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Dear Ms McCann,

**EXAMINATION OF THE DRAFT TOTNES NEIGHBOURHOOD
DEVELOPMENT PLAN – RESPONSE TO REQUEST FOR COMMENT**

I write on behalf of Fastglobe (Mastics) Ltd ("**Fastglobe**") in response to correspondence from you (via Mr Elliot Hales of South Hams District Council ("**the District Council**")) in which you requested comment on the potential to modify proposed Policy C12 of the draft Totnes Neighbourhood Plan ("**the Draft NP**"). I apologise for the delay in responding, but it has been necessary for Fastglobe to obtain legal advice.

1. In addition, I set out below a number of important matters of concern arising from the hearing that you held pursuant to para. 9(2)(a) of Sch. 4B to the Town and Country Planning Act 1990 ("**TCPA 1990**") on 6 September 2022.
2. In summary, Fastglobe makes two submissions in response to your correspondence:
 - (a) Submission 1: You, as the Examiner, do not have the power to modify Policy C12 of the Draft NP. An attempt to modify Policy C12 would be unlawful.
 - (b) Submission 2: In any event, even if the power to modify Policy C12 of the Draft NP is available, no modification is capable of remedying the deficiencies in the Draft NP.
3. As a result of either or both of these submissions, the only possible course of action is to proceed with a Draft NP that does not include Policy C12.
4. Unfortunately, Fastglobe did not consider that it had a fair opportunity to set out its concerns to you on the matters set out in the agenda for the hearing and on Policy C12 of the Draft NP. Accordingly I request that you give this letter your careful attention and take it fully into account in deciding how to proceed with the examination of the Draft NP.

I. SUBMISSION 1: THE EXAMINER DOES NOT HAVE THE POWER TO MODIFY POLICY C12 OF THE DRAFT NP. AN ATTEMPT TO MODIFY POLICY C12 WOULD BE UNLAWFUL.

5. Fastglobe's first submission is that you, as the Examiner, do not have the power to modify Policy C12 of the Draft NP. An attempt to modify Policy C12 would be unlawful.

(1) The relevant legal framework

Appointment of the Examiner

6. Pursuant to s. 38A(3) of the Planning and Compulsory Purchase Act 2004 ("**PCPA 2004**") Sch. 4B TCPA 1990 applies to neighbourhood development plans (as defined in s. 38A(2)) subject to the modifications set out in s. 38C(5) PCPA 2004.
7. The District Council submitted the Draft NP to you for examination pursuant to para. 7 of Sch. 4B TCPA 1990.

The documents forming the Examination

8. Pursuant to reg. 17 of the Neighbourhood Planning (General) Regulations 2012 ("**the 2012 Regulations**"), as soon as possible after the appointment of you as the examiner, the District Council was required to send a number of documents to you. So far as material reg. 17 provides:

'As soon as possible after the appointment of a person to carry out an examination [...] a local planning authority must send the following to the person appointed -

(a) the plan proposal [...];

(b) the documents referred to in regulation 15(1) [...]'

9. For the purposes of reg. 17 of the 2012 Regulations 'the plan proposal' means 'a proposal for a neighbourhood development plan submitted by a qualifying body under paragraph 1 of Schedule 4B to the 1990 Act' (see reg. 3 of the 2012 Regulations).
10. In addition, for the purposes of reg. 17 of the 2012 Regulations 'the documents referred to in regulation 15(1)' include 'the proposed neighbourhood development plan' and 'a statement explaining how the proposed neighbourhood development plan meets the requirements of paragraph 8 of Schedule 4B to the 1990 Act' (see reg. 15(1)(c) - (d) of the 2012 Regulations). Importantly, these documents are the documents that were submitted to the District Council by the Totnes Town Council

("TTC"). Thus, the District Council was required to pass onto you the documents provided to it by TTC.

11. Fastglobe understands that *'the proposed neighbourhood development plan'* submitted to the District Council by TTC pursuant to reg. 15 of the 2012 Regulations and which was provided to you in turn by the District Council pursuant to reg. 17 of the 2012 Regulations was the original version of the Draft NP which did not include Policy C12.
12. Fastglobe also understands that the *'statement explaining how the proposed neighbourhood development plan meets the requirements of paragraph 8 of Schedule 4B to the 1990 Act'* submitted to the District Council by TTC pursuant to reg. 15 of the 2012 Regulations and which was provided to you in turn by the District Council pursuant to reg. 17 of the 2012 Regulations did not make any reference to Policy C12.

The powers of the Examiner

13. The pertinent powers of the Examiner are described in para. 10 of Sch. 4B TCPA 1990. So far as material para. 10 provides:
 - (1) *The examiner must make a report on the draft order containing recommendations in accordance with this paragraph (and no other recommendations).*
 - (2) *The report must recommend either—*
 - (a) *that the draft order is submitted to a referendum, or*
 - (b) *that modifications specified in the report are made to the draft order and that the draft order as modified is submitted to a referendum, or*
 - (c) *that the proposal for the order is refused.*
 - (3) *The only modifications that may be recommended are—*
 - (a) *modifications that the examiner considers need to be made to secure that the draft order meets the basic conditions mentioned in paragraph 8(2),*
 - (b) *modifications that the examiner considers need to be made to secure that the draft order is compatible with the Convention rights,*
 - (c) *modifications that the examiner considers need to be made to secure that the draft order complies with the*

provision made by or under sections 61E(2), 61J and 61L,

(d) modifications specifying a period under section 61L(2)(b) or (5), and

(e) modifications for the purpose of correcting errors.

(4) The report may not recommend that an order (with or without modifications) is submitted to a referendum if the examiner considers that the order does not—

(a) meet the basic conditions mentioned in paragraph 8(2) [...]¹

14. Importantly, references in this provision to 'the draft order' are to be read as references to the 'proposed neighbourhood development plan' in the 2012 Regulations. I note that this was a matter highlighted to you at the hearing by the District Council.

(2) Fastglobe's submissions on the powers to modify the Draft NP

15. In light of the above statutory framework, Fastglobe makes the following submissions.
16. First, the only modifications that may be made to the Draft NP are those within para. 10(3) of Sch. 4B TCPA 1990.
17. Secondly, all of the modifications in para. 10(3) of Sch. 4B TCPA 1990 must be made (and can only be made) to 'the draft order'. As explained above, this must be read as a reference to the 'proposed neighbourhood development plan' in the 2012 Regulations.
18. Thirdly, 'the proposed neighbourhood development plan' in this case is the Draft NP that was submitted pursuant to reg. 15 of the 2012 Regulations, before the commencement of the examination, and which was passed onto you as the Examiner pursuant to reg. 17 of the 2012 Regulations. On this basis and as explained above, the proposed neighbourhood development plan was the original version of the Draft NP which did not include Policy C12. This is beyond any doubt because Policy C12 was only proposed after the steps required by regs. 15 and 17 were performed.

¹ Pursuant to s. 38C(5) PCPA 2004 the reference in this section to provisions in ss. 61E, 61J and 61L TCPA 1990 are to be read as references to the provisions made by or under ss. 38A and 38B PCPA 2004, except that pursuant to s. 38C(5)(c) references to s. 61L(2)(b) or (5) TCPA 1990 are to be disregarded. None of this affects Fastglobe's submissions.

19. Fourthly, it follows that no modifications may be made to Policy C12 because it was not part of the proposed neighbourhood development plan.
20. Fifthly, for the avoidance of doubt, it is not possible to use the power to modify to introduce Policy C12 into the Draft NP as a new policy. This is because such a modification would not fall within para. 10(3) of Sch. 4B TCPA 1990. Fastglobe notes that no party has suggested this as an approach, but if it was suggested, it would be in error.
21. Sixthly, you suggested at the hearing that because you "*had not started [the] examination*" then the inclusion of Policy C12 was possible. This is incorrect, as the District Council explained at the hearing. Whether or not you considered the examination to have started is irrelevant; rather, what is significant is how regs. 15 and 17 of the 2012 Regulations were complied with by TTC and the District Council, as set out above.
22. For all these reasons, there is no power to modify Policy C12 as proposed in your correspondence to Fastglobe.

II. SUBMISSION 2: EVEN IF THE POWER TO MODIFY POLICY C12 OF THE DRAFT NP IS AVAILABLE, NO MODIFICATION IS CAPABLE OF REMEDYING THE DEFICIENCIES IN THE DRAFT NP.

23. Further or alternatively, Fastglobe submits that even if there is a power to modify Policy C12 of the Draft NP, nevertheless no modification is capable of remedying the deficiencies that Fastglobe has identified in the Draft NP.
24. In summary, Fastglobe has identified the following deficiencies in TTC's approach:
 - (a) incorporation of Policy C12 and Appendix E into the Draft NP will cause TCC to fail to comply with reg. 14 of the 2012 Regulations;
 - (b) incorporation of Policy C12 and Appendix E into the Draft NP will cause TCC 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 TCC 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)(f) and (g) of Sch. 4B TCPA 1990;
 - (d) incorporation of Policy C12 and Appendix E into the Draft NP in the present circumstances would be unlawful because of the failure by TCC and the Council to comply with the Environmental Assessment

of Plans and Programmes Regulations 2004 ("the **SEA Regulations**") and para. 8(2)(f) and (g) of Sch. 4B TCPA 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)(a) of Sch. 4B TCPA 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)(d) of Sch. 4B TCPA 1990;
 - (g) 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.
25. None of the deficiencies can be remedied by amendment of the Draft NP. Each of these deficiencies will be considered in turn.

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

26. The incorporation of Policy C12 and Appendix E into the Draft NP by TCC has not complied with reg. 14 of the 2012 Regulations.
27. 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'*

28. 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 District Council in purported compliance with reg. 15 of the 2012 Regulations. The District Council has taken subsequent steps, for example the appointment of you as the examiner in September 2021. All of these matters preceded 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 District Council did not include Policy C12 or Appendix E.
29. It follows that if TTC persists with its attempt to incorporate Policy C12 or Appendix E into the Draft NP, TCC will have failed to comply with reg. 14 in the following respects.
30. 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 District Council because Policy C12 and Appendix E were omitted.
31. The subsequent ad-hoc non-statutory consultation cannot cure this error because the Draft NP had already been submitted to the District Council and thus the consultation is not publication in accordance with reg. 14(a) which requires publication before submission to the Council.
32. 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.²

33. Secondly, and for essentially the same reasons, TTC failed to comply with reg. 14(b) because it did not consult the relevant bodies before submitting

² Reference ID: 41-049-20140306

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 subsequent ad-hoc non-statutory consultation did not cure that error as it was not consultation before submission to the District Council.

34. Thirdly, and for essentially the same reasons, TTC failed to comply with reg. 14(c) because it sent a copy of the Draft NP to the District Council before formal submission under reg. 15 which did not contain Policy C12 and Appendix E.
35. It follows that it would be unlawful for the District Council to seek to make the Draft NP in due course containing Policy C12 and Appendix E because TTC has 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.
36. The only way for the District 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.
37. The further consequence, as considered below, is that the environmental screening assessments (if any) undertaken by the Council were flawed as they did not consider Policy C12 and Appendix E.
38. This issue cannot be cured by modifying the wording of Policy C12.

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

39. The incorporation of Policy C12 and Appendix E into the Draft NP by TCC was in breach of reg. 15 of the 2012 Regulations.
40. 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 [...]

41. As noted above, TTC has already submitted the Draft NP to the District Council and the District Council has appointed you as the examiner and taken further steps in respect of the Draft NP.
42. TTC purported to comply with reg. 15 by submitting a number of documents to the District Council. None of those documents included or considered Policy C12 and Appendix E.
43. It follows that it would be unlawful for the District Council to seek to make the Draft NP in due course containing Policy C12 and Appendix E because TTC has failed to comply with reg. 15 of the 2012 Regulations. More specifically:
 - (a) the consultation statement submitted to the District Council did not consider the consultation undertaken on Policy C12 and Appendix E (even if that consultation was lawful, which is not accepted);
 - (b) the Draft NP submitted to the District Council did not include Policy C12 and Appendix E and thus was not a complete copy of 'the proposed neighbourhood development plan';
 - (c) the basic conditions statement did not explain how the Draft NP including Policy C12 and Appendix E met the basic conditions;
 - (d) no environmental report was submitted (as Fastglobe contends was required by the inclusion of Policy C12 and Appendix E – see below) (or, in the alternative, there was no determination under reg. 9(1) of the SEA Regulations that the Draft NP including Policy C12 and Appendix E was unlikely to have significant environmental effects).
44. TTC has not sought to mitigate these errors by updating its submissions to the District Council, for example by submitting a new version of the Draft NP to the District Council including Policy C12 and Appendix E or a new consultation statement or a new statement dealing with the basic conditions. Accordingly, these breaches of reg. 15 have gone uncorrected.
45. In any event, it is not possible for TCC to retrospectively remedy these breaches of reg. 15 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.

46. Again, the only way for the District 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.
47. This issue cannot be remedied by modifying the wording of Policy C12.

(3) Issue 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)(f) and (g) of Sch. 4B TCPA 1990

48. 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*'.
49. TTC has not submitted any information to the District Council in respect of the Draft NP including Policy C12 and Appendix E so as to satisfy reg. 106(1) of the Habitats Regulations. The Habitats Regulations Assessment (dated May 2021 and prepared by Aecom) did not consider Policy C12 and Appendix E (see in particular PDF p. 20).
50. 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 your examiner's report by the District Council (in accordance with the timeline in the statutory scheme) because the District Council will require up-to-date surveys of the Fastglobe's site in order to comply with reg. 105 of the Habitats Regulations and it is not possible to undertake these surveys in the time available. (Similarly, it is not possible to rely on the earlier habitats regulation assessment undertaken by the Council in respect of the JLP: that is out of date and in any event considered a different plan.)
51. Further and for the same reasons, the District Council will not be able to comply with para. 1 of Sch. 2 to the 2012 Regulations and para. 8(2)(f) and (g) of Sch. 4B TCPA 1990 if it proceeds to consider the Draft NP including Policy CP 12 or Appendix E.
52. Again, the only way for the District 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.
53. This issue cannot be remedied by modifying the wording of Policy C12.

(4) Issue 4 – Failure to comply with the SEA Regulations and the impossibility of complying with para. 8(2)(f) and (g) of Sch. 4B TCPA 1990

54. No environmental assessment for the purposes of the SEA Regulations has been carried out at all or for the Draft NP including Policy C12 and Appendix E.
55. There is no coherent basis on which an environmental assessment under the SEA Regulations is not required. There is no evidenced basis on which it can be concluded that the Draft NP does not meet (at least) one of the triggers reg. 5(2), (3) and (4) of the SEA Regulations. In particular, the District Council has not complied with reg. 9 by making a determination under that power (including the preparation and publication of a statement of reasons) in respect of the Draft NP including Policy C12 and Appendix E.
56. It follows that the District Council will not be able to comply with the SEA Regulations and para. 8(2)(f) and (g) of Sch. 4B TCPA 1990 if it proceeds to consider the Draft NP including Policy CP 12 or Appendix E. Again, the only way for the District 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.
57. This issue cannot be remedied by modifying the wording of Policy C12.

(5) Issue 5 - 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.

(6) Issue 6 - 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,

58. It is convenient to consider these two issues together.
59. 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 [...]

60. The effect of Policy C12 and Appendix E is to attempt to restrict development of Fastglobe's 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).

61. 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 Fastglobe's 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).

62. JLL's appraisal (included as appendix 8 to their report) identified construction costs of £66,880,000 to implement the Order.
63. 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)

64. 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.
65. This lack of ability to proceed to deliver was plain to the site's previous owners. Fastglobe 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.

66. 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.
67. In light of these matters, a Draft NP incorporating Policy C12 and Annexe E would fail to comply with the basic conditions in numerous respects.
68. 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). In addition paragraph 16(b) of the NPPF requires plans to be deliverable, i.e. to propose viable forms of development. Policy C12 and Appendix E are 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.
69. 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).³
 - (b) Neighbourhood plans '*should be prepared positively, in a way that is aspirational but deliverable*' (emphasis added).⁴
 - (c) Neighbourhood plans should support the delivery of strategic policies.⁵
 - (d) Neighbourhood plans should not '*be used to constrain the delivery of a strategic site allocated for development in the local plan*'.⁶
70. 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

³ Reference ID: 10-002-20190509

⁴ Reference ID: 41-005-20190509

⁵ Reference ID: 41-003-20190509

⁶ Reference ID: 41-044-20190509

undermines the strategic policies in the development plan (in particular the strategic policies which seek to deliver more housing).

71. Moreover, the restrictions on development of Fastglobe's site which Policy C12 and Appendix E seek to impose require a form of development which is undeliverable and thus constrains 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.
72. 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 Fastglobe's site, contrary to Government policy. This document will also only serve to enshrine a non-deliverable approach to regeneration of the site.
73. These issues cannot be remedied by modifying the wording of Policy C12.
- (7) Issue 7 - 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.**
74. Pursuant to para. 8(2)(e) of Sch. 4B TCPA 1990, a neighbourhood development plan must be in general conformity with the strategic policies contained in the development plan for the area of the local planning authority.
75. In this case, the development plan consists principally of the JLP. Policy SP6 and TTV22 are strategic policies within the JLP which allocate the Site for mixed use development. The District Council confirmed this to you at the hearing and no party offered a contrary view.
76. 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.
77. The inappropriateness of this approach is underscored by the PPG which provides:

'Can a neighbourhood plan allocated 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.⁷ (emphasis added)

78. 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).
79. This issue cannot be remedied by modifying the wording of Policy C12.

Conclusion on submission 2

80. For these reasons, even if it is possible to modify Policy C12, there is no effective modification that can be made to remedy the issues identified above.

III. MATTERS ARISING FROM THE HEARING

81. In addition to the submissions above there are four matters arising from the hearing which Fastglobe wishes to draw to your attention.

(1) No support for Policy C12 in the representations made during consultation

82. At the hearing TTC asserted that members of the public made reference to Fastglobe's site in the consultation exercise undertaken pursuant to reg. 14 of the 2012 Regulations. Those representations were not available at the hearing but have now been made available. Fastglobe has considered those representations and there is absolutely no reference to its site. TTC's assertion was incorrect and should be disregarded by you. Further, this only serves to underline the absence of justification for Policy C12.

(2) No habitats regulation assessment of Policy C12

83. I have explained above why the inclusion of Policy C12 will lead to a breach of reg. 106 of the Habitats Regulations. At the hearing it was suggested by the District Council that a screening exercise had been undertaken for the purpose of the Habitats Regulations because a consultation response had been provided by Natural England. This assertion is fundamentally flawed: a consultation response provided by

⁷ Reference ID: 41-044-20190509

Natural England cannot be a screening exercise by the competent authority; and in any event the letter did not undertake such an exercise. This examination would fall into error if it proceeded on the basis of the District Council's assertion.

(3) Requirement to follow the PPG

84. At the hearing you suggested that the PPG was only guidance and did not need to be followed.
85. Pursuant to s. 38C(1) and (2)(e) PCPA 2004 s. 61O TCPA 1990 applies in relation to neighbourhood development plans. Section 61O provides:

'Local planning authorities must have regard to any guidance issued by the Secretary of State in the exercise of any function under any provision relating to neighbourhood development orders (including any function under any of sections 61F to 61H).'

86. Where a public authority is required to have regard to guidance it must follow that guidance unless there are good reasons not to do so.⁸
87. There are no good reasons to depart from the PPG in this case. None of the parties identified any such reason and you did not identify such a reason either.
88. This is particularly important in this case because, remarkably, TCC chose not to consult with Fastglobe before developing Policy C12 and Appendix E. Such an approach is clearly contrary to the PPG. For example:
- (a) The PPG requires a qualifying body to *'be inclusive and open in the preparation of its neighbourhood plan [...] and ensure that the wider community [...] is kept fully informed of what is being proposed [...] is able to make their views known throughout the process [and] has opportunities to be actively involved in shaping the emerging neighbourhood plan'*.⁹ This was not done in respect of Policy C12 and Appendix E. In particular, no opportunity was afforded to Fastglobe to be *'actively involved'* (or involved at all) in shaping the policy that will apply to the Site.

⁸ R. (*Lumba*) v Secretary of State for the Home Department [2011] UKSC 12, [2011] 1 AC 245 per Lord Dyson at [26]; *EC Gransden v. Secretary of State for the Environment* (1987) 54 P.&C.R 86; and

R. (Watermead Parish Council) v Aylesbury Vale DC [2017] EWCA Civ 152, [2018] PTSR 43 per Lindblom LJ at [29].

⁹ Paragraph 047; Reference ID 41-047-20140306; Revision date 06 03 2014.

(b) The PPG specifically refers to the need to involve landowners. This is because *'[by] doing this qualifying bodies will be better placed to produce plans that provide for sustainable development which benefits the local community whilst avoiding placing unrealistic pressures on the cost and deliverability of that development'*.¹⁰ Fastglobe as landowner of the Site was not involved. Further, the mischief which the PPG seeks to avoid has occurred as a result: Policy C12 does not promote a form of sustainable development, as explained below; the necessary redevelopment of the Site will not occur, thus losing a possible public benefit; and Policy C12 places such unrealistic expectations on the redevelopment of the Site that it is undeliverable.

89. These breaches cannot simply be waived on the basis that the PPG is "only guidance" for the reasons I have explained.
90. Further, whether or not Fastglobe has been prejudiced by this failure to follow the PPG is irrelevant. However, even if it was relevant, there has been obvious prejudice to Fastglobe. For example: Fastglobe was denied the important opportunity to help shape Policy C12 and the powers of modification that are now available are insufficient to remedy Fastglobe's concerns whilst retaining the policy. In addition, there is a complete dislocation between the evidence base and Policy C12. There is absolutely no evidence to support the inclusion of Policy C12. Fastglobe is thus prejudiced because it has been denied the opportunity to interrogate the justification for Policy C12.

(4) No evidence on viability

91. I have already explained above why the form of development promoted in Policy C12 is woefully unviable. In this regard it is very important to note that no contrary evidence was presented at the hearing. To the contrary, TTC accepted that there was no up to date viability appraisal. In these circumstances there is no basis on which it can be concluded that Policy C12 promotes viable or deliverable development. It would be an error of law to reach such a conclusion.

IV. CONCLUSION

92. For the reasons above, it is not possible to modify Policy C12 and in any event no modification can be made to Policy C12 which cures the deficiencies identified by Fastglobe. The Draft NP cannot proceed with the inclusion of Policy C12 and Appendix E.
93. In addition, 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 District Council to make such a plan.

¹⁰ Paragraph 049; Reference ID 41-048-20140306; Revision date 06 03 2014.

94. 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 has not followed this approach in respect of Fastglobe's site.
95. 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.
96. 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 Fastglobe, namely Brunel Park.

Kind regards,



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