

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

By E-Mail and Post

Councillor Thomas
Chairman of the Overview and Scrutiny Board
Council of the Borough of Torbay
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Wragge Lawrence Graham & Co LLP
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15 October 2014

Dear Sir

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

We are instructed on behalf of Bloor Homes Ltd.

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

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

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

Yours faithfully

Wragge Lawrence Graham & Co LLP

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Enc

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

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

By E-Mail and Post

FAO Anne-Marie Bond
Executive Head – Commercial Services
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6 October 2014

Dear Sirs

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Yours faithfully

Wragge Lawrence Graham & Co LLP

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