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.

CLOSING 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.

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.*

4. Given the agreement between the Appellant and the Council on the full range of matters as set out in the Appellant's Opening Statement 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').

5. The Inspector set out the Main Issues at the start of this Inquiry as:

   (i) The effect of the proposed development on the landscape character and appearance of the surrounding area with particular regard to the South Downs AONB and the settlement gap;

   (ii) Whether the Site is suitable for locating the proposed development outside of the existing built up area or future growth areas and / or land not identified in the Brixham Peninsula Neighbourhood Plan in regard to development plan policies and other material considerations including housing land supply ('HLS').

6. The Inspector identified matters relevant to his decision including:

   (i) The issues raised by Interested Parties; and

   (ii) The benefits of the proposed development to be weighed in the planning balance.

7. As regards RfR4 the Inspector noted that whilst the s106 Agreement is not a Main Issue it remained a matter for discussion and, if satisfactory, that RfR would fall away. The Council do not contend that RfR4 continues to stand as a reason for refusal. The s106 session culminated in the dating and completing of the agreement and, subject to one point (regarding the Berry Head Grassland Contribution, which does not impact upon the parties agreement and was dealt with at length during the s106 session) this matter no longer remains an issue to justify withholding consent.

8. The Inquiry was undertaken on a 'topic' basis and these closing submissions follow that structure.

II. MAIN ISSUE 1

9. Helpfully there is a substantial level of agreement between the parties on this matter, not least:

   (i) the only Landscape and Visual Impact Assessment before the Inquiry is that provided by the appellant and submitted in support of the Application[1];

   (ii) the methodology employed therein is both appropriate and agreed[2];

   (iii) the scope of the LVIA is agreed[3];

   (iv) the impact arising from the proposal, in AONB terms, is limited to a change in the setting of the AONB[4] and that there are no direct impacts upon the AONB[5];h

   (v) that the Special Qualities set out at Annex 4 of the AONB Management Plan ('AONB MP') provide an appropriate framework within which to both understand and consider the effects of the proposed development on the natural beauty of the AONB (RE stating that *"…they are the simplest way to interpret Natural Beauty"* [xx]).

10. There is, inevitably, a degree of overlap in the consideration of the Site in terms of the 'general' landscape impact (which arises regardless of the fact that the Site lies within the setting of the AONB) and consideration of the setting of the AONB. This is reflective of the fact that viewpoints exist where the proposed development would alter those views regardless of the fact that they lie within the boundary of the AONB (e.g. Fire Beacon Hill, the John Musgrove Trail).

[1] CD 1.22 and CD 2.22
[2] SK xc and xx
[3] SK xc and xx
[4] CD7.24 Pg 4 §2.1-2.2
[5] SK PoE Pg 15 §6.7 & xx

11. NPPF §172 provides:

> Great weight should be given to conserving and enhancing landscape and scenic beauty in National Parks, the Broads and Areas of Outstanding Natural Beauty, which have the highest status of protection in relation to these issues. The conservation and enhancement of wildlife and cultural heritage are also important considerations in these areas, and should be given great weight in National Parks and the Broads[54]. The scale and extent of development within these designated areas should be limited. Planning permission should be refused for major development[55] other than in exceptional circumstances, and where it can be demonstrated that the development is in the public interest. Consideration of such applications should include an assessment of: [*list of considerations follows*]

12. It is self-evident that as the Site lies outside of the AONB the explicit policy requirement that 'exceptional circumstances' be demonstrated to justify major development *within* designated areas does not apply. RE's evidence was clear on this point in his response to the Inspector's question where he considered only the 'first part' (and not the 'second part') of NPPF §172 to be relevant in the present case and that it ended before the words 'The scale and extent…'.

13. As made clear in cross-examination RE accepted that other than the issue of effects upon the setting of the AONB there are no other attributes of the Site which, in AONB terms, should be protected from development. This conclusion naturally flows from RE's agreement that the Special Qualities ('SQs') relevant to the proposed development (even on the basis of the seven SQs contended for by RE) exclusively relate to the issue of setting [xx].

NPPF §11(d)(i)

14. Much has been made, both in the Officer's Report to the Planning Committee ('OR') and the Council's subsequent written statements, of the Council's consideration that NPPF §11(d)(i) serves to displace the presumption in favour of granting planning permission on account of NPPF §172 being a policy falling within Footnote 6.

15. However, the requirement of §11(d)(i) is simply that permission is to be granted (where there are no relevant development plan policies or the most important policies ('MiPs') are, taken as a whole, out of date) unless the application of §172 provides a *"clear reason for*

refusing the development proposed". It is not disputed that the effects of a particular proposal on an AONB *could* be such as to constitute a clear reason for refusal, the dispute between the parties is whether the impact of the proposal development though a change in the setting of the AONB does found a clear refusal *in the present case.*

16. The Council say it does, the Appellant that it does not. The resolution of that question is a matter for the Inspector having heard and considered all of the relevant evidence, however there is no dispute as to the *operation* of §11(d)(i) nor does its existence serve to add any additional weight to any harm which might be identified nor establish any form of presumption which needs to be rebutted by the Appellant.

17. Indeed, §11(d)(i) only becomes operative once the Inspector has reached his conclusions as to the matters set out in NPPF §172 – it does not influence how that conclusion is reached but simply provides an instruction should the conclusion be (contrary to the Appellant's conclusions) that the impact upon the AONB through a change in its setting is such as to constitute a *"clear reason"* for refusing the proposal.

'Valued Landscape'

18. The only assessment in evidence of whether or not Site is a 'valued landscape' in terms of NPPF §170(a) is the LVIA and the specific consideration of it by Mr Leaver, in accordance with the guidance set out in GLVIA3 (Box 5.1). PL's assessment is transparent and clear [PL PoE Pg 34 §5.6 onward], as is the conclusion – the Site does not meet the criteria of a 'valued landscape' in NPPF terms. RE demurred from providing any conclusion in this regard [xx] though accepted that the consideration of it was taken account of in the LVIA. It is plain that the Site is not a 'valued landscape' such as to fall within NPPF §170(a) and clear from the Council's evidence at the Inquiry that, despite flirting with such a contention[6], the Council has not sought to provide any justification that it is, nor indeed is it referred to in RE's or SK's proofs of evidence.

19. Furthermore, despite being flagged by the Council as an issue between the main parties right up until the start of the Inquiry, SK accepted [xc & xx] that there was no

[6] CD7.24 Pg 9 – Landscape Position statement

'methodological' disagreement between the parties as regards the approach taken in the LVIA.

The AONB Management Plan and Special Qualities

20. s85(1) of The Countryside and Rights of Way Act 2000 requires a relevant authority (in this case the Secretary of State through his appointed Inspector) to *"…have regard to the purpose of conserving and enhancing the natural beauty of the area of outstanding natural beauty"*.

21. RE's approach to his evidence, predicated largely upon not giving an inch, led to some debate as to whether or not 'having regard to' a consideration lent it weight in the planning balance. RE insisted that it did and the mere fact that s85(1) is engaged somehow creates a negative weighting in the scales from the very start. Such an approach is incorrect, reference to the AONB MP guidance demonstrates so after the question 'What does it mean to have regard?' [CD 6.10 Pg 11 §30-32]:

> *"30. …Parliament's objective in creating this legal duty is for the conservation and enhancement of natural beauty to be a factor in a relevant authority's decision making…*
> *…*
> *32. …It must be given genuine attention and thought, and such weight as the decision-taker considers appropriate…"*

22. There is no doubt that the matter has been given genuine attention and thought – when tallied up more than a full day, probably approaching two, has been spent considering solely the impact of the proposal upon the AONB through a change in its setting. As is clear the duty to 'have regard' means exactly that – it must be considered. However, it does no more than that, the simple fact that there is a statutory duty is not a factor which is to be added into the planning balance. This is confirmed in the AONB MP annex 7, page 51 quoting the judgment of Cranston J in ***Howell v Stamford Renewables [2014] EWHC 3627 (Admin)***.

23. RE's initial position was that there was some deficit or deficiency in the LVIA such that it didn't fully take into account or assess 'natural beauty'. This was a contention which quickly foundered with RE relying upon an assertion that SQs were not explicitly analysed (though he accepted that the evidence of PL did explicitly consider them). RE rowed back

from that assertion recognising that the LVIA is compliant with the guidelines set out in GLVIA3 and that those guidelines specifically require an LVIA to take account of designated areas.

24. When directly questioned as to what, in his view, was missing from the LVIA RE's response was *"I'm not saying anything is"* [xx]. Furthermore, when asked what other guidance the Inspector might take into account RE responded that the SQs *"...are the simplest way to interpret natural beauty"* [xx].

25. There was additionally a degree of debate as to whether, if full account was taken of the relevant SQs, that some element of 'natural beauty' was not taken into account. Reference to the AONB MP guidance [CD6.10 Pg 12 §36] makes plain the inaccuracy of this contention:

> *"The South Devon AONB Partnership uses the special qualities and distinctive characteristics of the AONB as a means of explaining and describing its 'natural beauty' and for guiding management decisions"*

26. It is plain therefore that the SQs can be relied upon to properly, and fully, understand the relevant aspects of 'natural beauty' which might be affected by a particular development proposal.

27. There is disagreement between the Appellant and the Council as to *which* of the SQs are relevant to this proposal. Interestingly that is not the only disagreement (or at least mis-alignment) as regards to which SQs are relevant. RE's initial consultee response to the Council[7] cited 2 SQs, namely:

    (i) Iconic wide, unspoilt and expansive panoramic views (SQ5);
    (ii) Areas of high tranquillity, natural nightscapes, distinctive natural soundscapes and visible movement (SQ9).

[7] CD 4.18

28. This was subsequently expanded to cover "*a variety in the setting to the AONB formed by the marine environment, Plymouth City, market and coastal towns, rural South Hams and Dartmoor"* (SQ10).

29. I will return to deal with each of these below, but it is necessary to firstly address a further and wider argument contended for by RE.

30. It was only after the appeal had been made and the landscape position statement was being prepared that RE alighted upon his argument that a further 4 SQs are also relevant. RE acknowledged that despite SK being well aware of those additional SQs, and that SK's evidence has regard to the AONB and AONB MP, that SK chose not to include those additional 4 SQs in his analysis. Nor did SK seek to justify the further four SQs [xx].

31. The reason for that difference is clear – the additional 4 SQs cited by RE are not relevant to the determination of the appeal proposal. Not only that, aside from simply citing the SQs, there is no analysis or evidence from RE as to why they are relevant.

32. Those additional SQs are:

    (i) Ria estuaries (drowned river valleys), steep combes and a network of associated watercourses (SQ2);
    (ii) Deeply rural rolling patchwork agricultural landscape (SQ3);
    (iii) A landscape with a rich time depth and a wealth of historic features and cultural associations (SQ6); and
    (iv) An ancient and intricate network of winding lanes, paths and recreational routes (SQ7).

33. As explained by PL the additional 4 SQs relate to physical characteristics of land within the AONB itself, not perceptual characteristics which can be affected by a change in the AONB's setting (which is the argument contended for by the Council and the AONB unit). Nor does the fact that land other than within the boundary of the AONB displays some of the 'Distinctive Characteristics' identified as a defined feature of those SQs mean that it has a special quality. If land was sufficiently 'special' it would have been included within the AONB boundary.

34. In terms of Ria Estuaries it is agreed [SK xx] that the landform of the appeal Site differs markedly to the landform closer to the boundary of the AONB where the gradient drops sharply to the Dart Estuary. The closest that RE could come to making this SQ relevant was the presence of a tributary draining from a field within the Site. With respect, and as pointed out by PL, the mere fact that a field outside of the AONB contains the starting point of a watercourse which ultimately flows to the River Dart does not make it 'special' the purposes of the SQs.

35. The 'Distinctive Characteristics' of the deeply rolling rural patchwork agricultural landscape describe the characteristics of such land within the AONB. Furthermore, the location of the appeal Site ,whilst in policy terms being countryside, is not, in practical terms, 'deeply' rural – it has the character of agricultural land immediately adjacent to (and influenced by) a settlement edge and a main road.

36. In terms of 'rich time depth' the most that can be said of the appeal site is that it appears to have first had its present field boundaries sometime in the late 19th century. Reference to the (extensive) list of distinctive characteristics makes clear that this is not a singular feature that would suffice to accord with the SQ even if the Site lay within the AONB.

37. RE rightly accepted that there are no recreational routes which cross the appeal Site and certainly nothing to give rise to the Site being part of an ancient intricate network of winding lanes. That the Site is visible from footpaths within the AONB some several kilometres distant does not engage this SQ [see PL PoE Table 1, p14]

38. Having heard the totality of RE's evidence (such as it was) on those additional four SQs it is clear why SK did not consider that they were relevant to his analysis. When properly considered, on their own terms, they are simply not engaged in the consideration of the proposed development on the appeal Site.

39. Extensive reference was made through the course of the Inquiry to the Visually Verified Montages ('VVMs') in relation to a wide range of agreed Viewpoints ('VPs'). They are helpful and drawn up in accordance with the landscape Institute's guidance for their preparation. However, as agreed by all parties they are no substitute for the Inspector's site visit.

40. Whilst scrutinised closely it is important to bear in mind how they should be utilised as a guide to the 'real' experience:

    (i) whilst handled electronically it is possible to 'zoom in' (and on occasions the Inspector was invited to do so) it is to be remembered that, without the aid of binoculars, that is not an option open to the viewer in real life; nor would it appear consistent with LI guidance 06/19 [CD6.32]

    (ii) that the guidance for the presentation of VPs / VVMs is to centre the subject site in the middle of the frame – there is the natural tendency that this overplays the visual impact in the VVM as it focuses attention directly where the proposed development will be sited;

    (iii) that sequential views are to be treated as a linear 'experience' rather than each being the subject of an individual and isolated study – such sequential views are intended to provide an impression of the proposal across that kinetic route (the 'centring of the frame point' is relevant here too);

    (iv) the longer distance VVMs do not incorporate the proposed use of local materials (which SK accepted would 'soften' the visual impact of the scheme), therefore they reflect more than a 'worst case' in this regard.

41. None of these points are intended to be suggested as a criticism of the VVMs but simply acknowledges that they are a tool and that for them to be as useful as possible their constraints must be borne in mind.

42. There is disagreement between the parties as to the significance of the effect of the proposed development on the agreed VPs (both those within and those outside of the AONB). The conclusion as to those effects is plainly of relevance to both the level of impact on the AONB caused through a change in its setting and in terms of landscape impacts generally. Whilst holding differing views as to the level of those effects all of the professional witnesses quite properly acknowledged that ultimately the conclusion as to those effects is for the Inspector.

(1) SQ10 A variety in the setting to the AONB formed by the marine environment, Plymouth City, market and coastal towns, rural South Hams and Dartmoor

43. Views 5D, 6A, 7A and 7D are of assistance in this regard. It is agreed that in terms of views from the AONB of the appeal Site all of the VPs lie to the southern side of the Dart Estuary and some distance from the Site (all being over 3.5km distant[8]). Those VPs provide the existing views along with the development at Years 1 and 10. It may be noted that SK considered [xx] 10 years was the appropriate time period which is most relevant for evaluating each view and the impact of development.

44. The VVMs make clear the context of the proposed development. The VPs amply demonstrate that the views from the AONB include substantial elements of existing built form. It is correct that the appeal site faces the AONB. However, the contention that this is in some way harmful to the setting of the AONB is misplaced. The existing views already take in built form along the nearest ridgeline along with the extensive built form of Paignton and Torquay. The context of the existing view is one of a settlement pattern broken up with 'fingers' of green where the countryside flows in and around areas of urban development providing a 'soft edge' to the built form [PL xc; SK xx].

45. As accepted by SK [xx] the context in the present case is one of existing urban form, any consideration of the proposal has to be made with regard to that context and not some artificial or narrow approach, involving either imagining that context away or focussing narrowly upon the appeal Site in isolation. Whilst much was made by RE of the White Rock 1 ('WR1') development being located 'in a bowl' it is plainly visible. This is unsurprising given that the Site sits at is highest at 68m AOD and WR1 is located on a knoll at up to 88m AOD [PL xc and CD7.3c, IR12.34].

46. The appeal proposal was specifically amended through the course of the application to draw development away from the highest and more visible parts of the Site. Instead, those areas are dedicated to planting, allotments and grazing land. Even before those amendments were made the Council's (then) landscape advisor considered the proposed development to be acceptable *"These changes are therefore welcomed and make the proposals <u>even more acceptable</u> in landscape terms"* [see CD4.24 and CD4.25].

[8] PL proof Table 1 p14

47. They were considered to be *more* acceptable as, in the view of the Council's landscape advisor, they eliminated any short term adverse effects upon the AONB (plainly even without those amendments the officer was content that, with the masterplan integrating the Site into its setting, there would be no long-term adverse affects upon the AONB or in landscape terms more generally).

48. The combination of the revised proposals drawing the development back into the appeal Site along with the carefully considered landscape proposals (and legal obligation to undertake planting *before* development commences) ensures that the proposed development will sit comfortably within the surrounding context in landscape terms.

49. The VVMs also provide night-time views for VP3 and VP7A. They demonstrate that the lighting effect of the proposed development will be minimal when considered against the existing situation. RE's rather dogged contention that almost any development would be harmful to the AONB extended to consideration of these VVMs as well, a position not supported by SK [xx]. With respect, it is a position that is plainly not supportable and serves to reinforce what started to resemble a rather dogmatic objection to development irrespective of its true landscape and visual perceptibility. This

50. The VP8 series of views are from the John Musgrove Heritage Trail. The view is clearly influenced by the obvious built form in the fore to mid ground of the views of Galmpton (shown also in VP9). Helpfully, the VVMs also demonstrate how, post development, there will remain clear separation between the southern end of the development and Galmpton itself. Despite that obvious influence of built form in the view RE persisted in a contention that development of the appeal Site was harmful in that context, even at Year 10. That said, there was some equivocation as to whether the alteration in that view alone justified the withholding of permission or was 'borderline'. With respect, that plainly does not represent a reasonable or realistic position to take once the context of the setting and immediate (sharp edge) is taken into account. It speaks rather more to a slavish adherence to an objection rather than a considered and even-handed approach.

51. Looking at the matter in the round, consideration of the agreed VPs demonstrates that the appeal proposal is entirely in keeping with the context of the existing views, it is one of built form intermingled with countryside with the skyline dominated by the main urban settlements as SK accepted [xx]. The site is associated visually with those settlements rather

than the AONB. It does not read in those views as any closer to the AONB than existing development nor does it visually infringe upon the upper slopes of the Dart Valley. The effect on the character and setting of the AONB is negligible and at most minor adverse [PL PoE §4.46]. Put more colourfully PL explained his view that if a walker was asked to describe the view that their description would be the same both pre and post development.

(2) SQ5 wide, unspoilt and expansive panoramic views

52. The 'rationale' for the SQ is that *"Open and uninterrupted panoramic views from high ground offer a real sense of remoteness, wildness and scale"* [CD 6.10 Annex 4]. Even if it were accepted that the identified views from the AONB fell within that characterisation (which it is not) then the proposed development would do nothing to offend it. No views are interrupted, the panoramic view of the existing built form remains, whatever level of remoteness, wildness or scale might be obtained from those VPs (in contrast to VPs not taking in major urban form) is unaffected.

53. Just as importantly, the second 'rationale' for the SQ is that *"Vantage points with views that only contain natural features that are consistent with landscape character represent a diminishing, highly valued resource that is very highly regarded"*. It is in the context of the rationale for the SQ that the distinctive characteristics must be considered. The reference to natural features is telling – especially in the context of RE insisting that a barely discernible change to the already well-lit night time view is unacceptable.

54. Of the distinctive characteristics only the point about ridgelines might be considered to apply but on proper analysis deals with *"distinctive, unspoilt and very exposed ridgelines"*. The proposed development does not break the skyline nor is the local ridgeline (to the west of Goodrington) 'unspoilt' as it plainly hosts a swathe of existing built form. Likewise in terms of Policy Lan/P5 the character of the skyline and open views into, within and out of the AONB will be maintained.

(3) SQ9 Areas of high tranquillity, natural nightscapes, distinctive natural soundscapes and visible movement

55. In essence the Council's case in this regard was that the appeal proposal would result in a perceptible change in the built form visible from the AONB. That however does not go to

the SQ. RE accepted that there was no change in experience when in the AONB in terms of noise or smells but contended that the alleged disturbance to tranquillity was occasioned by traffic movements within the appeal site along with a change from an agricultural field to built form.

56. This, it is respectfully submitted, is not borne out. The visual change is barely perceptible, especially at Year 10. In any event, the visual change - in the context of views of major urban settlement - does not disturb the tranquillity of the AONB. Nor would traffic movement be discernible. The change in the nightscape would be minimal when considered against the existing position.

57. As PL fairly explained, in England tranquillity is a relative concept as it is difficult to find a truly remote spot. No doubt the AONB in this location feels more tranquil than, say, the centre of Torquay. However in terms of the SQ the distinctive characteristics principally reference an experience found elsewhere in the AONB and not at the locations identified. As PL noted it is difficult to find a truly remote spot in England, the characteristics spoken to by the SQ include the following descriptors:

    (i) *"Dark night skies… away from skyglow"*,
    (ii) *"Away from tightly focussed waterside settlements… the estuaries remain tranquil, remote and wild with little sense of human activity or presence"* and
    (iii) *"Sections of the coast are wild and rugged offering a sense of remoteness with few signs of human presence"*.

58. Those distinctive characteristics are not infringed or offended by the proposed development. Whilst there will be change it is not a change which would *"...greatly impinge on the qualities and characteristics that contribute to tranquillity, natural nightscapes or natural soundscapes in the AONB"* [PL PoE §4.32].

<u>The Settlement Gap</u>

59. It is agreed that should the development proceed there will remain a gap in built form between Galmpton and the Site. Equally, it is plain that the distance of that gap will inevitably be diminished. As accepted by DP [xx] the correct approach is to understand the

purpose and objectives of the gap rather than taking the simplistic view that any building upon it is in some way automatically harmful.

60. SK accepted that it is necessary to consider the justification for settlement gaps as set out at §5.23 of the BPNP [xx] and further that upon consideration of those criteria his concern was limited to the principle of the gap being diminished and the loss of views out to the AONB. It is correct of course that the appeal Site lies physically within the defined gap and that it will be built upon.

61. It is equally correct that a photograph of the Site appears in the BPNP. However, that is in relation to Policy E3 and not Policy E6, which deals with views and vistas. SK quite rightly confirmed that his evidence does not consider, nor raise any concern, in relation to Policy E6. In consequence it was agreed that the only other aspect of concern for SK was the first bullet of §5.23 and specifically the alleged loss of views toward the AONB (such a view, it is said, being a qualifying 'distant view').

62. An important consideration in this regard is how such a view might be 'enjoyed'. There is no public access to the appeal Site. The viewpoint is from Brixham Road - which itself is not accommodating of pedestrians (the footpath ceasing in the relevant section) - and, as demonstrated in VP14 (Fig 51) uninterrupted views will remain, post development, toward the AONB with the housing largely set behind established vegetation at Year 10.

63. Whilst the second bullet seeks to prevent coalescence and the merging of settlements it is plain that both Galmpton and WR1 are already in effect joined and merged with the urban area. Reference to Fig 15 of the Torbay Landscape Character Types and Local Character Map [CD 6.1] makes this clear as they are included in the 'grey' area of urban form. SK rightly accepted that they are already joined [xx] and that there are no 'corridors' which *"connect to and interact with the wider landscape"* (Policy E3 Bullet 3).

64. Reference to VP11 (view from Galmpton Open Access Land at NW edge of Galmpton) demonstrates that far from providing a sense of the 'gap' having been diminished in views from Galmpton that in fact the proposal reads simply as an extension of the existing settlement form, nor does that VP contain any 'distant views' which Policy E3 might seek to preserve.

65. When the reasons for the designation of settlement gaps are properly considered it is clear that Policy E3 is not in substance offended by the proposed development. As noted by DP there has to be some harm occasioned by a proposal in such a location, where the criteria for designation are not offended the simple fact that a gap is to be (in part developed) cannot warrant refusal of permission. In DP's own words such an approach would be *"draconian"* [xx].

The 1997 Decision

66. As explored in evidence the proposal for a business park refused by the SoS in 1997 is quite different to the appeal proposal. That is not just in terms of the end use but also:

(i) the extent of the proposed development area;

(ii) that the 1997 scheme required substantial re-profiling of the site topography to create a 'stepped' or 'terraced' landform;

(iii) that the landscape approach in the 1997 scheme was to screen or to seek to obscure the development with extensive tree belts at a higher level (inconsistent with the local landscape character) as opposed to utilising a carefully developed masterplan, as in the present case, to integrate the scheme with the local landscape character;

(iv) that the 1997 scheme was for large floorplate prominent buildings with associated areas of car parking / access, a proposal with very different visual effects to the present proposal.

67. Those points are, in fairness, agreed by the Council. It is argued nonetheless that the 1997 decision is relevant and weighs against the proposal on account of the SoS's expressed views as to the landscape quality of the Site. However, it is clear that the more prominent (and sensitive) portions of the 1997 site have gone on to secure approval in the form of WR1. Not only does the Council's decision in that regard speak for itself but it also fundamentally alters the baseline against which the present proposal is to be assessed as compared to the 1997 scheme (which, of course, did not include the built out WR1 because that site was then part of the proposal).

68. As noted by PL one additional fundamental change in approach is the preparation, review and publishing (every 5 years) of the AONB MP. That, it is agreed, provides a very useful tool for the consideration of development proposals both within the AONB and within its setting. That tool was not available to either the Inspector or the SoS in 1997, it has been considered fully with particular regard to the SQs. For the reasons already considered use of it serves to demonstrate that there would not be an unacceptable impact arising from the development proposed.

Landscape Character

69. It is agreed that the relevant landscape character assessments include the Devon Landscape Character Assessment and the Torbay Landscape Character Assessment, both of which were utilised in undertaking the LVIA [SK xx]. Following GLIVA3 the LVIA has used those LCAs as a starting point before moving on to the next stage of establishing bespoke assessments in relation to the particular locality in order to provide a fine-grained assessment.

70. Whilst the methodological approach is agreed there remained some residual criticism of this element of the LVIA. SK sought to assert that this element was not open and transparent. To the contrary it is and it is in accordance with GLVIA3 to utilise bespoke assessments (indeed it is a requirement to consider the existing landscape character of the site and locality in question). That criticism simply did not avail the Council's argument. That said, in reality, the substance of the dispute goes not to the methodology of the LVIA but its conclusions.

71. The bespoke assessment undertaken in the LVIA is important given the scale of the assessment in the Devon LCA which covers large tracts of land and that the Torbay LCA is geographically restricted, being principally concerned with the characterisation of landscape types as they relate to Torbay. As noted by PL [xc] the Site is, in landscape character terms, distinct from the steeper sloped valley as it falls to the estuary. It is undoubtedly rural land and it is 'countryside'. However, the Site is heavily influenced by its location on the edge of the urban settlement and by the development at WR1.

72. The illustrative Masterplan has been developed (and indeed the scheme revised through reducing the developed area) with careful consideration of landscape character. As explained by PL the Masterplan was itself underpinned by a suite of supporting documents providing a bespoke analysis of, and landscape proposal for, the proposed development and the Site. PL considered that there was a substantial level of detail, especially given that the application is in outline, he noted [xx] that:

(i) the Site has been divided into different character areas;
(ii) development of a greater density is located adjacent to Brixham Road;
(iii) the sensitive parts of the site (Fields 3 and southern edge of Field 2) are dedicated to landscaping; and
(iv) that the Masterplan is respectful of the landscape utilising and retaining existing landscape features and complementing the landscape character allowing the scheme to integrate with the existing landscape (as opposed to an inappropriate attempt to simply 'hide' it through screening);
(v) the Masterplan provides better opportunities for members of the public to enjoy and appreciate the countryside than that which is presently provided by Brixham Road;
(vi) the s106 agreement provides an undertaking to plant the landscaping prior to development commencing ensuring that it is well established by the point of completion of the scheme.

Conclusions on Main Issue 1

73. Following the rigorous testing of no less than three landscape witnesses it is clear that there is much agreement between the parties. The difference of professional judgment, the nub of the case as regards this issue, is not buried in an arid discussion on methodology or approach. It is simply one of their respective conclusions as to the landscape impact of the proposal and its effect upon the AONB through a change in its setting.

74. It is quintessentially a matter for the Inspector to draw his own conclusions on this principle issue. No doubt the site visit will assist. In the interim the VVMs have demonstrated that the change in terms of the setting of the AONB is perceptible but the effect is very limited. This is unsurprising given the surrounding character of urban form, the scheme of

landscaping designed to integrate the Site and the distance of the viewpoints from the AONB.

75. Much of the complaints raised by RE are misdirected and betray an inappropriate and perhaps rather myopic focus simply upon the proposed development. This is to fundamentally miss the point that there can be no *direct* impact upon the AONB, there can only be an *indirect* impact. The claim that the harm is substantial sets the bar far too high, when properly considered, given the minor extent of the change, the effects, such as they are can only be negligible and in some instances minor adverse.

76. In terms of the landscape character more generally the Site is heavily influenced by its setting against the main urban settlement, the influence of WR1 and that the ridgeline is already developed. Equally the VVMs show only minimal visual effects (with it being agreed that in a number of locations there is no adverse impact). The carefully considered landscape scheme will be established early on in the developments lifetime and will integrate the Site into the existing context of built form intermingled with fingers or corridors of countryside.

77. When properly considered the landscape impact of the proposal upon the landscape character and appearance of the surrounding area (having particular regard to the South Downs AONB and the purposes of, and effect upon, the settlement gap) is not such that permission should be withheld. Furthermore, those minimal effects come no way near amounting to a 'clear reason for refusal' in terms of NPPF §11(d)(i).

III. MAIN ISSUE 2

Housing Land Supply

78. The agreement that the Council are unable to demonstrate a 3YHLS has happily meant that it has only been necessary to spend a short period of Inquiry time considering specific sites. The anticipated release of the HDT came to fruition and, despite a slightly different number to that forecast by both parties[9], the practical effect is the application of a 20% buffer.

[9] Possibly, at least in part, the consequence of the calculation omitting one month of housing requirement to 'soften' the impact of the first COVID-19 lockdown per the amended methodology published by MHCLG

79. The Council were understandably reluctant to delve into their HLS situation – it can be described as nothing other than dire[10]. Furthermore, despite the claimed efforts of the Council seeking to rectify this situation it was apparent all of the sites referenced by DP [xc] and SF [proof paras 4.19 – 4.38], save for the site at Holcombe (referenced by DP[11]), are already accounted for in the Council's HLS. Whilst DP also made reference to the difficulties caused by the 'new' definition of 'deliverable' in the NPPF it is only fair to point out that this was a change to the NPPF first expounded in July 2018 and can hardly be described as 'new'. Irrespective of that, the need for the proper application of that policy is clear.

80. The problem that the Council have in this regard is that their underperformance in housing delivery is 'baked in' to the adopted development plan. Tellingly the situation as it persists now is exactly the prospect that troubled the Torbay Local Plan Inspector as it passed through examination. Like many local plans the TLP paints a positive view, one recognised by Inspector Keith Holland [CD7.3c] *"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]. This is reflected in TLP Policy SS1.

81. Inspector Holland undoubtedly had a particular concern as to whether the approach of the TLP, to almost entirely delegate its responsibility for the delivery of housing to neighbourhood plans, presented a risk of under-delivery and advised 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]. As can be seen in various policies within the TLP, attempts were made to provide a number of policy 'mechanisms' for action if, as is the case now, the plan fails to deliver.

82. Although the TLP was considered to meet the mandatory requirement of demonstrating a 5YHLS at the time of its adoption Inspector Holland observed *"The position beyond five years is much less clear and is very much dependant on the neighbourhood plan process"* [§48]. Importantly, given the approach taken in Torbay, the HLS is not only dependent

[10] SF Proof para 3.9

[11] A site which DP recognised was stalled and had been stalled for some considerable time.

upon the neighbourhood plan process but highly dependent upon those neighbourhood plans all delivering.

83. Whilst the BPNP may well have met its 'requirement' as made clear by DP [xx] that 'requirement' was not founded in any form of area specific housing needs assessment. It was simply an arbitrary allocation of a small portion of the district wide need based on a view as to what how much housing might be considered possible but, crucially, excluding the very site at White Rock identified by the Council and recorded by Inspector Holland as being "particularly important"[12]. It is the district which must meet its housing requirement on a district wide basis. It is plain that the experimentation with district wide coverage by neighbourhood plans has failed to deliver the lofty ambition of a *"step change in the development of Torbay".* Further, it is also clear that the Brixham Neighbourhood Development Forum appeared determined to act in a manner wholly at variance with Inspector Holland's assessment and observations.

84. That failure began to manifest itself right from the start – at no point has the TLC delivered against its annual requirement [SF PoE §4.4 Table 6], indeed DP referred to the housing requirement not having been met for a decade [xx].

85. It is to be remembered that the Council's contention of a 2.9 year HLS is not an agreed position. For all of the reasons set out in the Appellant's analysis of the potential sites it falls lower than that. It is abundantly clear that government policy requires development plans to boost significantly the supply of housing. It is plain that the TLP and the neighbourhood plans which underpin it have singularly failed to achieve that purpose.

86. Not only has the experiment failed but the cupboard is bare. There is nothing coming to the rescue. There is an almost complete absence of prospective sites whether strategic in size or collectively so in extent, which could come forward to remedy the deficit. Furthermore, even accepting the Council's optimistic timetable for the promotion and adoption of a new local plan, it remains at best at the most incipient stage in the process for planmaking and will not begin to provide even a development plan basis for future decision-making until 2023 at the very earliest. It certainly cannot be considered as providing a solution to the present dire predicament.

[12] See CD7.3c paras 57 -62 and, in particular, paragraphs 58, 60 and 61

87. The present situation makes clear why Inspector Holland was correct to be so concerned. Equally, he was correct to focus upon the appeal Site and its potential to provide at least part of the solution this problem. It was of course unfortunate that the HRA issues present at the time of the Examination precluded its allocation but those issues have been resolved.

88. It is clear that something must be done to provide a means of resolving this long-standing but acute problem for Torbay. With all due respect to DP the nature and significance of this problem was clearly evident to him. It was upon that basis that his own proof of evidence acknowledged that the decision in this case "is not an easy one" [DP proof para 1.5].

89. It is in that context that the only remaining issue advanced by the Council as to why permission should be withheld is the question of effect of the proposal in landscape terms. Indeed DP candidly accepted [xx] that this is the 'crux' of the issue and that save for the Council's concerns in that regard permission should be granted [DP PoE §8.8].

90. Whilst the Council now rely upon that reason for refusal it is plain that at the time that the Council itself promoted the Site for development for residential purposes via a MM [as DP accepted – xx] that:

    (i) the landscape character of the site and surrounding area was known;
    (ii) the existence and extent of the AONB was both known and appreciated (and indeed a Management Plan was in place);
    (iii) the effects of residential development could have been assessed;
    (iv) the Council was content that the residential development of the appeal Site was, in principle, sustainable development; and
    (v) the 1997 decision and the reasoning referred to therein did not alter that conclusion.

91. With those factors well known the appeal Site was promoted by the Council as an MM on account of it being, in the Council's view, *"one of the best alternative greenfield locations for sustainable growth in Torbay"* [TLP EiP Inspector Report CD7.16 §60].

92. It is apparent from the Inspector's report that it was only upon the basis of a perception of time affected and expediency that the Council sought to move the TLP to adoption, such that the Council withdrew the MM. However, the Council did not leave the matter there. It then went on to specifically include the appeal Site in its LDS [CD6.40 §3.5.2]. That

document specifically provided that in circumstances where there 'appears' to be a lack of a 5YHLS (a point which passed some time ago) that the Council would, amongst other measures, promote *"…outline planning applications, or a Local Development Order, for the land south of White Rock, as per Policy SS1"*. As accepted by DP that remains the Council's adopted LDS [xx].

93. In consequence, it is not unfair to observe that its historic approach to the promotion of the site for residential development sits rather uncomfortably with the contention that the proposal should be considered through the plan-making process [DP]. Still less comfortably does it sit with the contention that the site should be rejected now for landscape reasons principally relating to its alleged effect upon the setting of the AONB.

94. The TLP provides mechanisms to address the issue of a HLS deficit:

    (i) Policy SS1, the 'Growth Strategy' provides that *"if it appears that a shortfall in 5 years supply of deliverable sites is likely to arise, the Council will bring forward additional sites as indicated in Policy SS12"* (it being agreed that the policy refers principally to SS13 [DP xx]);

    (ii) Policy SS13 'Five Year Housing Land Supply' provides that where the 5YHLS is not maintained the Council will *"Consider favourably applications for new housing, consistent with Policy SS2, H1 and other policies of this plan"*. DP accepted that this *"pulls in favour"* of the proposal [xx].

95. As agreed by DP there is necessarily a 'tension' created within the TLP itself when a 5YHLS is not met as the policies to remedy that situation call for actions which will, to a degree, conflict with other TLP policies (e.g. C1). It is in that context that the present proposal must be considered – a context where the local plan itself contemplates remedial action which might offend certain policies in that same plan.

96. With respect, that is not altogether unusual. As Lord Carnwath observed in Suffolk Coastal [CD8.12, para 22 quoting the views of Lord Reed in ***Tesco Stores Ltd v Dundee City Council (ASDA Stores Ltd intervening)*** **[2012] UKSC 13; 2012 SLT 739** development plans and their policies should not be construed as if they were statutory or contractual provisions:

*"Although a development plan has a legal status and legal effects, it is not analogous in its nature or purpose to a statute or a contract. As has often been observed, development plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another. In addition, many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment. Such matters fall within the jurisdiction of planning authorities, and their exercise of their judgment can only be challenged on the ground that it is irrational or perverse (**Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759**, 780 per Lord Hoffmann) ..." (para 19)*

97. The third paragraph of Policy SS8 provides that *"...it will be particularly important to ensure that development outside the AONB does not have an unacceptable impact"*. As agreed by DP [xx] Policy SS8(3) is accepting of change. Development of itself does not offend the policy. SS8(3) only weighs against a proposal where such development would have an "unacceptable impact". In the present case it is acknowledged that the proposal will give rise to landscape change but it is considered that the effects will be negligible / minor adverse. Upon any realistic assessment of the impacts cannot be characterised as being "unacceptable" and in consequence no justifiable conflict with Policy SS8(3) would thereby arise.

98. There is the further point that Policy SS8(3) requires the value of natural landscapes to be considered by *"...using the Torbay Landscape Character Assessment and other relevant management plans"*. As has been made plain the Torbay LCA and the available range of relevant management plans have been fully considered in the Appellant's LVIA. This point was extensively ventilated with SK [xx] who accepted not only that the LVIA had specifically taken the Torbay and Devon LCAs[13] into account but that it had transparently dealt with them in going on to produce more detail baseline studies of the sort envisaged in GLVIA(3) para 3.16.

[13] the LVIA is replete with references to the various LCA studies but in particular see CD1.22 paras 4.1.8 – 4.1.21

99. Policy SS8(3) is, in truth, where the Council's case lies. As candidly stated by DP if the landscape effects of the proposal are not unacceptable then, in his view, planning permission should be granted [xx & PoE §8.8].

100. Likewise DP accepted [xx] that there would be no conflict with Policy SDB1 if the Inspector finds for the Appellant, rather than the Council, as regards the landscape impact. Furthermore DP accepted that Policy SDB3 is not relevant.

101. Policy C1 is the principle 'countryside' policy, it is framed in terms of the *"...open countryside, away from existing settlements"*. It is inevitably restrictive in its nature, by reference to settlement boundaries it views development proposals outside of them (with certain exceptions) as unacceptable. Yet a development plan is to be read as a whole and as explored above the TLP expressly contemplates having to take action when there is no 5YHLS which will almost inevitably involve development outside the defined settlement boundaries on greenfield sites.

102. The policies in the local plan can of course continue to be given weight but in the circumstances pertaining in this case that weight is necessarily limited. That is not only because of the HLS situation (and it being out of date) but, additionally, because of the TLP policy basis requiring further sites to be permitted, and thereby pulling in the other direction.

103. The TLP also incorporates in policy SS3 what was previously contained in §14 of NPPF 2012: namely a development plan policy which expressly provides for the presumption in favour of sustainable development to be applied to proposals where the relevant policies for decision-taking are out of date. Of course that differs to the present language of the NPPF but it does provide a statutory development plan, rather than simply a national policy basis, for the application of the presumption.

104. In terms of the presumption it is important to recognise that the Council agree that the Most Important Policies ('MiPs') for the determination of the appeal are out of date. DP accepts that unless the Inspector finds that the impact upon the setting of the AONB is such that it provides a 'clear reason for refusal' under §11(d)(i) then the tilted balance is engaged.

105. Whilst DP accepts that the MiPs contained in the BPNP are also out of date (given the HLS position) he contends that it should nonetheless be given significant weight. Whilst weight is of course a matter for the decision-taker, to give the BPNP significant weight in the present case would represent a failure to follow the clear purpose of NPPF §14. DP fairly accepted that he was unaware of any decisions by the SoS where a neighbourhood plan had been accorded significant or substantial weight, in circumstances where it is out of date [xx].

Neighbourhood plans are provided additional protection by virtue of NPPF §14, only a 3YHLS need be demonstrated. That is a much lower bar than applies to local plans.

106. In a case such as this where the HLS position is so desperate that NPPF §14 disengages the presumption in favour of neighbourhood plans it would circumvent that clear policy instruction by then giving that neighbourhood plan significant or substantial weight in terms of its spatial policies. Furthermore, there are no specific policies which would serve provide standalone reasons for refusal: for instance there is no heritage issue, no ecological issue, nor a local green space issue.

107. BPNP Policy E3 purports to identify and protect settlement gaps. It is notable that the TLP, as the strategic plan, identifies no such requirement for a settlement gap in this location[14]. Furthermore, having to comply only with the 'Basic Conditions' the BPNP policies have never been scrutinised and considered in the same way that a local plan policy would have to be.

108. The stated purposes of BPNP policy E3 are set out at §5.23-5.24 of the explanatory text. It is agreed that the first bullet is relevant but it is also agreed that the second is not. The Council's position is not entirely clear as to whether the third is relevant to the appeal proposal or not. Certainly SK was unclear as to what it was driving at [xx]. That said the appeal Site is not accessible nor is it a corridor, it does not present any means to fulfil any purpose in terms of connecting with the wider countryside. To the contrary: the appeal proposal itself provides the opportunity for a green corridor to connect with the wider countryside.

[14] as was explored with DP xx there is one gap of strategic significance identified at Kingkerwell, which is irrelevant to the location of the appeal proposal

109. Even in terms of bullet 1 of 5.23 it is agreed that the distant view of the AONB will remain post development (see VP14 and Fig 50 of CD 2.46(b)) albeit the foreground of that view would change. Both PL and SF were asked to consider the view across the appeal site from Brixham Road. Inevitably the photo at BPNP Pg 103 [CD 6.17] was referred to but the way that view is experienced is from vehicles travelling on Brixham Road (which has limited pedestrian infrastructure) or from the other side of Brixham Road with traffic immediately intervening.

110. Policy E6 appears to be directed in a rather vague and generalised way to the preservation of views and vistas said to be referred to in a range of other documents. However, even a rudimentary exploration of that list of documents was unable to elicit any particular views or vistas comprising that of the appeal site . It is notable that the Council does not offer any evidence that BPNP Policy E6 is offended.

111. From an exploration of this issue including with DP it would appear that there is something of a nexus between the matters sought to be covered within policy E6 and E3. As highlighted earlier SK and DP accept that whilst the gap will be partly built upon that a gap between Galmpton and the proposed development will remain. Whilst there is change the objective of the gap remains intact and secured.

112. However, the consideration of this point does not end there. Context matters and it is to be remembered of course that this is a 'gap' for Galmpton, a settlement which has already merged with the built form of the urban area. For those reasons quite properly DP accepted that it would not be appropriate to refuse permission on the basis of BPNP Policy E3 alone should the Inspector find the landscape impact to be acceptable [xx].

Affordable Housing

113. The issue of affordable housing is one of such significance that it does necessitate its own discrete consideration. The district's position as to affordable housing was characterised by SF as *"desperate"* [xc]. Analysis of it bears out that bleak assessment. The agreed annual requirement is of the order of 500 affordable homes (in fact 492 dwellings per annum – see SF proof paras 3.17 – 3.23). In the last 3 years AH delivery has averaged 50 dwellings, just one-tenth of the identified need. A comparison of the last 3 AMRs demonstrates that the waiting list for AH has grown from 1074 households to 1321.

114. That is a critical and continuing failure to deliver housing which has very real consequences for those in housing need in the Borough which are simply not being met. That is not simply a case as statistics emanating from some abstract mathematical exercise. It is the very real and continuing problem for those who do not even have the ability to access market housing perhaps some way removed from Torbay. These are people with needs for housing in Torbay which are not being met year after year.

115. The difficulties that the Council have with the stalled sites along with the sites which have not sold on the open market do not inspire hope that they will deliver materially elevated levels of affordable housing, let alone policy compliant levels. With respect, that appears likely to be so even if at least some of the sites referred to in the council supply actually do come forward for development.

116. This proposal will deliver 112 affordable homes. A figure not far short of the *entire* delivery of AH across the district for the last three years combined.

Other Matters

117. A substantial level of agreement has been reached between the Appellant and Council, this is reflected in the SoCGs, the s106 agreement and draft Conditions.

118. As will have been observed and noted third parties have had the opportunity to voice their concerns and have done so during the inquiry. A number of those related to highways related issues and a detailed note has been provided by way of response, notwithstanding that there is no issue regarding highways matters between the appellant and the Council given the extent of the detailed highway work that has been undertaken and the agreement of the statement of common ground. That goes beyond the terms of the transport assessment and indeed the proof of evidence produced by Mr Key and submitted to the inquiry.

119. Taken together they provide a complete answer to the matters raised and serve to demonstrate why there is complete agreement between the principal parties upon those issues.

120. Likewise on matters of ecology there is no dispute between the Appellant and Council. Agreement is again encapsulated in the terms of the statement of common ground but, in addition, a proof of evidence was also provided by way of written statement by Mr Harvey in order to assist the Inspector as required.

IV. THE APPROACH TO DECISION-TAKING

121. It is agreed that the most important policies for the determination of this appeal in both the TLP and BPNP are out of date. NPPF §11(d) is therefore engaged.

122. The first stop is NPPF §11(d)(i) and whether the landscape harm arising from the scheme is such that it constitutes a 'clear reason for refusing the development proposed'. For all of those reasons set out above the Appellant's position is that there will be negligible / minor adverse effects in terms of impact upon the AONB through the change in its setting.

123. The very recent Appeal Decision in Gotherington assists in this regard [CD9.9]. Not only does it set out the decision-making process (with which the parties agree) but also demonstrates how, in that case, having found the harm to views from the AONB through a change in its setting to be moderate such harm was insufficient to found a 'clear reason for refusal'.

124. A point was taken with SF [xx] that the level of harm argued in that case differed to the present. With respect, that point is simply irrelevant. The level of harm contended for may or may not have been different but the conclusion of the Inspector was that the harm in terms of views from the AONB was moderate. Having made that finding the Inspector concluded that such harm did not provide a 'clear reason for refusal'.

125. Should the Inspector determine that NPPF §11(d)(i) does not apply then it is submitted that the appeal should be determined upon the basis that the presumption in favour of sustainable development is engaged such that the benefits of the proposal would have to be significantly and demonstrably outweighed by the adverse impacts.

V. BENEFITS

126. Before considering the benefits of the scheme it is necessary to examine a specific complaint raised by the Council as to potential economic impacts. It is by the Council

suggested that the change in the setting of the AONB in terms of views from the AONB (and, it appears, views toward the AONB from Brixham Road) could give rise to a negative impact upon the tourism sector on account of fewer tourists visiting the area.

127. With respect that is no more than vague assertion. There is no objective evidence nor analysis to support this assertion. Frankly it is fanciful, reference to the VVMs demonstrates the minimal visual change occasioned by the proposal. To seek to suggest that this will lead to a discernible, let alone a significant diminution in the number of visitors to the locality is fanciful.

128. Perhaps in the light of the absence of any real evidence the Council sought to try and draw support from the 1997 Inspector's report. With respect, that attempt was wholly misplaced. As is agreed with the Council's witnesses, those comments were made in relation to an entirely different proposal – one which would have had large roofscapes, significant land forming, heavy linear landscaping, large buildings and large car parks visible from the AONB. They are simply not comparable nor relevant to the present case.

129. Save for that matter there is complete agreement between the Council as to the many substantial benefits that the appeal proposal provides and almost complete agreement as to the weight to be accorded to each of those benefits in the planning balance. For ease of reference this is set out in tabular form below:

Benefit	Weight (Council / PD)	Weight (Appellant / SF)
112 affordable dwellings	Very Significant	Very Significant
260 market dwellings	Significant	Significant
Provision of serviced site for new primary school	Slightly less than significant (as alternative site under consideration)	Significant (as no burden upon the public purse)
PH / Restaurant	Moderate	Moderate
Up to 80 permanent jobs and 40 construction jobs	'Probably' significant	Significant
Direct / Indirect economic benefits	Significant	Significant

POS in excess of policy requirement, community land	At least moderate weight	Moderate
Bio-diversity Net Gain	Moderate	Moderate to Significant
Countryside access	Moderate	Moderate to Significant

VI. CONCLUSIONS

130. The first question that the Inspector has to conclude upon is the level of adverse effects upon the AONB on account of a change in its setting. The Appellant's position, for all of the reasons set out in the its evidence and by PL, is that the adverse effects are negligible / minor adverse.

131. However, even if the Inspector were to consider that the degree of harm is greater than that it is respectfully submitted that the degree of harm is patently insufficient to justify being characterised as a 'clear reason for refusing the development proposed' (NPPF §11(d)(i)).

132. It is agreed that the most important policies in the development plan (both in terms of the TLP and BPNP) are out of date and the tilted balance engaged. Save for conflict with some of those out of date policies (which given the HLS situation should be afforded little weight) it is accepted by the Council that the 'crux' of the case is policy SS8.3 and the landscape impact. It is accepted that Policy E3 and the settlement gap would not, in itself, provide a proper basis whereby permission should be withheld.

133. The benefits are myriad and they are significant. It is agreed that a substantial level of weight should be accorded to them. Given the extremely troubling housing land supply situation the provision of 260 market dwellings necessarily carries significant weight. The affordable housing situation is, on any basis, appalling and, perhaps unusually in the circumstances pertaining in Torbay, it is fairly accepted by the Council that the provision of 112 affordable dwellings should be given very significant weight. With respect that is an entirely proper and correct attribution of weight indicating the profound seriousness of this issue and one which is otherwise simply not the subject of discernible remedial actions over a prolonged period of years.

134. Not only that but the Council simply have no answers to these problems. The HLS issue was flagged by the TLP EiP Inspector in 2015. The last two years of HDT results gave clear indication that there was a significant problem. No steps have been taken. The very recent HDT results simply confirm the problem. Any steps taken now in terms of the local plan review will take years to have any practical effect. These represent important factors providing the context for decision-taking in this district.

135. Upon any reasonable basis the benefits of the proposal significantly outweigh the adverse impacts (such as they are) of the scheme. In the tilted balance, the scales weigh very firmly in favour of the proposal.

136. Accordingly, the Appellant respectfully invites the Inspector to allow this appeal and grant planning permission.

PETER GOATLEY QC
CHRISTIAN HAWLEY

21st January 2021
No5 Chambers