

APP/X1165/W/20/3245011: Land to the South of White Rock Adjacent To Brixham Road Aka Inglewood Paignton, TQ4 7BQ (LPA Reference P/2017/1133).

APPEAL STATEMENT OF CASE BY TORBAY COUNCIL

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1. Preamble

- 1.1 The application reference P/2017/1133 was submitted to the Council as Local Planning Authority (LPA) on 3 November 2017 by Stride Treglown, acting as agent for the appellants Abacus Projects Limited and Deeley Freed Estates Limited.
- 1.2 The description of development (as subsequently amended) is:
- “Outline application for residential led development of up to 373 dwellings (C3) together with the means of vehicular and pedestrian/cycle access together with the principle of a public house (A3/A4 use), primary school with nursery (D1), internal access roads and the provision of public open space (formal and informal) and strategic mitigation. Details of access to be determined with all other matters reserved.”*
- 1.3 Torbay Council’s Planning Committee considered the application on 10th February 2020 and unanimously resolved that if the application were to be determined by the LPA it would have been refused as per the officer recommendation.
- 1.4 Despite the scheme’s benefits the LPA was unable to support the application, mainly due to the conflict with the Development Plan, particularly the Brixham Peninsula Neighbourhood Plan (BPNP); and impact upon the nearby Area of Outstanding Natural Beauty (AONB), a matter to which the NPPF requires great weight to be given. Although there are a limited number of issues, they are nevertheless substantial matters which meant the LPA could not support the application.
- 1.5 The application is extremely controversial locally, with well over 550 individual objectors, and objections from all of the neighbouring parishes, South Hams District Council and the South Devon AONB Partnership. There are objections on a wide range of issues including Habitats Regulations Assessments (HRA), ecology, highways, loss of agricultural land etc. It is appreciated that many objectors, and some councillors strongly disagree with the LPA’s assessment that many matters have been satisfactorily addressed by the appellants. It is understood that objectors will wish to raise these objections with the Inspector.
- 1.6 The appeal site has a long planning history. Industrial development was refused by the Secretary of State in 1997, particularly for its impact on the South Devon AONB. The current Local Plan Inspector’s final report (2015) appears favourable to the principle of development. Whilst the land then referred to as “South of White Rock” could not be progressed because of the need for habitats surveys, the LPA’s position at the Local Plan examination was always that the site’s allocation was subject to assessment of “ecology, landscape impact and agriculture” (paras 58 and 62 of the Inspector’s report). If the allocation had progressed at that time, the area would have come under greater scrutiny. These reports, and a summary of their key findings are attached at Appendix 1.
- 1.7 It also behoves the Council to set out why the application was not determined sooner. This is partly due to staff hiatus; but also due to the changing planning policy framework with the emerging (now made) neighbourhood plans, evolving five year supply debate and the national planning policy picture. The application is of strategic

significance in the context of a largely urban and constrained area such as Torbay; and the LPA would have preferred that the proposal was promoted through the first review of the Local Plan, when consideration can be made of the need for development, other options for growth etc. The LPA accordingly sought that the application be withdrawn a number of times (as per the letter of August 2019 cited by the appellant and reproduced as Appendix 2). The appellant's wish for the current submission to be resolved is respected: but the Council's evidence will necessarily involve a consideration of matters such as housing demand, the appropriateness of the standard methodology and related factors. These are already largely set out in the Council's Housing Delivery Test Action Plan for 2019. (See Appendix 3)

2 Scope of Evidence

- 2.1 The LPA's evidence will set out how the proposal significantly departs from the development plan, particularly the recently made BPNP. Even considering the proposal in the context of the tilted balance, the conflict with the BPNP is fundamental.
- 2.2 The Council will be calling Mr Roger English of the South Devon AONB Manager and Mr Steve Knott, Technical Director of Jacobs as expert witnesses on landscape matters, particularly the impact of the proposal on the South Devon AONB. Both Mr English and Mr Knott provided input into the application's assessment and their expert advice informed the officer recommendation. These are attached at Appendices 4 and 5. Mr David Pickhaver, Senior Planner at the LPA, will be giving evidence on planning matters.

3 Site description

- 3.1 The application site known as Inglewood comprises 31ha of open fields, largely bounded by hedgerows on the west side of Brixham Road (A3022). The residential area of Goodrington / Hookhills lies to the east; and the currently under construction White Rock mixed use residential/commercial area is to the north.
- 3.2 The site is within the Brixham Peninsula Neighbourhood Plan Area. The Long Road / Goodrington Road junction lies to the north. This is proposed to be upgraded as part of the proposal. The northern access foot / cycle path falls within the Paignton Neighbourhood Plan Area. However the overwhelming majority of the proposal falls within the Brixham Peninsula Neighbourhood Plan area.
- 3.3 More detailed site descriptions are contained in the officer report (section 3) and Alder King's Statement of Case.

4 Development proposal

- 4.1 During the consideration of the application, extensive negotiations have occurred between the appellant, Council officers and statutory consultees. Several changes were made to the application, including the submission of amended plans on 8 March 2018. The application description was amended (down from 400 dwellings) in November 2019 to bring the description into line with the March 2018 Site Features Plan and other submitted plans.
- 4.2 A more detailed description of the proposals is contained in section 3 of the officer report and section 3 of Alder King's Statement of Case.

5 The Development Plan

- 5.1 The development Plan comprises the Torbay Local Plan (2012-30), adopted December 2015, and the BPNP, which was made in June 2019. The Paignton Neighbourhood Plan, (also made in June 2019), is also relevant due to a very small part of the proposal being in the Paignton area.

Torbay Local Plan 2012-30 (Adopted December 2015)

- 5.2 The Plan contains a range of policies and the LPA accepts that some of these seek to boost housing supply (SS3, SS13), employment (SS4, SS5) and school provision (SC3). In addition, a much wider number of policies address matters that the Council considers are capable of mitigation through condition or s.106 Agreement.
- 5.3 However, the LPA was unable to support the proposal on the basis of conflict with the following development plan policies: SS2, SS8, SDB1, SDB3, and C1, (Text of the policies where the LPA considers there to be a particular conflict is reproduced at Appendix 6). The Landscape Character Assessment (Enderby Associates 2010) is attached at Appendix 7.

Brixham Peninsula Neighbourhood Plan (BPNP) (Made June 2019)

- 5.4 The BPNP was “made” by Torbay Council in June 2019 following overwhelming support at referendum in May 2019. The Council’s reasons for refusal cite conflict with the following policies BH3, BH4, BH9, E1,E2,E3,E6. The full wording of these is included at Appendix 6. The Neighbourhood Plan Group’s assessment of the Inglewood site (as “Land South of White Rock”) is appended at Appendix 8

6 Other Planning Documents

South Devon AONB Management Plan (2019-2024) and Planning Guidance (2017)

- 6.1 This document is the Statutory Management Plan for the South Devon AONB. All AONBs are required to prepare such plans, which, per section 89(2) of the Countryside and Rights of Way Act 2000, sets out the joint policies of the AONB’s local authorities for the management of their AONB and the carrying out of their functions in relation to it. The management plan includes policies, objectives and guidance on meeting the legal requirement to conserve and enhance the natural beauty of the area. The relevant sections are attached at Appendix 9.

Planning for the South Devon AONB: Planning Guidance (2017)

- 6.2 This is an annex of the AONB Management Plan which provides detailed guidance on how development can conserve and enhance the natural beauty of the South Devon AONB.
- 6.3 Section 4.6 of the guidance explains the “setting” of the AONB. It acknowledges that land in the setting does not have the same protection as AONB per se, but that the AONB should be protected from the effects arising from development in the setting.
- 6.4 Section 8 (p112) provides guidance for new development. Section 8.10 relates to development in the setting of the AONB. It states criteria for developments that have potential harm to the natural beauty of the AONB which are relevant to this appeal.

Planning Contributions and Affordable Housing SPD (Adopted 2017).

- 6.5 This provides advice on the scope of S106 Planning Obligations including the priority given to planning obligations. Mitigation of landscape, biodiversity, traffic etc. impacts are considered to be “site deliverability” matters. The draft S106 has been prepared in accordance with the SPD’s requirements.

7 Material Considerations

National Planning Policy Framework

- 7.1 The flowing sections are particularly pertinent:
- 7.2 **Chapter 2 Achieving Sustainable Development.** As well as the interaction of the presumption in favour of sustainable development in paragraphs 11 and 14, attention is drawn to paragraph 12 which confirms that the development plan remains the starting point for decision taking. It is also not considered that the application represents sustainable development due to its conflict with the development plan and unacceptable impact on landscape features worthy of protection.
- 7.3 **Chapter 3 Plan Making.** Although a s78 appeal is different from a local plan examination, the proposal raises issues of strategic importance and principles relating to neighbourhood planning (paragraphs 28-30) and local plan review (paragraphs 31-33) are likely to arise.
- 7.4 **Chapter 5 Delivering a Sufficient Supply of Homes.** Matters of importance are the calculation of local housing need (paragraphs 59- 60), identification of land for homes (paragraphs 67-72) and maintaining supply (paragraphs 73-76). To the extent that 5 year supply and the operation of the presumption in favour of sustainable development is considered pivotal to the application, the LPA may need to refer to relevant case law¹.
- 7.5 **Chapter 6 Building a Strong Competitive Economy.** The LPA has accepted that the proposal has significant economic benefits and therefore the application is not likely to hinge on Chapter 6.
- 7.6 **Chapter 11 Making Effective Use of Land** is relevant in the context of the brownfield first spatial strategy set out in the BPNP.
- 7.7 **Chapter 15 Conserving and Enhancing the Natural Environment.** This chapter sets out policies of great importance to the proposal. The proposal is a valued landscape, with intrinsic beauty, which are protected by paragraph 170 a) and b). Paragraph 171 relates to the identification and enhancement of sites. Paragraph 172 indicates that great weight should be given to conserving and enhancing landscape and natural beauty in AONBs, which have the highest level of protection in relation to these issues². Inglewood is within the setting of the AONB but not within the AONB itself, and therefore the LPA has not applied the three tests (a-c) in the second part of paragraph 172. Advice in paragraph 8-042-20190721 of the Planning Practice Guidance is also relevant to the setting of the AONB.

Ministerial Statements

7. 8 A statement was made by the Right Honourable Robert Jenrick MP, Secretary of State for Housing Communities and Local Government on Devon Live in December 2019 in relation to Torbay's Neighbourhood Plans (Appendix 10).

¹ R (on the application of East Bergholt Parish Council) V Babergh DC [2019] EWCA Civ 2200 St Modwen Developments Ltd. v Secretary of State for Communities and Local Government [2017] EWCA Civ 1643. Hopkins Homes Ltd. v Secretary of State for Communities and Local Government [2017] UKSC 37, Wavendon Properties Ltd v Secretary of State of Housing Communities and Local Government [2019] EWHC 1524 (Admin).

² In Monkhill LTD and SoSHCLG and Waveney BC [2019] EWHC 1993 (Admin), Mr Justice Holgate concluded (para63): *"The first part of paragraph 172 of the NPPF qualifies as a policy to be applied under limb (i) of paragraph 11(d) of the NPPF; it is also capable of sustaining a freestanding reason for refusal in general development control in AONBs, National Parks and the Broads"*.

- 7.19 Reference may be made in the LPA's evidence about other Ministerial Statements highlighting the importance of localism and the neighbourhood planning system.

8 Torbay's five year Housing Supply

- 8.1 The LPA accepts that there is a five year supply shortfall based on an assessment of deliverable sites at 2019; where the position was around 2.5 years. The officer report accordingly applied the tilted balance at paragraph 11 d) of the NPPF to the application. It concluded that the application failed on both tests in paragraph 11 d). The 2019 5 Year Supply statement is included at Appendix 11.
- 8.2 As it is likely to be a material consideration in determining the application, the Council has undertaken to publish its draft five year supply for 2020 as quickly as possible following the housing monitor which takes place in April 2020.

9 The Council's consideration of the application and reasons for refusal.

- 9.1 It was necessary to report the matter to Committee in February in order to meet the appeal timetable. Committee resolved unanimously that if the LPA determined the application, the recommendation would have been refusal.
- 9.2 The Committee also requested that legal advice be sought in relation to the objectors' argument that the proposal does not comply with legal requirements under the Habitat Regulations.
- 9.3 The Council's barrister's advice was that an appropriate assessment was properly carried out in consultation with Natural England and updated greater horseshoe bat surveys have been carried out. There will be (subject to a s.106 Agreement) measures designed to avoid impacts which will be established before the risk of adverse impacts arises. This means they are properly considered under the Article 6(3) procedure (mitigation) rather than the Article 6(4) procedure (compensation).
- 9.4 Accordingly, the LPA would not have imposed an HRA reason for refusal had it determined the application. Nevertheless, it recognises that other parties have outstanding objections on these, and related ecological grounds, and are likely to raise these at the Inquiry.

10 Expansion on LPA's the reasons why the LPA would have refused the Application

10.1. Conflict with the Brixham Peninsula Neighbourhood Plan and SDB1 of the Torbay Local Plan (Reason 1)

10.2 The LPA's evidence will show that the Inglewood proposal conflicts significantly and demonstrably with the made BPNP. The evidence will set out:

- The neighbourhood planning process in Torbay which has placed a great deal of emphasis on the government's localism agenda.
- The conflict with the strategic thrust of the BPNP (and policy SDB1 of the Local Plan) which prioritises development on previously developed land and in the built up area.
- The conflict between the proposal and the landscape policies of the BPNP, particularly the Settlement Gap Policy E3 and a strategically significant development outside of settlement boundaries.
- Why in this case five year supply considerations should not outweigh the development plan and the democratic wishes of the people expressed overwhelmingly in a referendum.

Conflict with the Adopted Torbay Local Plan (Reason 2)

10.3 The LPA's evidence will set out why there is a conflict with the Local Plan, whilst acknowledging that some policies may be taken as supporting the proposal

Pre-Emptying the Review of the Local Plan

10.4 The Council has not cited prematurity against the emerging Local Plan as a putative reason for refusal, given the early stage of preparation of the Review of the Local Plan. Nevertheless the LPA considers that proposals of this scale are best considered at a Plan Making stage, not least because it is a major shift in the Local Plan's policy of relative restraint in the Brixham Peninsula.

10.5 Consideration of the proposal through the plan making process would allow a proper consideration of the level of need and potential options for meeting development needs. Housing need, and wider economic factors affecting the housing market are considered in the Council's Housing Delivery Test Action Plan and noted above. Torbay's housing market is more nuanced than the standard methodology indicates.

10.6 These are all factors would be more appropriately interrogated through the Local Plan Review process, rather than as a departure from the statutory development plan into unallocated greenfield land. However since the appellant wishes to resolve the matter at appeal, the proofs of evidence will indicate why the standard methodology does not accurately reflect current and future demographic trends or market signals.

Landscape Impact (Reason 3)

10.7 The AONB Manager will address the following in his proof of evidence:

1. The effect the proposal would have on the statutory purpose for AONBs as it relates to South Devon – the conservation and enhancement of the natural beauty of the South Devon AONB.
2. The role and function of the land affected by the proposal.

3. That the assessment of impacts from the development on the AONB's natural beauty would cause unacceptable harm and that these must be given great weight in the planning balance.
 4. Under NPPF 2019 paragraph 11di, the harm to the natural beauty of the South Devon AONB provides a clear reason for refusal. Therefore, the presumption in favour of sustainable development is displaced in this instance.
 5. Even if the application were to be assessed under paragraph 11dii, as the appellant suggests, our review of the evidence shows that the adverse impacts of approving the proposal significantly and demonstrably outweigh the benefits.
- 10.8 The AONB Manager will also refer to relevant appeal decisions including Dymock Road, Ledbury APP/W1850/W/19/3225309 and Colchester Road, Bures Hamlet, Essex APP/Z1510/W/18/3207509 (Appendix 12); and to the 2019 Landscapes Review- National Parks and AONBs carried out by Julian Glover, which calls for the protection of AONBs to be strengthened (Appendix 13).
- 10.9 Jacobs were commissioned by the Council to provide additional advice on AONB impact. Jacobs concluded that despite mitigation, significant residual adverse effects on the setting of the AONB would remain. It concluded that the landscape impact would be greater than suggested by the appellant's LVIA montages. Jacobs' report is reproduced at Appendix 1 and the Council will be calling the report's author to give evidence and comment on LVIA matters.

Note on Reason for refusal 4: S106 Agreement

- 10.10 As set out in Informative iv, the appellants have sought to overcome as many technical matters as possible and a draft S106 is well advanced. It will be provided to the Inspector as soon as possible.

11 LPA's Assessment of the Planning Balance

- 11.1 The application is highly contentious. It provides significant benefits, but conflicts significantly with the development plan and has unacceptable landscape impacts. It has also generated an exceptional level of public objection. The LPA has advised that the tilted balance is engaged because of the lack of five year supply. It is noted that the three year supply situation has been contested by different parties. Furthermore it will need to be reassessed as soon as possible after 1st April 2020.
- 11.2 The application is a departure from the adopted Local Plan (specifically policies SS2, SS8, SS9, and C1). However, it may be seen as being consistent with the measures identified in the Plan to boost housing supply and meet the overall housing requirement (policies SS3,SS12, H1 and SS13 refers) and meet employment and education needs (policies SS1, SS4, SS5, H1.3 and SC3). The proposal is counter to the policy of restrained growth in the Brixham Peninsula (policies, SS12 and SDB1 and SDB3) which reflects the environmental sensitivity and peripherality of the south of Torbay.
- 11.3 The conflict with the Neighbourhood Plan is significant and demonstrable, specifically policies E1.3, E2 and E3. The BPNP makes site allocations to fully meet its housing requirement, and to-date has exceeded that requirement. The Neighbourhood Plan Group considered but rejected the Inglewood site as part of the Neighbourhood Plan making process. Policies BH3 and BH4 seek to direct housing to brownfield sites and regeneration opportunities towards the built up area. Even though the settlement gap between Paignton and Galmpton would not be totally built on, it would be significantly diminished and the intent of policy E3 of the BPNP subverted.
- 11.4 The AONB Partnership has consistently objected to the proposal on the grounds of landscape impact. Jacobs have also assessed the adverse impact of the proposal to be significant.
- 11.5 Given the acknowledged national importance of the Dart Valley as one of the finest riverine landscapes in the country, the need for development is not considered to outweigh the significant landscape impact in this highly sensitive and nationally important landscape. Footnote 6 of the NPPF confirms that NPPF policies in the framework relating to an AONB may still provide a clear reason for refusing a proposal despite a five year supply shortfall.