



Second submission of Wimbledon Park Residents' Association, May 18, 2022

Merton's draft Local Plan 2022

Site Allocation Wi3

1. Introduction

In our first submission of 3 September 2021, we drew attention to issues concerning the 1993 covenants affecting Wimbledon Park Golf Course and the potential conflict for LBM if they were to attempt to promote or endorse any development in contravention. Since then, further significant, and relevant material has come to light which strengthens the concerns about these issues. We have also received the benefit of advice from a leading QC (privilege in which is not waived) and have had drawn to our attention a recent decision of the Courts which is directly relevant.

LBM have been notified of these legal issues and have seen our first submission on the Local Plan but have not engaged with any of these concerns. In fact, they dismiss them without discussion on the grounds that they are not a planning matter so will not be considered as part of this Local Plan. But these are public law commitments, engaging LBM's standing as public authority. As such we understand that they are essential to a critical understanding of the draft Plan.

Following the invitation in paragraphs 27 and 28 of the Guidance Notes from the Inspectors for the Stage 1 June 2022 hearings, we respectfully ask the Inspectors to note this material and issues. We submit that they reinforce our position that the Plan is Un-Sound and Un-Deliverable as regards Wi3.

We have tried to make this submission self-standing, summarising or extracting documents of public record. Copies of those, marked with an asterisk (*), can be supplied, and representatives of this Association will attend the Inquiry.

2. Summary

The golf course is the undeveloped part of Site Wi3. We, and many others, have objected to the allocation of the golf course within Site Wi3. The 1993 covenants restrict the use and severely restrict any development on the golf course. They were put in place by LBM when they sold the freehold of the golf course to the All England to secure a commitment by LBM that it would not be developed. This was a municipal commitment as LBM hold the golf course, park and lake on trust under the Public Health Act 1875 as public open space. Much more than private matters, they create public law rights.

In addition to the conflict which the promotion of Site Allocation Wi3 in the Local Plan creates for LBM, LBM are not free unilaterally to authorise any departure from the covenants. As the Guidance Notes from the Inspectors make clear, NPPF 35 requires the Plan to be Sound, which includes "*Effective – deliverable over the plan period*". The covenants prevent deliverability, a point which renders the Plan un-Sound as regards Wi3. This Site Allocation raises a presumption of development which denies the full consideration of its various protections.

In short, Site Wi3 should not, for these and other reasons set out in our first submission, be extended to the golf course.



3. Latest developments

This second submission is prompted by three concerns:

3.1 Process.

For members of the public, volunteers looking after the interests of our members and communities, the task of examining the various iterations of the LBM's draft new Plan has been enormous. With hundreds of pages in the final version, peppered with spelling mistakes, inconsistencies and displaying a lack of proofreading, this has been a daunting operation, compounded by LBM subsequently filing 66 pages of Proposed Main Modifications (document OD4aii). These are presented in a spreadsheet which does not have numbered rows and cannot be copied and pasted, making it almost impossible adequately to critique it within the 3,000-word limit properly imposed on further submissions.

While typos etc are annoying but possibly excusable, this conduct has created an overriding concern that the myriad of changes conceals more substantial alterations which should have been balanced and open to public scrutiny. We note below an example: LBM's selective acceptance of comments, eg from the All England in relation to their (private) Masterplan. This has changed the balance of the latest draft Plan to its detriment and creates a risk of actual or perceived bias and unfairness.

We suggest that LBM should withdraw all amendments and comments which are not typos. Alternatively, as public consultation is an important element in the process of arriving at a final Borough Plan, may we respectfully ask the Inspectors to consider deferring the published timetable for hearings until:

- a) LBM has produced a fresh final document, certifying that there are no errors in it, and
- b) a further period has been allowed for comments on that document.

3.2 Current Planning Application.

LBM issued its Stage 3 draft Local plan in July 2021, seeking comments between 22 July and 6 September. LBM have now amended it (at the All England's request) to refer to the All England's "new Masterplan", and refer also to the comprehensive planning application (P21/2900) for the redevelopment of Wimbledon Park Golf Course dated 30 July, not registered until 24 August. But:

- a) The Masterplan is private and incapable of public scrutiny.
- b) The application is not due to come before planning committees until late 2022, more than a year after it was made.
- c) A Local Plan, designed to set strategy for many years, should not reference a single, contentious, and unresolved application, especially one made after the final consultation process commenced.

That application includes the installation of large permanent buildings and substantial development works to support the All England's commercial operations, all inconsistent with the covenants' restrictions. The weight of the application (101 documents) and time taken for review, together with the more than 1300 objections to date, demonstrate that this is both difficult and contentious. If LBM's uncritical promotion of the application in the latest version of the Local Plan is accepted, the public scrutiny of the application is weakened.



Further, through this uncritical acceptance of one party's proposal, LBM appears to adopt a narrow view of the central issue of its climate change policies and obligations when considering the future of Wimbledon Park. These topics should be consulted and discussed further in the light (eg) of Dr David Dawson's further submissions.

3.3 Covenants: this Plan is Un-Deliverable and Un-Sound as regards Wi3.

No attempt was made by LBM in any previous consultations on the Plan in respect of this sensitive and protected site Wi3 to mention the 1993 covenants, even though it was LBM who promised to impose them originally as a municipal commitment. While we explained the issues raised by the 1993 covenants only briefly in our First Submission, it is now appropriate to set out more detail. The covenants have still not been mentioned in the latest draft Plan nor in LBM's unilateral support for the All England's proposals which would breach them. Since the covenants make the Plan Un-Deliverable, and Un-Sound, these are startling omissions.

The February 2022 report of the Holocaust Memorial case supports these arguments, explained further below.

4. The meaning and effect of the 1993 Covenants

In the transfer to them of the freehold of the Golf Course dated 23 December 1993*, AELTG (the All England's land-owning company) covenanted for the benefit of LBM's freehold, being the remainder of the Park and Lake:

- 1. Not to use the [Golf Course] other than for leisure or recreational purposes or as an open space.*
- 2. No building shall be erected on the [Golf Course] other than a building or buildings the use of which is ancillary to the recreational or open space use referred to in para 1 and which building, or buildings shall not impair the appreciation of the general public of the extent or openness of the property.*
- 3. As soon as golf ceases, to dedicate a public walkway around the Lake.*

The Site Allocation (Local Plan Ch.09 P.283) describes Wi3, including the golf course as "*World class sporting venue of national and international significance with support for continued and long-term investment in all sites towards this end and to improve community access particularly to Wimbledon Park Lake.*" The last element, access to the Lake, is readily accepted and easily disposed of since a public walkway around the lake was agreed in 1993, is welcomed by all parties and should be implemented this year when golf ceases. But the proposals within the Site Allocation for commercial use and development breach the other covenants.

The case of *Thames Water v Oxford City Council* (1999) 1 EGLR 167 directly concerned a restrictive covenant limiting use to recreational purposes which a Council wanted to circumvent by building a stadium. At p170: "*The commercial exploitation of the game of football by hiring players and charging spectators is not itself a recreational purpose. Nor is it merely ancillary to the recreational purpose of the spectators.*" Substitute tennis for football and the proposal breaches the covenants: the primary justification and use of the All England's private tennis complex is commercial for the championships and qualifying, not leisure or recreation, nor would it be open space.



If the High Court were to be asked the question *“does the proposed development of a professional tennis facility on the golf course land as an adjunct to the existing AELTC facilities across Church Road, extending the international tennis centre, come within the scope of uses permitted within the restriction?”*, we understand, having taken advice from Leading Counsel, that the Court would answer *“no”* for the reasons given by the judge in Thames Water. It would amount to a centre for the commercialization of the game of tennis, charging spectators, part of the commercial operation of a massive tournament, so it is not a leisure or recreational use, nor is it open space.

Development of any buildings on the golf course is also restricted by the covenants. The starting position is the use, and it is only buildings ancillary to that use which can satisfy the covenants.

5. Background to the 1993 Sale: Merton’s commitment to the public

The archives of both the Wimbledon Park Residents’ Association and the Wimbledon Society, and the minutes of various Merton Council meetings held at Morden Library, have now yielded considerable essential legal material. This material demonstrates that in response to an enormous local outcry against the sale of the freehold of the Golf Course, LBM promised to impose the covenants. These are some extracts:

27 April 1993 LBM Policy and Resources Committee, Report to Committee*

LBM had decided to dispose of Wimbledon Park golf course. The report went on to say that the Policy and Resources Committee had been addressed by representatives from Wimbledon House Residents’ Association and Wimbledon Park Residents’ Association, had listened carefully to their comments and had a long debate.

First, the land was *“a valued open space in the area”* and they expected it to stay that way *“even though at present the use of the Golf Course itself is restricted to Members of the Golf Club only”*¹.

Second, they had decided to attach a covenant *“which will prevent the use of the land otherwise than for leisure and recreation purposes or as an open space”*.

Also, at the meeting the Chair indicated that *“in order to ensure that there is no misunderstanding or possible misinterpretation either by residents or any possible purchaser of the site, he proposes to add a further covenant preventing any building other than building which is ancillary to recreational or open space use and which will not impair public appreciation of the extent or openness of the land. This provides clarification on the Council’s behalf of our commitment to the open aspect of the Golf Course in the event of any disposal”*.

27 April 1993 LBM Policy and Resources Committee Resolution*

Resolved to declare the freehold of the Golf course surplus to LBM requirements and disposed of *“subject to ... access available to public around the lake at the earliest date ... covenants preventing the*

¹ This misapprehension is repeated in LBM’s latest amendment to Site Allocation Wi3: they have added *“with no public access other than in line with golf club membership rules”*. In fact, the Lease* to the golf club granted by LBM themselves in 1986 reserved the right for local residents to play without being members and at significantly reduced green fees, equivalent, perhaps, to the cost of participating in such a public sport at any public leisure or recreational facility.



use of the land otherwise than for leisure or recreation purposes or as an open space and covenants preventing any building except ancillary."

14 July 1993 LBM Ordinary Council Meeting Minutes*

The Chair of the Policy and Resources Committee (Councillor Colman, who was also Leader of the Council) was asked to state, for the record, the future status of the Wimbledon Park Golf Course land, and the minutes record his statement:

"I thank Councillor Philip Jones for advance notice of this question which resulted from our consultation with the Wimbledon Society who sought a clear statement from the Council about its intentions for the Golf Club site.

I am very pleased and proud to place on record our commitment to retaining the open space at the Wimbledon Golf Course regardless of the outcome of our bid to put the freehold out to tender.

As our tender document will clearly state and as I have said repeatedly, I am totally committed to ensuring this area remains part of Merton's green space. It is designated as Metropolitan Open Land. We are taking the necessary steps to make the space a conservation area. We shall be using tree preservation orders throughout the area. We are placing covenants on the sale of the freehold to prevent any owner of the land being able to develop it with houses or any other undesirable building development.

Councillors, I believe that shows our commitment. Now it is enshrined forever in Council minutes. It will show future Councils and future residents that when we decided to sell this land, we did so ensuring it would be kept as open space and we did so determined that the next owner and any future owner would be denied forever the opportunity to use this space for any development."

12 August 1993 Sales particulars issued by LBM to prospective buyers including the All England*

"The conveyance will contain (a) a covenant preventing the use of the land otherwise than for leisure or recreation purposes or as open space, (b) a covenant preventing any building on the land other than building which is ancillary to a recreational or open space use and which will not impair public appreciation of the extent or openness of the land and (c) as soon as golf ceases to be played, a dedicated walkway for public access around the Lake".

Newspaper cuttings with quotations from both LBM and the All England

23 September 1993 Wimbledon Borough News*

John Currie, All England Chairman: *"We completely understand and support everyone's determination to keep the land open and we purchased the land on that basis."*

Tony Colman, Merton Council Leader: *"Respecting the wishes of local people, this council is resolute that the land will be retained as open space. All England has bought the land knowing this is our policy and is aware that we would not allow development of the site."*

24 September 1993 The Wimbledon Informer*

Tony Colman, Merton Council Leader: *"The golf course land will be retained as open space. The whole stretch has been designated Metropolitan Open Land. We have declared it a conservation area and placed strong covenants on the sale."*



John Currie, All England Chairman: *"We completely understand and support everyone's determination to keep the land open and we have purchased the land on that basis."*

6. Effect of LBM's commitment.

The covenants were made with LBM as owner of the remainder of the Park and Lake and are registered at the Land Registry on the freehold titles of both AELTG (TGL94008*) and LBM (215592* and TGL95509*). They are binding. Since it was transferred to them in 1965 following London local government reorganisation, LBM have held, and continue to hold, their land as trustees under s164 Public Health Act 1875. We understand that as such LBM owe a duty to the locals on whose behalf they own the land and to whom they made a public law commitment to apply the covenants as drafted and promised and that they cannot release or vary them without our involvement.

The allocation of Site Wi3 for expansion of the All England commercial tennis complex would be in breach of the covenants and place LBM in breach of its commitments. As a result, the covenants render the plan Un-Sound and undeliverable.

7. Deliverability: The Holocaust Memorial case.

In the recently reported case of *The London Historic Parks and Gardens Trust v Minister of State for Housing and Westminster City Council and others*, 2022 EWHC 829 (Admin), regarding the proposed Holocaust Memorial in Victoria Tower Gardens, the presence of a pre-existing commitment restricting the use of the land was held to be a material consideration in the planning process (paragraphs 107-111). The effect of that legal impediment to the proposed development had not been acknowledged or taken into account in the planning process, so the claimant succeeded in judicial review of the decision to allow permission. The pre-existing obligation cast serious doubt on the deliverability of the project.

There is a remarkable parallel with Wimbledon Park and the current proposal. The 1993 covenants are a block on major development, and this block is reinforced by LBM's resolute commitment to apply them, a commitment which we understand remains enforceable against LBM as a matter of public law.

8. Conclusion.

We have been very keen to encourage a discussion with LBM about the covenants, but our attempts to communicate have fallen on deaf ears. These covenants therefore cast severe doubt on the deliverability of the Local Plan as regards the Site Allocation of land to the East of Church Road within Wi3, so fail the NPPF paragraph 35 test of Soundness as regards Effective deliverability.

We repeat, and conclude, that Wi3 should not include Wimbledon Park Golf course, and that any proposals for that land should take their chances in the planning arena without the presumption of development which that site allocation might allow.

For the Wimbledon Park Residents' Association, 56 Home Park Road, London SW19

Iain C Simpson
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