

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

-and-

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

Respondents

SKELETON ARGUMENT
On behalf of the Second Respondent

References to J/x are to paragraph x in the Judgment. In the form ASA/x are to paragraph x in the Appellant’s Skeleton Argument in support of its application for permission to appeal.

INTRODUCTION

1. This is the Second Respondent’s Skeleton Argument for the hearing of the Appellant’s appeal against the order of Mr. Justice Saini, dated 21st July 2025, which dismissed its claim for judicial review against the decisions of the First Respondent to grant planning permissions (ref: GLA/2024/0045/S3 and GLA/2024/0047/S3), dated 18th November 2024, (“the Planning Permissions”) in relation to Wimbledon Park Golf Course, Home Park Road, Wimbledon Park, London SW19 7HR (“the Site”).
2. The Planning Permissions permit the expansion of the Wimbledon Championships site onto Wimbledon Park Golf Course including the introduction of new tennis courts, tennis related infrastructure and new buildings to enable the hosting of the Wimbledon Qualifying Event and to improve the functioning and operation of The Championships (“the Development”).

3. The Appellant originally brought the claim on three grounds. All three were dismissed by Mr. Justice Saini in a Judgment dated 21st July 2025. The appeal is brought, with permission granted by Holgate LJ, on one ground only (which corresponds with Ground One of the original claim).
4. That is that the Judge “*erred in holding that the First Respondent reached a rational conclusion that the statutory trust and the restrictive covenants which affected the development site were immaterial to the decision on the planning application before him, insofar as they amounted to an insurmountable impediment to the delivery of the Development*”.
5. In summary, it is the Second Respondent’s position that the Judgment below reflects the conventional approach that non-planning related constraints to delivery are not generally material to planning determinations. In this case, the First Respondent considered whether any deliverability implications arising from the purported statutory trust and the restrictive covenants over the Site affected the planning merits of the Development and concluded that they did not. That was an entirely rational planning judgment. Further, where there is a purportedly “insurmountable” impediment to the delivery of a development, it is legitimate (if not necessary) for a decision-maker to determine whether the development would be acceptable in land use terms on the assumption that it will come forward at some point.

FACTUAL BACKGROUND

6. For the purposes of this claim, the factual background at ASA/12-26 [CB/21-25] is agreed, save that it is the Second Respondent’s position that no statutory trust exists over the Site. Indeed, it has reasonably and responsibly commenced separate legal proceedings to seek a declaration to this effect.¹
7. The Second Respondent also does not accept that there are or could be “intractable” difficulties in releasing the land from any trust that does exist, or from the restrictive covenants.

¹ The trial has been expedited to commence between 12th and 16th January 2026.

8. However, for the reasons set out below, it was common ground below (and remains so) that this Court does not need to consider or determine either of these issues.
9. The decision to grant permission was made in accordance with the recommendation contained within a detailed 221-page officers' report ("the OR"). Much of the analysis in the OR is not challenged. However, so far as is material to the appeal:
 - (1) The Site is Metropolitan Open Land ("MOL"), and thus subject to the same protections as the Green Belt in the application of planning policy. This meant that planning permission could only be granted where very special circumstances ("VSC") existed in accordance with paragraph 153 of the National Planning Policy Framework ("NPPF"), i.e. where the harm to MOL, and any other harm, was clearly outweighed by the benefits of the proposal.
 - (2) In the course of the application being considered, the Appellant contended that the Site was subject to a statutory public recreation trust under section 164 of the Public Health Act 1875, and that this was material to the application to develop the Site.
 - (3) This was considered at OR/141-142 [SB/55-56] as follows – with emphasis added:

"141. 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. 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.

142. Given the uncertainty as to the correct legal position, and that the issue of whether the land is the subject of a statutory trust may have a bearing on some of the planning issues, GLA Officers have assessed this application on the basis of

a precautionary approach, assuming that the land is subject to a statutory trust. In the rest of the report this is described as the Precautionary Approach. Where relevant, a separate assessment will also be undertaken to identify whether the analysis would be different if it was assumed that a statutory trust does not exist. This is referred to below as the Alternative Approach. These two approaches will be reflected within the open space assessments below, including the open space and recreational balanced assessment, and in the assessment of compliance with the development plan and the overall planning balance.”

- (4) Therefore, the OR recognised – in terms – that the potential existence of a trust was relevant to the determination of the application: see OR/141 [SB/55], and the application was assessed on the basis of a “*precautionary approach assuming that the land is subject to a statutory trust*” (see OR/142 [SB/55-56]).
- (5) This approach then informed the assessment of the Development throughout the OR² and a clear conclusion was reached that planning permission should be granted whether or not the statutory trust existed: see OR/855-858 [SB/115]. There is no complaint about the appropriateness or pragmatism of this “dual” approach.
- (6) The OR also expressly considered the relationship between the potential existence of a statutory trust and the restrictive covenants and their implications for the deliverability of the Development. In addition to OR/141 [SB/55] (set out above), OR/131 [SB/53-54] addressed the potential impact of the restrictive covenants. It stated as follows:

“Ordinarily, potential difficulties of implementation are not relevant to the planning merits of the decision, but in some circumstances deliverability can be a material consideration. If, for example, the benefits relied on are particularly time-sensitive, potential delay to their realisation may affect the weight they are given in the planning balance. 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. Further, there are no other potentially suitable and available alternative sites which could be less constrained in terms of deliverability. Alternative sites are considered further at paragraphs 294 and 337 of this report.”

² See, for example, the assessment in relation to land use considerations (OR/260-261 [SB/77]), open space provision (OR/274-277 [SB/79]), urban design (OR/438 [SB/86]), amenity impacts (OR/570 [SB/93]), the assessment of compliance with the development plan (OR/851 [SB/114]), and the overall planning balance (OR/833 [SB/112]).

- (7) Therefore, the OR correctly identified that deliverability was capable in law of being a material consideration, but reached a planning judgment that it was not material in determining this particular application. In reaching that judgment, express consideration was given to whether the deliverability of the Development would affect its judgment of the planning merits. It was concluded that it would not.
- (8) This conclusion was then reflected in the overall judgment that planning permission should be granted at OR/857-858 [SB/115]. That overall balance, which was ultimately accepted by the Deputy Mayor for Planning, Regeneration and Fire Safety in granting planning permission, was described at J/16 [CB/85] as follows:

“...the proposal represented a very significant economic benefit to the London and UK-wide economy. It was said that the projected total economic impact of the Wimbledon Championships (with the proposal) for the UK economy on an annual basis was £336.02 million and the proposal would result in the creation of 40 year-round jobs and 256 Championships jobs. Officers said that the proposal would provide a very significant economic benefit to the local, regional and national economies in accordance with the NPPF and a number of other London Plan Policies in relation to Merton and Wandsworth. They emphasised that the Wimbledon Championships are one of the most prestigious tournaments in world tennis, which attracts global visitors and contributes to London’s brand as a visitor destination; and the proposal would support and enhance the Championships, securing its future in this location. It was also said that the proposed development would facilitate very significant public open space and recreational, community, cultural, heritage, ecology and biodiversity, economic and employment, design, and transport related public benefits. The benefits were balanced against the harm caused by the proposal and for the purposes of considering proposals for inappropriate development on MOL, the benefits were considered by the Defendant to represent VSC in accordance with NPPF Paragraph 152.”

LEGAL FRAMEWORK

10. The legal framework is set out at J/41-50 [CB/97-99].
11. It is not disputed that the overarching legal position is as set out at J/42 [CB/97], namely:

“...whether a particular consideration is “material” within section 70(2) of [the Town and Country Planning Act 1990] requires consideration of two distinct questions. First, whether the consideration is one capable in law of being a material consideration for planning purposes; and second, whether it is material for the purposes of the

determination of the particular application in question (which will depend on the circumstances). The first question is a binary matter of law for the Court. The second question is a matter of judgment for the decision maker on the facts of the particular case, subject only to Wednesbury review.”

12. A clear distinction therefore exists between whether a consideration is capable of being material, and the separate exercise of planning judgment as to whether that consideration is in fact material in the particular circumstances of a case.
13. In this case, it is common ground that the implications of any trust and the restrictive covenants on the deliverability of the Development were capable in law of being a material consideration. Indeed, that is expressly recognised in the OR: see OR/141 [SB/55].
14. Therefore, the challenge in this case can only be to the First Respondent’s judgment that the deliverability of the Development was not material to the determination of the actual land use planning merits of the proposal and on the particular facts of this case.
15. As set out at J/42 [CB/97], and is accepted by the Appellant, that can only be on the grounds that the judgment reached was irrational. That is a high hurdle. As Lord Hodge and Lord Sales put it in R. (Friends of the Earth Limited) v Heathrow Airport Limited [2021] 2 All ER 967 at [117]:

“It is not enough that a consideration is one that may properly be taken into account, nor even that it is one which many people, including the court itself, would have taken into account if they had to make the decision.”

16. The hurdle is even higher in this case, since the “ordinary” position is that the existence of difficulties in implementing a planning permission, even if apparently insuperable, does not mean that planning permission should be refused for a desirable development. As it was put in British Railways Board v Secretary of State for the Environment [1994] J.P.L. 32, per Lord Keith of Kinkel:

“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.”

17. As such, deliverability considerations are only likely to be material in any particular case if they are judged to be “*relevant to the planning merits of the proposal*”: see City of Newcastle upon Tyne v SSLUHC [2022] EWHC 2752 (Admin) at [89], per Holgate J (as he then was) following a summary of the relevant case-law (emphasis added).
18. However, and importantly, it is for the decision-maker in the first instance to decide whether deliverability (or non-deliverability) is relevant to the planning merits of any particular application.
19. Examples of circumstances where a decision-maker may find that deliverability is material in a particular case (on the grounds that it affects the planning merits) include circumstances where the balance between harms and benefits may differ depending on when the development is actually delivered; and circumstances where two or more sites are competing for a single development opportunity.
20. There may be other circumstances where deliverability may be material – but whether it is in any given case remains a matter of judgment for the decision-maker (subject only to review by the Court on conventional public law grounds).
21. There are a number of cases where the Court has reviewed that exercise of discretion by a decision-maker, having regard to the ordinary position that deliverability would not be relevant to the land use planning exercise of judging the acceptability of a proposal in the public interest. Therefore:
 - (1) In City of Newcastle, the Court found that the deliverability of a proposal was lawfully treated as being material on the facts of that case, i.e. that it was not irrational for the Inspector as a matter of planning judgment in the circumstances of that case to conclude that the fact that a proposal was deliverable was in of itself a benefit. That was in the context where the site in question had historically been “*exceptionally difficult*” to develop: see [90] – [91].
 - (2) Conversely, in Satnam Millenium Ltd v SSHCLG [2019] EWHC 2631 (Admin), where the Secretary of State took into account the deliverability of the proposal, Sir

Duncan Ouseley held that taking delivery into account contrary to the conventional approach was irrational in circumstances where there was no explanation of how the non-deliverability of the proposal actually affected the planning merits of the proposal: see, in particular, [91] – [100] – and see further below.

- (3) Finally, in Wathen-Fayed v SSLUHC [2023] P.T.S.R. 524, the local planning authority reached a judgment that while the existence of a statutory impediment to deliverability would not ordinarily be material, on the particular facts of that case it considered as a matter of judgment that the deliverability of the proposal was material to its planning merits. The lawfulness of that judgment was not actually in dispute in the case but Timothy Mould KC (as he then was) noted that the judgment it had reached was lawful (at [76]). However, that was again in the context that (as noted by the Deputy Judge at [61]) judgments of this nature will be fact-specific and only be unlawful if they are unreasonable in the Wednesbury sense.
22. In all instances, the judgment on materiality in any given case was for the decision-maker in the first instance, and the Court only intervened if that judgment was irrational.
23. Interestingly and obviously in none of the cases did the Court set aside the conventional or “ordinary” approach to the non-materiality of non-planning constraints on grounds of irrationality.
24. Finally, it is necessary to consider the position where (as here) there is an allegation that the development may not be capable of being delivered at all, i.e. where there is a so-called “insurmountable” impediment to delivery. This was considered in detail in Satnam:
- (1) In Satnam, planning permission was sought for a strategic housing development in the absence of a five-year housing land supply (see [23]).
- (2) The Inspector found that the scheme was not deliverable as proposed (see [21]). Nonetheless, the Inspector carried out the planning balance “*assuming that it was deliverable*” ([23]). On that assumption, significant weight was given to meeting unmet housing need. However, the adverse impacts of the development would, it was

found, significantly and demonstrably outweigh the benefits and it was recommended that the appeal be dismissed (see [23] – [26]).

- (3) This approach was not criticised. Indeed, Sir Duncan noted that *“this is how [the balancing exercise] should be done”* (at [52]).
- (4) The Secretary of State agreed that the scheme was not deliverable (at [33]). However, in contrast to the Inspector, in his planning balance he gave no weight to the benefits of the proposal precisely because it was not deliverable (at [35]).
- (5) The decision was challenged. One of the grounds was that this was a flawed approach to the planning balance (see [42]). Sir Duncan agreed that the approach adopted was irrational (see [63] – [68]). As he summarised the position (at [92] – [93]):

“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?...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...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 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.”

25. Therefore, Satnam is clear authority for the proposition that the benefits of a proposal cannot be disregarded on the grounds that the development may not be deliverable at all – even in the context where one of those benefits is the “need” for the scheme. Rather, where there is a purported “intractable” obstacle to delivery it is perfectly legitimate to determine whether the development would be acceptable in land use terms on the assumption that it will come forward at some point: see Satnam at [52].

THE JUDGMENT BELOW

26. The Judge's findings in relation the Ground One are set out in Part IV of the Judgment. In summary, so far as is relevant to the points the Appellant continues to pursue, those conclusions were as follows:

- (1) Officers correctly directed themselves in law by accepting that questions of deliverability can as a matter of principle be material considerations (see OR/141 [SB/55]). However, whether or not to take account of or give weight to deliverability considerations was a matter for the First Respondent, impeachable only on classic public law irrationality grounds: see J/52 [CB/99].
- (2) In reaching their assessment that deliverability was not material in this case, it was open to Officers to find that the benefits of the Development (and in particular the "need" for the development) were not time-sensitive: J/57 [CB/101].
- (3) Further, deliverability considerations do not automatically become material merely because weight is given to the "need" for a development as a benefit of the proposal. As it was put at J/54 [CB/99-100]:

"There is no authority for the proposition that deliverability will always be material where need is identified as a benefit which weighs against harm. Proposals for development are regularly supported by a needs case (e.g. housing and lack of five year housing land supply). The fact that the balance is being considered as part of a VSC analysis makes no difference of principle."

- (4) That remains the case in circumstances where it is alleged that there is an "insurmountable" obstacle to delivery. As it was put at J/55 [CB/100]:

"...Mr Harris KC was right to submit that the decision-maker is required to assess or test the land use planning acceptability of a proposal which has been the subject of a duly made application, and does so on the basis that they are testing both the benefits and harms of the proposal as they are proposed to be delivered. Adopting the assumption that the development can be delivered, it would then be illogical to modify the weight to be given to the benefit of meeting a need simply on the basis that it is alleged that the development cannot take place. That was exactly the error identified by Sir Duncan Ouseley in Satnam."

- (5) Finally, the suggestion that the approach may be different where there is a statutory impediment to delivery was *"difficult to follow but was in any event unsupported by*

case-law". In particular, it was directly contrary to the judgment of Sullivan J (as he then was) in R v Solihull BC [1999] 77 P & CR 312: see J/58-60 [CB/101-102].

RESPONSE TO GROUND

27. The Appellant argues that the Judge erred in three ways in concluding that the First Respondent rationally concluded that deliverability was not material to this application.

28. These will be considered in turn:

(i) Time-sensitivity of the need

29. It is said that it was irrational for the First Respondent to conclude that the need for the Development was not particularly time-sensitive (see ASA/57-64 [CB/35-37]).

30. In short, the Judge was right to find that it was open to the First Respondent to find that the benefits of the proposal were not "time-sensitive" for three main reasons:

31. First, as it did below, the Appellant places great reliance on comments made by the Second Respondent in its application materials (ASA/57 [CB/35-36]).

32. However, the Second Respondent went no further than identifying a "*pressing need*" for the Development. In particular, it did not contend that the merits of the Development were time-sensitive by reference to a particular date or event. To that extent, the position was different from London Historic Parks and Gardens Trust v Minister of State for Housing [2022] J.P.L. 1196, where considerable weight was given to the benefit of delivering the memorial within the lifetime of Holocaust survivors (at [110] – [111] and [149]).

33. Rather, it was the Second Respondent's position that the need for the Development was growing year on year, i.e. that the risk to the status of the Championships and to the condition of heritage assets would get more, not less, pressing if planning permission was not granted.

34. Therefore, even on the Second Respondent's case, the deliverability of the Development was not being advanced as a factor that was relevant to the planning merits, since the

“need” for the Development would remain (and would arguably increase) even if there was a delay in delivery. At no point did the Second Respondent argue that the benefits of the proposal should be weighed differently by reference to the date of the delivery.

35. Second, in any event, what matters is not how the Development was promoted by the Second Respondent, but the lawfulness of the assessment reached by the First Respondent.
36. In this respect, the judgment reached by the First Respondent was clear: there was a “need” for the Development but its benefits were not time-sensitive: see OR/131 [SB/53-54] and 795-798 [SB/105-106]. Indeed, the OR states in terms that no “*weight [is] being placed on the speed with which any of the benefits can be delivered*” (OR/131 [SB/53-54]). As was correctly noted at J/57 [CB/101], no part of the OR refers to or relies on the speed or the timing of the Development’s benefits.
37. Third, even if the First Respondent reached a different judgment from the Second Respondent as to the nature or extent of the need for the development, that does not in of itself demonstrate an “irrational” conclusion. That difference of judgment between applicant and planning authority is in fact a feature of most planning applications (where applicants often seek to argue pressing need and authorities take a more measured approach).
38. Further, it is plainly rationally open to a decision-maker to find that a development meets a need, whilst also concluding that the weight to be given to that benefit is unaffected by the speed of its delivery. That is especially the case here in the context where: (i) no party was suggesting that the need for the Development would reduce over time and (ii) where the development was required, by condition one of the Planning Permissions, to be implemented within 3 years in any event.

(ii) Approach to need as a benefit in cases where VSC must be demonstrated

39. The Appellant’s case appears to be that where (i) a development amounts to “inappropriate development” in MOL and (ii) “need” is put forward as a benefit of the proposal then (iii) without more, it is irrational to conclude that deliverability is not material, contrary to the ordinary position (see ASA/65-75 [CB/37-39]).

40. There are several reasons why that argument is flawed:
41. First, the mere fact that need being relied upon as a benefit of a proposal cannot mean that deliverability is automatically material. Most major development is promoted on the basis that it will help meet a need of some form or other. If deliverability was always material in those circumstances, this would be inconsistent with the position that deliverability will not ordinarily be a material consideration: British Railway Board at pg 38; City of Newcastle at [87] and Wathen-Fayed at [60].
42. Second, that proposition finds no support in the existing case-law. As the Judge correctly identified at J/44-48 [CB/98-99] (and as set out further above), the cases relied on by the Appellant (including Wathen-Fayed and Newcastle) are simply examples of the Court reviewing a decision-maker's discretion on the materiality of deliverability on conventional public law grounds - having regard to the "general" position that deliverability is not normally material. They do not establish any special rule that deliverability is always material simply because "need" is relied on as a benefit.
43. The Appellant relies on the fact that in Wathen-Fayed the Deputy Judge noted that it was lawful to find that deliverability was material, in a case where meeting a need was relied on as a benefit of the proposal. However, it does not follow that because a judgment was reached in one case that was found not to be unreasonable, that this was the only reasonable judgment that could be reached in that case, still less that it was the only reasonable judgment that could be reached in another, different case.
44. Third, the "ordinary" position that deliverability considerations are unlikely to be material is unchanged in circumstances where it is contended that there is an insurmountable obstacle to delivery.
45. If a development is prevented from being implemented it will, as Sir Duncan made clear in Satnam at [93], not deliver any benefits (whether meeting a need, or otherwise). But there will also be no harm. There will be no development at all. Therefore, where there is a purported "intractable" obstacle to delivery it is perfectly legitimate to determine whether the development would be acceptable in land use terms on the assumption that

it will come forward at some point. That approach was found to be lawful in Satnam (at [52]).

46. Otherwise, it would be impossible to reach a decision in any case where there is or is said to be an “intractable” obstacle.³ That is simply not how Parliament intends the planning system to work.⁴ The planning decision-maker is required to assess or test the land use planning acceptability of a proposal which has been the subject of a duly made application, and does so on the basis that he or she is testing both the benefits and harms of the proposal as they are proposed to be delivered.
47. Adopting the assumption that the development can be delivered, it would then be illogical to modify the weight to be given to the benefit of meeting a need simply on the basis that it is alleged that the development cannot take place. That was exactly the error identified by Sir Duncan in Satnam.
48. Fourth, the approach taken in Satnam does not change in circumstances where planning permission is sought for development in the Green Belt/MOL and therefore where paragraph 153 of the NPPF is potentially engaged. Paragraph 153 of the NPPF states as follows:

“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 [MOL] by reason of inappropriateness, and any other harm resulting from the proposal, is clearly outweighed by other considerations.”

49. The Appellant’s argument is set out at ASA/72-73 [CB/38-39] as follows:

“...The “default” position in MOL is that development should not take place.

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

³ At least until after the determination of the non-planning intractable issue.

⁴ It permits planning applications to be made in advance of other statutory regimes and in the face of statutory prohibitions. It allows (subject to notice) the making of an application on another’s land. It requires and allows speedy decision-making, including appeals against non-determination. In determining an application (or an appeal against non-determination), there are only two statutory options: approve or refuse (see section 70(1) of the 1990 Act).

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.”

50. Therefore, it appears to be suggested that where there is a purported intractable problem with the delivery of a Green Belt/MOL development, the correct approach is not to assume that the development will be delivered (per Satnam), but rather to disregard all of the benefits and harms of the development (i.e. to effectively proceed on the basis that the development will not come forward). This, on the Appellant’s analysis, then leaves the so-called “default position” that permission should be refused.
51. There are numerous problems with this argument, both as a matter of logic and policy interpretation:
 - (1) It is intellectually incoherent to require a decision-maker to assess the acceptability of a development proposal on the effective assumption that it will not be delivered, such that it will give rise to no harms or benefits (or indeed any impact at all). As set out above, that is not how Parliament intends the planning system to operate.
 - (2) That is demonstrated by this case: the VSC test does not apply in the abstract - it can only be engaged on the assumption that the development is actually to be delivered (and would therefore result in inappropriate development on MOL). It is impossible to simultaneously proceed on the assumption that a development will not be delivered whilst also applying a policy test that is only engaged if the development does come forward.
 - (3) In any event, the Appellant misunderstands the effect of paragraph 153 of the NPPF. It does not set out a “default position” that development in the Green Belt/MOL is unacceptable (contrary to ASA/73 [CB/39]). Rather, it states that because inappropriate development in the Green Belt/MOL is harmful by definition, it can only be approved in VSC. In other words, the requirement to demonstrate VSC is only engaged where there is harmful inappropriate development in the Green Belt/MOL.

(4) Therefore, the effect of disregarding both the benefits and harms of a proposal (as suggested by the Appellant) is also to “disregard” the harmful inappropriate development that gave rise to the harm to MOL and the need to demonstrate VSC in the first place. There is no “default” position in policy (or elsewhere) that “*development should not take place in MOL*” (as suggested at ASA/72 [CB/38]). The requirement to find VSC is bound up in policy with the existence of harm that needs to be outweighed – it makes no sense to “disregard” that harm, yet still find that the Development is somehow unacceptable.

52. In truth, the intractable difficulties caused by the Appellant’s suggested approach simply serve to show the common-sense, and correctness, of Sir Duncan’s decision in Satnam which was endorsed by the Judge below. As the Judge correctly put it at J/54 [CB/99]:

“There is no authority for the proposition that deliverability will always be material where need is identified as a benefit which weighs against harm...The fact that the balance is being considered as part of a VSC analysis makes no difference of principle.”

53. Finally, and for completeness, the suggestion that the mere grant of an unimplementable permission results in harm (at ASA/75 [CB/39]) is an entirely new point. It was not raised in objection before the Planning Permissions were granted. Not only is there no evidence to support it even now but, as Holgate J (as he then was) put it in Mead Realisations v SSLUHC [2024] EWHC 279 (Admin), in the context of planning appeals (at [179]):
- “The Inspector cannot be criticised for acting irrationally, or for failing to give reasons, in relation to an argument of this kind which the claimant did not see fit to rely upon at any stage in its appeal.”*

54. Further, as the authorities set out above establish, many permissions at the time of determination might be practically unimplementable: ordinarily that is a matter for the applicant and not the decision-maker. There is no special rule that the grant of an unimplementable permission on MOL is intrinsically harmful/different in principle from one granted on non-MOL.

(iii) Statutory vs Private impediments to implementation

55. Finally, it is said that there is a material difference between a statutory prohibition on the use of land and a private-law bar to implementation.

56. This ground confuses two separate concepts: (i) the relevance of the purported trust to the weight to be given to the loss of open space in the overall planning balance and (ii) its relevance to the deliverability of the scheme.
57. As to the former, the fact that a statutory trust gives rise to public interest considerations may be relevant when assessing the merits of the Development, particularly in relation to policy compliance/weight when considering the impact of the proposal on open space.
58. However, this was recognised, in terms, by the First Respondent at OR/141-142 [SB/55-56], and resulted in the “precautionary approach” and “alternative approach” adopted in the OR. One example of that approach can be seen in the assessment of the impact of the proposal on open space. Under the precautionary approach, the loss of protected open space was given “very significant weight” as a harm in the overall balance; however, under the alternative approach, on the assumption that the open space was not subject to a statutory trust, only “limited weight” was given to this harm: see OR/787 [SB/102] and J/30-31 [CB/91].
59. The suggestion that this analysis only amounted to “lip service” (ASA/83 [CB/40-41]) is completely without merit and, in any event, it was no part of the Appellant’s pleaded case before the Judge to challenge the weight given to the loss of open space in the overall planning balance.
60. In any event, the point goes nowhere. The Appellant states that “...*the loss of land perpetually open to the public is plainly a weightier matter than the loss of public land per se*” (ASA/84 [CB/41]). As set out above, that is exactly the judgment that was reached by the First Respondent. It is impossible to see how the OR can be criticised for reaching the conclusion contended for by the Appellant.
61. As to the latter, 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 over-ride, any existing property or statutory rights: see London Historic Parks and Gardens Trust at [109]. As it was put by

Sullivan J (as he then was) 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”.

62. As such, 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.
63. The position is no different where there is a statutory restriction on the use of the land (as opposed to ownership difficulties or incompatible private rights). That can be seen by R. v Solihull BC [1999] 77 P & CR 312 at 317. In that case, Sullivan J (as he then was) 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): see, in particular, at pg 317-318.
64. Further there are many other instances where development which requires planning permission would be prohibited from taking place on the relevant land by absent a further authorisation or statutory consent. For example, section 278 of the Highways Act 1980.
65. To the extent that public interest considerations underlying the impediment to delivery are relevant, there may be circumstances where they are taken into account when discharging or modify the statutory impediment to delivery (for example, section 278 agreements are only entered into where the highway authority considers that they *“will be of benefit to the public”* (section 278(1)).
66. However, so far as the planning determination is concerned, the origin of the impediment to delivery does not make any material difference when considering deliverability – it is the existence of the impediment, and the impact it may have on delivery, that matters. As set out above, whether those considerations are then relevant in any given case is then a matter of judgment for the decision-maker.

CONCLUSION

67. For all of these reasons, the Judge was right to dismiss the claim for the reasons he gave.
It is respectfully submitted that the appeal should be dismissed.

RUSSELL HARRIS KC
ANDREW PARKINSON
Landmark Chambers,
180 Fleet Street,
London,
EC4A 2HG

JAMES MCCREATH
Wilberforce Chambers
8 New Square
Lincoln's Inn, WC2A 3QP

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