

13 August 2022

AE LTC Development of Wimbledon Park Golf Course lands – Material Considerations
Merton ref: 21/P2900
Wandsworth ref: 2021/3609

1. Introduction

This paper explains why the 1993 covenants by the applicant, AELTG, and the promises made by LBM when they put them in place as a term of the sale, are central to this planning application and must be given full weight as Material Considerations. We respectfully submit that the planning decision-makers should take them into account and stop this application in its tracks.

We have already notified LBM of serious concerns about the legal effect of the 1993 covenants on this project and on LBM's conduct when dealing with its residents in the Wimbledon Park and Village areas and have offered to engage in discussions.¹ Unfortunately there has been no active response. Our offer to discuss this remains open.

In the meantime, the Wimbledon Park Residents' Association, the Belvedere Estate Residents' Association, the Parkside Residents' Association, and this Society have taken advice from an eminent QC. As the 1993 circumstances also have a direct and significant effect on the planning application itself, this objection, fully informed by legal advice, is submitted on behalf of all of them.²

We have tried to make this submission self-standing, summarising or extracting documents of public record.³

2. Summary

The 1993 covenants restrict the use and development of the golf course. This project would be a flagrant breach of them. The covenants were put in place by LBM when they sold the freehold of the golf course to the AELTG (the applicant itself). LBM had committed to the Wimbledon Park Residents' Association and The Wimbledon Society that the golf course would not be developed. Much more than a private matter, this was a municipal commitment and it and the covenants created public law rights, from which LBM have no power unilaterally to depart. As the commitment served a planning purpose, it and the covenants are Material Considerations in this application, to which any decision must pay regard.

¹ Letters to Councillor Allison 30 July and 29 August 2021 and 16 February 2022; to Chris Lee, Director, 12 January 2022.

² Legal privilege in the advice is not waived, but we believe it will be helpful to the planning decision-makers and their legal advisers to engage in these issues, so we are setting them out as fully and clearly as we can.

³ Copies of all those marked with an asterisk (*) can be supplied.

This submission, to be treated as a further objection to the application, sets out the covenants and the circumstances of LBM's commitment. It goes on to explain the legal effect of the covenants and commitment, and a legal analysis of their effect as Material Considerations.

3. The meaning and effect of the 1993 Covenants

In the transfer from LBM to them of the freehold of the Golf Course dated 23 December 1993*, AELTG covenanted with LBM:

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].

3. As soon as golf ceases, to **dedicate** a public walkway around the Lake.

3.1 Restriction of use. 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 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.

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 AELTG facilities across Church Road, extending the international tennis centre, come within the scope of uses permitted within the restriction?"* it is clear, on 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: the development of so many courts, buildings, roads, paths and visitor areas would create private, enclosed spaces.

3.2 Restriction of buildings. 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. As discussed above the commercial use for tennis is not authorised; just as the use is forbidden, so therefore are the buildings. While use by members of the public for recreation of up to 7 courts out of 39 for a short time after the Championships is now suggested by the applicant, that is not the primary use. The primary use is commercial, for professional tennis, which is prohibited, and so the buildings will all be prohibited as well.

Even if some use of the proposed development might be authorised by the covenant, all buildings should be ancillary to that use and not impair the appreciation of the extent or openness of the property. As we understand the position from our QC, on no basis is the stadium (28m high x 104m wide and seating 8,000) ancillary to anything, and it also breaches the covenant as an impairment to extent or openness. In the same way the covenant rules out the large 30,000sf CMH industrial building, the two professional player hubs and the extensive number, specification and size of other buildings, seven with transformer chambers suggesting substantial power requirements. The elements proposed for public use (eg the "permissive" park or "permissive" board walk) do not require or justify such a massive amount of development.

3.3 Dedicated public walkway. The plan on the 1993 transfer clearly indicated a pathway around the perimeter of the lake. “Dedication” has a technical meaning. It may be broadly defined as “the giving of land to public use with the intention that it be accepted and used for such public use.” The applicant does not now propose to dedicate the walkway. Instead, it proposes a “permissive” use, reserving the right to close it. That would be unacceptable and a breach of the covenant if it were on its own land, but the proposal is further in breach because it will not be around the lake but over the lake.

The applicant proposes to use land belonging to LBM. Substantial lengths of the walkway are shown within the lake on land which is retained by LBM. On that basis, the applicant proposes to have the right to restrict access to LBM’s property. There is no evidence of any proposal by LBM to agree to that, nor any Local Government Act 1972 disposal process to achieve it, which would be firmly resisted.

4. 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 Morden Library record set of minutes of Merton Council meetings, 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:

4.1 Council Reports and Minutes

27 April 1993 LBM Policy and Resources Committee, Report of 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 LBM 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”*.⁴

Second, LBM 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 *“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 use of the land*

⁴ This misapprehension continues to be repeated to suit the applicant (eg Planning Statement Addendum, May 2022, paragraphs 4.5.52 and 4.5.55). In fact, the Lease* to the golf club granted by LBM themselves in 1986 reserved the right for Merton residents to play without being members and at significantly reduced green fees, equivalent, for example, to the cost of participating in such a public sport at any public leisure or recreational facility.

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."

4.2 Sales Particulars

The covenants were incorporated in the sales particulars* and subsequent legal documents*:

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".

4.3 Comments to the Press

LBM's commitment to the public was also mentioned in newspaper cuttings with quotations from both LBM and the current applicant in similar terms, suggesting a joint press release:

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.”*

5. Legal effect of the covenants and LBM’s commitment

The covenants were made with LBM as owner of the remainder of Wimbledon 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.

At first sight it might appear that these were simply private arrangements between landowners, but LBM’s position was different for at least two reasons of fundamental significance to this planning application and any planning issues relating to Wimbledon Park Golf Course. This analysis, as we are advised by Leading Counsel, goes to the heart of LBM’s position in this case, preventing a release or waiver of the covenants.

5.1 LBM as trustee of the land which has the benefit of the covenant

LBM hold the land which has the benefit of the covenants, and therefore hold the benefit of the covenants themselves, as trustee for the people of Wimbledon. The Wimbledon Park Estate was originally acquired by Wimbledon Corporation pursuant to the Wimbledon Corporation Act 1914*, by sections 9 and 11 of which it was held by the Corporation under section 164 Public Health Act 1875. The Report* to the 27 April 1993 Committee meeting, mentioned at section 4.1 above, confirmed that the Wimbledon Corporation Act had not been repealed.

The land was transferred to LBM in 1965 following London local government reorganisation,⁵ which stipulated that LBM had held, and continued to hold, their land as trustees under s164 Public Health Act 1875. Many leading court cases have established that s164 creates a trust.⁶ The effect of that trust is that LBM does not itself enjoy the benefit of the land for any purposes it wishes. LBM’s powers to deal with the covenant are severely limited by its position as trustee, and, in particular, they have no statutory or express or implied power to release or waive the benefit of the covenant.

5.2 LBM’s Public Law commitment about the covenant

Secondly, and even more than that, in 1993 LBM made a public law commitment to WPRA and this Society. LBM would control the future use of the land, whatever the vagaries of its designation and guidance from

⁵ Article 44 (1) (I) and Schedule 5 Pt II, Local Government Order 1965/654 amending Schedule 5 London Authorities (Property etc) Order 1964/1464.

⁶ Attorney General v Sunderland Corporation (1876) 2 Ch D 634 regarding s74 Public Health Act 1848, forerunner of s164; see also The Churchwardens and Overseers of Lambeth Parish v The London County Council (1897) AC 625 (Brockwell Park held by the council as “merely custodians and trustees for the public”); Maries v Merton [2014] EWHC 2689 para 11; R (Friends of Finsbury Park) v Haringey London Borough Council [2017] EWCA Civ 1831 “held on trust for the purpose of public enjoyment” and Day v Shropshire [2020] EWCA Civ 1751 “trust for public enjoyment”.

central policy over which LBM might have less control. As can be seen in Tony Colman's statements mentioned at section 4.1 above, and in a number of other communications*, these were emphatic binding promises to WPRA and this Society that LBM would act in a certain way on which that Association and this Society and their members and the people of Wimbledon, could rely. The golf course was to be "retained as open space".

These promises have fundamentally added to the obligations of LBM as trustee and created further and separate public law rights in favour of those to whom they made them. LBM are obliged to apply the covenants as drafted and promised and cannot release or vary them without the involvement of those to whom they were made, particularly the Wimbledon Park Residents' Association and the Wimbledon Society.

In a nutshell, as trustee and as local authority LBM have no power to release or vary the restrictions without the engagement of their beneficiaries and especially the people to whom they made the promises. This is like the private Act in the Holocaust Memorial case mentioned below: a further Act of Parliament might overturn it, but action cannot be taken unilaterally to avoid it.

6. Why is this relevant to the planning application? Material Consideration

The planning decision-maker must have regard to "material considerations" (s70(2) Planning Act 1990, replacing s29(1) Planning Act 1971). It is trite law that private covenants are not a material consideration for planning purposes. However, in this case not only the covenants, but more especially the promises made by LBM to impose them are not private matters. As explained above, and reported in the minutes of 1993* the promises were made to control the character or use of the land, over and above existing designations and policies.

Many cases have considered this, and a clear summary and explanation is to be found in the House of Lords decision in *Great Portland Estates v Westminster City Council* (1985) AC 661. That case was a challenge to a local plan in which, it was argued, the plan was concerned with the needs of particular users rather than the development and use of land. **It was held 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 was defined as one which relates to the character or use of the land. In that case the purpose could be promoted and secured by protecting certain sites from redevelopment.

Lord Scarman gave the judgement in GPE, citing favourably the decisions of Chief Justice Lord Parker in *East Barnet UDC v British Transport Commission* (1962) 2QB 484, and of Viscount Dilhorne in the House of Lords in *Newbury District Council v SoS for the Environment* (1981) AC 578. Specifically: "*The test, therefore, of what is a material 'consideration' in the preparation of plans or in the control of development (see section 29(1) of the Act of 1971 in respect of planning permission: section 11(9) and Schedule 4 paragraph 11(4)) in respect of local plans) is whether it serves a planning purpose: see Newbury District Council v Secretary of State for the Environment [1981] AC 578, 599 per Viscount Dilhorne.*" At the same time the House of Lords had been hearing arguments in *Westminster v BWB*, reported immediately after GPE at (1985) AC 676 and arrived at the same conclusion regarding material considerations.

The issue has arisen again 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. There the presence of a pre-existing commitment restricting the use of the land was held to be a material consideration in the planning process. While the judge accepted the general proposition that the grant of planning permission permits development on planning grounds alone (paragraph 109), he dismissed it in the circumstances of that case as he agreed with the Inspector's conclusion on the effects of the restriction upon deliverability, saying: "*However, in this case,*

when considering the credibility and viability of alternative sites, the Inspector identified the deliverability of the proposal and, in particular its timing as a material consideration meriting considerable weight” (paragraph 110). The effect of the legal impediment, the restriction of development, on the proposal 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.

There is a remarkable parallel with Wimbledon Park and the current proposal. The 1993 covenants serve a planning purpose relating to the character and use of the land. They are a block on this development, and this block is reinforced by LBM’s resolute 1993 commitment to apply them, a commitment which remains enforceable against LBM as a matter of public law. Without the power to release or waive them, and having committed to give them effect, LBM cannot renege on them.

7. 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, and the promises by LBM pursuant to which they were made, constitute a material consideration in planning terms, serving a planning purpose, a purpose relating to the character or use of the land, of such force and relevance as to require the decision-maker to refuse this application which breaches them.

It is astonishing that the covenants have not apparently been considered in this application, and we trust that this objection and an appreciation of the covenants and the promises which gave rise to them, will now take an appropriate place in the consideration of this misguided application by all decision-makers. The effect must be to refuse the application.

For the Wimbledon Society and the Wimbledon Park Residents’ Association, with the support of the Parkside Residents’ Association and the Belvedere Estate Residents’ Association.

Yours sincerely

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Chair, Wimbledon Society Planning & Environment Committee

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