

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING’S BENCH DIVISION
PLANNING COURT (MR JUSTICE SAINI)
BETWEEN:

SAVE WIMBLEDON PARK LIMITED

Appellant

and

- (1) THE MAYOR OF LONDON
(2) THE ALL ENGLAND LAWN TENNIS GROUND PLC
(3) THE LONDON BOROUGH OF MERTON
(4) THE LONDON BOROUGH OF WANDSWORTH

Respondents

APPELLANT’S SKELETON ARGUMENT

Introduction

1. This appeal is about the circumstances in which a statutory impediment to the delivery of a planning proposal is a material consideration in deciding whether or not that proposal should be granted planning permission.
2. The proposal in question (“the Proposal”) is the expansion of the All England Lawn Tennis Ground’s (“the Club’s”)¹ tennis grounds on to land formerly used as Wimbledon Park Golf Course (“the Golf Course Land”).

¹ The parent company of the AELTG is the All England Lawn Tennis and Croquet Club Ltd (“the Club”), which owns 100% of AELTG’s shares. The Club also owns 100% of the shares in the All England Lawn Tennis Club (Championships) Ltd (“AELTC”), which runs the Wimbledon grand slam.

3. The Proposal is for a significant development, including an 8,000-seat stadium, 38 tennis courts and associated infrastructure, new buildings and works to Wimbledon Park lake.
4. The Golf Course Land is Metropolitan Open Land (“MOL”), and thus subject to the same protections as the Green Belt in the application of planning policy.
5. The statutory impediment in question is that the Golf Course Land was presumed by the Mayor, on legal advice, to be subject to a statutory trust under s. 164 of the Public Health Act 1875 requiring it to be kept available for public recreation use (“the Statutory Trust”).
6. The applications for the Proposal were originally made to both the London Borough of Merton (“LBM”) and the London Borough of Wandsworth (“LBW”) as the Golf Course Land lies within the administrative boundaries of each authority who are the statutory planning authorities for the areas with the vast majority of the Golf Course Land within Merton. LBM voted to approve the Proposal by six votes to four. LBW voted to refuse the Proposal by seven votes to none.
7. However, the application was called in for determination by the Mayor of London (“the Mayor”).
8. Subsequently the Proposal was granted planning permission (“the Permission”) by the Deputy Mayor for Planning, Regeneration and Fire Safety, exercising powers delegated by the Mayor in September 2024.
9. The Golf Course Land is also the subject of restrictive covenants which require it to be kept open and free of built development (“the Restrictive Covenants”).
10. On 21 July 2025, Saini J dismissed the Appellant’s claim. The Appellant now seeks permission to appeal to the Court of Appeal on ground 1 only.

11. In essence, the Appellant says that the Mayor reached an irrational conclusion in respect of the non-materiality of the Statutory Trust and the Restrictive Covenants as a bar on the implementation of the Proposal. On the facts, the only rational conclusion open to the Mayor was that the need for the Proposal was time-sensitive, yet the Mayor's decision that the implementation bar was immaterial was premised on the conclusion that the need for the Proposal was not time sensitive. Further, even if the need was not time-sensitive, the Proposal is inappropriate development on Metropolitan Open Land (equivalent to the Green Belt) which renders the implementation bar material: the Mayor acted irrationally in concluding otherwise, and the Judge erred in his approach to this issue. Finally, the Judge erred in treating the effects of the Statutory Trust (and by implication the Restrictive Covenants) as conceptually no different to a private law impediment to development: properly understood, the two are different in principle, in a manner which is highly pertinent to the matter at issue.

FACTUAL BACKGROUND

12. The facts are uncontroversial and not in dispute.
13. The Application is a hybrid application. The Application sought full planning permission for the provision of:
 - i. Thirty-eight grass tennis courts and associated infrastructure, comprising of the re-profiling of the landscape and the removal, retention and replanting of trees;
 - ii. Seven satellite maintenance buildings;
 - iii. A boardwalk around the perimeter of and across Wimbledon Park lake, lake alterations (including lake edge, de-silting & de-culverting), highway works to Church Road;
 - iv. New pedestrian access points (involving large areas of hardstanding) at the northern and southern ends of the site; new vehicular access

points; and

- v. The creation of a new area of parkland with permissive public access.
14. The Application sought outline planning permission (with all matters except layout reserved) for the construction of new buildings and structures, including an 8,000-seat covered stadium incorporating a qualifying player hub, guest facilities and associated event operational facilities; a central grounds maintenance hub and two players hubs.
 15. The Application was called-in for determination by the Mayor on 22 January 2024.
 16. The Application is the subject of an Officers' Report prepared for the Deputy Mayor to consider in determining whether to grant or refuse planning permission ("the OR"). Paragraphs 150 – 163 [SB/61-64] of the OR record the procedural history of the Application in more detail.
 17. The Application was considered at a hearing on 27 September 2024. Following the hearing, in accordance with the recommendation of the OR, the Deputy Mayor resolved to grant planning permission subject to the conclusion of a s. 106 legal agreement.
 18. The reasoning contained in the OR as to the non-materiality of the Restrictive Covenants and the Statutory Trust, respectively, is at paras 130-132 and 141-142 [SB/53-54; 55-56]. The critical reasoning on the point at issue is at para 141 [SB/55]:

"If the land is held subject to a statutory trust, GLA Officers consider that is in principle capable of being a material consideration. Even if the public rights are not currently exercised, the lawful use has a public value and an adverse impact on that lawful use is capable of being a material consideration. The existence of the right may also affect how

some planning policies apply to the proposed development, and the weight that attaches to certain harms and benefits. In some cases, deliverability can also be a material planning consideration. In some cases, deliverability can also be a material planning consideration. As explained in paragraph 131 above, ordinarily, any potential difficulties the developer might face in implementing the development would be an immaterial consideration when determining whether what is proposed is acceptable in planning terms. In this case there is nothing to indicate that any deliverability implications would be a material consideration. GLA Officers do not consider any of the benefits relied on are particularly time-sensitive, or that there are other potentially suitable and available alternative sites which could be less constrained in terms of deliverability.”

19. On 15 November 2024 a s. 106 agreement was entered into between the Mayor, LBM and LBW and the Club (the “s106 Agreement”) and on 18 November 2024 the Decision Notices were issued formally granting the Permission.

The Golf Course Land

20. The Proposal comprises approximately 39.7 hectares of land identified as the Golf Course Land, Wimbledon Park lake (“the Lake”) as well as a section of Church Road. The site lies across Church Road to the east of the AELTC Main Grounds, where the Wimbledon Tennis Championships (“The Championships”) are held every year. The Club is the owner of both the freehold and leasehold interests in the Golf Course Land, the Club having acquired ownership of the freehold from LBM in 1993, the leasehold owning company in 2018 and the leasehold itself in 2021.
21. Upon the 1993 Disposal, the Restrictive Covenants were entered into. The benefit of the Restrictive Covenants is annexed to land held by LBM also on the Statutory Trust in both LBM and LBW including the part of Wimbledon Park currently open to the public and the lake. That land and

the benefit of the covenants annexed to it are held by LBM on trust for the benefit of members of the public. The covenants maintain the openness of the Golf Course Land, prevent development and restrict its use so as not to impair the appreciation of the general public of the extent or openness of the Golf Course Land. The covenants provide so far as material:

“1 Not to use the Property otherwise than for leisure or recreational purposes or as an open space [...]

2 No building shall be erected on the Property other than a building or buildings the use of which is ancillary to the recreational or open space use referred to in paragraph 1 above and which building or buildings will not impair the appreciation of the general public of the extent or openness of the Property [...]” [HB/923]

22. Most of the Golf Course Land lies within the LBM. However, a northern section of the former golf course lies within the LBW. The application site does not include the part of Wimbledon Park currently open to the public except for a small section of land to the north of the lake (to enable the proposed boardwalk connection to the existing lakeside path). The part of Wimbledon Park currently open to the public is recreational land to the north- east of the application site, the use of which by members of the public is protected under the Statutory Trust..
23. The Golf Course Land together with the part of Wimbledon Park currently open to the public and the lake forms part of land formerly known as the Wimbledon Park Estate (“the Estate”). The freehold of the Estate was acquired in or about 1915 by the Corporation of the Borough of Wimbledon under powers conferred by a local Act, obtained for that and other purposes, entitled the Wimbledon Corporation Act 1914.
24. On 12 April 2023 the Wimbledon Park Residents’ Association (“WPRA”) wrote

to the Planning Departments at both LBM and LBW, referring to *R (Day) v Shropshire Council* [2023] UKSC 8. WPRA contended that the whole of the Estate, including the Golf Course Land, was held by AELTG subject to a statutory public recreation trust under s. 164 of the Public Health Act 1875, and that this was material to the Application to develop the Land. The reasons why the Estate is subject to the Statutory Trust are not engaged in this JR, because the Defendant determined the Application on the assumption that the Statutory Trust existed (see below).

25. Following WPRA's analysis on the point, the issue of the Statutory Trust was the subject of competing legal opinions prepared by leading counsel.⁵ The Mayor obtained its own opinion from Timothy Morshead KC dated 17 September 2024 which concluded that the Golf Course Land is held under a Statutory Trust pursuant to s. 164.
26. The application site is subject to a number of key planning policy designations within adopted planning policy. These include the following designations:
 - i. Wimbledon Park and lake, including the Golf Course Land and The Wimbledon Club are collectively designated as MOL and Open Space.
 - ii. Registered Park and Garden of Special Historic Interest (Grade II*) ("RPG") – the application site is a remnant of a larger historic landscape designed by Lancelot "Capability" Brown. The designation includes the Golf Course Land, Wimbledon Park Lake and also includes the neighbouring Wimbledon Club and the part of Wimbledon Park currently open to the public. The entire site is included on Historic England's 'At Risk' Register.
 - iii. The application site is included within a Site of Importance for Nature Conservation and is also part of a defined Green Corridor.
 - iv. All the trees on the Land are protected under a Tree Preservation Order or by a Conservation Area designation (the application site being within the

Wimbledon North Conservation Area).

THE LAW

27. When determining a planning application, the decision maker is required to have regard to, *inter alia*, any “material considerations”: Town and Country Planning Act 1990, s. 70(2).

28. In *R (Wright) v Resilient Energy Severndale Ltd* [2019] 1 WLR 6562, the Supreme Court confirmed that the test for the materiality of a consideration in planning decision-making is the same as the test for imposing a condition on a planning permission. The test involves three considerations (per Lord Sales JSC at para 32, citing with approval the speech of Viscount Dilhorne in the *Newbury* case):

“the conditions imposed must be for a planning purpose and not for any ulterior one, and ... they must fairly and reasonably relate to the development permitted. Also they must not be so unreasonable that no reasonable planning authority could have imposed them ...”

29. Material considerations fall into three categories: those to which regard must be had; those to which regard must not be had (often referred to as immaterial considerations); and those to which regard may be had if the decision maker in his judgement considers it right to do so: *R (Friends of the Earth) v Heathrow Airport Limited* [2021] PTSR 190 at para 116.

30. In respect of the third category of consideration, the test as to whether or not a matter is so “obviously material” to a decision, so that the failure to consider it is an error of law, is one of rationality judged according to the *Wednesbury* test: *Friends of the Earth* at paras 119-121.

31. The materiality of non-planning impediments to the implementation of a planning permission is a subject which has been considered by the Courts on

a number of occasions.

32. The starting point is *British Railways Board v Secretary of State for the Environment* [1994] JPL 32. The appeal concerned a planning permission for housing development in circumstances where the proposed access to the scheme was across third party land, and the third party (in that case, Hounslow LBC) had indicated that it would not permit access across its land. The Secretary of State refused permission on the basis that there was no reasonable prospect of delivering the development.
33. Lord Keith of Kinkel set out the governing principles in cases where the owner of land has indicated an intention not to allow a planning permission to be developed:

“The owner of the land to which the application relates may object to the grant of planning permission for reasons which may or not be sound on planning grounds. If his reasons are sound on planning grounds no doubt the application will be refused. But if they are unsound, the mere fact that the owner objects and is unwilling that the development should go ahead cannot in itself necessarily lead to a refusal. The function of the planning authority is to decide whether or not the proposed development is desirable in the public interest. The answer to that question is not to be affected by the consideration that the owner of the land is determined not to allow the development so that permission for it, if granted, would not have reasonable prospects of being implemented. That does not mean that the planning authority, if it decides that the proposed development is in the public interest, is absolutely disentitled from taking into account the improbability of permission for it, if granted, being implemented. For example, if there were a competition between two alternative sites for a desirable development, difficulties of bringing about implementation on one site

which were not present in relation to the other might very properly lead to the refusal of planning permission for the site affected by the difficulties and the grant of it for the other. But there is no absolute rule that the existence of difficulties, even if apparently insuperable, must necessarily lead to refusal of planning permission for a desirable development. A would be developer may be faced with difficulties of many different kinds, in the way of site assembly or securing the discharge of restrictive covenants. If he considers that it is in his interests to secure planning permission notwithstanding the existence of such difficulties, it is not for the planning authority to refuse it simply on their view of how serious the difficulties are.”

34. As is evident from that passage, the House of Lords did not consider there to be an outright bar on the materiality of non-planning impediments to implementation in all circumstances. Lord Keith himself gave the example of competing alternative developments. The reason for materiality in such an instance is apparent: where there is a limited demand for a particular form of development, and two locations on which that demand could be met, the inability to develop on one of the sites is relevant to the weight which can properly be attached to its ability to meet the need. The impediment is relevant to the planning merits of the decision, and thus material.
35. It is also notable that, on the facts of the case, the House was not required to consider the position in respect of impediments which flow from statutory controls on land use: the impediment at issue in *BRB* was third party ownership.
36. The relationship between the materiality of an impediment and the planning merits of the underlying decision has been emphasised by the Planning Court in a series of decisions which consider *BRB*.

37. In *Satnam Millenium v SSHCLG* [2019] EWHC 2631 (Admin), Sir Duncan Ouseley considered the principles established by *BRB*, and held as follows (para 91, emphasis added):

“The law, as stated in the BRB case, means that, in general, the question of whether a proposal can be implemented is irrelevant to the decision whether to grant permission. There is no legal requirement that planning permission be refused unless a developer commits itself to implementing a proposal. But a proposal can be refused permission on the grounds that it cannot be or is unlikely to be implemented, where difficulties of implementation are relevant to the planning merits of the decision; for example, where there is a need to be met, and two or more sites compete for the single opportunity, the ability of one to meet the need through implementation and the difficulties of the other to do so, are plainly material. There may be cases where a partial implementation might create a rather different balance between benefits and impacts.”

38. It is the nexus of the impediment to the planning balance that creates the materiality. On the facts of the case, the Judge (Sir Duncan Ouseley) held that the SoS had acted irrationally in taking an impediment into account, in circumstances where there was no explanation as to how the impediment affected the planning balance.

39. In *The London Historic Parks and Gardens Trust v The Minister of State for Housing* [2022] JPL 1196, Thornton J recognised the materiality of a statutory impediment to the delivery of the proposed Holocaust Memorial at the Victoria Tower Gardens in Westminster. The impediment in question arose from the London County Council (Improvements) Act 1900, s. 8 of which required the Victoria Tower Gardens to be kept in public use as a garden.

40. Thornton J recognised that, in general terms, a planning decision is not

concerned with impediments to delivery: a planning permission removes the planning impediment to development, but is without prejudice to any other hurdles in the way of implementation (para 107). On the facts of the case before her, however, the inspector had attached considerable positive weight in the planning balance to “*the deliverability of the proposal and, in particular its timing*” (para 110); specifically, the inspector attached positive weight to the need to deliver the memorial during the lifetimes of at least some survivors of the Holocaust. In those circumstances, the s. 8 impediment to the delivery of the Memorial at the proposed location was a material consideration (para 111), and the failure to consider that material consideration at the inquiry resulted in the success of the challenge (para 128).

41. In *City of Newcastle upon Tyne v SSLUHC* [2022] EWHC 2752 (Admin), Holgate J (as he then was) held (para 85) that counsel had “*rightly accepted that there is no authority stating that deliverability is an irrelevant planning consideration*”. At para 87 the Judge cited the *BRB* case, and noted (emphasis added):

“A would-be developer is entitled to a decision from the planning authority on the merits of his proposal, notwithstanding that he holds no interest in any of the land, or any difficulties in relation to ownership or control of land. The position would be different if, for example, the merits of a proposal depend upon the development being desirable in the public interest or there being a need for the scheme.”

42. Holgate J emphasised the role of public interest desirability in the materiality of impediments. If a scheme is desirable in the public interest, and if that desirability underpins the case for the grant of permission for the proposal, then the fact that the proposal cannot be implemented will be material to the weight that can properly be attached to that desirability.

43. It is also notable that Holgate J did not confine his example to cases where the

need arose in a ‘competing alternatives’ scenario, or where the need was time sensitive; it is the fact of a need for a scheme as such that gives rise to the nexus to the planning merits. That nexus exists because if the justification for an otherwise unacceptable proposal includes its ability to meet a need, then a bar to implementation is relevant to the likelihood that the need can be met and the otherwise unacceptable development rendered acceptable.

44. That latter point was further explored in the decision of Timothy Mould KC (as he then was) in *Wathen-Fayed v SSLUHC* [2023] PTSR 524.

45. *Wathen-Fayed* concerned a planning application for a crematorium located in the Metropolitan Green Belt. Permission had been granted by a planning inspector on the basis that there were VSC justifying inappropriate development in the Green Belt; that VSC case was itself based on the fact that the incinerator would “*meet an existing and growing community need for cremation facilities*” (para 2). One of the issues in the statutory challenge was whether the delivery of the crematorium would be prevented by the provisions of the Cremation Act 1902, which regulates the location of crematoria.

46. The Deputy Judge recorded the approach of the planning officer to the materiality of that potential deliverability concern (para 75):

“It is clear from the report that Tandridge’s planning officer treated the ability of the site to accommodate the proposed development without contravening section 5 of the 1902 Act as a material consideration in determining Horizon’s planning application. In paragraph 37 of the report, the planning officer advised that although a statutory impediment to delivery of the proposed development would not ordinarily be material to the determination of the planning application, the position was different in the present case. The statutory restrictions imposed upon the siting of crematoria by section 5 of the 1902 Act were

material here because the case for the proposed development was founded upon its ability to meet a pressing social and community need for a new cremation facility to serve the local area. If it were the case that the site was unable to accommodate the proposed development without contravening the requirements of section 5 of the 1902 Act, that would undermine the primary justification advanced by Horizon for the existence of very special circumstances to outweigh the policy objection resulting from its location in the Green Belt.”

47. The Deputy Judge described that analysis as “*legally impeccable*”, and as following the principles stated by Lord Keith in the *British Railway Board* case (para 76).⁶
48. The Deputy Judge thus endorsed the position that, where a development is required to demonstrate VSC, and where the VSC case rests on the existence of a need for the proposal, then the ability actually to deliver that need is material to the planning balance.
49. Nothing in para 75 of the judgment suggests that the materiality analysis was dependent on the existence of competing alternative sites. Nor was the need time-sensitive in the *London Historic Parks* sense; on the contrary, the need for the crematorium was “*existing and growing*” (para 2).
50. Rather, the materiality flowed from the fact that the planning balance involved consideration of the proposal’s ability to meet a need as a planning benefit, and the existence of an impediment to meeting that need is material to the weight which can be attached to that benefit.
51. Finally, in *R v Solihull BC ex parte Berkswell PC* [1999] 77 P & CR 312, the High Court held that the bar on implementation of a development which flowed from a statutory requirement to maintain a hedgerow was immaterial to a planning decision. Sullivan J’s reasoning on the key point was as follows (317):

“In my judgment it is clear from the authorities cited by Mr Griffiths

that the 1802 Act was not a material consideration which the council was bound to consider when deciding whether or not to grant the planning permissions. Whether the 1802 Act created public or merely private rights, and questions as to the legal status of the hedges generally, were not relevant for the purposes of deciding the planning merits. ... Nor is it correct for Mr Norman to submit that the grant of planning permission in some way overrides the provisions of the 1802 Act or gives authority for the commission of an offence under that Act. The planning permissions merely establish that the construction of the by-pass as proposed is satisfactory on planning grounds.

That decision is entirely without prejudice to any further consents which may or may not be required for the construction of the bypass.”

THE JUDGE’S FINDINGS

52. The Judge’s reasoning and conclusions on the Appellant’s ground 1 are contained in Part IV of the Judgment, and in particular at paras 51 – 63 [CB/99-102].

53. The essence of the Judge’s conclusions are as follows:

- i. Officers had correctly directed themselves in law that an impediment to delivery was capable of being material, with the judgment on capability in this case being impugnable only if it was irrational (para 52) [CB/99];
- ii. There is no authority for the proposition that the existence of a need for a development renders a delivery impediment material to the planning balance: many applications are supported by a need argument, and the fact that this was a VSC case does not alter the position as a matter of principle (para 54) [CB/99-100];
- iii. As a matter of logic, delivery impediments are unlikely to be material where the impediment prevents both the benefits and the harms from

manifesting (*Satnam*), and in this case officers had turned their minds to whether the impediment affected the land-use planning judgment, concluding that it did not, and that it did not particularly matter when the development came forward (para 55) [CB/100];

- iv. Officers correctly identified that there was not a closed list of instances where a delivery impediment could be material to a scheme (para 56) [CB/100];
- v. It was not irrational for officers to have concluded that the need for the Proposal was not time-pressing (para 57) [CB/101];
- vi. *Solihull* provided a complete answer to the argument that there was a difference between a private law impediment and a statutory impediment, because the grant of planning permission merely removes the planning impediment to delivery, and does not affect other non-planning restrictions (paras 59-60) [CB/101-102];
- vii. The Mayor had in fact considered the position if the Proposal was only delivered in part, via the package of controls contained in the s. 106 agreement (para 61) [CB/102].

THE GROUND OF APPEAL

- 54. The Appellant's case is that the Mayor acted irrationally in concluding that the Statutory Trust was immaterial to the decision on the planning application insofar as it amounted to an insurmountable impediment to the delivery of the Proposal.
- 55. There are three independent ways in which the Mayor's decision in this respect was irrational, and in respect of which the Judge erred in concluding otherwise:
 - (i) The Mayor was irrational in concluding that the need for the Proposal

was not particularly time-sensitive. That in turn led the Mayor to the wrong conclusion on materiality on the approach established in *London Historic Parks*.

- (ii) Even if it was rational to conclude that the need for the Proposal was not time sensitive, it was in any case irrational to treat the inability to deliver the need for the Proposal as immaterial to the merits. Contrary to the Judge's findings, the context of the Proposal, and in particular the need for the Club to demonstrate VSC, does make an in-principle difference to the approach which the Mayor should have taken; and
- (iii) In any event, the particular nature of the Statutory Trust is, contrary to the Judge's findings, conceptually distinct from a private law impediment to delivery such as a difficulty with land ownership or site assembly. That distinction is important to materiality: planning is ultimately concerned with whether or not a development is in the public interest, and an impediment such as the Statutory Trust bears on that question.

56. Each of those sub-issues will be taken in turn.

Sub-issue 1: the nature of the need for the Proposal

57. Throughout the application process, the Club emphasised, repeatedly and forcefully, that the need for the Proposal was urgent. Thus:

- (i) Applicant's Planning Statement Addendum at 4.5.3-4.5.39 [SB/228-233] repeatedly emphasised the urgency of the need, summarised at 4.5.40 [SB/233]:

"...the principle [sic] need case that underpins the very special circumstances for the proposed development is the pressing requirement to resolve the inadequacies of The Championships and Qualifying Event against a backdrop of increased global

competition within tennis and other sports; the lack of security of tenure for the current Qualifying Event venue; and the strategic objectives of the AELTC.”

- (ii) Similarly, in relation to proposed works to the Grade II* Registered Park and Garden there was said to be a “pressing need for investment into the site and a viable mechanism for securing its conservation and long-term management” (4.5.44 Planning Statement Addendum) [SB/234]. It was contended that “Urgent action is required to reverse the adverse impacts resulting from silt build up [within the Lake].” (4.5.87 Planning Statement Addendum) [SB/242].

58. In the circumstances, there is no real dispute but that the Club itself considered its need case to be highly time-sensitive.

59. In the OR’s analysis of the need for the development at OR paras 292-300 [SB/82-84], the OR summarised the Applicant’s case that there is “*a risk that The Championships fall behind other tennis Grand Slam tournaments due to inadequacies of the AELTC grounds and operations, citing the following reasons: - Inadequacy of facilities at the Bank of England site in Roehampton for hosting the Qualifying Event and its location away from the main AELTC site; - The need for additional tennis courts, including a larger, third show court; - Event capacity; and – Inadequacy of practice courts for the main draw tournament.*” The OR went on at OR para 300 [SB/84] to “*acknowledge and accept the need for the development, through the expansion of the AELTC Main Grounds, the provision of a new Show Court including the justification for the total number of courts on site.*” And at OR para 302 [SB/85] “*GLA Officers acknowledge and accept the need for the development.*” And at OR para 305 [SB/85] “*there is a clear, identified need for the development to ensure that the Championships maintain their position as a key cultural and sporting fixture in the British summer and world sporting calendar.*”

60. Given the nature of case presented to the Mayor, which was wholly predicated

on the urgency of delivery, and given the comments contained in the OR as to the basis of the need case, the Appellant says that the only rational conclusion available to the Mayor was that the need was time-sensitive. There is simply no sensible way in which the timing of delivery can be said to be unimportant given the wider circumstances on which the Application was based.

61. Put another way: the Mayor could not simultaneously accept that there was a need for the Proposal to enable the Championships to retain their status in line with other Grand Slams, and base his decision on that need, while being agnostic about whether and if so when that need was met. The urgency is an inherent and inseparable part of the wider need case.
62. The Judge erred in concluding otherwise, and the Judgment does not properly grapple with the rationality of the Mayor's decision in this regard. It is true that the assessment of the urgency of need is a matter for the Mayor's planning judgment, as the Judge found; but that is not the end of the analysis. That judgment needs to have been exercised on a rational basis. In the circumstances, no such rational basis exists.
63. The Mayor's irrational conclusion on this point resulted in an erroneous conclusion on the non-materiality of the Statutory Trust as an impediment to delivery: the OR's logic on this point, accepted by the Mayor, was predicated on the need not being particularly time-sensitive. If that conclusion is irrational, then the further conclusion predicated on it was erroneous.
64. The same points apply in respect of the Restrictive Covenants, the discharge of which is required before the delivery of the Proposal, and the meeting of the need, can be achieved.

Sub-issue 2: the role of need and VSC in assessing materiality

65. Even if the Mayor was rational in concluding that the need for the Proposal

was not time-sensitive, his approach to the materiality of the Statutory Trust and the Restrictive Covenants as implementation bars remains irrational.

66. The Defendant's decision was made on the basis that the Statutory Trust was in place, so that the Proposal extended to land which was required to be maintained as public open space (OR para 142) [SB/55-56].
67. The Defendant recognised, correctly, that the Proposal amounted to inappropriate development on MOL, so that it could only take place if justified by VSC (OR paras 262-3) [SB/77]; The Defendant accepted that there was a need for the Proposal, and that acceptance informs the whole of the OR's analysis of the public benefits advanced by AELTG in support of the Proposal (see in particular OR para 795 *et seq*) [SB/105-115].
68. Where the need for a Proposal is treated as a benefit which can overcome a harm in the planning balance, then the ability of that need actually to be met on the site (i.e. whether the benefits can be delivered) is highly likely to be relevant to the weight which can be attached to the benefit (*City of Newcastle*);
69. In the language of *Wathen-Fayed*, the existence of the Statutory Trust/Restrictive Covenants means that the site is unable to accommodate the development, and that inability undermines the primary justification advanced by AELTG for the existence of VSC to outweigh the policy objection resulting from the site's location on MOL;
70. The Judge failed, with respect, properly to appreciate the role of VSC in this context.
71. Where, as here, a Proposal amounts to inappropriate development on MOL, then the starting point and default position is that the development should not be permitted. The benefits of a proposal – including the need for it – must be sufficiently strong to amount to VSC so as to overcome that starting

position.

72. Put another way, the planning balance does not start off evenly in a context such as this one – the “scales” of the balance are heavily weighted against the Proposal. The “default” position in MOL is that development should not take place.
73. The result of that default position is what distinguishes this case from one such as *Satnam*. It is true that the impediment to delivery prevents both the benefits and the harms of the scheme from arising. In a non-MOL/Green Belt case, the result is that the impediment has no impact on the planning balance, and can be disregarded as immaterial. In the context of MOL/Green Belt development, however, the result of disregarding both the benefits and harms of the scheme is that the default position remains unaffected. And that default position is that the development is unacceptable and should not be permitted to proceed.
74. That logic explains the difference between *Satnam*, on the one hand, and *Wathen-Fayed* on the other, and shows why Mr Mould KC was correct in *Wathen-Fayed* to endorse the proposition that an impediment to delivery could be material in a VSC context.
75. Further, the grant of even an unimplementable planning permission can be harmful in the context of a heavily protected location such as the Golf Course Land: the grant of permission amounts to a finding that the change of use of the protected land is acceptable as a matter of principle, and the establishment of such a principle can weaken the protection of the site in the planning system even if the development is not delivered.

Sub-issue 3: the nature of the Statutory Trust

76. The Judge held that there was no difference in principle between an implementation bar that flows from a statutory land use control, and one that

flows from (for instance) ownership difficulties (Judgment para 59) [CB/101].

77. The Judge was wrong so to hold.
78. As Lord Keith explained in *BRB*, planning decisions are concerned, ultimately, with whether or not a development is desirable in the public interest. Indeed, the purpose of the planning regime is to restrict private property rights in the public interest.
79. Where a development is precluded because of private law issues such as a lack of site ownership, the fact of the preclusion tells the planning authority nothing at all about the public interest desirability of the proposal at issue: the fact that the applicant does not happen to own the site is immaterial to whether or not the development is desirable in the public interest.
80. Further, where the deliverability of a scheme is prevented by a private law consideration such as lack of ownership, the rationale behind that prevention may have nothing to do with the public interest at all. A private landowner can refuse to sell his land to a developer for any lawful reason. His reasons may be arbitrary, or selfish, or whimsical. There is, in short, no connection between the existence of the bar and the desirability of the scheme.
81. The position for a statutory preclusion such as the Statutory Trust is different.
82. The purpose of the Statutory Trust is to ensure that the Golf Course Land is kept available for recreational use by the public – it was on that basis, following the advice of Mr Morshead KC, that the Mayor proceeded when determining the application. That is a public interest consideration which directly relates to the use to which the land is put. When the planning authority is judging whether or not a change of use of land is desirable in the public interest, it is clearly material that there is a statutory bar on the change of use of the land which is itself imposed in the public interest. The same cannot be said for a private law impediment such as a difficulty around site

assembly. They are conceptually different.

83. Under the OR's precautionary approach, the status of the Golf Course Land as public (rather than private) open space was considered. That is, however, only a partial account of what the Statutory Trust does: it also makes the whole of the Golf Course Land available for public recreation in perpetuity. It is that additional factor that gives rise to the impediment to delivery. The impediment to delivery is a manifestation of the sheer weight of the public interest against the development of the Golf Course Land, which the OR (by its exclusion of deliverability bar considerations) failed to factor into its decision. The OR paid lip service to the assumed existence of the Statutory Trust, but failed adequately to address the consequences for the planning balance. Such an approach was irrational, and the learned Judge erred in holding otherwise.

84. Put simply – in deciding whether or not it is in the public interest to change the use of land, the existence of a statutory bar on the change of use of the same land in the public interest is clearly a material consideration. Put another way – the loss of land perpetually open to the public is plainly a weightier matter than the loss of public land *per se*.

85. The *Solihull* case concerned a statutory requirement to maintain hedges in place. Such a requirement, while representing an implementation bar flowing from the existence of public right, is of a different character to the Statutory Trust. The Statutory Trust regulates the very thing – the use of the land in the public interest – at which the planning regime is directed. *Solihull* is therefore distinguishable from the present case.

86. If Sullivan J purported to establish a general rule that implementation bars are immaterial irrespective of their character, then *Solihull* was wrongly decided.

Senior Courts Act 1981

87. The Club contended below that the Mayor's decision would have been the

same even if the Mayor erred in its approach to the materiality of the Statutory Trust as a bar to implementation. That is said to be because (a) the Mayor concluded that the need for the Proposal was not time sensitive, and (b) because the need for the Proposal will in any event only increase over time.

88. Neither of those points is made out, for two reasons.

89. First, as a matter of logic, if a need is incapable of being delivered, then it does not matter whether the level of that need is the same, or decreasing, or increasing, over time. It is not as though the statutory bar on the development of the site is overridden when the need reaches a certain intensity: the bar exists however intense the need. It is relevant that in *Wathen-Fayed* the need at which the proposal was directed was one that would increase over time; but that did not prevent the impediment to meeting the need being treated as a material consideration.

90. Secondly, and more fundamentally, the OR treated the implementation issue as immaterial, and said no more about it. It follows that there is nothing in the OR to indicate how much weight the Mayor would have attached to the implementation bar if he had considered it to be material. Yet it is the weight of material consideration which informs the outcome of the planning balance. Since there is no way of knowing what weight the Mayor would have given to the Statutory Trust as an impediment to delivery, it follows that there is no way of knowing what impact the impediment would have had to resolving the VSC balance in particular, or the planning balance more generally. Where there is no way of knowing how those balances would have been resolved, it cannot be said that the outcome of the balances would have been the same even without the error.

91. For those reasons, the Decision is vitiated by the error in its approach to the Statutory Trust and the Restrictive Covenants, and should be quashed on that

basis.

AARHUS COSTS PROTECTION

92. Pursuant to CPR Rule 52.19A, the Appellant asks the Court to impose a £10,000 costs cap pursuant to the Aarhus Convention. The appeal would be prohibitively expensive for the Appellant otherwise.

93. At first instance, Lang J applied a £10,000 cap, with a reciprocal £35,000 cap in favour of the defendants, at the time that she granted permission. The Mayor applied to Saini J for that cap to be lifted or varied; Saini J rejected that application (with costs) and confirmed the continuing application of the £10,000 cap.

94. To assist the Court in assessing the Appellant's position, an updated witness statement is provided with the Appellant's notice setting out the Appellant's financial position.

CONCLUSION

95. For the above reasons, the Appellant asks the Court to grant permission to appeal. The appeal has a realistic prospect of success, and in any event raises important issues about the planning law materiality of impediments to development where those impediments are themselves manifestations of decisions about where the public interest lies in respect of land use. There is at present no authority at appellate level which grapples with that issue.

96. The Appellant further seeks an order that the Mayor pays its costs, subject to the usual Aarhus rules, and any such other relief as the Court sees fit.

Sasha White KC and Luke Wilcox

Landmark Chambers

22 August 2025