



Meeting: Council

Date: 15 November 2018

Wards Affected: All Wards in Torbay

Report Title: Brixham Peninsula Brixham Peninsula Neighbourhood Plan – Determination of Independent Examination

Is the decision a key decision? Yes

When does the decision need to be implemented? A decision statement must be issued “as soon as possible” after Council.

Executive Lead Contact Details: Councillor Derek Mills, Deputy Mayor and Executive Lead for Planning, derek.mills@torbay.gov.uk

Supporting Officer Contact Details: Kevin Mowat, Assistant Director Business Services / Acting Assistant Director Planning and Transport, kevin.mowat@torbay.gov.uk

1. Proposal and Introduction

- 1.1 Neighbourhood planning was introduced by the Localism Act 2011; that Act introduced new rights and powers to enable communities to become directly involved in planning for their areas. Neighbourhood planning enables interested communities to produce a Neighbourhood Plan. There are detailed statutory requirements which dictate the process for formulating and making a neighbourhood plan.
- 1.2 Once ‘made’ (i.e. “adopted”), Neighbourhood Plans form part of the statutory development plan and therefore become an important consideration when determining planning applications.
- 1.3 This report sets out the local planning authority (LPA) officers’ recommendations in respect of the submitted plan.
- 1.4 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, Galmpton 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.

- 1.5 The Plan has been the subject of a consultation and, following that, an independent examination which tested whether the Plan meets the requirements of the 'basic conditions' as set out by law.
- 1.6 The Examiner's report on the Plan was received by Torbay Council and the Forum on 26^h July 2018. It recommends that, subject to the modifications proposed in the report, the Plan does meet 'basic conditions' and should proceed to a referendum. The Examiner also recommends that the referendum area does not need to be extended beyond the designated Plan Area.
- 1.7 Officers have considered each of the Examiner's recommendations and reasons given in accordance with the law as set out in Appendix 2. In summary a set of additional modifications that meet the legal 'basic conditions' are now proposed.
- 1.8 These accept many of the Examiner's recommendations, but do make a number of modifications not recommended by her. These additional modifications have reasons for doing so which find a proper statutory basis, and reflect an appropriate exercise of planning judgment taking all of the submitted representations into account. The rewording and retention of these policies are considered to meet the 'basic conditions'. The requirement for re-consultation is discussed later in the Report, but officers' advice is that this is not legally necessary in this case. In summary, the modifications proposed are not as a result of new evidence, or a new fact, or a different view taken by the authority as to a particular fact. Instead the modifications are as a result of a planning judgement taken on how the submitted Plan can meet the 'basic conditions' whilst maintaining the original intent of the community.
- 1.9 It is recommended that the Council:
 1. Agrees the decision statement in Appendix 2, which shall be adopted and published accordingly, and that the Brixham Peninsula Neighbourhood Plan as modified in Appendix 3, is submitted to a referendum in accordance with the Neighbourhood Planning (General) Regulations 2012 (as amended) and the Neighbourhood Planning (Referendums) Regulations 2012 (as amended); and,
 2. Delegate to the Assistant Director of Transport and Planning to ensure that the Policy maps are finalised for inclusion in the Plan prior to the

referendum, reflecting all modifications set out in the decision statement in Appendix 2; and,

3. Accepts the Examiner's recommendation that it is not necessary to extend the referendum area and that the most appropriate area for the referendum will be that of the Brixham Peninsula Neighbourhood Area.

Appendices

- Appendix 1: Independent Examiner's Report
- Appendix 2: Decision Statement
- Appendix 3: Post Examination Neighbourhood Plan with modifications as recommended
- Appendix 4: Neighbourhood Area Map

Background Documents

Brixham Peninsula Neighbourhood Plan Submission Version, and representations – www.torbay.gov.uk/neighbourhood-plans
Council Approval of area designation – 7th December 2012 –December 2017 (the Report (Item 11) and Minutes www.torbay.gov.uk/council)
National Planning Policy Frameworks 2012 and 2018
Planning Practice Guidance
NPIERS Guidance
Locality Neighbourhood Plans Roadmap

Supporting Information

Background Information

2. What is the proposal/issue

- 2.1 The Localism Act 2011 introduced new rights and powers to enable communities to get directly involved in planning for their areas. Neighbourhood planning allows interested communities through a Neighbourhood Forum to produce a Neighbourhood Plan.
- 2.2 The National Planning Policy Framework (NPPF) and National Planning Practice Guidance (NPG) state that neighbourhood planning enables communities to play a much stronger role in shaping the areas in which they live and work and in supporting new development proposals. It provides the opportunity for communities to set out a positive vision for how they want their community to develop and can put in place planning policies that will help deliver that vision of granting planning permission for the development they want to see.
- 2.3 In 2012, the Council decided to designate three large neighbourhood areas covering 100% of the geographical area of Torbay. This decision was unusual in the UK and has meant that the three neighbourhood plans are large and complex, which has required significant work by the community and LPA in formulating the plans.
- 2.4 There are a series of regulatory stages required by the Neighbourhood Planning (General) Regulations 2012 (as amended) ('the Regulations') that a plan must follow and the Brixham Peninsula Neighbourhood Plan has been through these to date. Key dates are as follows:
- 6 December 2012: Brixham Peninsula Neighbourhood Forum (Note paragraph 1.3 above) and Area Designated.
 - 28 January to 11 March 2017: Pre-submission (Regulation 14) consultation on the draft Plan
 - 21 August 2017: Brixham Peninsula Neighbourhood Plan submitted to Torbay Council as the LPA. Note: A further revised Consultation Statement was submitted in October 17.
 - 1 November to 18 December 2017: Plan published by Torbay Council for formal Regulation 16 public consultations
 - December 2017: Brixham Peninsula Neighbourhood Forum and Area re-Designated
 - March 2018: Independent Examiner (Deborah McCann) appointed. Her examination commenced in April 2018
 - 1 June 2018: Examiner's Clarification Questions to the BPNF as part of examination process
 - 18 June and 2 July 2018: Clarification responses by BPNF provided.
 - 26 July 2018: Final Examiners Report received
- 2.5 The Council has a duty to provide advice and assistance to town councils and to engage constructively with the community throughout the neighbourhood

planning process including when considering the recommendations of the independent examiner. However, the Council remains the Local Planning Authority with statutory responsibility for ensuring that the neighbourhood plans it 'makes' are lawful. If a neighbourhood plan is not lawful, the LPA (not the neighbourhood forum in question) will be liable to legal challenge e.g. by landowners whose interests may be affected by the plan.

- 2.6 A neighbourhood plan must support the strategic development needs set out in the Local Plan, positively support local development, not promote less development than set out in the Local Plan, nor undermine its strategic policies.
- 2.7 If successful at examination and referendum a Neighbourhood Plan must then be 'made' (i.e. adopted) by the Council within 8 weeks and at that point it comes into force as part of the statutory development plan. Applications for planning permission must be determined in accordance with the development plan, unless material considerations indicate otherwise. Should there be a conflict between a policy in a neighbourhood plan and a policy in a Local Plan, that conflict must be resolved in favour of the policy which is contained in the last document to become part of the development plan.
- 2.8 Unlike a local plan, the test for a neighbourhood plan is not one of 'soundness'. The role of the Examiner (and the Council acting as LPA) is limited to testing whether the draft Plan meets the "basic conditions" and other matters set out in para 8 of Schedule 4B of the Town & Country Planning Act 1990 (as amended). The 'basic conditions' are that;
 - a. having regard to national policy, it is appropriate to make the Plan;
 - b. the Plan contributes to the achievement of sustainable development;
 - c. the Plan is in general conformity with the adopted strategic local policies for the local area;
 - d. the Plan is compatible with EU obligations;
 - e. the Plan meets Human Rights requirements.

The Examiner must also consider whether the referendum area should extend beyond the neighbourhood area.

- 2.9 It is the responsibility of the Council, as LPA, considering the recommendations and reasons of the examiner, to ensure that, with or without modifications, the Plan meets the "basic conditions". If it is so satisfied, the Council must make arrangements for the Plan to proceed to referendum – in accordance with paragraph 12(4) of the Town & Country Planning Act 1990 (as amended). Although the examiner is the specialist advisor, the Council is the decision-maker. The examiner's report cannot, of itself, be the subject of a legal challenge. The Council must consider each of the examiner's recommendations (and the reasons given) and decide what action to take in response to each of those recommendations. Regulation 18(2)(a) of the Neighbourhood Planning Regulations 2012 (as amended) require the Council to give the reasons for its decision. The decision must then be published in the form of a 'Decision Statement'. A Decision Statement must be published within 5 weeks of receipt of the Examiner's report, unless some other date has been agreed with the Neighbourhood Forum. In this case, it was agreed by the LPA

and Neighbourhood Forum that the time would be extended to allow time to consider the matters in full.

2.10 The modifications that the Council may make are prescribed in legislation – extract set out below:

- a modifications that the authority consider need to be made to secure that the draft order meets the ‘basic conditions’,
- b modifications that the authority consider need to be made to secure that the draft order is compatible with the Convention rights,
- c ...
- d ..., and
- e modifications for the purpose of correcting errors.’

(note: (c) and (d) do not apply to Neighbourhood Plans)

If the Council (as LPA) can make modifications to a neighbourhood plan to enable that plan to meet the ‘basic conditions’, it must make those modifications (rather than refuse a Plan proposal). However, the Council can only make such changes and cannot modify a plan for betterment. Such modifications should be discussed with the Neighbourhood Forum, but there is no general requirement for a formal consultation with interested parties or the public.

2.11 If the Council decides not to follow the Examiner’s recommendations, or make minor alterations as described in paragraph 2.9 above; it may instead make alternative modifications or even refuse to submit the plan to referendum. Clear reasons must be given for departing from the Examiner’s recommendations. Modifications not recommended by the Examiner must be discussed with the Qualifying Body, which has the option of withdrawing the plan if it is unhappy with the changes proposed by the Council.

2.12 Generally paragraph 12 of Schedule 4B gives the LPA a fairly broad power to make minor modifications that accord with the Examiner’s recommendations without the need for further consultation. Paragraph 13 of Schedule 4B states that if the LPA propose to make a decision which differs from that recommended by the examiner and the reason for the difference is wholly or partly as a result of new evidence or a new fact or a different view taken by an authority as to a particular fact, then the LPA must consult on the changes for a minimum of six weeks.

2.13 In respect of the requirement to undertake further consultation on any changes not recommended by the Examiner, Officers have considered the relevant legislation and taken legal advice¹. It is not considered that further consultation is necessary in this case as there has been no new evidence or facts, and the reasons why the decision is differing from the examiner is based upon the

¹ The Court of Appeal in *Keibell Developments* [2018] EWCA Civ 450) especially paragraphs 34-35. It is noted that Lord Justice Lindblom clearly distinguishes between the exercise of planning judgements and matters of fact (paragraph 49). Paragraph 50 rules that paragraph 13 (of Schedule 4B) “does not generate.... a general entitlement to additional consultation after the examination has taken place”,

planning judgement of compliance with the 'basic conditions', but it is not a different view of a fact.

- 2.14 A Forum may withdraw its Neighbourhood Plan at any time before the Council issues its Decision Statement (which is to be issued shortly after the Council meeting).
- 2.15 Members should also note that a new National Planning Policy Framework (NPPF) was issued in July 2018. Paragraph 214 of the new NPPF allows a transition period for examining plans submitted up to 24th January 2019: therefore the three Neighbourhood Plans in Torbay continue to be considered against the 2012 NPPF. However the new (2018) NPPF is material to decision-taking, with respect to planning applications, immediately. Paragraph 14 of the 2018 NPPF specifies the weight that may be given to neighbourhood plans and provides a degree of protection against the Presumption in Favour of Sustainable Development (now in NPPF 11).
- 2.16 Legislation sets out that the Secretary of State has powers to intervene at the request of the Qualifying Body, where requested in writing by them within 6 weeks of the publication of the decision notice, in the following circumstances:
- the Council fails to make a decision within 5 weeks of an examination report. (Note : All parties have agreed to an extension to the 5 week period until the Council meeting on 15 November 2018);or
 - where the Council does not follow all of the Examiner's recommendations; or
 - the Council modifies the plan in a way that was not recommended by the Examiner (except where the modification is to ensure compatibility with EU or human rights obligations or to correct an error).

However the Secretary of State may agree to intervene in other situations.

- 2.17 In such cases the Secretary of State (or an Inspector appointed by him) may exercise the functions of the local planning authority in deciding what actions to take with respect to the Examiner's report.

3. Options for Council's Determination of Neighbourhood Plans

- 3.1 In response to the report of an Independent Examiner, the LPA must decide whether the Plan should be submitted to referendum. The LPA's options are that

- 1. Council accepts the Independent Examiner's recommendations in their entirety** that the Plan (with any modification by the Independent Examiner) should be submitted to referendum.
- 2. The Council does not accept the Independent Examiner's recommendations in their entirety.** Reasons must be included and what modifications are proposed by the Council which must show they accord with the 'basic conditions' requirements in relation to the plan as

submitted. A schedule of proposed further modifications has been prepared (at Appendix 2) which both the Forum and officers support.

- 3. To refuse the plan** (on the basis that the plan proposal does not meet, or cannot meet with modification, the 'basic conditions' and Convention rights). Reasons must be included.
- 3.2 The issues around Brixham Peninsula Neighbourhood Plan are discussed in section 4 of this report. In summary Officers consider that the Plan is now capable of proceeding to referendum. However there are a number of matters which have been developed further from the Examiner's recommended modifications, ensuring those modifications are within the limitations of the regulations. These further changes have been discussed with the Neighbourhood Forum, and are considered by officers to maintain the original intent of the community and ensure it meets the 'basic conditions'. The modifications are not as a result of new evidence or facts, or as a result of a different view of a fact. They are matters of planning judgement, identifying alternative solutions to meeting the 'basic conditions', not seeking betterment of the submitted plan. These changes are discussed in more detail in Section 4 of this report and set out fully in Appendix 2.
- 3.3 The LPA must also decide whether to extend the area to which the referendum is to take place. As the three neighbourhood areas are clearly defined and there are no significant cross-border policies in the Plan, it is not considered necessary by the Examiner or the LPA to extend the area to which the referendum is to take place.

4. Examiner's Recommendations (see Appendix 1)

- 4.1 The Examiner did not consider it necessary to make significant changes to the content of the Brixham Peninsula Neighbourhood Plan and has instead proposed a series of modifications. No policies are recommended for deletion but a number of policies have been modified by a greater or lesser extent to ensure they meet the 'basic conditions', most significantly these are one proposed housing site allocation being deleted and an amendment of a Local Green Space boundary.
- 4.2 The LPA have considered the Examiner's recommendations and reasons for them, and have concluded that a number of further or alternative modifications are appropriate. All modifications have been discussed with the forum. In relation to the recommended deletion of the housing site allocation (Waterside Quarry), the LPA agree with the examiner's conclusions. Officers have considered it necessary to align the justification text to associated Policy changes in order to meet the 'basic conditions', particularly by adding clarity. A more detailed assessment of the Examiner's recommendations is set out at Appendix 2.
- 4.3 The LPA, made a series of representations on the submitted plan which have been considered by the examiner, along with those from other Council departments, and third parties including the development industry. The key

concerns raised by the LPA are set out below but the Examiner's report, in Appendix 1, addresses these and others in full.

Housing Site Allocations

- 4.4 In the submitted plan, Policy BH3 'Delivery of new homes' allocates housing sites to meet the identified need set out in the Council's Local Plan. In relation to this policy, and particularly Table 2 ('Allocated housing sites') and BH3-I10 Waterside Quarry, the Examiner's report states she had '*considered carefully the evidence and supporting documents available..... and the relevant representations*'. The Examiner's conclusions stated that she '*focused on the issue of the adequacy or otherwise of the environmental assessment of the site in the light of the PoW case and whether or not the site as a result of this and other site constraints is developable*' and concluded that she was '*not satisfied that the HRA assessment of the site as submitted is adequate*'. It is important to note that the LPA has consistently maintained a position which raises concerns over the adequacy of the assessment, concluding the same as the Examiner.
- 4.5 The Forum strongly disagree with this conclusion and have put forward a number of further representations to support the re-instatement of Waterside including referencing the provision within the plan of a safeguarding Policy (E8) and additional modified text to BH3, to ensure no Likely Significant Effect at the planning application/project stage (see also the discussion in 4.5 below). These representations have been given serious consideration.
- 4.6 The Council, as competent authority and following discussions with its consultant Jacobs UK Ltd, contests the conclusion of 'no potential effect on Greater Horseshoe Bats' reached by the AECOM HRA (submitted HRA with Neighbourhood Plan). This screened out the Waterside Quarry site with no mitigation measures and did not recognise that this site had Greater Horseshoe Bat records immediately adjacent to it. Based on the evidence provided to date, the LPA agree with the conclusion of the Examiner and do so as it is not possible to ascertain that the proposal site is not likely to have a significant effect on a European site in accordance with the basic condition as prescribed in Schedule 2 Paragraph 1 of the Neighbourhood Planning Regulations 2012.
- 4.7 It is the view of Officers that there has, in essence, been an insufficient response to the existing evidence on and around the site in respect of the identified presence of bats. The Plan cannot rely on a safeguarding policy and the competent authority **must**, before the plan is given effect, have ascertained that there is no likely significant effect on the integrity of a European site. This requirement is set out within "The Conservation of Habitats and Species Regulations 2017", Regulation 105. The Plan would not be lawful if these conditions are not met and the retention of the site could bring proceedings for judicial review which could then compromise the Plan as a whole. Had the evidence been appropriately considered within the submitted HRA, it is not believed that the site would have been screened out. Consequently there has not been an assessment of the 'in combination effects' or any mitigation measures proposed.

- 4.8 Had the Waterside Quarry site not been screened out, it may have been possible (as with other sites) to adopt a mitigation strategy that may have identified a development opportunity. However, the presence of a roost in the cliff face of the adjacent site marks it apart from the other allocations. Evidence of full and satisfactory mitigation has not been provided. It is not possible to rely on the existing broad mitigation measures set out in the Local Plan as these are applied in principle before further evidence is obtained. In this case as there is further evidence, this indicates a requirement for specific mitigation measures. If mitigation measures had been submitted, this would have been considered.
- 4.9 It is of note that nothing set out above rules out development on any part of the site at any point going forward, it is instead about the process for this plan. It is considered that there may be mitigation measures that would provide a solution but such information would have to be provided. Although this has not been received through the plan making process to a satisfactory degree, it would be possible to submit a planning application, which contained such information, for consideration.
- 4.10 The Examiner's Report also considers the wider Policy BH3 - Delivery of new homes. She concluded that there was a potential shortfall in housing numbers, and that consequently the policy should be modified to '*supporting the strategic development needs set out in the Local Plan*'. Whilst the LPA raised earlier concerns that the capacity of some sites may vary from that shown in Table 2 of the submitted Plan; on reflection Officers now consider that whilst some sites may deliver less, others have the potential to deliver more units and consequently the overall delivery should broadly meet the Torbay Local Plan Policy SDB1 of 660 dwellings by 2030. The LPA is therefore satisfied that sufficient housing numbers based on the sites listed following modification of the Plan meet the required housing figure set out in the Torbay Local Plan Policy and is therefore in general conformity in this respect.
- 4.11 The LPA considers that the additional policy text recommended by the Examiner is moved to the supporting text and is further modified, restricting the 'strategic need' to that of the Brixham Peninsula (Local Plan Policy SDB1 area) only. This ensures that the plan meets the 'basic conditions', and clearly demonstrates that, when 'made', the Plan contains policies and allocations to meet its (fully) identified housing requirement.
- 4.12 As previously reported to Council, officers have assessed the stock of deliverable housing sites against the local Plan housing requirement and have concluded that Torbay has around 4.19 year supply of deliverable housing sites. The Forums disagree with this figure, and argue that that there is at least 6.1 year supply. The LPA's position, including responses to the Forum's argument, is set out at:
<https://www.torbay.gov.uk/council/policies/planning-policies/evidence-base-and-monitoring/>

- 4.13 The Government has sought to provide some protection for neighbourhood plans against the effect of a five year supply shortfall. Paragraph 14 of the 2018 NPPF provides that, where a 5-year housing land supply cannot be demonstrated, development which conflicts with the provisions of a recent neighbourhood plan is less likely to be ‘sustainable development’ where, amongst other things:
- i. the LPA can demonstrate a 3-year housing land supply; and
 - ii. the neighbourhood plan contains policies and allocations to meet its identified housing requirement (*emphasis added*).
- 4.14 Members are asked to note officer advice that the LPA is not able to demonstrate a 5-year housing land supply. The Brixham Peninsula Neighbourhood Plan does allocate housing sites and therefore, in addition to housing allocation contributing to the general housing supply requirement, the area of Brixham will benefit from the additional protection afforded by the NPPF to areas with neighbourhood plans in place, where a 3-year housing land supply can be demonstrated by the LPA.

Employment Allocations

- 4.15 The Neighbourhood Plan, in Policy J1, ‘identifies’ employment sites but does not allocate them. However, the Plan policies are generally supportive of employment development. The LPA is not under a NPPF obligation to maintain five years supply of employment sites. The Examiner has held that the Neighbourhood Plan cannot be required to make site allocations. Her recommended modification did however seek to ensure that J1 ‘*promoted appropriate to meet the local and strategic needs set out in the Torbay Local Plan 2012-2030*’. The Local Planning Authority has added the codicil that this need relates to the SDB1 Area (see Appendix 2 and 3).
- 4.16 The submitted Plan’s accompanying AECOM HRA expressed concerns in relation to Site J1-I1 (Oxen Cove and Freshwater). The Examiner therefore took the view that, ‘...*although this is a fine distinction I am clear that as the sites have not been allocated any potential shortfall in evidence in relation to the HRA can be adequately addressed should any planning application come forward.*’ It was within the scope of the ‘basic conditions’ to retain the employment sites as ‘identified’. In any case, the site passes the Council’s HRA appropriate assessment.

Local Green Spaces

- 4.17 Local Green Space designations allow local communities to give special protection to green areas of particular importance to them. Local Green Spaces have a similar status to green belt, and development can only occur in specific circumstances.
- 4.18 Government guidance (contained in paragraphs 76 and 77 of the 2012 NPPF) says that the Local Green Space designation will not be appropriate for most green areas or open space; and that the designation should be consistent with the local planning of sustainable development and complement investment in a sufficient number of homes, jobs and other essential services. The designation

should be capable of enduring beyond the end of the plan period and should only be used:

- where the green space is in reasonably close proximity to the community it serves;
- where the green area is demonstrably special to a local community and holds a particular local significance, for example because of its beauty, historic significance, recreational value (including as a playing field), tranquility or richness of its wildlife; and
- where the green area concerned is local in character and is not an extensive tract of land.

4.19 The submitted Plan has designated 16 Local Green Spaces, the Examiner discusses the issue of Local Green Spaces on pages 47-49 of the Report. In summary, the Examiner found that all areas of designation submitted in the Plan, meet the requirements of the NPPF with the exception of part of E4-13 Churston Golf Course. In this case the Examiner concluded that the boundary of the proposed area should be revised to exclude the area of the Clubhouse, Car Park, 1st and 18th holes of the originally proposed area; that the site would however remain protected, specifically by Policy E6 of the Plan which places the site outside the 'settlement boundary' and that any development proposal would therefore need to be considered in the context of rural countryside area (Policy C1 criteria in the Local Plan) and Neighbourhood Plan Policy BH9 Exception sites policy alongside general protection policies for recreational spaces and Habitats Regulation matters relating to the SAC.

4.20 The extent to which this area of Local Green Space designation at Churston Golf Course is in general conformity with the Local Plan and has regard to the NPPF requires a planning judgement.

4.21 The Forum disagree with modification proposed by the Examiner and specifically questioned why designation does not meet the 'basic conditions'.

4.22 The Council in its capacity as landowner and the LPA made representations on a number of Local Green Spaces which were proposed on the basis that they had development potential. The Examiner did not consider that to be a valid objection to the Local Green Space tests in and of itself. However she concluded that the Golf Course Clubhouse, Car Park, 1st and 18th holes should be excluded in order to address concerns and ensure the Plan is in conformity with the strategic policies of the Local Plan.

4.23 The examiner reported that *"Torbay Council object to the area including the 1st and 18th hole of Churston Golf area being included in the proposed Churston Golf Course LGS on the basis that the site is currently within built up/urban area (village) with potential for sustainable development. This site, including the existing clubhouse has (expired) outline planning permission for 132 units and is identified in the Torbay Local Plan as 'BPNPH2' -Appendix C Pool of potential housing sites. The Local Plan Inspector recommended consideration of site as housing allocation in Neighbourhood Plan. Torbay Council consider that there is a resulting lack of Conformity with Strategic Policies: SS12 and SS13 and SDB 1 of the Torbay Local Plan... My conclusion is that whilst most*

of the proposed Local Green Spaces do meet the required tests I have concerns relating to the proposed boundary of the proposed Churston Golf Course LGS. I have considered the Torbay Council objection and my conclusions on the Brixham Peninsula Neighbourhood Plan housing policies and their ability to deliver the level of housing growth identified in the Torbay Local Plan and therefore a lack of SS12 and SS13 and SDB 1 of the Torbay Local Plan. To overcome my concerns and meet the 'basic conditions' the boundary of E5-13 should be modified to exclude the area which covers the 1st and 18th hole of Churston Golf Course, including the existing club house". It is noted (given the Examiner's report does not explicitly acknowledge it) that there were other representations to this site being designated as a Local Green Space, submitted on behalf of the previous applicant, which state that there remains potential for development on the site. It is further noted that the Examiner's reference to E5-13 is made in error and should refer to E4-13.

- 4.24 While the Examiner has raised concerns over the "ability to deliver the level of housing growth identified" it is noted, as it is in 4.12 and 4.13 of this report also, that the LPA do not now concur with that conclusion. The Torbay Council objection referred to by the Examiner made it clear that the site had potential for sustainable development, therefore meeting paragraph 76 of the NPPF (2012). These matters differ from one another in that the Examiner was referring to development within the Plan period, whereas the LPA are referencing the future ability to plan for sustainable development beyond the Plan period. The key concern of the LPA is that designating the whole site as a Local Green Space is not consistent, given the resulting constraint, with the local planning of sustainable development.
- 4.25 It is proposed by the LPA that the boundary of the designation will be modified from that as submitted but will not match that as recommended by the Examiner. It was determined by the Local Plan inspector that the site should be considered by the local community and the result of this is clear intention to designate the site as Local Green Space but also to ensure the Plan makes sufficient allocations to meet the identified need for the plan period.
- 4.26 The modification is that the Clubhouse and Car Park should be excluded from the designation but that the 1st and 18th holes are maintained within it. It is considered that the 1st and 18th specifically meet the three criteria of Paragraph 77 (NPPF 2012) set out in 4.19 of this report, as it is a green space in reasonably close proximity to the community; a green area demonstrably special to the local community and holds a particular local significance for example because of its recreational value; and the green area concerned is local in character whereas the arguments for the Clubhouse and Car Park area are less clear. Designating the 1st and 18th meets Paragraph 76 of the NPPF (2012) as it, when considered alongside the Clubhouse and Car Park area, provides capacity within the site to enable the local planning of sustainable development in the future and complements the planning of homes, jobs and other essential services.
- 4.27 It is a matter of planning judgement as to the extent of the site that is necessary to enable sustainable development. The resultant designation would accord

with the 'basic conditions' by having regard to the NPPF, meeting both paragraphs 76 and 77 of the NPPF (2012). As modified it provides for some flexibility in the future, beyond the end of the plan period which would not otherwise have been explicitly possible, to consider the site through the plan making process as part of the local planning of sustainable development. Members should also note that the designation 'should' be capable of enduring beyond the Plan period but may be reviewed at future Plan making stages.

Affordable housing

4.28 Policy BH1 'Affordable housing – site allocations' provides for affordable housing in accordance with Local Plan Policy H2. However there is an exception where off-site contributions are 'ring-fenced' for the provision of affordable housing within the Brixham Peninsula area. The commuted sums held by the Authority will be released to the wider Torbay area if they unspent on the 3rd anniversary of payment. Policy BH2 'Affordable housing - occupation' apportions the eligibility for occupation of affordable housing to a local connection within the Brixham Peninsula. The Council objected to this policy on the grounds that it would create a 'two tier' system of housing allocation from the existing Devon Home Choice and would be difficult to administer. However, the Examiner considered there was sufficient evidence submitted with the plan to retain the Policy, albeit in a modified form, that restricts applications to 'new' affordable units and that there is a default to the Torbay Council Waiting List if no occupants can be found. The LPA is satisfied that the key workers criterion, removed by the examiner, can be retained without impacting on the 'basic conditions'.

Views of the Forum on Policy modifications and deletion

4.29 Through a two way consultation with the Forum, a revised form of wording for a number of Policies is proposed which Officers consider do now meet the 'basic conditions' and it is accordingly recommended that they should be updated (as modified) in the Plan. The schedule of recommended changes are set out in Appendix 2. The Forum, as set out above, do not agree with the Examiner and LPA position on the deletion of Waterside Quarry as an allocated housing site, or on all of the changes proposed specifically in the justification text.

Policies Map

4.30 In line with the Examiner's recommendation, Officers and Forms are working jointly to update the policies map to support the Plan modifications. In preparing a Policies map it has been necessary to make minor modifications to the key to accord with the Policy Document as well as the inclusion of boundary area for Policy J5 (harbour-side economy). This has been done solely for mapping consistency reasons and does not change the substantive policy boundaries. Other changes are also made to accord with the modifications as set out in Appendix 2. Not all of the changes have been made at the time of writing, many are reflected in the latest document but these will require further updates to be made, and accordingly it is proposed that Council delegates authority to the Assistant Director of Business Services to make any necessary further changes.

4.31 The examiner also recommended modification of the boundary of Policies J6 and J7. However, the necessity of the recommendation has been questioned. Officers believe that the modification could add betterment to the plan, but it is not necessary to meet ‘basic conditions’ and accordingly the boundary has not been modified and remains as submitted.

EU Obligations

4.32 The Council maintains the responsibility for deciding whether, or not, a Neighbourhood Plan is compatible with EU regulations.

Strategic Environmental Assessment (SEA)

4.33 A SEA is necessary due to the allocation of sites raising the possibility of significant environmental effects arising from the plan. This was carried out as part of a Sustainability Appraisal which concluded that the plan mitigated negative effects and identified opportunities to enhance positive effects.

Habitats Regulation Assessment (HRA)

4.34 A HRA is required by the Habitats Directive (92/43/EEC) when the implementation of the Plan may lead to likely significant effects on European Sites.

4.35 Natural England did not object to the Plan, or the modifications proposed by the examiner, and made it clear that it is the responsibility of the Council (as LPA) as the competent authority to ensure that the Plan does not have a likely significant effect of European sites.

4.36 The accompanying HRA Appropriate Assessment (‘AA’) has been modified to ensure it accords with the Ruling of the European Court in People over Wind (PoW)². Changes to the plan have been made to ensure compliance with the Habitats Regulations.

Human Rights

4.37 Officers have raised no objection in respect of Human Rights, as considered against the European Convention for Human Rights and the Human Rights act 1998. The examiner did not raise human rights issues in her assessment of the Plan against the “‘basic conditions’”.

5. Recommended Modifications (see Appendix 3)

5.1 As discussed in Section 4 above, Officers have given serious consideration to the Forum’s further representations on all matters and the Decision Statement, along with the amended Plan in Appendix 3, sets out the LPA conclusions.

5.2 Officers have had a two way consultation with the Forum to modify a number of Policies. Officers are satisfied that the policy wording as modified overcomes the Examiner’s reasons for their modification and satisfies the “‘basic conditions’”. It is therefore appropriate to modify the Plan as set out above and in more detail at Appendix 2 and 3.

² People Over Wind, Peter Sweetman v Coillte Teoranta Case C-323/17

- 5.3 A number of additional minor modifications have been necessary for the purpose of ensuring legibility, grammatical and numbering accuracy of the Plan. These have also been the subject of consultation with the Forum and are indicated at Appendix 2 and 3.

6. Corporate Plan and Responsibilities

- 6.1 The Neighbourhood Plan has no legal requirement to consider or support the Corporate Plan of the Council.
- 6.2 The Brixham Peninsula Neighbourhood Plan will deliver the number of homes that the Local Plan (2012-2030) requires. The Plan does not allocate Employment sites but does make provision for the employment need. It contains strong policies to promote good design and a high quality built and protect the natural environment.
- 6.3 The Neighbourhood Plan has no legal requirement to consider or contribute towards the Council's responsibilities as corporate parents.
- 6.4 The Neighbourhood Plan has no legal requirement to consider deprivation. However, the plan (if approved) would contribute to sustainable development in accordance with the requirement set out in the 'basic conditions'.
- 6.5 The Plan contains strong policies to improve the quality of the built environment and to resist poor quality developments. It also contains a local affordable housing occupation policy that provides for a local connection to the Peninsula in the first instance but does default to the Torbay Waiting List. It provides a framework that will help resist poor quality development that could worsen environmental deprivation.

7. Financial and Legal Implications

- 7.1 The Town and Country Planning Act 1990 (as amended), Planning and Compulsory Purchase Act 2004, Localism Act 2011, Neighbourhood Planning Act 2017, and Neighbourhood Planning (General) Regulations 2012 (as amended) all apply. The Council must ensure that the Plan meets the "basic conditions" as set out in Law.
- 7.2 There will be financial implications in respect of officer resources and direct costs associated with any referendum, should the decision be taken to put the plan to referendum. If the decision is taken to undertake further consultation and examination this will also incur additional costs and time.
- 7.3 The Council can be challenged on its decision and any such challenge arising would incur additional costs as well as the resource implications.
- 7.4 Central Government will provide additional grant funding to the LPA on completion of the referendum. Any costs not covered by the grant funding will fall to the revenue budget.

7.5 When it is made, the “Neighbourhood Portion” of CIL that must be spent in the area where development arises will increase from 15% to 25%.

8. Risks

8.1 The Council must consider its duty to support Neighbourhood Planning whilst ensuring that only a Plan which meets the ‘basic conditions’ is put to referendum. Failure to do so could result in legal challenge.

8.2 If the Plan is approved in line with the recommendations of the Examiner, the onus on the Council to justify its decision would be much reduced. If the further Modifications are not consulted upon there may be a legal challenge to the Plan from dissatisfied third parties whose only opportunity to object will be through that of judicial review.

8.3 Additionally, if the Council decides to put the Plan to referendum and in due course it is made (adopted) then, as land owner, it will have a number of Local Greenspace designations on its assets. However, the Examiner has allowed the designations despite objection from Council as landowner.