
Housing Land Supply Issues

Participant's Statement

Day 2 (19th November)

On behalf of Bloor Homes

October 2014

1.0 INTRODUCTION

- 1.1 The NPPF (Para. 49) requires that a local planning authority has a 5-year supply of deliverable housing sites, without which relevant policies for the supply of housing will not be considered up-to-date. Torbay Council **does not currently have a sufficient 5 year housing supply** based on either (1) the emerging Local Plan (Policy SS11) requirement for 400-500 homes per annum); or (2) the full, objectively assessed housing needs of Torbay (940 homes per annum). On this basis, the emerging Torbay Local Plan would not be effective, nor consistent with the NPPF and would, therefore, be unsound.
- 1.2 In the Pre-Hearing Notes, Paragraph 20, the Inspector has indicated that any additional representations relating to any new material that has been prepared since the submission of the Torbay Local Plan should be submitted to the Examination by 24th October. To this end, we have set out below the latest position on housing land supply, as stated by Torbay Council since the submission of the Plan, and our updated representations.

Torbay's stated Housing Land Supply

- 1.3 The Council published its topic paper entitled '*Growth Strategy and Capacity for Change*' in July 2014, which sets out Torbay's rationale for the growth strategy proposed within the draft Local Plan. The document states (page 30) that in accordance with draft Policy SS12:

"The 5 year supply position at April 2013 indicates a total of 2,797 deliverable dwellings. An updated position can be provided for the Examination if required. The five year supply at April 2013 arose from 62 sites of 6 or more dwellings. Of these 42 are major developments of 10+ dwellings and 16 are sites of 30+ units. These have planning permission, except for the Great Parks sites. The Great Parks sites are considered to be partly deliverable because they are housing sites in the Adopted Local Plan, are the subject of recent Masterplanning (2013) and there is active developer interest."

- 1.4 More recently, in October 2014, Torbay Council have stated as part of their submitted evidence to the ongoing Inquiry at Churston Golf Club (APP/X1165/A/13/2205208) that:

"Torbay has a stock of around 2,797 deliverable dwellings (at 2013). This represents about 5.89 years of supply."

“The most recent DCLG Household Projections (currently 2011 based Interim Projections, published 2013) is the most relevant measure of Torbay’s objectively assessed need. The projections support a 5 year supply trajectory of around 475 dwellings a year (when a 5% buffer is added).”

- 1.5 Bloor Homes duly lodged objections to the Local Plan in relation to draft policies SS11 (the proposed provision for housing); SDB1 (the scale of housing provisions on the Brixham Peninsula); and Policy C1 (regarding the allowable categories of development outside defined settlement boundaries).
- 1.6 As part of our representations, we outlined our principal concerns with the emerging Plan, which has not been mollified by the submitted Plan, nor by the topic paper published by the Council alongside the submitted document.
- 1.7 **The concern relates to the Plan’s treatment of housing need and in particular the substantial failings in its response to the NPPF and the exhortation to seek to meet in full the objectively assessed housing need.**
- 1.8 In order for the Plan to be sound it is necessary for the Inspector to form a view on the adequacy, or otherwise of **Torbay’s** 5 Year Land Supply. In order to do so, it is therefore necessary to form a view on the scale of the Full Objectively Assessed Need (FOAN) for housing. In the light of new information, we have updated our assessment of FOAN, which is identified now as being 940 dwellings per annum. (Please refer to the separate **Participant’s Statement on Torbay’s FOAN**).

2.0 HOUSING SUPPLY

2.1 The scale of the FOAN and thus of the Torbay housing requirement is only the first of five steps in the assessment of 5 Year Housing Land Supply:

1. First, it is necessary to identify the appropriate 'baseline' requirement for the 5 year period. In the light of paragraph 47 of the NPPF this should be based on the objectively assessed need for housing in full (unless through an adopted Local Plan it has been accepted that there are good reasons why the need cannot be met in full);
2. Second, it is necessary to consider the size of the buffer that should be added to the 5 year requirement in accordance with Paragraph 47 of the NPPF – either 5% or 20%, brought forward from later in the Plan period;
3. Third, it is necessary to consider whether there has been any shortfall in the provision of housing since the commencement of the period to which the requirement relates and to decide how to treat this shortfall. (Putting steps 1 – 3 together produces the requirement side of the land supply assessment);
4. Fourth, it is necessary to consider the available supply of deliverable sites that can contribute dwellings in the 5 year period;
5. Fifth and finally, the requirement and supply are compared in order to identify whether or not there is a 5-year supply of deliverable sites or whether there is a shortfall (and, if so, what the scale of that shortfall may be).

2.2 We have briefly addressed each of these steps in turn:

Baseline Housing Requirement

2.3 Bloor Homes considers that the full, objectively assessed need for Torbay is **940 homes** per annum. This is based on the DCLG projections as a starting point for the assessment, but also taking into account economic and affordability indicators.

2.4 **The Council's evidence base sets another figure that might be taken into account, 615 homes** per annum, which Peter Brett Associates advised the Council in July 2013 was their recommendation as the objectively assessed need for the purposes of preparing the Local Plan. We understand that Torbay disregards this figure and effectively this advice.

2.5 The emerging Local Plan (Policy SS11) sets a requirement of between 400-500 homes per annum. More recently, at the Churston Inquiry the Council have stated that the requirement figure may be in the region of **452 homes** per annum (without any buffer),

based on DCLG Household Projections (currently 2011 based Interim Projections, published 2013).

- 2.5 There is accordingly a difference in the baseline housing requirement between the objectors and the Council of 488 homes per annum (940-452), or 2,440 homes over a 5 year period. Clearly, this has a significant impact on 5-year land supply.

Past Undersupply

- 2.6 Paragraph 47 of the NPPF requires that the housing supply in the 5 year period should be increased by a buffer brought forward from later in the Plan period of 5% in normal circumstances, or 20% where there is record of persistent under-delivery.
- 2.7 Figure 1 below sets out the past record of completions in Torbay against the housing provisions of the Devon Structure Plan (from 2001–2006); the draft Regional Spatial Strategy (2006–2012); the baseline requirement figure derived from the PBA Final Report, July 2013 (615 dwellings); and the Barton Willmore estimates of FOAN (940 dwellings) for the first year of the new Plan period, 2012–13.
- 2.8 It can be seen that the Council has failed to achieve the level of requirement that was emerging through the RSS process since 2008 (it is important to note that the RSS **housing requirement took into account environmental constraints as a 'policy-on' figure**) and has fallen well short of the objectively assessed need for the past five years, whether on the basis of the Peter Brett Associates advice or on the Barton Willmore assessment. It has even undershot the constrained supply figure set out in the emerging Local Plan in three of the past five years.

Table 1: Housing Completions v Requirements 2001–2013

Year	Completions	Requirement	Surplus / Shortfall
2001-02	568	300 ¹	+268
2002-03	494	300 ¹	+194
2003-04	511	300 ¹	+211
2004-05	402	300 ¹	+102
2005-06	418	300 ¹	+118
2001–06	2398	1500	+893
2006-07	743	750 ²	-7
2007-08	809	750 ²	+59
2008-09	450	750 ²	-300
2009-10	322	750 ²	-428
2010-11	402	750 ²	-348

2011-12	268	750 ²	-482
2006-12	2994	4500	-1506
2012-13	350	452 ³	-102
		615 ⁴	-265
		940 ⁵	-590

Sources of requirement: 1 = Devon Structure Plan; 2 = Draft RSS; 3 = Torbay Council view; 4 = Peter Brett Associates advice; 5 = Barton Willmore

Scale of the Buffer

- 2.9 It follows that there is a marked under-delivery of housing throughout the period, continuing into 2012-13 and the 20% buffer would be appropriate.

Resulting 5 Year Requirement

- 2.10 It can be seen that there is a range of requirement figures that emerges, summarised in the following table:

Table 2: Requirements from Steps 1 - 3

Basis of Requirement	Baseline requirement	Buffer	Baseline + buffer	Shortfall 2006-12	Shortfall 2012/13	Resulting Requirement
Emerging Torbay Local Plan (based on DCLG, 2012 based population projections, with shortfall and 20% buffer applied)	452 x 5 = 2,260	20%	2,712	1,506	590	4,808
Barton Willmore Assessment	940 x 5 = 4,700	20%	5,640	1,506	590	7,736

Assessment of Supply

- 2.11 The Council's view of the available supply for the period 2013 – 18 is that there are 2,797 deliverable dwellings. We have not undertaken forensic assessment of housing supply at this stage, as any potential disagreements over the availability of sites would pail into insignificance compared to the issue of the appropriate requirement and accumulated shortfall. This would, therefore, be unlikely to make a material difference in this case on the basis that Torbay does not have a 5 year housing supply based on their stated supply of sites.
- 2.12 The Council proposes that more than 30% of the 5 years land supply will come from windfall sites. The NPPF (Para. 48) states that compelling evidence is required that the sites have consistently become available in the local area and will continue to provide a

reliable source of supply. There is insufficient evidence available that demonstrates that historic windfall rates will continue in the Torbay and on this basis; we consider that the reliance on windfall sites should be moderated and have accordingly reduced this to 20% in our assessment of supply at **Appendix C**.

- 2.13 An additional matter has arisen that would affect the adequacy of the supply. On 25th September, the Council considered a petition by the Churston Galmpton and Broadsands Community Partnership **requesting that the Council enters into a Covenant "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"**. The Officers submitted a report to the Mayor and Council, a copy of which is in Appendix this statement. It can be seen that the Officers recommended strongly against this, identifying significant, adverse implications for the Local Plan. We understand that the Council voted against entering into the Covenant. However, contrary to the advice, we have been informed that the Mayor resolved on 30th September to enter into the Covenant.
- 2.14 The legal implications of this decision are matters for others to address, while the implications for the Local Plan will no doubt become clear once the Examination opens in November. The decision does however raise serious implications for the reliance that can be placed on Council-owned land to contribute to the housing supply, even where planning permission has been granted, as at Churston Golf Club.
- 2.15 We **draw particular attention to the Officers' assessment (Appendix A)** in their Appendix 2, page 199, of the report which advises the Council owned sites which may no longer be **in the Council's five year supply** and the comment immediately following which advises that:

"The loss of these sites represents around 16% of the 5 year land supply for the Bay. This would mean that the Council would not have a 5 year land supply, which leads to 'open season' for developers. It's notable that Countryside Zone designation cannot be used as a reason to refuse planning applications for new homes, when there is not a 5 year supply of housing land."

- 2.16 We have provided an emended version of Torbay housing land supply at **Appendix C**, (with amended supply figures coloured red).

Summary of 5 Year Supply

- 2.17 Based on Council's housing requirement the 20% buffer and the full shortfall against the Draft RSS provisions from 2006, the available supply amounts to **2.89 years'** supply.

Without the Council owned sites and with windfall allowance reduced to 20% this figure falls further to **2.21 years**.

- 2.18 Based on the our assessment of objectively assessed need, the 20% buffer and the full shortfall against the Draft RSS provisions from 2006, the available supply amounts to **1.8 years' supply**. Without the Council owned sites and with windfalls reduced to 20% this figure falls further to **1.37 years**.

Table 3: Assessment of Adequacy of Supply (Years' Supply)

Basis of Requirement	Buffer + shortfall	5 Year requirement	Torbay Council's stated supply 2,779 dwellings	Supply excl. all Council sites & reduced windfall allowance to 20% c. 2,124 dwellings
Torbay Council Assessment based on DCLG, 2012 based population projections	20% buffer. Shortfall in 2006 – 12 and 2012/13	4,808	2.89 years' supply	2.21 years' supply
Barton Willmore	20% buffer. Shortfall in 2006 – 12 and 2012/13	7,736	1.80 years' supply	1.37 years' supply

- 2.19 It is clear that the Council does not have a sufficient 5 year housing supply. The NPPF (Para. 49) requires that a local planning authority has a 5 year supply of deliverable housing sites, without which relevant policies for the supply of housing will not be considered up-to-date. On this basis, the local plan would not be effective, nor consistent with the NPPF and would, therefore, be unsound.

APPENDIX

Appendix A: Officers' Report for Torbay Council meeting 25th September 2014

Appendix B: Officers' Report for Torbay Council meeting 15th October 2014

Appendix C: Barton Willmore's Assessment of 5 Year Land Supply

Appendix A: Officers' Report for Torbay Council meeting 25th September 2014



Clerk: June Gurry
Telephone: 01803 207013
E-mail address: governance.support@torbay.gov.uk
Date: Wednesday, 24 September 2014

Governance Support
Town Hall
Castle Circus
Torquay
TQ1 3DR

Dear Member

COUNCIL - THURSDAY, 25 SEPTEMBER 2014

I am now able to enclose, for consideration at the Thursday, 25 September 2014 meeting of the Council, the following reports that were unavailable when the agenda was printed.

Agenda No	Item	Page
	<p>a) Petition requesting a covenant protecting Churston Golf course from development Approximately 2000 signatures. In accordance with Standing Orders the petition will be considered at this meeting.</p> <p>Please find enclosed an officer report on the proposed covenant.</p>	(Pages 191 - 203)

Yours sincerely

June Gurry
Clerk

Agenda Item 18a



Meeting: Council

Date: 25th September 2014

Wards Affected: Churston and Galmpton

Report Title: Petition regarding Churston Golf Club

Is the decision a key decision? No

When does the decision need to be implemented? n/a

Executive Lead Contact Details: Cllr Derek Mills

Supporting Officer Contact Details: Charles Uzzell, Director of Place. Email Charles.uzzell@torbay.gov.uk Telephone 01803 201201

1. Purpose and Introduction

- 1.1 A petition has been received by the Council, with sufficient signatures as to trigger a debate at the Council meeting.
- 1.2 The petition requests that a Covenant is entered into 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.
- 1.3 In furtherance of the petition, Churston, Galmpton and Broadsands Community Partnership have proposed a form of words for the petition.
- 1.4 There are significant implications of the proposed covenant in respect of the new Local Plan, the details of which are set out in this report.

2. Proposed Decision

That the Mayor be recommended as follows;

- 2.1 That the Council does not enter into a deed of Covenant in respect of Churston Golf Course.

Alternative decision

- 2.2 If the Mayor does not accept this recommendation, the proposed wording of a covenant would need to be amended so that the Council entered into a deed covenanting with the residents of Churston & Galmpton ward in 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, 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.”

The Covenant would be appropriately registered with the Land Registry.

3. Reason for Decision

- 3.1 The land at Churston Golf Club is subject to a 999 year lease, entered into in 2003. The lease has a specific user clause that limits the use of the land as either a golf club or agricultural land. To amend this user clause would need political agreement which safeguards the land from inappropriate development. Additionally any development proposed would require planning permission which provides further protection from inappropriate development of the area.
- 3.2 The proposed covenant has significant implications in respect of the Local Plan.
- 3.2 The proposed covenant would result in additional costs to the Council of undertaking referendums.
- 3.3 The proposed covenant has significant implications in respect of the Council’s future income and ability to fund the Capital Programme.

Supporting Information

A1. Legal implications

- A1.1.1 The Council can legally enter into a covenant not to develop its land, provided

the Covenant is not inconsistent with;

- (a) Any statutory, charitable or trust purpose for which the land is held,
- (b) Any statutory restrictions on the disposal of an interest in the land,
- (c) Any prior obligation assumed by and enforceable against the Authority.

The Churston, Galmpton and Broadsands Community Partnership have proposed the following wording for a Covenant following the petition that was undertaken, as follows;

“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; or***

- (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.”

Paragraphs (b) and (c) of this wording extend beyond the subject matter of the petition which was purely in respect of development of Churston Golf Course, and it is not recommended that these additional matters are considered for inclusion within the proposed covenant.

It is the legal view that paragraph (a) is too widely drafted, with some elements 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. If it is considered desirable to enter into a Deed of Covenant it is proposed that the following wording is used;

“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 the deed it will not on the land shown edged in red on the plan attached, 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."

A1.2 Cost implications of a referendum

A1.2.1 To accede to the request would commit the Council to the costs of any referendum required under the terms of the Covenant. In addition to significant staffing implications within Governance Support, there would be a revenue cost of approximately £12,000 per referendum.

A1.3 Planning Implications of the proposed covenant

A1.3.1 It is the professional planning view that any decision to support the petition (and impose a 'no development' clause re Churston Golf Course) would result in the new Local Plan being unsound and undeliverable; would be contrary to a decision previously made by Development Management Committee; and would seriously undermine efforts to secure investment in the Bay.

A1.3.2 Every Council and their public sector partners are actively encouraged, by Government, to put forward their land for development. This Council is doing just that, as evidenced by the Local Plan. For example, the Council's land in Collaton St Mary, Preston Down Road, Edginswell, Barton, Torquay, Paignton and Brixham town centres provides the backbone for delivery of jobs, homes and infrastructure in the Bay over the next 20 plus years. The new Local Plan is currently being examined in detail by the Planning Inspectorate and is due for a formal hearing in mid November 2014. A key part of that process is for the Planning Inspectorate to be convinced that the new Local Plan is deliverable and sound. If a decision is made to impose a 'no development' requirement at Churston Golf Course this will in turn require the land at the 1st and 18th holes of the Golf Course to be withdrawn from the 5 year housing land supply. It is then foreseeable that the Planning Inspectorate will consider whether that approach could be applied to other Council owned land which supports the new Local Plan. The Planning Inspectorate will consider whether a precedent will have been set for communities to stop development by petition, rather than by very careful consideration of planning issues. It is the professional view that the Planning Inspectorate will consider the soundness and deliverability of the new Local Plan to be seriously undermined if a 'no development' clause is included for Churston Golf Course, and a foreseeable outcome would be that the Council will be asked to reconsider its new Local Plan and will not be allowed to

proceed with the Examination. The Council may have to withdraw the Local Plan from further examination and the impending Hearing. If that were to occur that would represent a very serious problem for the Council. The Council would be without an up to date Local Plan and would not have a 5 year housing land supply. 'Rogue' development is more likely on sites that provide less benefit and more harm to the Council and to the community, environment and the economy. The Council would need to amend its Local Plan, requiring further time, probably 9 -12 months and cost in the region of £50,000 - £75,000. The documents at Appendices 2 and 3 demonstrate the implications of accepting the proposed covenant. The appendices show the sites that would be lost from our current five year housing land supply, leaving less than an adequate supply of housing land. They also show the sites that would need to be withdrawn from the Local Plan, and indicate those sites that would need to take their place. Members will be aware of the sensitivities associated with all of the substitute sites.

A1.3.3 The Local Plan has been developed in partnership with other organisations, including the Local Enterprise Partnership and adjoining Local Authorities under the Duty to Co—operate. Teignbridge District Council has supported the new Local Plan. If this covenant is agreed and a precedent is set for this to happen on other sites, this will quickly undermine our commitment to provide housing land to meet our own needs. In turn this could place strain on our current constructive working relationships with our neighbouring authorities. At this late stage in Torbay's plan making process, and following Teignbridge's recent adoption of its new Local Plan, it is considered very unlikely that Teignbridge would accept the need to provide housing in Teignbridge, to meet Torbay's needs. This could, in itself, lead to the Planning Inspectorate refusing to allow the Local Plan to proceed to a hearing.

A.1.4. Investment Risks

A1.4.1 The Council's proactive approach to securing development and investment in the Bay is welcomed by the development industry. There is a very real officer concern that investment 'pipelines' would start to run dry if the Council was seen as withdrawing from its commitments at a late stage. Indeed, the positive outcomes (such as Abbey Sands), in terms of achieving investment in the right place, of the right quality and at the right time, would be replaced by development of sites that the Council would not want to see coming forward, as there would not be a 5 year land supply. In addition to the harm caused by development of sensitive 'rogue' sites, the level of New Homes Bonus and monies from business rates is likely to decrease.

A.1.5 Risk of Precedent

A1.5.1 To accede to the request could encourage other similar applications and mean that the Council's ability to develop and/or sell its property may be compromised in the future. The Council has to act consistently in its approach

to such requests. The Council's entering into of Covenants at Babbacombe and Paignton Green can be differentiated from this request by virtue of the fact of their distinct nature and unfettered access to the public. If the Council were to agree to enter into this Covenant the Council may find itself in difficulties in resisting future requests.

A.1.6 Risks to Future Capital Programme and Other Income.

A1.6.1 Having regard to the risk of precedent summarised above, the Council needs to consider the potential financial implications of this decision. The Council will use the capital receipts that the sites in the local plan allocated for development would create to invest in capital projects such as schools, transport and regeneration schemes. If the development potential of these sites is substantially diminished their value will reduce accordingly. The Council currently has a capital receipts funding requirement of £2.1m in the current capital programme (we have spent capital that we need to replace by selling assets) and we will have to address future pressures for capital investment. If we do not have assets to fund capital projects the scale of investment we will be able to realise in schools, transport, regeneration and other much needed infrastructure will be limited

A1.6.2 There also be a negative impact on other income streams such as New Homes Bonus (NHB) and NNDR income. The Council received a total of £2.1m NHB grant in the current financial year. This grant relates directly to the number of homes built in the Bay. If we reduced certainty around which sites are available for development we can confidently expect to see a hiatus in development which will reduce our NHB income. NNDR could also be depressed on sites that would have created mixed use developments as the Council now gets to keep a proportion of the uplift in NNDR income. If sites that would have accommodated new commercial space are no longer available this source of income will also be lost.

A2 Possibilities and Options

A2.1 To take the action requested by the Petition, i.e to enter into a deed of covenant, either;

- In the form of words suggested by the Community Partnership,
- An amended form of words.

A2.2 Decline to enter into a Deed of Covenant as the land already has sufficient protections from the terms of the lease as well as the political and planning processes, and because of the impact upon the new Local Plan.

A2.3 Request further exploration of the matter with Officers and the community before a decision is taken.

A3 Fair Decision Making

A3.1 A petition with approximately 3,000 signatures has been submitted to the Council to trigger the Council debate.

A3.2 The proposal is due to be considered by the Community Partnership at its public meeting on 24 September 2014, and therefore the result of this will be known in advance of its consideration by Full Council.

A4. Public Services (Social Value) Act 2012

A4.1 The granting of a covenant in the terms proposed amounts to a disposal of the land, and therefore the requirements in respect of achieving best consideration apply.

A5. Risks

A5.1 Should the Council wish to see development on this land, it would have to first carry out a referendum of the residents of Churston and Galmpton. Even if the proposals were supported the delay in carrying out the referendum could result in the development opportunity being lost.

A5.2 The covenant is an absolute one, therefore any development would not be permitted without approval in a referendum.

A5.3 To accede to the request would commit the Council to the costs of any referendum required under the terms of the Covenant. In addition to significant staffing implications within Governance Support, there would be a revenue cost of approximately £12,000 per referendum.

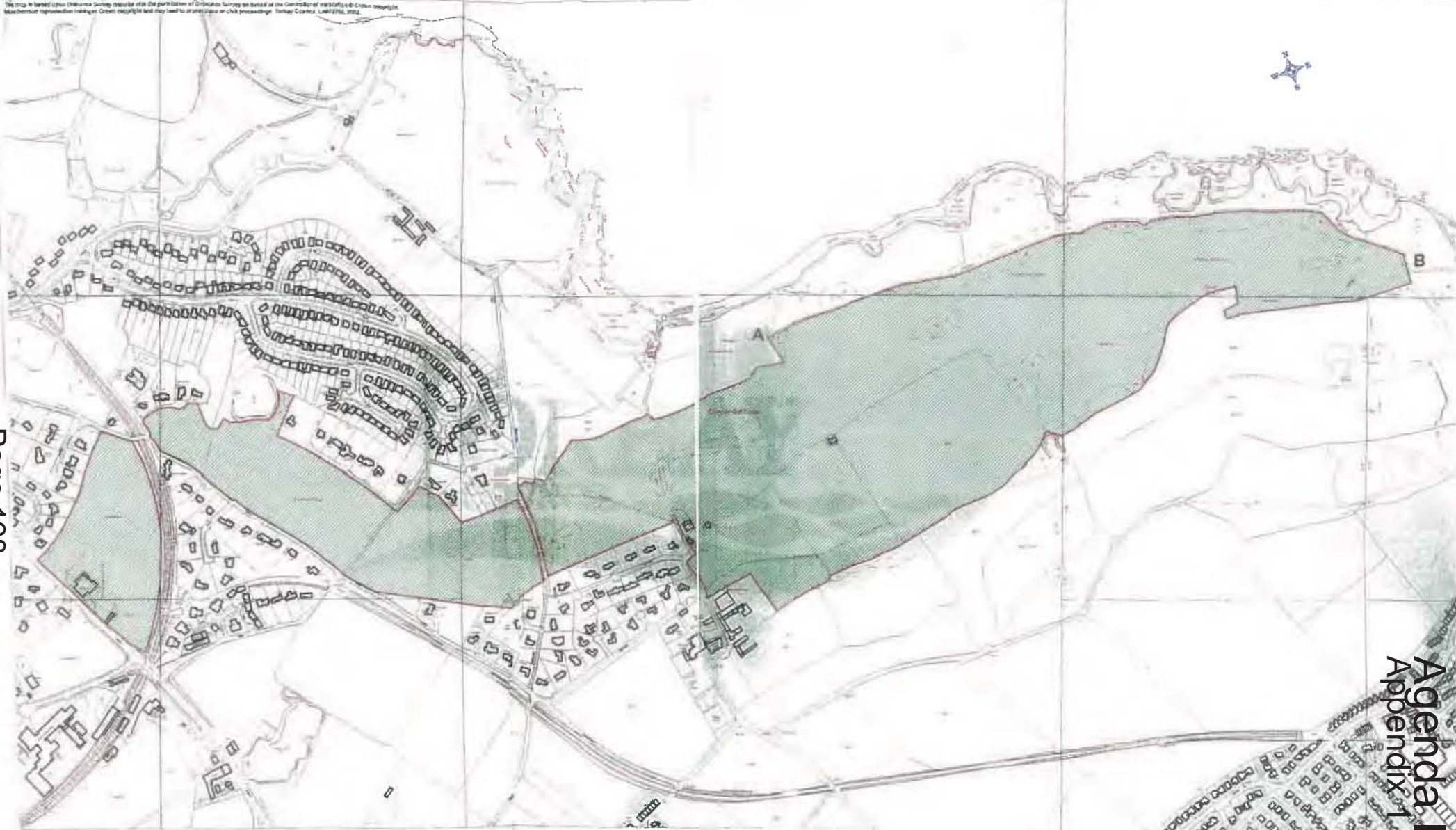
A5.2 To accede to the request could have significant implications in respect of the Local Plan.

A5.3 To accede to the request could encourage other similar applications and mean that the Council's ability to develop and/or sell its property may be compromised in the future. The Council has to act consistently in its approach to such requests. The Council's entering into of Covenants at Babbacombe and Paignton Green can be differentiated from this request by virtue of the fact of their unfettered access to the public. If the Council were to agree to enter into this Covenant the Council may find itself in difficulties in resisting future requests.

Appendices –

1. Plan showing the land comprising of Churston Golf Course
2. Planning Implications of the Churston Covenant
3. Substitute sites

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Agenda Item 18a
Appendix 1



Title: Churston Golf Course
Date: 7 February 2003

Plan No: EMT112
Asset No: B326

Scale Not determined

ENVIRONMENT SERVICES DIRECTORATE (Highways & Estates Management)
Plan Prepared By: Property Records Officer, Roebuck House, Abey Road, Torquay, TQ2 5TF (01803) 207925

A **B**
Coastal path adjacent
golf course.

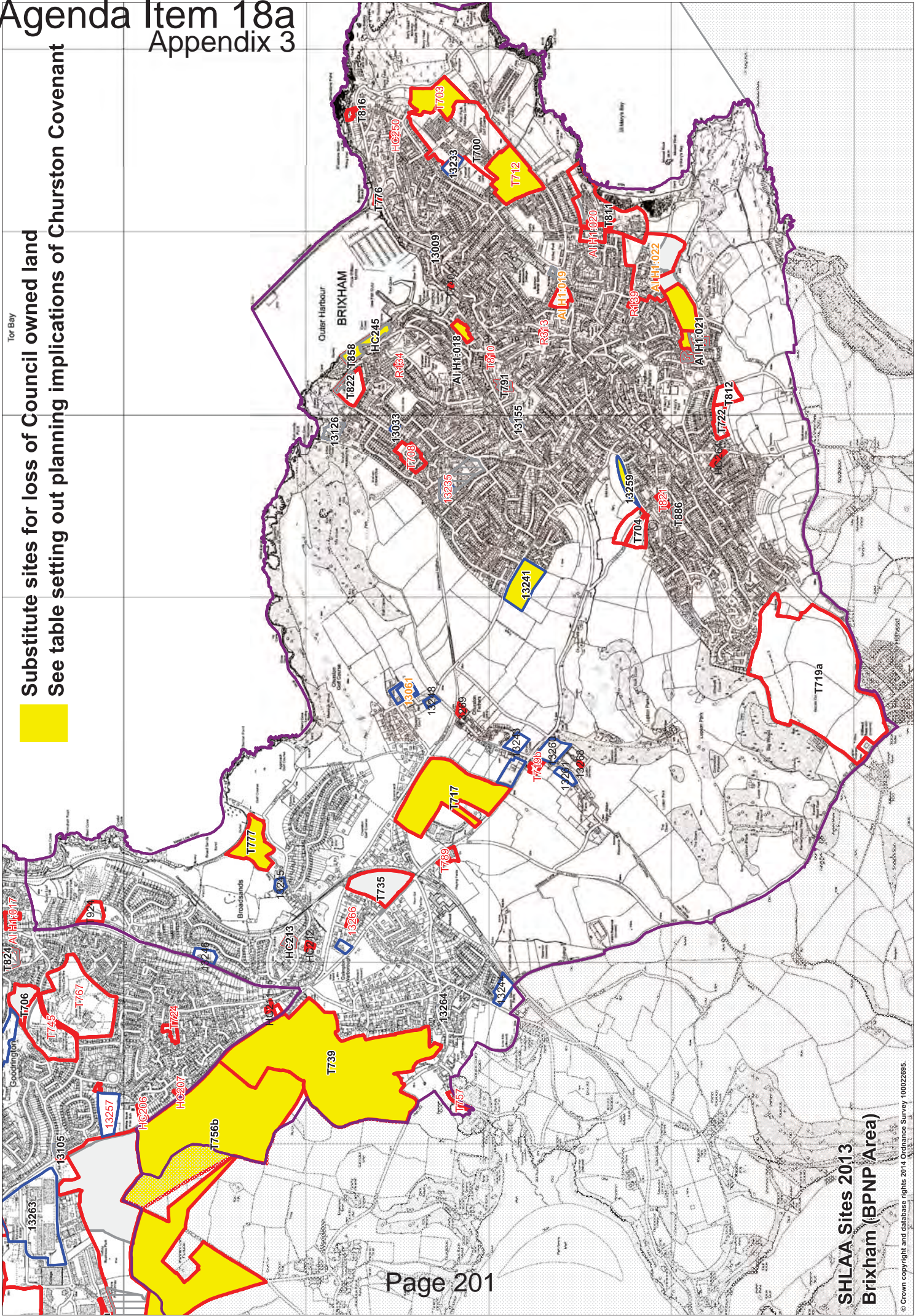
Planning implications of the Churston Covenant

Council owned sites that may no longer be in the Council's 5 year housing land supply	
1. Oldway Mansion / Gardens, Paignton	
2. Great Parks, Paignton	
3. Kings Ash House, Paignton	
4. Churston Golf Club, Churston	
5. Hatchcombe Lane, Torquay	
Comment: The loss of these sites represents around 16% of the 5 year land supply for the Bay. This would mean that the Council would not have a 5 year land supply, which leads to 'open season' for developers. It's notable that Countryside Zone designation cannot be used as a reason to refuse planning applications for new homes, when there is not a 5 year supply of housing land.	
Council owned sites that may no longer feature in the new Local Plan	
1. Little Blagdon Farm, Collaton St Mary (which is likely to result in the whole masterplan being undeliverable)	
2. Preston Down Road, Paignton	
3. Great Parks, Phase 2 (which is likely to undermine delivery of the whole masterplan area)	
4. Torquay Town Centre sites (e.g. Pavilion)	
5. Paignton Town Centre Sites (e.g. part Queens Park; masterplan identified sites)	
6. Grange Road sites, Paignton	
Comment: This is likely to lead to the loss of about 1000 homes from those sites identified / indicated in the new Local Plan. This will not only result in the new Local Plan being withdrawn, but the Council will not secure capital receipts (and other benefits) from the sale / development of its land.	
Sites that would necessarily be considered / used to substitute the loss of Council owned sites	
1. Land south of White Rock (which could have impact on AONB)	
2. Car Parks across the Bay	
3. Copythorne Road, Brixham	
4. Mathill Road, Brixham	
5. Manor Farm, Galmpton	
6. Sandringham Gardens, Paignton	
7. Brockenbury, Churston	
8. Nutbush Lane, Torquay	
9. St Mary's, Brixham	
10. Torquay Golf Club	
11. Enlarged Wall Park, Brixham	
12. Yalberton Holiday Park, Paignton	
Comment: All these sites were identified in the Strategic Housing Land Availability Assessment, but were not included in the new Local Plan due to their sensitivity. It would be necessary to bring some / all of them forward to make up the 1000 + shortfall in homes. It is worth noting that the loss of land at Churston Golf Course (132 units) represents around 16% of the overall allocation (800) for Brixham Peninsula in the new Local Plan. There would be a need to ensure that number was made up quickly, particularly in/around Brixham, which is likely to be on land / in areas that are far more sensitive – in planning terms – than Churston Golf Course (1 st & 18 th)	

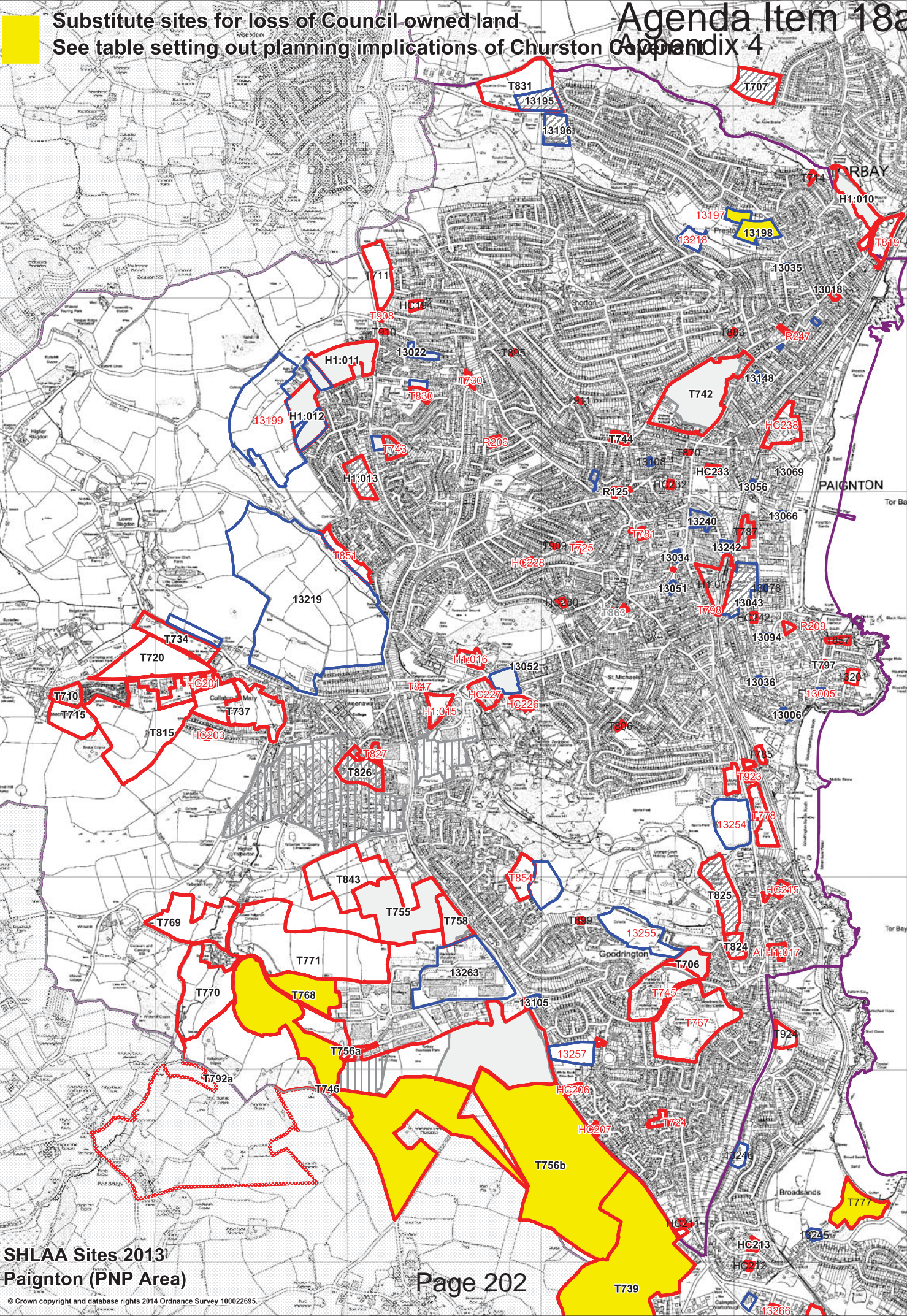
Agenda Item 18a

Appendix 3

Substitute sites for loss of Council owned land
See table setting out planning implications of Churston Covenant



Substitute sites for loss of Council-owned land
See table setting out planning implications of Churston



Appendix B: Officers' Report for Torbay Council meeting 15th October 2014



Contact: Kate Spencer
Telephone: 01803 207063
E-mail address: scrutiny@torbay.gov.uk
Date: Wednesday, 15 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 72 - 82)
	Letter from Bloor Homes Ltd	(Pages 83 – 86)

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**
Telephone: **01803 207701** **01803 207160**
E.mail: **charles.uzzell@torbay.gov.uk** **anne-marie.bond@torbay.gov.uk**

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

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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



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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

Executive Head – Commercial Services

Council of the Borough of Torbay

Town Hall

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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 any 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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Appendix C: Barton Willmore's Assessment of 5 Year Land Supply

Site	Comments	TOTAL YIELD	2013/14	2014/15	2015/16	2016/17	2017/18
TORQUAY							
H1.1 Scotts Bridge Barton	Allocated part around edge (North and East) of completed 'Evolve' development. Total yield as suggested by SHLAA	18			18		
H1.8 Palace Hotel	Adopted Local Plan allocation 35 units. P/2013/1209 pending decision 137 units.	35				35	
TM4 Royal Garage Site (Torwood Street, Torquay)	P/2011/0035 Permitted 11.05.12 for 14 units	14		14			
Hatchcombe Lane, Scotts Bridge	P/2010/0452 approved 27.09.11	0	0	0			
Beechfield Avenue extension	H1.04 P/2009/0775 approved 28.09.10, currently on site	105	105				
Hollcombe former Gas works	H1.10 P/2008/0114 permitted 11.10.12. Land contamination issues	185		35	50	50	50
South Devon College (Torre Marine), Torquay	PP granted 21.10.05 (P/2005/0138) Site being developed. 75 extra-care units (P/2010/1389 granted 29.09.11 and P/2012/1264 granted 20.02.13).	75		20	20	35	
Scotts Meadow	P/2010/1388 allowed at appeal 01.06.12	155	15	35	35	35	35
Land at (adj 84) Grange Road, Torquay	P/2007/420 & P/2011/0750 for 9 flats	9			9		
Conway Court Hotel, Warren Road	P/2010/1080. Approved Dec 2012, subject to S106.	14		14			
Queensway, Torquay	Part under construction P/2007/2095 allowed 20.05.08	16	6	10			
Torre Station	P/2012/1155 permitted 12.06.13	8			8		
Tor Manor, 11 Tor Church Road, Torquay	P/2008/0705 allowed 30.06.09 and P/2012/0632 allowed 06.09.12	10				10	
Fairlawns, 27 St Michaels Road, Torquay	P/2011/0505 approved 10.01.12	14		14			
English House Hotel Teignmouth Road Maidencombe	P/2011/0181 approved 12.01.12 (9 units) P/2011/0361 approved 12.01.12 (6 units)	9		9			
Spa View Stitichill Road	P/2012/1107 approved 27.08.13, subject to s106	8	8				
Papillon 18 Vansittart Road, Torquay	P/2008/1256 approved 03.06.10 P/2013/0512 (extension of time for previous app) pending subject to s106	8		8			
R/O Snooty Fox, St Marychurch, Torquay	PP granted 08.03.05 (P/2004/2047) Site being developed; PP for 41 units in total (7 completed; 4 under construction; expectation for remaining to become 20)	20		10	10		
Westhill Garage, Chatto Road, Torquay	PP granted 28.07.09 (P/2009/0422) time limit extension P/2012/0078 permitted 12.07.13	15		15			
Bishops Court Hotel, Lower Warberry Road, Torquay	Approval 08.07.09 (P/2008/1623) Development not yet commenced; hotel closed	42	22	20			
Lincombe Hall Hotel, Lower Woodfield Road, Torquay	PP granted 01.02.11 (P/2010/0738)	12		12			
16 Market Street, Torquay	PP granted 31.07.08 (P/2008/0124); Renewal pending (P/2011/0289)	13				13	
Walton Lodge, Middle Warberry Road, Torquay	PP granted 21.04.09 (P/2009/0049) - lawfully commenced	11					11
The Pines, 78 St Marychurch Rd, Torquay	PP granted 24.11.11 (P/2011/0552) P/2012/1214 (8 units total) allowed 11.03.13, P/2014/0030 (14 units total) pending decision	12		12			
Melville Place, Melville St, Torquay	PP granted 28.10.10 (P/2009/1243)	10		10			
South Devon Hotel, St Margarets Road	P/2013/0057 granted 10.05.13 Extra care units (2)	26		26			
331 Teignmouth Road	P/2005/0740 approved 28.07.05 - lawfully commenced	22				22	
1 Warbro Road	P/2007/1949 allowed 25.02.08 & P/2010/1383 allowed 21.06.12	11			11		
Suite Dreams Hotel, Steep Hill, Maidencombe	P/2011/0356 allowed 19.09.11	10		10			
Torbay Court, Chelston Road	P/2006/0982 allowed 11.06.07; P/2012/0127 allowed 10.05.12	10	10				
Adj 85 Shrewsbury Ave & 46-48 Coombe Ln	P/2010/0139 allowed 07.12.10	6		6			
Country House 62 Ellacombe Road	P/2008/1654 allowed 12.01.11	8		8			
Country House 62 Ellacombe Road	P/2008/1704 allowed 12.01.11	6		6			
178 St Marychurch Road	P/2009/0333 allowed 23.11.09 & P/2012/1214 time extension allowed 11.03.13	7		7			
42 Warren Road	P/2011/1085 allowed 03.09.12	7		7			
Zephyrs Hotel, St Albans Road	P/2011/1309 allowed 05.09.12	7	7				
111 Abbey Road	P/2011/1391 allowed 05.07.12	8	8				
Torquay Totals		938	173	308	161	200	96
Torquay Total over 5 years		946					

Site	Comments	TOTAL YIELD	2013/14	2014/15	2015/16	2016/17	2017/18
PAIGNTON							
White Rock, Paignton	P/2011/0197MOA permitted 29.04.13	125		35	35	35	20
Yannons/Holly Gruit, Paignton	Outline approvals (P/2010/0289 & P/2009/1287) for total approx 320 dwellings	240	20	50	55	55	60
Marine Park, Goodrington, Paignton	PP granted 28.12.11 (P/2009/1084). On site	100	10	30	30	30	
Oldway, Paignton (1)	P/2012/0925 permitted 12.09.12. On site	0	0	0	0	0	
Great Parks Phase 2 H1.11	Brief being prepared. (Includes part between H1.11 and H1.12 not developed from phase 1)	0			0	0	0
Great Parks Phase 2 H1.12	Application pending (P/2012/1074) for 84 units on southern part	0		0	0	0	0
Divisional Police Headquarters, Paignton	P/2011/0324 approved Feb 2012 allowed 20.02.12	14		14			
Kings Ash House (South West Water Depot), Kings Ash Road	P/2012/1223 allowed 15.03.13 for 14 units (also P/2010/0666 allowed 22.03.11 for 29 units). Likely to implement 14 unit permission	14		14			
R/O 10-16 & 18-20 Gibson Rd	P/2008/0206 approved 30.04.09 site preparation works	6	6				
Hayes Rd, Paignton (1)	PP granted work commenced; PP for 123 new units involving demolition of 50 (P/2009/1179); Sanctuary HA on site	73	73				
13-39 Langridge Road	P/2011/1056 net gain of 10 units - on site	10	10				
25-35 Smallcombe Road (Foxhole), Paignton	P/2011/0777 Allowed 27.03.12. On site	7	7				
Totnes Rd Service Station, Totnes Road, Paignton	PP granted 15.04.08 (P/2007/1370); Renewal (P/2011/0395) allowed 08.12.11	14		14			
1 Fortescue Road	P/2011/0906 allowed 23.04.12. Currently on site	6	6				
Meadowfield Hotel, 36 Preston Down Road	P/2010/0782 allowed 24.05.12	0		0			
10 Palace Avenue	P/2010/1227 allowed 14.11.11	7		7			
Seaford Sands Hotel, Roundham Road	P/2011/0105 allowed 12.09.12	14		14			
Seaford Hotel, 2-4 Stafford Road	P/2011/1201 allowed 20.09.12	9		9			
Paignton Totals			132	187	120	120	80
Paignton Total over 5 years		639					

Site	Comments	TOTAL YIELD	2013/14	2014/15	2015/16	2016/17	2017/18
BRIXHAM							
Brixham Town Centre H1.18	Local Plan allocation. P/2012/1309 pending decision	14			14		
Brixham Paint Station H1.19	H1.019 P/2006/1066 approved 30.08.07 Part built	22					22
H1.22 Dolphin (Sharkham Village), Brixham	Under Construction PP granted 13.05.05 (P/2004/1032)	34	10	10	14		
Churston Golf Club	P/2011/0829 allowed 20.12.12	0		0	0	0	0

Douglas Avenue (Riviera Bay Holiday Park), Brixham	P/2011/0470 allowed 03.02.12. On site.	12	12				
Churston Court Farm, Churston Rd	P/2010/0177 allowed 18.08.10; on site	9	9				
Berry Head Garage, Berry Head Road	P/2005/1381 allowed 28.09.05 & P/2010/0902 time limit extension allowed 27.03.12; Site cleared	6			6		
Brixham Totals			31	10	34	0	22
Brixham Total over 5 years							97
Torbay Total (identified sites)			336	505	315	320	198
Windfalls / Small sites (fewer than 6 dwellings)		450	90	90	90	90	90
Total Projected Completions		2124	426	595	405	410	288

(1) Many or all of these units are extra-care units, which are counted as open market homes where they provide independent living

Windfalls/small sites figure taken from SHLAA. This is slightly below the 10 yearly average rate.

The delivery of housing will need to be subject to plan monitor and manage on the basis of development plan requirements and allocations and annual monitoring.

THIS 5 YEAR SUPPLY INCLUDES ALL SITES WITH PERMISSION IN THE 12/13 MONITORING YEAR AND/OR LOCAL PLAN ALLOCATIONS

SITES GRANTED PERMISSION POST 31ST MARCH 2013 ARE NOT INCLUDED