Churston Covenant – Additional Information Requested

1. **Valuation of the land by an independent valuer**

   It has not been possible to gain an independent valuation of the land in the timescales available.

2. **Mr Haddock's points:**
   a. **There is already a covenant on the land. It has been breached on a number of times. The Council has failed in its statutory duty to enforce the current covenant.**
   b. **Clarification requested by Cllr Tyerman – is there an existing covenant or are there issues around the conditions of existing leases**

   The golf club lease is subject to covenants that are detailed in a conveyance dated 20.12.72. This conveyance is referred to in the 2003 golf club lease. The relevant covenant states that the purchaser (Torbay Council in 1972) will not use the golf club land except in such a way that there will always be an 18 hole golf course as long as there is public demand for such a course. This is consistent with the permitted user clause of the lease.

3. **Mr Billings' points:**
   a. **The report wrongly assumes that the planning permission for the 1st and 18th hole is undeliverable.**

      At the last meeting of the Overview & Scrutiny Board officers advised of the risk that discussions held at Board meeting and recommendations by the Board could undermine the Council's position at the forthcoming Public Inquiry (relating to the Council's refusal of planning permission for a new clubhouse) and at the Local Plan Examination. The Council's position, as Local Planning Authority, on this site is quite clear – the 1st & 18th is a deliverable site, featuring in the Council's 5 year land supply and in the Local Plan. The Council's position as landowner is also clear – there is no contract that allows development of the 1st & 18th, but this or a future Administration could agree a new contract, relatively quickly.

      Outline planning permission, for delivery of 132 new homes on the 1st & 18th, was granted on 20/12/2012. Consequently, all Reserved Matters need to be submitted by 20/12/2015 in order to keep the outline planning permission 'alive'. There is then two years, from the date of approval of the final reserved matters, within which development must be commenced. A reserved matters application (covering design and appearance) has already been submitted and approved for the 42 sheltered units. As the principle of development has been accepted by the Council, reserved matters applications will deal with issues such as design and landscaping. Reserved matters applications could be submitted, and the outline permission kept alive, even if the Clubhouse appeal was dismissed (i.e. planning permission not granted by the Inspector).

The one planning 'barrier' to delivery of the development at 1st & 18th is planning permission for a relocated clubhouse. The Appellants, in relation to the Clubhouse appeal, argue that the 1st & 18th is an important site for housing as the Council does not have (they contend) a 5 year housing land supply. They argue this is a good reason for the Inspector to allow the appeal for the Clubhouse. As such it seems odd for the community to suggest, at this time, the 1st & 18th is not deliverable, as this might be considered as providing support for the proposed clubhouse. If the Inspector allows the appeal (and hence gives permission for the proposed clubhouse), there is nothing in planning terms to prevent delivery of the 1st & 18th.

Until the outcomes of the Churston Golf Club planning appeal and the Local Plan Examination are known, the Council should continue to consider the site as deliverable. It should be noted that the site is considered as deliverable in the Council's refreshed Strategic Housing Land Availability Assessment (July 2013), which forms a key piece of evidence to support the new Local Plan. That work was undertaken with the Council, landowners, the community and housebuilders / developers.

The National Planning Policy Framework (NPPF) defines 'deliverable' as follows:

"To be considered deliverable, sites should be available now, offer a suitable location for development now, and be achievable with a realistic prospect that housing will be delivered on the site within five years and in particular that development of the site is viable. Sites with planning permission should be considered deliverable until permission expires, unless there is clear evidence that schemes will not be implemented within five years, for example they will not be viable, there is no longer a demand for the type of units or sites have long term phasing plans."

That raises a number of 'tests':

1. **Availability** – in planning terms the site is considered as available, especially as it has planning permission. In land ownership terms, a new contract with Bloors (or another developer) and the Golf Club could be in place relatively quickly.
2. **Location** – the Council's Development Management Committee has agreed the location of the site to be suitable for development, by granting outline planning permission; Council has agreed to inclusion of the site within the new Local Plan.
3. **Achievable** – in the current market conditions the development is considered as achievable, viable and capable of being delivered in the next 5 years (note: even if the site is not considered as deliverable – in whole or in part – in the next 5 years, the site is still categorized as developable in NPPF terms: "To be considered developable, sites should be in a suitable location for housing development and there should be a reasonable prospect that the site is available and could be viably developed at the point envisaged.")

Consequently, officers consider the site to be deliverable in accordance with the NPPF.

b. The report ignores the other housing sites identified in the Neighbourhood Plan.

See answer to question 6 below

c. The report wrongly assumes the covenant is a "no development" covenant.

The covenant is not a 'no development' covenant. Firstly the proposed covenant does not apply to any development that is within the permitted user clause of the lease (i.e. Golf Club or agriculture). Secondly the proposed covenant only prevents development on the land without first obtaining the agreement of the majority of the residents of the ward at a referendum.

d. The report wrongly fails to explain that the covenant is not a disposal.

Council Officers are of the firm belief that the proposed covenant is classed as disposal under the Local Government Act 1972.

'Land' is defined in s.270(1) of the 1972 Act as including 'any interest in land and any easement or right in, to or over land'.

The benefit of a restrictive covenant is an equitable interest in land and the grant of this restrictive covenant therefore involves a disposal of land within s.123 of the Act.

It is therefore incumbent on the Council in pursuance of s.123 of the Act to achieve the best consideration reasonably obtainable for the covenant unless the Council is able to rely on the 2003 General Disposal Consent Order or unless the specific consent of the Secretary of State is obtained.

4. Does the Mayor's decision bind future administrations?

The decision to grant the covenant would bind future administrations. Although the Council could in theory apply to the Land Tribunal to discharge the covenant (although at significant cost) it is highly unlikely that the covenant would be discharged. The Tribunal applies stringent rules. Whilst there are identifiable beneficiaries (i.e. people benefiting from the covenant) it is probable that the Tribunal would uphold the covenant.

Obtaining a beneficiary's consent to a discharge of a covenant can be a route to discharge the same. However in this case there are a large number of beneficiaries meaning that obtaining all of the beneficiaries' agreement to discharge the covenant would be practically difficult if not virtually impossible.

5. **Is it possible for the development on the 1st and 18th holes to go ahead without a Mayoral signature on a variation to the lease?**

   The user clause in the lease specifies that the land must be used as a Golf Club or as agricultural land. Any amendment to this lease would require the consent of the Mayor and the Golf Club.

6. **If it is the case that the Brixham Neighbourhood Forum can identify sites with the capacity to offset the loss of the 1st and 18th holes, would that be considered?**

   The suggestion is to 'offer up' the sites identified by the community, as part of the Brixham Neighbourhood Planning process, as a substitute for the loss of new homes on the 1st & 18th.

   In summary, the suggestion – if implemented – would leap-frog essential, legally required components of the plan making process. It would, if those sites were put forward now by the Council for the Local Plan, result in postponement of the Local Plan Hearing and a significant delay to the Local Plan – for the reasons given in the answer to Question 3 of the Call-in Notice. For reasons given below, the sites could not be included in the Council's 5 year land supply. There is simply no certainty, yet, that the sites will remain within the Neighbourhood Plan; the sites need to be fully tested; they don't have planning permission; there is a lack of clarity and consistency on the numbers of new homes for some sites. For all these reasons the substituting of the 1st & 18th by other, smaller sites identified by the community could not be supported by officers. This is supported by advice from consultants appointed by the Brixham Peninsula Neighbourhood Forum.

   The Council's professional planning officers, and the Neighbourhood Forum's own consultants, have provided advice to the BPNF about the status of those sites, in strategic planning terms. The BPNF's own consultant has provided lots of comment on the emerging draft Neighbourhood Plan and expressed real concern about the deliverability of some sites and the sorts of housing numbers that the community has suggested for some sites.
   There has long been an agreement between the Council, producing a Local Plan, and Forums producing Neighbourhood Plan namely:

   - That the Council would allocate the sites to come forward in the first five years, at least, of the Local Plan and those strategic sites / areas, such as Torquay Gateqay, that might come forward over the much longer term.

   - That Neighbourhood Forums, in their Neighbourhood Plans, would allocate sites for the medium term – roughly 2018 – 2027 – although it is acknowledged that some sites may come forward sooner, some later. This is explicitly recognised in the emerging draft BPNP (see para 53). The Local Plan provides a 'pool' of sites for each Forum to choose from.

   This approach recognises the importance of Localism and neighbourhood planning, but also gives comfort to the Local Plan Inspector that the Council has identified, in its Local Plan, sufficient land to deliver the 9,300 (approx) new homes set out in the Local Plan.

1. **Status of the Neighbourhood Plan**

   The BPNP has not been through a pre-submission consultation process, is nowhere near a referendum and has not been through a sustainability appraisal. Under this test the BPNP has no weight in planning terms. New National Planning Practice Guidance makes it clear that: "*Whilst a referendum ensures that the community has the final say on whether the neighbourhood plan comes into force, decision makers should respect evidence of local support prior to the referendum when seeking to apply weight to an emerging neighbourhood plan. The consultation statement submitted with the draft neighbourhood plan should reveal the quality and effectiveness of the consultation that has informed the plan proposals."* From this Guidance it is clear, to the Council, that the evidence of local support can only be assessed at the time of production of a draft neighbourhood plan, with a supporting consultation statement, and that 'local' in this case should be defined as Brixham Peninsula, not just a community partnership area. However, the Council could (if O & S think it worthwhile) seek DCLG's further advice (in addition to NPPF and NPPG) if required. This will take time.

2. **Status of the sites put forward by CGB CP**

A) <u>There has been no formal assessment of whether the sites are acceptable or deliverable</u>. The Council has suggested a mini SHLAA process, to assess the sites in terms of constraints and deliverability. This has not yet been undertaken, but is particularly important as, for example, the community has identified sites for development that the Local Plan SHLAA work rejected. In addition, the community has added sites, and increased housing numbers on those sites. For example:

- Broadhaven, Broadsands – current planning application is for 8 residential units (P/2014/0899). The Community Partnership has objected to it on the grounds of impact on the residential area. The SHLAA suggests up to 8 units.
- Waterside Quarry – Local Plan SHLAA says the site as a whole is unlikely to achieve 6 new homes, but the community has identified the site as capable of accommodating 10 homes. (Development Management Committee has resolved to approved outline permission for 3 detached dwellings on the northern part of the site)
- Notwithstanding the professional advice contained in the Local Plan SHLAA, and the community's objection to 8 homes on the Broadhaven site, the community has suggested that the emerging Neighbourhood Plan (BPNP35) identifies 15 – 25 units in total for the two above sites. A figure of 14 in total is more likely. So the mini SHLAA suggested by the Council will also need to check that numbers proposed in the Neighbourhood Plan are actually deliverable.
- The Council is also aware of another substantial site, promoted by a land owner to the community, which has not been considered at all by the community. It's important, to the robustness of the plan making process, that all suggested sites are given consideration. The mini SHLAA process needs to ensure that happens or the Neighbourhood Plan could be challenged.

B) The sites have not been through any sustainability appraisal, which is an essential part of the planning process. This is even more important for CGB as the strategy of 'spread the jam thin, using a high number of small sites' is different to the strategy set out in the new Local Plan, for which a sustainability assessment has been undertaken. For example:

- The community has included Greenway Park for development. The Local Plan SHLAA suggested no more than 6 units; the community suggests 10 units. This site is partly within the AONB, so any development will have an impact on the AONB. It is these sorts of impacts that need to be assessed in a formal Sustainability Appraisal.

If the sites promoted by CGP CP were now added to the Council's 5 year land supply, and therefore to the Local Plan, extra work would need to be undertaken to cover the lack of sustainability appraisal. This is exactly what the Local Plan Inspector has warned against. It would require the Local Plan Hearing to be postponed and the Local Plan to be delayed.

3. Windfall sites

Based on Torbay's past record, and NPPF advice, the Council's 5 year housing land supply allows for 130 new homes per annum on windfall sites. These are defined, in Torbay, as sites of less than 6 homes and are not identified in the Local Plan.

The community has identified quite a large number of small sites in Churston, Galmpton and Broadsands, many of which will deliver less than 6 homes. Some of these will be delivered as windfall sites in the next 5 years (e.g. Waterside Quarry; Weary Ploughman site), following the appropriate assessment of each site as part of the planning process and granting of planning permission. As such, sites in Churston, Galmpton and Broadsands are already contributing to the Council's 5 year land supply.

Other sites, which will be allocated in the Neighbourhood Plan following proper assessment and consultation / referendum, will usefully form part of Torbay's housing land supply over the medium to long term. However, these sites are not yet included in a Neighbourhood Plan that has reached an advanced stage, so cannot be guaranteed to remain within the Plan. By definition these sites don't have planning permission. There is absolutely no guarantee that they can be delivered in 5 years. So they cannot realistically be included in the Council's 5 year land supply and, for the reasons given above, they cannot be included in the Local Plan.

7. In terms of setting a precedent, what characteristics of each site would be considered?

This is a question that is almost impossible to answer, as each decision will turn on its own facts. As previously stated, 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 their own facts, then the Council could face a Judicial Review Challenge if it acted inconsistently, on the ground of irrationality.

When considering the previous covenants at Babbacombe and Paignton Green, the characteristics of the same are inter alia;

- Freely open to all members of the public without charge,
- Events are hosted which the public can attend,
- The areas are important for local tourism,
- They had received requests to register the same as Town or Village Greens.

These characteristics could form the basis of criteria by which future requests for covenants could be judged and could form the basis of a Covenants Policy. If such characteristics were met, then absent other differentiating factors, the Council could face legal challenge if it did not act consistently.
The granting of a covenant at Churston would mean that the characteristics by which future requests would be judged against would be much wider, therefore making it more difficult to refuse future requests, if acting consistently.

8. Further explanation of why no compensation could be claimed.

Any proposed covenant over land cannot be in conflict with the terms of a lease over the land unless both parties agree to vary the terms of the lease to reflect the covenant.

If the Council imposes a covenant in its capacity as Landlord and it subsequently frustrates a Tenant from carrying out its terms under the lease, the Tenant could seek damages.

However the wording of the proposed covenant has been carefully drafted so as to ensure that it does not interfere with the terms of the lease. Specifically the covenant does not include within its definition of development any use that is allowed in accordance with the Permitted User Clause of the lease i.e use as a golf course or agriculture. An example of this would be the building of a new club house. This would be classed as a development in accordance with the permitted user clause, and therefore the Golf Club would not need to seek the consent of the Council (other than in its capacity of Local Planning Authority), and there would not be a requirement to hold a referendum of the ward. A contrasting example would be a proposal to build a hotel anywhere on the existing course. The covenant would require that the Council undertook a referendum and obtained the agreement of the majority of the ward prior to entering into an agreement to amend the existing lease.

These examples demonstrate how the proposed covenant does not impact upon the terms of the existing lease.

9. Clarification of the number of people who signed the petition – 2000 or 4000?

The Petition deadline is 10 clear working days before the Council Meeting. The number of signatures received by this deadline is the number which is officially reported and recorded. However some petitioners leave their petitions open and continue collecting signatures, and they may reference different numbers of signatories. However as explained, from the Council perspective the official number is the number received by the petition deadline, which in this case was reported to be 'approximately 2000'. Following a request to the Board a count based on postcodes was undertaken and resulted in the figure of 2053.

10. It is most likely that there will be a legal challenge or possibly three legal challenges (Bloor Homes, Churston Golf Club and the Churston and Galmpton Residents} to the decision that the Mayor may make. If such litigation is forthcoming, does the Council:

a. have the necessary finances to defend the action and make any payment ordered and how might this effect the Councils ability to continue its other duties and function; and

b. the staffing levels to engage with what could be a long drawn out process.

(a) The Council has a modest budget for external legal fees, however any sums in excess of that would need to be met from the Comprehensive Spending Review Reserve. The CSR Reserve is a finite reserve, and therefore any use of it limits its ability to be used in the future.

(b) As with all Council departments, staffing resources within the legal team have reduced in the last few years. The legal team constantly have to prioritise its workload so as to meet the many demands that are placed upon it. If there were to be legal challenge of the Mayor's decision, then this work would have to take priority over some of the other work of the team.

11. Could such litigation mean that the Local Plan is put on hold during this litigation period and what could the impact be of the legal process if it takes two or more years to resolve.

Officers do not believe that litigation, if brought against the Council, would automatically stop the Local Plan. However, the decision about whether the Local Plan should proceed to a Hearing in November, and whether the Local Plan is sound or not, rests with the Local Plan Inspector. The Inspector is aware of the situation regarding Churston and has provided advice, as previously reported to the Board, to the extent that loss of the 1st & 18th is potentially a problem, given the impact on 5 year supply of housing land and deliverability of the Plan.

12. Is Graham vs Easington District Council (2008) is relevant to this situation?

In Graham v Easington District Council, the council was the beneficiary of a restrictive covenant not to use the land for anything other than a coach depot, however they subsequently granted planning permission to the owner of the land for residential development. The court held that there was a 'close coincidence' between the council's role as landowner and its role as planning authority. The grant of planning permission

demonstrated that the practical benefits secured by the covenant were not of substantial advantage to the council (the balance of industrial land versus housing land in the district had changed) and so the covenant could be discharged.

In the case of the proposed covenant at Churston, the council would not be the beneficiary of the covenant. The owners of properties around the golf course would be the beneficiaries of the covenant. This is a significant difference to the Graham case. Torbay Council's permission as landowner to discharge the covenant is irrelevant; the permission or establishment of one of the Tribunal's grounds against all the beneficiaries would be necessary to discharge the covenant.

It is very possible that in the future Churston may be a very different place. Development may surround the area in question and it may be possible to argue for example, one of the Tribunal's grounds, i.e. that the covenant does not secure to the beneficiaries 'any practical benefits of substantial value or advantage'.

The point is that any removal of a covenant is centred around the beneficiaries of the covenant. The Land's Tribunal would focus on whether the covenant still secures any benefit to the beneficiaries.

13. A detailed appraisal of the Bloor Homes Solicitors letter with opinion regarding the weight we should be giving to each of the 4 reasons they give for the covenant being illegal.

The answer to question 13 is detailed for members in a separate report which is exempt from publication by virtue of paragraph 5 of Part 1 of Schedule 12A of the Local Government Act 1972.

14. What is the possibility of the covenant being removed by reference to the Lands Chamber?

An application to the Land's Tribunal is often a lengthy process. If no objections are raised, an application can take 3 months and much longer in a disputed case. The Tribunal has power to order the applicant to pay compensation to all people entitled to the benefit of the covenant for any loss or disadvantage suffered as a result of the discharge of the covenant. In reality, it would be difficult to discharge this covenant as described in response to question 4 above.