

Proposed covenant protecting Churston Golf Course from development

Report of the Overview and Scrutiny Board

1. Background

- 1.1 The Overview and Scrutiny Board met on 16 and 22 October 2014 to consider a call-in by nine Members of the Council of the decision by the Mayor to enter into a deed covenanting with the residents of Churston and Galmpton Ward that the Council would not allow any development of Churston Golf Club without any such proposal first obtaining the majority of votes in a referendum of the registered electors of that Ward.
- 1.2 In considering the call-in, the Board sought answers to the questions posed in the call-in notice. Arising from its consideration of those answers, the Board raised a further set of questions to which it also received answers from Council officers.
- 1.3 Having heard from the Call-in Promoter and Supporters, officers and the Mayor, the Board agreed that the issue be referred to the Council for consideration for the following reasons:

A range of additional information has been made available since the original decision was made and therefore due consideration should be given to the:

- legal implications of the decision
- financial implications of the decision
- implications for the Local Plan
- fairness of the decision on other wards in Torbay
- potential damage to the economy

The original recommendation of the Council was that the decision be deferred to allow further investigation by the Place Policy Development Group. Given the additional information now available, councillors should be given the opportunity to consider that information and make their recommendation.

- 1.4 This report sets out the information that was considered by the Board over the course of its meeting.

2. The legal implications of the decision

The petition

- 2.1 The petition deadline is 10 clear working days before the meeting of the Council. 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.

2.2 A petition is classed as valid if the following has been provided:

- at least 25 signatures, or at least 1000 signatures if triggering Council debate. To establish the number of signatories there is a visual check 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.

2.3 The number of signatures received by the petition 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. 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 by a member of the Board a count based on postcodes was undertaken and resulted in the figure of 2053.

2.4 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 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"

The proposed covenant

2.5 After 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.”

- 2.6 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.
- 2.7 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.
- 2.8 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. The proposed covenant wording was as follows:

“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.”

- 2.9 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.

Imposition of covenants on Council land

- 2.10 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.
- 2.11 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'.
- 2.12 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.
- 2.13 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.
- 2.14 Since the Council is proposing to grant the covenant for no consideration, the Council could 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 £2 million'.
- 2.15 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.
- 2.16 Additionally before the covenant could be 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.

Future removal of any covenant

- 2.17 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.
- 2.18 Whilst 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. An application to the Land's Tribunal to remove a covenant is often a lengthy process. The Tribunal applies stringent rules. 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. Whilst there are identifiable beneficiaries (i.e. people benefiting from the covenant) it is probable that the Tribunal would uphold the covenant.
- 2.19 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.

- 2.20 . In the case of *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.
- 2.21 Applying this case to 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.
- 2.22 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'.
- 2.23 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.

The current lease and any future compensation

- 2.24 The golf club lease is subject to covenants that are detailed in a conveyance dated 20 December 1972. 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.
- 2.25 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.
- 2.26 There are no other parties who have a charge registered against Churston Golf Club other than Barclays Bank. No liability can fall on to the Council if the Golf Club defaulted on its borrowings.
- 2.27 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.
- 2.28 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 to demonstrate this would be a proposal to build 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.

- 2.29 These examples demonstrate how the proposed covenant does not impact upon the terms of the existing lease. On the basis that there is no such conflict then there is no basis for a leaseholder to claim compensation.

Precedent

- 2.30 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.
- 2.31 The decision to grant the covenant would bind future administrations in that, 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.
- 2.32 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.
- 2.33 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.
- 2.34 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.
- 2.35 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.

Future Legal Challenge

- 2.36 In defending any legal challenge 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.
- 2.37 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.

- 2.38 A letter from the solicitors acting on behalf of Bloor Homes had been circulated to all members of the Board. The Board asked for a response to the points raised in the letter from the Executive Head – Commercial Services. The detailed response is included as an appendix which had been circulated separately as it is exempt from publication by virtue of paragraph 5 of Part 1 of Schedule 12A of the Local Government Act 1972.

3. The financial implications of the decision

- 3.1 The Overview and Scrutiny Board received advice from the Head Valuer at Torbay Development Agency as there was insufficient time to instruct external agents. It was however confirmed to the Board that the District Valuer had reviewed the advice of TDA and agreed that the adopted figures were reasonable based upon the assumptions made.

Change in value of the Golf Club

- 3.2 In determining the change in value of the land if a covenant was imposed the following assumptions have been made:
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 5 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 £7-8 million.
 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.

3.3 The calculation undertaken is as follows:

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

Total area of golf course from plan EM2469 = 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 = £7,000,000

Less Existing Use Value = £ 132,000

£6,868,000

3.4 Having made the comments in Assumption 6 above, the financial loss in terms of any capital receipt would be £2 million, based upon the above assumptions.

3.5 Other potential loss of benefits could cover loss of Council Tax for the new houses, any section 106 contribution and New Homes Bonus. 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

3.6 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

£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

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

Possible Loss of Council Tax

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

- 3.9 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.
- 3.10 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.
- 3.11 The 90 open market houses would create 47 jobs at £21,000 pa this has a value of £987,000 pa.
- 3.12 The 132 units would create 428 construction jobs.
- 3.13 Annual value of jobs created (exc construction): £315,000 + £987,000 = £1,302,000
- 3.14 In summary:

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

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

Change in value of other sites

- 3.15 The Board sought to determine the potential change in financial value of other assets if similar petitions to that put forward by Churston, Galmpton and Broadsands Community Partnership were received in relation to other Council assets, and covenants subsequently granted
- 3.16 The advice from the Head Valuer was based upon the information currently to hand (including advice from colleagues about specific projects – Oldway Mansion, Great Parks, Hatchcombe Lane and Cary Green) and the following assumptions:
1. That the only Council owned sites affected are those detailed in section 3.17.
 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.
- 3.17 Considering the following Council owned sites:
- 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 assets is considered to be in the region of £47,375,000

4. Implications for the Local Plan

- 4.1 In simple terms, agreeing to the Churston Covenant threatens progress with, and delivery of, the new Local Plan. This is principally 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 other petitions 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.
- 4.2 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 the Area of Outstanding Natural Beauty (AONB) – than the 1st & 18th, which is why the Council has not allocated them in the Plan. If that leads to such sites being allocated, by the Inspector following promotion of those sites by landowners / developers at the Hearing, 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.
- 4.3 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.
- 4.4 The summary of the Inspector’s advice is as follows:
- 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 five year housing land supply.
- 4.5 There are two key points in the Inspector’s advice.
- 4.6 First, five year land supply. The Council believes it has a five 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. However the Inspector may believe that 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 five year housing land supply and the Council’s position will have been weakened if Churston Golf Course (1st & 18th) is not included.
- 4.7 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 made their intentions clear. Those land owners / developers

have been invited, by the Planning Inspector, to the Local Plan Hearing. Officers did not consider it necessary for the Council to promote additional sites at this point, before the Hearing.. 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).

4.8 The sites that are being promoted by land owners / developers at the Hearing are:

- Land at Collaton, opposite Parkers Arms Public House (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)

4.9 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 five 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 (totalling 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.

4.10 The loss of Churston Golf Course (1st & 18th) makes it more likely that 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.

Five Year Housing Land Supply

4.11 It is never a good idea to lose sites, especially those with planning permission, from the Council's five 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 five year land supply, even though it only represents 5% of the number of homes in the Council's housing land supply, will threaten the Bay's ability to maintain a five year supply, especially if the Local Plan Inspector considers that 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.

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

4.13 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 (detailed in paragraph 3.6).

4.14 In more detail and in addition to above:

- **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, in 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 five year supply sites and is not, as such, pivotal to the maintenance of a five year housing land supply. However, that assessment by the Council is based on providing 475 homes per annum (440 Department of Communities and Local Government (DCLG) Household projections; + 11 for second homes; x 5% for National Planning Policy Framework (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 five 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 five 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 five 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 Peter Brett Associates evidence on housing need) or 820 (2011 Strategic Housing Market Assessment (SHLAA) 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 does not meet the Bay's objectively assessed housing need and that 11,000 or 12,000 are required over the next 20 years to meet objectively assessed need. This will require 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 five 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.

4.15 If the Council cannot show a five 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 paragraph 4.8 and the following:

- Car Parks across Torbay;
- Copythorne Road, Briaxham
- Mathill Road, Brixham

- Manor Farm, Galmpton
- Sandringham Gardens, Paignton
- Land rear of Brokenbury Sewage Treatment Works, Paignton
- Nutbush Lane, Torquay
- Torquay Golf Club
- Enlarged Wall Park, Brixham
- Yalberton Holiday Park, Paignton

4.16 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 five 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.

Deliverability of planning permission at 1st and 18th hole

4.17 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 five 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.

4.18 Outline planning permission, for delivery of 132 new homes on the 1st & 18th, was granted on 20 December 2012. Consequently, all Reserved Matters need to be submitted by 20 December 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).

4.19 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 five 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.

4.20 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.

4.21 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.”

4.22 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 five years (note: even if the site is not considered as deliverable – in whole or in part – in the next five 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.

Additional sites to “offset” the loss of houses on the 1st and 18th holes

- 4.23 A suggestion was made 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.
- 4.24 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 earlier in this report. For reasons given below, the sites could not at present be included in the Council’s five 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 (BPNF).
- 4.25 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.
- 4.26 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 Gateway, 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. 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.

Status of the Neighbourhood Plan

- 4.27 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.

Status of the sites put forward by Churston, Galmpton and Broadsands Community Partnership

- 4.28 There has been no formal assessment of whether the sites are acceptable or deliverable. 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.

- 4.29 The sites have not been through any sustainability appraisal, which is an essential part of the planning process. This is even more important for Churston, Galmpton and Broadsands 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.
- 4.30 If the sites promoted by Churston, Galmpton and Broadsands Community Partnership were now added to the Council's five 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.

Windfall sites

- 4.31 Based on Torbay's past record, and NPPF advice, the Council's five 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.
- 4.32 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.
- 4.33 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.

5. Potential damage to the economy

- 5.1 In considering whether a decision to place a covenant on Churston Golf Club would deter future investment into the Bay as proposals concerning council owned land (housing or otherwise) would carry the added risk of a covenant being granted after considerable development costs have been incurred for those sites, 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 the following paragraphs represent a perspective rather than a definitive opinion.

- 5.2 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
- 5.3 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.
- 5.4 Given that there has not been widespread use of covenants 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.
- 5.5 The Board received representations from a Representative for the Business Forum who expressed unequivocally that the imposition of a covenant would damage Torbay's reputation and deter inward investment.