

Town and Country Planning Act 1990 Section 78 Appeal

Land to the South of White Rock adjacent to Brixham Road (“Inglewood”), Paignton, Torbay, TQ4 7BQ

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

LPA Ref: P/2017/1133

CLOSING SUBMISSIONS ON BEHALF OF TORBAY COUNCIL

INTRODUCTION

1. As noted in Opening, and in spite of the duration of this inquiry, this is, at its heart, a very simple appeal, particularly in light of the Appellant’s correctly made concession that the appeal scheme is in conflict with the spatial strategy in the development plan.¹

2. The main matters for determination helpfully provided at the opening of the inquiry are:
 1. Impact on the South Devon AONB and landscape character;
 2. Whether the site is a suitable location for development outside of the established built up area and Future Growth Area on land not identified in the development plan, having regard to the development plan policies and other material considerations including housing land supply;
 3. Other issues raised by objectors; and
 4. The benefits of the proposal.

3. The main matters pertinent to the Council’s case will be explored in turn, after a brief summary of the relevant background to this appeal that was explored at length during the inquiry.

RELEVANT BACKGROUND

¹ Appellant’s Opening Submissions §15 and SF XX.

4. The Appellant places great weight on the Council's early consideration of development on the site. But the Council was always pellucidly clear that the site was only suitable for development if nature conservation and AONB impacts were acceptable.² The former were; the latter very much were not. So the Appellant may well be disappointed but has no genuine basis to feel aggrieved.
5. Nor should it be surprised. The 1997 Secretary of State decision and the report of Inspector Pratt giving rise to it confirmed just how important the appeal site was in its context. The description of the landscape remains as true today as it was then. This is due to the strenuous efforts taken to protect it, efforts which have paid off in the remarkable views over open countryside which can still be enjoyed from the AONB, albeit less and less as development encroaches into these views. The mere existence of detracting urban influences is not a basis for complacency and a "more of the same won't hurt" attitude. That way lies death by a thousand cuts. It is a reason to protect what remains. When a proposal to develop what does remain involves breaching a "visual watershed", as described by Inspector Pratt,³ then drawing a line becomes all the more important.
6. Despite the Council's confirmation, provided four separate times, that it did not rely on the details of the 1997 scheme as a comparable and what was relied on was rather the description of the qualities of the landscape,⁴ the Appellant sought to obfuscate the relevance of this decision by carrying out an extensive exploration of the details of that scheme. It is all utterly irrelevant. The fact that the Dart Valley is one of the "finest riverine landscapes in the country"⁵ does not depend on the details of any scheme. The fact that there are "fine open views across the site to the Dart Valley AONB"⁶ does not depend on the details of any scheme. The following comments by Inspector Pratt have nothing at all to do with the details of any scheme:

"When travelling southwards, this vantage point [the open view across the site] is particularly important since it represents the first view of the Dart Valley seen by visitors after cresting the ridge at White Rock. During the holiday season, many hundreds of tourists pass this way in cars or coaches and see this currently uninterrupted view across to the other side of the Dart Valley....Although existing

² CD Inspector Keith Holland's Report at §62

³ CD 7.3(a) §12.40

⁴ And material considerations relevant to economic harm, such as the impact on tourism as considered by Inspector Pratt.

⁵ CD 7.3(b) §12

⁶ CD 7.3(a) §12.40

development on the other side of Brixham Road has already breached the ridge line, this is no reason to extend development further beyond it into an area which has previously been protected from development. This further extension would be all the more damaging given the prominent and visually sensitive nature of much of the application site.”

7. Every aspect of that commentary remains true today.

THE SOUTH DEVON AONB

8. The PPG provides helpful guidance on how to consider the impact of development in the setting of an AONB:

“How should development within the setting of National Parks, the Broads and Areas of Outstanding Natural Beauty be dealt with?”

Land within the setting of these areas often makes an important contribution to maintaining their natural beauty, and where poorly located or designed development can do significant harm. This is especially the case where long views from or to the designated landscape are identified as important, or where the landscape character of land within and adjoining the designated area is complementary. Development within the settings of these areas will therefore need sensitive handling that takes these potential impacts into account.

Paragraph: 042 Reference ID: 8-042-20190721”

9. That guidance expressly refers to harm. A useful definition of “harm” when considering an impact on an AONB is set out in the AONB Management Plan’s Planning Guidance: “any impact which causes loss, damage or detriment to the AONB’s natural beauty, its special qualities or its distinctive characteristics or to the perception of its natural beauty.” The guidance goes on to note “the significance of that harm will depend on factors such as reversibility, frequency, duration, magnitude and probability of effects/impacts. A ‘significant effect’ is not inconsequential and likely to undermine the objective of conserving and enhancing the natural beauty of the AONB.”⁷
10. Mr English demonstrated that there is a strong relationship between the appeal site and the Dart Estuary component of the AONB. Given the appeal site’s complementary rural

⁷ CD 6.10 Planning Guidance Annex to AONB Management Plan at page 82 §140.

character, it makes a significant contribution to the special qualities of the AONB that define its character.⁸ He confirmed that the special qualities set out in the AONB Management Plan summarise, but do not equal, the qualifiers of natural beauty that led to the area's designation in the first place. They are a subset of natural beauty but the criteria relating to *both* special qualities and natural beauty must be considered.⁹ Mr Leaver agreed this is the correct approach.¹⁰ So it is holistic assessment, though of course reasons need to be provided explaining how various factors featured in that assessment.

11. The site is intrinsically linked to the AONB, through both visual and geographical links. The site forms the head of a tributary which directly connects it to the Dart Valley, and the area visually reads as continuous AONB landscape running up to the Brixham Road.¹¹
12. Mr English noted that the AONB's setting in this location is particularly important because the AONB relies heavily on the backdrop to formulate its character in these narrow parts.¹² Further, there are urban areas to the west (Plymouth) and east (Torbay) so its rural setting is also required to maintain the separation between the AONB and urbanised areas.
13. The appeal site is significantly different to White Rock 1. The lay of the appeal site gives the clear impression of the land sloping down towards and facing the AONB in contrast to White Rock 1 which sits in a bowl, sloping away from the AONB on the other side of the ridgeline. The appeal site drains towards the River Dart and is very visible from the AONB. This can be contrasted with the parts of White Rock which may well be higher than the appeal site but are much less prominent when seen from key parts of the AONB.¹³
14. The Appellant made much of the distances involved. But Mr Leaver rightly conceded that what matters is impact at the end of the day, not distance.¹⁴ Seen from south-west of the Dart there is no marked difference between the AONB and its setting.¹⁵ It is also important to note the division of the landscape into foreground, middle ground, and background as Mr Knott pointed out. The middle ground views from the AONB include the appeal site on

⁸ RE EiC

⁹ RE EiC

¹⁰ PL XX

¹¹ RE EiC

¹² RE EiC

¹³ All RE EiC

¹⁴ PL XX

¹⁵ RE EiC

the near side of the White Rock ridgeline, whereas the long-distance urbanised backdrop of Torbay and the bay of Torbay on the far side of the ridgeline provide a backdrop to the views and is often partially obscured by haze.¹⁶ Thus, the appeal site stands out more in the view than the urban area of Torbay, is geographically more intimately connected with the AONB than the urban area of Torbay, and so must be distinguished from the urban area of Torbay.

15. With all of that in mind, it falls to consider in more detail where the alleged harm arises. Mr English points in particular to the harm to three of the special qualities of the South Devon AONB, but with four others also being adversely affected by the development.
16. The special quality relating to the iconic wide, unspoilt and panoramic views available from the AONB will be harmed by the development. It is accepted the development will be noticeable in these views.¹⁷ From these iconic panoramic views the development will form a detracting protuberance of urban development spreading down a slope facing the AONB.
17. Areas of high tranquility is the next special quality. Mr Leaver agreed there was an impinging effect on tranquility due to the appeal scheme, and that the appeal site does contribute to the tranquility of the AONB¹⁸ (he could hardly have argued otherwise: it is a field). Mr English noted, and it was again agreed, that it is relative tranquility in relation to the built up area of Paignton that falls to be considered, not absolute tranquility.¹⁹ On the night-time impacts of the proposed development, the impact on the AONB must be considered in the round. Natural nightscapes also contribute towards a sense of tranquility,²⁰ and those would be adversely affected by the appeal scheme.
18. The final of the core three special qualities is “a variety in the setting to the AONB”. The fact that setting is listed as a special quality in and of itself is important. It does not, however, mean this is the only truly applicable special quality as Mr Leaver tried to argue,²¹ which is contrary to his earlier evidence and common sense. For example, the iconic views do not only apply to views of land within the AONB. This belies Mr Leaver’s unreasonable

¹⁶ SK EiC

¹⁷ PL XX

¹⁸ PL XX

¹⁹ RE EiC and PL agreement in XX.

²⁰ RE EiC

²¹ PL XX

approach to how the special qualities could be affected by the appeal scheme. The AONB Management Plan confirms, in line with Mr English's evidence, that the AONB's rural hinterland of undeveloped countryside is "particularly significant" to the AONB because part of its natural beauty derives from wide panoramic views.²² His evidence, supported by Mr Knott, was that the development will have a significant adverse effect on certain of these views to such a degree that it would harm this special quality.

19. Four additional special qualities are noted by Mr English. His was a nuanced assessment of harm to these additional four special qualities because it is premised on the fact that the appeal site presently constitutes an area in the setting of the AONB which exhibits complementary characteristics of the AONB. The loss of these complementary characteristics in its setting would accordingly cause harm. It is worth pointing out that the case law mentioned in Annex 7 of the AONB Management Plan (on which more later) specifically endorses Mr English's approach, as the judge said "when considering the purpose of conserving and enhancing the natural beauty of [a designated landscape] it is relevant to consider the extent to which the land affected exhibits the characteristics of [that designated] landscape, since those characteristics are what create 'the natural beauty...[of that landscape]'"²³.

20. Starting with ria estuaries and a network of associated watercourses, the site is clearly part of this network of watercourses. It forms the head of a tributary to the River Dart. Whilst this will not be lost, the natural beauty would be given the proximity of built development. Further fields constituting a rolling patchwork of agricultural landscape within the AONB's setting would also be lost to urbanisation. The quality of a landscape with a sense of rich time depth would also be adversely affected given the longstanding historic land use of the site for agriculture. Finally, the ancient and intricate network of winding lanes, paths and recreational routes would be adversely affected by the appeal scheme given that those who use these routes are going to be there predominately for the views and as extensively rehearsed in the evidence, those views will be significantly harmed by the appeal scheme.

²² CD 6.10 Planning Guidance Annex to AONB Management Plan at page 29 final bullet point "distinctive characteristics". Replicated in Annex 4 of CD 6.10.

²³ Howell v SSCLG, Stamford Renewables Ltd and others [2014] EWHC 3627 (Admin) at §48.

21. Also of relevance is Mr English's evidence that the appeal scheme would breach AONB Management Plan policies.²⁴ Both Mr Leaver and Mr Fitton agreed these are relevant considerations to be taken into account when considering the acceptability of landscape impact to the AONB.²⁵
22. They are very much matters of judgment (save for Lan/P7) to be taken into account. Lan/P1 provides that the special qualities, distinctive character and key features of the South Devon AONB will be conserved and enhanced. The evidence before the inquiry demonstrated that this will not be satisfied. Lan/P4 provides that tranquillity, natural nightscapes and dark skies of the AONB will be enhanced and maintained in a consistent cross-boundary evidence-based approach. The appeal scheme does not enhance these factors, nor does it maintain them as it will form a detracting feature in the landscape in relation to all of them. Lan/P5 refers to skylines and views, and provides that the character of skylines and open views into, within, and out of the AONB will be protected. This too is breached. Finally on the landscape policies in the Management Plan is Lan/P7, which has a factual foundation. Under this policy the quality and character of the deeply rural character of the land adjoining the AONB boundary which forms part of its essential setting will be maintained. Mr Leaver disagreed that the appeal site could be described as deeply rural.²⁶ It is frankly hard to conceive how an open field with hedgerow boundaries could be any more rural. This policy too is breached.²⁷
23. Mr Roger also mentioned Plan/P2, which provides that development management decisions are to give great weight to the purpose of conserving and enhancing the natural beauty of the AONB. It positively supports development which is appropriate and proportionate. As the appeal development does not conserve nor enhance the natural beauty of the AONB and is not appropriate nor proportionate this policy is not satisfied.²⁸
24. It can be seen that the site, being rural undeveloped countryside situated on the undulating downslope of a ridgeline facing the AONB and exhibiting a large number of complementary characteristics comprises precisely the type of land that the PPG

²⁴ RE PoE §51 and §62.

²⁵ PL XX

²⁶ PL XX

²⁷ All landscape policies at CD 6.10 page 19.

²⁸ CD 6.10 page 36

contemplates should be protected from development. It makes an important contribution to conserving and enhancing the natural beauty of the AONB; it falls within the PPG's contemplation of sites where "long views from or to the designated landscape are identified as important"; and the landscape character of the site and the AONB are complementary. The PPG does not rule out all development in such circumstances, but it does say development will need "sensitive handling". From the evidence it is clear that the appeal proposals do not constitute sensitive handling, for even in light of fully developed mitigation the appeal proposals would have unacceptable significant adverse effects.²⁹

LANDSCAPE CHARACTER

25. The appeal site is identified in the Torbay Landscape Character Assessment as "highly sensitive".³⁰ This assessment provides the most important description of landscape character, given that it assesses the qualities of the site itself rather than the extensive area covered by the character area described in Part 1 of the Torbay Landscape Character Assessment (Type 1 Rolling Farmlands; overlapping with Devon Character Type 3B Lower Rolling Farmed and Settled Valley Slopes).³¹
26. The starting point for any LVIA must be the sensitivity of relevant landscape receptors.³² That information is found in the relevant landscape character assessment. The information on sensitivity contained within that document is the first step in establishing the entire baseline for the landscape assessment in the LVIA.³³ If you start from the wrong baseline, you end up with the wrong conclusion. Were there any doubt, GLVIA3 reminds us "Landscape Character Assessment is the key tool for understanding the landscape."³⁴ And in order to understand the conclusions reached in an LVIA, GLVIA3 requires clear and transparent reasons. There is no indication or allegation that those who compiled the LVIA here were ignorant of the requirements of GLVIA3, and all landscape experts agreed it was prepared in accordance with GLVIA3.

²⁹ Evidence of both Mr English and Mr Knott.

³⁰ CD 6.2 Torbay LCA Part 2 extracts, 10 North Galmpton AoLC.

³¹ CD 6.1 Torbay LCA Part 1 extracts: Figure 15 (Type 1) and **CD Devon** Landscape Type 3B

³² Agreed PL in XX.

³³ CD 6.8 GLVIA3 page 38 §3.26

³⁴ CD 6.8 GLVIA3 page 74 §5.4.

27. So the authors of the LVIA were aware they had to provide clear and transparent reasons for their assessment. Before looking to see what reasons were provided explaining how the Landscape Character Assessment was considered, we must first see what that document says. When we look to the Torbay Landscape Character Assessment, the appeal site is identified in Part 2 as being amongst the “arable fields in the northern part extending west from the A380 Brixham Road towards the Torbay boundary west of Goodrington.” The Torbay Landscape Character Assessment goes on to note:

“[t]he land slopes broadly westwards towards the River Dart estuary within South Hams and the South Devon AONB. Much of the area is relatively open farmland and the northern part is more open and this allows long distance views to the south west to hills beyond the Dart within the AONB, whilst the southern part of the area is screened from the west by a combination of a slight ridge and field boundaries”.³⁵

28. The characteristic photo of this character area is across the appeal site and identified as the “[v]iew west towards South Devon AONB from A3022 Brixham Road”.³⁶

29. Under³⁷ “Landscape Value” it describes the scenic beauty of the local landscape area including the site as having a “[f]oreground of attractive views into AONB”. Under “Visual Sensitivity” it describes the “[l]argely open views across most of area”, and under “Prominence in wider landscape” it notes the “[n]orthern part [which includes the appeal site] has seamless visual connection with S Devon AONB”. The conclusion on Overall Sensitivity was “highly sensitive”. It did however note “[p]arts of southern area slightly less sensitive due to visual containment.” All of this information insofar as it relates to the appeal site is obviously highly relevant, and in line with the requirements of GLVIA3, fundamental to the assessment carried out in the LVIA.

30. How did the LVIA, in line with the requirement to provide clear and transparent reasons, take this into account in its assessment? It applied the only part of the above description of landscape character which did not apply to the appeal proposals.

31. In the LVIA, under “How the LCAs relate to the site” we see first, agreement the local landscape character assessments generally represent an accurate and appropriate basis for

³⁵ CD 6.2 First page of extract (internal page 34).

³⁶ CD 6.2 Ibid

³⁷ All of the following quotes from CD 6.2 second page; internal page 35.

assessing the effects of the proposals.³⁸ So far so good. It then provides an extract from Part 2 of the Landscape Character Assessment itself. This is where the LVIA falls apart. It only notes the lower sensitivity of the southern part,³⁹ which Mr Leaver agreed is not the area that contains the appeal site.⁴⁰ The appeal site is located at the highly sensitive northern part. So when the LVIA identifies landscape receptors as its baseline for assessment and considers the sensitivity of those receptors, it is paying regard to the wrong part of the landscape character area and not to the highly sensitive part on which the appeal scheme is actually proposed.⁴¹ When questioned on the LVIA Mr Knott confirmed that despite the fact that it was a substantial body of work, it had overlooked the characteristics of the 10 North Galmpton AoLC.⁴² A very lengthy LVIA that has not had regard to the correct information is just as useless as an LVIA consisting of a single page.

32. This is an enormous problem for the Appellant. The LVIA takes no account, in what is the very baseline for the assessment, of any of the important points made in a key description of landscape character. It refers to another, less sensitive, less prominent, less valuable in landscape terms, more visually contained part which is not seamlessly connected to the AONB. This is a fatal flaw which fundamentally undermines the Appellant's landscape case because when you start from a wrong, less sensitive, baseline you proceed in ignorance of the actual landscape sensitivity of the appeal site and end up with an LVIA that wrongly underestimates landscape effects. This is further compounded by the erroneous methodology employed in that the LVIA had already wrongly downplayed the landscape effects by only considering major effects to be significant. Mr Knott confirmed in his professional experience the widely held view in the landscape profession is that an effect of moderate or above is significant.⁴³

33. When confronted with this fatal flaw Mr Leaver said he didn't write the LVIA.⁴⁴ He did not, but he still relied on it. There is nothing further from the Appellant which even purports to provide an assessment using the correct part of the local landscape character assessment.

³⁸ CD 1.22 LVIA at page 26 §4.1.20.

³⁹ CD 1.22 LVIA at page 26 §4.1.21.

⁴⁰ PL XX. It is further clear from the introducing text paragraph of 10 North Galmpton and the map that the appeal site is located within the northern part of the AoLC.

⁴¹ This is supported by Figure 6e of the LVIA which considers receptors on the appeal site but considers the sensitivity to be only medium.

⁴² SK XX

⁴³ SK XX confirming this constituted his remaining concern as to methodology.

⁴⁴ PL XX

Such an assessment is required to determine compliance with policies SS8.3 and C1 of the Local Plan as well as policies E1, E2, and E3 of the Brixham Peninsula Neighbourhood Plan.⁴⁵

34. It therefore follows that the only tool before the inquiry that assists in this essential task of determining policy compliance is Mr Knott's very clear and specific assessment of the landscape impacts of the appeal development on the correct part of the AoLC. His conclusion was that there would be a "significant direct adverse effect on the landscape character of the North Galmpton AoLC in the long-term" in light of the high sensitivity of the AoLC and what he judged to be the high adverse magnitude of change.⁴⁶ He also pointed out that the proposed planting, whilst softening views, would at the same time contribute to obstructing existing characteristic views over the open rural landscape of the North Galmpton AoLC towards the AONB. It is also worth noting in this respect Mr Leaver agreed that wraparound mitigation planting in this context caused landscape harm.⁴⁷ Because the proposed mitigation would not generally provide effective mitigation from distant views to the North Galmpton AoLC from the AONB either Mr Knott concluded there would be a significant adverse effect on landscape character even once mitigation planting had matured (year 10).⁴⁸

35. Those conclusions on the significant adverse impact to a key relevant landscape receptor are further supported by the evidence before the inquiry on the impact on specific visual receptors.

36. Mr English's view was that the harmful impact on views indicated in the VVMs at representative viewpoints 6 and 7 were, on their own, sufficient to warrant refusal. The remaining viewpoints are also clearly relevant, and the Council provides further details in the summary set out at Table 6 of the Landscape Position Statement.⁴⁹ All of these viewpoints will be observed from the site visit in light of the commentary set out in the Position Statement and the evidence before the inquiry. This said, a few of the key views warrant further commentary in these Closing submissions. Mr Knott has identified a

⁴⁵ Which require compliance with policy C1 of the Local Plan.

⁴⁶ SK PoE §6.20.

⁴⁷ Stated in EiC in relation to 1997 proposals and accepted in XX.

⁴⁸ SK PoE §6.21.

⁴⁹ CD 7.24.

number of locations where iconic views are available from the AONB and where the visual effects of the development would be significantly adverse. Those views are represented in VVMs for viewpoints 5, 6, 7, 8, and 9.

37. From VP5 (sequential views along Dittisham Road) the view shows the appeal site sitting in front of the wooded ridgeline defined by Brixham Road in this location. In this vicinity the ridgeline is predominantly wooded. Though there is an exception with a short row of housing fronting, the ridgeline is more or less undeveloped with an absence of development. The view subdivides into foreground, middle ground (estuary and valley slopes rising to ridgeline) and more distant views (bay of Torbay and Torquay). At Figure 11 we see the proposed development and housing in front of a wooded area extending down into the tributary valley of the Dart. In Mr Knott's view this shows a clear encroachment of uncharacteristic urban development on the upper valley slopes, eroding the landscape character. He concluded it was a substantial deterioration to the view which forms part of the AONB setting.⁵⁰

38. From VP6 (sequential views along the recreational trail on Fire Beacon Hill): viewpoint 6A is represented by Figures 13-17. The features of the view highlighted by Mr Knott are similar to viewpoint 5, but it is a more elevated view. Just beyond the predominately wooded ridgeline one can see the bay of Torbay, with the appeal site and verdant fields and hedgerows sloping down to the River Dart which forms the base of this vista. The appeal site forms the only part of this particularly attractive,⁵¹ iconic view fronting the bay that does not feature a thick line of detracting urban development. Mr Knott's evidence was that Figures 16-17 show substantial urban encroachment.⁵² It can also be seen that the year 10 view showing the proposed boundary mitigation provides very little effective mitigation and the overall effect in this view is of a substantial new area of housing.⁵³

39. From VP7 (sequential views along the recreational trail to Dittisham): we see Figures 18-24 in the VVM. These views have similar characteristics to VP6. This viewpoint is one of a sequence of four views from the footpath that winds down Fire Beacon Hill. Mr Knott

⁵⁰ SK EiC.

⁵¹ Attractive in that large bodies of water in a landscape attract the eye, agreed PL XX.

⁵² SK EiC

⁵³ SK EiC

pointed to the LVIA Appendix 2 Addendum (January 2020) Figure 1 which provides a list of baseline view figures and a plan showing all representative viewpoints. This helpfully identifies the appeal site and field numbers (dividing the appeal site into 5 fields). One can see in the photo that the more distant views of Torquay appear very distinct from the middle ground views of the Dart Valley.⁵⁴ He highlighted that it was important to walk the full length of this footpath to appreciate how the views change as well as the continuous nature of some of those views.⁵⁵

40. From VP8 (sequential views along the John Musgrave Trail): one can see the extent of the proposed housing, including the White Rock mitigation. Mr Knott pointed to Figure 34 which shows the year 10 effect which shows the cumulative effect of the White Rock development when fully built out, which would be viewed alongside the appeal development and Galmpton.⁵⁶ The Appellant labelled these jutting extensions of urban development as “fingers”. That is unfortunate language because when viewed from these views on the John Musgrave Trail the appeal development would present a distinct middle finger to the AONB.

41. From VP9 (view from road between A379 and steam railway bridge near Galmpton): Mr Knott referred to Figures 35-41. Whilst this shows a similar effect to viewpoint 8, one sees more of Galmpton. The VVM showing the proposed mitigation at year 10 again demonstrates the cumulative effect of other urban development in the area on the AONB. Mr Knott describes the overall effect at year 10 as constituting urban sprawl.⁵⁷

42. One point made by the Appellant was that the scheme would allow public access and views towards the AONB that are not currently available. Whilst that may technically be true, it does nothing to render the impact to the views which are already available acceptable. They are not, even taking into account the impact of the development once mitigation has established and including the proposed improved palette of materials. Both Mr English and Mr Knott concluded that the degree of residual harm would be remain unacceptable.

⁵⁴ SK EiC

⁵⁵ SK EiC

⁵⁶ SK EiC

⁵⁷ SK EiC

SECTION 85 CROW ISSUES

43. It may well be tiresome to point out the rules, but it is correct to do so. The rules prohibiting leading questions with your own witnesses, attempting to have a second bite at examination in chief, and on providing factually erroneous evidence exist for a reason: to ensure the decision is accurate. The rule prohibiting the introduction of late evidence exists for a reason: fairness. It also exists for a simpler reason: the early identification of issues ensures that valuable inquiry time is not wasted on points absent of merit.
44. That is what happened in the course of Mr English's cross examination. The proposition of law put to Mr English (who is not a lawyer) by way of the unacceptably late introduction of new evidence during his cross examination (Annex 7 of the AONB Management Plan) was that the language of "regard" in s.85 CROW could be given "little, if any, weight".⁵⁸ That is not legal authority: this case was subject to appeal to the Court of Appeal when Annex 7 was drafted⁵⁹ (this was not mentioned in the Annex nor in cross examination), so this case is not the final legal authority on the issues it decided. For that lawyers would look to the Court of Appeal's decision.
45. That is not necessary here, however, because the (appealed) case quoted in Annex 7 of the AONB Management Plan does not even concern s.85 CROW. Rather, it concerns the Norfolk and Suffolk Broads Act 1988. The statute is different; the contextual language is different; the area of land and designation it concerns are different; the aims to be achieved are different; and the considerations relating to the duty are different. The context is totally different from the duty set out in s.85.
46. The critical point is that it would be simply wrong to conclude that s.85 CROW could be given "little, if any, weight" in planning decisions because, unusually for the NPPF, we have a very clear direction on the weight to be applied when s.85 is engaged. Paragraph 172 makes it perfectly clear that this is not an unweighted assessment: rather than little if

⁵⁸ The relevant part of Annex 7 is "To have regard to a matter means simply that that matter must be specifically considered, not that it must be given greater weight than other matters, certainly not that it is some sort of trump card. It does not impose a presumption in favour of particular result or a duty to achieve that result. In the circumstances of the case other matters may outweigh it in the balance of decision-making. On careful consideration the matter may be given little, if any, weight." Howell v SSCLG, Stamford Renewables Ltd and others [2014] EWHC 3627 (Admin) at §46.

⁵⁹ [2015] EWCA Civ 1189

any weight, decision makers are told to place “great weight” to conserving and enhancing landscape and scenic beauty in, amongst others, AONBs, which have the highest status of protection in relation to these issues.

47. That provision relates to the Broads as well (the relevant paragraph in the 2012 NPPF in force at the time of the Howell decision was 115) but oddly, despite the NPPF being in force at the time of that decision (and the application which gave rise to it), that paragraph did not feature in the decision in Howell at all. The judge therefore did not pay any regard to the clear direction of the NPPF to give great weight to the aim of conserving and enhancing natural beauty when carrying out the duty he was concerned with in that case, let alone the s.85 duty. That Howell is not an appropriate case from which to draw any guidance at all on the s.85 duty is an example of why it is not a good idea to blindside an opponent by putting legal propositions based on evidence introduced only during cross examination to a non-legally qualified witness with no advance warning of the legal argument that was to be put forward.

48. In any event, it is worth pointing out that even in light of the policy set out in paragraph 172 of the NPPF the Glover Review heard “in strong terms from very many respondents” that s.85 is “too weak”.⁶⁰

THE APPEAL SITE IS NOT AN APPROPRIATE LOCATION FOR DEVELOPMENT

49. As it is agreed the scheme is in conflict with the spatial strategy of the development plan, and is not positively supported by the relevant landscape policies (the Council has demonstrated quite the opposite, that there is a positive breach of these policies) the starting point is refusal under s.38(6) of the Planning and Compulsory Purchase Act 2004. The government has consistently reiterated that we are in a plan-led system. Quite simply, the plan takes precedence.

50. In this respect those who worked so hard for so many years to produce the Brixham Peninsula Neighbourhood Plan should be commended. They established a clear direction for the type and location of growth in their area that allows decision makers to confidently state whether a development is or is not in conformity with this plan. Whilst the precision

⁶⁰ CD 7.5 page 50 second paragraph down.

of some policies could perhaps be improved, that is entirely forgivable. Very many local plans across the country suffer from a much more problematic lack of precision even though they went through a far more involved examination process. What matters is that a decision maker is able to understand whether a scheme complies with the relevant policies, and that is entirely possible here. This appeal scheme is not in compliance with the relevant policies in the Neighbourhood Plan. There is an accepted conflict with the spatial strategy⁶¹ and the landscape evidence confirms there is a conflict with policies E1 (all five sub-policies are relevant⁶² and all five are breached), E3 (a blatant conflict as the development visually closes the Gap and supported by text confirming the policy does not contemplate any development within Settlement Gaps), and E6 (plans must be read as a whole and the view confirmed as valued under policy E3, Appendix 3 is one of the views protected under the non-exclusive⁶³ policy E6).

51. On the Settlement Gap issue, Mr Knott confirmed the development would substantially close the Settlement Gap designated in development plan policy between Paignton (Goodrington) and Galmpton.⁶⁴ This reduction in the Settlement Gap would occur in the most visually prominent location of the entire Gap. The appeal site is precisely when drivers along Brixham Road emerge from the highly urban setting of White Rock 1, crest the ridgeline where the vegetation changes, and experience the fine, open, panoramic views over the appeal site towards and connecting with the AONB.

52. Nor does the Appellant find support in the Local Plan. It does not support greenfield development on unallocated sites where there is landscape harm. It conflicts with the spatial strategy set out in this plan,⁶⁵ and would lead to both the loss of open countryside and urban sprawl, and so would further conflict with policy C1.⁶⁶ Mr Knott's evidence was that he

⁶¹ CD 6.17 BPNP policies relating to housing: BH3 (page 25: site is not allocated), policy BH4 (page 27: site is not brownfield), policy BH9 (page 33: site is not an exception site), policy E2 (page 38: site is outside of settlement boundaries, see also landscape concerns re. policy C1 TLP in relation to policy E2.3).

⁶² SF XX

⁶³ Agreed this is not an exclusive list, SF XX

⁶⁴ SK EiC; see policy E3 Brixham Peninsula Neighbourhood Plan.

⁶⁵ CD 6.16 policy SS2 (pages 50-51: site is not in a Future Growth Area and constitutes major development which is not contemplated outside of FGAs), policy SBD1 (pages 125-126 insofar as 660 dwellings are allocated to Brixham and the appeal would cause an exceedance of that figure) and policy C1 (page 159: development is not contemplated in open countryside but is rather directed to FGAs and Strategic Delivery Areas).

⁶⁶ CD 6.16 policy C1 (page 159).

considered the scheme did constitute urban sprawl,⁶⁷ and confirmed, just as Inspector Pratt determined in 1997, that the development breaches identifiable barriers to further urban development.⁶⁸ It would also have an unacceptable impact on the special qualities of the AONB and so conflict with policy SS8.3.⁶⁹

53. Ultimately of course it is the overall development plan and overall impact that must be considered. The development reduces the designated Settlement Gap between Paington and Galmpton in the most prominent location providing a sense of separation between the settlements, for the first time allows development to spill over the ridgeline to the west of Brixham Road into the open rural landscape, and would obscure the fine, open, prominent, uninterrupted, seamless visual connection between Brixham Road and the AONB currently enjoyed by residents and the very many tourists who visit the area. From the AONB itself, a number of the iconic panoramic views would be subject to significant adverse long-term harm.

54. The Appellant argues the conflict with the development plan and the harm to the landscape and AONB should be overridden due to the failure to satisfy the growth objectives set out within the plan. That is too narrow a view of the development plan: neither the Local Plan nor the Neighbourhood Plan set out a “growth-only” strategy.⁷⁰ Both documents recognise the county’s extraordinary landscape and natural resources, and seek to protect them. The site is one of those areas that benefits from such protection in the development plan, particularly the Neighbourhood Plan. For example, in a comprehensive survey of housing sites it is said that “[d]evelopment of this site would demonstrably impact on sweeping public views into Dart Valley AONB from the Dartmouth Road, something which currently significantly contributes to the character of the area.”⁷¹ We can see that was carried through to policy E3 which designates the site as a Settlement Gap.⁷² Mr Fitton rightly acknowledged the appeal scheme would create a new edge to the settlement.⁷³ That is not acceptable in the most visually prominent section of land designated as a Settlement Gap

⁶⁷ SK EiC

⁶⁸ SK EiC and CD 7.3(a) §12.40 for “visual watershed” quote.

⁶⁹ CD 6.16 policy SS8.3 (page 73).

⁷⁰ Though it is right to point out they do not not duck the issue: CD 6.17 page 5 preface, 4th para down and page 8 §1.10. The BPNP does not set out a prohibition on the provision of housing: quite the opposite.

⁷¹ CD 6.5 Housing Site Assessment BPNP at page 83 (“White Rock Extensions”: see page 82).

⁷² CD 6.17 Brixham Peninsula Neighbourhood Plan.

⁷³ SF XX

nor appropriate given that this new settlement edge breaches two existing identifiable barriers to settlement: the Brixham Road and the ridgeline south of White Rock.

55. The Council recognises growth, particularly the provision of housing for those who need it, is essential. That is why it has always faced its housing delivery numbers with what some may have viewed as a brutal honesty. This is very far from an authority which hides its head in the sand and there can be confidence that it is doing all it can to provide the necessary housing in appropriate locations. Bringing those sites forward and unlocking them in some instances does require significant work, and this is taking time. But of course a lag does not mean a free for all in the interim. Development in Torbay is only rendered acceptable once we are assured that irreplaceable, internationally significant⁷⁴, economically and environmentally critical natural assets such as the South Devon AONB will not be unacceptably harmed. That is not the case here in the eyes of (1) those who know this landscape best (the AONB's Manager, Mr English), or (2) the expert landscape consultant engaged to provide independent scrutiny of the landscape impact of the development (Mr Knott).
56. This means refusal unless material considerations indicate otherwise. They do not. The NPPF and its injunction to significantly boost the nation's housing supply must be balanced against the equally weighty South Devon AONB Management Plan and the need to protect its special qualities. If there is a tie (though in the Council's view there clearly isn't), then paragraph 172 of the NPPF is the tie-breaker. This confirms that great weight must be given to the need to conserve and enhance AONBs. There is no equivalent in the NPPF regarding housing: §59 doesn't come close. Houses can go anywhere, after all. The natural beauty of an AONB cannot. It must be protected.
57. The decision-making framework is subject to a second statutory duty, that set out in s.85 CROW. Whilst there is a minor difference in the language of policy SS8.3 of the Local Plan (conserve or enhance) and s.85 (conserve and enhance), the statutory wording is to be preferred given this is a standalone duty outside the development plan. There is thus a requirement to integrate into the decision the substantive, rigorous and fully reasoned

⁷⁴ RE EIC: AONB designation is based on factors which satisfy the IUCN criteria for a Class V landscape and therefore such a designation is of international, not only national, significance.

consideration of the impact of the proposal on the aim of conserving and enhancing the natural beauty of the AONB under CROW. For additional clarity the NPPF makes clear that in this exercise “great weight” is to be given to the aim of conserving and enhancing the natural beauty of the AONB. This development does neither: it is accepted there is positive harm as it would be introducing a detracting feature into the landscape.⁷⁵ This means, quite apart from s.38(6) indicating the decision must be refusal, so too does s.85 (as supplemented by the NPPF).

58. The Appellant also prays in aid the tilted balance. As noted in Opening, Mr English’s view, as the best-qualified expert on the AONB and what makes it so special, is that the harm to the AONB is such that it does provide a clear reason for refusal. The statutory consultee on AONB matters (Natural England) directed the decision maker to Mr English (as manager of the AONB Partnership) when it was consulted on the appeal proposals.⁷⁶ This means there is a clear reason for refusal under the first sentence of paragraph 172 of the NPPF and footnote 6 is engaged so as to dis-engage the tilted balance under paragraph 11(d)(i). It is a matter of judgement but it is evident that on this basis the appeal would also fall to be dismissed. If harm to the AONB constitutes a clear reason for refusal (and great weight must be given to Mr English’s opinion that it does), then it is impossible to see how it could nonetheless be considered sustainable development.

59. Even in the alternative scenario, applying the tilted balance, the harm that would be caused by the development would significantly and demonstrably outweigh the benefits, when assessed against the policies in NPPF taken as a whole. Paragraph 172 remains in play in this assessment and, as noted earlier, nowhere in the NPPF is there the equivalent injunction to give “great weight” to the provision of housing. These landscapes are resources for not only the present but also all future generations; the time-scale implications of this consideration are therefore significantly longer than the need to deliver 3, 5 or more years of housing land supply. These landscapes are also resources of international importance; therefore the geographical implications of this consideration are significantly wider than the local need for housing. It follows that on any basis the need to protect the AONB takes precedence over the need to provide housing.

⁷⁵ PL XX

⁷⁶ CD 4.11

60. This is not to say the Council does not accept the imperative to provide housing, particularly affordable housing, for its residents and those who wish to live in Torbay. That is why Mr Pickhaver rightly gave significant weight to these considerations in the planning balance. But he was also clear that even giving significant weight to the need to provide housing the scheme was still unacceptable due to its landscape impacts, even accepting the benefits of the scheme.
61. Except for environmental harm, there is much agreement between the parties on the elements in the planning balance. The only disputes are minor: Mr Pickhaver pointed out that there is a more preferred location for the school, and so gave its provision by way of the appeal scheme moderate weight.⁷⁷ As this would mean a school, albeit a less costly one, being located in a less than ideal location, that is entirely reasonable. He gave biodiversity net gain moderate weight. That too is a reasonable conclusion, and even Mr Fitton did not seek to argue strenuously that significant weight should be given to this benefit.⁷⁸ Finally, on economic harm to tourism, this is a harm Mr Pickhaver took into account. Mr Fitton did not seek to argue that it was irrelevant, rather that it was difficult to attribute weight to it.⁷⁹ This is indeed very much a matter of judgment but it did not stop previous inspectors from attributing weight to this adverse effect in their decision.⁸⁰ The planning balance nonetheless lies firmly in favour of refusal.

CONCLUSION

62. The appeal proposal conflicts with the development plan, would lead to significant, demonstrable, and unacceptable landscape harm, including to the special qualities and natural beauty of the AONB to which great weight must be afforded, and no material consideration indicates that permission ought to be determined other than in accordance with the development plan. Housing is not the be all and end all of planning decisions. When there are irreplaceable natural assets of international quality and national importance at risk, it is rather their protection that is the be all and end all and must be secured by way of planning decisions.

⁷⁷ DP XX

⁷⁸ SF XX

⁷⁹ SF XX

⁸⁰ CD 7.3(a) Inspector Pratt's report to SoS at §12.33; §12.40; §12.41.

63. The Council therefore respectfully requests that the appeal be dismissed.

Nina Pindham

No5 Chambers

21 January 2021