Wimbledon Park
Residents' Association

LB Merton Local Plan Inquiry. Statement on Matter 5, Proposal Wi3, questions 2, 4 & 5, also Matter 8, question 1. Chalk and cheese.

Dr D.G. Dawson, Wimbledon Park Residents' Association. September 2022

I am a professional applied environmental scientist, specialising in environmental methodologies. I worked on environment, biodiversity, ecology and nature conservation for London government from 1983 until 2006, when I retired from being joint Head of the Mayor of London's Environment Group. In the 1980s, I initiated and implemented the, then novel, Sites of Importance for nature conservation and Areas of Deficiency in Access to Nature, and in the 2000s I led work on the Mayor's Biodiversity Strategy for London. I worked extensively with London local government for biodiversity conservation in statutory planning. I have lived in Wimbledon Park for 29 years, making many ecological studies locally and I am skilled in ecological survey methodology. Since 2006, I have volunteered to assist local amenity societies.

I made a submission on proposal Wi3 for the consultation on the LB Merton Local Plan in September 2021, and submitted a statement endorsed by five local organisations suggesting agreed Main Modifications to this Proposal, for the Stage 1 hearings of this Inquiry. LB Merton has not agreed the suggested modifications.

Proposal Wi3 is for the land holdings of the All England Lawn Tennis Club (AELTC) on both the existing operational tennis grounds west of Church Road and the LB Merton part of Wimbledon Park Golf Course to the east of Church Road. In the Stage 1 hearings, we summarised our view of the incoherence of Wi3 as proposed. We submitted that the two parts of the AELTC holdings, the golf course to the east and the tennis grounds to the west, are "chalk and cheese". The purpose of this statement is to flesh out the differences either side of Church Road, so as to clarify the "chalk and cheese" and to urge modifications to ensure that appropriate policy is applied to each, rather than a single policy common to both.

In short, it's not good policy that is applied to both chalk and cheese.

The differences:

1. The golf course is 100% Metropolitan Open Land (MOL), whereas the tennis grounds are predominantly built development which is progressively encroaching on a small area of MOL, in what was originally Aorangi Park. Attrition has left around 20% of the tennis grounds as MOL, but this is proposed to be revised down to around 10%.
2. The golf course is wholly included in the Wimbledon North Conservation Area on account of mature trees, large scale open space, the history of the ornamental park, historic views and the nature conservation site. The tennis grounds had no features deserving of Conservation Area status until AELTC purchased the Southlands site, adjacent to the Victorian Queensmere House, which is included within the Bathgate Road Conservation Area. Grass courts were developed there

20 years ago, but the Conservation Area largely features early 20th century housing.

3. The golf course is 100% a Site of Borough Importance for nature conservation, Grade I. It has many old trees, including 41 Veteran trees in a pastoral setting. The oldest of these is an Ancient English oak of around 500 years old. It has two National Priority Habitats: Lowland Mixed Deciduous and Wet Woodland, supporting important species including 8 species of bat. The best that the tennis grounds has is a single 150-year-old oak.
4. As the sole surviving large remnant of the 18th century Wimbledon Park, the golf course is around half of a Grade II* historic park. Other areas included in this listing are the adjacent Wimbledon Club and public park (including the lake). Although other small remnants of the historic park exist, none qualifies for any grade of listing. This includes the open spaces of the tennis grounds.

The parts of Wi3 applying to the tennis grounds are appropriate for an intensive and strategically-important lawn tennis operation. There, they would be restricted to a very specific use across a homogeneous site. However, applying Wi3 to the golf course would wash that very specific policy over a totally different homogeneous area, a Grade II* historic park protected for strategically-important open space (MOL), biodiversity and heritage values. This precludes other futures for the golf course which could be more compatible with the character of the golf course. We submit that such a narrowing of policy is not effective planning.

The Grade II* historic park was listed as “at risk” in June 2016, in part because divided ownership results in discordant landscape management. Applying Wi3 to the golf course would compound the difficulties arising from three different visions for the future. As applied to the golf course, the local plan would not be Positively Prepared with a positive and effective vision for the Grade II* listed historic park.

Our suggested Main Modification to Wi3, submitted in Stage 1, outlined factors that should be considered, and approaches that could be explored, when planning the future of the golf course. Given that the golf course is nothing like the tennis grounds, this future would be more appropriately considered as part of planning for the future of the Grade II* historic landscape. The draft local plan is deficient in having no policy specific to this landscape. Such a policy would ensure that the golf course should be planned alongside other heritage land. We urged modifications to the local plan to ensure that the golf course is appropriately so planned.

Applying Wi3 to the golf course introduces uncertainty in determining planning proposals there. This is because proposals for a specific tennis development introduce a conflict with policies protecting open space, biodiversity and heritage. There is no such problem in applying Wi3 to the tennis grounds. We submit that the plan would be unambiguous, so giving certainty, should our suggestions be adopted.

Wimbledon Park
Residents' Association

Third submission of Wimbledon Park Residents' Association **September 20, 2022**

Merton's draft Local Plan 2022 **Site Allocation Wi3: Wimbledon Park Golf Course**

MIQs August 2022 for Stage 2 hearing 5 October 2022

Matter 5, Question (6):
Taking together the presence of restrictive covenants relating to part of the Wi3 site with recent case law[1] 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(c) of the Framework)?

1. Introduction

The short answer to this MIQ is "**no**", as to both deliverability and developability:

1.1 The 1993 covenants are a material consideration in the creation of the Local Plan.
1.2 The promotion of the AELTC scheme in the draft Plan is not justified.
1.3 The 1993 covenants, as a material consideration, should be given great weight.
1.4 LBM's refusal to acknowledge the 1993 covenants in connection with the Local Plan raises a legitimate concern about bias, a further material consideration.
1.5 The 1993 covenants go to the heart of the deliverability of the Plan and the developability of the golf course land.

2. Background

2.1 In this third submission, building on our first of 3 September 2021 and second of 18 May 2022, we provide further, House of Lords, authority for the answer "no" to MIQ 5 (6) that, as regards Wi3 at the former golf course, the Plan is Unsound and Undeliverable. [2]

2.2 We discussed the *Holocaust Memorial* case in our second submission. A circumstance which blocked a planning application was held to be a material consideration to which great weight should be given, such that the planning decision was overturned. The circumstance was a local Act of Parliament still in force, perhaps overlooked until late in the day, which could not be circumvented without a further Act or some other steps beyond the unilateral power of the planning authority.

[1] *The London Historic Parks and Gardens Trust v Minister of State for Housing and Westminster City Council and others* 2022 EWHC 829 (Admin)
[2] This submission relates to the golf course land, the part of Wi3 burdened by the 1993 covenants. Other submissions deal with the existing AELTC site to the west of Church Road to which Matter 5 also relates, and our comments at sections 4 and 7 below are also applicable to that part

2.3 The covenants were imposed by LBM to fulfil promises made by it to the local community that the golf course land would be kept open, with strict controls over its use and any development, and have exactly that effect. For the various reasons explained in our second submission, LBM is not in a position unilaterally to release or waive those covenants, so they have a similar blocking effect as in the *Holocaust Memorial* case. [3]

3. The 1993 Covenants as a Material Consideration in the Local Plan

A material consideration in the preparation of a local plan must serve a planning purpose, that is one which relates to the character or use of the land. The 1993 covenants are a material consideration.

3.1 At the First Stage hearings, the proposition that the covenants are a material consideration was dismissed by both LBM and the AELTC, without authority, as "a private matter; covenants have nothing to do with planning". This was incorrect and we are glad to note that the Inspectors will return to the topic.

3.2 The House of Lords decision in *GPE v Westminster City Council*[4] concerned a Local Plan which proposed a policy to limit an area to traditional industrial uses, despite the arguments of a developer who sought commercial and office development and uses. Lord Scarman, citing *Newbury*[5], explained at page 670 that "*the test of what was a material consideration in the preparation of local plans or in the control of development was, as for planning, whether it served a planning purpose. A planning purpose is one which relates to the character or use of the land*."

3.3 The 1993 covenants were imposed to uphold the openness of the land and severely restrict its development, furthering a commitment by LBM to the local community, despite the vagaries of any current planning designation, as to the character and use of the land. They created much more than a private interest: while the covenants are between landowners, the circumstances of their imposition, and the purpose behind them, are matters of public interest.[6] Their imposition fulfilled a public law commitment, from which LBM is not free to resile (to avoid its commitments), and they fulfil a purpose relating to the character and use of the land.

3.4 The conclusion is inescapable: in these circumstances the 1993 covenants are a material consideration.

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[3] This footnote simply notes a separate issue, unrelated to the Local Plan Inquiry. Wimbledon Park was bought by Wimbledon Corporation pursuant to the Wimbledon Corporation Act 1914. That Act has not been repealed and contains important limitations on the powers of Wimbledon Corporation's successor, LBM. We are not pursuing the point here, so these submissions are made without prejudice to our contentions, for another forum, that those limitations further restrict LBM's potential powers in relation to the Park

[4] 1985 AC 661

[5] The House of Lords decision in *Newbury DC v Secretary of State for the Environment* 1981 AC 578

[6] *Stringer v Ministry of Housing and Local Government* 1971 1 AllER 65 at 77

4. The promotion of the AELTC scheme in the draft Plan is not justified

It is not appropriate to create a planning policy, such as site allocation Wi3, for the personal benefit of one particular occupier.[7]

4.1 Lord Scarman also dealt with this issue in *GPE v Westminster*. At page 669 he cited *East Barnet*[8]: "*What is to be considered is the character of the use of the land, not the particular purpose of a particular occupier*". Lord Scarman further explained "*These words have rightly been recognised as extending beyond the issue of change of use: they are accepted as a statement of general principle of the planning law. They apply to development plans as well as to planning control.*"

4.2 He added that the statement has limitations: "*Personal circumstances of an occupier, personal hardship, the difficulties of businesses which are of value to the character of a community are not to be ignored in the administration of planning control. It would be inhuman pedantry to exclude from the control of our environment the human factor. The human factor is always present, of course, indirectly as the background to the consideration of the character of land use. It can however, and sometimes should, be given direct effect as an exceptional or special circumstance. But such circumstances, when they arise, fall to be considered not as a general rule but as exceptions to a general rule to be met in special cases. If a planning authority is to give effect to them a specific case has to be made and the planning authority must give reasons for accepting it.*"

4.3 These limitations are apposite but irrelevant in this case. For the AELTC at Wi3 should there be an exception for "personal hardship" or a "struggling business"?

4.4 Nor is there an exceptional special case for which any reasons have been given, save that the AELTC has requested the original and extended Wi3, and LBM seem to wish to agree to it. Wi3 has been drafted and amended to appear to satisfy AELTC ambitions. The Site Description for Wi3 uncritically promotes development by the AELTC:

"*AELTC now owns the former golf course in Wimbledon Park and proposes that this becomes part of the hosting estate for the Wimbledon Championships, enabling the entire site to support the qualifying rounds and the Championships themselves by 2030.*

The AELTC have commenced the preparation of a new masterplan to investigate and identify the future development opportunities for the AELTC Estate and The Championships incorporating the golf course. In August 2021 the AELTC submitted planning application 21/P2900 to Merton Council"[9]

4.5 It was explained on behalf of AELTC at the first stage hearing that the AELTC masterplan is not a single document but an "evolving vision". If the Local Plan is not the forum to discuss 21/P2900[10], as

[7] While this submission focuses on Wi3 in so far as it relates to the golf course, the same arguments against the unquestioning promotion of this occupier's personal ambitions apply just as clearly to the existing tennis complex to the west of Church Road. Please see other submissions about that site
[8] *East Barnet UDC v BTC* 1962 2QB 484, a decision of the Lord Chief Justice
[9] LBM05 - Merton's Local Plan incorporating proposed modifications dated 20 May 2022, page 290 https://www.merton.gov.uk/system/files/LBM05%20Merton%27s%20Local%20Plan%20incorporating%20Main%20Modifications%20dated%2020th%20May%202022.pdf
[10] Merton 21/P2900, Wandsworth 2021/3609

settled at the First Stage hearings, nor is it the forum to promote the imprecise and unknown, personal and future, circumstances of an occupier, contrary to Lord Scarman's clear statement of the law.

5. Weight to be given to Material Consideration

The 1993 Covenants should be given substantial weight, blocking the proposed allocation Wi3.

5.1 In giving the decision of the House of Lords in *Tesco*[11] Lord Hoffmann confirmed (para 56) that "*whether something is a material consideration is a question of law but that the weight which should be given to it is a question of planning judgment, a matter for the planning authority*". He went on to explain "*Provided that the planning authority has regard to all material considerations, it is at liberty (provided that it does not lapse into Wednesbury irrationality) to give them whatever weight the planning authority thinks fit or no weight at all. The fact that the law regards something as a material consideration therefore involves no view about the part, if any, which it should play in the decision-making process.*"

5.2 And at para 68 "*If the planning authority ignores a material consideration because it has forgotten about it, or because it wrongly thinks that the law or departmental policy precludes it from taking it into account, then it has failed to have regard to a material consideration. But if the decision to give that consideration no weight is based on rational planning grounds, then the planning authority is entitled to ignore it*."

5.3 The 1993 covenants are a material consideration in law. What weight should be attributed to them? They are a safeguard of openness and a block on any significant development, created to fulfil a commitment by LBM, so we submit that it would be unreasonable and irrational not to give considerable weight to them.

5.4 Having regard to Lord Hoffmann's reference to *Wednesbury*[12] tests and irrational decisions, there is an inevitable, unfortunate but necessary, question in this matter: why are LBM still ignoring the covenants, and their own promises?[13] Can this be a rational approach? As matters of fact:

5.4.1 The original contracting parties, LBM and AELTC still own the interests to which they apply and have extensive, regular dealings.

5.4.2 The 1993 covenants are online at the Land Registry.

5.4.3 LBM minutes, including those in our analysis, are in the Morden Library on the second floor of the Merton Civic Centre.

5.4.4 LBM have been made aware of these issues for more than a year. [14]

[11] *Tesco Stores v Secretary of State for the Environment* 1995 2AllER 636
[12] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* 1948 1KB 223
[13] We discuss conflict of interest and bias at section 6 below
[14] In addition to our submissions on the Local plan and the planning application, there were letters from The Wimbledon Society to Leader of the Council, Councillor Allison 30 July and 29 August 2021 and 16 February 2022; and to Chris Lee, Director of Environment and Regeneration, 12 January 2022.

6. Bias, a further Material Consideration

The potential for perceived bias in LBM's promotion of the AELTC cannot be avoided.

6.1 In our first submission we referred to LBM's conflict of interest in relation to the 1993 covenants: "*If they were to promote development through the Local Plan the AELTC might expect them to release the covenant, or if LBM are offered some consideration to release the covenant, they may feel compelled to promote development*."

6.2 We used the neutral expression "*conflict of interest*". However, the Encyclopaedia of Planning Law, listing specific material considerations relevant to planning decisions and the preparation of Plans, is less reticent: "*Bias, appearance of bias and predetermination*".[15] The leading case is the decision of the House of Lords in *Porter v Magill*. This notorious litigation concerned the promotion of a policy by Westminster Councillors to achieve a political advantage, which was held to be unlawful. The test to be applied for determining the existence of apparent bias was "*whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility of bias*"[16].

6.3 Following the original "Call for Sites" the heavily developed site to the west of Church Road became a Site Allocation (Wi3) at Stage 2 (October 2018). The golf course to the east was added at Stage 2a (November 2020) at the further request of the AELTC who had just bought the golf club. The Inspectors will be familiar with the "chalk and cheese" nature of the two sites. Following the addition of the golf course to Wi3, LBM's attention has been drawn to the covenants, but without any engagement or response. We explained at section 3 above why the covenants are relevant to the Plan and at 4 what looks like an unquestioning adoption of the personal ambitions of one occupier. A Site Allocation that appears to pre-empt any position on the covenants is unlawful and, further, raises concerns about openness, transparency, and the risk of bias.

7. The effect of the 1993 covenants on deliverability or developability

The 1993 covenants prevent extensive development such as anticipated in Wi3, but do not prevent all development. No site allocation can substitute for their effect and the Plan is therefore unsound in adding the golf course to Wi3.

7.1 The Framework test (NPPF 35 (c)) is about effectiveness, that is whether the plan is *deliverable* over the plan period. This MIQ asks whether the proposal is also *developable*.

7.2 The latest Modification of the Local Plan has changed the introductory wording concerning Site Allocations in respect only of Wimbledon. The earlier version of the Plan had the same introductory wording for all areas. For Wimbledon alone, the following paragraph has been deleted, losing with it the significant words which we have shown here in bold:

"*Site allocations are planning policies which apply to* ***key potential development sites of strategic importance.*** *Site Allocations are needed to ensure that* ***when a strategic site comes forward for redevelopment*** *it integrates well into its surroundings and* ***contributes towards meeting strategic***

[15] 2-3290/6 P70.31 at section 9
[16] *Porter v Magill* 2002 2AC 357 at 494 para 103

needs *for new homes, jobs, public open space, public access routes, transport infrastructure and social infrastructure, such as health or education facilities.* ***Site allocations set out the land uses that must be provided as part of any redevelopment*** *alongside other acceptable land uses that may be provided in addition to the required land uses. Any development proposal for a Site allocation will be determined against planning policies (including the London Plan).*"[17]

and instead, this paragraph has replaced it for Wimbledon alone:

"*Identifying sites for a specific land use or type of development helps give certainty to what is likely to happen in that neighbourhood and helps provide homes, business space, town centre uses, infrastructure, community facilities, sports, parks and open spaces and other types of development to help meet the borough's and London's needs. These sites are contained in the development plan as site allocations*."

7.3 It is strange that this wording was altered in this way simply for Wimbledon. As we mentioned in our first submission, Wi3 is listed alongside brownfield, tired development sites with potential and without any of the policy or statutory protections enjoyed by Wimbledon Park. The changes appear to suggest that none of the Wimbledon sites, including especially Wi3 to which LBM and AELTC have paid so much attention, has the development potential which would normally justify such a Site Allocation. In respect of the other Wi sites, ripe for development, this is a strange outcome.

7.4 Perhaps LBM will be able to explain their purpose in making these changes. Meanwhile the inference must be drawn that Wi3 is not recognised as a strategic site to be brought forward for development. If there is little confidence regarding the normal attributes and vocabulary of site allocations, such as "*key*", "*potential*", "*strategic*", "*importance*", "*redevelopment*", or "*towards strategic needs*" then why is Wi3 there at all? The logical conclusion must be drawn that Wi3 is not a strategic development or redevelopment site at all and, we submit, it never should be. It should remain protected open space.

7.5 The new wording claims to promote certainty. However, the site description for Wi3 suggests that anything the AELTC may propose is within the allocation: "*a new masterplan to investigate and identify the future development opportunities for the ALTC Estate and The Championships incorporating the golf course*". We noted above that this is an "evolving vision", personal to the AELTC. Far from giving certainty, this is giving *carte blanche*. This is exacerbated by the failure to recognise the 1993 covenants.

7.6 We set out the 1993 covenants, which govern the character and use of the golf course, in our second submission. Briefly, they restrict use and limit development to buildings ancillary to that use, subject to the overall proviso that nothing should impair the appreciation of openness,[18] as follows:

[17] LBM05 - Merton's Local Plan incorporating proposed modifications dated 20 May 2022, page 283 https://www.merton.gov.uk/system/files/LBM05%20Merton%27s%20Local%20Plan%20incorporating%20Main%20Modifications%20dated%2020th%20May%202022.pdf

[18] The attention of both LBM and the AELTC was drawn to this in writing more than a year ago. There has been no response or engagement on the interpretation of the covenants. We can only infer that our interpretation has been accepted as correct. The only relevant comment is a letter from the chairman of the AELTC to our chairman dated 13 July 2021 in which he wrote that "*As to the assurance made in 1993, I am sure you can appreciate that the requirements of the club and the community have developed in the resulting 28 years…*"

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 [Golf Course].

7.7 "Leisure" and "recreation" in these circumstances connote an activity, just like the golf course or public park. The case of *Thames Water v Oxford City Council*[19] directly concerned a restrictive covenant limiting use to recreational purposes which a Council wanted to circumvent by building a stadium for professional football. 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 applicant's private tennis complex is commercial for the championships and qualifying, not leisure or recreation, nor would it be open space.

7.8 Development of any buildings on the golf course is also restricted by the covenants. The starting position is the use: it is only buildings ancillary to an authorised use which can satisfy the covenants. The primary use is commercial, for professional tennis, which is prohibited, and so the proposed buildings will all be prohibited as well.

7.9 The 1993 covenants do not prevent all or any development, but they do recognise the openness of the space, and the need to allow leisure and recreation, much like the golf course which has been fully operational on the site for more than 120 years, a municipal facility for Merton residents[20]. They also restrict building and development to ancillary buildings which do not impair an appreciation of openness.

7.10 The current allocation for Wi3, as it relates to the golf course to the east of Church Road, cannot be deliverable or developable within the 5-10 years suggested in Wi3, or at all.

8. Conclusion

For the reasons set out in all three of our submissions, we urge the Inspectors to declare the proposed Plan Unsound in so far as it seeks to extend Wi3 to the golf course, and insofar as it seeks to allow the AELTC *carte blanche* on the existing site.

For the Wimbledon Park Residents' Association

Iain C Simpson
Chairman

Christopher Coombe
Planning Committee

[19] 1999 1EGLR 167

[20] The golf course and other land was originally acquired by LBM's predecessor the Wimbledon Corporation, under the Wimbledon Corporation Act 1914, section 8 of which provided for it to be run as a municipal golf course. The lease from LBM provided extensive and valuable membership and playing rights and concessions for LBM residents.