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Date: Monday, 20 October 2014

Overview and Scrutiny
Town Hall
Castle Circus
Torquay
TQ1 3DR

Dear Member

OVERVIEW AND SCRUTINY BOARD - THURSDAY, 16 OCTOBER 2014

I am now able to enclose, for consideration at the Overview and Scrutiny Board to be held on Thursday, 16 October 2014, the following reports that were unavailable when the agenda was printed.

Agenda No	Item	Page
4.	Officer Response to Call-in	(Pages 18 - 28)
	Letter from Bloor Homes	(Pages 29 – 32)

Yours sincerely

Kate Spencer
Overview and Scrutiny Lead

Agenda Item 4



Title: **Proposed Covenant protecting Churston Golf Course from development – Officer response to questions raised in Call-in Notice**

To: **Overview and Scrutiny Board** On: **16 October 2014**

Contact Officer: **Charles Uzzell** **Anne-Marie Bond**
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1. Is the proposed covenant legal or legally advisable as it could result in existing leaseholders to claim compensation e.g. Churston Golf Course, TCCT and others in due course which are likely be affected, as the retrospective imposition of restrictive covenants was not envisaged when the tenants originally entered into the terms of the lease?

The Council can legally impose a covenant to prevent development on its land. There are however a number of provisions and procedures which must be taken into account.

The Council cannot dispose of its land (disposal means selling, granting interests in land such as covenants and leases etc.) unless it can achieve best value for it (usually full current open market value). It would therefore be incumbent on the Council to seek the best consideration reasonably obtainable for the covenant, unless the Council has the specific consent of the Secretary of State or it can rely on a General Consent Order.

Since the Council is proposing to grant the covenant for no consideration, the Council should try to rely on a General Consent Order whereby deemed consent is given to an undervalue disposal of land if;

‘the difference between the unrestricted value of the land to be disposed of and the consideration for the disposal does not exceed £2m’.

Determining the value of the covenant is not easy. It will be enjoyed by and confined to those with an interest in land capable of being benefited by the covenant. That value (the enhanced value of their land with the covenant in place) needs to be assessed by a valuer. It is those properties that surround the golf course that would be considered to have the benefit of the covenant. The calculation would be the **enhanced** value of their land with the covenant in place.

Depending upon the outcome of that valuation exercise, it may be possible to rely on the General Consent Order. If however the enhanced value of the properties exceeds £2m, an application for the Secretary of State’s specific consent would be required.

Additionally before the covenant is legally made, a notice of the Council’s intention to grant the covenant will need to be advertised in the Herald Express for two consecutive weeks and any objections to the proposed covenant will need to be duly considered.

As detailed in 8. below, a covenant wording was provided in the Council report to ensure that it did not conflict with the terms of existing leases in the area. On the basis that there is no such conflict then there is no basis for a leaseholder to claim compensation.

It should be noted that the reality is that there is no legal mechanism by which land held by the Council can be given absolute and irrevocable protection, as covenants can be

wholly or partially modified or discharged by the Lands Tribunal under s.84 Law of Property Act 1925.

- 2. Barclays Bank appears to have first charge over the 999 year lease, signed by the Golf Club. Are there any other parties who have charges over the land? What are the consequences of the proposed Churston Covenant on this land and, specifically, is any liability likely to fall on the Council if Churston Golf Club default on its borrowings (as a result of the introduction of the Churston Covenant)?**

There are no other parties who have a charge registered other than Barclays Bank. No liability can fall on to the Council if the Golf Club defaulted on its borrowings.

- 3. What is the likely impact of agreeing to the Churston Covenant on current progress with the Local Plan?**

In simple terms, agreeing to the Churston Covenant threatens progress with, and delivery of, the new Local Plan. That risk is further increased if the Churston Covenant is agreed because it sets a precedent for other petitions to be submitted regarding Council owned land that is identified for development in the new Local Plan. If those petitions come forward before the Local Plan Hearing, there is a very good chance the Inspector will postpone the Hearing. If they come forward after the Hearing, it may be difficult to deliver the Local Plan, in the way the Council sets out in the Local Plan, and as a consequence more sensitive sites will be promoted (by land owners) to secure delivery.

Whether the Local Plan continues or not, there will be a greater opportunity (if the Covenant is agreed) for other landowners / developers to successfully promote, at the Local Plan Hearing, their own sites. These are highly likely to be in more sensitive locations – such as AONB – than the 1st & 18th, which is why the Council has not allocated them in the Plan. If such sites are allocated, by the Inspector, the huge amount of work undertaken by the Council and Torbay's communities – to identify the most sustainable sites for development - will have, in part, been wasted.

The appointed Local Plan Inspector is probably the most senior and respected Inspector at the Planning Inspectorate. The Council is not allowed, under the terms of the regulations governing Local Plan production, direct dialogue with the appointed Local Plan Inspector. However, via the Local Plan Programme Officer, officers have obtained an opinion from the Inspector. His opinion is summarised below. It is the presiding Inspector's opinion that is important; far more important than any legal opinion.

Summary of the Inspector's advice:

- Potentially a problem, given impact on 5 year land supply and deliverability of the Plan;
- Extent of problem increased if other sites are affected;
- Council may need to find substitute sites, which will then need to be advertised and Sustainability Appraisal work done;
- If this extra work is required, then Examination may have to be delayed;
- Little point in Council proceeding without a clear 5 year housing land supply.

There are two key points in the Inspector's advice.

First, 5 year land supply. The Council believes it has a 5 year housing land supply, based on the last DCLG Household Projections. So, officers believe we can proceed to the Local Plan Hearing on this basis. But the Inspector may believe the Council needs to provide more homes than the 9,239 currently shown in the Local Plan. If that is the case, then the Council may not have a 5 year housing land supply and the Council's position will have been weakened if Churston Golf Course (1st & 18th) is not included.

Secondly, the need to identify sites not yet identified in the Local Plan – predominantly because of their environmental sensitivity. Officers know it is the intention of a number of land owners and developers to promote other sites to the Inspector at the Local Plan Examination. Comments made by those land owners / developers during the last consultation on the Local Plan make their intentions clear. Those land owners / developers have been invited, by the Planning Inspector, to the Local Plan Hearing. Officers do not consider it necessary for the Council to promote additional sites at this point, before the Hearing in mid November. If the Council did promote additional sites, at this stage, the Hearing – and therefore the Local Plan - would be delayed, as the Inspector advises (see his comments above).

The sites that will be promoted by land owners / developers at the Hearing are:

- Land at Collaton, opposite Parkers Arms PH (promoted by Bloor Homes)
- Car Boot Sale site (promoted by Taylor Wimpey)
- Land south of White Rock (promoted by Abacus / Deeley Freed)
- St Mary's, Brixham (promoted by Smiths Gore)
- Sladnor Park, Maidencombe (promoted by PCL Planning)
- Corbyn Apartments (promoted by the land owner)
- Land around Yalberton (promoted by the land owner)

It is useful, in this context, that the Council's Development Management Committee decided (in September 2014) to grant planning permission for development at Wall Park, Brixham. The development includes 165 new homes. Once the S106 Agreement has been signed and the decision issued, the site will be added to the 5 year supply of housing land. However, the site is already identified in the new Local Plan and contributes towards the total capacity for new homes (totaling 9,300) in the Bay. Consequently it will be necessary to find a substitute site for Churston Golf Course (1st & 18th), if the Covenant is agreed.

The loss of Churston Golf Course (1st & 18th) makes it much more likely that these the more sensitive sites referred to above, and potentially others, will be considered as acceptable by the Inspector and allocated in the Local Plan. These are sites that communities across Torbay have been clear about: they do not wish to see those sites developed; they are environmentally sensitive sites; it is these areas of land that make Torbay special. That position is made clear in emerging Neighbourhood Plans. So the proposal by Churston & Galmpton Community Partnership flies in the face of the work that the Council has carried out with its partners in the wider community across Torbay and, indeed, that communities have undertaken in their preparation of Neighbourhood Plans.

4. What is the potential impact, of agreeing to the Churston Covenant, on the Council's 5 year supply of housing land? If the Council does not have a 5 year housing land supply, what are the consequences?

The simple answer is:

It is never a good idea to lose sites, especially those with planning permission, from the Council's 5 year housing land supply. Loss of those sites has planning and economic consequences. Loss of those sites also has an impact on Torbay's communities. The loss of Churston Golf Course (1st & 18th) from Torbay's 5 year land supply will threaten the Bay's ability to maintain a 5 year supply, especially if the Local Plan Inspector considers Torbay needs to provide more than 9239 homes over the next 20 years, and will put pressure for development of other more sensitive sites than Churston Golf Course (1st & 18th). These are the very sites that Torbay's communities have worked hard, through the Local and Neighbourhood Plan process, to protect from development.

In **planning terms** it is extremely important to maintain a 5 year housing land supply, to avoid more sensitive land being developed. It is a fact that lack of a 5 year land supply trumps land identified as 'countryside zone' the Local Plan – so, in the absence of a 5 year housing land supply, the Council could not defend refusal of planning permission on the grounds that development is in the countryside.

In **economic terms**, sites with planning permission that are developed bring substantial economic and social benefits. For the development at Churston (1st & 18th), the Section 106 Agreement secured a total of £578,000 as community benefits, including:

- £260,510 on sustainable transport, to be spent on upgrading America Lane to a bridleway along its entirety, completing the shared use path on the A3022 from Churston Road to Manor Vale Road, completing missing cycle link between Manor Vale Road and Churston Road with a 3 metre shared use path, and upgrading lighting in the underpass between Bridge Road and Greenway Road.
- £34,990 lifelong learning contributions would be spent on capital investment at Churston Library (It might be considered as ironic that there was a protest by local people, at the September Council meeting, to keep the library open, at the same time as local people were petitioning the Council to stop the development that helps fund the library).
- £100,650 education contribution would be spent on increasing provision (classroom space) at White Rock and Roselands schools
- £145,924 greenspace contribution would be spent on the public rights of way improvement plan and the SW Coast Path.

These are all things that local people tell us are important to them locally.

The more detailed answer, in addition to above, is:

- **The Council's current position** – The Council considers it has a 5.9 year supply of housing land, which includes land at the 1st and 18th. The 1st and 18th is the 4th largest site with planning permission in the Bay – so it's important in terms of size – and is, planning terms, a relatively constraint free, very developable site. The loss of 132 new homes, with planning permission, represents just under 5% of the total number of homes on 5 year supply sites and is not, as such, pivotal to the maintenance of a 5 year housing land supply. However, that assessment by the Council is based on providing 475 homes per annum (440 DCLG Household projections; + 11 for second homes; x 5% for NPPF buffer) and is about to get tested in the following ways.
- **Churston Clubhouse Inquiry** – The Inspector for the Churston Golf Clubhouse Inquiry is being asked to decide whether the Council's assessment is correct or whether a higher number should be applied. He is being asked, by the appellants, to consider up to 940 new homes per annum. If the Inspector agrees with this, or any figure above about 550, then the Council will not have a 5 year land supply. The loss of Churston (1st & 18th) will contribute to that under-supply. It is worth noting that two previous Inspectors, re Wall Park and Scotts Meadow, concluded the Council did not have a 5 year land supply, based on formal updates (2008) of the DCLG Household Projections.
- **DCLG Household Projections** – A formal update of the DCLG's Household Projections will be published very shortly. They could show that Torbay needs to provide more than the 440 homes per annum that the last update suggested. That will put pressure on the 5 year housing land supply, underlining the importance of maintaining a very healthy amount of housing land with planning permission.

- **Local Plan Examination** – The Inspector for the Local Plan will, as a key issue, be making a decision on the Council’s objectively assessed housing need. The Council’s own evidence, just on housing need, suggests 615 (from the PBA evidence) or 820 (2011 SHMA update) homes per annum would meet objectively assessed housing need. The Council’s case is that the Bay doesn’t have the environmental capacity for that number of homes, but the Inspector may not accept the Council’s case. He may decide, for example, that up to 10,000 new homes is unacceptable and that 11,000 or 12,000 are required over the next 20 years to meet objectively assessed need. This will required additional sites to come forward, many of which will be in extremely sensitive locations. The requirement to do this is made all the more necessary if the 1st & 18th falls out of the 5 year land supply. In other words, if 132 new homes don’t come forward on the 1st & 18th, then they (or more) need to be found elsewhere, which is likely to be on more sensitive land than the 1st & 18th.

If the Council cannot show a 5 year housing land supply, at any point, then there will be increased pressure for development on environmentally sensitive sites (certainly more environmentally sensitive than the 1st and 18th). Those sites include those listed in answer to Question 3 and the following:

- Car Parks across Torbay;
- Copythorne Road, Briaxham
- Mathill Road, Brixham
- Manor Farm, Galmpton
- Sandringham Gardens, Paignton
- Land rear of Brokenbury STW, Paignton
- Nutbush Lane, Torquay
- Torquay Golf Club
- Enlarged Wall Park, Brixham
- Yalberton Holiday Park, Paignton

Even if the Council chose to refuse any subsequent planning applications for the development of such sites, there is clear evidence across the country that the absence of a 5 year land supply would mean that the Council is unlikely to be successful in defending such decisions at appeal. That pressure increased because, in accordance with case law, local designations – such as countryside zone – are ‘trumped’ by housing need

5. Does the Churston Covenant result in any change to the financial value of land comprising Churston Golf Course? If so, how much is the change in value and what is the potential loss of other benefits?

Caveat: The request for advice was made on Wednesday 8 October with a deadline of Tuesday 14 October.

A golf course is a specialist type of property and in the past the Council has sought external advice from Humberts Leisure (now merged with GVA to form GVA Humberts Leisure) and the District Valuer. Bearing in mind the urgency of the request it is considered that there is insufficient time to instruct external agents.

The following is the advice from the TDA’s Head Valuer based upon the information currently to hand and making a number of assumptions. Due to the need for urgent advice it should be noted that, if further time is available and/or the assumptions were altered, then the advice given may be different.

How much is the change in value?

This question only relates to the change in value and does not ask 'what is the financial loss to the Council?'

Assumptions

1. It is assumed that the value of the whole golf course is £1.65 Million (i.e. the premium paid in 2003 for the 999-year lease) with the assumption that there has not been a significant change in value in the last 11 years.
2. The Existing Use Value of the 1st & 18th holes is calculated on a pro-rata basis ignoring any possible uplift in value due to the presence of clubhouse on this land.
3. The adopted current land value for the 1st & 18th holes will be as per the development value as assessed by the District Valuer contained in the report dated 05 April 2010. It is assumed that there has not been a significant change in value since April 2010. This figure was in the region of £7-8M.
4. That a future Administration would be willing to allow development on the 1st & 18th holes with such development being the same for which planning permission was granted to Bloor Homes. It is also assumed that the cost of re-providing the golf course facilities and any payment to the Club by Bloor Homes) are the same as per the proposed scheme in 2010.
5. The change in value will be the difference.
6. An assessment of the financial loss to the Council in terms of the capital receipt for not giving consent to vary the lease will not be carried out as the question only relates to the value of the land.

Calculations

Existing Use Value of the 1st & 18th holes –

Total area of golf course from plan EM2469 – 534,750M² / 53.47 Hectares / 132.12 Acres.

Area of 1st & 18th holes – 10.58 Acres.

(£1,650,000 / 132.12 acres) x 10.58 acres = £132,130 Say £132,000

Uplift in Value –

Development Value of the Land - Adopt £7,000,000

Less Existing Use Value - £ 132,000

£6,868,000

Having made the comments in Assumption 6 above, if the Overview and Scrutiny Board did ask what the financial loss in terms of any capital receipt then this would be £2M, based upon the above assumptions.

What is the potential loss of other benefits?

This could cover loss of Council Tax for the new houses, any s106 contribution / New Homes Bonus etc. This does not include the £2M the Council was to receive for giving its consent to allow the development to take place on the 1st & 18th holes.

The following is based upon the assumption that any future proposals / development are the same as per the planning permission granted to Bloor Homes.

S106 contribution

As mentioned in the answer to question 4, for the development on the 1st & 18th holes on Churston Golf Club, the Section 106 Agreement secured a total of £578,000 as community benefits, including:

- £260,510 on sustainable transport, to be spent on upgrading America Lane to a bridleway along its entirety, completing the shared use path on the A3022 from Churston Road to Manor Vale Road, completing missing cycle link between Manor Vale Road and Churston Road with a 3 metre shared use path, and upgrading lighting in the underpass between Bridge Road and Greenway Road.
- £34,990 lifelong learning contributions would be spent on capital investment at Churston Library (It is ironic that there was a protest by local people, at the

September Council meeting, to keep the library open, at the same time as local people were petitioning the Council to stop the development that helps fund the library.

- £100,650 education contribution would be spent on increasing provision (classroom space) at White Rock and Roselands schools
- £145,924 greenspace contribution would be spent on the public rights of way improvement plan and the SW Coast Path.

New Homes Bonus

This could be approx. £1.1M, based on 132 units at Band D for 6 years (£8,400 per unit).

Possible Loss of Council Tax

The proposed development was for 90 homes and 42 extra care flats.

According to the Business Rates / Council Tax Department the flats would attract Council Tax and not Business Rates.

Based upon a payment of £1,504.22 for Band D properties for the financial year 2014/15 and a total of 132 houses / flats (assume all on Band D) the potential loss would be in the region of £198,500.

Loss of Jobs

It is understood that the extra care flats was the affordable housing element. As such there are 90 open market houses and 42 affordable extra care apartments. The following is based upon the ratio that every 100 owners occupied family homes creates 52 jobs when occupied and 324 jobs during construction.

It is further assumed that the occupiers of the extra care apartments would not be employed. However, it is assumed that the extra care apartments would create 15 FTE jobs, in the form of gardeners, maintenance, cleaning, catering and nursing. Adopting the average salary for Torbay of £21,000, this results in an annual value of £315,000.

The 90 open market houses would create 47 jobs at £21,000 pa this has a value of £987,000 pa.

The 132 units would create 428 construction jobs.

As such,

Total construction jobs: 428

Total FTE jobs: 15 + 47

ANNUAL value of jobs created (exc. Construction): £315,000 + £987,000 = £1,302,000 pa

Summary

S106 Contributions	£578,000
New Homes Bonus	£1,100,000
Loss of Council Tax	£198,500
Loss of Jobs	<u>£1,302,000</u>
	£3,178,500

N.B. The figure used by Bloors has routinely been £5m in total, including capital receipt of £2M to the Council.

6. Will the decision deter future investment into the Bay as proposals concerning council owned land (housing or otherwise) will carry the added risk of a covenant being granted after considerable development costs have been incurred for those sites?

In the timescales required by the call-in process it has not been possible to go out to market to test views. Accordingly it is difficult to properly assess the impact of the decision on future investment so this response represents a perspective rather than a definitive opinion.

We can though draw on Council and TDA contacts with investors and local businesses. Last autumn the TDA's Business Barometer asked a number of questions around planning focusing on what supports business growth and what businesses are looking for when making investment decisions. Answers included;

- Rapid processing of applications.
- Single and consistent point of contact for each applicant/case

This demonstrates some of the views that businesses, large and small, will have and we know that as a general rule developers who are bringing forward proposals (housing or otherwise) dislike unpredictable decisions around planning. Indeed the development industry lobbied to ensure that the National Planning Policy Framework set out a broadly more permissive approach to development than there had been under previous legislation.

Given that there has not been widespread use of the covenant previously by the Council investors would likely take that into account. There is a risk that the decision creates a precedent and that future proposals are also impacted upon in this way which might make generating interest more difficult. There is also an impact if proposals move forward in that, while we know that higher levels of confidence are likely to ensure that the value for the site is achieved, higher levels of uncertainty and risk will likely see that risk being in some way factored into the appraisal for sites and schemes.

7. If similar petitions, to that put forward by Churston & Galmpton Community Partnership, are received in relation to other Council assets will they result in any change to the financial value of those assets? If so, how much is the likely change in value for each asset? If this precedent is applied the other Council owned sites identified within the Local Plan and, in particular, the next five year's land supply for housing, what is the potential loss of capital receipt to the Council for each of these sites?

Caveat: The request for advice was made on Wednesday 8 October with a deadline of Tuesday 14 October.

The following is the advice from the TDA's Head Valuer based upon the information currently to hand (including advice from colleagues about specific projects – Oldway Mansion, Great Parks, Hatchcombe Lane and Cary Green) and making a number of assumptions. Due to the need for urgent advice it should be noted that, if further time was available and/or the assumptions were altered, then the advice given may be different.

Assumptions

1. That the only Council owned sites affected are those detailed elsewhere in this report.
2. That each site is capable of being developed for residential use and that planning permission would be forthcoming.

3. No account has been taken for any resultant benefits from any development if appropriate e.g. additional Council Tax, s106 contributions, New Homes Bonus etc.
4. That there are no leases / legal agreements in place so no account has been taken for any compensation /relocation costs associated with obtaining vacant possession.

The following Council owned sites were considered

- Oldway Mansion, Paignton
- Great Parks, Paignton
- Hatchcombe Lane, Torquay
- Little Blagdon Farm, Paignton
- Preston Down Road, Paignton
- Cary Green / Pavilion, Torquay
- Victoria Park & Queens Park, Paignton
- Pitch & Putt Course, Goodrington, Paignton

The potential change in value of the above assets is considered to be in the region of £47,375,000

8. Was the petition legally made, what is the detailed wording of the petition and does the proposed covenant accord with the requirements of the petition?

In accordance with the validation exercise as described at 10. below, the petition was deemed to be validly made.

The wording of the petition was

“In 2012, Torbay Council made a covenant with the residents of Paignton promising not to allow any development of Paignton Green without the agreement of the majority of residents. In July 2014, the Council then covenanted with the residents of St Marychurch promising not to allow any development of Babbacombe Downs without the agreement of the agreement of the majority of residents.

The residents of Churston and Galmpton ask to be treated equally.

The Golf Course is highly valued by the community and as it provides the Green Wedge between Paignton and Brixham, contributes materially to the character of the area, and acts as an important wildlife corridor.

As freehold land owner, Torbay Council is asked to covenant with the residents of Churston and Galmpton not to allow development of Churston Golf Course without first obtaining the agreement of the majority of the residents of the ward at a referendum”

Following receipt of the petition, the organisers of the same submitted the following proposed form of wording for the covenant;

“Torbay Council covenants with the people of the current electoral ward of Churston and Galmpton (identified edged blue on the plan attached) that for a period of 100 years beginning on the date of this deed on the land variously known as Churston Golf Course (identified edged red on the plan attached) it will not:

(a.) Allow any development of Churston Golf Course

For this purpose “development” shall be defined as any deviation from the Permitted User clause at para 1.12 of a lease between The Council of the Borough of Torbay and Churston Golf Club Limited dated 3 April 2003 or any matter within that lease or

otherwise for which the consent of the Freeholder owner is required for any reason. In broad terms this permitted user clause provides for the use of the land as either a golf course complying with minimum standards on the land or as agriculture. Hence for example only use of the land for housing, industry or for a road would constitute development.

(b.) Sell or otherwise dispose of Churston Golf Course or sell or otherwise dispose of its rights as Freeholder owner

(c.) Allow any land owned freehold by The Council of the Borough of Torbay to be used to facilitate any development of any permanent structures on Churston Golf Course.

without any such proposal first obtaining the majority of votes in a referendum of the persons who at the day of the referendum would be entitled to vote as electors at an election of councillors for Churston and Galmpton Ward and are registered as local government electors at an address within this Ward.”

As was set out within the report to Council, it was considered that paragraphs (b) and (c) of this wording extended beyond the subject matter of the petition. As such it was recommended that these additional matters were not considered for inclusion within the proposed covenant.

In considering the proposed wording, it was the legal opinion that paragraph (a) was too widely drafted, with some elements potentially interfering with the terms of the Golf Club lease, which it is not possible to do without the Tenant's (Golf Club's) consent. The Council as Landlord of the golf club lease cannot unilaterally change any term of that lease without agreement from the Tenant. Therefore the effect of any proposed covenant cannot restrict the Permitted User clause or the Tenant's rights to make alterations in accordance with the lease.

Accordingly a revised covenant wording was provided within the Council report to ensure that its terms (if adopted) did not interfere with the terms of the Golf Club lease, and excluded paragraphs (b) and (c), but achieved the aim of the petition.

9. Does the granting of a covenant, primarily in response of a petition, create a legal precedent and if the council has a duty to act consistently, what are wider implications of such a decision for Mayor Oliver and future Administrations?

The granting of the covenant in response to the petition does not create a legal precedent, as a legal precedent can only be created by a judicial ruling.

As a public authority the Council should act consistently and fairly in all of its dealings. If the Council were to receive further requests to grant covenants, then unless it is possible to differentiate decisions on specific facts, the Council could face a Judicial Review challenge if it acted inconsistently, on the grounds of irrationality.

A reasoning or decision is deemed to be irrational (or 'Wednesbury' unreasonable) if it is so unreasonable that no reasonable person, acting reasonably, could have made it.

10. As the decision is predicated on the strength of a single petition, can officers provide a breakdown of postcodes recorded and have officers checked the petition for duplication or erroneous entries etc? If so, can members be informed of their findings?

When petitions are received they are validated by Officers within Governance Support against the requirements of the petition scheme which is set out in the Council's Constitution.

This validation includes ensuring that the following has been provided;

- at least 25 signatures, or at least 1000 signatures if triggering Council debate. This involves a visual check being carried out to ensure that they are sufficient signatories to be accepted and there is no duplication of entries.
- a clear and concise statement covering the subject of the petition and what action the petitioners wish the Council to take,
- the subject matter of the petition on each page,
- the name, address (or place of work or study if the person does not live in Torbay) and signature of any person supporting the petition,
- contact details, including a phone number and address, for the petition organiser.

If these requirements are met the petition is deemed valid. A breakdown of the postcodes is not undertaken.

Your Reference
Agenda Item 4, 16 October 2014
Our Reference
2097788/QDM/JAC/CPW2

By E-Mail and Post

Councillor Thomas
Chairman of the Overview and Scrutiny Board
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15 October 2014

Dear Sir

**Meeting of the Overview and Scrutiny Board, 16 October 2014, 17:00, Agenda Item 4 – Proposed
Covenant protecting Churston Golf Course from development**

We are instructed on behalf of Bloor Homes Ltd.

We enclose our letter of 6 October 2014, addressed to Anne-Marie Bond, Executive Head – Commercial Services within the Council of the Borough of Torbay (the **Council**).

The contents of the letter are of material relevance to the call-in which is to be considered at the meeting of the Council's Overview and Scrutiny Board on 16 October 2014 (and listed as Agenda Item 4).

We should be grateful if you would please draw the enclosed letter to the attention of the Overview and Scrutiny Board for its consideration at the meeting.

Yours faithfully

Wragge Lawrence Graham & Co LLP

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Enc

cc Kate Spencer, Town Hall, Castle Circus, Torquay, TQ1 3DR. scrutiny@torbay.gov.uk

Your Reference
Agenda Item 18(a), 25 September 2014
Our Reference
2097788/QDM/JAC/CPW2

By E-Mail and Post

FAO Anne-Marie Bond
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6 October 2014

Dear Sirs

Decision to enter into a deed of covenant in relation to land at Churston Golf Club, Dartmouth Road, Brixham

As you are aware, we are instructed on behalf of Bloor Homes Ltd.

On 25 September 2014, the Mayor of the Council of the Borough of Torbay (the **Council**) made a decision (the **Decision**) that the Council would enter into a deed of covenant in relation to land at Churston Golf Club, Dartmouth Road, Brixham (**Churston Golf Course**). In particular, by the deed the Council (as the freehold owner) would give a covenant not to allow development of Churston Golf Course without first obtaining the agreement of the majority of the residents of Churston & Galmpton Ward at a referendum (the **Covenant**). The Decision was published on 30 September 2014.

The Decision followed a petition being received by the Council, which proposed that the Council enter into a deed giving the Covenant. No reason was given for the Decision, other than that it was *'[to] respond to the petition...'*

Prior to the Decision, the giving of the Covenant was discussed at the Council meeting which was held on 25 September 2014 (as Agenda Item 18a). A report titled *'Petition regarding Churston Golf Club'* and dated 25 September 2014 (the **Report**) was prepared by the Council to inform this discussion and the Decision. The Report recommended that the Council should not give the Covenant. Subsequently, councillors voted overwhelmingly: (i) to defer a decision on the issue to allow further investigation; and (ii) that the Covenant should not be given.

Notwithstanding the strong recommendation made in the Report, the broad range of persuasive reasons given in support of the recommendation and the majority decision of the councillors, the Mayor proceeded to make the Decision.

The Decision is unlawful. It is susceptible to successful challenge by way of judicial review on (at least) the grounds set out below.

1 In deciding to give the Covenant, the Council is in breach of its statutory duties

- 1.1 Section 123 of the Local Government Act 1972 (the **1972 Act**) requires that the Council shall not, without the consent of the Secretary of State:

'dispose of land, otherwise than by way of a short tenancy, for a consideration less than the best that can reasonably be obtained'.

- 1.2 As is accepted in the Report (at §A4), the giving of the Covenant would amount to a disposal of land (section 270(1) of the 1972 Act providing that '*land*' includes any right in, to or over land).
- 1.3 The Covenant would involve the Council giving up its right to develop Churston Golf Course unless the development obtained a majority vote in a local referendum. As such, the Covenant would lead to a significant loss of value of the land.
- 1.4 It cannot be said that the Council would be obtaining reasonable consideration for this. On the contrary, the Council would be giving up this right for no consideration whatsoever.
- 1.5 Whatever political or other benefit might be considered to attach to the giving of the Covenant, that benefit could not constitute consideration – consideration as referred to in section 123 of the 1972 Act consists only of '*elements of the transaction of commercial or monetary value to the [Council]*' (see *R v Pembrokeshire County Council, ex parte Coker* [1999] 4 All ER 1007 at 1013).
- 1.6 As far as we are aware, the consent of the Secretary of State has not been obtained, nor are there are plans to seek it before the Covenant is given.

2 In deciding to give the Covenant, the Council is in breach of its fiduciary duties

- 2.1 The Council owes a fiduciary duty to its ratepayers to not expend resources held for the performance of its statutory functions thriftlessly, but to deploy the full financial resources available to it to the best advantage (see *Bromley Council v Greater London Council* [1983] 1 AC 768).
- 2.2 By giving the Covenant, the Council would be losing its rights in respect of the land and reducing its value, for no consideration at all. In circumstances in which adequate protections against unwanted developments already exist (see the Report, at §3.1), this alone is a breach of the Council's fiduciary duties.
- 2.3 In any case, any benefit from the Covenant could be attributed only to those residents of Churston & Galmpton Ward who would be able to vote in a referendum. In giving the Covenant and losing its rights over the land, the Council would be failing to '*hold the balance fairly and reasonably*' between the ratepayers in that ward and its ratepayers as a whole, giving '*undue weight*' to the interests of the former (see *Bromley* at 776).
- 2.4 Churston Golf Course is not land intended for public use (unlike the land at Babbacombe and Paignton Green – §A1.5.1 of the Report). It is a private golf course leased from the Council, and the Council's interest in it is that of commercial landlord with a financial investment. The Council owes a duty to its ratepayers as a whole to protect that investment and not to compromise the value of the land or unduly limit the future options available. Giving the Covenant would clearly breach this duty.

3 In light of the new Local Plan, it is irrational for the Council to decide to give the Covenant

- 3.1 The Report refers to the new Local Plan, which is currently being considered by the Planning Inspectorate. The giving of the Covenant will, according to the Report (at §A1.3.1), result in the new Local Plan being '*unsound and undeliverable*'.
- 3.2 The new Local Plan is a fundamentally important statutory document, the published version of which has been prepared following substantial consultation and in accordance with a prescribed statutory process. The Council has proposed the new Local Plan for the next stage in that process.

- 3.3 It follows from the Report that the giving of the Covenant will not only be entirely inconsistent with the new Local Plan, it will fundamentally undermine the whole policy.
- 3.4 The Decision document makes no reference to the new Local Plan. For the Council to maintain the new Local Plan as its proposed Local Plan on the one hand and decide to give the Covenant on the other is fundamentally inconsistent and therefore irrational. It is a decision that no reasonable authority could reach, and therefore *Wednesbury* unreasonable (see *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 KB 223).
- 4 **The Decision fails to give due regard to the Report and the councillors' vote**
- 4.1 The Report sets out several pages of detailed reasons why the Council should not give the Covenant and recommends that it should not be given. Indeed, the Report does not contain a single reason in favour of the giving of the Covenant.
- 4.2 In summary, the Report states that the Covenant is unnecessary, would lead to increased cost, would risk investment in the Council's area, would undermine the Local Plan and would create a dangerous precedent, and additionally that there would be potential negative impacts on the income of the Council.
- 4.3 Moreover, councillors have voted overwhelmingly against the Covenant and in favour of the Report's recommendation.
- 4.4 In light of all this, the Council could not possibly, had it had due regard to the Report and given due weight to the issues raised in it, come to the conclusion that the Covenant should be given.
- 4.5 In addition, the reasons given for the Decision do nothing to address the recommendation made in the Report or any of the matters set out in it. It is simply asserted that the Mayor '*considered the recommendation*'. The stated 'reason' reveals clearly that, in spite of this assertion, he in fact failed to address his mind to the Report adequately, if at all.
- 4.6 It follows that the Decision is infected by a failure to give due regard to material considerations.

The Decision states that it may be implemented on Wednesday 8 October 2014, unless the call-in procedure is triggered. We therefore understand that no deed of covenant has been executed and that the decision is still capable of being reversed so as to avoid the Council engaging in the unlawful act of giving the Covenant.

Given the importance of this matter, we request your written assurance by 09:00 on Tuesday 7 October 2014 that the Council will not execute any deed which implements the Decision, without first giving us at least seven days' written notice of the Council's intention to do so. In addition, we request written clarification whether or not the call-in procedure has been triggered at that time.

If we do not receive this assurance or a response to this question, we reserve the right to take action to preserve our client's position without further notice to you.

Finally, for the avoidance of doubt, this letter is not a letter before claim written in accordance with the *Pre-action Protocol for Judicial Review*. Our client's rights in respect of the sending of such a letter to the Council in due course remain reserved.

Yours faithfully

Wragge Lawrence Graham & Co LLP

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