



## **Monitoring Officer Report Issued pursuant to s.5 Local Government and Housing Act 1989**

**3 July 2017**

---

### **1. Introduction**

- 1.1 In accordance with legislation and in accordance with the Council's Constitution, if I, as the Council's Monitoring Officer believe that any proposal, decision or omission by the Council (acting through the Executive or as the Council), has given rise to (or is likely to, or would give rise to) a contravention by the Council of "any enactment or rule of law" it is my duty to prepare a report ("a Monitoring Officer Report") on the matter.
- 1.2 I make this report believing that the decision of the Mayor dated 27 June 2017 is such a contravention.
- 1.3 As this report relates to a decision of the Mayor, it must be submitted to him. It must also be sent to every member of the Council.
- 1.4 In preparing a Monitoring Officer Report, I must, so far as is practicable, consult with the Chief Executive and the Chief Finance Officer. I have consulted with the Chief Executive, but it has not been possible to consult with the Chief Finance Officer due to his absence from the office on annual leave.
- 1.5 The Mayor must consider this report within 21 days of it first being sent to him and all members. The Mayor is under a duty to ensure that no step is taken to give effect to any decision to which this report relates until the end of the first business day after the day on which his consideration of the report is concluded and reported.
- 1.6 The Mayor must prepare a report setting out what action (if any) he has taken in response to this report; what action (if any) he proposes to take (and when); and his reasons for taking (or not taking) action. The Mayor must ensure that a copy of his report is sent to every member of the Council and myself as Monitoring Officer.

### **2. Contravention**

- 2.1 The Council's Policy Framework, in the form of the Asset Management Strategy states that the Council shall not restrict or reduce the current or future value of its assets through the use of contractual restrictions, covenants, or peppercorn rents.
- 2.2 The Council is the freehold owner of the land comprising Churston Golf Course.
- 2.3 The Mayor can only make decisions which are not contrary to the Policy Framework and are not contrary to (or not wholly in accordance with) the Budget. This is set out in law within The Local Authorities (Functions and Responsibilities) (England) Regulations 2000, Schedule 4, and as set out in the Constitution at F5.1;

"Executive functions may only take decisions that are in line with the Budget and Policy Framework. If any of these bodies or persons wishes to make a decision that is contrary to the Policy Framework or contrary to (or not wholly in accordance with) the Budget approved by the Council, then ... that decision may only be taken by the Council."

2.4 Therefore the Mayor cannot make any decision in respect of the land comprising Churston Golf Course if it reduces the current or future value of it.

2.5 The Mayor has previously sought to impose a 100 year covenant on the land at Churston Golf Course on the following terms;

'Torbay Council covenants with all inhabitants of the ward of Churston and Galmpton that for a period of 100 years beginning on the date of this deed it will not on the land, shown edged in red on the plan attached to the submitted report, known to be Churston Golf Course, allow any development of 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 the Churston and Galmpton Ward and are registered as local government electors at an address within this Ward. For the purposes of this covenant 'development' shall not include any development permitted under the terms of the lease between The Council of the Borough of Torbay and Churston Golf Club Limited dated 3 April 2003. Nothing contained or implied in this Deed shall prejudice or affect the exercise by the Council of its regulatory functions under the Town and Country Planning Act 1990 or any other statute or statutory instrument.'

2.6 However ultimately the Mayor withdrew his decision on 17 December 2015, although the Mayor's wish to place a covenant on the land remains on the Council's Forward Plan.

2.7 More recently the Mayor requested that Officers explore whether a covenant of a shorter period would result in a diminution of the value of the land at Churston Golf Course, and consequently the District Valuer was instructed to advise.

2.8 The District Valuer (DV) prepared his advice, as contained within a letter dated 17 May 2017 (attached as appendix 1). On 27 June 2017, I met with the Mayor and Deputy Mayor to discuss this advice, together with Liam Montgomery, Head of Asset Management within the TDA.

2.9 Within this meeting it was discussed that within the words used in Paragraph 11 of the DVs letter, there was a contradiction, highlighted in yellow as set out below;

"I have also been asked about the effect of a shorter period of time that a restricted covenant would last for and the effect on value. In my opinion a restrictive covenant of 5 years or less would probably have a negligible effect on value. My reasoning for this is that any development of the site is going to be a long term project with several hurdles to overcome. I think that once the term of the restrictive covenant is above 10 years there would be an effect on value."

It was agreed that the TDA would revert to the DV and ask that he consider this wording.

2.10 Consequently the DV issued a revised letter on 29 June 2017 (attached as appendix 2), and I met with the Mayor at 5pm on the same day and provided him with a copy. In respect of Paragraph 11 this stated;

“I have also been asked about the effect of a shorter period of time that a restricted covenant would last for and the effect on value. In my opinion a restrictive covenant of 5 years or less would still have a negative effect on value although this is likely to be minimal. My reasoning for this is that any development of the site is going to be a long term project with several hurdles to overcome. I think that once the term of the restrictive covenant is above 5 years, there would be a measurable negative effect on value.”

2.11 I advised the Mayor that the advice from the DV was now absolutely clear that the imposition of any covenant, irrespective of length, would result in a diminution in value of the asset. As such it was contrary to the Corporate Asset Management Plan which is a Policy Framework document, and therefore the Mayor could not make a decision to impose a covenant. The Mayor asked that further questions be submitted to the DV.

2.12 Shortly after returning to my office, the Mayor arrived and handed to me a Record of Decision dated 27 June 2017 (attached as appendix 3), placing a covenant on the land comprising of Churston Golf Course for a period of 10 years. It should be noted that the Record of Decision that the Mayor has signed does not accord in its entirety with Standing Orders in relation to Access to Information, namely E17.

2.13 I firmly advised the Mayor that he could not make the decision and that as Monitoring Officer I am required to advise all Councillors that such a decision was outside his powers as it was contrary to the Policy Framework. The Mayor acknowledged my advice, but confirmed that he was making the decision, and asked that it be published.

2.14 I have re-affirmed my advice to the Mayor earlier today, when I advised him as to the contents of this report, and the process that would now follow.

### **3. Conclusion**

3.1 The Mayor is seeking to make a decision that is unlawful as it is ultra vires (i.e. outside of his powers). The Local Authorities (Functions and Responsibilities) (England) Regulations 2000, Schedule 4 is clear that the Mayor cannot make a decision which is contrary to Policy Framework.

3.2 The revised letter of the DV does not, in my opinion, leave any ambiguity nor room for interpretation. The imposition of a covenant of any duration on the land at Churston Golf Club will result in a reduction in the value of the asset.

3.3 As such it is my clear belief that the Mayor's decision has given rise to a contravention of a rule of law, and therefore it is my duty to prepare this report and submit it to the Mayor and all Councillors.

**Anne-Marie Bond**  
**Monitoring Officer**

Appendix 1 : District Valuers Letter of 17 May 2017  
Appendix 2 : District Valuers Letter of 29 June 2017  
Appendix 3 : Decision of the Mayor dated 27 June 2017