

PlanWimbledon

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Your Ref:

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By email: secretary@planwimbledon.org

LETTER OF ADVICE

Dear PlanWimbledon

Refusal to designate PlanWimbledon as a neighbourhood forum

You have asked us to advise as to the lawfulness of the London Borough of Merton's decision to refuse PlanWimbledon's application to be designated as a neighbourhood forum. We have obtained advice from Jenny Wigley QC of Landmark Chambers and her advice is set out below.

Background information

PlanWimbledon is a not-for-profit organisation of people who live and work in Wimbledon. In February 2021, PlanWimbledon submitted an application to the London Borough of Merton to be designated as a neighbourhood forum for the purpose of developing a neighbourhood plan. A public consultation on PlanWimbledon's designation was held by Future Merton in April and May 2021. Despite an important number of responses in favour of PlanWimbledon's designation, the London Borough of Merton rejected PlanWimbledon's application on 7 July 2021.

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Advice as to lawfulness

The refusal to designate was unlawful for two reasons:

1. There was a misdirection as to the council's discretion and power to designate under section 61F(7) of the 1990 Act; and
2. There was a misdirection as to the correct approach in section 61F(7)(a)(ii) of the 1990 Act, applying an overly narrow interpretation of the statutory wording.

Issue 1: misdirection as to the council's discretion and power to designate under section 61F(7)

The application by the proposed claimant was considered by the council on 7 July 2021. It was accompanied by a report from the council's officers on whose recommendation the Decision was made. We refer to relevant passages of such report in this letter.

The discretion and power for a local planning authority to designate a body as a neighbourhood forum is contained in section 61F of the 1990 Act. Section 61F(5) contains mandatory conditions which must be satisfied for a designation to be made. The officer's report does not anywhere suggest that the mandatory conditions in s.61F(5) are not met.

The basis for the recommendation to refuse is instead that two of the 'criteria' in s.61F(7)(a) are not met, namely s.61F(a)(ii) and (iii)¹. Refer to paragraphs 1.6 and 3.3 of the report:

"1.6 Officers recommend that PlanWimbledon does not currently satisfy the criteria that must be taken into account by the council under Section 61F(7)(a) of the Town and Country Planning Act 1990, in that its membership is not considered to be drawn from all places in the specified area or all sections of the community in that area, and further its purpose does not reflect in general terms the character of the entirety of the area. Accordingly the Council is legally required to refuse the application for designation as a neighbourhood forum in relation to the specified area.

[...]

3.3 Officers analysis of the evidence received by the council and as set out in the report leads to the conclusion that PlanWimbledon's membership is not drawn from

¹ For the avoidance of doubt, we are aware that you do not agree with officers' assessment as to whether PlanWimbledon complies with such 'criteria', but such disagreement is not the basis of the first ground of challenge.

different sections of the community in so far as the business community, particularly medium to larger businesses or businesses in certain geographic locations, are not represented in PlanWimbledon's membership. Two of the area's major business groups (Merton Chamber of Commerce and Love Wimbledon BID) are not supportive of the area and Love Wimbledon does not support the forum. Furthermore, for similar reasons, officers analysis is that the proposed forum does not reflect the character of the specified area, so far as it includes the business community."

Section 61F(7)(a) is as follows:

"(7) A local planning authority—

(a) must, in determining under subsection (5) whether to designate an organisation or body as a neighbourhood forum for a neighbourhood area, have regard to the desirability of designating an organisation or body—

(i) which has secured (or taken reasonable steps to attempt to secure) that its membership includes at least one individual falling within each of sub-paragraphs (i) to (iii) of subsection (5)(b),

(ii) whose membership is drawn from different places in the neighbourhood area concerned and from different sections of the community in that area, and

(iii) whose purpose reflects (in general terms) the character of that area,

(b) may designate only one organisation or body as a neighbourhood forum for each neighbourhood area..."

Officers describe the matters in section 61F(7)(a) as being "*the government's mandatory criteria*". They go on to state that, should such criteria not be met, the council "*is legally required to refuse the application*" (paragraph 1.6). Further in the report (at paragraph 3.4), officers state that their overall recommendation is that PlanWimbledon:

"does not meet government's mandatory criteria to be designated as a neighbourhood forum. Accordingly, the Council is under a duty to refuse to designate the proposed forum because the mandatory criteria are not satisfied."

That is a clear misdirection. On a correct reading, section 61F(7) does not set out *mandatory* criteria. It merely sets out matters to which the council must have regard in its determination. It does not prescribe that the council is only able to designate if all the matters which are stated to be 'desirable' are considered to be present in the application. As is clear from *R (Daws Hill Neighbourhood Forum) v Wycombe DC* [2014] 1 WLR 1362, the power to designate is discretionary. The only duty is to have regard to the specified matters. So long as those matters are taken into account, there is no legal duty to decide the application one way or another.

Per Sullivan LJ in *Daws Hill* at [12]:

“While the first of Mr. Stinchcombe's propositions is correct, as far as it goes, it fails to recognise the discretion conferred upon the local planning authority by subsection 61F(5) : the authority may, not must, designate an organisation or body meeting the conditions set out in that subsection as a neighbourhood area. Once again, the manner in which this subsection (5) discretion may be exercised is subject to a duty: to have regard to the desirability of designating a body that meets the criteria in subsection (7). Provided the local planning authority does have regard to the desirability of designation in such a case, it may still refuse an application for designation as a neighbourhood forum.” (emphasis added)

While officers refer to the council having a discretion (paragraph 2.18), the clear impression given (also taking into account the other passages in the paragraphs referred to above) is that there is discretion to refuse when the (desirable) criteria are perceived as being met but there is no discretion to approve when the (desirable) criteria are perceived as not being met. That is an error of law. Whilst *Daws Hill* was focused on there being a discretion to refuse, it follows that there is also a discretion to approve as long as regard is had to the prescribed matters. The council was told that it did not have that discretion and acted accordingly.

The section 61F(7) duty is analogous to that in section 66(1) of the Town and Country Planning (Listed Buildings and Conservation) Areas Act 1990 which uses similar language, in that it is a duty to have special “*regard to the desirability of*” preserving the listed building and its setting when considering whether to grant planning permission for a development which affects a listed building or its setting. It is well established that a local planning authority is entitled to grant planning permission for a development which harms the setting of a listed building so long as it takes into account the harm and gives it special consideration. Similarly, a council is entitled to designate a body as a neighbourhood forum notwithstanding that it is not considered to be a body which meets each and every part of what is stated to be desirable in section 61F(7)(a). In legal error the council was wrongly advised that it was not so entitled.

Issue 2: misdirection as to the correct approach in section 61F(7)(a)(ii)

Apart from the failure properly to interpret the council’s discretion to designate under section 61F(7), officers also applied too high a test when considering section 61F(7)(a)(ii), which is the desirability of designating an organisation or body “*whose membership is drawn from different places in the neighbourhood area concerned and from different sections of the community in that area*”. In a number of places in the report officers give the impression that the membership should be drawn from *all* places in the area concerned and from *all* sections of the community (see paragraphs 1.6 and 2.42) and that the membership must be proportionate (see paragraph 2.42).

This distorts section 61F(7)(a)(ii) which merely states that it is *desirable* that the membership is drawn from different places in the area concerned and from different sections of the community, i.e. that it is desirable that the membership should not be homogeneous. That does not require the membership to be entirely proportionate or representative.

Deadline for judicial review proceedings

The London Borough of Merton's decision was taken on 7 July 2021. The deadline for judicial review would be six weeks from this date, i.e. 18 August 2021.

Next steps

If you decide to go forward with the judicial review proceedings, the first step will be to send a pre-action protocol letter to the London Borough of Merton, setting out issues identified above. We will be able to draft this letter on your behalf, should you decide to proceed any further.

I hope this letter is helpful. Please do not hesitate to contact me directly if you have any questions.

Leigh Day

Yours faithfully

LEIGH DAY