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Dear Ms Marlton,

RE:FORMER DAIRY CREST SITE, TOTNES & CONSULTATION ON THE DRAFT TOTNES NEIGHBOURHOOD PLAN ("THE DRAFT NP")

1. We act for Fastglobe (Mastics) Ltd ("**Fastglobe**"), owners of the former Dairy Crest site at Station Road, Totnes ("**the Site**").
2. We write in response to your consultation on the addition of proposed policy C12 ("**Policy C12**") and proposed appendix A ("**Appendix E**") to the Draft NP. Policy C12 deals specifically with the Site.
3. Fastglobe propose to redevelop the Site. The redevelopment project is known as Brunel Park and is locally led and managed by Patrick Gillies of Bruce Gillies Ltd, a resident of Totnes. This local connection means that the Brunel Park vision is also a mixed use vision for the regeneration of the site. It includes the community re-use of the Brunel Building, together with residential, employment and tourism uses.
4. Remarkably, you chose not to consult with us before developing Policy C12 which you intend to include within the NP. Notwithstanding that such an approach is clearly contrary to the Planning Practice Guidance ("**the PPG**"), we have considered Policy C12 (as well as proposed Appendix E to the NP).
5. For the reasons below, Fastglobe objects to Policy C12 and Appendix E. If Totnes Town Council ("**TTC**") seeks to add Policy C12 and Appendix E to the NP, it will be impossible for South Hams District Council ("**the Council**") to make the Draft NP lawfully. Further, Policy C12 and Appendix E are flawed, such that they fail to contribute to sustainable development, are in conflict with the National Planning Policy Framework ("**NPPF**") and the PPG, and will result in the Draft NP failing to meet the basic conditions in para. 8(2) of Sch. 4B to the Town and Country Planning Act 1990 ("**TCPA 1990**") (irrespective of any other grounds on which the Draft NP fails to satisfy the basic conditions, as to which Fastglobe reserves its position).

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6. In summary, after taking advice from Leading and Junior Counsel, we have identified the following deficiencies in TTC's approach:
 - a. incorporation of Policy C12 and Appendix E into the Draft NP will cause TTC to fail to comply with reg. 14 of the Neighbourhood Planning (General) Regulations 2012 ("**the 2012 Regulations**");
 - b. incorporation of Policy C12 and Appendix E into the Draft NP will cause TTC to fail to comply with reg. 15 of the 2012 Regulations;
 - c. incorporation of Policy C12 and Appendix E into the Draft NP will cause TTC to fail to comply with reg. 106 of the Conservation of the Habitats and Species Regulations 2017 ("**the Habitats Regulations**") and it is not possible in present circumstances for the Council to comply with reg. 105 of the Habitats Regulations, para. 1 of Sch. 2 to the 2012 Regulations and para. 8(2)(g) of Sch. 4B T CPA 1990;
 - d. the incorporation of Policy C12 and Appendix E into the Draft NP will prevent compliance with the basic conditions, specifically para. 8(2)(a) of Sch. 4B T CPA 1990;
 - e. the incorporation of Policy C12 and Appendix E into the Draft NP will prevent compliance with the basic conditions, specifically para. 8(2)(d) of Sch. 4B T CPA 1990;
 - f. the incorporation of Policy C12 and Appendix E into the Draft NP will prevent compliance with the basic conditions, specifically para. 8(2)(e) of Sch. 4B T CPA 1990.
7. Given the foregoing, Policy C12 and Appendix E will only serve to thwart Fastglobe's attempts to redevelop the site for a mix of uses that will enhance and support the vitality and viability of Totnes, in accordance with relevant provisions of the development plan that provide for the mixed use redevelopment of the site.

(1) Failure to comply with reg. 14 of the 2012 Regulations

8. The incorporation of Policy C12 and Appendix E into the Draft NP will cause TTC to fail to comply reg. 14 of the 2012 Regulations.
9. So far as material, reg. 14 of the 2012 Regulations provides:

'Before submitting a plan proposal [...] to the local planning authority, a qualifying body must –

- (a) *publicise in a manner that is likely to bring it to the attention of people who live, work or carry on business in the neighbourhood area -*
 - (i) *details of the proposals for a neighbourhood development plan [...];*
 - (ii) *details of where and when the proposals for a neighbourhood development plan [...] may be inspected;*
 - (iii) *details of how to make representations;*
 - (iv) *the date by which those representations must be received, being not less than 6 weeks from the date on which the draft proposal is publicised [...]*
- (b) *consult any consultation body referred to in paragraph 1 of Schedule 1 whose interests the qualifying body considers may be affected by the proposals for a neighbourhood development plan [...]*
- (c) *send a copy of the proposals for a neighbourhood development plan [...] to the local planning authority'*

10. TTC consulted on the Draft NP in purported compliance with reg. 14 between 16 November 2019 and 2 January 2020. Shortly thereafter, TTC submitted the Draft NP to the Council in purported compliance with reg. 15 of the 2012 Regulations. The Council have taken subsequent steps, for example the appointment of an examiner in September 2021. All of these matters precede the publication of Policy C12 and Appendix E by TTC and thus (1) the Draft NP which was the subject of consultation in 2019 and 2020 did not include Policy C12 or Appendix E and (2) the Draft NP which was submitted to the Council did not include Policy C12 or Appendix E.
11. It follows that if TTC seek to incorporate Policy C12 or Appendix E into the Draft NP, TTC will have failed to comply with reg. 14 in the following respects.
12. First, TTC will have failed to comply with reg. 14(a) because it has not publicised the Draft NP including Policy C12 and Appendix E in accordance with reg. 14(a) before submitting the Draft NP to the Council. The earlier publication of the Draft NP will not have been publication of the Draft NP as examined and considered by the Council because Policy C12 and Appendix E were omitted.

13. The ongoing consultation cannot cure this error because the Draft NP has already been submitted to the Council and thus the consultation is not publication in accordance with reg. 14(a) which requires publication before submission to the Council.
14. This analysis is in accordance with the PPG which provides:

'At what stage does the pre-submission consultation take place on a draft neighbourhood plan or Order?

Before the formal pre-submission consultation takes place a qualifying body should be satisfied that it has a complete draft neighbourhood plan or Order. It is not appropriate to consult on individual policies for example. Where options have been considered as part of the neighbourhood planning process earlier engagement should be used to narrow and refine options. The document that is consulted on at the pre-submission stage should contain only the preferred approach.¹

15. Secondly, and for essentially the same reasons, TTC will have failed to comply with reg. 14(b) because it will not have consulted the relevant bodies before submitting the plan proposal to the local planning authority. Again, the earlier consultation with those bodies is insufficient because the Draft NP did not contain Policy C12 and Appendix E; and the current consultation cannot cure that error as it is not consultation before submission to the Council.
16. Thirdly, and for essentially the same reasons TTC will have failed to comply with reg. 14(c) because it sent a copy of the Draft NP to the Council before formal submission which did not contain Policy C12 and Appendix E.
17. It follows that it would be unlawful for the Council to seek to make the Draft NP in due course containing Policy C12 and Appendix E because TTC would have failed to comply with reg. 14 of the 2012 Regulations. There is obvious prejudice arising from such failure as it prevents proper consideration of the Draft NP at a formative stage.
18. The only way for the Council to avoid this legal error is to proceed with the Draft NP as originally submitted to it, which does not contain Policy C12 or Appendix E.

(2) Failure to comply with reg. 15 of the 2012 Regulations

¹ Reference ID: 41-049-20140306

19. The incorporation of Policy C12 and Appendix E into the Draft NP will cause TTC to fail to comply reg. 15 of the 2012 Regulations.
20. So far as material, reg. 15 of the 2012 Regulations provides:
- (1) Where a qualifying body submits a plan proposal [...] to the local planning authority, it must include [...]*
 - (b) a consultation statement;*
 - (c) the proposed neighbourhood development plan [...]*
 - (d) a statement explaining how the proposed neighbourhood development plan meets the requirements of paragraph 8 of Schedule 4B to the 1990 Act [...]*
 - (e) (i) an environmental statement prepared in accordance with paragraphs (2) and (3) of regulations 12 of the Environmental Assessment of Plans and Programmes Regulations 2004; or*
 - (ii) where it has been determined under regulation 9(1) of those Regulations that the plan proposal [...] is unlikely to have significant environmental effects (and, accordingly, does not require an environmental assessment), a statement of reasons for the determination [...]*
21. As noted above, TTC has already submitted the Draft NP to the Council and the Council have appointed an examiner and taken further steps in respect of the Draft NP.
22. TTC purported to comply with reg. 15 by submitting a number of documents to the Council. None of those documents included or considered Policy C12 and Appendix E.
23. It follows that it would be unlawful for the Council to seek to make the Draft NP in due course containing Policy C12 and Appendix E because TTC would have failed to comply with reg. 15 of the 2012 Regulations. For example, the consultation statement submitted to the Council would not have considered the consultation undertaken on Policy C12 and Appendix E; the Draft NP submitted to the Council would not have included Policy C12 and Appendix E and thus would not be a complete copy of *'the proposed neighbourhood development plan'*; the basic conditions statement would not have explained how the Draft NP including Policy C12 and Appendix E met the basic conditions; and no environmental statement would have been submitted (or not determination of no likely

significant environmental effects) of the Draft NP including Policy C12 and Appendix E.

24. It is not possible for TTC to avoid these errors by seeking to update its submissions to the Council, for example by submitting a new version of the Draft NP to the Council including Policy C12 and Appendix E because all of the matters stated in reg. 15 must be included in the submission of the plan proposal to the local planning authority (see, in particular, the word '*include*' in reg. 15(1)). This means that there is a single opportunity to comply with reg. 15 and that opportunity has now passed.
 25. Again, the only way for the Council to avoid this legal error is to proceed with the Draft NP as originally submitted to it, which does not contain Policy C12 or Appendix E.
- (3) Failure to comply with reg. 106 of the Habitats Regulations and the impossibility of compliance with reg. 105 of the Habitats Regulations, para. 1 of Sch. 2 to the 2012 Regulations and para. 8(2)(g) of Sch. 4B TCPA 1990.**
26. Pursuant to reg. 106(1) of the Habitats Regulations, '*[a] qualifying body which submits a proposal for a neighbourhood development plan must provide such information as the competent authority may reasonably require for the purpose of the assessment under regulation 105 or to enable it to determine whether that assessment is required*'.
 27. TTC has not submitted any information to the Council in respect of the Draft NP including Policy C12 and Appendix E so as to satisfy reg. 106(1) of the Habitats Regulations. Further, TTC will be unable to comply with reg. 106(1) in accordance with the proposed timescale for the examination of the NP and consideration of the examiner's report by the Council (in accordance with the timeline in the statutory scheme) because the Council will require up-to-date surveys of the Site in order to comply with reg. 105 of the Habitats Regulations and it is not possible to undertake these surveys. Such surveys can only be carried out during the March – October 'survey window'.
 28. Further and for the same reasons, the Council will not be able to comply with para. 1 of Sch. 2 to the 2012 Regulations and para. 8(2)(g) of Sch. 4B TCPA 1990 if it proceeds to consider the Draft NP including Policy CP 12 or Appendix E.
 29. Again, the only way for the Council to avoid this legal error is to proceed with the Draft NP as originally submitted to it, which does not contain Policy C12 or Appendix E.

- (4) **The incorporation of Policy C12 and Appendix E into the Draft NP will prevent compliance with the basic conditions, specifically para. 8(2)(a) of Sch. 4B TCPA 1990.**
- (5) **The incorporation of Policy C12 and Appendix E into the Draft NP will prevent compliance with the basic conditions, specifically para. 8(2)(d) of Sch. 4B TCPA 1990.**

30. It is convenient to consider these two issues together.

31. So far as material, para. 8(2) of Sch. 4B TCPA 1990 provides:

'A draft order meets the basic conditions if –

- (a) *having regard to national policies and advice contained in guidance issued by the Secretary of State, it is appropriate to make the order [...]*
- (d) *the making of the order contributes to the achievement of sustainable development [...]*

32. The effect of Policy C12 and Appendix E is to attempt to restrict development of the Site to a form which matches the development the subject of the South Hams District Council Community Right to Build Order for Totnes Neighbourhood Area 2017 ("**the Order**"). This is apparent from the wording of Policy C12 and Appendix E against the Order and is confirmed beyond any doubt by (1) the hyperlink in paragraph 5 of Policy C12 which links to documents underpinning the Order as '*[e]vidence supporting the development brief*' and (2) consideration of the Agenda, background papers and minutes of the meeting of TTC on 4 October 2021 (when the decision to propose Policy C12 and Appendix E was made).

33. Importantly, the development the subject of the Order ("**the Order Development**") is not, and never was, viable and deliverable. The Totnes Community Development Society ("**TCDS**" - who proposed the Order) were granted a licence to occupy the Site in August 2014 but were unable to raise the necessary funding to deliver the Order Development. In a Valuation Advisory Report carried out for TCDS and Dairy Crest Group plc (since purchased by Saputo) in May 2019, JLL appraised the Order. That appraisal concluded that the Order Development:

'results in a residual land value of negative £55,352,566. This demonstrates that the proposed scheme is not currently commercially viable....' (paragraph 7.2.4, page 30).

34. JLL's appraisal (included as appendix 8 to their report) identified construction costs of £66,880,000 to implement the Order.

35. In addition, JLL considered that:

'the value of the property in its existing employment use where a purchaser would acquire the property, undertake the essential demolition and remediation works but otherwise continue to use the property in its current employment use [...] This results in a net land value of £450,000' (paragraph 7.3.2, page 31)

36. Thus, making the reasonable assumption that a site owner would not sell for less than existing use value, the inevitable conclusion is that for the Order to proceed to implementation, finance in excess of £68 million pounds would need to be in place (and it was not). TCDS had an opportunity to raise this finance (since they had an interest in the site from August 2014), acquire the Site and proceed to commence development but they were unable to do so.

37. This lack of ability to proceed to deliver was plain to the Site's owners. Our clients therefore stepped in to prevent a sale of the Site on the wider market (since an unrestricted disposal may well have meant the Site being sold to those who have no connection to the town). In this way the Brunel Park vision was born. That vision is, importantly, deliverable.

38. Thus it is perfectly plain, from both JLL's assessment and the effluxion of time since TCDS took an interest in the Site, that the Order Development was not, and is not, deliverable.

39. In light of these matters, a Draft NP incorporating Policy C12 and Annex E would fail to comply with the basic conditions in numerous respects.

40. First, NPPF para. 7 provides that the *'purpose of the planning system is to contribute to the achievement of sustainable development'* and NPPF para. 8 provides that planning policies *'should play an active role in guiding development towards sustainable solutions'*. Further, Chapter 11 of the NPPF focuses on the need to make effective use of land as part of the attainment of sustainable development, in particular the redevelopment of brownfield/previously developed land (see paras. 119, 120 and 124). Policy C12 and Appendix E is in direct conflict with these provisions because the Order Development (as enshrined in Policy C12) is neither deliverable nor viable, such that it does not amount to sustainable development, because it will never be delivered and stymies the redevelopment of brownfield land in accordance with the NPPF. It follows that a Draft NP containing Policy C12 and Appendix E would: (1) fail to accord with para. 8(2)(a) of Sch. 4B TCPA 1990 because the conflict with the NPPF means that it is not appropriate to make the Draft NP; and (2) fail to accord with para. 8(2)(d) of Sch. 4B TCPA 1990 because it would not be sustainable development.

41. Second, the PPG (to which regard must be had pursuant to s. 610 TCPA 1990) requires that:
- a. *'It is the responsibility of plan makers in collaboration with the local community, developers and other stakeholders to create realistic, deliverable policies'* (emphasis added).²
 - b. Neighbourhood plans *'should be prepared positively, in a way that is aspirational but deliverable'* (emphasis added).³
 - c. Neighbourhood plans should support the delivery of strategic policies.⁴
 - d. Neighbourhood plans should not *'be used to constrain the delivery of a strategic site allocated for development in the local plan'*.⁵
42. A Draft NP which includes Policy C12 and Appendix E will fail to accord with these clear imperatives in the PPG because the Order Development, as enshrined in Policy C12 and Appendix E, is not deliverable and thus undermines the strategic policies in the development plan (in particular the strategic policies which seek to deliver more housing). Moreover, the restrictions on development of the Site which Policy C12 and Appendix E seek to impose require a form of development which is undeliverable and thus constrain the delivery of a site which is allocated in the development plan. It follows that a Draft NP containing Policy C12 and Appendix E would fail to accord with para. 8(2)(a) of Sch. 4B TCPA 1990 because the conflict with the PPG (i.e. advice contained in guidance issued by the Secretary of State) means that it is not appropriate to make the Draft NP.
43. Finally, Section 2 to Appendix E is entitled 'Brief Requirements'. Requirements is not a word compatible with advice or guidance. Appendix E is clearly an approach to further elaborate a prescriptive approach to the Site, contrary to Government policy. This document will also only serve to enshrine a non-deliverable approach to regeneration of the Site.
- (6) The incorporation of Policy C12 and Appendix E into the Draft NP will prevent compliance with the basic conditions, specifically para. 8(2)(e) of Sch. 4B TCPA 1990.**
44. Pursuant to para. 8(2)(e) of Sch. 4B TCPA 1990, a neighbourhood development plan must be in general conformity with the strategic policies

² Reference ID: 10-002-20190509

³ Reference ID: 41-005-20190509

⁴ Reference ID: 41-003-20190509

⁵ Reference ID: 41-044-20190509

contained in the development plan for the area of the local planning authority.

45. In this case, the development plan consists principally of the Plymouth and South West Devon Joint Local Plan ("**the JLP**"). Policy SP6 and TTV22 are strategic policies within the JLP which allocate the Site for mixed use development.
46. A Draft NP which incorporates Policy C12 and Appendix E would not be in general conformity with those strategic policies because Policy C12 and Appendix E seek to restrict the range of development that can come forward, cutting down the breadth of policy TTV22, and thus constraining the delivery of the allocation. Moreover, because the Order Development is not viable or deliverable, the effect of Policy c12 and Appendix E is to undermine Policy SP6 and TTV 22.
47. The inappropriateness of this approach is underscored by the PPG which provides:

'Can a neighbourhood plan allocate additional or alternative sites to those in a local plan?

A neighbourhood plan can allocate additional sites to those in a local plan (or spatial development strategy) where this is supported by evidence to demonstrate need above that identified in the local plan or spatial development strategy. Neighbourhood plans should not re-allocate sites that are already allocated through these strategic plans.⁶ (emphasis added)

48. Policy C12 and Appendix E seek to re-allocate in exactly the way that is prohibited by the PPG. This underscores the failure to comply with para. 8(2)(e) of Sch. 4B TCPA 1990 (and also gives rise to a further failure to comply with para. 8(2)(a) of Sch. 4B).

Conclusion

49. For the reasons above, a Draft NP which contains Policy C12 and Appendix E will fail to meet the basic conditions in para. 8(2) of Sch. 4B TCPA 1990 and it would be unlawful for the Council to make such a plan.
50. Not only are Policy C12 and Appendix E flawed, but the manner in which TTC has sought to introduce these policies is disappointing and counterproductive. The PPG stresses the importance of collaboration and discussion, but TTC have not followed this approach in respect of the Site.

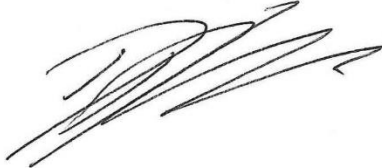
⁶ Reference ID: 41-044-20190509

51. Since the closure of the former Dairy Crest operation in 2007 that Site has lain derelict. Currently it is a 'magnet' for anti-social behaviour and there has been the tragic loss of human life on the site during this period of urban decay. There is no virtue in perpetuating this period of urban decay. The proposed new policy C12 can only serve to ensure that the site remains derelict and undeveloped.
52. This does not need to be – and should not be – the future for the Site. The Site is available, and deliverable, for mixed use regeneration as per the longstanding objective of both this, and previous, development plans in the form proposed by our client, namely Brunel Park. Our client will, shortly, be making a planning application for their proposed mixed use scheme.
53. Our client wishes to bring this sorry period of the site's history to an end and they are currently taking what steps they can to reduce the negative impact of this decay upon neighbours to the site and the town generally. These steps include:
 - a. Letting the office building located in the southern corner of the site in order to create jobs and to provide a degree of site surveillance.
 - b. Carrying out regular reviews of perimeter security and the securing of building openings.
 - c. Making a 'Bat house' planning application to South Hams District Council (SHDC) in order that they can proceed to demolish non-Listed structures on the site.
 - d. Making an LBC submission to SHDC in order to clarify the layout of the Brunel Building to accommodate community uses.
 - e. Carrying out updated flood modelling to support a planning application for redevelopment of the site.
54. However, further progress in resolving the current anti-social behaviour problems that occur cannot be made until our clients are able to proceed with their proposals to redevelop the site. There is no virtue in perpetuation of the urban decay/anti-social behaviour status of this Site. It is important that the Site is redeveloped. It is not the role of the planning system to impose a particular, non-deliverable, vision upon a Site
55. We therefore request that TTC reconsider its' position and (in order to allow the Draft NP to proceed without significant objection to it) and withdraw proposed new policy C12 and the associated Appendix E forthwith. There is simply no need for the Draft NP to make any additional provision in respect of the Site on top of JLP. Instead, TTC should

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progress the Draft NP in the form previously submitted to the Council and it should support our client's imminent application for planning permission so that the much needed redevelopment of the Site can be realised.

Kind regards,



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