or Order. The relationship between any group and the formal functions of the town or parish council should be transparent to the wider public"*
- 18 On 11 February 2016, Paragraph 015 was amended specifically to refer to the use of s102(4), noting that non-councillor members of committees established under it will have voting rights by the operation of s13(3) and (4)(e) of the Local Government and Housing Act 1989.
- 19 There are no available BTC records that indicate how or when BTC resolved to create BPNF as sub-committee of BTC. I am instructed that there are no public records that provide any reference to BPNF being formally treated as a committee of BTC, whether through s102(4) or otherwise. Notably, BTC did not act to appoint members to BPNF in the same manner as it acted to appoint members to its committees at its annual meeting. At the same time, BPNF's formal constitution is that of a neighbourhood forum (not a sub-committee of a parish council) and, notwithstanding certain references to it being "subsidiary to BTC", liaising with BTC, etc. it is nonetheless the constitution of a "wholly independent" body with control in particular of its own membership.
- 20 In addition, had BPNF been acting as some form of an advisory committee to BTC, this would be demonstrated by BTC itself taking decisions on the BPNP, perhaps having received advice or recommendations from BPNF. In the context of neighbourhood plans, the critical decisions would be the commencement of Regulation 14 consultation ahead of submission and ultimately, the actual submission in accordance with Paragraph 1 and Regulation 15. On those items, it may be noted that:
- (1) BTC received reports from BPNF on 28 July 2016, 13 October 2016, 17 November 2016 and 12 January 2017, each of which told BTC that the Regulation 14 consultation

would start shortly. The last of these reports referred to the size of the consultation draft and the manner of the consultation. There is however no indication that those drafts were before the members of BTC (in their capacity as such rather than as members of BPNF) or that BTC decided any of the details of the consultation. In addition, it is to be noted that BPNF itself did not meet formally in this period. In consequence, it would appear that these decisions were taken by the BPNF Steering Group rather than the Forum as a whole.

(2) I note that BTC did resolve to, “support the emerging Neighbourhood Plan” following a presentation from members of BPNF and a question and answer session at its meeting on 27 April 2017, and that resolution is quoted and relied upon in the basic conditions statement. However, as BPNF's minutes indicate, the submission draft was not agreed by BPNF until its meeting of 1 August 2017 and that meeting expressly stated that the draft would be submitted by the Chair of BPNF as, is understood, what actually occurred. That is distinct from BTC leading the process.

21 I note the wording included in the officer's report to the extraordinary full council meeting which seek in some way to try and address these difficulties. However, in my view the summary observations by the officer's report fail to address the difficulties outlined above. Put shortly, there was no legal authority to designate the forum in this case and the officer's response does not address the issues around the making of the applications to Torbay, as a whole. Indeed, the reference to BTC needing to “lead” on the BPNP does not accurately reflect the requirements of the Regulations and Schedule 4B of the Act. Further, even if it did, the detailed evidence from BTC which has been provided to me does not demonstrate that BTC did in fact “lead” the process. These are jurisdictional matters which if the Council simply proceed further with the process (including a referendum) would, upon the basis of material that I have seen, be likely to give rise to the prospect of being rendered a nullity by the Courts.



PETER GOATLEY

No 5 Chambers

Birmingham – London – Bristol - Leicester
www.no5.com
0870 203 5555

12th November 2018

IN THE MATTER OF

**LAND AT INGLEWOOD (PREVIOUSLY
KNOWN AS WHITE ROCK), BRIXHAM
ROAD, TORBAY**

ADVICE

**Anne Harrison
DAC Beachcroft LLP
Portwall Place
Portwall Lane
Bristol
BS1 9HS**