

**Application Number**

P/2017/0571

**Site Address**

Land Off Brixham Road - Former Nortel Site  
Long Road  
Paignton  
TQ4 7BL

**Case Officer**

Mr Scott Jones

**Ward**

Blatchcombe

**Description**

(Variation of conditions on planning application P/2014/0947/MOA; As amended by S73 applications P/2016/1372 and P/2017/0123): Outline Application with all matters reserved except access, for demolition of the remaining buildings on the site and redevelopment for mixed use purposes comprising up to 255 Class C3 dwellings, up to 5,574sqm of B1 and /or B8 business and/or warehousing uses, up to 8,501sqm Class A1 (bulky goods) retail with up to 515sqm garden centre, and up to 139sqm of A3 cafe /restaurant uses, along with related site access, access roads and paths, parking, servicing, open space and landscaping. (Condition 32: Restrictive Goods Condition).

**Executive Summary/Key Outcomes**

The application is to amend Condition 32 (restrictive goods condition) of the outline consent granted under reference P/2014/0947 for the demolition of buildings and mixed use development comprising up to 255 dwellings, up to 5,574sqm of business and/or warehouse uses, up to 8,501sqm of (bulky goods) retail with up to 515sqm garden centre and up to 139sqm of café/restaurant use, at the former Nortel site on the western outskirts of Paignton. Devonshire Park is part of the Brixham Road/Yalberton Future Growth Area is set out in Policies SS2 and SDP3.4 of the Adopted Local Plan.

The decision to grant outline consent was finely balanced because the provision of the retail floor space in an out of town location was considered to have an adverse impact on the Paignton and Torquay town centres. To limit the impact the outline consent was subject to four conditions controlling the total floor space, the range of goods, the minimum size of units possible, and also limit concessions within units.

The sale of goods condition, to which an amendment is now being sought, was imposed in order to limit the sale of comparison goods by limiting the sale of goods towards the "bulky" end of the market. The condition limited sales from the retail units to eleven categories of retail goods and this did not include convenience (food) retail. The application seeks to vary this condition to permit the sale of convenience (food) goods within one unit of up to 1,486sqm. This amendment

should be considered in terms of the current Local Plan, National Policy and other relevant material considerations.

Policy TC3 *Retail Development* of the Torbay Local Plan 2012-30 states that for new out-of-centre retail development to be acceptable it should pass the 'impact test' and the 'sequential test' and should improve the spatial distribution of accessible facilities throughout the Bay to help achieve greater social cohesion. The National Planning Policy Framework (NPPF) sets out similar tests requiring such development to pass the sequential test and the impact test, as detailed within Paragraphs 24, 26 and 27 of the NPPF.

Considering local and national planning policy there are two key retail policy considerations, which is whether there is a sequentially preferable site and whether there would be an unacceptable impact upon town centres. In addition to these considerations other material consideration are also relevant.

The Council's retail advisor has concluded that the proposal fails the sequential test as White Rock has a planned Local Centre and there is planning permission for a similar size store in the area of the identified Local Centre, which is deemed to be both suitable and available for food retail. As a result, the advice to the Council is that the application fails the sequential test. The retail advice on other sites of interest is more reserved and concludes that there is insufficient information available to confidently conclude that either Crossways in Paignton or Middle Street in Brixham are genuinely suitable and available alternates at this present time. This entails a planning judgement about the reasonable prospects of their delivery in the near future.

The second relevant test is one of retail impact. On the information available, the Council's retail advisor agrees with the applicant's assertion that the proposal would have a similar level of financial impact upon Paignton Town Centre as the extant scheme. There is however concern that as the town centre is vulnerable to even small changes the widening of the trading overlap may itself have a demonstrable impact. The concluding advice is that there is a balanced judgement to be made as there some concern on widening the trading overlap with Paignton town centre.

Officers have carefully considered the two issues regarding the sequential and impact tests.

In terms of the sequential test although White Rock has been identified as a preferable site there is doubt whether directing such development there and resisting it as Devonshire Park would have a demonstrable positive impact in terms of seeking to help secure successful town centres or helping to enable sustainable economic growth, as both sites would appear to provide car-based food retail adjacent to the ring road. It is therefore considered uncertain that White Rock could be robustly argued as a preferable site as it is principally a similar proposition

spatially. Officers also consider that it is relevant to consider the evidence that suggests that White Rock is advancing with an interested food retailer. Although this does not alter the concluded failure of the sequential test at this moment in time, it is relevant to consider the prospect of the site being delivered in the near future and thus the likelihood of it being no longer available.

Careful consideration has been given to Crossways and Brixham Town Centre. These are both town centre sites and are suitable for food retail. It is noted that the Torbay Development Agency and Neighbourhood Forum have objected that the current application could harm the viability of the town centre sites. However neither of these sites have live planning permission and there are no publically available extant plans for their redevelopment. On this basis it is concluded that there is less than a realistic prospect of the sites being available for the proposed use.

In regard to retail impact on balance it is considered that, as there is a number of food retail outlets already established along the Western Corridor, the proposed inclusion of food retail at Devonshire Park is unlikely to have an unacceptable impact upon Paignton town centre, as any harm on the town centre food retail sector is likely to be balanced by the reduced harm (competition) in the bulky goods sectors, and the main area of trade impact is likely to be upon diverted food retail trade from other outlets along the Western Corridor.

The NPPF (paragraph 27) indicates that as the application fails the sequential test policy guidance is that it should be refused unless other material considerations indicate otherwise. Notwithstanding this, the relatively "technical" nature of this failure and uncertainty about the availability of genuinely town centre sites are relevant considerations.

In regard to other material considerations it is relevant to consider that the site is a contaminated derelict brownfield site that is in a Future Growth Area, as designated within the Torbay Local Plan. Although the application is discordant with retail policy guidance the delivery of the mixed use scheme, which the amendment seeks to support delivery of, accords with a range of local and national policy guidance. It is a material consideration that the scheme would help secure remediation of this large contaminated site, which the applicant has confirmed he is willing to undertake. It is also a material consideration that that it will aid regeneration of a large derelict brownfield site that is prominent in the local area, and also aid with the effective use of brownfield land, which is supported in national and local policy. In addition by aiding the implementation of the mixed use scheme it will also help deliver much needed housing and employment opportunities, which is also supported in local and national policy guidance. In terms of the food store alone it is projected that 55-60 jobs (33 FTE) will be created (based on the identified food retailers Operator Statement: Lichfields: Oct 2017: Produced on behalf of M&S). The site is also within the Council's five year supply of housing sites and measures to ensure delivery of such sites should be given significant

weight.

In summary, the broader benefits outlined above in terms of remediation of land, effective use of a brownfield site, the delivery of housing and employment opportunities, and assistance with the wider Local Plan strategy (in Policies SS1, SS2 and SDP 3.4) are substantial. The retail planning policy is not clear cut, and there is a degree of conflict with policy TC3 of the Local Plan and Chapter 2 of the NPPF; in particular in terms of sequentially preferable sites, and broadening the area of impact on the town centres. However, as set out above, these issues are not clear cut, as there are factors that mitigate the extent of conflict. Officers consider that the balance, when all material considerations are weighed up, lies in favour of support for the proposal

There are three representations raising objections. The Paignton Neighbourhood Forum cites that the proposal fails the sequential test for food retail as Crossways could deliver the store, and has concern that the retail impact assessment is not robust enough. The two further representations raise concern in terms of traffic impact and the robustness of the assessment, along with certain points that appear to relate to the wider outline consent. The Torbay Development Agency also object on grounds of the likely harmful impact on town centre regeneration.

### **Recommendation**

Approval; Subject to:

1. A Condition to secure remediation of the site (including the housing area) to a suitable level for its intended use, in-line with the land uses outlined within the approved indicative Masterplan (Reference 1449-PL-001 Rev A), prior to the first occupation of the retail development,
2. All previous Conditions (as amended by previous S73 applications), and,
3. The provision of a planning obligation to secure the sum of £36,744 as mitigation for the increased impact upon the Western Corridor caused by the additional traffic which would result from the introduction of convenience retail within the development, paid upfront or secured via a S106 Legal Agreement.

### **Decision Level/Statutory Determination Period**

The application is before Members as the proposal is an amendment to a Major application.

The determination date for this application is the 31st August 2017. The target date has been exceeded as further information was requested from the applicant on sequential testing and retail impact.

## **Site Details**

The site comprises the former Nortel/Bookham site that is now known as "Devonshire Park" to the west of the Brixham Road on the outskirts of western Paignton. The site is a former industrial site that primarily manufactured electronics and closed in 2006. Following demolition of most of the buildings in recent years, the site is largely derelict.

The wider Devonshire Park site has an area of 9.76ha. The topography of the site rises by about 20 metres from south to north. The retail park section of the site (which is the subject of this application) is located in the southern part of the site, fronting Long Road and Brixham Road.

The buildings that sat on the southern part of the site have been largely demolished. The network of linked car parks still exists in the northern part of the site, which are framed by trees and hedgerows.

In terms of immediate context the site is bounded by housing, sports pitches and the Western Business Park to the north, Brixham Road to the east, Long Road to the south and South Devon College to the west.

The site is within the Brixham Road/Yalberton Future Growth Area in the Adopted Local Plan (SDP3.4). The site has permission (P/2014/0947) for a mixed use development including retail, subject to a condition limiting the nature of goods sold (see below).

The site is located within the greater horseshoe bat sustenance zone associated with the South Hams SAC at Berry Head. It is within Flood Zone 1 and within the Critical Drainage Area designated by the Environment Agency.

Parts of the site are known to be contaminated from the historic uses. The parts with most risk are to the south and particularly to the west, with lower risk to the north.

## **Detailed Proposals**

The application is a Section 73 application that seeks to vary a condition on the extant mixed-use scheme in order to permit convenience (food) retail.

The extant outline consent granted permission for up to 255 dwellings, up to 5,574sqm of B1/B8 employment space, 8,501sqm of (bulky) retail, 515sqm garden centre and associated parking, servicing etc.

The proposal is to vary Condition 32 (Sale of goods within specified categories) of the outline consent to permit the sale of convenience goods within one unit of up to 1,486sqm.

Condition 32 currently permits the sale of the following goods;

- (i) Do-It-Yourself goods and materials;
- (ii) new kitchens and bathrooms;
- (iii) garden centre goods and materials, including plants;
- (iv) furniture and home furnishings
- (v) carpets and other floor coverings;
- (vi) gas and electrical goods;
- (vii) camping and associated leisure goods, no more than 10% of the net sales floor area of this category to be used for the sale or display of clothing and/or footwear;
- (viii) motor vehicle and bicycle related goods;
- (ix) pets and pet products;
- (x) office furniture; and
- (xi) ancillary products reasonably related to the categories above and restricted to a maximum floor area within each retail unit of 10% of the net sales floor area.

The proposal seeks an amendment to add the following wording to introduce the extra category, adding the wording;

*(xii) Convenience goods within one unit up to 1,486sqm.*

The applicant has stated that the amendment is necessary as following marketing of the retail park interest had been disappointing and they are currently unable to implement the extant permission as it is unviable.

The applicant has stated that they have reached agreement with three retailers and terms have been agreed with a fourth, however this is a food retailer. If they secure this fourth retailer the applicant has stated that this would make the scheme viable and thus if the amendment was granted the scheme could be delivered with the remaining retail floor space being built speculatively. It is their intention to commence in early 2018 if consent is granted.

It has been stated by the applicant that once a viable retail element is secured it will trigger the remediation of the northern part of the site where the residential elements of the extant permission will be delivered. Therefore if the amendment is secured it will aid in the regeneration of the whole of the Devonshire Park site. The applicant has indicated that they are willing to deliver the housing area of the site ready for development prior to occupying the retail element, in order to help the delivery of the housing element.

## **Summary Of Consultation Responses**

### **The Council's Retail Advisor (GVA)**

There are two clear retail issues, the sequential test and the retail impact test. Both are engrained within Local and National planning policy. Following a review of the

additional information submitted by the applicant, the advice is as follows;

*The sequential test:*

It is considered that the information submitted has not provided sufficient information to demonstrate compliance with the sequential test following an agreed focus on three key sites.

The applicant has failed to demonstrate that White Rock Local Centre (TC 2.19) is not a sequentially preferable site. The site benefits from planning permission for a similar sized store and hence it would appear suitable. The applicant's conclusion that the site is not available as there is already a food retailer tied to the site is disputed as for the purposes of the sequential test it is whether a site is available for the use rather than any particular user. Therefore at this present time this site is, as it has been identified to sit in the retail hierarchy, considered a sequentially preferable site for food retail that is suitable and available.

In terms of other sites of focus the applicant has sought to address the suitability and availability of Crossways (Paignton) and Middle Street (Brixham). Both of these sites have long been promoted as potential retail development sites and are being treated as high priority sites in terms of the Council's regeneration programme. They are both continuing to be subject of further appraisal work by the Torbay Development Agency and the Torbay Development Agency has advised that retail floorspace remains a key focus for both sites.

It is considered that both sites, but particularly the Brixham site, have the potential to accommodate a foodstore unit and therefore may be suitable.

However in terms of availability at this present time there is insufficient information available to confidently conclude that either of these sites are genuinely suitable and available alternates. For the Council to conclude otherwise it will need to have confidence that either or both of these sites can be progressed to a sufficient stage where further certainty can be reached on the suitability and availability of either site.

*Retail impact:*

There is some concern about the quality of the applicant's data in respect to retail impact and there is a preference that a more appropriate evidence base is submitted.

However on the assumption that the applicant's analysis of the likely trade diversion is reasonable it suggests that there would be a 6% loss in terms of total turn-over on Paignton town centre, which is a similar level to the extant permission for Devonshire Park. This appears a reasonable conclusion and therefore it is not contested that the financial impact would not be to a similar level and therefore it is unlikely that there would be a material difference in the overall level of direct financial impact on the retail sector in Paignton town centre.

There are however further considerations on impact and it is relevant to consider the breadth of effect on Paignton town centre, as there will be a widening of the trading overlap as the scheme would be competing with the town centre on both comparison and convenience goods. In regard to this it is reasonable to suggest that Paignton town centre already faces significant competition from out-of-centre foodstores. However this does not mean that some additional food trade will not be diverted. This is a concern as previous advice has indicated the vulnerability of Paignton town centre is such that even small levels of trade loss could be harmful. The Council should be aware that the available data indicates that that Paignton town centre is becoming even more vulnerable as it loses market share across both convenience and comparison goods sectors. This trend, in combination with the committed floorspace, makes this situation worse. There is a balanced decision to make on the wider cumulative impact.

*Strategy and Project Officer (regarding retail and highway and transport matters):*

*Retail matters:*

*Sequential test*

There is agreement with the Council's retail advisor that in terms of the sequential test the relevant consideration should be whether there is scope to provide up to 1,486sqm of convenience retail (with reasonable flexibility over format and scale) in a sequentially preferable site and not the whole of the permitted floorspace of the extant scheme.

The sequential test is set out in NPPF 24 and Policy TC3 (D) of the Adopted Local Plan. Policy TC3(D)2 requires there to be no other town centre or edge of centre site that is suitable, available or viable.

On the information available, the retail advice received is that the proposal fails the sequential test as there are sequentially preferable sites at White Rock. The situation with Crossways (Paignton town centre) and Middle Street (Brixham town centre) is more unclear.

The retail advice appears conclusive in terms of the availability of a site at White Rock, which is designated within the Torbay Local Plan retail hierarchy and will become a Local Centre. However the purpose of the sequential test is to support the town centre first approach, help ensure successful town centres, and help enable sustainable economic growth and secure the range of economic and social benefits that are related. Although White Rock is designated for a local centre it is very close to the Devonshire Park site and spatially sits within a similar context. It is relevant that realistically the impact of delivering a foodstore at White Rock rather than at Devonshire Park is unlikely to be any more beneficial to the town centre or spatially more sustainable. It would appear uncertain that if the sequential preference of one over the other was contended at appeal whether it

would be reasonably considered a preferable site in real terms.

#### *Impact test*

The impact test is set out in Policy TC3 (D)1 of the Local Plan and paragraph 26-27 of the NPPF. The Local Plan refers to "unacceptable" impacts whereas the NPPF refers to "significant adverse impact". The intention of the two policies is similar.

The current application must consider the additional impact of convenience retail, since the principle of albeit relatively bulky comparison goods has already been approved.

The Council's retail advisor has broadly accepted the applicant's assessment that the proposal is likely to result in a 6% loss of retail turnover in Paignton Town Centre, which is similar to the overall impact of the approved retail development at Devonshire Park. This is a material consideration to take into account. There is however concern that the widening of the trading overlap will itself have an unacceptable impact on a centre that is struggling.

Crucial points are that there is no additional floor space and that there is unlikely to be any additional financial impact. It therefore falls in the impact of the change in retail offer. Whilst the reduction in bulky retail goods will reduce the trading impact on these sectors that currently trade within the town centre, the introduction of food retail will introduce competition within this market area within the town centre. As the town centre already experiences a high level of competition from out of town food retail located along the Western Corridor it would appear reasonable to conclude that the introduction of this sector of retail within the Devonshire Park scheme is unlikely to present a demonstrable impact, as the trade diversion to food appears established, and any impact is likely to be more aligned with diversionary sales from existing retailers along the Western Corridor.

#### *Spatial distribution of facilities*

It is relevant to note that Policy TC3 (D)3 seeks to improve the spatial distribution of accessible facilities throughout the Bay and to help achieve social inclusion. The Western Corridor area is well served with food stores and an additional store could reinforce the position of most food stores being relatively inaccessible to people with no access to a car. However the floorspace has been established for retail purposes within the extant outline scheme and therefore the impact is not considered demonstrable. It is also relevant to note the rise in home delivery food retailing, which itself improves access to such services.

Wider material considerations also apply and it is recognised that the proposal would unlock regeneration of a brownfield site and help deliver much needed housing and employment. Although contrary to the retail policy aims and objectives the proposal is in accordance with a number of Strategic Policies within the Local Plan relating to the Growth Strategy, development within Strategic

Growth Areas, the presumption in favour of sustainable development, housing delivery and the economy and employment. When considering the Local Plan 'in the round' and when considering the wider benefits the balance appears in favour of support for the proposal.

*Highway impact:*

The application is supported by a Transport Assessment including a TRICS assessment, to assess the impact of convenience retail upon the immediate road network. This concluded that the traffic impact can be accommodated within the existing highway network, and does not create specific capacity log jams. It also noted that a number of trips will be passing or shared trips.

Notwithstanding the Transport Assessment convenience retail has a greater impact on the road network than non-food. TRICs indicates that Retail Parks excluding food generate fewer trips per day than those retail parks that include food sales.

On this basis of a food store of 1,486sqm a contribution of £36,744 has been agreed with the applicant to mitigate the additional impact upon the highway network. This contribution should be secured to be used towards projects on the Western Corridor in accordance with Policy SS6.2.ii, and SS7 of the Adopted Local Plan.

*Torbay Development Agency Town Centres Regeneration Programme Director*

This out of centre food outlet does not accord with the Local Plan. Town centre regeneration is now one of the Council's top transformation projects to which significant resources are being committed.

The Council has adopted (April 2017) a Transformation Strategy for Torbay's Town Centres, which now forms part of the Council's Economic Strategy. The Strategy sets out a 10 year programme for successful town centre regeneration and, specifically, identifies delivery activities over the next 3 years (Phase 1 of the regeneration programme). The key purpose of Phase 1 is to build confidence - investor confidence; developer confidence; confidence by communities in delivery of town centre regeneration etc. That confidence, and the Council's efforts, will be undermined by any further significant increase in food retail out of town.

Food retail is a key element of viability for several key town centre regeneration projects, including Victoria Centre and Crossways in Paignton and Brixham Town Centre Car Park. The Council's considerable efforts and financial support for town centre regeneration is highly likely to be undermined by additional significant out of town food retail, as it will be much more difficult to achieve viable development of regeneration sites and more difficult to secure momentum in the delivery of town centre regeneration.

### **Summary Of Representations:**

There are three representations raising objections.

The Paignton Neighbourhood Forum cites that the proposal fails the sequential test for food retail as Crossways could deliver the store, and has concern that the retail impact assessment is not robust enough.

The two further representations raise concern in terms of air quality, tree removal, overlooking and traffic impacts, which appear directed towards the broader extant scheme rather than the amendment sought through this application.

### **Relevant Planning History:**

#### *P/2017/0493 and P/2014/0494:*

Two options for groundworks, including the demolition of remaining structures, grubbing out of trees, foundations and floor slabs, remediating contamination and earth works to re-profile the site. Approved 22.09.2017.

#### *P/2017/0123:*

Variation of condition P1 of P/2014/0947 (as amended) (Outline Application with all matters reserved except access) - to vary Condition (P1) detailed approved plans to vary the access arrangement off Long Road. Approved 18.10.17.

#### *P/2016/1372:*

Variation of condition P1, 34 and 35 of P/2014/0947 (Outline Application with all matters reserved except access) - to vary Condition (P1) - Approved Plans to omit reference to the Masterplan, Condition (34) to vary the minimum unit size restriction for 1 unit and Condition (35) to clarify the restriction of concessions. Approved 18.10.2017.

#### *P/2014/0947:*

Outline Application with all matters reserved except access, for demolition of the remaining buildings on the site and redevelopment for mixed use purposes comprising up to 255 Class C3 dwellings, up to 5,574sqm of B1 and /or B8 business and/or warehousing uses, up to 8,501sqm Class A1 (bulky goods) retail with up to 515sqm garden centre, and up to 139sqm of A3 cafe /restaurant uses, along with related site access, access roads and paths, parking, servicing, open space and landscaping. Approved 22.03.2016.

#### *P/2017/1041:*

Variation of conditions on application P/2014/0947: (Devonshire Park Housing/Commercial Project). Variation of condition 33 - Maximum retail floor space. Amendment sought: Increase total gross floor area of class A3 floorspace from 139sqm to 167sqm. Pending Decision.

### **Key issues/material considerations:**

The key issues are :

1. The provision of convenience retail in terms of; (a) satisfying the sequential test, and (b) the retail impact upon existing and planned centres in terms of investment, vitality and viability,
2. Highway and movements impacts, and
3. Other material considerations

#### **1. The Provision of a Convenience Retail Unit of 1,486sqm**

The two key issues are the sequential test and the retail impact test.

The sequential test is to consider whether there is a more suitable site available to deliver the development. The retail impact test is to consider the impact upon existing and planned centres. Each of these tests will be considered in detail below.

##### **1(a). The Sequential Test**

The sequential test is set out in Policy TC3 of the Local Plan and paragraph 24 et seq. of the NPPF. The interpretation of the NPPF has also been adjudicated on by the Courts. In this context suitable and availability means "suitable for the development proposed by the applicant" which is a wider meaning than suitable for retail in principle. However availability means availability for the type of retail use for which permission is sought, and not availability for a particular retailer .

The sequential test is relevant as the proposal seeks to provide a town centre use in an out-of-centre location, as Devonshire Park is not designated within the local retail hierarchy and is not within an area allocated or intended to be allocated for convenience retail use in the Torbay Local Plan. The sequential test is necessary in order to consider whether there is a more appropriate location available that could deliver the development.

In regard to local policy context Policy TC3 *Retail Development* of the Local Plan states that new out-of-centre retail development must meet three criteria, one of which is that no other town centre or edge-of-centre site is suitable, available or viable. This aligns with the sequential test guidance in the NPPF. Paragraph 27 of the NPPF states that where an application fails to satisfy the sequential test it should be refused, which is a premise supported within Local Plan Policy TC3.

The applicant has provided information that seeks to assert that the sequential test is met.

The sites identified for sequential assessment are Crossways (Paignton town centre), Victoria Square (Paignton town centre), Middle Street (Brixham town

centre), Preston District Centre, and Yannons and White Rock Local Centres. The assessment of each of these sites is covered in turn below.

*Crossways, Paignton town centre*

Crossways is genuine town centre site and has a Local Plan allocation as such (Policy TC2.1.2). The NPPF seeks to promote competitive town centre environments and recognise these as the heart of the community (Para 23). The submitted Neighbourhood Plan (Policy PNP8) envisages a retail role for the centre, but does not make a firm proposal for a supermarket.

The applicant contends that the current retail space is not suitable for retail use as the centre has been vacant for a number of years and the site is proposed for redevelopment within the Local Plan and the adopted Town Centre Masterplan SPD for Paignton. It is, for these reasons, considered reasonable to exclude the current building as a potential sequentially preferable site. Therefore the site's suitability and availability hinges upon a redevelopment scheme being suitable and available.

The applicant contends that the site is not suitable or available. Suitability is argued principally on design grounds in terms of food retail being likely to present a building form that is unlikely to be able to respond with the masterplans intentions for pedestrian permeability and active frontages in a redevelopment scheme. In terms of availability it is contended that a scheme is unlikely to come forward in a reasonable timeframe as there is no extant permission and no publically available regeneration scheme that supports a clear desire to move the site forward.

The Torbay Development Agency has indicated that Crossways is a priority site for regeneration and that an application for a mixed use retail and residential scheme is expected soon.

Crossways is not uncommon with many town centre regeneration sites in that it is a complex proposition and, as such, reaching an opinion on suitability and availability of this site is not simple. On one hand the applicant contends that as there is no extant planning permission, and where there are current occupiers on site and no public information that may suggest an open desire or any demonstrable momentum from the landowner to progress this long identified, the actuality of the site being available within a reasonable timeframe is clearly uncertain. On the other hand the Torbay Development Agency states that they are confident that the landowner wishes to progress redevelopment and that a planning application could be submitted very soon and they are seeking to support this process as the site is a corporate priority. The Council's retail advisor, notwithstanding the confidence of the Torbay Development Agency, concludes that at the present time there would appear insufficient information to conclude that the site is suitable or available.

Officers have carefully considered the various comments and in the circumstance

agrees with the Council's retail advisor that, on the information currently available, it cannot be confidently concluded that Crossways can be considered either suitable or available at this present time. There appears too much uncertainty where there is no planning permission and an apparent lack of any demonstrable information within the public domain that suggests the site could be delivered speedily enough to reasonably be considered available at the present time. It is also relevant that as the Crossways site is not in Council ownership - this creates a reliance on a third party and limits the ability of the Council through the Torbay Development Agency to progress their regeneration agenda.

On the basis of the evidence presented by the applicant, the comments of the Torbay Development Agency's Town Centres Regeneration Programme Director, and considering the advice of the Council's retail advisor, it is deemed reasonable to discount Crossways as a suitable and available sequentially preferable site at the present time. The above judgement is made on the information that is currently available.

*Victoria Square, Paignton town centre*

Like Crossways, this is a genuine town centre site for Paignton however the site is occupied by a food retailer and other units within the centre are too small to accommodate the proposed floor space. In the circumstances, this location can be dismissed as a sequentially preferable site.

*Middle Street, Brixham town centre*

This is also a genuine town centre site (TC2.1.3) located in the heart of Brixham. Previously the site was committed for mixed use retail and residential development however the permission has now expired (for context planning permission P/2012/1309 granted consent for mixed use including 2,791sqm net sales area, plus 218sqm ancillary retail). It is noted that the submitted Brixham Neighbourhood Plan wishes to see a small-medium sized supermarket as well as other units and parking on the site.

The applicant's sequential assessment seeks to assert that at this current time there is no viable development proposal for the site and no identified development partner (for this Council owned site) and that this means that there is no timescale for this development and therefore the site is unavailable for the proposed development.

Current advice from the Torbay Development Agency is that the future of this site is less certain than Crossways.

Although unlike in the case of Crossways the Council does own the land and hence there is an opportunity to achieve more certainty in terms delivery; however the site appears some way off delivering a regeneration opportunity that may include food retail.

On the information available it is not evident that the redevelopment of this site is expected within a reasonable period of time and hence this site is not considered an available sequentially preferable site for the proposed development. Similar to the situation with Crossways, Members are advised that this is a judgment on the information currently available.

#### *Preston District Centre*

The applicant's assessment is considered reasonable and the Council's retail advisor agrees with the conclusions that there are no suitable and available sites in Preston District Centre. It is noted in particular the Vauxhall Garage is identified for residential use in the Adopted Local Plan.

#### *Yannons Local Centre*

Yannons Farm Local Centre contains an Aldi food store and is unlikely to be able accommodate another food store of the scale proposed. It can be dismissed as a potential sequentially preferable site.

#### *White Rock Local Centre*

White Rock is identified to provide a Local Centre and the site appears to be suitable as it has permission (P/2011/0197/MOA and reserved matters application P/2016/0411) for a foodstore of a similar scale. There is also a current application for a revised foodstore under planning reference P/2017/1019.

The applicant contends that the site is not available as another food retailer is furthering a scheme on this site. The Council's retail advisor and the Courts have confirmed that for the purposes of the sequential test availability is for the use and not the user. Therefore at this present time the site, as it has been identified to sit in the retail hierarchy, appears to technically be a sequentially preferable site for food retail that is both suitable and available.

However notwithstanding the advice received Members are advised that the purpose of the sequential test is to help ensure successful town centres and help enable sustainable economic growth, along with the range of economic and social benefits that are related to sustainable growth. Although White Rock is designated for a local centre it is very close to the Devonshire Park site and spatially it sits within an almost identical context. Realistically the impact of delivering a foodstore at White Rock rather than at Devonshire Park is unlikely to be any more beneficial to the town centre or spatially a more sustainable form of development. In addition, while the site is currently available for retail use, there is a fair expectation that it will be built out in the near future, which will remove its availability. It is a balanced argument but it is considered relevant that there is uncertainty whether, if the sequential preference of one over the other was contended at appeal, the White Rock site would be reasonably considered a preferable site in real terms.

Having considered the advice, it is recommended that that the proposal is considered to fail the sequential test in terms of White Rock being a suitable and

available site. It therefore conflicts with Policy TC3 of the Local Plan and NPPF paragraph 27. However the degree of this conflict may be mitigated, as a judgement of planning merit, by the fact that White Rock is similarly located to Devonshire Park in terms of accessibility, ring road location and relationship to the town centre.

1(b). Impact on Town Centre Investment and Vitality and Viability

The second test is one of retail impact.

NPPF provides clear advice that proposals with the potential to generate a significant adverse impact upon town centres should be refused planning permission (Paragraph 27).

Where the impact is adverse but not significant other benefits of the development, such as regenerating a derelict brownfield site, can be weighed against the harm to town centres when determining the application.

Policy TC3 of the Local Plan again provides the relevant policy guidance and the policy cites that proposals must meet 3 criteria, these being;

1. Proposals should not cause any unacceptable impacts either individually or cumulatively on the vitality and viability of existing or planned centres,
2. No other town centre or edge of centre site is suitable, available or viable; and
3. Development would improve the spatial distribution of accessible facilities.

The local and national tests are worded slightly differently however they seek to achieve similar goals, to promote competitive town centres and support their viability and vitality.

Because of the sensitivity of Torbay's town centres to out of centre retail, the Local Plan sets a threshold of 500sqm to trigger the impact test, which is below the baseline 2,500sqm in the NPPF.

In terms of context for Members the decision to grant outline consent under planning reference P/2014/0947 was finely balanced as the provision of the retail floor space was considered to have an adverse impact on town centres, and near to a significant adverse impact, due to the poor health of the centres and their vulnerability to relatively small levels of impact.

During consideration of the outline consent the Council's retail consultant raised concern on the potential for a significant adverse impact on town centres. The parameters for the retail element were subsequently evolved and ultimately measures were identified to try and reduce the likely trading overlap between the comparison goods sectors to prevent a significant adverse impact.

Subsequently the Council's retail advice concluded that the revisions including terms of the range of goods that could be sold would reduce the trading overlap and in turn reduce the financial impact on these centres. It was however concluded that although the restriction in goods may reduce the scale of risk regarding the significant adverse nature of any impact, the scale could remain significantly adverse as both centres are susceptible to relatively small levels of impact.

Outline permission was ultimately granted which was likely to have an adverse impact, but not a significant adverse impact with, as stated, the above conditions being attached to limit the risk of a significant adverse impact on town centres, which included the range of goods to be sold.

Condition 32 was attached in order to limit the sale of comparison goods. Members are reminded that the permission permitted the sale of eleven categories of retail goods, which were;

- (i) Do-It-Yourself goods and materials;
- (ii) new kitchens and bathrooms;
- (iii) garden centre goods and materials, including plants;
- (iv) furniture and home furnishings;
- (v) carpets and other floor coverings;
- (vi) gas and electrical goods;
- (vii) camping and associated leisure goods, no more than 10% of the net sales floor area of this category to be used for the sale or display of clothing and/or footwear;
- (viii) motor vehicle and bicycle related goods;
- (ix) pets and pet products;
- (x) office furniture; and
- (xi) ancillary products reasonably related to the categories above and restricted to a maximum floor area within each retail unit of 10% of the net sales floor area.

The current application seeks to introduce a convenience retail unit of 1,486sqm, as a 12th category. The retail impact of this is discussed below.

It is clear that the outline consent was granted on balance with restrictive conditions to reduce the risk of a significant adverse impact on town centres, which included the type of goods to be sold. As there was clearly considerable concern over the level of the likely adverse impact any relaxation of the restrictive conditions should be duly considered due to the previously cited susceptibility of town centres to relatively small levels of impact.

In terms of the proposal there is concern about the reliability of the applicant's data as analysis is based upon historic shopping patterns. This leads to a situation where the survey data has had to be manually adjusted to take into account more recent foodstore openings in the area, there being no assessment of the impact of

the proposal on existing investment in nearby town centres, and there being no up-to-date assessment of the health of Paignton and Torquay town centres. However, the Council does not have any reliable data on shopping patterns other than the 2013 Retail Update (which in part used 2011 survey data), and on this basis it is accepted that all parties are using the best information currently available.

The Council's retail advisor has accepted the assertion that the likely trade diversion is similar to the extant scheme with a likely 6% loss in terms of total turnover on Paignton town centre.

However whilst the financial impact may be to a similar level there is a concern raised that the breadth of effect on Paignton town centre will be widened. This is principally as the scheme would subsequently be competing with the town centre on both comparison and convenience goods trading areas. In this case the applicant has reported that the convenience store is necessary in order to achieve a viable development to commence and bring forward in the market. The Council's retail advisor has raised a concern that the increase in the trading overlap between Devonshire Park and Paignton town centre may have a likely significant effect. Previous advice indicated the vulnerability in the health of Paignton town centre and lead to a conclusion that that even small levels of trade loss could be harmful.

The data available indicates that Paignton town centre is becoming even more vulnerable as it loses market share across both convenience and comparison goods sectors. In terms of information that is available for comparison goods total spend remained static between 2007 and 2013 in the context of significant growth expenditure within this time period. This indicates a loss of market share. In terms of convenience turnover within the town centre this fell from £30.4 m in 2007 to £17.8m in 2013. A significant loss in turnover and market share.

The concern on the impact of widening the trading overlap is noted by Officers however there is a balanced decision to be made. On one hand the reduction in the trading floor space available to 'bulky goods' will reduce the impact on this sector of town centre retail. This 'benefit' then has to be weighed against the potential harm on the food retail sector which is being introduced in to the trading equation. In the context where there is a large amount of out-of-centre food retail already competing with Paignton town centre, where there is a Morrisons, Asda, Sainsburys and Aldi along the ring road, food retail is considered to be a less sensitive introduction in to the scheme. It is still the case that there may be some trade diversion from the town centre but predominantly the impact of food retail diversion is already present and the mainstay of any impact is likely to be one of diversionary sales from within other operators along the Western Corridor (some of which are out of centre). On balance the concern on the breadth of retail is considered countered by the reduced impact upon bulky goods (and the range of less than bulky items permitted to be sold by Condition 32) and the existence of a strong presence in terms of food retail along the Western Corridor, which is likely

to limit the impact of any further introduction of food floorspace. This conclusion is consistent with Officer advice to Members for two previous food store units on the Western Corridor within the past decade (Yannons Farm and White Rock) where the main impact was considered to be one of diversionary sales within the Western Corridor rather than any demonstrable impact upon Paignton town centre.

Paragraph 27 of the NPPF notes that proposals likely to have significant adverse effects on centres should be refused. Policy TC3 of the Local Plan out of centre retails development should not cause "unacceptable impacts".

It is concluded that the proposal is unlikely to be a significant or unacceptable impact, for the reasons stated above, notwithstanding the concern of the Council's retail advisor.

The proposal is therefore considered, on balance, to pass the retail impact test in accordance with the NPPF and Policy TC3.

#### *Spatial Distribution of accessible facilities*

Closely linked to retail impact considerations, Policy TC3 (D)3 seeks to improve the spatial distribution of accessible facilities throughout the Bay and to help achieve social inclusion. The Western Corridor area is well served with food stores and there is a danger that allowing an additional store could reinforce the position of most food stores being relatively inaccessible to people with no access to a car. The Indices of Deprivation clearly show Paignton town centre as a deprived area and as previously discussed the provision of convenience food may impact town centre regeneration, which is often underpinned by a food retail presence within a scheme. However as determined within this report that proposal is considered unlikely to have a significant impact upon town centre food retail and hence the harm upon spatial distribution of such facilities is not considered unacceptable. The proposal, for this reason, is considered to accord with the aspiration of TC3(D)3.

#### 2. Impact upon the highway network and movement

Notwithstanding the Transport Assessment, convenience retail is considered to have a greater impact on the road network than non-food.

The difference in trip rates between "with food" and "without food" retail parks is 48.2 trips per 100sqm. On this basis 1,486sqm food store on a retail park would generate 716.25 more trips than the same unit selling non-food.

The Adopted Planning Contributions SPD seeks transport contributions based on £171 per trip (based on the assessed cost of delivering the LTP and highway infrastructure in Future Growth Areas).

Following discussion of the expected linked trips the Council's Strategic Transport Officer has agreed a figure to £36,744.00 in terms of required mitigation.

The monies would be used towards projects on the Western Corridor as per Policy SS6.2.ii, and SS7 of the Adopted Local Plan.

On the basis of the above, it is considered appropriate to seek a S106 Obligation as above to mitigate additional traffic generated by convenience sales should Members grant permission.

The existing Section 106 agreement would need to be tied to the new application through a deed of variation to include the transport obligation outlined above should Members wish to approve the scheme.

This should be completed prior to the formal determination of the application.

Subject to the above the proposal is considered acceptable on highway safety grounds and compliant with the aims and objectives of policies TA2, and DE1 of the Torbay Local Plan 2012-2030. A retail travel plan is required for the development under the conditions previously imposed.

### **3. Other material considerations**

As the application fails the sequential test policy guidance dictates that it should be refused unless other material considerations indicate otherwise. Other material considerations should also be considered in respect of the degree of retail impact.

In regard to other material considerations the site is a contaminated derelict brownfield site that is in a Growth Area, as designated within the Torbay Local Plan.

Although the application conflicts to some extent with retail policy guidance, the delivery of a mixed use scheme on the site, which the amendment seeks to support delivery of, accords with a range of local and national policy guidance. Hence when the aspirations of the Local Plan is considered 'in the round' it is in accordance with a number of key growth, housing and employment policies.

It is also a material consideration that that it will aid regeneration of a large derelict brownfield site, which the effective use of is supported in national and local policy. One of the core planning principles (Para 17 of the NPPF) is to encourage the effective use of land by reusing land that has been previously development, provided that it is not of high environmental value.

The applicant has confirmed he is willing to undertake this remediation. It is suggested that should Members agree with Officers and consider that the remediation is necessary as part of a package of material benefits that weigh in favour of the scheme, then the delivery could be achieved by a Planning Condition, which has been identified within the officer recommendation.

By aiding the implementation of the mixed use scheme it will also help deliver much need housing and employment opportunities, which is also supported in local and national policy guidance. In terms of the housing the aforementioned preparation of the housing area being fit for its intended use is likely to make the site more attractive to housing providers and potentially aid speed delivery. The site is within the Council's five year housing supply and therefore measures to assist delivery can be given significant weight.

In terms of employment the food store alone is projected to create 55-60 jobs (33 FTE) based on the identified food retailers Operator Statement (Lichfields: Oct 2017: Produced on behalf of M&S). This projection is above the comparison goods expected provision and would suggest that a further 17 FTE jobs could be created by the amendment, which could increase the overall projected job creation forecasts for the retail and employment from circa 157.5 FTE to 173.5 FTE jobs.

The material considerations are considered demonstrable and Officers feel that collectively they add great weight in favour of the application in this particular circumstance, where it relates to a contaminated and derelict brownfield site that sits in a prominent location, in a designated Growth Area.

### **S106/CIL**

As stated above a S106 contribution of £36,744.00 would be required to mitigate the impact of additional vehicular movements that would be generated by the proposal.

The proposal is not CIL liable as it is an amendment to an extant planning permission and does not increase floorspace. However CIL will be liable on any future increase in retail floorspace, should this occur.

### **Statement of Pro-active Working**

The Council has sought to work positively and proactively with the applicant through pre-application discussions and through open dialogue throughout the application process including requests for further information.

### **Local Finance Considerations**

The applicant cites that the convenience store is necessary in order to provide the necessary quantum of interest to make commencement of the outline consent viable.

Delivery will bring a number of economic benefits to Torbay through the mixed provision of housing, retail and employment space.

The extent to which the application will secure the regeneration of the derelict site and provide housing and employment are material considerations.

The applicant refers to the need to secure a third retailer to make the Devonshire

Park development viable in order to commence in early 2018.

### **Human Rights and Equality Issues**

Human Rights Act - The development has been assessed against the provisions of the Human Rights Act, and in particular Article 1 of the First Protocol and Article 8 of the Act itself. This Act gives further effect to the rights included in the European Convention on Human Rights. In arriving at this recommendation, due regard has been given to the applicant's reasonable development rights and expectations which have been balanced and weighed against the wider community interests, as expressed through third party interests / the Development Plan and Central Government Guidance.

### **Environmental Impact Assessment**

The proposal has been screened in accordance with the current Environmental Impact Assessment Regulations. The proposal is not considered to be EIA development and does not need to be supported by an Environmental Statement.

### **Conclusions**

The provision of a convenience food store is supported for the following reasons.

Firstly the town centre sites identified are not considered available and the site identified as White Rock is not considered a different proposition to Devonshire Park when considering what the sequential test seeks to achieve. The sequential test is technically failed however the benefit of seeking to deliver the development within the site identified over the Devonshire Park site is questionable.

The retail impact is not unacceptable as the financial impact of the proposal is similar to the extant scheme and the impact of broadening the trading overlap is muted by the extent of food retail already established in the area, together with the lessening of the impact upon the bulky goods sector of trading in the town centre.

There are other positive material considerations that weigh in favour of the proposal. It will deliver the remediation of the entire site to a level suitable for its intended use, it will help facilitate the commencement of the mixed-use scheme and regenerate a derelict brownfield site, and will through this regeneration help deliver much needed housing and employment opportunities.

The introduction of convenience retail is indicated by trip rate analysis (TRICS) to generate an increase in vehicular traffic. The Highways Authority has requested a S106 Contribution towards mitigating the effect of this upon the Western Corridor, which should be secured.

The conclusions above have sought to acknowledge that the planning policy situation is complex, however whilst the matter is finely balanced it is considered that although the application fails the sequential test other material considerations including the delivery of wider Local Plan and NPPF objectives outweigh the retail

policy concerns, and that taken as a whole the development can be considered to represent sustainable development.

The officer recommendation is therefore one of approval in line with Policies SS1, SS2, SS3, SS4, SS12, SS13, TC1, TC2, TC3, and TA2 of the Torbay Local Plan 2012-2030 and Paragraph 27 of the NPPF.

### **Informative(s)**

01. In accordance with the requirements of Article 35(2) of the Town and Country Planning (Development Management Procedure) (England) Order, 2015, in determining this application, Torbay Council has worked proactively and positively with the applicant to attempt to resolve the planning concerns the Council has with the application. However, in the event the applicant was unable to satisfy the key policy tests in the submission and as such the application has been refused.

### **Relevant Policies**

- TC1 - Town Centres
- TC2 - Torbay retail hierarchy
- TC3 - Retail Development
- SS6 - Strategic transport improvements
- SS7 - Infrastructure, phasing and employment
- SS11 - Sustainable Communities Strategy
- TA2 - Development access