
TOWN AND COUNTRY PLANNING ACT 1990

SECTION 78 APPEAL

BY ABACUS PROJECTS LIMITED AND DEELEY FREED ESTATES LIMITED

IN RESPECT OF LAND AT INGLEWOOD, TORBAY

**OUTLINE APPLICATION FOR RESIDENTIAL LED DEVELOPMENT
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.**

**OPENING STATEMENT ON BEHALF OF
THE APPELLANT**

Appeal Ref: APP/X1165/W/20/3245011

LPA Ref: P/2017/1133

I. INTRODUCTION

1. The Appellant applied to Torbay Council ('the Council') for outline planning permission for the residential led development of up to 373 dwellings, a public house and a primary school (including nursery provision) by way of its planning application ('the Application') which was validated on 13th November 2017.

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2. The appeal site ('the Site'), comprising some 31 hectares, is predominantly agricultural land (made up of several defined fields) which lies to the south west side of Brixham Road. Directly to the north east is the residential area of Hookhills and to the north the mixed use residential and commercial development known as White Rock. The Site lies to the south west of Torquay and is located within the setting of the South Devon AONB the boundary of which lies approximately 0.55km to the west.
 3. The Council failed to determine the Application and the Appellant appealed on the basis of non-determination. By way of the decision of its Planning Committee, and in reliance upon an Officer's Report ('the OR'), the Council resolved that if it had determined the Application it would have refused planning permission for the four reasons ('RfRs') set out in that OR, namely:
 - 1) *The proposal is significantly and demonstrably contrary to Policies BH3, BH4, BH9, E1, E2, E3 and E6 of the Brixham Peninsula Neighbourhood Plan and the strategic framework for the Neighbourhood Plan set by Policy SDB1 of the Torbay Local Plan 2012-30. The extent of this conflict, including development of an area identified as a settlement gap identified in Policy E3 of the Neighbourhood Plan, would seriously undermine the Development Plan as a whole.*
 - 2) *The proposal constitutes major development outside of the established built up area or Future Growth Area and not identified in a neighbourhood plan, contrary to policies SS2, SS8.3, SDB1, SDB3 and C1 of Torbay Local Plan 2012-30.*
 - 3) *The development would represent a substantial and harmful intrusion into open countryside which forms part of the backdrop and setting of the South Devon AONB, which would be clearly visible from public vantage points and recreational networks (within the AONB) and from outside the AONB (looking towards AONB), contrary to Paragraphs 170 and 172 of the NPPF, Policies SS2, SS8.3 and C1 of the Torbay Local Plan 2012-30, and Policies E1 and E6 of the Brixham Peninsula Neighbourhood Plan, and the South Devon AONB Management Plan (2019-2024).*
 - 4) *In the absence of a completed S106 Agreement, there is no effective delivery mechanism required to ensure measures to mitigate the impact on the South Hams SAC, and the Landscape Ecological Mitigation Plan (LEMP) for both White Rock and the current proposal, highway network, critical drainage area. Nor could the provision of social infrastructure such as a school site, employment, affordable housing, or public open space be ensured. This would be contrary to Policies SS1, SS5, SS8, NC1, SDB1, SS6, TA1, TA2, ER1, SC1, SC2, SC3, SC4 and H2 of the Torbay Local Plan 2012-2030 and Policies J4, E8, T1, and BH2 Brixham Peninsula Neighbourhood Plan.*

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4. The Appellant has continued to work with the Council and a s106 Agreement has been prepared which addresses those matters raised as part of RfR4. That s106 Agreement will be provided to the Inquiry.

 5. Before turning to those reasons for refusal it is important to note that there is agreement between the Council and the Appellant that the proposal is acceptable in terms of:
 - (i) highways impacts,
 - (ii) access,
 - (iii) ecology and bio-diversity (and in particular the impact upon greater horseshoe bats and ciril buntings),
 - (iv) soil and land value (BMV),
 - (v) surface and foul water / drainage,
 - (vi) provision of affordable housing,
 - (vii) education provision,
 - (viii) healthcare provision,
 - (ix) POS and play provision,
 - (x) employment contribution,
 - (xi) heritage / archaeology,
 - (xii) noise.

 6. Importantly it is also agreed that the Council cannot demonstrate a five year housing land supply and furthermore (whilst there is a minor debate as to the margin of the shortfall) that the HLS position is that the supply stands at less than three years.

 7. As can be seen therefore the principal issues that remain between the Appellant and the Council are:
 - (i) the impact of the proposal on the local landscape;
 - (ii) the impact of the proposal on the South Devon AONB (through change in its setting);
 - (iii) the purported conflict with the development plan comprising the Torbay Local Plan 2012-2030 (adopted December 2015) and the Brixham Peninsula Neighbourhood Plan (made 19th June 2019) ('the BPNP').

II. THE APPEAL SITE

8. The Site has a pedigree. This is not a speculative proposal newly developed and proposed outside of the plan making process. Inspector Keith Holland's Report following the examination of the Torbay Local Plan [CD7.3c] makes clear that "*The overriding theme of the Plan is a step change in the development of Torbay. The Plan makes it clear that this is a plan for growth*" [§21].
9. Whilst recognising the strategy of reliance upon district wide neighbourhood plans to deliver that plan for growth Inspector Holland, somewhat presciently, noted that "*...the Plan needs to include a clear policy commitment that the Council will undertake the necessary development plan work if the neighbourhood planning process does not successfully deliver the Local Plan strategy*" [§28]. Whilst that observation was made in the context of the NPs not then yet having full coverage across the district the point remains good as regards the continued ability (or, more accurately, inability) of the Torbay Local Plan to deliver the required level of housing.
10. Whilst satisfied at the time of the examination that the Council could demonstrate a 5YHLS Inspector Holland was concerned that "*The position beyond five years is much less clear and is very much dependant on the neighbourhood plan process*" [§48]. In fact that issue manifested even earlier than the five year horizon noted by the Inspector. Even at the time of the Council's consideration of the proposed development in early 2020 it accepted that it could not demonstrate a 5YHLS or indeed a 3YHLS. The absence of a 3YHLS is of course important in the context of a made neighbourhood plan (such as in the present case) as it means that the terms of NPPF §14 are not met and the presumption in favour of sustainable development does not fall to be disapplied.
11. In the context of those concerns, Inspector Holland observed that "*The land south of White Rock is particularly important in this regard*" [§58] (at the time considered for 450 dwellings). The land was considered by the Council as a Main Modification "*...as one of the best alternative green field locations for sustainable growth in Torbay*" [§60]. That MM however faced a difficulty in terms of timing (and the progress of the plan) as the necessary ecology evidence would not have been available until October 2015. It is

worthwhile noting at this point of course that those ecological appraisals (and in particular the necessary Habitats Regulations assessments) have been undertaken and present no bar to the development of the Site.

12. The Council also cited the need (in addition to undertaking an Appropriate Assessment) to consider the impact upon the AONB. At the time, it anticipated that this work would take some 12 months. Inspector Holland noted “...if the necessary work is undertaken and shows that from an environmental point of view the site is developable, there is nothing to stop the Council from carrying out a partial review of the plan as soon as it has the necessary evidence” [§62].
13. The Council rightly have not sought to found a reason for refusal on the basis of prematurity. Nonetheless, as is clear from both the SoC and the Council’s evidence, there is a complaint that the Site should be considered as part of the plan-making process rather than through the development control / appeal process. That complaint is misguided. It might bear some weight if the Torbay Local Plan was performing satisfactorily, or indeed if there was some reasonable prospect of the next stage of the plan-making process reaching maturity within a reasonable timescale.
14. However neither is the case. The Council’s HLS position is dire. It is failing to deliver the housing growth not only advocated broadly at a national level but when considered against its own targets. The shortfall is far from trifling. At less than three years HLS the Torbay Local Plan is woefully underperforming (and was already on that path within only a few years of its adoption). In such circumstances it is entirely right and proper that proposals are brought forward and considered outside of the plan-making process, especially in circumstances - such as the present case - where the Site *has* been considered as part of the plan-making process and was in fact put forward by the Council as one of the best alternative sites for “*sustainable growth in Torbay*”.
15. It is through the lens of this recent history of the Site that the spatial / policy objections now relied upon by the Council fall to be considered. A proposal for a non-allocated site outside of defined settlement boundaries inevitably conflicts with the spatial strategy of a development plan. In the present case however any such conflict is tempered by the clear failure of that spatial strategy to meet with the growth objectives of that very same plan.

Furthermore, it is not a plan of ancient vintage – it is a plan which within a short period of time has demonstrated that it is not effective in delivering the required growth.

16. The Torbay Local Plan itself recognises the need for action where, during its currency, the Council are unable to demonstrate the required 5YHLS. Policy SS13 requires the Council to take action to remedy the deficit by bringing forward sites from a future date in the plan, allocating new sites through site allocations DPDs or considering favourably applications for new housing consistent with Policy SS2 and H1. Despite that clear instruction (and indeed the existence of those future development sites) the Council is still unable to remedy the substantial deficit.

III. THE REASONS FOR REFUSAL

17. As is clear the difference of opinion between the Appellant and the Council lies in development plan policy and landscape impact. Whilst other parties raise matters, in addition, it is noteworthy that:

- (i) the Council do not contend that those matters warrant the refusal of permission; and
- (ii) despite having raised objections and secured Rule 6 status Brixham Town Council have withdrawn from the appeal process having chosen not to pursue those concerns as a principal party to the Inquiry.

18. The Council's objections to the scheme can be categorised thus:

- (i) landscape impact;
- (ii) impact upon the AONB through development within its setting;
- (iii) development in the 'open countryside';
- (iv) development in a settlement gap (BPNP designation);
- (v) conflict with the Torbay Local Plan's spatial strategy and the BPNP.

19. Where a Council is failing to deliver its identified housing growth, embodied in the statutory development plan (as is the case here), it is almost inevitable that there will be some degree of conflict with the settlement strategy within that plan. This is because that plan is failing – so something else needs to be done. Whilst of course those policies can

continue to carry weight in the decision making process it is the Appellant's submission that, in the present case, those spatial policies should carry very little weight indeed given that they have been found so materially wanting.

20. The Torbay Local Plan is reasonably new. Its landscape policies have been found compliant with the NPPF. Essentially, it is submitted, this case turns upon the landscape effects of the proposal. Those effects are the impact upon the local landscape, the impact upon the AONB and the impact upon the Galmpton settlement gap.

21. Plainly there is disagreement now between the Council and the Appellant as to what those effects are, particularly in the medium to long term. That was not always the case. From the outset the development of the proposal has been landscape led. Careful consideration has been given to:

- (i) the local and wider landscape character,
- (ii) the Site's existing green infrastructure and opportunities for Green Infrastructure as an integral element of the proposal,
- (iii) views from the AONB of the Site (and from the Site to the AONB),
- (iv) the topography of the site, and
- (v) the opportunity to secure attractive access to the wider countryside both for future residents of the scheme and the local populace more widely.

22. Indeed, it was the ongoing proactive consultation with the Council which led to the revision of the original proposal and its substitution with revised plans reducing the number of dwellings, reducing the footprint of the development and removing built development from the highest part of the Site.

23. Tellingly the proposal, even before those revisions, was considered acceptable by the Council's landscape advisor who, in his consultation response [CD4.24], noted that he *"Broadly agrees with findings of applicant's LVIA that impact on landscape is not of significance"*. Furthermore, the revised plans removing development from 'field 3' were considered [CD4.25] to *"eliminate the short term adverse effects on the Waddeton Conservation Area and the South Devon AONB... These changes are therefore welcomed and make the proposals even more acceptable in landscape terms"*.

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24. For the purposes of the Inquiry the Council rely not on those conclusions but upon the appraisal of its new external advisor. Those conclusions are markedly different, as reported in the OR they note that “*significant adverse visual effects would arise...*”.
25. So far as the Council’s advisors are concerned there is a broad range of opinion from the proposal being acceptable (Mr Bryan, Teignbridge Council, Landscape Advisor to the Council) through to it not being acceptable (Jacobs).
26. In contrast the Appellant’s appraisal and conclusions are consistent. Not only that but as part of its proactive approach to the Application, and following the objections raised by the AONB Unit, the Appellant retained Mr Peter Leaver, an experienced landscape expert (and advisor to the North Devon Coast AONB Partnership). Mr Leaver was instructed to undertake an independent, impartial review of the issues of concern in relation to the landscape and visual impacts of the proposal given the fundamental difference of opinion between the Nicholas Pearson Associates LVIA submitted with the Application (the conclusions with which the Council’s then advisor agreed) and the view taken by the Council’s subsequently appointed landscape advisor (Jacobs).
27. Whilst Mr Leaver’s evidence will be explored more fully during the Inquiry in summary he:
- (i) agrees with the conclusions of the submitted LVIA that there will be no significant adverse effects on the assessed visual and landscape receptors (including the setting of the AONB and the BPNP settlement gap);
 - (ii) appraised the 7 (of 10) ‘special qualities’ of the AONB set out in the AONB Management Plan identified as being relevant by the Council / AONB Unit and concludes that the proposal will have negligible or only minor adverse effects on the setting and special qualities of the AONB;
 - (iii) concludes that the landscape and scenic beauty of the AONB would not be adversely affected;
 - (iv) considers that with the exception of the Site and its immediate surrounds (which plainly would have a significant change in character through development) the residual effects of the development on the local landscape would be minor adverse / negligible.

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28. Out of an abundance of caution (given comments made by third parties) Mr Leaver has also considered whether or not the Site could constitute a ‘valued landscape’ in NPPF terms. Having undertaken that assessment in accordance with Box 5.1 of GLVIA3 Mr Leaver concludes that it does not, nor does it come close.
29. In summary it will be demonstrated in evidence that whilst inevitably there will be some landscape impact arising as a result of the proposed development that impact will be minimised through the carefully designed scheme (set out in the Illustrative Masterplan) such that any impacts are minor in nature. In so far as views of the Site are concerned from the AONB (which are at some distance) they will be read and appreciated in the context of the existing urban development and pattern of Torbay.

IV. THE PLANNING BALANCE

30. The Appellant is clear that the ‘tilted balance’ is engaged in this case and, furthermore, that the Council’s position that it is to be disengaged by operation of NPPF §11(b)(i) is incorrect. Whilst harm to the setting of an AONB *could* in certain circumstances constitute a ‘clear reason for refusal’ (per Footnote 6 of NPPF §11(d)(i)) it is clear that in the present case, having been the subject of careful and detailed analysis, the effect upon the setting of the AONB does not provide a clear reason for refusal. In consequence the decision-maker is to move on to NPPF §11(d)(ii) and determine the appeal with the presumption in favour of sustainable development engaged.
31. Notwithstanding that the ‘tilted balance’ is engaged the Appellant submits that, even if it were to be disapplied and an ‘ordinary’ balancing exercise undertaken, permission should be granted.
32. That view is based not only on the Council’s very troubling HLS position but, on a more positive note, through recognition of the many benefits of the scheme. In fairness to the Council it candidly recognises that the proposal “...*provides significant benefits*” [OR §5.18.1].
33. They include:

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- (i) provision of up to 373 new homes including up to 112 affordable homes;
 - (ii) a new school (including nursery) (420 pupil capacity);
 - (iii) £68m construction spend (creating employment over the 8 year project period of up to 140 workers per annum);
 - (iv) household spending of up to £8.6m per annum a proportion of which would be captured locally (£1.3-1.7m);
 - (v) employment from the public house element of 30-40 jobs along with 35-40 FTE staff for the proposed primary school;
 - (vi) public open space and areas of play; and
 - (vii) greater accessibility / permeability into the countryside from the urban area of Torbay through the Site.

34. The Appellant will demonstrate through the course of the Inquiry that the landscape and policy conflicts alleged by the Council do not serve to indicate that planning permission should be refused. In fact, once all of the evidence is properly considered it is clear that this is a development which not only benefits the district but which the district needs if it is to even begin to remedy its failing plan for growth.

35. Accordingly, in due course the Appellant will respectfully invite the Inspector to allow the appeal and grant permission.

PETER GOATLEY QC
CHRISTIAN HAWLEY

12th January 2021
No5 Chambers