

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

CA-2025-002183

BETWEEN:

SAVE WIMBLEDON PARK LTD

Appellant

- v -

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

Respondents

SKELETON ARGUMENT
ON BEHALF OF THE FIRST RESPONDENT

References: [CB/page] is a reference to a page in the Core Bundle; [SB/page] is a reference to a page in the Supplementary Bundle; [ASA, §] is a reference to a paragraph of the Appellant's appeal skeleton argument dated 22 August 2025 at [CB/19-43]; [J, §] is a reference to the judgment below; and [OR, §] is a reference to the First Respondent's Stage 3 Officer's Report ("OR") extracts of which are at [SB/3-116].

INTRODUCTION

1. The Appellant ("A") appeals, with permission of Lord Justice Holgate (Order dated 18 November 2025), the Order of Mr Justice Saini dismissing its judicial review of the First Respondent's ("R1") decision of 18 November 2024 ("the Decision") by which he granted planning permission for the expansion of the All England Lawn Tennis Club (owned by the Second Respondent Interested Party ("the Club" or "R2")). The Decision allows the Club to expand onto the Wimbledon Park Golf Course and the creation of a new show court, a further 38 grass tennis courts, tennis-related infrastructure and buildings and a new area of parkland with permissive public paths ("the Development").
2. The decision to grant permission was made in accordance with the recommendation contained within a detailed 221-page Officer's Report ("the OR") [extracts at SB/3-116].

3. The appeal is brought on a single ground that reflects how Ground 1 was eventually argued in the hearing below, namely that it was irrational for R1 to conclude that, in the particular circumstances of this case, impediments to the deliverability of the Development in the form of a (disputed) statutory trust over the land on which the Development is proposed and restrictive covenants binding that land, with the effect that it is to be kept open and free from development, were not material considerations that were required to be taken into account in the determination of the Club's planning application.
4. In summary, R1 submits that the approach taken by the learned Judge below and his application of the relevant principles was impeccable. The standard to be applied was that of rationality, and that he was correct to find that R1's Decision was not irrational for the reasons that he gave.

LEGAL PRINCIPLES

5. The relevant legal framework is set out at [J, §§41-50]. The law on material considerations is well-established. There are three categories: (i) mandatory material considerations (i.e. ones that the statute expressly or implicitly requires to be taken into account as a matter of legal obligation); (ii) immaterial considerations (i.e. ones that may not be taken into account); and (iii) material considerations which *may* be taken into account if the decision-maker in his/her judgement considers it appropriate and relevant to do so. In respect of this last category, where a matter is not a mandatory material consideration a decision-maker will not act unlawfully if he does not take it into account unless it would be Wednesbury irrational for him/her *not* to do so (R (Friends of the Earth) v Heathrow Airport Ltd [2020] UKSC 52 at [16]-[121]).
6. Deliverability is not a mandatory material consideration. In British Railways Board v Secretary of State for the Environment [1993] 3 P.L.R. 125 the House of Lords made clear that a local planning authority should not refuse planning permission merely because a developer is faced with difficulties in implementing a development, such as by virtue of restrictive covenants. Lord Keith of Kinkel explained however that whilst a local planning authority is not "*absolutely disentitled from taking into account the improbability of permission for [a development], if granted being implemented*", in certain circumstances it "*might very properly lead to the refusal of planning permission*". It is a matter that a local planning authority "*might*" take into account, and there is "*no absolute rule*" either way. Impediments to deliverability fall squarely within the third category of material consideration, therefore: not mandatory, but "*might*" be taken into account without legal error.
7. In addition, authority makes clear that such impediments will *not* normally be material. The fact that a developer may require additional consents other than, or may need to clear hurdles in addition to, the obtaining of planning permission before it can carry out the contemplated development will not generally be material to the question whether that development is acceptable in planning terms (London Historic Parks and Gardens Trust v Minister of State for Housing [2022] EWHC 829 (Admin) at [109]). This is the case

even where the hurdle in question is “*apparently insuperable*” (*British Railways Boards*), because a decision on a planning application requires the local planning authority to decide whether the proposed development is desirable in the public interest, the answer to that question is not affected by difficulties of implementation. The effect of a planning permission is to overcome the statutory bar on carrying out development without the benefit of planning permission (*R v Solihull BC* [1999] 77 P & CR 312 at pp.316-317). It does not override other restrictions (see [J, §59]).

8. Nevertheless, impediments to deliverability have been found to be material considerations properly taken into account in a number of cases, as identified by the Judge below at [J, §45]. These include where there are two competing sites which address a need that could be met by either one and one of those sites had implementation difficulties (*Satnam Millenium Ltd v Secretary of State for Housing, Communities and Local Government* [2019] EWHC 2631 (Admin) at [91] (given as an example, not on the facts of that case) and where the need is time-sensitive (*London Historic Parks and Gardens* where deliverability was relevant due to the weight placed by the decision-maker on “*the importance of the need to deliver the Memorial within the lifetime of the Holocaust survivors*” (at [111])).
9. This is precisely the approach that was taken by the officer and described as “*legally impeccable*” in *Wathen-Fayed v Secretary of State for Levelling Up, Housing and Communities* [2023] PTSR 524. The planning officer in that case advised that, generally speaking, obstacles to delivery were not material considerations, but that on the specific facts of that case, as a matter of judgement, it ought to be taken into account. Importantly, however, the case is not authority for the proposition that whenever there is an impediment to the deliverability of a development within the Green Belt the justification for which is predicated on meeting a need, a decision-maker is required to take that impediment into account when determining the planning application. All that case reinforces is that, in line with the high authority set out above, in such circumstances a decision-maker will not err by deciding to take it into account as a matter of judgement. Indeed, the *ratio* of *Wathen-Fayed* centred on whether as a matter of statutory construction, a statute did or did not create an impediment to deliverability, and not directly on the implications of any such impediment for the decision-making process.
10. Similarly, in *City of Newcastle upon Tyne v Secretary of State for Levelling Up, Housing and Communities* [2023] 2 P. & C.R. 7, Holgate J (as he was then), was faced with the submission that “*the deliverability of the proposal development was a legally irrelevant consideration*” (at [83(iii)]). The learned judge restated the *British Railways Board* position that it was not necessarily legally impermissible for deliverability to be taken into account if the decision-maker considered it relevant to the planning merits of a decision (at [89]), before finding that the Inspector in that case “*gave ample reasons as to why the deliverability of the scheme was relevant to her decision*” in the context where the site in question had historically been “*exceptionally difficult to develop* (at [90]-[91]). The force of this reasoning is that the decision-maker did not err in taking deliverability issues into account, not that she was required as a matter of legal obligation to take them into account.

11. In Satnam Millenium Ltd v Secretary of State for Housing, Communities and Local Government [2019] EWHC 2631 (Admin) the Inspector found that the proposal for a large housing scheme was not deliverable (at [21]) but carried out the planning balance on the assumption that the scheme was deliverable (at [23]). He concluded that the adverse impacts significantly and demonstrably outweighed the benefits and recommended that planning permission should be refused (at [25]). The Secretary of State agreed that the scheme could not be delivered (at [33]) and accorded no weight to the benefits for this reason (at [35]). The claimant said that the Secretary of State's approach to the planning balance was flawed (see [42]). Sir Duncan Ouseley agreed (at [63]-[68]). Paragraphs [92] – [93] summarise the position:

"92. The issue raised by this ground is why planning permission should be refused because it cannot be implemented; why should that tell against the grant of permission? I have already concluded under ground 1 that, deliverable or not, it was unlawful on many bases to allow for the adverse impacts without considering the benefits which they would bring; and irrational to treat the lack of deliverability as an adverse factor. This is closely related to those errors. I cannot discern here what material planning consideration could warrant a refusal of permission on the grounds that the proposal could not be implemented. There were no competing sites. There was no competing proposal for this site which could find greater favour with Homes England or the local bus company, which this permission might stultify. There was no suggestion that an unimplemented planning permission would in some way blight the site or discourage other proposals with better prospects.

93. Nor do I see any reasoning in the DL, which treated lack of deliverability as an adverse factor, as to why that was either adverse or relevant, beyond that there would be no benefits, if it were not delivered. But nor would there have been any disadvantages. Of course, if it is not or cannot be implemented, it can bring no benefits by way of housing. But it is impossible to see here why that should be a factor telling against the grant of permission unless that has some planning implications. Those are not identified."

12. It is notable that the facts are similar here: no competing sites; no competing proposal; nor any suggestion that planning permission would in some way blight the site or discourage better proposals (save perhaps lately at **[ASA, §75]** but that was not a point pursued in front of the decision maker).
13. Satnam demonstrates that a planning balance must consider both sides of the equation in determining whether a proposal is in the public interest and that consideration is generally independent of the question of deliverability. This is what the judge identifies rightly at **[J, §55]**.
14. None of this authority is controversial between the parties as to its relevance – and, although as shall be explored below, A seeks to draw more from especially Wathan-

Fayed and Newcastle than their reasoning can bear, A nevertheless appears to accept, as the judge below found, that in order to impugn the Decision, A must demonstrate that deliverability was a mandatory consideration on the facts of this case because it was irrational for R1 not to take it into account.

15. Finally, to establish irrationality in the planning space is a “*particularly daunting task*”, where Parliament has entrusted judgement to expert and democratically-accountable decision-makers (see R. (Newsmith Stainless Ltd) v. Secretary of State for the Environment, Transport and the Regions [2017] P.T.S.R. 1126). This is especially so where the ordinary position, as set out in British Railways Board, is that the existence of difficulties in implementing a planning permission does not mean that planning permission should be refused for development that is acceptable in the public interest.

FACTUAL CONTEXT FOR GROUND OF APPEAL

16. Whilst the broader factual context set out at [ASA, §§12-26] is not controversial and not repeated here, R1 highlights the following points of fact which are directly relevant to the ground of appeal.
17. During the course of the determination of the planning application, A (and others) and R2 disagreed as to whether or not the land comprising the former Wimbledon Park Golf Course was held by the London Borough of Merton (“R3”) under a statutory trust pursuant to section 164 Public Health Act 1875. R1 understands that R2 has commenced separate proceedings, to which he is not a part, for a declaration as to the correct position which are currently pending before the Court. A also raised concerns about the existence of restrictive covenants over the land.
18. R1 expressly dealt with the issue of the statutory trust and the restrictive covenants in the OR.
19. The statutory trust was considered at [OR, §§135-143] [SB/54-56]. R1 considered the decision of the Supreme Court in R (Day) v Shropshire Council [2023] UKSC 8 and noted that ultimately the existence of the statutory trust was a question for the courts [OR, §140].
20. R1 explained its view of the relevance of the existence of the statutory trust to its decision-making as follows [OR, §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.”

21. R1, therefore, expressly recognised that the existence of the statutory trust could be material to the determination of the application. R1 then notes that it did not judge in this case that anything points to the deliverability implications of the statutory trust being material. The reasons were set out in greater detail in the context of the preceding analysis on the restrictive covenants where officers advised that obstacles to the successful delivery of the Development could be material where *“the benefits relied on are particularly time-sensitive, [because] potential delay to their realisation may affect the weight they are given in the planning balance”* [OR, §131] [SB/54] but that:

“GLA officers do not consider that difficulties regarding implementation are relevant in this case. The benefits of the proposals are set out in paragraphs 795-833 of this report and they are not considered time sensitive, nor is weight being placed on the speed with which any of the benefits can be delivered.” [OR, §131]

22. In that context officers concluded that the restrictive covenants were not considered to be a material consideration.
23. However, the approach taken to the statutory trusts was distinct. Because of the uncertainty of the position as to whether or not the statutory trust exists (with various legal opinions pointing in different directions), officers advised the Deputy Mayor to adopt a precautionary approach and to assume that the land is subject to a statutory trust (*“the Precautionary Approach”*) [OR, §142] [SB/55]. Officers also advised how their assessment of the merits would have been different had the land not been so held (*“the Alternative Approach”*) [OR, §142] [SB/56].
24. As such, R1 expressly recognised that the existence of the statutory trust could be material to the determination of the application and went on to deal with it on the assumption that it did exist.
25. The Precautionary Approach, and where relevant the Alternative Approach, can be seen throughout the OR (see, for example, [OR, §235, §261, §§272-277, §304, §438, §570, §§782-787, §§799-804, §846 and §§855-858] [SB/72, 77, 79, 85, 86, 93, 102, 106, 113, 115]). At [OR, §§855-858] there is a clear conclusion that planning permission ought to be granted whether on the Precautionary or Alternative Approaches, i.e. whether or not the statutory trust exists. A does not suggest that there was anything unlawful in this twin track approach.
26. Whilst A places great emphasis on how R2 sought to justify the Development in terms of need (see [ASA, §57]), it is important to note how [OR, §131] [SB/53-54] is reflected elsewhere in the OR. At [OR, §§795-8] [SB/105-106], officers record R2’s argument about *“pressing need”*, but then go on to accept that there is *“a need”* for the Development, not a *pressing* need. This is unsurprising when read together with the advice given in [OR, §131] [SB/53-54].
27. Further, at [OR, §798] [SB/106], officers do not in fact advise that any specific weight should be afforded to need. The table of benefits and the weight to be afforded to them

at [OR, §833] [SB/112] does not include need as a separate category. Whilst much of A's case is predicated on the Club's reliance on need, that does not in fact reflect the decision-maker's approach.

28. Thus whilst the existence of the statutory trust and restrictive covenants was recognised, and their implications in terms of the application of planning policy were fully worked through the OR by means of the Precautionary Approach, officers advised that the alleged obstacle that they could present to delivery of the Development was not itself a material consideration which should weigh against the grant of planning permission.

RESPONSE TO THE GROUND OF APPEAL

29. A argues that the Judge erred in three ways in holding that R1 reached a rational conclusion of the Statutory Trusts and the Restrictive Covenants where immaterial to the decision in so far as they amounted to an insurmountable impediment to the delivery of the Proposed Development. Each of the three ways is addressed in turn.

Sub-issue (i): the nature of the need for the proposal

30. Under this sub-issue, A alleges that it was irrational for R1 to conclude that the need for the Development was not particularly time sensitive. The Judge's conclusions on this issue are at [J, §57]. His conclusions are unimpeachable.
31. R1 was advised through the OR that the benefits of the Development "*are not considered time sensitive, nor is weight being placed on the speed with which any of the benefits can be delivered*" [OR, §§131, 141] [SB 53-54, 55]
32. A argues [ASA, §61-2] that, given the way in which R2 presented its application (see the references at [ASA, §§57-59]) and officers' acceptance that there was a need for the Proposed Development, "*the only rational conclusion available to the [R1] was that the need was time-sensitive*" [ASA, §60].
33. The logic of the submission below determined by the Judge was that: (i) R2 in its application for planning permission asserted that there was a "*pressing need*" for the Development; (ii) because R1 granted the application, he should be assumed to have agreed with this position; and (iii) therefore R1 cannot rationally suggest otherwise than that the benefits of the Development were time-sensitive because to do so would contradict this assumption.
34. That was the argument that is addressed and, rightly, rejected at [J, §57]. As the judge said, it requires the Court either to ignore or to re-write the plain words of officers' advice:
- (i) First, merely because an application for planning permission is granted does not mean that the decision-maker should be taken to have accepted all the applicant's contentions set out in its application. The Court must look at the way in which the decision-maker has approached matters and what the decision-maker has

determined to understand why it granted permission, not at the applicant's submissions to the decision-maker;

- (ii) Secondly, to the extent that in this case A is right that the application was premised on there being a pressing need for the Development, it is plain that officers did not agree with the Club, because their express advice (as set out above) was that the benefits of the Development were *not* time sensitive;
 - (iii) Thirdly, when setting out the benefits of the Development, including need, officers, whilst acknowledging the Club's assertion of a pressing need, expressly stated that there is "*need*" only for the Development, not that there was a "*pressing need*" no more **[OR, §§795-798] [SB/105-106]**. That was clearly intentional;
 - (iv) Fourthly, A has been unable to point to any part of the OR in which officers advised that weight should be given to the timing of any of the benefits of the Development. That is unsurprising, because their express advice (as set out above) was that no "*weight [is] being placed on the speed with which any of the benefits can be delivered*" **[OR, §131] [SB/54]**;
 - (v) Fifthly, in any event, officers did not expressly give weight to need (whether pressing or otherwise) as a benefit in the final planning balance.
35. A now states that the judgment does not properly grapple with the rationality of the conclusion that the need was not time-sensitive. Putting aside the fact that the Judge answered A's submission directly, A's focus now on the rationality of that conclusion is misplaced.
36. First, the Club, whilst saying the need was pressing, put no timeframe on delivery. There was no date by which the Proposed Development was said to be required to be in place.
37. Secondly, it is not irrational for R1 to come to a different view on need than the Club *per se*, as indicated by the Judge.
38. Thirdly, when the nature of the need identified by the Club is understood, it is hard to see how the position adopted by R1 could be said to be irrational.
39. Three points are referred to by A and relied upon to establish the time-sensitivity of the need: (i) the Club's case that the need was pressing to resolve the inadequacies of the Championship and Qualifying Event against a backdrop of increased competition as set out in its Planning Statement **[ASA, §57(i)]**; (ii) the Club's statement that the need to invest in the Registered Park and Garden was also pressing **[ASA, §57(ii)]**; and (iii) the Club's statement that urgent action was required to address silting in the Lake **[ASA, §57(ii)]**.
40. A states that "*urgency is an inherent and inseparable part of the wider need case*" **[ASA, §61]**. Urgency may have been part of the case promoted by the Club but it is plainly within the bounds of rational conclusions to conclude that there is indeed a need for

the Championships to evolve and improve but given its health that it is not urgent. Similarly, it can be concluded that there is a need to improve the Registered Park and Garden and Lake but there is no obvious basis on which to say the need is urgent given both have existed in their current state for some time. The short point is that R1's conclusions, although different from the Club's, are plainly not irrational.

41. For these reasons it was not irrational for R1 to reach the view that he did on the time-sensitivity issue. Just because A considered that R1 ought to have reached a different view does not mean that R1's conclusion was unlawful.

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

42. A's second submission appears to be that where development is proposed on Metropolitan Open Land and a very special circumstances argument is made based on need, impediments to delivery are "*highly likely*" to be material [ASA, §68] or "*could be material*" [ASA, §74]. A correctly does not seek any longer to maintain the point taken below on Wathen-Fayed, and appears to accept the position summarised at paragraph [9] above, that that case is not authority for the proposition that *whenever* there is an impediment to the deliverability of a development within the Green Belt the justification for which is predicated on meeting a need, a decision-maker is required to take that into account when determining the planning application. A itself submits that the case shows merely that in some cases "*an impediment to delivery could be material in a VSC context*" [ASA, §74]. It is clear, and A now appears to accept, that the mere fact that need is relied on as a benefit of a proposal does not lead to the conclusion that deliverability has to be material. That would be inconsistent with the established law that deliverability will not normally be a material consideration, given that most large schemes are promoted on the basis that they are meeting a need.
43. Further, it is notable that this ground is predicated on a reliance on need but fails to address the fact that officers did not rely on need as a distinct benefit in the planning or very special circumstances balance [OR, §833] [SB/112].
44. Having moved away from the suggestion that where need is relied upon, delivery issues will always be material in very special circumstances cases, A is obliged to rely on a distinction between very special circumstances cases and non-very special circumstances cases. A relies in this regard on the proposition, with regards inappropriate development in the Green Belt, that there is a default position that development should not be permitted [ASA, §71]. That does not properly reflect Green Belt policy at all.

45. Paragraph 153 of the NPPF states:

"Inappropriate development is, by definition, harmful to the Green Belt and should not be approved except in very special circumstances. 'Very special circumstances' will not exist unless the potential harm to the Green Belt by reason of inappropriateness, and any other harm resulting from the proposal, is clearly outweighed by other considerations."

46. There is no default position. The policy requires a planning balance but the balance is tilted ("*clearly outweighed*"). The policy does not create some in-principle difference as to what is material to the balancing exercise. It does not change what may go in the scales. It simply leans on one side of the scales. The suggestion that there is an in-principle difference to the decision-making process itself is wrong.
47. That the Development required very special circumstances in order to justify its consent does not affect the basic principles as to the materiality or otherwise of deliverability. Either any issue relating to the statutory trust and restrictive covenants will be resolved and the Development will come forward, bringing the public benefits said to constitute very special circumstances and which outweigh the harm caused, including both definitional harm and harm to openness of the Metropolitan Open Land (given "very significant weight" at **[OR §781] [SB/102]**); or it will not, and the harm (including definitional harm by reason of inappropriateness) will not arise and will not require justification by very special circumstances. This is in effect what Sir Duncan Ouseley held in Satnam that both sides of the equation need to be assessed even-handedly as the acceptability or otherwise of a development requires the assumption that it comes forward.
48. What A needs to identify is some factor, not considered by R1 and so obvious that it would be irrational for it to be ignored, that has the effect that this relationship between benefit and harm is affected. The very special circumstances test on its own is not such a factor.
49. Given R1's consideration of the Metropolitan Open Land implications of the Development were lawful and A does not contend otherwise, this sub-issue raises no rationality issue as to deliverability.

Sub-issue 3: the nature of the statutory trust

50. The third sub-issue is an assertion by A that the learned judge below was wrong to hold 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*" **[ASA, §§76-77]**.
51. The Appellant elides, first, the question of the relevance of the source of the impediment to issues of deliverability (the subject of the judgment below) and the question of the relevance of the statutory trust to the question of the loss of open space, being an issue that goes to public interest and the planning balance.
52. It is important to read both the actual words used by the learned judge below (see **[J, §59]**) and the context in which that reasoning was given, namely in response to a submission that there is "*a special category of case where deliverability will always be a material consideration...where there is said to be a statutory bar to development*" **[J, §58]**. A does not assert that this is an inaccurate summary of the submission below, but

it is a submission that (rightly) is not pursued on appeal. It is plainly wrong. It was in response to that submission that the judge commented that:

"...a local planning authority may lawfully conclude that a development is acceptable in land use planning terms and grant planning permission even if the development is incompatible with a different (non-planning) restriction on the use of land. As I said during submissions, as a matter of logic the position can be no different where there is a statutory restriction on the use of the land (as opposed to ownership difficulties or incompatible private rights). There is no principled reason why that should not be the case, and nor was one advanced by [A]." [J, §59]

53. The Judge properly noted in coming to this view that:

"The grant of planning permission simply establishes that a proposed development is acceptable in land use terms as a matter of judgment and as at the date of the decision. It is without prejudice to, and does not override, any existing property or statutory rights: see London Historic Parks and Gardens Trust at [109]. As explained in pithy terms by Sullivan J in R v Solihull BC [1999] 77 P & CR 312 at 317, the grant of planning permission simply sanctions the carrying out of a development which otherwise would be in contravention of the statutory inhibition against, in general, the carrying out of any development of land without planning permission." [J, §59]

54. He then said that:

"In fact, Solihull provides a direct answer to his submission. In that case, Sullivan J held that it was lawful to grant planning permission for development, even if it would be incompatible with a restriction in an Act of Parliament (in that case the Berkswell Enclosure Act 1802). Further, it is a commonplace that there are instances where development which requires planning permission would be prohibited from taking place on the relevant land absent a further authorisation or statutory consent (such as section 278 of the Highways Act 1980). I note that in its written Reply to the Summary Grounds, SWP argued that both Solihull and London Historic Parks (which subsequently applied it) were wrongly decided. No such submission was pursued before me by Mr White KC." [J, §60]

55. Again, there is no suggestion in A's appeal that Solihull was wrongly decided. It is the delivery issue that is relevant, not its cause. As such, it was the first question that was the issue in the Court below and this was answered unimpeachably by the Judge. This sub-issue is now the focus of the second question.

56. However, it is quite clear that R1 *did* address the relevance of the statutory trust to the question of the loss of open space, being an issue that goes to public interest and the

planning balance, by assuming the statutory trust existed and taking the Precautionary and Alternative Approaches.

57. Applying the Precautionary Approach, which assumes the statutory trust to be in place, R1 gave “*very significant weight*” to the “*very significant harm*” caused by the loss of protected open space [OR, §783, §787] [SB/102]. By contrast R1 gave “limited weight” to the loss of open space on the Alternative Approach “*given that the land has operated as a privately owned golf course over which there was significantly limited access, and the 11.1ha publicly accessible parkland would substantially improve public access when compared with the former golfing use.*” [OR, §785, §787] [SB/102].
58. It is plain that R1 addressed precisely the issues A now raises. As a result, A is driven to go further. A states that OR “*paid lip service*” to the existence of the statutory trust but failed to adequately address the consequences for the planning balance and that was the irrationality [ASA, §83]. That submission is unsustainable if the OR is to be read fairly and as a whole as it must.
59. A seeks, therefore, to go further. [ASA, §84] indicates that the submission is in truth that R1 failed to give appropriate weight to the potential loss of land subject to a statutory trust, because “*loss of land perpetually open to the public is plainly a weightier matter than the loss of public land per se*”.
60. Putting to one side the appropriateness of raising new arguments for the first time before the Court of Appeal, such an argument is plainly misconceived. First, the weight to be attributed to a material considerations is wholly a matter for the decision-maker (*Friends of the Earth* at [121]; citing *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, per Lord Hoffman at p.780). Secondly, arguments as to the appropriate weight in planning decision-making are arguments as to the merits of a decision, and not its lawfulness, and are therefore inappropriate to raise in judicial review.

CONCLUSION

61. For these reasons, the judge was right to dismiss the claim for the reasons he gave and R1 respectfully requests that the appeal be dismissed with costs.

MARK WESTMORELAND SMITH KC
BRENDAN BRETT
19 December 2025

Francis Taylor Building,
Inner Temple,
London, EC4Y 7BY.