

For the attention of the Head of Planning
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27 April 2018

By email and Special Delivery

Dear Sirs

Objection to Planning Application P/2017/1133

We confirm that we act for Mark and Rosemary Yallop and Andrew and Christina Brownsword. We write in relation to planning application ref. P/2017/1133 (the Planning Application) for "up to 400 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. The proposal includes amendments to Brixham Road, Long Road junction and Windy Corner junction. Details of access to be determined with all other matters reserved" (the Development) at land to the South of White Rock adjacent to Brixham Road, Inglewood Paignton (the Site).

The Planning Application was re-advertised following additional information being received on 8 March 2018. We understand that there is no date settled in respect of the Planning Committee Meeting to determine this application. For the reasons set out below we strongly object to this Planning Application and request that Members refuse it.

Nature of Objection

On the basis of the current documentation available on your website, our clients' key objections to the Planning Application are:

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- (a) **This is a wholly inappropriate Planning Application that has no regard for the Local Plan process.** The Planning Application follows a failed attempt to allocate the Site for housing in the last review of the Local Plan. In that review the Inspector advised that if the Site was to be brought forward, a Local Plan review would be the most appropriate method to consider new evidence.

By submitting a planning application, a strategic approach, taking proper account of the wider impacts across the Council's overall administrative area, is rendered impossible. This has been demonstrated by the consequential and detrimental effects the Planning Application has on Neighbourhood Plans, ecology and habitats and the South Devon AONB. Section 2 of this letter outlines our concerns in respect of the circumvention of the Local Plan process.

- (b) **The Planning Application conflicts with the Brixham Peninsular Neighbourhood Plan and the Paignton Neighbourhood Plan.** If the Planning Application is granted it will prejudice the delivery of key strategic sites in the Brixham Peninsular Neighbourhood Plan area. It remains unclear why there was an extraordinary delay by the Council to appoint an examiner to consider these two Neighbourhood Plans which were submitted to the Council in August 2017.

However, as the examinations have now commenced, it would be premature to determine the Planning Application before the outcome of the examinations are known. Section 3 of this letter outlines our concerns.

- (c) **The Planning Application does not conform with the Development Plan and there are no material planning considerations to justify its grant.** This letter outlines the conflict with key policies in section 4 and the absence of material planning considerations in section 5. We are aware that the Council may be seeking to rely on its draft Five Year Land Supply Statement, which settles on a calculation of 3.96 years, to justify the grant of planning permission. We consider the Council's calculations to be flawed and open to challenge.

In particular the Council has excluded sites but with no robust justification. Additionally, representations submitted by the Brixham, Paignton and Torquay

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Neighbourhood Forums establish an “imbalance between job growth and housing growth” in the Council’s calculations. We set this out in Section 6 of this letter.

- (d) **The Site is approximately 600 metres from the South Devon Area of Outstanding Natural Beauty.** It is highly significant that following a previous planning application that was called in and refused, the Secretary of State attached “substantial weight to the need to preserve the high quality of the Dart Valley AONB as one of the finest riverine landscapes in the Country”. Woodland planting to screen that development was rejected by the Secretary of State because of its “wholly unacceptable visual impact on the AONB”. The Council’s Arboricultural Officer also casts doubt over how effective the proposed screening will be in this Planning Application. We share these concerns as the width of the proposed woodland belt is insufficient to deliver the proposed screening that the applicant relies on so heavily. It is also unlikely that the advance planting will be sufficiently mature within a five year period to screen the development.

The South Devon AONB Partnership maintains its original strong objection to the Planning Application despite changes to the proposed Development put forward by the applicant. Torbay’s Landscape Character Assessment of May 2010 considers the sensitivity of the rolling farmland of the proposed development site to be “High”. The management strategy is to enhance the landscape. The LVIA undervalues the sensitivity of the landscape, the visual receptors to the west of the site and the magnitude of change. The resulting assessment produced by the applicant is undervalued and misleading.

The Council has a statutory duty to conserve and enhance the AONB pursuant to section 85 of the Countryside and Rights of Way Act 2000.

Sections 7 and 8 of this letter outlines our concerns in more detail.

- (e) **The proposed Development will result in harm to habitats and species and in particular Cirl Buntings (which are on the RSPB red list) and Greater Horseshoe Bats.** We have commissioned Aspect Ecology to review the Planning Application and enclose their findings. The Development brings significant risk that there will be a loss of priority species, resulting in a breach of important national policy. In connection with this, the applicant fails to demonstrate that there are no

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alternative sites that could alone or in combination accommodate some or all of the Development to avoid or adequately mitigate the effects on important sites and species.

Aspect Ecology conclude that there is insufficient information to assess the cumulative impacts of the Development and the White Rock development to the north of the Site. They also confirm there is evidence that habitats for Cirl Bunting and Greater Horseshoe Bats will be harmed, Section 9 of this letter and the enclosed report from Aspect Ecology sets this out in more detail.

1. The correct approach for the determination of the Planning Application

Determination of Planning Applications

The statutory requirements governing the determination of planning applications are clear. There is a statutory presumption requiring that the decision be made in accordance with the development plan unless material considerations indicate otherwise. See section 38(6) of the Planning and Compulsory Purchase Act 2004 and section 70 of the Town and Country Planning Act 1990 (as amended). We consider there are no material considerations to justify the grant of planning permission and set out our reasons in section 5 of this letter.

This statutory presumption (requiring a decision to be made in accordance with the development plan) is not altered by the National Planning Policy Framework (NPPF), which is policy guidance to be given such weight as the decision-maker considers appropriate as a 'material consideration'. This can be succinctly summarised in *Hopkins Homes Ltd v Secretary of State for Communities and Local Government* [2017] UKSC 37:

"In dealing with an application for planning permission a local planning authority is required to have regard to the provisions of the development plan so far as material: see section 70(2)(a) of the Town and Country Planning Act 1990. Where section 38(6) of the 2004 Act applies, as it does when a local planning authority determines whether or not to grant planning permission, it requires that "the determination must be made in accordance with the [development] plan unless material considerations indicate otherwise" (Para 19).

"In discharging these requirements reference to relevant policies is not of itself sufficient. An authority must interpret the policies correctly and, given the duty imposed by section 38(6)

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of the 2004 Act, as a general rule, it must determine (a) whether the individual material policies support or count against the proposed development or are consistent or inconsistent with them and (b) whether or not the proposed development is in accordance with the development plan as a whole" (Para 20).

Interpreting Planning Policy

It is established that the proper interpretation of planning policy is ultimately a matter of law for the court. However, the application of relevant policy is for the decision-maker to undertake in a lawful manner.

A failure properly to understand and apply relevant policy will constitute a failure to have regard to a material consideration, or will amount to having regard to an immaterial consideration (see the judgement of Lord Reed in *Tesco Stores v Dundee City Council* [2012] UKSC 13 [2012] P.T.S.R. 983, at paragraphs 17 to 22).

Material Considerations

If the correct material considerations have been identified, it is also a well-established principle that the weight to be attached to any material consideration and all matters of planning judgement are within the exclusive jurisdiction of the Council determining the planning application. It is for the Council to decide what weight should be given to material considerations, subject to *Wednesbury* irrationality (*Tesco Stores Limited v Secretary of State for Environment* [1995] 1 W.L.R. 739). Reasoning may be irrational in the sense that it "fails to add up" and has given rise to a decision "in which, in other words, there is an error of reasoning which robs the decision of logic" (per Sedley J in *R v. Parliamentary Commission for Administration ex p. Balchin* [1998] 1 P.L.R. 1, 13E-F).

2. The misuse of the planning application process to circumvent the Local Plan process

Following the introduction of section 54A of the Town and Country Planning Act 1990 in 1991 (now found in s.38(6) PCPA 2004) the statutory planning system is plan led. This is acknowledged throughout the NPPF, for example: "196. The planning system is plan-led. Planning law requires that applications for planning permission must be determined in

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accordance with the development plan, unless material considerations indicate otherwise. This Framework is a material consideration in planning decisions.” [Footnote omitted]

The impact assessment for the NPPF noted that “in the Localism Act, the Government has... introduced a bottom up approach that enables local communities to decide the level of housing that is required in their area and share in the benefits of development.”

The impact assessment continues by:

“This is a fundamentally different approach based on councils being best placed to make local decisions, holding the knowledge and expertise of their area. Supporting and building on these changes, the Framework removes a large amount of central prescription, being clear about what is Government policy and giving councils greater discretion in those areas which national policy no longer covers. This will enable them to find innovative solutions and respond to the needs of their different communities. At the same time, local people will be encouraged to reengage in the planning process through improvements in collaborative democracy and new policy vehicles such as neighbourhood plans.” [Underlining added].

A planning application is not the correct process to establish the principle of development for the Site, which is quintessentially a matter for development plan making including Neighbourhood Plans.

As you are aware the Council adopted a Local Plan in December 2015 meaning that the plan is just over two years old. The Applicant took part in the Local Plan process by promoting the site of the current application, referred to as "White Rock 2" in the Planning Inspectorate Report dated 12 October 2015 ("Inspector's Report"), on the Examination into the Torbay Local Plan.

The planning application process is being used to promote its masterplan concept to establish the principle of suitable development. This disregards the Council's clear decision that the Site should be considered when the Local Plan is scheduled to be reviewed in 2020. Whilst the Local Plan Inspector did not rule out any future development on the Site, he did not endorse the Site simply noting development might be made possible if "necessary evidence" came forward (Paragraph 61, Inspector's Report). However, the Applicant either omits or glosses over the Inspector's very important comment that a partial

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review of the Local Plan would be needed to establish the Site as a "Future Growth Area", as the Inspector noted in paragraph 62 of his report:-

"... if the necessary work is undertaken and shows that from an environmental point of view the site is developable, there is nothing to stop the Council from carrying out a partial review of the Plan as soon as it has the necessary evidence. This course of action would enable sensible medium term planning to be undertaken in a timely fashion not least because in 12 months the Council should be much better informed about the likely medium term and long term housing supply position as a consequence of the neighbourhood planning process".

The Site was not included in the Local Plan as a Future Growth Area suitable for Strategic Development. The Applicant attempts to explain this by reason of necessary work not having been done in relation to mitigation and that "if the sensitivities of the site could be overcome it is recognised to be the best opportunity to deliver sustainable development". The work carried out by the Applicant for this Planning Application is not sufficient, nor should this outline application be used to establish a principle of development before more robust work is undertaken. The community should be consulted as they were during the Local Plan process, 2 years ago.

The Applicant builds a case based on its belief that the Site should have been in the Local Plan and that a later Local Plan review is too late, referring to Paragraph 62 of the Inspectors Report which:

"...makes reference to the reasons why the proposed allocation was not taken forward at the time of the Local Plan examination. Leading into this the IR notes that reconsidering the site at a later plan review has "several disadvantages", principally relating to the lack of certainty that it brings"

The Applicant spends considerable time referring to work that was undertaken to amend the emerging Plan via Main Modifications and referencing the Inspectors Reports which provides justification for housing at the Site but cannot reverse the decision not to allocate the site with a flawed application. The Applicant attempts to justify the use of the planning application process instead of a Local Plan review:

... "within the context of this planning application, paragraph 62 [of the Inspector's Report] is considered to be a critical point which must be borne in the wider consideration of the

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application. It notes that, "if the necessary work is undertaken and shows that from an environmental point of the view the site development, there is nothing to stop the Council from carrying out a partial review of the Plan as soon as it has the necessary evidence"

The Applicant then conflates development control and plan making with the following flawed logic:

"Whilst it is recognised that this explicitly notes that the Council should consider a review of the Plan, [that logic] can be equally applied to the Council considering an application, the key point being the availability of the "necessary evidence" to underpin the case for allocation/granting consent rather than the procedural method for making a decision". (Planning, Design and Access Statement, Page 61)

This cannot be correct. The Inspector was clear that a Local Plan review would be the appropriate method to consider new evidence, he would surely have said "or planning application" if he had this in mind. Crucially, the public has a legitimate expectation that 2 years after the Site failed to be allocated for housing in a Local Plan, that Site should not then be granted planning permission for a use not in conformity with the Local Plan as made. The very fact that the Inspectors Report suggests a Local Plan review as the suitable forum to bring the Site into the Local Plan for development, is a material consideration in this Application.

3. Conflict with the Neighbourhood Plans

The Planning Application, even with its most recent revisions has been prematurely made, especially in view of the current examination of the Brixham Peninsular and Paignton Neighbourhood Plans. Despite being submitted to the Council in August 2017 the examination of the Neighbourhood Plans has only commenced very recently. No reasons have been provided by the Council for the extraordinary delay in the appointment of an examiner.

The Site falls within the Brixham Peninsular Neighbourhood Plan area. The proposed Development is in conflict with key strategic policies in this Neighbourhood Plan that identifies preferred employment and housing sites. The grant of the Planning Application will prejudice the delivery of the Brixham Peninsular Neighbourhood Plan.

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In addition the grant of the Planning Application is contrary to important landscape policies in the Brixham Neighbourhood Plan, namely policies E1, E2, E3 and E6. The Site has already been considered by the Brixham Peninsular Neighbourhood Forum and rejected as a result of its impact on the Dart Valley and the South Devon AONB. Paragraph 216 of the NPPF confirms that weight may be given to relevant policies in emerging plans and in particular (as is the case here) to those emerging plans at a more advanced stage.

We comment further on housing supply numbers in the material considerations section of this letter but at this point would highlight the Applicants statement that the application:

"... is not predicated on a specific argument in respect of 5 year housing land supply, opting instead to demonstrate that the Site is a sustainable location for development." (Planning, Design and Access Statement, Page 61)

We take this to mean that the Council should consider the Application on the sustainability of the location and give little or no weight to housing supply matters.

4. Failure to conform with the Development Plan

It is our understanding that the Applicant and the Council accepts that the Planning Application is not in conformity with the Development Plan. The conflict that the Planning Application has with key policies governing the development of the Site, save for those related to Design, Affordable Housing, social change and balanced communities, are noted below:

- Policy SS1 outlines the growth strategy for Torbay. It states that for this period and leading up to 2022 development will be generated by the completion of committed sites and developable sites identified in Neighbourhood Plans. Where Neighbourhood Plans do not identify sufficient sites to provide for the housing requirements of the Local Plan, the Council will use the Local Plan process to allocate more sites for housing. If the Council considers that there will be a shortfall in the 5 year supply of deliverable sites (which they do here), they will bring forward additional sites as set out in Policy SS12. **The proposed development is clearly in breach of this Policy's growth strategy, which quite correctly seeks to direct new development to locations that are far more suitable and sustainable than the application Site.**

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Policy SS1 states inter alia that:

‘In years 6-10 of the Plan (2017/18-2021/22), development will come from completion of committed sites and developable sites identified in Neighbourhood Plans. The pool of developable housing sites is included in Appendix C (Table 26) to this Plan. If Neighbourhood Plans do not identify sufficient sites to provide the housing requirements of the Local Plan, the Council will bring forward sites through site allocations development plan documents. If it appears that a shortfall in 5 year supply of deliverable sites is likely to arise, the Council will bring forward additional sites as indicated in Policy SS12’.

The Site is not a ‘committed site’, nor is it identified in a Neighbourhood Plan, or a site allocations development plan document as a developable site. Accordingly, there is a breach of the growth strategy in Policy SS1. This policy sought to take a strategic approach. Any additional housing sites would be identified through the plan making process with its processes for strategic environmental assessment and public participation in the selection of alternative sites.

- Policy SS3 reflects paragraph 14 of the NPPF. This provides that planning applications that accord with the Local Plan should be approved unless material considerations indicate otherwise. It then goes on to consider opportunistic planning applications (such as this one) which seek to capitalise on the proposition that the final part of Policy SS3 comes into play, because the lack of a 5 year housing land supply means that the “relevant policies” in the Local Plan are out of date. In these circumstances the Council is directed to grant planning permission unless material considerations indicate otherwise. In doing so the Council is obliged to consider the adverse impacts of granting planning permission, where they would significantly and demonstrably outweigh the benefits when assessed against the policies in the NPPF taken as a whole. In addition, the Council must take into account specific policies in the NPPF that indicate planning permission should not be granted.

Notwithstanding that we do not agree with the premise that there is a lack of a 5 year housing land supply, when considering what are “relevant policies”, the

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following considerations apply. The explanatory text in Policy SS3 indicates that it was intended to reflect the wording of paragraph 14 of the NPPF. **This would mean it has at most limited application because Policies C1 (countryside and the rural economy), SC4 (sustainable food production), SS8 (natural environment), SS9 (green infrastructure) and NC1 (biodiversity and geodiversity) will continue to be up to date and highly relevant to this Planning Application.**

This has been clarified by the Supreme Court in Hopkins Homes Ltd v Secretary of State for Communities and Local Government [2017] UKSC 37 which confirmed that “relevant policies” deemed to be out of date (where there was a lack of 5 year housing land supply) were housing supply policies only, not policies with a wider remit of relevance to applications for housing. Additionally, even where the ‘tilted balance’ in paragraph 14 of the NPPF applies because policies are deemed ‘out of date’ by the NPPF, **that does not require them to be given any less weight, which remains a matter of planning balance** (Hopkins Homes at [55]-[61] per Lord Carnwath). Even if some policies were to be deemed ‘out of date’ for the purpose of Policy SS3 in the absence of a 5 year supply, Policy SS13 would remain ‘up-to-date’ for the purpose of the Local Plan, because that latter policy directs the approach to be taken in a case where there is a shortfall in 5 year housing land supply.

- Policy SS7 Infrastructure states inter alia that ‘Development that does not meet critical infrastructure requirements such as those relating to flooding and highway safety or ecological/environmental improvements to meet Habitats Regulations requirements will not be permitted.’ **This development gives rise to significant shortcomings in relation to ecology. We outline the relevant policies below and include a more detailed analysis at Section 9 and in the enclosed report prepared by Aspect Ecology. We also share concerns raised by other objectors that the Development will give rise to unacceptable traffic and transport impacts, which in turn leads to a deterioration of air quality.**
- Policy SS8: Natural Environment states inter alia:

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"All development...should positively contribute to the conservation and enhancement of the natural assets and setting of the Bay. The Council will safeguard, conserve and enhance the valued qualities, features and attributes of sites protected under European legislation and other important natural landscape, including tranquillity, dark night skies, bathing waters, biodiversity and geodiversity within the Bay, commensurate with their importance. This will ensure that:

Sites, species and habitats protected under European, or equivalent, legislation will be protected from development. Development around the edge of the built-up area will be required to protect and manage wildlife and habitats, including corridors between them, in accordance with Policy NC1. Particular attention must be paid to Greater Horseshoe Bat flight paths, and Cirl Buntings." As stated above, we do not consider the Application to have provided a robust ecological submission.

- Policy SS9 Green Infrastructure provides: "A new Countryside Access and Enhancement Scheme will be delivered at White Rock, Paignton", as designated on the Policies Map. The new housing development, pub and school on the Site are inconsistent with this policy.
- Policy SS12 Housing states: "In accordance with Policy SS1, provision will be made for 8,900 new homes over the Plan period or beyond, so long as these can be provided without harm to the economy or environment, including sites protected under European legislation. Housing provision will focus upon a sustainable pattern of distribution throughout the Bay, with an emphasis upon the regeneration of brownfield sites and town centre sites, and development of urban sites...Major new housing schemes will be brought forward via partnership between landowners, developers, the community and Council, utilising Neighbourhood Plans, in accordance with the broad numbers set out in Table 3, Policies SDT1 'Torquay', SDP1 'Paignton' and SDB1 'Brixham'."

It has not been demonstrated that this Development will not harm the environment (including European protected sites). This is not a brownfield, urban or town centre site, and is not identified in either the Local Plan or in a Neighbourhood Plan. Accordingly, there is conflict with Policy SS12.

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- Policy SS13 Five year housing land supply indicates that where there is greater than a 5 year housing land supply, housing will only be permitted where 'consistent with other policies in the Local Plan'. Where there is less than 5 years' housing land supply, it states:

"Where the supply of specific deliverable sites (plus windfall allowance) falls below this figure, or Neighbourhood Plans do not identify sufficient sites to meet Local Plan requirements in years 6-10 of the housing trajectory, the Council will either:

1. Bring forward additional housing land from later stages of the Plan, working closely with land owners, developers and Neighbourhood Forums; or
2. Identify additional sites through new site allocation development plan documents (DPD); or
3. Consider favourably applications for new housing, consistent with Policy SS2, H1 and other Policies of this Plan."

The Council has not identified this Site in a site allocation DPD. It is not being brought forward from later stages in the Plan, and this development is not 'consistent with...other Policies of this Plan' among other reasons, because it is located in designated countryside and causes environmental harm. Accordingly, it is inconsistent with Policy SS13.

Policy M3: Preserving and safeguarding of limestone resources states that "[a]ny proposal on or in the vicinity of an important mineral resource, including a Mineral Safeguarding Area, should demonstrate that it will not cause unnecessary sterilisation or prejudice the future extraction of important minerals...on these sites".

The Site lies in a Mineral Safeguarding Area for limestone. The built development proposed will sterilise the extraction of limestone from underneath such development. In turn this means that the Development may only be justified in accordance with this policy on the basis that such sterilisation is necessary. **The Applicant has not proven that the sterilisation is necessary on this Site, and certainly not to the extent contemplated.**

Policy C1 Countryside and the rural economy states:

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"In the open countryside, away from existing settlements, and in rural areas surrounding the three towns of Torbay, development will be resisted where this would lead to the loss of open countryside or creation of urban sprawl...Major new development should focus on Future Growth Areas in the Strategic Delivery Areas set out in the Key Diagram, consistent with the ambition and policies of the Local Plan. Otherwise, development outside the main urban areas and Strategic Delivery Areas will normally only be permitted within the established boundaries of villages and hamlets..."

This proposal is in clear breach of this policy. The Site lies in open countryside adjacent to Paignton, such that the Development would create urban sprawl. Furthermore, the policy states that:

"the Council will also have regard to the need to protect, conserve or enhance the distinctive landscape characteristics and visual quality of a particular location, as identified in the Torbay Landscape Character Assessment, the suitability of development and the capacity of the countryside to accommodate change. Development in the countryside should not have adverse effect on the integrity of the South Hams SAC or other important habitats."

It is clear that the Development will fundamentally and detrimentally harm the distinctive landscape characteristics and visual quality of its location and surroundings. An adverse effect on the South Hams SAC cannot be ruled out, whilst it would result in an overall loss of habitat by encroaching onto farmland.

Policy SC4 Sustainable food production states, *inter alia*:

"Development which would result in the detriment to or loss of the best and most versatile agricultural land (Grades 1, 2, or 3a) will only be permitted where there is an overriding need for the development and it is demonstrated by the applicant that it cannot be accommodated on lower grade land. Where development is proposed and there is a choice between sites of different grades, development should take place on land of the lowest grade feasible, subject to other Policies in the Plan. Residential development schemes of 30 or more units should include provision for sustainable food production, including allotments, proportionate to the scale of the development."

There is a clear conflict with this policy as the Development will result in the loss of approximately 31ha of Best and Most Versatile ('BMV') land. It has not been

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demonstrated that there are no alternative sites that could, individually or in combination, accommodate the quantum of housing, school and pub proposed for this Site. Furthermore, there is no provision for sustainable food production proportionate to the scale of the development.

Policy SC4 is fully consistent with, and reinforced by, paragraph 112 of the NPPF which states:

‘Local planning authorities should take into account the economic and other benefits of the best and most versatile agricultural land. Where significant development of agricultural land is demonstrated to be necessary, local planning authorities should seek to use areas of poorer quality land in preference to that of a higher quality.’

The area of land-take here is clearly significant, and is admitted to be such by the Applicant’s Environmental Statement. This, oddly, recognises the built development only as ‘moderate adverse’ in relation to potential for food production, and then seeks to set that off against the fact that there is some ‘landscape and amenity land’, so as to conclude with an understated overall impact of as ‘minor adverse’. In reality, the practical impact is to indefinitely sterilise the land for agricultural use for multiple generations, as well as physically affecting the soil by compaction, capping etc. As such, this development is inconsistent with the NPPF unless ‘demonstrated to be necessary’, which the Applicant has failed to do.

The loss of agricultural land classified by the NPPF as BMV is justified by the Applicant by reference to a claim that the Site has been recognised by the Council "largely through the Local Plan process... that this site represents the best available option for future major sustainable development". This claim is simply untrue as the Site was rejected for inclusion in the Local Plan.

Permanent loss of farmland should be given substantial weight. Soil is a vital agricultural resource. There is a cumulative effect on the long-term future of this resource from every development on BMV soil. It is necessary for the Council to quantify the cumulative losses of BMV soil in Torbay’s area, in conjunction with other plans and projects, and it would be a grave error to fail to quantify and have regard to this cumulative effect. All the Applicant’s Environmental Statement purported to do was to consider 13 permitted projects described as ‘future developments’, and then state (para 9.10.3) that only two of them were ‘deemed

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to have a potential cumulative effect'. No information was provided as to the pattern of losses of BMV land, the remaining stock, the extent of loss of soils from these developments, or the losses from future planned but not-yet-permitted projects.

Not only will the built development take BMV land, but the proposed off-site ecological compensation proposals will also result in the permanent loss of further arable land, and consideration needs to be given to the sustainability of these cumulative losses of arable land.

Policy NC1 Biodiversity and geodiversity states:

"Development should not result in the loss or deterioration of irreplaceable habitats or wildlife corridors. Where development in sensitive locations cannot be located elsewhere, the biodiversity and geodiversity of areas will be conserved and enhanced through planning conditions or obligations.

...

Internationally important sites and species will be protected. Avoidance of likely significant effects should be the first option. Development likely to affect an international site will be subject to assessment under the Habitat Regulations and will not be permitted unless adverse effects can be fully mitigated.

In addition, development likely to have a significant effect on the integrity of the South Hams SAC will be required to provide biodiversity conservation measures that contribute to the overall enhancement of Greater Horseshoe Bat habitats.

Development around the edge of the built-up area that is within the Berry Head SAC Sustainance Zone or likely to affect strategic flyways of Greater Horseshoe Bats will as appropriate be required to protect existing hedgerows (including remnant hedges and veteran trees) that surveys show are being used as bat flyways. Such development will also enhance the existing flyways by providing features (such as linear corridors of hedgerows) to maintain and improve the ecological coherence of the landscape, necessary to maintain the Torbay population of Greater Horseshoe Bats in 'favourable conservation status'. This will include maintaining lighting levels at 0.5 lux.

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Developer contributions will be sought from development within the Brixham Peninsula (Policy SDB1) towards measures needed to manage increased recreational pressure on the South Hams SAC resulting from increased housing numbers or visitor pressure.

Nationally important sites and species

Development on or likely to have an adverse effect on nationally important sites such as Sites of Special Scientific Interest will not normally be permitted. Such proposals will only be permitted in exceptional circumstances where the following can be met:

- (i) The benefits from development outweigh the impacts on the site and broader nature conservation interests; and
- (ii) Nature conservation impacts can be fully mitigated/compensated.

Consideration should be had to the cumulative impacts of developments. Development likely to cause harm to such sites or species that cannot be mitigated as above will therefore only be permitted where there is an overriding public interest considered to outweigh the impact(s) on nature conservation, where a thorough assessment of impacts (both individually and in combination with other developments) has been undertaken, and where consideration has been given to reasonable alternative sites for development. Development that risks harm to Cirl Bunting habitats and territories will only be permitted where the benefits of development clearly outweigh the impacts, including in combination effects, and the impacts can be mitigated in full. Developers will be expected to provide mitigation on site, where practicable.

Locally important sites and species

Development in locally important sites will only be permitted where there are no reasonable alternative sites, where the reasons for development clearly outweigh damage to nature conservation interests, where every effort has been made to minimise any such damage, and where appropriate mitigation and compensation measures can be put in place".

This Development conflicts with policy NC1 among other reasons because it will result in significant residual harm to Cirl buntings, a nationally important priority species designated as being 'of principal importance for the purpose of conserving

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biodiversity' under s.41 of the Natural Environment and Rural Communities Act 2006 such that the Development cannot be 'mitigated in full', and because it will harm Greater Horseshoe Bats and other bat species in the absence of compensatory measures. Furthermore, it has not been demonstrated that there are no alternative sites that could, individually or cumulatively, accommodate the 400 homes, pub, school and associated development. Conservation impacts and the implications of the Habitats Directive are addressed in detail below.

5. Lack of Material Considerations justifying departure from the development plan

The Applicant asserted in its covering letter accompanying the application:

"Whilst it is recognised that the application is a departure from the Local Plan, the Planning Justification of Case set out in the accompanying Planning, Design and Access Statement demonstrates a robust case to allow the Council to grant planning permission for what would represent a sustainable and positive addition to the Paignton area to meet the needs of current and future generations and support the aims and aspirations for growth set out by the Council".

We disagree that the Planning Justification of Case demonstrates any such robust case and have set out our reasons in this letter.

As noted in the Planning Justification, development at the same site has been proposed and refused consent by the Secretary of State in 1997 following a call-in. The Applicant tries to differentiate its proposal by pointing to the larger site and different boundary in the refused application, but this does not evade the basic point that the Applicant is applying to develop land within the same Site which has not been included in the Local Plan.

Local Finance

The Applicant states at page 66 of its Design and Access Statement that:

"The decision to grant permission would also secure the delivery of new housing which would in turn provide wider benefits through the new homes bonus and council tax receipts,

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thereby providing a further income stream to deliver essential Council Services and Infrastructure".

Income generation should not be a heavily weighted material consideration here. It applies to any new housing irrespective of location. Here, we are dealing with development on an unallocated site in an environmentally sensitive location.

6. Housing Supply

The proposed large-scale housing development at this location is contrary to the Development Plan. The proposal can only be justified on the grounds of a need for housing supply at this location. Such a case would need to demonstrate that there was not a five-year housing land supply ('5YHLS'), that the housing that is the subject of this application would be completed and delivered for occupation within the next 5 years, and importantly that building on this Site was necessary rather than on alternative sites allocated through the plan-making process.

The Applicants have stated in their application that it '... is not predicated on a specific argument in respect of 5 year housing land supply, opting instead to demonstrate that the Site is a sustainable location for development.' (Planning Justification, p.61).

We take this to mean that the Council should consider the Application on the sustainability of the location and is not being invited to give weight to housing supply matters or to apply a 'tilted balance'. **We note that no cogent case has been made to demonstrate that there are no reasonable alternative sites for housing, or that the proposed 400 units of housing would be delivered within 5 years.**

The Applicant has, however, asserted at page 66 of its Design and Access Statement (contradicting its statement that the application need not be considered with regard to housing supply issues), that 'granting planning permission would assist in securing the Council's housing land supply position'. We also note that submissions are currently being made in support of the Application to the effect that the need to provide a housing land supply justifies this scheme. We do therefore wish to make some observations about housing land supply.

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The Council's Draft Five Year Land Supply Statement ("Supply Statement")

The Council produced its Supply Statement in December 2017. That Supply Statement was challenged and a technical consultation undertaken which closed on 5th March 2018. As of the date of this letter the current status of that consultation, as noted on the Council's website, is that "responses are currently being considered and an update will be placed on this web page in due course". The Supply Statement, which is an officer level assessment of Torbay's five year housing supply position for 2017/18 – 2021/22, after applying a 5% buffer and providing for previous undersupply, settled on a five year supply calculation of 3.96. We consider that any planning decision based on that 3.96 figure will be flawed and open to challenge.

We have considered the submission of all three Neighbourhood Forums on the Supply Statement, dated 5 March 2018. Based on the submissions of the Forums relating to evidence of job losses, it is reasonable to consider that the requirement for new houses has been overstated and that there is an "imbalance between job growth and housing growth". We support and adopt the Neighbourhood Forums submission on this point. The remainder of this section of our representation on the Planning Application concerns the Council's failure to consider deliverable sites because they are put forward in the Neighbourhood Plans. We consider this to be a legally flawed interpretation of deliverable and that the Council has not properly considered sites which it should have.

The Supply Statement on its third page, under the heading 'Discounted Sites' declares:

"Those sites which the Council did not include in the five year supply spreadsheet are neighbourhood plan sites as, although submitted and consulted on, are yet to be examined; some masterplan sites; sites which were under construction but have less than 6 units left to be built on site; and 'old' sites with an implemented permission which have seen no recent activity".

It is unlawful to simply disregard masterplan sites, sites providing less than 6 homes, sites with long-standing permissions where work has not started, and neighbourhood plan sites. An assessment must be made, in relation to each such site, as to its potential to deliver within 5 years having regard to the criteria in Footnote 11 of the NPPF (i.e. suitability, availability, practical achievability and viability). In the case of *St Modwen Developments v SSCLG* [2017] EWCA Civ 1643, the Court of Appeal clearly established that the test for

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deliverability is whether there is a realistic prospect (as opposed to a fanciful prospect) of delivery within 5 years. A site does not have to be allocated in a current development plan to be included. It does not have to be expected to be actually delivered; the question is deliverability, not second-guessing whether the owners will bring it forward. Lord Justice Lindblom noted:

'[12] [The PPG states] 'planning permission or allocation in a development plan is not a prerequisite for a site being deliverable in terms of the five-year supply'...

[36] [...There is an] essential distinction between the concept of deliverability, in the sense in which it is used in the policy, and the concept of an "expected rate of delivery". These two concepts are not synonymous, or incompatible. Deliverability is not the same thing as delivery. The fact that a particular site is capable of being delivered within five years does not mean that it necessarily will be. For various financial and commercial reasons, the landowner or housebuilder may choose to hold the site back. Local planning authorities do not control the housing market. NPPF policy recognises that.

[37] Where the policies in the NPPF paras 47 and 49 are concerned with the composition of the five-year supply of housing land, they are consistently worded to refer to a supply of housing sites that can be regarded as "deliverable", not sites that are regarded as certain to be delivered... By contrast, the policy for the "housing trajectory" in the fourth bullet point of para.47 is not expressed in terms either of "deliverable" or of "developable" sites as such, but in terms of illustrating "the expected rate of housing delivery".

[39] ...Sites may be included in the five-year supply if the likelihood of housing being delivered on them within the five-year period is no greater than a "realistic prospect", this is the third element of the definition in fn.11. This does not mean that for a site properly to be regarded as "deliverable" it must necessarily be certain or probable that housing will in fact be delivered upon it, or delivered to the fullest extent possible, within five years. As Lord Gill said at [78] of his judgment in Suffolk Coastal DC, when referring to the policies in the NPPF para.47, the insistence on the provision of "deliverable" sites sufficient to provide five years' worth of housing reflects the futility of local planning authorities relying on sites with "no realistic prospect of being developed within the five-year period".'

Discounting sites which have long-standing permissions that have not been built out, for that reason alone and without assessing their suitability, availability, achievability

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and viability is not only unlawful but would be perverse. It would enable landowners to undermine the plan-making process by holding back construction on the suitable permitted and allocated sites they control, in order to promote otherwise unsuitable sites in reliance on the lack of housebuilding in those more suitable locations. This is what Lindblom LJ was alluding to in his paragraph [36] above. Moreover, disregarding neighbourhood plan sites is also perverse and undermines the plan-making process, because it artificially lowers the 5YHLS figure, so as to enable developers to pre-empt emerging neighbourhood plans by applying for permission on sites rejected for inclusion in the neighbourhood plans.

The Neighbourhood Forums consider that the sites put forward are available now, offer suitable location for development now, have a realistic prospect of delivery and are viable. There is no evidence in the Supply Statement that the Council has turned its consideration to these points. The Council's failure to grapple with issues correctly is evidenced by Appendix A to the Supply Statement which contains the list of sites considered by the Council and which appears to exclude all sites which do not have planning permission already granted. No "significant constraints" are pointed to by the Council as reasons for not considering Neighbourhood Plan sites. Even if the draft Neighbourhood Plans did not exist, the sites they allocate would. In its reference to Discounted Sites the Supply Statement also fails to set out why 'old' sites are not accounted for and what 'old' means.

There appears to have been a failure on the part of the Council to apply the correct test to sites, or no evidence that those tests have been applied at all, resulting in an underestimate of deliverable sites as defined in the NPPG. A planning decision contrary to the Development Plan justified by reference to the 3.96 five year supply housing figure would clearly be open to challenge.

Additional Sites

As there has been an underestimate of deliverable sites, the Council's calculation of 3.96 years of supply cannot be considered to be robust. Other sites must be added. The key questions for the Council must be:

1. What other sites are deliverable in terms of the 5 year supply (see LJ Lindblom above)?

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2. How many units can other deliverable sites provide for the 5 year supply?

Sites put forward in the draft Neighbourhood Plans can be considered as deliverable. Deliverability is not the reason given by the Council for not considering these sites. If, as the Council has done, we exclude planning applications at Bishops Court, the Pavilion and Yalberton Road from the Neighbourhood Forums housing supply figure, the total housing supply is 3138 over the 5 year period. This results in a 5 years supply of 5.56 (based on the Council's target of 564 units per year).

If, as well as excluding the three sites above, we also accept the Council's windfall figure of 100 per year resulting in a total of 2988 units supply, then the 5 years supply remains above 5 at 5.29 (2988/564). This is equivalent to assuming 10% of the Neighbourhood Plan sites either cannot be delivered or will not deliver the full 3290 units that the Neighbourhood Forums consider to be possible and is a reasonable sense check.

The Council must carry out the necessary work to establish whether there is a 5YHLS in order to ascertain the true position. We believe that this work will demonstrate that there is no, or no sufficient, shortfall justifying departure from the Development Plan, and that the harms from the scheme would clearly and demonstrably outweigh the benefits when the extent of housing land supply has been correctly calculated.

Whilst each development requires to be assessed on its own merits, the 5YHLS position is subject to constant change. The Council should be very slow to give weight to a temporary shortfall in housing land supply, when determining an application that would cause permanent harm to interests of acknowledged importance, such as this noted valued landscape. We note that that in similar cases the Secretary of State has called in such applications in order to assess whether permission could be justified given the permanent harm to areas of acknowledged importance should the Development go ahead. For example see the Secretary of State's decision to reject plans for up to 225 homes and a 60-bed care in Hampshire upheld in *Hallam Land Management Ltd v Secretary of State for Communities and Local Government & Anor*, [2017] EWHC 2865 (Admin).

The Secretary of State has recently refused plans for 212 homes on a former factory site within the Buckinghamshire green belt, despite the Council being unable demonstrate a five-year housing land supply. The application, for the former Molins factory site at Saunderton, was appealed after Wycombe District Council failed to issue a decision within prescribed

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timescales. Following a public inquiry, it was recovered by the Secretary of State in October 2016. By a decision letter dated September 2017, the Secretary of State agreed with a planning inspector that the application should be refused. Amongst the reasons given he found that there would be 'a significant amount of harm to the landscape and scenic beauty of the AONB and that this would not be outweighed by the benefits of the scheme'.

We believe that there are enough deliverable sites in Torbay that have not been considered by the Supply Statement and as a result, Torbay does have a 5 year supply of housing. Accordingly, Development Plan policies which relate to housing cannot be considered out of date. There can be no "tilted balance" approach to decision making in relation to the Planning Application. The Planning Application must be determined in line with the Development Plan and lack of housing cannot be a material consideration.

7. Landscape and Visual Impact

The Applicant has stated that the Inspectors Report for the adopted Local Plan was its "starting point" in considering: 1) The baseline position for considering the Site's development potential; and 2) then to understand whether the potential impacts from development can be mitigated. This is a flawed approach. Even if the first task has been accomplished accurately, the Planning Application does not show that impacts can be mitigated adequately.

As noted by the Council's Arboricultural Officer on 21 March 2018:

"The Tree Protection Plan contained within the original version of the Tree report dated Nov 2018 (Ref 0377-A-TSE) has not been included in the amended version revised 01-18. The absence of this prevents any commentary on the new proposed layout realigned as part of the further LVIA work" (Email from Lee Marshall to Angharad Williams dated 21 March 2018 re the Application).

As of the date of this letter, no such additional plan had been uploaded onto the Council's planning website.

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The Landscape and Visual Impact Assessment addendum places a great deal of reliance on landscape mitigation, notably tree and woodland planting along the western edge of the site, and off site features for screening.

The Green Infrastructure Plan (Rev A) shows a narrow 8-10m wide proposed woodland belt along parts of the western edge of the development. This width is insufficient to ensure the level of screening on which the application so clearly relies. It also assumes that in five years the advance planting will have grown sufficiently to screen much of the proposed development. This is highly improbable, without planting a high percentage of trees planted as mature specimens and to a much greater width than currently proposed.

The Council's Arboricultural Officer also considers the planting within the residential areas to be unsuitable "to achieve its desired aims in both visual and temporal terms".

This reliance on screen planting is required because of the inappropriateness of the site for a development on this scale and of this nature. The falling topography (the ground falls over 16m across the site) and its south and west facing aspect allows open views to and from the west, including the South Devon AONB. This is clearly illustrated in Viewpoints 2-9 and 15-19 of the LVIA, with the proposed development shown on the skyline and spilling over into the rural Dart estuary landscape.

Torbay's Landscape Character Assessment of May 2010 considers the sensitivity of the rolling farmland of the proposed development site to be 'High': *"Much of this land is open to views from the AONB to the west and south. The existing urban edge is well integrated and any new development would extend the edge into this open landscape. There is therefore only limited potential to accommodate change without substantial wider impact. Small scale development within a more discrete area north of Galmpton could potentially be accommodated if sensitively sited, although the relationship to the Conservation Area and AONB would need to be carefully considered. Mitigation of any proposed development changes should be achieved through a combination of careful siting with strong screen planting and the reinforcement of existing field hedgerow boundaries would be necessary."*

The management strategy is to enhance the landscape. *"The strategy should focus on the enhancement of the existing hedgerow network by planting of new hedgerow trees and copses to help to integrate the urban edge further in views from the AONB to the west. Reinstatement of field boundaries in the northern part should be encouraged and these*

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would supplement planned strategic planting around the proposed extension to the employment site at White Rock." See Torbay Landscape Character Assessment of May 2010, Landscape Character Type 1, Area O.

The LVIA undervalues the sensitivity of the landscape and visual receptors to the west of the site, as well as the magnitude of change. The resulting assessment of landscape and visual effects is therefore also both undervalued and misleading.

Policy DE1 of the Torbay Local Plan 2012-30 requires that "Major development should...protect important local and longer distance views and impact on the skyline....having regard to the location and prominence of the site". The LVIA clearly shows that the scheme does not meet the stipulations of Policy DE1. Again, this is clearly illustrated in viewpoints 2-9 and 15-19 of the LVIA, with the proposed development shown on the skyline and spilling over into the rural Dart estuary and South Devon AONB landscape.

As the Council's Arboricultural Officer notes:

"Mature hedge rows may be subject to varied management as per countryside management schemes or farming operational reasons. I see no detailed description of the composition, health, disease resilience or structure of Nords Wood that would allow greater understanding, and possibly confidence of its suitability to screen the development. I understand it to be outside of the site boundary and hence possibly its control." (Email from Lee Marshall to Angharad Williams dated 21 March 2018 re the Application).

We question whether or not the Applicant has or can have, in reasonable time, the necessary control of land to give the Council and our client's confidence that the Development will be suitably screened.

Your own officer, at this late stage has not been able to carry out a detailed review of proposed tree planting and is unable to confidently state that the proposed screening will be suitable, as a result of the lack of information provided by the applicant. If any review has taken place, is not available for public consideration.

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8. Effect of development on the AONB

The Application Site lies about 600m from the South Devon AONB, within the Countryside Area designated by Policy C1 of the Torbay Local Plan. Policy C1 provides that development 'will be resisted where this would lead to the loss of open countryside or creation of urban sprawl....to the detriment of their special rural character and setting'. Policy SS9 of the Local Plan states that a countryside access and enhancement scheme will be delivered at this site.

The South Devon AONB Partnership has objected to this application as 'a marked change that harms AONB special qualities' and because it appears as 'dense urban sprawl' from a range of viewpoints within the AONB. Their email of 27 March considers that the changes to the scheme put forward by the Applicant are not sufficient to reverse their initial findings that they maintain their strong objection to the Development. The Partnership has been set up jointly by all responsible local authorities including Torbay Council. Its remit includes production of statutory AONB management plans under s.89(2) of the Countryside and Rights of Way Act 2000, on behalf of the Council. By virtue of this provision, the South Devon AONB Management Plan represents the Council's 'policy for the management of the area of outstanding natural beauty and for the carrying out of their functions in relation to it'

The Council must when exercising functions in relation to or affecting land in the AONB, have regard to the purpose of conserving and enhancing the natural beauty of the AONB (Countryside and Rights of Way Act 2000, s.85). This application engages that duty as it affects views of and from the AONB. Harm is identified to the rural setting of the AONB, as the site forms part of a buffer between urban areas of Torbay to the north and the Dart Estuary within the AONB to the south.

The AONB Management Plan identifies that 'iconic wide unspoilt expansive panoramic views' and 'high tranquillity, natural nightscapes, distinctive natural soundscapes and visible movement' are special qualities characterising the area. The AONB Unit has drawn attention to Policy SS8 of the Torbay Local Plan which states that 'it will be particularly important to ensure that development outside the AONB does not have an unacceptable impact on the special landscape qualities of an adjoining or nearby AONB or other valued landscapes such as country parks'.

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Policy SS8 requires regard to be had to 'other relevant management plans, to help ensure the objectives for their conservation are met'. Policy Lan/P1 of the AONB Management Plan requires preservation and enhancement of special qualities and distinctive character of the AONB. Policy Lan/P7 notes that '[t]he deeply rural character of much of the land adjoining the AONB boundary forms an essential setting for the AONB and care will be taken to maintain its quality and character' and Policy Lan/P5 states that the character of open views out of the AONB will be protected.

There will be a clear interference with views from the AONB and across the Site. This harm to the landscape character and unobstructed open views constitutes a conflict with national policy on protecting valued landscapes (NPPF paragraph 109), scenic beauty in AONBs (paragraph 115) and areas of tranquillity (paragraph 123). South Hams District Council objected on the same basis.

AONB Management Plan Policy Plan/P2 states, 'Development management decisions will give great weight to the purpose of conserving and enhancing the natural beauty of the South Devon AONB; and support development that is appropriate and proportionate to its setting within or adjacent to the South Devon AONB'.

Our clients object to the loss of views across the site, particularly those looking westwards and into the AONB as well, both from within the Site and from the directions of Galmpton and Brixham Road.

In 1997, the then Secretary of State exercised his section 77 call-in power to determine and refuse permission for a business park application at this location (no.1995/1304), attaching 'substantial weight to the need to preserve the high quality of the Dart Valley AONB as one of the finest riverine landscapes in the country', finding that the substantial areas of woodland planting proposed as 'mitigation' would itself have 'a significantly adverse and wholly unacceptable visual impact on the AONB'. **Whilst the proposed Development is different, the landscape and essential issues of the Planning Application are the same. Both schemes must rely on inappropriate planting as a screen for the built development which would be visually harmful.** By way of illustration, we refer Members to the photomontage contained in the photographs appended to the Applicant's LVIA for 'viewpoint 14', where we see that the tree and hedge screening would, if it worked as designed, itself appear as an extremely ugly high wall of vegetation. The principle of

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consistency of decision-making strongly supports the view that the Planning Application should also be refused for the same reasons.

The application documents do not give due regard to the impact of this development on the AONB and its setting. The LVIA does not apply due value to the sensitivity of the AONB and its setting. Section 43 of the South Devon AONB Planning Guidance states: *"great weight should be given to conserving landscape quality and scenic beauty (under paragraph 115 of the NPPF) regardless of whether the development is located within the AONB, or on land outside but so as to affect (i.e. in 'the setting' of) the AONB."*

The west facing aspect of the site is a significant and highly sensitive part of the AONB setting. Section 129 vii of the AONB Planning Guidance indicates that paragraph 115 of the NPPF applies. Even if the proposed scheme were considered acceptable in the current context, the Landscape and Visual Impact Assessment addendum places a great deal of reliance on off-site features for screening. As the Council's Arboricultural Officer notes:

"Mature hedge rows may be subject to varied management as per countryside management schemes or farming operational reasons. I see no detailed description of the composition, health, disease resilience or structure of Nords Wood that would allow greater understanding, and possibly confidence of its suitability to screen the development. I understand it to be outside of the site boundary and hence possibly its control."

We question whether or not the Applicant has or can have, in reasonable time, the necessary control of land to give the Council and our client's confidence that the development will be suitably screened by the off-site features relied upon.

9. Ecology (Impact on Habitats and Species)

Paragraph 117 of the NPPF expects planning to promote the recovery of priority species. Paragraph 109 of the NPPF expects net gains in biodiversity where possible. Paragraph 118 expects biodiversity to be protected or enhanced and states that 'if significant harm resulting from a development cannot be avoided (through locating on an alternative site with less harmful impacts), adequately mitigated, or, as a last resort, compensated for, then planning permission should be refused.' **Accordingly, it is apparent that the proposal amounts to a breach of important national policies.**

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Why this application has been misdescribed as providing 'mitigation' rather than compensatory measures, and why that matters

Conceptually, it is vital for Members to understand that what is being offered by the Applicant through the establishment of new habitat (e.g. hedges, pasture, certain kinds of grassland) to make up for land taken by built development, is a textbook kind of 'compensation', and not 'mitigation' as it has been described inaccurately.

A direct harm caused by the development is loss of (through built development), and disturbance to (through movement, noise, lighting etc) particular areas of habitat. This is being compensated for by the establishment of substitute habitat nearby. This is directly relevant to NPPF paragraph 118 and Local Plan Policy NC1, because there is a hierarchy whereby a site rendered ecologically acceptable only by successful compensatory measures, is permissible only if its effects can neither be avoided (by locating on a different site altogether) nor adequately mitigated (by for instance encroaching less on the critical habitats or otherwise being designed so as to reduce the harm caused in the first place – which is difficult where the harmful effect is land-take rather than say emission of pollutants).

As Policy NC1 puts it, 'Avoidance of likely significant effects should be the first option'. **In our case, the Applicant has not demonstrated that there are no alternative sites in the Council's area that could, alone or in combination, accommodate some or all of the new homes, pub and school so as to avoid or adequately mitigate the effects on the Site.**

This is directly relevant to the question of protected bird and bat species, which are considered below.

Birds, including Cirl Buntings

Wild birds are protected by Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (Wild Birds Directive). By article 2, the UK must take the requisite measures to maintain the population of the species at a level corresponding to ecological, scientific and cultural requirements and, by article 3 it must 'take the requisite measures to preserve, maintain or re-establish a sufficient diversity and area of habitats'. Article 5 requires the UK to establish a general system of protection that effectively prevents the intentional or reckless killing or disturbance of such wild birds

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(by analogy: cases C-103/00, *Commission v Greece* [2002] ECR I-01147 at [35]-[40], C-183/05 *Commission v Ireland* at [30] and [36]), C-383/09, *Commission v France* at [20]-[21]). Adverting to disturbance of the species, with a risk of significant population loss, and going ahead anyway is not permissible. Regulations 9(1) and 10(8) of The Conservation of Habitats and Species Regulations 2017 transpose these requirements into domestic law. They state respectively that a competent authority such as the Council must have regard to the requirements of the Directive and, 'So far as lies within its powers, a competent authority in exercising any function in or in relation to the United Kingdom must use all reasonable endeavours to avoid any pollution or deterioration of habitats of wild birds'.

Cirl Buntings

The application site and its so-called 'off-site mitigation land' ('OSML') (which straddles the district boundary with South Hams District Council's area) support a nationally significant population of the Red Listed bird species the Cirl Bunting (*Emberiza cirlus*). This is listed as a species of principal importance for conservation under section 41 of the Natural Environment and Rural Communities Act 2006, and whose range is confined to a pocket of South-West England.

The Applicant's survey work found a minimum of 4 pairs' breeding territories on the proposed housing site, and a further 3 pairs observed adjacent to it. By way of context, the population of this species in the UK was counted as 1078 pairs in 2016, and where a site supports 1% or more of the national population of a native bird species, that site will qualify for SSSI selection.

There has been no proper study of alternative sites in accordance with the mitigation hierarchy, contrary to the abovementioned local and national policies, and to the Council's 'Wildlife and Development Guidance Note: Cirl Bunting' (October 2017) at page 8.

The applicant's proposal is to establish new replacement habitat for these Cirl Buntings and other birds on OSML.

However, RSPB's own national survey work indicates that this OSML itself already supports a minimum of 6 breeding territories of Cirl Buntings. Thus, the Development would result in a net loss of 6 pairs without additional measures. The applicants' environmental statement itself accepts that 'at least four' territories are present and breeding on the OSML (p.76,

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para 5.5.42) but contends that improvements would be made for those pairs. As the birds are territorial, there would nonetheless be a loss of habitat for the pairs displaced from the application site, which would have to compete with the existing population on the OSML in order to establish themselves in those birds' territories. The RSPB therefore objected to this Application because it would entail a loss of Cirl Bunting habitat. A further concern expressed by RSPB is that the current application site was intended itself to be used as 'off site mitigation' (replacement habitat) for fauna displaced from a 39 hectare site known as 'White Rock' immediately to the north, which has extant planning permission for 350 homes, 36,800sqm employment floorspace and 392sqm of student accommodation (P/2011/0197, secured by a planning obligation). The RSPB considered there to be insufficient evidence to demonstrate that this cumulative effect has been compensated for.

Whilst the latest letter appears to indicate that RSPB are now satisfied by the Applicant's statement in the Ecological Addendum of February 2018, no reasoning has been provided for this change of view which is, on the face of it, illogical. No further information has been provided with this Application as to the extent of knock-on losses resulting from the White Rock development (compared to surveys before its approval and construction), which would require to be added to those arising from development of this site. The only new information is (Addendum, p.10) that 'a minimum of 10 pairs of breeding Cirl Bunting in the Farm Management Plan area should be the target', with monitoring for up to 10 years post-construction.

There is no evidence demonstrating that the proposed compensatory habitat would provide for all 10 breeding pairs (leaving aside the question whether any additional breeding pairs were lost because of redevelopment of White Rock or other nearby sites). In that regard, we note that the Council's own 'Wildlife and Development Guidance Note: Cirl Bunting' (October 2017) states that there should ordinarily be at least 2.5ha of suitable habitat per breeding territory lost or compromised, made up of at least 1.13ha of rough grassland, 0.2ha of hedge/scrub and 1ha of spring barley (Table 1, page 9). Those quantities and proportions are designed to give sufficient margin for error or failure of the habitat to establish.

The proposals will provide 22ha of suitable grassland, 0.9ha of hedgerows and 4ha of Spring Barley to support Cirl Bunting (Environmental Statement, table 24, p.80), which would have to be divided between 10 territories. That implies a shortfall of hedgerow and in

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particular of Spring Barley. It is important to bear in mind that around 16ha of arable land will be converted to pasture in order to support Greater Horseshoe Bats, but it appears that this loss will impinge on Cirl Buntings.

The loss of arable land would be highly relevant to Skylark conservation, as well as to other species. Skylark is a Red Listed species, of which the Environmental Statement records a probable 8 to 10 breeding pairs on the application site. No evidence has been provided by the applicants as to the existence of breeding pairs on what is now the OSML. Although much less rare than Cirl Bunting with about 1.5m breeding territories, the national Skylark population has suffered a 'recent and dramatic decline' according to RSPB. (<https://www.rspb.org.uk/birds-and-wildlife/wildlife-guides/bird-a-z/skylark/>). Skylarks require 2 or 3 broods of young each year in order to maintain their populations, and nest in hollows in the ground (<https://www.rspb.org.uk/birds-and-wildlife/wildlife-guides/bird-a-z/skylark/nesting-and-breeding-habits/>). Increasing livestock densities results in their nests being trampled and over-grazing which deprives them of cover (<https://www.rspb.org.uk/birds-and-wildlife/wildlife-guides/bird-a-z/skylark/threats/>). There is inadequate evidence provided with the Application to demonstrate that there would be sufficient quality and quantity of Skylark habitat to compensate for the loss of habitat on the application site.

Existing arable land may be sub-optimal foraging habitat for certain species, but it is still of some value as habitat for those species, whether for breeding sites, resting-places, or even just providing buffering or connectivity benefits. **Cumulative effects of loss of arable land require to be considered. Whilst many changes to farming regimes are outside Town and Country Planning control, they still need to be considered cumulatively in combination with development proposals that are subject to the planning system, as well as being regulated where necessary under environmental impact assessment regulations and other statutory management powers. The Applicants have not studied such cumulative effects at all.**

Timing

The proposed timings of habitat creation (3 years in advance of Phase B construction) would be insufficiently far in advance, in the expert opinion of Aspect Ecology, for

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hedgerows, woodland and wood pasture to be functional, with probable interim losses for species utilising such habitats, particularly Greater Horseshoe Bats.

Predation

Given the importance of Cirl Bunting to Devon, and of relevance to ground-nesting species, it is noted that the Environmental Statement gives very little consideration to the effect of companion animal predation. Further information is needed, for example on details of the cat-proof fencing proposed within the Environmental Statement and data proving its efficacy.

Bats

Natural England originally objected to the Application, considering that further information and a Habitats Regulations assessment were required to determine impacts on populations of Greater Horseshoe Bats of the Special Areas of Conservation at South Hams and Berry Head. They explained in their representation that these bats are 'among the rarest and most threatened... in Europe' and that South Devon supports the largest recorded roost in Northern Europe. **Although Natural England have now withdrawn that objection, they were wrong to withdraw it for reasons that we shall explain.**

Bats are protected by article 12 of Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (Habitats Directive). There are 2 separate protective mechanisms in the Directive: article 6 and article 12.

Article 6

The article 6 mechanism protects Special Areas of Conservation (SACs) designated under the Directive and the populations of species and habitats for which they were designated. The Directive requires that they be managed with a view to being restored to or maintained at favourable conservation status of the species and habitats for which they are designated (arts. 1(l), 3(1), 4(4)), and that 'the necessary conservation measures' to that end be integrated into other development plans (art.6(1)). Article 6(2) imposes a general duty to 'take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which

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the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive’.

These general obligations apply in addition to a more specific procedure when determining whether to consent to development projects.

In our case, the relevant SAC is the South Hams SAC which is spread over 5 sites and protects a population of over 1000 adult Greater Horseshoe Bats constituting about 31% of the UK population (‘GHB’, *Rhinolophus ferreus*) which breed within the protected sites but also forage and roost across a wider ‘sustenance zone’ that includes the Application Site. Without the habitat in the sustenance zone, the bats would not survive and the population at the breeding colonies would be harmed. Accordingly, harm to the designated SAC may be caused by development within the sustenance zone, particularly in combination with other development in that zone.

The specific procedural protections in article 6, paragraphs (3) and (4) are as follows (and have been transposed into domestic law by regulations 63, 64 and 70(1)(a) of The Conservation of Habitats and Species Regulations 2017 (‘the Habitats Regulations’):

‘(3) Any plan or project not directly connected with or necessary to the management of the site [i.e. the SAC] but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

(4) If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 [i.e. the network of SACs] is protected. It shall inform the Commission of the compensatory measures adopted.’

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The Court of Justice of the European Union has determined as follows: An appropriate assessment under article 6(3) must examine the best scientific evidence in the field and 'cannot be regarded as appropriate if it contains gaps and lacks complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the [SAC] concerned'. As the Directive aims at guaranteeing that there will be no deterioration of habitats or significant disturbance of species, the project may only be approved if there is no reasonable scientific doubt that such effects can be excluded (Case C-404/09, *Commission v Spain* at [99]-[100], [127], [142]).

- The requirement to look at effects in combination with other plans and projects includes pre-existing development and not just future planned or consented-but-unbuilt development (e.g. Case C-142/16, *Commission v Germany* at [57]-[63]: failed to take account of a power plant built in 1958).

- Article 6(4) of Directive 92/43 can apply only after the implications of a plan or project have been studied in accordance with Article 6(3) of that directive. Knowledge of those implications in the light of the conservation objectives relating to the site in question is a necessary prerequisite for application of Article 6(4) since, in the absence thereof, no condition for application of that derogating provision can be assessed. The assessment of any imperative reasons of overriding public interest and that of the existence of less harmful alternatives require a weighing up against the damage caused to the site by the plan or project under consideration. In addition, in order to determine the nature of any compensatory measures, the damage to the site must be precisely identified. (Case C-304/05, *Commission v Italy* at [83]).

- A measure that is incorporated into a project which compensates for losses to wildlife caused by the project by allowing other creatures elsewhere to do better than they otherwise would have done in the absence of the project, is a compensatory measure that can only be taken account of at the article 6(4) stage. If, in the absence of data, the effectiveness of such a measure in fully compensating for the harm can only be determined at a subsequent monitoring stage, that does not guarantee its effectiveness beyond reasonable doubt. (Case C-142/16, *Commission v Germany* at [36]-[38] – 'fish ladder' to allow fish to travel upstream, to compensate for localised adverse effects of a power-plant, inadequate data to demonstrate it would guarantee the integrity of the SAC population).

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- The creation of replacement habitat areas to make up for areas of habitat destroyed or damaged by the project will, even if incorporated into the project for which consent is sought, amount to compensatory measures that cannot be taken into account at the article 6(3) stage, but may only be considered and weighed up at the article 6(4) stage, after the damage has been precisely identified. Otherwise, the procedures laid down by the Directive would be circumvented. Furthermore, 'as a rule, any positive effects of a future creation of a new habitat which is aimed at compensating for the loss of area and quality of that same habitat type... even where the new area will be bigger and of higher quality, are highly difficult to forecast with any degree of certainty and, in any event, will be visible only several years into the future' (Case 521/12, T.C. *Briels and Others v Minister van Infrastructuur en Milieu* at [29]-[37]). The fact that the compensatory measures are intended to be established pre-emptively in advance of the development taking place/causing harm does not change this, and does not mean they are to be deemed a 'mitigation measure' that can be taken account of at the article 6(3) stage. The CJEU so held in Joined Cases C-387/15 and C-388/15, *Orleans and others v Vlaams Gewest* at [49]-[64], wherein it noted that 'the wording of Article 6 of the Habitats Directive contains no reference to any concept of "mitigating measure."'.

- On 12 April 2018, delivering judgment in Case C-323/17, *Sweetman v Coillte Teoranta* consistently with the above line of case law, the Court of Justice ruled at [34]0-[41] that 'measures intended to avoid or reduce the harmful effects of a plan or project' that had been incorporated into the plan or project could not be taken into account at a 'screening stage'. The Court noted:

'[35]...the fact that, as the referring court has observed, measures intended to avoid or reduce the harmful effects of a plan or project on the site concerned are taken into consideration when determining whether it is necessary to carry out an appropriate assessment presupposes that it is likely that the site is affected significantly and that, consequently, such an assessment should be carried out.

[36] That conclusion is supported by the fact that a full and precise analysis of the measures capable of avoiding or reducing any significant effects on the site concerned must be carried out not at the screening stage, but specifically at the stage of the appropriate assessment.

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[37] Taking account of such measures at the screening stage would be liable to compromise the practical effect of the Habitats Directive in general, and the assessment stage in particular, as the latter stage would be deprived of its purpose and there would be a risk of circumvention of that stage, which constitutes, however, an essential safeguard provided for by the directive.'

- An 'appropriate assessment' must use reliable and up-to-date information. Otherwise, purely hypothetical adverse effects would find their way into the weighing up exercise, the examination of alternatives and the determination of compensatory measures. It would not be certain that actual damage is taken into account. Case C-43/10 *Nomarchiaki Aftodioikisi Aitolokarnanias & Others* [2013] Env LR 21, [AG138]-[AG139] and [AG219]; judgment at [112]-[115].

It is possible to find domestic court decisions that are inconsistent with the above case law, including at Court of Appeal level. English courts have historically held that it is permissible to treat replacement habitat as 'mitigating' or 'avoidance' measures because they will result in no net loss of protected species populations. However, they were in error so to do: the very fact that one has to talk of 'net' loss indicates that they are compensatory measures where expected losses are to be compensated for by hoped-for gains. English courts have also held that it is permissible to rely on 'mitigating measures' to rule out doing an appropriate assessment in cases where there would, in the absence of such measures, be a likely significant adverse effect. However, the above settled line of European Court case law is emphatically clear and binding on all domestic courts, and so following those inconsistent domestic judgments would be a serious and manifest error of law entitling individuals to redress (Case C-224/01, *Köbler v Austria* [2004] Q.B. 848, judgment at [51]-[57]).

As 'competent authority' under regulation 9(3) of the Conservation of Habitats and Species Regulations 2017, the Council must, in exercising any of its functions, have regard to the requirements of the Directives so far as they may be affected by the exercise of those functions. It is also a general principle of EU law that competent authorities within a Member State must take all measures, general or particular, which are necessary to secure compliance with EU law. The article 6 duties imposed by the Habitats Directive, which are clear and precise, are directly actionable whether or not domestic legislation has properly transposed them into national law.

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How does article 6 apply to the Application Site? It is acknowledged by the Applicant that the site lies in the sustenance zone for the South Hams SAC, and that in the absence of what it describes as mitigation measures (chiefly amounting to the replacement habitat already referred to above), it would have a significant effect on the SAC population. The Council's consultants have purported to "screen out" the application, deciding in reliance on the so-called 'mitigation measures' that it is not necessary to undertake an 'appropriate assessment'.

This approach is unlawful as it is contrary to the European case-law set out above. An 'appropriate assessment' requires to be carried out. The development may then only be authorised on the basis of compensatory measures only under article 6 paragraph (4), and only if all the criteria of this paragraph are met. This application is not at a stage at which that may be done. *Inter alia*:

- It has not been demonstrated that there are no alternative solutions with less harmful impacts, in terms of taking none or less of the application site. Compensatory measures are supposed to be a 'last resort', not a convenient substitute for applying the avoidance-mitigation-compensation hierarchy. Section 3.4 of the Environmental Statement amounts to special pleading as to why no serious study or examination of alternatives has been engaged in. It asserts, after making untrue allegations about the findings of the Local Plan inspector such as that the 'Local Plan process identified this site as effectively being the next best site' (para.4.3.4), that 'consideration of alternative sites is restricted by a lack of knowledge' (para 3.4.4). It is incumbent on those seeking to develop this site to justify a derogation from article 6(3). In Case C-209/04, *Commission v Austria* at [AG72], Advocate-General Kokott observed:

'Article 6(4) of the Habitats Directive permits projects to be approved only if no alternative is available. Although the Austrian Government is right that not every theoretically imaginable alternative stands in the way of project approval, the examination of alternatives cannot be confined – as in the case of an EIA – to "the main alternatives studied by the developer" (point 2 of Annex III to the EIA Directive). That would not guarantee the absence of alternatives as required by Article 6(4) of the Habitats Directive. Consequently, the approving authority must ensure that at least those alternatives are examined that are not obviously – beyond reasonable doubt – out of the question. (31) In selecting the alternative,

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the decisive factor is whether imperative reasons of overriding public interest demand the implementation of this alternative or whether they can also be met by another alternative.'

Defra's guidance, 'Habitats and Wild Birds Directives: guidance on the application of article 6(4)' (2012) states among other things:

'For the test to be passed the competent authority must be able to demonstrate objectively the absence of feasible alternative solutions. The applicant is primarily responsible for identifying alternatives... Alternatives must be considered objectively and broadly. This could include options that would be delivered by someone other than the applicant, or at a different location, using different routes, scale, size, methods, means or timing. Alternatives can also involve different ways of operating a development of [sic – 'or'] facility.'

It advises that a do-nothing option should be considered, as should more expensive or difficult alternatives that are not unreasonable, if potentially less damaging to the affected site. There has been no examination or surveying of reasonable alternative sites to identify the extent to which they would be less harmful to Greater Horseshoe Bats.

- **It is not possible to precisely identify all its in-combination effects to feed into the identification of alternative solutions or necessary compensatory measures, and to inform the article 6(4) balancing exercise as to whether any imperative reasons of public interest outweigh the harms.** In particular:
 - o The Applicant's Planning Design and Access Statement notes that in April 2013 planning permission was secured for the mixed use development (circa 350 homes plus local centre, employment land and public open space) at White Rock to the north of the Site. Since that time the land has been sold and development commenced by Linden Homes but construction of that development has not been completed. The full impact of that development and effectiveness of mitigation proposed has not had sufficient time to be tested. **No data has been presented with this application as to the impact assessment predictions for the White Rock site to the north in 2011, whether the current application site was surveyed as part of that application, and the extent to which losses and displacement of species from the White Rock site and losses at or knock-on effects at this application site (or other local sites) have actually occurred.** If the

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compensatory measures at the application site for the White Rock development have not in fact fully compensated for losses arising from that development, there will be a net loss which would amount to a cumulative impact in combination with the instant development, which would itself have to be compensated for when designing the offsite compensation measures.

- **The Environmental Statement prematurely asserted that there would be no significant or non-significant effect from the application alone, and then- in a *non sequitur* – that it was accordingly unnecessary to consider cumulative effects because none would arise** (ES, para 5.6.1). The whole point of considering cumulative impacts is to identify impacts from a development that are not significant in isolation but are significant in combination with others ('death by a thousand tiny cuts'). There has simply been no assessment whatsoever of existing, planned and consented projects in the sustenance zones of the SAC.
- **There is no data presented that proves the compensatory measures are guaranteed beyond reasonable doubt to fully compensate for the significant effects of the development.** In particular,
 - The only survey work reported for the OSML is a Phase I Habitat Survey to identify the habitat types present (Ecological Baseline Report, para 2.2). The OSML has not been surveyed for bat foraging or, so far as we can tell from the Ecological Baseline Report dated May 2017 (see Figs.2-3), roosts, so we do not know to what extent the compensatory land will have to cater for bats already using that land, in addition to bats displaced from the application site. Accordingly, it is not enough merely to be satisfied that the OSML will replicate the application site.
 - Whilst there is proposed to be a replacement of the same area of pasture, there is no extra margin of compensatory land in case some of the habitat does not 'take' or is not of the same quality. Paragraph 33 of the Defra guidance sensibly advises:

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'in some cases compensation requirements will need to cater for uncertainty over the harm that might be caused by a proposal or the effectiveness of compensation measures, or to account for any time lag before compensatory habitat becomes established. For example:

- If there is uncertainty about the success of the proposed measures, the compensation area might need to be to be larger than the area damaged
- Potential actions may be required as a condition of consent in case compensation proves to be less successful than anticipated
- It may be that anticipated harm to a site proves to be less than anticipated, or compensation measures are more successful than expected. Where feasible, compensation requirements should be sufficiently flexible to scale back the compensation required in such cases'.

In our case, the absence of such flexibility or margin for uncertainty means that there is a greater risk. Even if there were data demonstrating that the compensatory habitat was absolutely certain to be of sufficient quality, no detailed mechanism to effectively legally guarantee that compensation has been submitted.

Article 12

All native bat species (sub-order *Microchiroptera* including Greater Horseshoe Bats) are protected by article 12 and Annex IV(a) of the Habitats Directive (as replaced by article 1 of Council Directive 2013/17/EU). Article 16 allows for derogations 'for imperative reasons of overriding public interest' where the Member State establishes that 'there is no satisfactory alternative', and that the derogation is not detrimental to the maintenance of the population of the species at a favourable conservation status in their natural range.

Article 12 requires a system of strict protection for these species, which prohibits deliberate disturbance of the species and deliberate killing of specimens of the species. In this context, 'deliberate' means intentionally or recklessly (that is, doing something with a risk of killing or disturbing the species, after having adverted to that possibility): Case C-224/01, *Commission v Spain* at [70]-[71]. 'Disturbance' includes (but is not limited to) destruction of habitat likely (that is, imposing a real risk) to impair their ability to survive, breed, reproduce or rear their young, or significantly affecting the local distribution or abundance of the

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species. Significance is a matter for judgment on the facts of a given case, but activity does not have to be significant at population level in order to be prohibited by the Directive (reg.43(2) of the Habitats Regulations and *R(Morge) v Hampshire CC* [2011] UKSC 2 at [19]-[23] per Lord Brown).

These provisions are transposed by regulations 9(3), 42(1), 43 and Schedule 2 of the Habitats Regulations, which require the Council to have regard to the requirements of the Directive and make it a criminal offence to deliberately disturb or kill these species without a licence from Natural England.

When granting licences, Natural England is not a planning authority, and has not got the resources or remit to carry out its own evaluation of all the relevant planning policies, alternative sites, planning merits and planning demerits to establish whether the overall public interest favours grant of permission. Accordingly, it will normally consider that it is for the elected local planning authority to determine where the public interest lies, such that the grant of planning permission establishes the overriding public interest for the development in that location when it comes to look at issuing a licence. This means that the planning authority needs to consider the 3 derogation tests and issues such as alternative locations, conservation harm and compensatory measures when determining whether the development is in the public interest. Natural England has not given specific advice in relation to Article 12 in its consultation response of 8/12/2017 but referred the Council to its standing advice (mentioned in Annex A of its letter). Natural England's standing advice for local planning authorities ('Protected species: how to review planning applications', updated 12 August 2016) states inter alia: ¹

'Check if the applicant has taken steps to avoid affecting protected species...When it isn't possible to avoid affecting species applicants must have a mitigation strategy to:

- * remove or reduce the negative effects of their proposal
- * show how they will carry out risk reduction measures

¹ <https://www.gov.uk/guidance/protected-species-how-to-review-planning-applications>

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...If the development proposal is likely to have a negative effect on European protected species, you need be confident that Natural England is likely to grant a licence. Check whether the proposal will meet the licensing criteria (the '3 legal tests') to make sure that:

the activity is for a certain purpose, for example it's in the public interest to build a new hospital

there's no satisfactory alternative that will cause less harm to the species

the activity doesn't harm the long-term conservation status of the species...

... Check compensation is appropriate

Ask for compensation measures to be included in planning proposals if it isn't possible to minimise the risk to protected species. Compensation must:

- make sure that no more habitat is lost than is replaced, which means there's no net loss

- provide for like-for-like habitat replacements, which are located next to or near existing species population (check distances in the relevant species standing advice) and in a safe position to provide a long-term home

- provide for a better alternative habitat in terms of quality or area, compared to what will be lost

- include proposals to make sure habitats are still connected to allow normal species movement

'Make sure alternative sites are established far enough in advance so they're ready for the species that will use them.'

It is evident from the Ecological Baseline survey (Table 15, p.28) that the great majority of registrations of bat calls picked up by the automated detection apparatus was comprised of species other than Greater Horseshoe Bats. There were 50,170 pipistrelle registrations, 4,125 noctule, Leisler's or Serotine calls, 2,015 Myotis calls, 670 Lesser Horseshoe, 266 Long-eared, and 10 Barbastelle calls, compared against 1,321 Greater Horseshoe Bats calls. The activity was 'fairly well distributed across the site', and particularly high nearer to

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Brixham Road. As this land will be taken by housing development, it is *prima facie* likely to disturb these species by reducing the area and quality of habitat available to them on the Site, and requiring them to find alternative habitat elsewhere.

In our case, there has been no attempt to quantify the numbers of bats affected by the application proposals (at all, let alone in combination with White Rock development and with other local development sites), or to identify the numerical abundance, distribution, or dynamics of each of the existing bat species' populations locally so that the question of the extent and significance of impacts on this site to the local populations can be determined. Reasonable alternative sites have not been studied to determine whether there are satisfactory alternatives with less impact. Alternatives such as siting development further from Brixham Road to reduce impacts on the various bat species have not been studied.

As explained above in relation to Greater Horseshoe Bats, the only survey work reported for the OSML is a Phase I Habitat Survey to identify the habitat types present (Ecological Baseline Report, para 2.2). The OSML has not been surveyed for bat foraging or, so far as we can tell from the Ecological Baseline Report dated May 2017 (see Figs.2-3), roosts, so we do not know to what extent the compensatory land will have to cater for bats already using that land in addition to bats displaced from the application site. Accordingly, it is not enough merely to be satisfied that the OSML will replicate the application site. These other species of bats have different diets to Greater Horseshoe Bats and are not reliant on dung beetles like Greater Horseshoe Bats. It is not therefore a 'given' that pasture habitats optimal for Greater Horseshoe Bats will also be optimal to compensate for these species.

It has not been demonstrated to be imperative (i.e., 'essential' see 2012 Defra guidance para 23) to build this quantum of housing, school and pub, in this manner, on this site. The habitat lost is not being replaced on a like-for-like basis. Whilst the compensatory habitat is designed to result in a small increase in length of hedgerows and in the area of grassland margins, and to replace an equivalent area of lost pasture (25ha), there will be a loss of around 15.5ha of arable land. It has not been demonstrated that this loss will be adequately compensated for. The connectivity and location of the habitat in relation to roosts and commuting routes of the relevant species has not been considered. If the replacement habitat lies further from roosts, that may cause detriment.

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In the light of the above, there is insufficient information in relation to bats to enable Members to proceed to grant permission.

Conclusion

For the reasons set out in this letter, we request that the Planning Application be refused. In due course please notify us of the date of the Planning Committee meeting.

Yours faithfully



Enclosure:

1. Report by Aspect Ecology dated 23 April 2018

Technical Briefing Note

Project: Land at Inglewood, Paignton

Technical Briefing Note: Review of Ecological Impacts of the Proposed Development and the Proposed Mitigation Package

Date: 23 April 2018

BACKGROUND

1. Aspect Ecology Ltd has been appointed by Farrer & Co to review the ecological reports and mitigation proposals which have been submitted in respect of proposed development at a site known as Inglewood, located south of White Rock and adjacent to Brixham Road, Paignton.
2. The development site comprises approximately 28ha of mixed farmland located on the southwestern edge of Paignton. The site is located within the identified Sustenance Zone for Greater Horseshoe Bats associated with the South Hams Special Area of Conservation (SAC). In effect, this identifies the area as constituting supporting habitat for one or more of the interest features for which the European site is designated.
3. Bat surveys have been undertaken by the developer's ecologists and use of the site by foraging/commuting Greater Horseshoe Bats has been confirmed. The Ecology chapter of an Environmental Statement (ES) submitted as part of the planning application identifies the site as being of regional value for bats.
4. The site also falls within the range of the Cirl Bunting, a rare UK species with a range currently restricted to Devon and a small, introduced population in Cornwall. The species is listed on Schedule 1 of the Wildlife and Countryside Act 1981 (as amended) and is also a 'Red list' species as identified in Birds of Conservation Concern (BOCC)¹.
5. Breeding and wintering bird surveys have been undertaken by ecologists commissioned by the developer and Cirl Bunting was recorded within the site in the course of both surveys. The Ecology chapter of the ES also identifies the site as being of regional value for birds.
6. A range of other wildlife species occur within the site, including European Protected Species (EPS), i.e. a wide range of bat species, and species of principle importance as identified in accordance with S41 of the NERC Act 2006².
7. The site also incorporates a range of mitigation measures provided to compensate for habitat losses resulting from the adjacent White Rock development, which is currently under

¹ Eaton MA, Aebischer NJ, Brown AF, Hearn RD, Lock L, Musgrove AJ, Noble DG, Stroud DA and Gregory RD (2015) 'Birds of Conservation Concern 4: the population status of birds in the United Kingdom, Channel Islands and the Isle of Man' British Birds 108, pp.708-746

² Natural Environment and Rural Communities Act 2006

construction to the north of the Inglewood site. Under the development proposals, these compensation measures would be lost or compromised by the proposed development.

8. A range of mitigation and compensation measures are proposed. The compensation measures very largely relate to impacts on Greater Horseshoe Bats and Cirl Buntings and are proposed to be delivered to the west of the development site in an area of farmland within the SAC Sustenance Zone and that already supports Cirl Bunting. Measures include conversion of arable land to grazed pasture and provision of an area of spring barley with stubbles retained overwinter to benefit Cirl Bunting.
9. The proposals generated ecology-based objections from Natural England (dated 8 December 2017) in respect of potential effects on Greater Horseshoe Bats that constitute an interest feature of the South Hams SAC. The letter of objection identified that further information was required, namely “a comprehensive mitigation, avoidance and enhancement package” and a Habitats Regulations Assessment.
10. RSPB also objected to the proposals on 14 December 2017 on the basis of potential adverse effects on Cirl Bunting. Again, this largely related to requests for additional information/clarification regarding details of the mitigation and compensation proposals.
11. Apparently in response to these objections, the developer’s ecological consultants produced an Ecological Addendum (February 2018) seeking to provide some clarity on the mitigation proposals.

REVIEW OF THE ECOLOGICAL IMPACT ASSESSMENT

12. Notwithstanding the points raised in the above objections, a number of points remain of relevance, namely:
 - Habitats Regulations Assessment
 - Mitigation Hierarchy
 - Cirl Bunting Survey Methodology
 - Timing of Delivery of Compensatory Habitats
 - Quantum of Mitigation Provision
 - Effects of Lighting
 - Effects of Pets on Wildlife in Mitigation/Compensation Areas
 - Proposed Off-site Bat House
 - Cumulative Effects
 - Reliance on Monitoring
 - Effects on Other Species
13. These are discussed below.
14. Habitats Regulations Assessment. Paragraph 2.5.4 of the ES refers to the National Planning Policy Framework (NPPF) presumption in favour of sustainable development. It fails to refer to paragraph 119 of the NPPF which states (inter alia):

The presumption in favour of sustainable development (paragraph 14) does not apply where development requiring appropriate assessment under the Birds or Habitats Directives is being considered, planned or determined”.

15. As is set out in the 'South Hams SAC – Greater horseshoe bat consultation zone planning guidance' document, all stages of a project should be subject to checking and assessment as necessary, including pre-construction, construction and operation. *"The promotor must be clear that where information is lacking about a potential effect, the competent authority is likely to assume that there will be an effect."* In the event an appropriate assessment is required following an HRA screening process, a high level of certainty must be demonstrated that there will not be an adverse effect on the integrity of the European designation, i.e. there should be no reasonable scientific doubt.
16. An HRA Screening Assessment has been undertaken by Jacobs³. This concludes at S 15 *"In the light of both the incorporated and additional mitigation measures identified in Section 13 of this HRA Screening Assessment there is NOT likely to be a Significant Effect – alone or in combination with other proposals or projects"*. However, earlier, at S 12 (Additional Mitigation Measures) it is stated *"Additional mitigation measures must be considered at the integrity test stage (Appropriate Assessment), but should not be relied on or anticipated during the LSE screening stage"*. Therefore, since the conclusion at S15 specifically states that it is considering additional mitigation measures, the conclusion of the Screening Assessment is unsound and a Likely Significant Effect cannot be ruled out. Accordingly, the assessment should proceed to the next stage, i.e. Appropriate Assessment.
17. Mitigation Hierarchy – Compliance with National and Local Policy and Guidance. Paragraph 118 of the NPPF states:

"When determining planning applications, local planning authorities should aim to conserve and enhance biodiversity by applying the following principles:
 - *If significant harm resulting from a development cannot be avoided (through locating on an alternative site with less harmful impacts), adequately mitigated, or, as a last resort, compensated for, then planning permission should be refused;"*
18. The importance of following the hierarchical approach identified by the NPPF is identified in the Torbay Local Plan policy NC1, the Planning Contributions and Affordable Housing SPD (para 2.6.1) and the Cirl Bunting development guidance note.
19. The ES (Section 3.4) does not adequately demonstrate that the proposed development could not be accommodated elsewhere. It appears to conclude that since the LPA had considered allocating the site, then it should be regarded as a suitable location. The ES also refers to issues relating to multiple ownership of land constraining availability of alternative sites. However, this does not appear to consider the potential for the overall development (i.e. 400 residential units, primary school and public house) to be brought forward over multiple locations. As such, the hierarchical approach set out in the NPPF is not being followed for a proposals site that provides supporting habitat for an SAC and that is deemed to be of regional value for both bats and birds.
20. Particularly in respect of the identified Sustenance Zone for the SAC bat population, it is considered that if development is to take place here a strategic approach to its location should be developed, rather than permitting speculative proposals to be brought forward (particularly where they affect previously provided mitigation as described above).
21. Cirl Bunting Survey Methodology. It appears that no specific survey of the 'Off-Site Mitigation Land' (OSML) for nesting Cirl Bunting has been undertaken by the applicant. Instead, results from the RSPB national survey and other nearby survey work in respect of a different development

³ Conservation of Habitats and Species Regulations 2017. Stage 1: Screening of likely significant effect (LSE) on a European site (March 23 2018)

proposal are relied upon. The national survey methodology employed by RSPB is restricted to observations made from public rights of way and, as such, does not accord with RSPB site-specific survey recommendations⁴. Neither does the information provided by the applicant include a detailed assessment of the existing value of the OSML for breeding and over-wintering Cirl Buntings.

22. It is considered that the survey data is inadequate for its current purpose and may represent an underestimate of the actual number of territories / breeding pairs. Accordingly, in line with the precautionary principle, it would be appropriate for mitigation measures to make sufficient habitat provision for a larger number of Cirl Buntings than the 10 pairs currently targeted. This is particularly the case, given that RSPB is of the view⁵ *“that Torbay Council did not ensure adequate compensation provision for cirl buntings in its decision on P/2011/0197 and the content of the related LEMPs”*.
23. Timing of Delivery of Compensatory Habitats. To avoid adverse effects on Greater Horseshoe Bats and Cirl Bunting, certainty is required that created features will provide fully functional habitats for these species, in advance of commencement of any works with potential to adversely affect the target species.
24. The phasing of delivery of habitat mitigation is inappropriate. The Farm Management Plan (Stride Treglown, October 2017) identifies hedgerow planting as being undertaken within the next appropriate planting season following either granting of outline planning permission or signing of a S106 agreement. More usefully, the Phasing Plan (Stride Treglown) relates this to the construction process, specifying that mitigation planting or habitat creation will occur at least one year/growing season in advance of any construction.
25. We consider that a minimum of 5 years growth would be required to provide conditions suitable for nesting Cirl Bunting. The RSPB website⁶ describes Cirl Bunting as *“very sensitive to disturbance, particularly during the breeding season”*. Impacts of development on Cirl Buntings would, therefore, be expected to occur immediately construction commenced. Even if planting with mature stock, a timescale of what is likely to be the minimum of one year is entirely inadequate to allow the development of the ‘thick bushy conditions’ that nesting Cirl Buntings favour. Neither are we satisfied that grazed grassland will develop an appropriate invertebrate fauna for foraging Cirl Bunting for several years, hence the phasing of the delivery of the compensation is not appropriate.
26. In the event of planning permission being granted under the current proposals, this would result in significant adverse impacts on a scarce and highly geographically restricted Schedule 1 bird species.
27. The initial unsuitability of new habitats also applies in respect of Greater Horseshoe Bats. Newly planted hedgerows may not function as commuting routes. Hedgerow, tree and woodland planting will take many years to mature into optimal foraging habitat and effective screening of light spill from the development. We consider that a period of at least 15 years would be required from planting before trees and woodland would develop any significant value for foraging bats, with hedgerows likely taking 5 – 10 years.

⁴ *Survey Methodology to establish presence of cirl bunting on a site*. RSPB, June 2017

⁵ RSPB consultation response dated 14 December 2017

⁶ <https://www.rspb.org.uk/birds-and-wildlife/wildlife-guides/bird-a-z/cirl-bunting/watching-cirl-buntings/>

28. In the intervening years, there will be detrimental impacts on Greater Horseshoe Bats, an interest feature of the nearby South Hams SAC, with damage to their identified sustenance zone, i.e. SAC supporting habitat.
29. Disregarding the inherent inappropriateness of developing mitigation land for SAC supporting habitat and for the red-listed Schedule 1 (Wildlife and Countryside Act 1981) Cirl Bunting, the relocation of the previously agreed mitigation provision for White Rock has the effect of delaying the effective delivery of that mitigation, thereby compounding cumulative impacts from the two developments.
30. Given the above considerations, it is unclear how there can be no scientific doubt that there would be no likely significant effect on the SAC Greater Horseshoe Bat population required for an HRA to conclude there is no likely significant effect.
31. Quantum of Mitigation Provision. Cirl Bunting compensatory habitat requirements, together with a justification, are set out in Appendix 6 of Torbay Council (et al)'s '*Wildlife and development guidance note: Cirl Bunting*' (October 2017). This identifies that a minimum of 2.5ha of appropriately managed habitat is required for one pair of Cirl Buntings. This should include a variety of habitats as set out below:
 - A minimum of 1.13ha of semi-improved/rough grassland. The document notes that grassland compensation sites are unlikely to be of high quality and will need time to develop and there could be a case for increasing the area of grassland provided. However, it notes a working assumption that some summer foraging habitat is provided by arable land;
 - A minimum of 0.2ha of hedge/scrub (nesting habitat). The document notes that hedgerows must be appropriately managed to provide the thick bushy conditions that nesting Cirl Buntings favour; and
 - A minimum of 1ha of weedy overwinter stubble. Research is reported, to the effect that 1ha of Environmental Stewardship's special barley option (spring barley left as stubbles until the following March) will support an average of 1.7 pairs of (overwintering) Cirl Buntings. The crop may also be used for foraging for invertebrates or for grain in inclement weather.
32. Little information is provided in the Ecological Baseline Report or the Ecology Chapter of the Environmental Statement on the current suitability of the so-called Off-Site Mitigation Land (OSML) for Cirl Buntings. However, it may be seen from on-line aerial photography that it comprises a mosaic of arable and grassland and, given the estimated six pairs of Cirl Bunting breeding there, clearly provides suitable habitat at present for that number of birds.
33. The 4ha of arable land retained as overwinter stubbles would, according to the development guidance note referred to above, support 6.8 (4 x 1.7) pairs of Cirl Buntings, i.e. approximately the same number of birds already known to be breeding there and less than the target of 10 pairs. Therefore, the quantum of mitigation provision is inadequate and an adverse impact on the local Cirl Bunting population is likely to result.
34. The Ecological Addendum has confirmed that there will be no net loss of cattle-grazed pasture from the proposals. However, newly established grassland is likely to take a number of years to develop an invertebrate fauna comparable with that of more established grassland. As such the compensation will not be fully functional for several years. Accordingly, there is an effective net loss of grassland foraging habitat for Greater Horseshoe Bats.

35. Effects of Lighting Associated with the New Development. A continuing concern for Greater Horseshoe Bats is the impact of lighting from the development. It is difficult to see how residents of the proposed development would be prevented from installing outside lights within their gardens, potentially illuminating dark zones intended to be capable of utilisation by light-averse bat species such as Greater Horseshoe Bat. This point is considered within the HRA Screening Assessment undertaken by Jacobs. Within the Screening Assessment it is suggested that new homeowners could be provided with an information pack explaining the issues associated with artificial lighting. It also proposes creating a clause within deeds/covenants of the new properties, requiring installation of external lighting to require a planning application. It is considered that the long-term efficacy of either of these approaches is extremely doubtful, again rendering a conclusion of no likely significant effect impossible at the level of certainty required under the Regulations.
36. Effects of Pets on Wildlife in Mitigation/Compensation Areas. The ES gives very little consideration to potential effects of companion animals on wildlife, with cats in particular being a likely cause of predation of birds and potentially bats. Further detail is required as to how such impacts would be mitigated. These should include details of the cat-proof fencing that is proposed within the ES.
37. Proposed Off-site Bat House. A contribution to the creation of an off-site bat house is proposed as part of the mitigation 'package' for the Inglewood development. However, the HRA Screening Assessment notes that delivery cannot be guaranteed at this time. Therefore, this measure cannot be relied upon in respect of any HRA.
38. Cumulative Effects. Cumulative effects are not considered within the Ecology Chapter of the Environmental Statement in respect of any species or habitats. This is based on the erroneous conclusion that the proposals will have no residual effect whatsoever. Several cumulative or in-combination effects will inevitably arise, ranging from:
 - permanent reduction in the functional extent of the Greater Horseshoe Bat sustenance zone and losses in extent of actual or potential Cirl Bunting habitat;
 - medium term effects due to reduced habitat quality, acting over several years until compensatory habitats mature;
 - likely reductions in actual Cirl Bunting habitat, particularly arable habitat;
 - increased lighting disturbance, and
 - impacts of pets, particularly cats, on nesting Cirl Buntings and potentially on foraging bats. Cumulative impacts on other faunal species are considered below.
39. These effects arising from the proposed development must be considered in combination with effects arising from other relevant developments or development proposals, not least the White Rock scheme.
40. Monitoring. If, as it appears, monitoring is a key part of the compensation, given the requirement for certainty under the Habitats Regulations, it is necessary at this stage to identify (i) the parameters to be measured in order to ascertain mitigation efficacy; (ii) relevant thresholds which could be assessed; and (iii) remedial actions which would be implemented should mitigation not be found to be effective.
41. No information is provided to indicate what remedial actions would be available in the event that management needs to be varied. For example, there are very specific targets identified for sward height and structure within grazed grasslands. The amount of grazing required to achieve that will vary from year to year, dependent on growing conditions. No information is provided as to whether additional livestock could be made available if required in a good growing season, or

alternatively whether 'buffer land' is available to move stock to in years of poor grass growth. This lack of information does not provide confidence that the mitigation could actually be implemented as described.

42. It is noted (para 2.15) in Jacobs' Memorandum to Torbay Council (11 April 2018) that, should mitigation measures be correctly implemented but the targets not be met, no additional compensatory payments would be requested to make up any shortfall in meeting the targets. This is inappropriate unless it can be demonstrated that alternative management strategies could be implemented that would subsequently achieve those targets. However, this does not appear to be the case.
43. Effects on Other Species. Arable land provides nesting habitat for Skylark, a S41 priority species known to be present within the proposals site. As noted above, there would be a cumulative loss of arable land from the proposals in combination with other development. The compensatory measures for Cirl Bunting and Greater Horseshoe Bat would also have an adverse effect on Skylark, through new hedgerow planting reducing field size and thereby their suitability for nesting Skylark.
44. It is also noted that no mitigation measures are proposed in respect of legally protected reptiles, in relation to protecting against killing or injuring and in relation to provision of compensatory habitat with appropriate enhancements.

CONCLUSIONS

45. It is concluded that the assessment of ecological effects undertaken to date is inadequate. More detailed information is required in a number of areas identified above. However, the most serious shortcomings are considered to be:
 - a. the insufficient quantum of mitigation;
 - b. the timing of delivery of mitigation resulting in non- or poorly-functioning compensatory habitats in the early years of the development; and
 - c. the lack of assessment of cumulative effects.
46. It is also considered that the HRA Screening Assessment of the proposals is flawed and that appropriate assessment is required.
47. More fundamentally, it is considered that the hierarchical approach to avoidance of adverse effects on biodiversity set out in the NPPF, has not been followed. Where a site provides supporting habitat for an SAC feature, as is the case here, it is vital that the hierarchical approach is adhered to. It is also considered highly inappropriate for development to be proposed which will result in the loss of mitigation provided for another development, particularly where it relates to national important populations of rare and specially protected species and supporting habitat for an SAC, as in the case here.