

# **LB Merton Examination in Public**

## **Matter 5 – Site Allocation Wi3 (All England Lawn Tennis Club)**

### **AELTC Hearing Statement**

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#### **1. Introduction**

- 1.1 The following Hearing Statement has been prepared by Rolfe Judd Planning on behalf of the All England Lawn Tennis Club (the “AELTC”) in reference to Inspectors’ Matter 5 (Site Allocation Wi3).
- 1.2 This Statement builds on our previous representations to the earlier rounds of public consultation on the new Merton Local Plan, our previous Hearing Statement (dated May 2022) to Stage 1 of the Examination, and our oral representations made at the State 1 Hearing.
- 1.3 For the sake of clarity, this Statement (and enclosures) provides a response to Questions 2, 4, 5 and 6 – as set out in the Inspector’s Matters, Issues and Questions – Stage 2 Hearings document.

#### **2. Matter 5 – Response to Inspector’s Questions**

**Question 2: Would any suggested MMs provide a positive strategy for the conservation and enjoyment of the Registered Park, and provide an effective basis for the measures to address the reasons for its inclusion on Historic England’s Heritage at Risk register (per paragraph 190 of the Framework)**

- 2.1 The Registered Park & Garden (Grade II\*) is a remnant of a Capability Brown landscape and is considered to be of 18th Century significance. The Registered Park & Garden includes Wimbledon Park Golf Course (part of the Wi3 Site Allocation), alongside Wimbledon Park and the Wimbledon Club (both outside the allocation).
- 2.2 The entire Registered Park & Garden (including that part sitting within Site Allocation Wi3) is identified by Historic England as being ‘At Risk’. The Wimbledon Park entry on the ‘At Risk’ Register states the following:

*“A remnant of the C18 landscape by Lancelot ‘Capability’ Brown for the 1st Earl Spencer’s manor house at Wimbledon, itself developed from a C16 estate. The Local Authority*

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*manages Brown's lake and land to the east as a municipal park with an emphasis on sport, with land to the west in private ownership as golf and sports clubs. The divided ownership results in differential landscape management. A masterplan exists for the municipal park, and a project to address lake safety is underway. Proposals for major new development on the golf course may deliver considerable investment across the site."*

- 2.3 The Register recognises that the investment associated with a 'major new development proposal' on the golf course has the potential to deliver significant benefits to the wider Registered Park & Garden, which in turn could secure the removal of the Registered Park & Garden from the Register. This is reflective of the extensive consultation undertaken by the AELTC with Historic England and the Gardens Trust.

- 2.4 It is also relevant to note the representations made by the Gardens Trust (dated 14<sup>th</sup> July 2022) to the current AELTC Planning Application Ref: 21/P2900. These representations make clear the key role new development will play in removing the wider Registered Park & Garden from the 'At Risk' Register – and state:

*"...we recognize [sic] that the likelihood of finding an alternative viable financial mechanism to fund the heritage improvements and subsequent longterm maintenance and management of the newly created parkland and veteran trees, is vanishingly unlikely. The commitment by AELTC for maintenance of the parkland and lake in perpetuity is to be greatly welcomed, so that Merton and Wandsworth can focus their limited budgets elsewhere.*

*We support the aim of removing the landscape from Historic England's At Risk Register (HAR). The retention and propagation of all the veteran trees, accompanied by individual management plans, demonstrates a positive commitment by AELTC to management of the heritage of the site in the longer term. We also encouraged to see collaboration with neighbouring landowners to ensure a long-term management and maintenance regime for the entire area and hope this initial approach will be sustained – we suggest a S106 condition that builds in a long-term forum to oversee the management of the site."*

- 2.5 This also adds further weight to the important role Site Allocation Wi3 will play in providing a positive strategy for the conservation of this important historic environment (in accordance with NPPF paragraph 190).
- 2.6 We are also aware and have read the Statement of Common Ground between Merton Council and Historic England (dated 10/06/2022) relating to Matter 14 and Site Allocation Wi3. The Statement of Common Ground outlines agreed modifications to the Policy text. We

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can confirm that the AELTC has no objection to these modifications and agrees that they would provide added clarity in light of paragraph 190 of the NPPF.

- 2.7 For the avoidance of doubt, it should be noted that whilst there is no objection to the modification referencing the production of a landscape management and maintenance plan for the entire Registered Park & Garden (set out within the above Statement of Common Ground), the implementation of any agreed measures and/or maintenance on land outside the AELTC's control will be the responsibility of the respective landowner.

**Question 4:** Would any suggested MMs ensure the allocation is grounded in an understanding and evaluation of the defining characteristics of the Wi3 site and its surroundings (per paragraph 127 of the Framework)?

- 2.8 Paragraph 127 of the NPPF states that *"Plans should, at the most appropriate level, set out a clear design vision and expectations, so that applicants have as much certainty as possible about what is likely to be acceptable"*.
- 2.9 In our view, Site Allocation Wi3 (incorporating proposed MMs from Merton and those suggested by Historic England) is clear in establishing the character of the site and wider area. The draft policy wording distinguishes between the character of the main AELTC site and the golf course and the core opportunities which could be realised by new development. It is also clear that Site Allocation Wi3 would be read alongside other Policies relating to design within the new Local Plan, the London Plan (2021) and the relevant Conservation Area Appraisals, which would collectively form part of any assessment of new development proposals.
- 2.10 On this basis, the draft wording for Site Allocation is considered to be consistent with Paragraph 127 of the NPPF.

**Question 5:** Would any suggested MMs ensure the approach to Metropolitan Open Land (MOL) is justified, and do they provide an effective basis for development management across the Wi3 site in these regards?

- 2.11 Site Allocation Wi3 (incorporating proposed MMs from Merton) notes that the site includes land designated as Metropolitan Open Land (MOL). This includes the golf course and part of the northern end of the AELTC's main site.
- 2.12 It is clearly understood that the Site Allocation would be read together with other Policies within the Local Plan, including Policies O15.1 and O15.2 which set out the detailed policy approach towards development proposals involving open space and MOL. The MMs to the

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supporting text to Policy O15.1 and paragraph 15.2.5 are also clear that new development will be considered against London Plan (2021) Policy G3 and NPPF paragraph 147.

- 2.13 As a result, the Site Allocation and the Green and Blue Infrastructure Chapter of the Local Plan are considered to provide a clear, effective and justified basis for the assessment of new development proposals at the site (as per the requirements of the NPPF).

**Question 6: Taking together the presence of restrictive covenants relating to part of the Wi3 site and recent case law referred to in previous hearing statements is the allocation effective insofar as its deliverability (or developability) over the plan period is concerned (per paragraph 35(d) of the Framework)?**

- 2.14 A Note has been prepared by CMS (the AELTC's legal representation) responding to Question 6. This Note is further supported by Joint Legal Submissions prepared on behalf of the AELTC by Counsel (Russell Harris KC, Jonathan Karas KC and Richard Turney). These submissions are appended to this Statement and should collectively be taken as our client's position on this question.

**3. Further Comments**

- 3.1 We are aware that further MMs are likely to be proposed to the text within Site Allocation Wi3 and we reserve the right to provide further comments to any amendments received post completion of this Statement. We also anticipate that further Statements will be prepared by other respondents to the questions outlined by the Inspectors. We also reserve the right to respond to any further matters raised by other respondents in order to provide any corrections or clarifications which may assist the Inspectors review of this matter.

## INSPECTORS' QUERIES IN RELATION TO MERTON LOCAL PLAN EIP

### NOTE SUBMITTED ON BEHALF OF THE ALL ENGLAND LAWN TENNIS GROUP PLC AND THE ALL ENGLAND LAWN TENNIS CLUB (CHAMPIONSHIPS) LIMITED

#### 1. QUESTION FROM INSPECTOR

1.1 Following the Merton Local Plan Examination in Public ("EiP") hearing sessions in June 2022, PINS issued a "Matters, Issues and Questions" document which will guide discussions at the Stage 2 hearing sessions.

1.2 This document includes the following question:

*Taking together the presence of restrictive covenants relating to part of the Wi3 site [AELTC] with recent case law [London Historic Parks and Gardens Trust v Minister of State for Housing [2022] EWHC 829 (Admin)] referred to in previous hearing statements is the allocation effective insofar as its deliverability (or developability) over the plan period is concerned (per paragraph 35(d) of the Framework)?*

1.3 We consider that the reference to paragraph 35(d) is intended to mean 35(c).

1.4 Paragraphs 35 and 36 of the Framework state as follow:

#### ***Examining plans***

***35. Local plans and spatial development strategies are examined to assess whether they have been prepared in accordance with legal and procedural requirements, and whether they are sound. Plans are 'sound' if they are:***

***(a) Positively prepared*** – providing a strategy which, as a minimum, seeks to meet the area's objectively assessed needs <sup>21</sup>; and is informed by agreements with other authorities, so that unmet need from neighbouring areas is accommodated where it is practical to do so and is consistent with achieving sustainable development;

***(b) Justified*** – an appropriate strategy, taking into account the reasonable alternatives, and based on proportionate evidence;

***(c) Effective*** – deliverable over the plan period, and based on effective joint working on cross-boundary strategic matters that have been dealt with rather than deferred, as evidenced by the statement of common ground; and

***(d) Consistent*** with national policy – enabling the delivery of sustainable development in accordance with the policies in this Framework and other statements of national planning policy, where relevant.

***36. These tests of soundness will be applied to non-strategic policies [footnote omitted] in a proportionate way, taking into account the extent to which they are consistent with relevant strategic policies for the area.***

## 2. ANALYSIS

- 2.1 The third limb of the test for soundness is that the relevant policy is “*deliverable over the plan period...*”. Therefore, the “deliverability” of a proposed policy or site allocation is material to the inclusion of that policy or site allocation within an emerging local plan.
- 2.2 Paragraph 36 indicates that the test for 'soundness' should be applied to non-strategic policies in a proportionate manner, taking into account the extent to which those policies are consistent with the strategic policies for the area. Allocation Wi3 is a non-strategic policy, it follows that an assessment of deliverability should be proportionate, not exhaustive.
- 2.3 The plain English meaning of “deliverability” is the quality or ability to be delivered. A matter is deliverable if it allows the possibility of being delivered. The test of soundness does not require certainty of delivery or anything close to it.
- 2.4 Whether a policy has the ability to be delivered is a matter of judgment. Local plan examinations which consider this issue (even in relation to strategic allocations) usually and correctly proceed on the basis of considering whether there is a reasonable prospect of the policy or allocation being delivered within the lifetime of the plan. If there is a reasonable prospect of delivery then the policy or allocation will then be effective.
- 2.5 The Merton Local Plan allocates the site Wi3 in the following terms:  
*“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.”*
- 2.6 The Merton Local Plan also provides *inter alia* that:  
*“Development of the site provides an opportunity to master plan the golf course land to create environmental, social and economic benefits to the wider area, to host more sporting activities to upgrade and improve AELTC’s facilities to continue the prominence of The Championship activities within Merton including the qualifying event.”*
- 2.7 The Merton Local Plan is not specific about the precise nature of the opportunities provided as part of site allocation Wi3 or about the nature of the development which this allocation will support.
- 2.8 The Merton Local Plan covers the period 2022/23 to 2036/37. There is, at the very least, a reasonable prospect that the proposed site allocation Wi3 for the AELTC site is capable of being delivered within this period:
- 2.8.1 The site is in the ownership and control of the AELTC. The Club has the ambition and resources to deliver the World Class sporting venue of national and international significance at the allocation site in the public interest. The Club and the local planning authority share the opinion that the allocation provides an opportunity to secure and deliver environmental social and economic benefits to those living in Merton, London and further afield.
- 2.8.2 The Club has submitted a detailed planning application to Merton, which is consistent with the terms of the allocation: though the allocation is not prescriptive as to the form of development and other forms of development toward the ambition

of a World Class sporting venue of national and international importance are supported by the Policy. Again, this application (which is likely to be determined before the adoption of the emerging plan) is clearly indicative of the commitment of the Club to deliver inter alia the aims and objectives of the policy and to secure the public benefits which the policy anticipates during the lifetime of the Plan.

- 2.8.3 No party to the Local Plan Examination process is in these circumstances alleging that the allocation is physically or functionally incapable of delivery as a matter of fact.
- 2.8.4 Rather, it is alleged that land law restrictive covenants contained in a 1993 Transfer of part of the allocation site means that there is no realistic prospect of the delivery of the allocation and its public benefits.
- 2.8.5 Such allegations are simply incorrect. The planning system exists to control the development and use of land in the public interest.
- 2.8.6 If the Local Plan process finds that the allocation to create a facility of national and international importance with very wide social environmental and economic benefits is in the public interest and in the interest of the retained land and is otherwise sound, then (even if the restrictive covenants were fit for the purpose of restricting relevant development; which is not accepted) Merton as landowner would as a matter of principle be fully entitled voluntarily to release or vary those restrictive covenants. There is at least a reasonable prospect on the facts of this case of such a voluntary release or variation. This prospect would be yet further enhanced in the event of the grant of planning permission for the proposal in the terms of the application mentioned above.
- 2.8.7 Further and in any event, there exists (as one would expect) a series of public law provisions to ensure the delivery of that public interest is not stymied by the existence of land law restrictions such as restrictive covenants. These also give several routes to a finding of a reasonable prospects of delivery.
- 2.8.8 Joint legal submissions from leading Planning and Property Counsel in relation to these matters are appended. But, in summary, even if any restrictive covenants were fit for the purpose of restricting relevant development in a land law sense here then:
  - (a) there is nothing restricting Merton as landowner of the retained land (the retained land being the Merton owned Wimbledon Park and lake) from releasing or varying the covenants, subject to it exercising that discretion in a rational and lawful way having regard to the purposes for which the retained land was acquired. In circumstances where development had been found to be in the public interest either through the local plan process or through the grant of permission or by both and where there are clear benefits to be gained from the development to the wider “retained land”, there would at the very least be a reasonable likelihood that Merton would choose voluntarily not to impede the delivery of the public benefit by varying the covenants;
  - (b) a release or modification of the restrictive covenants could also be sought from the Upper Tribunal (Lands Chamber) under section 84 of the Law of

Property Act 1925 ("**s84 LPA 1925**"). Section 84(1)(aa) allows modification or discharge of a restrictive covenant if it impedes a reasonable user of the burdened land. This process was introduced specifically to avoid frustration by land law impediments of projects which are found to be in the public interest. Again, in circumstances where the local planning authority was actively supporting the delivery of the allocation, where the allocation was considered to be otherwise sound and where a specific planning permission might even have been granted, there must be at least a reasonable prospect of any restrictive covenant being released or modified by the Upper Tribunal.

- (c) Section 203 of the Housing and Planning Act 2016 also gives a local planning authority the power to override rights including restrictive covenants for planning purposes where development is in the public interest. It achieves this by having the land in question vested in it for planning purposes. This (often temporary) vesting has the effect of overriding the relevant restrictions and covenants which might be impeding delivery of development in the public interest. Again, given the nature of the allocation and the support of the Council (and the strategic authority) for the creation of a world class national and international sporting venue and associated local and wider benefits, there must be at least a reasonable prospect of the local planning authority securing delivery via this route.

- 2.9 The issue as to whether land law restrictive covenants should stand in the way of an allocation of land that is otherwise sound and in the public interest has been considered elsewhere. It is often encountered in local plan contexts.
- 2.10 The matter was recently considered by Inspector Jonathon Bore in relation to the Waverley District Local Plan 2018. In that case, the Inspector noted the existence of a restrictive covenant in respect of golf course land which the local authority proposed to remove from the green belt to allow its development. An argument was made that the existence of the restrictive covenants (the benefit of which in that case was held by those who opposed development at the site, so a voluntary variation of the covenants was not likely) restrained the delivery of the proposed number of dwellings on the site and that as a result the site allocation could not be delivered and would fail the test of effectiveness in the Framework.
- 2.11 The planning authority supporting the effectiveness of the allocation argued that there was a reasonable prospect of delivery during the plan period. In particular, it referred to the power of the Upper Tribunal to vary modify or discharge restrictive covenants which impede reasonable land uses. The Council also referred to its other powers aside from s84(1) to override covenants, such as s 203 Housing and Planning Act 2016, in the event that they were needed.
- 2.12 The Inspector found that the release of the land from the green belt and the bringing forward of housing development was in the public interest and that these circumstances pointed to a reasonable prospect that an application under s84 LPA 1925 to vary modify or discharge the covenants would be successful thus allowing delivery of the allocation. He therefore found that the allocation was deliverable and effective.

- 2.13 We consider that in the circumstances of this case, the Inspector in the Merton Local Plan EiP can be yet clearer about the potential for a reasonable prospect of delivery of the Wi3 either through the s84(1) route or otherwise for the reasons set out above. In short, there are number of reasonable routes to delivery: only one route to a reasonable prospect of delivery is necessary.

### **3. THE HOLOCAUST MEMORIAL CASE AND ITS RELEVANCE.**

- 3.1 The Holocaust Memorial case (London Historic Parks and Garden Trust v Minister for State for Housing [2022] EWHC 829) is of little relevance to the issue of deliverability in the context of the NPPF test of soundness.
- 3.2 First, it is a case about the relevance of deliverability as between competing sites in a very specific planning application context. It was not considering deliverability in the context of a development plan or the NPPF requirements of soundness.
- 3.3 Second and critically, the bar to delivery in that case was a statutory prohibition on locating the development on the application site. The Judge explained the issue thus “*Does the LCC (Improvements Act) impose a statutory [prohibition on locating the Memorial in the Gardens.*” The Judge found as a matter of fact and law that the statute did prohibit delivery and that the Inspector should have taken that prohibition into account.
- 3.4 In this case there is NO statutory prohibition at all: there are alleged to be land law impediments to delivery contained in a Deed of Transfer. But they are of a completely different order to a statutory prohibition binding on all. And for the reasons set out above there are reasonable prospects (even if the covenants are fit for the purpose of restraining development in a land law context) of the covenants being varied if they impede delivery in the interest of the retained land or the public interest. The scheme of the legislation relevant to land use planning specifically provides for such rights to be varied or overridden if the public interest is not to be impeded. Far from being a statutory bar, there are specific statutory (as well as voluntary) routes to delivery in this case.

### **4. CONCLUSION.**

- 4.1 The allocation passes the test of deliverability and is effective. It is also otherwise sound. It will deliver a World Class venue of national and international importance and many social economic and environmental benefits to the local and wider area.

**CMS Cameron McKenna Nabarro Olswang LLP**  
**21 September 2022**

## **APPENDIX 1**

### ***LEGAL SUBMISSIONS***

## **Merton Local Plan Inspectors' Questions and Issues**

### **Joint Legal Submissions on behalf of the AELTC.**

1. Site Wi3 All England Lawn Tennis Club – Church Road, Wimbledon has been allocated as part of the emerging Merton Local Plan. It supports the creation of a world class sporting venue at the allocation site.
2. The Plan allocates the site in the following terms: “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.”
3. The draft Plan also provides inter alia that “Development of the site provides an opportunity to master plan the golf course land to create environmental, social and economic benefits to the wider area, to host more sporting activities to upgrade and improve AELTC’s facilities to continue the prominence of The Championship activities within Merton including the qualifying event.”
4. The wider area referred to above includes the Retained Land (the publicly accessible parts of Wimbledon Park) which has the benefit of the restrictive covenants. In particular that the Proposed Development will enhance access to the Retained Land and the application secures enhancements to the lake abutting the Property (being Wimbledon Park Golf Course) which forms part of the Retained Land.
5. An objection to the allocation has been made on behalf of the Wimbledon Park Residents Association. It provides that:

“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.**” (our emphasis)

6. The Inspectors conducting the Examination have issued a “Main Issues and Questions” document which includes the following question to be considered:

“Taking together the presence of restrictive covenants relating to part of the Wi3 site with recent caselaw [London Historic Parks and Garden Trust v Minister of State for Housing [2022]EWHC 829] referred to in previous hearing statements, is the allocation effective insofar as its deliverability (or developability) over the plan period is concerned as per paragraph 35 [c] of the Framework?.”

7. A note dated 21 September 2022 from CMS which directly answers this question has been supplied to the Local Plan Examination. We have seen its contents and agree with them. We particularly note that the *London Historic Parks and Gardens* case concerned a statutory prohibition on the development proposed for which the statutory framework for planning provides no means of varying or discharging. Only Parliament could overcome the impediment in that case. In the present case, for the reasons set out below, the relevant and alleged land law barriers to delivery can be varied voluntarily or by a number of routes to ensure the delivery of the public interest.
8. This note sets out Legal Submissions which explain how there is at least a reasonable prospect of delivery in response to the objectors’ contention that “the covenants prevent deliverability, a point which renders the Plan unsound as regards Wi3”.
9. This contention is incorrect and in short, this note sets out our submissions as to why it is incorrect.

***The issue of deliverability and the Emerging Plan.***

10. The four tests of soundness are set out in the NPPF. The third test of soundness is whether the Plan is effective. Effective is stated to mean inter alia “deliverable over the plan period.”
11. The soundness of non-strategic policies in the plan (such as the allocation of Wi3) falls to be assessed, in a proportionate way.

12. In this way the deliverability of a policy or an allocation in the plan (as opposed to the general rule in relation to the consideration of an application) can be material to its inclusion or to the nature of its inclusion in that Local Plan. It is thus important to understand what is meant by deliverability in this context.
13. Deliverability is an ordinary English word and should be given its ordinary English meaning. Deliverability is the quality or ability to be delivered. Something is deliverable if it “allows the possibility of being delivered”.
14. The evidence that will be sufficient to establish deliverability will depend upon context and is a matter for the decision-maker. However, it is to be noted that the term “deliverability” envisages an “ability” or a potential, or a possibility of being delivered. The test is deliberately not a requirement of certainty of delivery. Further, the guidance is not seeking an exhaustive consideration of the issue but for a non-strategic site is clear that the assessment need only be proportionate.
15. Most local plan examinations which consider this issue (even in relation to strategic allocations) proceed on the basis of whether there exists a “reasonable prospect” of delivery during the lifetime of the plan. If there is a reasonable prospect of delivery then the policy is likely to be effective. We take the view that for most considerations of effectiveness that is a lawful and appropriate approach. It is the appropriate approach in this case.
16. There may be a number of routes to delivery of an allocation during the lifetime of a plan. So long as there is at least a **reasonable prospect of one** route to delivery then the test of deliverability will be met.
17. The test will of course also be met if there is a reasonable prospect of **more** than one route to delivery.
18. In the present case, even assuming for these purposes, that the Covenants are potentially effective as a matter of land law to impede development of the site which has by definition otherwise been found to be in the public interest, then there exists a number

of routes by which such restrictive covenants might be varied to allow such development to be delivered.

*Variation by agreement*

19. Merton appears to hold the land which it retains for public recreation subject to the statutory trusts which arise under Public Health Act 1875 s.164. The covenants on the face of things appear to have been taken by Merton as conducive to its functions under that statutory provision. To the extent that Merton considered that the variation of the covenant was calculated to facilitate or was conducive to the exercise of the statutory functions which it performs in holding the land benefitted by the Covenants, it has powers to vary those covenants: see Local Government Act 1972 s.111.

20. Neither Merton nor the decision-maker can at this stage finally pre-judge whether a variation of the covenants permitting the Proposed Development (but otherwise restricting development) would facilitate or be conducive to the exercise of those functions. Nevertheless, given the benefits which the Proposed Development would bring to the Retained Land itself even aside from any other local, national and international benefits which the proposed development might bring, it can properly be concluded there that there is at least a *reasonable prospect* that Merton will now reach a judgment that the Covenants should be varied to allow the Proposed Development to proceed. The ultimate decision will be for Merton performing non-planning functions. But it is manifestly incorrect as a matter of law to assert that there is a bar on Merton forming that judgment in light of its statutory functions and in all the circumstances as they *now* prevail.

*S 84 (1) Law of Property Act 1925*

21. In any event, another route which would overcome any impediment to development potentially posed by the covenants is via the mechanism provided by s 84(1)(aa) of the Law of Property Act 1925 (as amended). We note that the paper of objection from the Wimbledon Society setting out its suggestion as to the effect of the Restrictive Covenants is entirely silent as to the existence of or role of this section in ensuring that

private law impediments to reasonable user can be wholly or partially discharged or modified by the Upper Tribunal.

22. The mechanism was specifically introduced in 1969 to avoid private restrictive covenants frustrating the delivery of projects in the public interest.
23. In exercising such powers, the Tribunal is required to take into account inter alia the development plan, any declared or ascertainable pattern of planning decisions as well as the period and context in which the restriction was created.
24. In the present case the potential existence of the Covenants as impediments to reasonable user only arises in the event that planning permission for the Proposed Development is granted or if the examination has concluded (that other than the issue of deliverability) the allocation is sound and in the public interest or if there is a combination of both factors.
25. In the case of the Local Plan, the Inspectors have in these circumstances to consider proportionately (even if the covenants were apt in private law to impede the delivery of the allocation which is not specific as to form of development) whether there was a reasonable prospect of the land law right being discharged or modified in the public interest or whether there were other routes to delivery.
26. In the circumstances where:
  - a. The local planning authority will have indicated its continued support for the allocation of the site for a World Class Sporting Venue of national and international importance with local borough and strategic benefits to the economy environment and society through the development plan process; and
  - b. where the Inspectors are otherwise satisfied about the appropriateness of the allocation on its merits and its soundness in other respects

there would clearly at the very least be a reasonable prospect that the Upper Tribunal would discharge or vary the restrictive covenant to remove the impediment to reasonable development in the public interest.

27. Further, on current timescales, there is every possibility that a resolution to grant planning permission for the Proposed Development or the actual grant of permission from Merton might be achievable by the time the Inspectors make any relevant decision on the allocation including its delivery. In such circumstances, assuming a positive resolution and grant of permission the prospect of the restrictive covenants being removed or modified becomes even more compelling since the local planning authority will have crystallised its view on the public benefit being served by a specific proposal with the benefit of planning permission.

28. The issue of the relevance of restrictive covenants to the effectiveness of a local plan policy is not a new one. For example, a senior Inspector (Mr J Bore) appointed to examine the Waverley Local Plan in 2018 had to consider fully argued objections to the strategic allocation of land (a golf course in part) for housing in the Green Belt. One of the limbs of the argument advanced against the allocation was that the existence of restrictive covenants enforceable in private law meant that the site was undeliverable (reducing the number of houses and thus the benefits associated with the development in the Green Belt). As a result, it was argued that the allocation failed the test of effectiveness:

“My clients do not intend to allow the modification or discharge to the covenant and any application to do so will be challenged and is unlikely to be successful.

Policy SS6 cannot therefore, be considered to be effective, as there is no realistic prospect of the site coming forwards for development of greater than 27 units; Policy SS6 is therefore unsound, and the allocation should be removed.”

29. In response the council as local planning authority argued that there were a number of routes to delivery but also that there was applying the relevant tests at least a reasonable

prospect that the restrictive covenants would be discharged or altered by the Upper Tribunal via s 84(1).

30. The Inspector's conclusions bear setting out in detail in the context of the present Local Plan Inspector's question set out above. He said at para 122:

“There is an 88 year old covenant on the land limiting development to 27 dwellings. Covenants are not normally planning matters, but it has been suggested that, were delivery restricted to only 27 dwellings, this would not represent the exceptional circumstances required to support the change in the Green Belt boundary. However, the need for housing land to be made available in the public interest and the strategic exceptional circumstances for Green Belt release point to a reasonable prospect of the covenant being varied, modified or discharged under s84 of the Law of Property Act 1925 to enable the full capacity of the site to be achieved.”

31. This conclusion of a “reasonable prospect” of the covenant being varied modified or discharged was in the case of a strategic allocation entirely lawful reasonable and appropriate to the circumstances.
32. The same conclusion is for the reasons set out above available to the Inspectors in the circumstances of the present case and would clearly allow a finding in turn that while the ultimate decision to release or vary the covenants will be a matter (a) for the discretion of the local authority exercising its statutory functions or (b) for a decision of the Upper Tribunal (Lands Chamber) there was a reasonable prospect of delivery of both the Proposal and the allocation.

*Other routes giving a reasonable prospect of delivery.*

33. We referred to Merton's powers to agree to vary the covenants and have set out the mechanism provided by the Law of Property Act s 84 because as demonstrated above it provides a likely reasonable prospect of delivery even in circumstances where a relevant landowner holding the benefit of a restrictive covenant objects to the delivery of the proposal.

34. In the present case, the present position of the planning authority is that it **supports** the allocation of the site in the terms set out above. It is also considering whether the Proposed Development is in the public interest through its consideration of the planning application. If it concludes that the development is in the public interest, and ought to get planning permission then the mechanisms available to it to deliver that public benefit are wider than those contained in the Law of Property Act.
35. Thus, by s 203 of the Housing and Planning Act 2016, local planning authorities were given the power in certain circumstances to ensure delivery of projects in the public interest which might be the subject of private law impediments. S 203 gives authorities the power to override easements and other rights including restrictive covenants if the land becomes vested in it voluntarily or otherwise and if the authority could have compulsorily acquired the land for planning purposes.
36. If, therefore, Merton as planning authority took the view (as it clearly reasonably could) that overriding the Covenants which stood as an impediment to the delivery of the proposal was in the interests of planning of its area, an arrangement could be reached with Merton under which the land was vested in Merton. The Covenants would then be overridden to allow the Proposed Development to proceed.
37. This additional potential route to delivery further underscores the fact that the proposed allocation if otherwise appropriate and sound cannot be said to be undeliverable.

### **Overall**

38. The restrictive covenants contained in the 1993 Transfer do not and cannot mean that the allocation contained in the emerging Local Plan are undeliverable in the terms of the NPPF. The allocation clearly has at least a reasonable prospect of delivery.

Russell Harris K.C.  
Jonathan Karas K.C.  
Richard Turney

20 September 2022