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AELTC application to develop Wimbledon Park Golf Course
Merton 21/P2900, Wandsworth 2021/3609

Following publication of the Supreme Court decision in Day v Shropshire on 1 March 2023 we researched and made a detailed planning objection on 12 April 2023. The Wimbledon Society submitted a supporting objection on 13 April. We analysed the circumstances of LBM's holding of the Wimbledon Park Estate and its sale to the Applicant in 1993 and concluded that the land the subject of this application is held under a statutory public trust which is incompatible with the application. The application should accordingly be rejected by the planning decision-makers.

The Applicant has now supplied opinions from two Counsel dated 23 June and 7 July that the analysis produces an inconvenient result for the Applicant and so argues that a different interpretation should be applied. On 12 July LBM planning department specifically invited the Wimbledon Park Residents' Association and The Wimbledon Society to send any comments on this by 3 August. With the kind and prompt assistance of the senior partner of Russell-Cooke and George Laurence KC, a leading expert on the law relating to open spaces, a formal and considered opinion was submitted on 31 July, answering the legal concerns raised by the Applicant and reinforcing the view that Day v Shropshire applies in the circumstances of this case.

The Applicant's opinions of Counsel also raised some factual matters of interest, and we have now been able to carry out further research at the British Library and Merton Library and continue a dialogue with the legal department at LBM. We understand that LBM is itself taking leading counsel's advice on its position. On behalf of WPRA and The Wimbledon Society we offer some additional relevant comments to assist LBM's counsel and the planning decision-makers.

This paper is also supported by the Wimbledon Union of Residents' Associations, Parkside Residents' Association and the Belvedere Estate Residents' Association. As representatives of the local community, we will welcome community engagement about this important public trust land. In the meantime, please treat this paper as a further planning objection.

This note is in addition, and without prejudice, to the arguments put forward by Russell-Cooke and George Laurence KC or other representations on behalf of those who object to this application.
As we explained in Appendix III to our planning objection of 15 February 2023, further issues are emerging all the time. We continue to reserve the right to raise further legal submissions and planning objections, and all legal rights.

For the Wimbledon Park Residents' Association, 56 Home Park Road, SW19 7HN.

Iain C Simpson, Chairman Christopher Coombe, Planning Committee

1. Summary

The research undertaken by the Applicant, and our own research, has produced yet more material on which the planning decision-makers must base a refusal of this application. In brief:

1.1 **1986 golf club lease.** It is now clear that the relevant procedures were not followed when this was granted. Therefore, both the freehold and leasehold interests, now owned by the Applicant, are held by it on trust for the public. The application is incompatible with the trust, so should be rejected whether pursued by freeholder or leaseholder.

1.2 **Relevant factual evidence.** The voluminous research submitted at this late hour by the Applicant has put LBM and Wandsworth planning departments and their communities to considerable extra effort and expense. It has also no doubt delayed even further the process to conclude this unwanted application. Curiously, however, it has in fact reinforced the analysis that Day v Shropshire applies to this application.

1.3 **Permissive access.** The Applicant proposes to retain control over the whole site, and even over those parts of the site to which it would appear to be willing to allow occasional 'permissive' access. The Applicant has refused to engage with the many local and community objections to such an arrangement, and the community's express wish to discuss this. Since 'permissive' access is so inconsistent with the public trust, the planning decision-makers have no alternative but to reject the application in its entirety.

1.4 **Conclusion.** This is not simply a dry legal discussion about whether certain case law applies to the circumstances of the Wimbledon Park Estate. The legal position is clear and must require the planning decision-makers to reject this application. Not only does the Supreme Court require that the public trust should be considered in the planning decision, but since the rights of the public extend over the whole of the land, those rights should be given great weight. This issue concerns the rights of the community of Wimbledon over public trust land, acquired by and for the community more than 100 years ago. The community continues to stand ready to discuss this application and the public rights which the Applicant has failed to acknowledge.

2. The 1986 Golf Club Lease and the statutory trust

2.1 The 1993 sale to the Applicant was analysed and discussed in our paper of 12 April 2023. A disposal also occurred in 1986 when the most recent lease was granted to the Golf Club. That was the first grant after the whole Estate was appropriated in 1965 to the s164 Public Health Act 1875 statutory trust. It is curious but helpful that the issue of the 1986 lease grant has now been raised by the Applicant's latest research and in the opinion of the Applicant's Counsel Mr Karas KC: it is now clear that the lease grant also failed to comply with the Local Government Act 1972 requirements such that the lease itself, also held by the Applicant, is subject to the statutory trust.

2.2 Mr Karas, at paragraph 55, treats the 1986 and 1993 disposals the same, admitting that the statutory trust was not considered: "*On neither occasion does it appear that it was considered that s164 of the 1875 Act applied to the Property…*".

2.3 We established in our 12 April paper that in 1993 LBM went ahead with the sale ignorant of the 1963-5 Acts and Regulations. Our paper set them out, and when we presented a final draft of it to LBM legal department for comment, they admitted to us that they were not aware of them nor had copies. We note that the Applicant has not even tried to contradict our findings: neither Counsel for the Applicant discusses the fact that the 1993 LBM report analysed in our 12 April 2023 paper was based on a fundamental lack of knowledge and misunderstanding of the effect of those instruments.

2.4 We have nevertheless checked in respect of 1986, just as we did for the 1993 sale (paras 6.17 – 6.24 of our 12 April paper). We undertook the same careful enquiries, over two full days at the British Library for advertisements, and over several days at Merton Library for Council minutes. Nothing has been revealed, and indeed we have again found that LBM were not unaware of the need to advertise. In December 1985 a proposal to let the tennis courts on the Wimbledon Park Estate to the Applicant was advertised under s123 LGA.

2.5 We have also checked again with LBM legal department to be quite sure of these facts. We expected that these important issues would have been covered fully in Merton's records, and on 17 July 2023 asked LBM legal department for confirmation. We received the following response on 31 July: "*As with all organisations, the historic files are not kept indefinitely as we do not have any records from the legal or property teams from 1986*", and again on 10 August: "*the legal files from 1996* [sic] *and 1986 have been destroyed … the committee papers available to me are those also available to the public in the Merton Library*".

2.6 There is no evidence of any consideration of the nature of LBM's land holding in connection with the 1986 lease grant, nor of any advertisement for it. We respectfully disagree with Mr Karas's suggestion, again at paragraph 55, that:
"… *this evidence* [LBM's ignorance of the facts and law in 1993] *is admissible as supporting the factual inference that at the date of those Orders* [1964 and 1965] *the Property was not being treated as public open space subject to s.164 duties, in contrast to the balance of the Estate*."
Far from it. The critical date was not only 1964 or 1965, but the lease surrender and new grant in 1986, the first to happen after those Orders had taken effect. If, as Mr Karas admits, LBM did not know in 1993 about the fate of the Wimbledon Corporation Act and the 1965 transfer of properties to it, then it would be more accurate to infer that LBM did not know about them in 1986. Any decision and process which LBM undertook on that basis must be suspect.
In the words of the Supreme Court at paragraph 116: "… *this leaves a rather messy situation in which CSE no doubt bought the land in the expectation of being able to develop it. But that is a consequence of Shrewsbury TC's acknowledged failure to do the investigatory work that Dr Day did to establish the status of the land …*".

2.7 A disposal of public trust land without complying with the requirements of the LGA 1972 does not discharge the statutory trust. The 1986 Lease, now held by the Applicant, is therefore also impressed with that trust.

3. Applicant's 'Supporting Bundle of Relevant Factual Evidence'

3.1 The Applicant has submitted a very large number of documents in its 'Supporting Bundle of Relevant Factual Evidence'. Far from justifying the conclusions which Mr Karas seeks to draw, we suggest that this interesting new material establishes that the golf course land was always within and treated as part of the Wimbledon Park Estate, including for the purposes of the Wimbledon Corporation Act 1914. We note some issues here without prejudice to the simple, legal analysis as set out in our paper of 12 April, and the opinion of George Laurence KC and the letter from Russell-Cooke of 31 July.

3.2 The lake was included within the golf course lease demise until 1986.

3.2.1 The Applicant's extensive research has now revealed some of the leasing history of the golf course. From the earliest lease disclosed, before the Wimbledon Corporation Act, until the 1986 lease, the demise included the lake. A few examples will suffice (***emphasis added***):

3.2.1.1 **Lease 31 December 1900** (Document 4) for ten years: "ALL those pieces or parcels of land ***and land covered with water*** …";

3.2.1.2 **Lease 15 June 1925** (Document 26) for 21 years from 31 December 1924: "ALL that piece or parcel of land **and land covered with water** …";

3.2.1.3 **Lease dated 10 April 1961** (Document 51) to expire 31 December 1998: "ALL that piece or parcel of land ***and land covered with water*** …".

The 1986 lease (Document 56) was the first which excluded the lake. Although the Applicant's Bundle does not include the lease plan, this is apparent from the Filed Plan at the Land Registry.

3.2.2 If despite the weight of arguments against it, the suggestion of Mr Karas (that the golf course lease land was not subject to the 1965 appropriation as public trust land) is correct, this might produce the most remarkable and unimaginable result that this public lake, owned and managed by LBM, is not in fact within the s164 public trust. Far from it. As discussed, and submitted in George Laurence KC's opinion of 31 July, the appropriate conclusions to be drawn are in fact that:

3.2.2.1 the trust impressed on the whole Estate in 1965 took effect immediately the 1961 lease was surrendered and the 1986 lease granted, and

3.2.2.2 a lease to the golf club and the nascent statutory trust of the land in that lease are consistent and compatible.

3.3 **The Wimbledon Park Estate always included the Golf Course.**

3.3.1 **Wimbledon Town Planning Scheme 1926-1927** (Document 29)

This helpfully clarifies the distinction between Public and Private open spaces. The golf course, park and lake were always and consistently treated as public open space.

3.3.1.1 Page 281: "The existing PUBLIC OPEN SPACES within the area of the proposed Scheme are: - … WIMBLEDON PARK 122 acres within the Borough. 94 acres are leased to a Golf Club, and there are 20 hard tennis courts constructed by the Corporation…"
[The whole of the Park and Golf course were identified as one of the Public Open Spaces within the Borough].

3.3.1.2 Page 283: "There are a number of Private Sports Grounds scattered about the Town Planning Area as follows: In the Residential Area:
Wimbledon Park – 13.5 acres All England Lawn Tennis Ground [the original AELTG site], 10.6 acres Private Sports Ground [Aorangi Park, once open space and home to a rugby union club, now partly MOL and part of the AELTG-developed site west of Church Road].

3.3.1.3 Page 292, modifying the entry at page 282 of the Bundle: "Areas proposed to be reserved for Open Space: Wimbledon Park – Light green ~~hatched~~ edged dark green – 8.907 acres – ~~Public~~ Private Open Space - Cricket Ground." [This is The Wimbledon Club cricket ground, which has never been part of LBM's Wimbledon Park Estate].

3.3.2 **Wimbledon Corporation Act 1933** (Document 32)

Section 87 gave Wimbledon Corporation power to use land "***forming part of the Wimbledon Park Estate***" for car parking (***emphasis added***). By measurement and description this land is part of the golf course between the entry to The Wimbledon Club cricket ground to the south and buildings on Wimbledon Park Road to the north. This land was within the demise to the golf club, as shown on the plan to the lease exhibited at Document 26. The 1933 Act clearly regarded the golf course as part of the Wimbledon Park Estate.

3.3.3 **Wimbledon Town Planning Scheme 1932-1947** (Document 33)

Again, this clarifies that golf course, park and lake were treated the same. Map no 4 shows the whole of the Wimbledon Park Estate, including the golf course and the lake, as coloured green edged yellow (this colouring may have faded over the years, but the key and the map correspond). According to the key at page 353, this colouring designates "***Land held by Corporation under and subject to the Wimbledon Corporation Act 1914***". As Mr Karas concludes (paragraph 40 (3)) this indeed establishes that the land was held under the 1914 Act. It is that designation ('Land held under…') that is used in the 1964-5 Statutory Instruments when appropriating it to the s164 trust.

4. Public rights or permissive access?

4.1 Just as in Day v Shropshire, the development and use proposed by this planning application are incompatible with the public trust. As such, and also as in Day v Shropshire, that incompatibility is a material consideration which should be given considerable weight so that the application is rejected. Mr Karas does not discuss this, nor does the Applicant's planning counsel, Mr Harris KC, in his opinion of 6 July 2023. For example, Mr Harris does not seek to argue that the application would nevertheless still be compatible with the public trust, or that existence of a public trust would not be a material consideration in this application. Nor does he discuss the weight which should be given to this consideration.

4.2 The public trust is discussed by the Supreme Court in Day v Shropshire (paragraphs 41 to 49 "*The public's rights to enjoy land held on statutory trust for their benefit*"). These are rights of the public, not of any section of the public, nor of the custodian trustees, and override any rights of the custodian trustees in the land.

4.3 The trust arises under section 164 Public Health Act 1875, which provides as follows: "*Any local authority may purchase or take on lease lay out plant improve and maintain lands for the purpose of being used as* ***public walks or pleasure grounds*** *and may support or contribute to the support of public walks or pleasure grounds provided by any person whomsoever*.
Any local authority may make byelaws for the regulation of any such public walk or pleasure ground and may by such byelaws provide for the removal from such public walk or pleasure ground of any person infringing any such byelaw by any officer of the local authority or constable." (***emphasis added***).

4.4 The Supreme Court went on to accept and explain (paragraphs 58 to 64) that the public rights under the section 164 trust are "*analogous … with public rights in village and town greens…*" That is, that they are enjoyed "*as of right*". At paragraph 59 the Court cites, from the decision in (Barkas) v North Yorkshire County Council, the words of Lord Neuberger: "*Thus, if a person uses privately owned land 'of right' or 'by right', the use will have been permitted by the landowner – hence the use is rightful. However, if the use of such land is 'as of right', it is without the permission of the landowner…*".
At paragraph 60, the Supreme Court goes on to discuss, to the same effect, Lewis v Redcar (No 2), a Supreme Court decision cited by George Laurence KC in his opinion of 31 July. Public rights under a s164 PHA 1875 statutory trust arise and may be exercised 'as of right'.

4.5 Put simply, public rights to *public walks or pleasure grounds* held under the statutory trust may be exercised *without* the permission of the landowner. Except pursuant to byelaws authorised by s164, the landowner may not restrict them or apply terms to any permission. Rights granted by the permission of the landowner are not public rights under the statutory trust.

4.6 This application is for a private development, on a site which the Applicant claims as its own. The public trust applies to the whole of the land, but the Applicant does not propose to permit public access to the whole of the land. To that extent alone, this incompatibility with the public trust is of sufficient weight, as in Day v Shropshire, to dismiss this application.

4.7 If, as we submit, LBM and/or the planning decision-makers are advised that Day v Shropshire applies in this case, the Applicant may try instead to assert that the public access and benefits it proposes would themselves be compatible with public trust status. Indeed, the concessions made by the Applicant regarding the interpretation of the 1965 Orders might be understood to be preparing the ground for such an assertion. It is, however, clear that the Applicant's proposals do not satisfy this requirement: any such assertion would be false.

4.8 The Applicant merely proposes that the public should enjoy access to part of the land for part of the year on a 'permissive' basis. That is, the public would enjoy no access or use of any of the land at any time '*as of right*'. In addition to our objections (e.g., the Parkside Residents' Association's Comments paper dated 18 February 2023) that any 'benefits' proposed are insufficient to overcome the severe planning policy objections to the development of this Metropolitan Open Land, Grade II* listed heritage asset, such arrangements would be contrary to the rights of the public under the statutory trust. They could not discharge the Applicant's continuing obligations to the community under this trust. Those obligations guarantee the public's access rights; the Applicant's approach fails to recognise that entitlement and instead seeks to constrain it significantly (both as to area and time) whilst also maintaining a monopoly of exclusive control over the site. This approach is wholly inconsistent with the statutory public trust.

4.9 The 'permissive' access and use proposed is fully critiqued in the PRA paper of 18 February. In summary it includes a small proportion of the land for a public park except when required by the Applicant, possible occasional use of a few of the tennis courts when the Championships have finished, 'potentially' some sort of community use (unspecified) of the existing golf club building and 'potentially' other buildings. It also includes proposals for use of a lake walkway to be constructed in part on the Applicant's land and in part as a boardwalk within and over the lake itself. The use of all these facilities is to be controlled by the Applicant. Please see the PRA paper of 18 February for a discussion of further issues about the proposed 'benefits'.

4.10 In our paper of 15 February 2023, we explained why this application over the former golf course breaches the 1993 covenants about development and use freely agreed by the Applicant in favour of LBM as trustee for the public of the remainder of the Wimbledon Park Estate. The 1993 covenants also required the Applicant to create and dedicate a walkway on land identified around the lake. This paper now addresses the issues on which, we suggest, LBM should now be advised concerning the Applicant's proposals for the provision and use of the lake walkway. LBM is the s164 PHA 1875 trustee for the public of the lake and the park, including the benefit of the 1993 covenants, and its powers to deal with that land and those interests are constrained by statute. There are several issues which should prevent this application as proposed, including the following four reasons.

4.11 First, the obligation imposed by LBM on the Applicant in the covenants of 1993 was to "*dedicate*" a walkway "*around the lake*". 'Dedicate' is a legal concept, to make available to the public, just as a highway or footpath is dedicated. As such it requires unrestricted access. That of itself would also be consistent with the public trust status of the application site. A 'permissive' route proposed by the Applicant is not a 'dedicated' route, so it is inconsistent with both the concept of dedication and with the status of the public trust land.

4.12 Second, the Applicant may seek to persuade LBM to allow a walkway over, rather than around the lake, and so to waive, vary or release the obligations given in covenants by the Applicant to LBM in 1993. In that case LBM will need to consider whether, as public trustee of the benefit of the covenants, it has the power to agree to such a change. The power to dispose under s123(1) LGA 1972 does not include the power to permit such variations. We reserve the right to make further legal submissions should this still be proposed.

4.13 Third, the Applicant proposes that the use by the public of this walkway should be 'permissive', that is the public's access is by permission of the Applicant, which can be withdrawn or modified at any time. To the extent that the walkway is on land owned by the Applicant, not the lake, this contradicts the public trust under which the Applicant owns that land: it is an unlawful restriction on the rights of the public.

4.14 Fourth, where the walkway is over the lake, that land (and water) is owned and held by LBM as trustee under s164 PHA. If LBM wish to allow the Applicant any rights over it, for example to control access to it, those rights must be created (if at all) in accordance with LGA 1972. LBM have no power to do otherwise: LBM's power to deal with public trust land is limited to acts of 'disposal' under section 123 LGA 1972. We reserve the right to argue that the control proposed by the Applicant does not amount to a disposal for this purpose. If it does not, LBM have no power to authorise it; if it does, LBM must comply with s123.

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