Neutral Citation Number: [2025] EWHC 1856 (Admin)

Case No: AC-2024-LON-004279

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/07/2025

Before :

THE HONOURABLE MR JUSTICE SAINI

- -

Between :

THE KING **on the application of** **SAVE WIMBLEDON PARK LTD**	**Claimant**
- and -	
MAYOR OF LONDON	**Defendant**
-and-	
(1) THE ALL ENGLAND LAWN TENNIS GROUND PLC **(2) LONDON BOROUGH OF MERTON** **(3) LONDON BOROUGH OF WANDSWORTH**	**Interested Parties**

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Sasha White KC and **Luke Wilcox** (instructed by **Russell Cooke LLP**) for the **Claimant**
Mark Westmoreland Smith KC and **Brendan Brett** (instructed by **TfL Legal Team**) for the **Defendant**

Russell Harris KC, Andrew Parkinson and **James McCreath** (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **First Interested Party**

Hearing dates: 8 & 9 July 2025

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Approved Judgment

This judgment was handed down remotely at 2pm on Monday 21 July 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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THE HONOURABLE MR JUSTICE SAINI

Mr Justice Saini :

This judgment is in 7 main parts as follows:

I. Overview

1. This is a case about the proposed expansion of the site of the Wimbledon Championships onto Wimbledon Park Golf Course, Home Park Road, Wimbledon Park, London SW19 7HR ("the Golf Course Land"). The plan of the proposed development site ("the Plan") annexed to this judgment identifies the Golf Course Land and other significant features in the surrounding areas. The Defendant has granted planning permissions for what will be a substantial expansion and development project. The development site is 39.7 hectares (ha) of land (about the size of 50 football pitches) and is to the west of Wimbledon Park and to the east of the All England Lawn and Tennis Club's existing main ground. If it proceeds, the development will involve developing 38 new tennis courts, tennis related infrastructure and new buildings including an 8,000 seat stadium, as well as extensive works to Wimbledon Park Lake. The development is highly controversial.

2. The successful applicant for the relevant planning permissions was the First Interested Party, the All England Lawn Tennis Ground Plc ("AELTG"). The parent company of AELTG is the All England Lawn Tennis and Croquet Club Ltd. That company also owns 100% of the shares in the All England Lawn Tennis Club (Championships) Ltd, which runs the Wimbledon Championships. The development is said to enable the hosting of the Wimbledon Qualifying Event, to improve the functioning and operation of the Wimbledon Championships and its continuation as the world's leading Grand Slam tournament. For convenience, I will refer to the First Interested Party, the applicant for the relevant planning permissions for the development, as "the Club" below.

3. The Claimant, Save Wimbledon Park Ltd ("SWP"), does not want the development to proceed. SWP is a company limited by guarantee and formed as a campaign group based in the London Borough of Merton ("Merton") and the London Borough of Wandsworth ("Wandsworth"). SWP has issued and pursued this claim through *crowdfunding.* The papers before me show that there are substantial numbers of people in the locality and elsewhere who strongly oppose the expansion and development. 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. It also benefits from a number of other protective designations, as I describe further below at [11]. In this regard, the application site was fairly described by the Wandsworth Senior Planning Officer, in an earlier stage of the planning process, as being subject to "some of the most restrictive planning constraints possible".

4. The Club's application for planning permissions was originally made to both Merton and Wandsworth as relevant planning authorities. That is because the Golf Course Land lies within the administrative boundaries of each authority. Merton voted to approve the proposal but Wandsworth voted to refuse. In broad terms, the balance between the "harms" and the "benefits" of the development was differently struck by each of the authorities. The applications were *called in* for determination by the Mayor of London ("the Defendant").

5. In due course, the Deputy Mayor for Planning, Regeneration and Fire Safety ("the Deputy Mayor"), exercising powers delegated to him by the Mayor, granted permission for the development on 18 November 2024. This grant of planning permissions by the Deputy Mayor is the target of SWP's claim for judicial review. Permission was granted by Lang J on the papers by Order dated 7 February 2025, together with Aarhus Convention costs-capping protection.

6. For reasons which will become clearer below, it is necessary to record at this stage that the Defendant granted planning permission on the presumption that the Golf Course Land is subject to a statutory trust requiring it to be kept available for public recreational use ("the Statutory Trust"). I say this was a presumption because that issue is in dispute. However, it is not in issue that the Golf Course Land is the subject of restrictive covenants which require it to be kept open and free of built development ("the Restrictive Covenants"). The existence of each of these restraints or impediments on development are at the heart of SWP's case that the Defendant acted unlawfully in granting the planning permissions.

7. By way of broad summary, SWP makes three complaints about the legality of the target decision to grant planning permissions to the Club. These are reflected in Grounds 1-3 of its claim (see [10] below). First, that the Defendant failed to take into account, adequately or properly, a number of material considerations in respect of the Statutory Trust and the Restrictive Covenants. In particular, SWP says that the planning "benefits" upon which the Defendant relied to satisfy the very special circumstances ("VSC") test, and thus to justify development on MOL, were predicated on the need for the proposal. Yet, it says, the Defendant claimed to be determining the application on the basis that the Statutory Trust existed, and the effect of the Statutory Trust was to preclude the development and thus to preclude the meeting of that need. This is essentially a complaint about what parties called "deliverability" of the proposal as a relevant consideration having been unlawfully excluded. Secondly, SWP says that the Defendant failed to consider whether the earlier land use management choices in the development site amounted to deliberate neglect, or damage to, a heritage asset contrary to the National Planning Policy Framework ("the NPPF") paragraph 202 (version of 20 December 2023 - the text of which has been superseded). Thirdly, SWP says that the Defendant erred in its consideration of the NPPF paragraph 103 in respect of sports and recreational provision. Mr White KC, Leading Counsel for SWP, focussed his oral submissions on the first ground.

8. By way of overview, and in answer to the three complaints, Mr Westmoreland Smith KC, for the Defendant, and Mr Harris KC, for the Club, say as follows. First, they argue that the Defendant concluded, and was entitled to conclude, that the issue of deliverability was not a material consideration in the circumstances of this planning application. They say that for SWP to succeed in arguing to the contrary, it has to show that the Defendant's conclusion on this point was irrational, and it cannot overcome that

high hurdle. As to the second complaint, they say the Defendant did take into account SWP's allegation of deliberate damage or neglect to heritage assets within the meaning of paragraph 202 of NPPF but that provision was not, on the facts, engaged. As to the third complaint, they say there was no error in the Defendant's approach to the question of "alternative sports and recreational provision" and "qualitative improvement" within the meaning of paragraph 103 of the NPPF.

9. The Club's position is that no statutory trust exists over the site. I was informed by Mr Harris KC that the Club has commenced separate legal proceedings in the Chancery Division (due for expedited hearing in January 2026) seeking a declaration to this effect; and that it has agreed terms to fund SWP's legal costs in acting as a representative defendant in that claim. The Club also does not accept that there are, or could be, insuperable difficulties in releasing the relevant land from any trust that does exist, or from the Restrictive Covenants (it relies on various statutory mechanisms which it says provide for the removal of any trust and restrictive covenants). These matters are however agreed not to be among the issues for my decision in this judicial review claim.

10. Counsel have helpfully agreed a List of Issues which encapsulates each of SWP's complaints in the following terms: (1) the lawfulness and rationality of the Defendant's approach to the materiality of the (assumed) Statutory Trust over the development site, and the Restrictive Covenants affecting the development site (**Ground 1)**; (2) the lawfulness of the Defendant's consideration of the requirements of paragraph 202 of the NPPF in respect of the deliberate neglect of or damage to a heritage asset (**Ground 2**); and (3) the lawfulness of the Defendant's approach to the interpretation and application of paragraph 103(b) and (c) of the NPPF (**Ground 3**). If SWP is successful on any of these grounds an issue would arise as to whether relief should be refused under section 31(2A) of the Senior Courts Act 1981.

II. The Facts

Chronology of the Application

11. As I have indicated above, the application site is subject to a number of designations within adopted planning policy:

    i) MOL and Open Space - Wimbledon Park and Wimbledon Park 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*) – the application site is a remnant of a larger historic landscape designed by Lancelot "Capability" Brown. Again, this designation includes the Golf Course Land, Wimbledon Park Lake, the Wimbledon Club and Wimbledon Park, which is currently open to the public. The entire site is included on Historic England's 'At Risk' Register.

    iii) Nature Conservation - the application site is a Site of Importance for Nature Conservation and is also part of a defined Green Corridor.

iv) Finally, trees on the land are protected under a Tree Preservation Order or a Conservation Area designation (the application site being within the Wimbledon North Conservation Area).

12. The Club's planning application was a cross-boundary application, submitted to both Merton and Wandsworth. It was a "hybrid" application, seeking 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 and de-culverting); (iv) highway works to Church Road; (v) new pedestrian access points at the northern and southern ends of the site; (vi) new vehicular access points; and (vii) the creation of a new area of parkland with permissive public access.

13. 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 stadium incorporating a qualifying player hub, guest facilities and associated event operational facilities, a central grounds maintenance hub and two player hubs. The Application was *called-in* for determination by the Defendant on 22 January 2024.

14. On 8 June 2024, objectors submitted a series of representations to the Defendant including: (1) a Consultation Response and Commentary; (2) a Response and Objection on behalf of SWP summarising some key planning policy issues; (3) representations on Green Belt Policy, VSC and "Need"; and (4) a Heritage Assessment of the landscape and the effect of the Development. I was taken to some of these materials during oral submissions.

15. The Application was the subject of a detailed 221-page Officers' Report ("the OR") prepared for the Deputy Mayor to consider in determining whether to grant or refuse planning permission. The OR recommended the Application be granted and I will need to consider it in some detail below. In relation to officers reports in general, the applicable legal principles are well-established: see R (Mansell) v Tonbridge and Malling Borough Council [2019] P.T.S.R. 1452 ("Mansell") at [42]. It is only if the advice given in an officer's report is significantly or seriously misleading that the court will be able to conclude that the decision itself was rendered unlawful by that advice. Further, in reaching that assessment, an officer's report must be read fairly and with reasonable benevolence; the Court must be "vigilant against excessive legalism infecting the planning system" (Mansell at [41]). See also St Modwen Developments Ltd v Secretary of State [2018] P.T.S.R. 746 at [69].

16. In their recommendations in the OR, the Defendant's planning officers ("Officers") concluded that 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.

17. The Application was considered at a hearing on 27 September 2024 at which representations were made by a number of parties, including the Officers, Merton, Wandsworth, local MPs and from Christopher Coombe (of the SWP). The Officers' recommendation was discussed in detail. Having considered the transcript of the hearing, it is clear to me that there was strong opposition from many quarters to the proposal. At the end of the hearing, the Deputy Mayor announced that he agreed with the Officers' recommendation in the OR. The Deputy Mayor said:

> "In summary, the proposed development would facilitate very significant benefits, including those to public open space and recreation, community, cultural, heritage, ecology and biodiversity, economic unemployment and transport, all which would be appropriately secured. I agree with my officers that these benefits clearly outweigh the harm identified in relation to MOL, open space and heritage as well as other harm identified, and this is the case whether the land is assumed to be held in statutory trust or not. In my mind, these would clearly outweigh the harm caused by the proposal and represent very special circumstances. I agree with officers that the development is in accordance with the development plan when read as a whole. For these reasons, I agree with GLA planning officers' recommendation and grant planning permission."

18. Planning permissions were granted subject to the conclusion of a legal agreement under section 106 of the Town and Country Planning Act 1990 ("the 1990 Act"). On 15 November 2024, a section 106 agreement was entered into between the Defendant, Merton, Wandsworth and the AELTG (the "section 106 Agreement") and on 18 November 2024 the Decision Notices were issued formally granting the permissions which are the target in this judicial review.

The Statutory Trust and the Restrictive Covenants

19. As can be seen from the Plan, the relevant site comprises approximately 39.7 hectares of land identified as the Golf Course Land, Wimbledon Park Lake, as well as a section of Church Road. The site lies across Church Road to the east of the Club's main grounds, where the Championships are held annually. The Club is the owner of both the freehold and leasehold interests in the Golf Course Land, it having acquired ownership of the freehold from Merton in 1993, the leasehold owning company in 2018 and the leasehold itself in 2021.

20. Upon the 1993 disposal, the Restrictive Covenants were entered into. The benefit of the Restrictive Covenants is annexed to land said by SWP to be held by Merton on the Statutory Trust, including the part of Wimbledon Park currently open to the public and the Lake. The Restrictive Covenants provide insofar 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 […]"

21. Most of the Golf Course Land lies within Merton. However, a northern section of the former golf course lies within Wandsworth. 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). Wimbledon Park is currently open to the public and is recreational land to the north-east of the application site, the use of which by members of the public is said to be protected both under the Statutory Trust and by the Restrictive Covenants. 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, and entitled the Wimbledon Corporation Act 1914.

22. On 12 April 2023, the Wimbledon Park Residents' Association ("WPRA") wrote to the Planning Departments at both Merton and Wandsworth, referring to R (Day) v Shropshire Council [2023] UKSC 8 ("Day"). In reliance on that case, WPRA said that the whole of the Estate, including the Golf Course Land, was held by the Club 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. This was supported by SWP.

23. The Club disagreed as to whether the Golf Course Land was held by Merton under such a statutory trust. Differing views were expressed on this issue by a number of Opinions of Leading Counsel and these opinions were in the bundles for the hearing. In an Opinion dated 17 September 2024, Leading Counsel instructed by the GLA (Timothy Morshead KC) advised, in summary, that the land in question is held under section 164 of the Public Health Act 1875; that Merton was obliged to advertise proposals to dispose of that property under s123(2A) of the Local Government Act 1972, both in 1981 and in 1993 (and it seems it did not do so); and therefore, the decision in Day was engaged. Leading Counsel explained that he had reservations about whether that case is "fully secure as an authority" (given what Lady Rose, giving the judgment of the Supreme Court, said was agreed as common ground) but taken at face value, he advised the decision in Day indicates that both the 1981 lease and the reversion expectant on its

termination, are subject to a statutory trust in favour of the public, for the purpose of recreation, binding on the current tenant/reversioner.

The OR and how it addressed the Restrictive Covenants and the Statutory Trust

24. Advice on the relevance of the Restrictive Covenants was provided to the Deputy Mayor at OR, §§128- 134. Certain paragraphs are particularly relevant and were subject to detailed criticism by Mr White KC. I will accordingly set them out in full:

> "130. In general, whether or not a restrictive covenant impacts an applicant's ability to implement a planning permission is irrelevant to the decision to whether to grant permission. It is often the case that an applicant for planning permission will need to resolve matters of land ownership and/or rights affecting a development site before a development can proceed and there is no legal requirement that planning permission be refused unless the developer commits itself to implementing a proposal. GLA Officers are satisfied that the existence of the restrictive covenants are not of themselves matters to which regard must be had nor are the restrictive covenants in and of themselves considered to be material to the determination of the current planning application.
>
> 131. 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.
>
> 132. The restrictive covenants could impact the deliverability of all or some of the development and so it is possible that not all of the benefits would be delivered but GLA officers consider that it is likely any issues caused by the restrictive covenants would have to be resolved before the development is implemented. Further, if not all of the development is carried out some of the harms will not arise. As such the restrictive covenants are not considered to be a material consideration. For the same reasons, even if they were material, they would attract only minimal weight."

25. The Statutory Trust was addressed at OR, §§135-143. Officers considered Day and noted that ultimately the existence of such a trust was a question for the courts: OR §140. They noted that differing legal opinions had been expressed by counsel and explained they had sought their own independent legal advice from Leading Counsel (that was a reference to Mr Morshead KC's advice and a hyperlink to the Opinion was provided). They said that while, in Leading Counsel's opinion, the land was held subject to a statutory trust for its use for public recreation, the matter was "far from clear cut".

26. Again, I need to set out in full certain paragraphs of the OR because they are central to SWP's rationality complaints under Ground 1 in relation to the Statutory Trust. The Officers said:

> "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."

27. This Precautionary Approach, and where relevant, the Alternative Approach, can then be seen throughout the OR. I refer, for example, to the assessment in relation to land use considerations (OR §§260-261), open space provision (OR §§274-277), urban design (OR §438), amenity impact (OR §570), the assessment of compliance with the development plan (OR §851), and the overall planning balance (OR §833), which I will now consider in more detail.

III. VSC and the planning balance

28. Given the focus by Mr White KC in his submissions on the approach to the VSC "planning balance", I need summarise how that issue was addressed and reflected the Precautionary and Alternative Approaches. The relevant parts are OR §§773-787. It was first noted that the proposal represented development for alternative sports and recreational use of the site located in MOL, which was said to be land to be protected from "inappropriate development" in accordance with national planning policy tests that apply to the Green Belt. It was recorded that the NPPF allows for exceptions to the general policy position that the construction of new buildings is inappropriate in such a location. The OR said that the proposal would fail to preserve the openness of the site and would conflict with one of the purposes of including land within the MOL, and therefore the proposal would represent 'inappropriate development' within MOL (such development being, by definition, harmful to the MOL and which should not be approved except in VSC). In addition to this 'definitional' harm, the OR said that account must also be taken of the harm to openness and the conflict with one of the purposes of including land within the MOL. Accordingly, the OR concluded that "very significant weight" should be given to any such harm and that VSC "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 (as per paragraphs 152 and 153 of the NPPF)". In this regard, the OR noted the contrast between Wandsworth's and Merton's decisions on this central VSC issue. Wandsworth had concluded that the substantial harm to, and loss of, visual and spatial openness identified to MOL was not outweighed by VSC, while Merton concluded the weight of the benefits would "clearly outweigh" harm identified in relation to MOL, and other harm identified.

29. The OR then identified the structured approach the Officers would adopt in undertaking the various individual balancing exercises necessary by: summarising all the harm, including harm to the MOL identified within the planning assessment and considering what weight ought to attach to each element; summarising all the planning benefits identified within the planning assessment and considering what weight ought to attach to each element; assessing whether the public benefits of the proposed development outweighed the less than substantial harm to the significance of heritage assets; assessing whether the benefits of the proposed development outweighed the harm to the designated open spaces and sports and recreational provision; assessing whether the benefits of the proposed development "clearly outweighed" the harm to the MOL and any other harm identified and amounted to VSC; assessing whether the proposed development was in overall accordance with the development plan; and finally undertaking the Section 38(6) Planning and Compulsory Purchase Act 2004 "planning balance". The OR then went on to undertake each of these exercises. "Harms" were categorised as one of the following: "none", "very limited", "moderate", "significant", and "very significant".

30. Officers assigned "very significant weight" to the harm to MOL for reasons I have identified above. As to "protected open space", the Officers concluded that the proposal would result in harm due to the loss of protected open space. They said that applying the Precautionary Approach, the proposed development of the site would represent the loss of 18.6ha of protected open space that could otherwise be accessible to the public for the purposes of recreation. Therefore, notwithstanding the provision of 11.1ha of maintained publicly accessible open space, which represented a moderate qualitative benefit, the proposal would represent "very significant harm" to the protected open space on site. This very significant harm was assigned by Officers "very significant weight". They explained that the Statutory Trust (if it bound the land) would not create an obligation for the Club to maintain the land to any particular standard. In this regard, the provision of the 11.1ha of publicly accessible, managed, and maintained land would result in a substantially more usable, functional, more inclusive and better designed parkland than would otherwise be available on the assumption that a Statutory Trust does exist. That was said to be a moderate qualitative benefit. Applying the Alternative Approach, Officers still considered that the proposal would result in a net quantitative loss of open space. However, given that the land had operated as a privately owned golf course to which there was significantly limited access and that the 11.1ha of publicly accessible parkland would substantially improve public access when compared with the former golfing use, Officers said the harm to the open space would be given "limited weight" in this approach. Overall, Officers concluded at OR §787 (emphasis as in original):

> "…the proposal would provide significant benefits, improving current levels and quality of access to the MOL, and improving poor quality areas to provide a wide range of benefits to Londoners. Set against that, applying the Precautionary Approach, the proposal would result in a loss of protected open space, including building works on protected open space. Therefore, GLA Officers assign **very significant weight** to the loss of protected open space. Applying the Alternative Approach, this element would be granted **limited weight** 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".

31. Having then conducted a similar exercise in relation to harm to "heritage", the OR went on to consider "public benefits", again using the weight classifications I have identified above. Given the importance of the "need" underlined under Ground 1, I should set out exactly what the OR said in relation to need, and public benefits, and how the Precautionary and Alternative Approaches were applied in practice in ascertaining such benefits.

32. The OR said (emphasis as in original):

> "*Need for the development*

795. The applicant has presented a VSC case based on three core principles as follows:

- There is a pressing need for the proposed development.
- This need for the proposed development cannot be met elsewhere.
- The proposed development will secure significant public, heritage, and other benefits.

796. In response to these core principles, GLA Officers accept that there is a need for the development and recognise that synergies and public interest benefits would be achieved by bringing qualifying onto the same site as the Championships. This would ensure that the Wimbledon Championships are in line with the other Grand Slam tournaments.

797. Furthermore, there is an identified need for additional Championship courts and the addition of 39 grass courts (Parkland Show Court plus the other 38 grass courts) would also provide built in flexibility during the Championships if other grass courts are damaged or unplayable. As mentioned above, the AELTC Main Grounds is constrained and spectator circulation during the Championships is challenging. The additional capacity created through this application could enable the reconfiguration of existing courts on the AELTC Main Grounds, thereby potentially improving circulation, spectator comfort and the operation of the Championships.

798. Consequently, GLA Officers accept that the need for the proposed development cannot be met elsewhere without fundamentally altering the nature of the Wimbledon Championships.

Public open space and recreational benefits

799. GLA Officers acknowledge that the proposal seeks to deliver increased access to open space whilst also improving the quality and usability of the other open space and recreational space on site.

800. The provision of 11.1ha of new publicly accessible parkland is stated as one of the key benefits of the proposal. The proposal would also deliver substantial benefits through the de-silting of Wimbledon Park Lake (valued at £7.5 million), various upgrades to Wimbledon Park (contributions valued at £10.7 million), as well as a boardwalk around Wimbledon Park Lake. All of these elements would have open space and recreational benefits.

801. Applying the Precautionary Approach, GLA officers would give **moderate weight** to the provision of 11.1ha of publicly accessible open space. Whilst it is recognised that the land has not operated as public open space for over a century, under the Precautionary Approach it is assumed that there is already a public right to use the land for public recreation. Nevertheless, any such right would be a right to use the land as kept by the landowner. There is, for example, no specific obligation on the landowner to keep the land as parkland or a golf course. In that context the provision of publicly accessible open space, that would be managed and maintained as parkland by the AELTC, still provides a public benefit because of the significant qualitative improvements, that can in itself be given moderate weight in the planning balance.

802. The 11.1ha of publicly accessible open space would interconnect with Wimbledon Park, providing a cumulative area of 29.1ha of qualitatively improved open space. Additionally, the 9.6ha Wimbledon Park Lake would be enhanced through improved accessibility and water quality, thereby increasing its recreational value. This combined area (38.7ha) would represent a very significant public benefit enabling the local community access onto land that has been utilised as a private member's golf course for over 100 years. The boardwalk around the lake would also increase access to open space and provide recreational angling opportunities.

803. Applying the Precautionary Approach, GLA Officers consider the provision of publicly accessible open space and other open space and recreational benefits to represent a very significant public benefit. Even discounting the weight attributable to the 11.1ha of publicly accessible open space (to which only moderate weight is given on the precautionary approach), **very significant weight** is attributed to the substantial public benefits offered by the lake de-silting works, the lake boardwalk, as well as the Wimbledon Park upgrade works/contributions alone (separate to the 11.1ha of publicly accessible open space). These elements alone would constitute a very significant public benefit.

804. Applying the Alternative Approach, and assuming that the land is not subject to a statutory trust, the provision of 11.1ha of publicly accessible open space as well as all other open space benefits would also represent a **very significant** public benefit."

33. The OR undertook a benefit analysis as regards other issues and the overall VSC conclusion (balancing benefits and harms) at OR, §847-850 was expressed as follows:

"Very special circumstances

> 847. Taking into account all planning harms and planning benefits outlined above, GLA Officers consider that the weight of benefits would clearly outweigh the harm identified to MOL and the other harms identified. This conclusion is reached for both the Precautionary and Alternative approaches to this assessment.
>
> 848. The public benefits are wide ranging and substantial. They could only be delivered by this applicant as no other individual, organisation, or local authority would be in a position to deliver this range of public benefits.
>
> 849. The open space and recreation, economic and employment, as well as heritage benefits alone would amount to VSC in this circumstance.
>
> 850. Therefore, the public benefits of the scheme amount to VSC that allow for permission to be granted."

34. Finally, at §§857-858, in relation to the ultimate Section 38(6) planning balance issue, it was said that taking into consideration the harms/benefits, and applying the Precautionary Approach, Officers considered that the weight of the benefits would clearly outweigh the harm identified in relation to MOL, open space, heritage, as well as other harm identified. Accordingly, they advised that the benefits amount to VSC that allow for permission to be granted and, if the Alternative Approach was adopted, the balance would be even more clearly in favour of the grant of consent.

35. I will address the case law after summarising the essential arguments made on behalf of the parties. I turn to the first of SWP's complaints.

IV. Ground 1: deliverability, the Statutory Trust and Restrictive Covenant

36. On behalf of SWP, Mr White KC's core argument under Ground 1 was wide-ranging and persuasively presented. I summarise his principal points in stages as follows:

(1) 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.

(2) The Defendant recognised, correctly, that the proposal amounted to inappropriate development on MOL, so that it could only take place if justified by VSC.

(3) The Defendant accepted that there was a need for the proposal, and that acceptance informed the whole of the OR's analysis of the public benefits advanced by the Club in support of the proposal.

(4) 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 plainly relevant to the weight which can be attached to the benefit (City of Newcastle: see [47] below).

(5) In the language of Wathen-Fayed (see [44] below), the existence of the Statutory Trust means that the site is unable to accommodate the development, and that inability undermines the primary justification advanced by the Club for the existence of VSC to outweigh the policy objection resulting from the site's location on MOL. It was obviously material to consider, not only whether the Golf Course Land was subject to the Statutory Trust but also how difficult it would be, and how long it might take, to free the Golf Course Land from the Statutory Trust and to resolve the issue of the Restrictive Covenants.

(6) The OR recommended, and the Defendant concluded, that the impedimentary aspect of the Statutory Trust was immaterial, on the basis that the benefits were (a) not time sensitive, and (b) that there are no suitable alternative sites for meeting the need. The OR thus treated those two examples as though they represented the totality of situations in which an impediment to delivery could be material. That was an error of law: where a planning application is said to meet a need, and where the meeting of the need is said to overcome a planning objection to the development, then impediments to the delivery of the proposal are necessarily material considerations.

(7) Alternatively, Mr White KC argued that it was irrational for the Defendant to conclude that the Statutory Trust was immaterial in circumstances where the need for the proposal was treated as a key aspect of the VSC case. He said that no rational planning authority could treat the delivery of a development as a planning benefit while disregarding the fact that the delivery is legally impermissible.

37. What I have set out above is a high level summary but I do need also to refer to the particular documentary material Mr White KC put at the forefront of his oral submissions on the "need" issue. In this regard, he relied strongly on what was said by the Club in its Planning Statement Addendum and how the OR addressed the case being put by the Club in relation to "need". He submitted that the Application was premised consistently and throughout on there being a "pressing need for the proposed development" (OR, §795). He took me to the Applicant's Planning Statement Addendum at 4.5.3–4.5.39 and summarised at 4.5.40:

> "…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."

38. Similarly, in relation to proposed works to the Grade II* Registered Park and Garden there was said by the Club 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). He relied on the fact that the Club said, "Urgent action is required to reverse the adverse impacts resulting from silt build up [within the Lake]." (4.5.87 Planning Statement Addendum).

39. Mr White KC referred to OR §795 which set out the Club's "three core principles" in relation to its case for VSC which included that "[t]here is a pressing need for the proposed development". I have set out the fuller text above at [32]. He submitted that there was no suggestion in that part of the OR which analysed the need case, that the need was anything other than "pressing" or that the need for the development was not part of the VSC case on which the merits of the scheme depended. Mr White KC said that had Officers considered that the need was less than "pressing", or that the merits of the development did not depend on there being a need for it, an explanation for that consideration would have been necessary. He also relied on the OR's analysis of the need for the development at OR, §§292-300 where 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 §300 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, §302 "GLA Officers acknowledge and accept the need for the development." And at OR§ 305 "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." Mr White KC argued that none of this reasoning gives any other indication than that the Club's need case was accepted "without demur". In all these circumstances, he submitted it was irrational to say that the benefits being relied upon were not "time-sensitive".

40. Mr Westmoreland Smith KC (whose main submissions on Ground 1 were adopted by Mr Harris KC) submitted in response as follows, by way of summary. His points were simple and attractively presented. He argued that the Defendant was entitled to find that deliverability implications were not relevant to its determination of the land use planning merits of the Application in the particular circumstances of the case. He said that this judgment as to the relevance of non-planning constraints was for the decision-maker and can only be challenged on the grounds of irrationality; and the Defendant's approach in this regard was not an irrational planning judgment, rather, it properly reflected the conventional approach to the general absence of relevance of non-planning related constraints to planning determinations. In those circumstances, Mr Westmoreland Smith KC argued that the prospect of releasing the Golf Course Land from the Restrictive Covenants or any Statutory Trust that existed over the site was not a matter that the Defendant was obliged to take into account when determining the acceptability of the proposal in land use planning terms "if delivered". In particular, he underlined that the Defendant had not accepted the time sensitivity of the development. Mr Harris KC emphasised that the Defendant had done no more than adopt what he

called the "ordinary" position as to the relevance of non-planning restraints in deciding not to regard deliverability as a material consideration.

Legal framework

41. As a matter of general public law, where a matter is not a mandatory material consideration in public law terms (that is, one that a statute expressly or implicitly requires to be taken into account as a matter of legal obligation), a decision maker will not act unlawfully if he does not take it into account unless it would be Wednesbury irrational for them not to do so: R (Friends of the Earth) v Heathrow Airport Ltd [2020] UKSC 52 at [119]-[121]. Further, as was noted by the Supreme Court at [117] in that decision (and citing the well-known case of CREEDNZ Inc v Governor General [1981] NZLR 172) to meet that hurdle:

> "...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."

42. Moving from public law generally to the planning context, whether a particular consideration is "material" within section 70(2) of the 1990 Act 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.

43. It will not ordinarily be a material consideration to the determination of a planning application that the applicant would, if granted planning permission, need to overcome legal obstacles in order to implement the authorised development. The principle was stated by Lord Keith of Kinkel in British Railways Board v Secretary of State for the Environment [1993] 3 PLR 125 in the following terms:

> "The function of the planning authority is to decide whether the proposed development is desirable in the public interest. The answer to that question is not to be affected by the consideration that the landowner 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 they decide that the 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 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."

44. As explained by Timothy Mould KC (then sitting as a Deputy High Court Judge) in Wathen-Fayed v Secretary of State for Levelling Up, Housing and Communities [2023] PTSR 524 ("Wathen-Fayed") at [61], Lord Keith acknowledged in this part of his speech in British Railways Board that there will be cases in which it will be reasonably open to the planning authority determining an application to have regard to difficulties of implementation as a material consideration. At the level of principle, there will also be planning applications in which, on the facts of the case, the local planning authority would act unreasonably in determining the planning application were they not to have regard to difficulties of implementation. That would be a public law error of a decision maker failing to have regard to a material consideration. But everything depends on the facts.

45. So, deliverability has been described as a relevant consideration in a number of first instance decisions. One such example is 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: see Satnam Millenium Ltd v Secretary of State for Housing, Communities and Local Government [2019] EWHC 2631 (Admin) ("Satnam") to which I return below. Another example is where the need is time-sensitive as in The London Historic Parks and Gardens Trust v The Minister of State for Housing [2022] JPL 1196 ("London Historic Parks and Gardens"). In that case, Thornton J held 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": [111].

46. In Wathen-Fayed, the planning officer recognised that, generally speaking, obstacles to delivery were not material considerations, but that on the specific facts of that case, as a matter of judgement, they ought to be taken into account. This approach was commended by the Deputy Judge at [76] as "legally impeccable" as an application of British Railways Board. However, Wathen-Fayed is not authority, as suggested by Mr White KC, 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. As I read this case, all that it reinforces is that in such circumstances a decision-maker will not err by deciding to take it into account. It is a case on specific facts where the outcome of the case was dependent on a wholly unrelated point.

47. I also do not consider City of Newcastle upon Tyne v Secretary of State for Levelling Up, Housing and Communities [2023] 2 P. & C.R. ("City of Newcastle"), establishes any new principle or assists on the facts before me. In answer to a submission that "the deliverability of the proposal development was a legally irrelevant consideration" (at

[83(iii)]), Holgate J stated the established position that it was not legally impermissible for deliverability to be taken into account if 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" (at [90]). The conclusion was that it was not irrational for the Inspector (as a matter of planning judgment) to conclude that the fact that a proposal was deliverable was in and of itself a benefit, was in a context where the site in question had historically been "*exceptionally difficult*" to develop: see [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.

48. Conversely, in Satnam, where the Secretary of State also 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].

49. Mr White KC also relied on Day. I do not consider that case helps me with the issues I have to determine. The planning permission was quashed in that appeal because the local planning authority had failed ever to take the existence of a statutory trust into account (the non-planning impediment in that case was literally unknown to the decision-maker). That is not this case.

50. I turn to the application of these principles in relation to Ground 1.

Discussion

51. I essentially accept the submissions of Mr Westmoreland Smith KC and Mr Harris KC in relation to Ground 1. These submissions properly reflect the application of the above legal principles on the facts before me.

52. The starting point is that the Officers correctly directed themselves in law by accepting that questions of deliverability can as a matter of principle be material considerations: OR, §141. However, there is no rule of law that deliverability will always be a relevant consideration, even if the obstacles to implementation are "apparently insuperable" (British Railways Board). Rather, whether or not to take account of or give weight to such matters was a matter for the Defendant, impeachable only on classic public law irrationality grounds. That requires consideration of the reasons given in the OR in the section I have cited above at [24] (the Restrictive Covenants), and [26] (the Statutory Trust), respectively.

53. The Officers advised that deliverability was not relevant because 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." In addition, there were "no other potentially suitable and available alternative sites which could be less constrained in terms of deliverability": OR, §131 in relation to the Restrictive Covenants. The same point is made in relation to the Statutory Trust at OR, §141.

54. Mr White KC argued as part of his rationality submissions that, even if the need case were not pressing, that alone does not justify treating the impediments to delivery which flow from the Restrictive Covenants and the Statutory Trust as immaterial

considerations. He said the materiality of an impediment flows from its "nexus to the planning merits" of the scheme and that where the need for a development (whether pressing or not) is advanced as justifying a development which is contrary to policy (in this case, the policy against inappropriate development on MOL), then it is "obvious" that the weight which can be attached to that need is affected. I reject this submission. 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.

55. Further, as a matter of logic, it cannot be the case that the existence of an obstacle (even an insurmountable one) means that, in cases where the proposal meets a need, deliverability is always material – without the need for more. If a development is prevented from being implemented it will, as was 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 (as here) it is alleged that there is a purported "intractable" obstacle to delivery it was legitimate in my judgment 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]. Otherwise, it would be impossible to reach a decision in any case where there is or is said to be an "intractable" obstacle. 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. I accept there may be cases where a decision-maker could find deliverability relevant to this land use planning exercise as a matter of planning judgment. The cases show such examples. However, in this case the Officers expressly turned their minds to such issues and concluded that the deliverability of the development did not affect the weight to be given to its benefits – and, in particular, that the weight to be given to the benefit of meeting a "need" was not affected by precisely when the development actually came forward. That was a lawful exercise of judgment.

56. I do not accept Mr White KC's submission that the Officers erroneously advised that deliverability would only be material if either the benefits were time-sensitive or there were competing, alternative sites. He said they wrongly approached matters as if there were a "closed class" of situations when deliverability would be relevant. I consider that argument is based on an overly critical and selective approach to the OR. At OR, §131, officers expressly advised that these two issues are merely two "examples" of situations in which deliverability could be material. In no sense was it misleading not to state the obvious – i.e. that there may be other situations (there is no closed list) where the deliverability of a proposal may, contrary to the ordinary position and as a matter of planning judgment in each case, be relevant to the merits of the development beyond the "examples" given.

57. I was also not persuaded by Mr White KC's submission that the Defendant's conclusion that the benefits of the development were not time sensitive was irrational. The logic of this argument appears to be that: (i) the Club in the Application asserted that there was a "pressing need" for the development; (ii) because the Defendant granted the Application, it should be assumed to have agreed with this position; and (iii) therefore it cannot rationally suggest otherwise than that the benefits of the development were time-sensitive because to do so would contradict this assumption. I do not accept this approach. It requires me either to ignore, or to re-write, the plain words of the Officers' advice. 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. One must look at the way in which the decision-maker has approached matters, and precisely what the decision-maker has determined, to understand why it granted permission, not at the applicant's submissions to the decision-maker. To the extent that in this case SWP is right that the Application was premised on there being a "pressing need" for the development, it is plain that Officers did not agree because their express advice (as set out above) was that the benefits of the development were not time sensitive. 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). Finally, Mr White KC did not identify 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 given their express advice was that no "weight [is] being placed on the speed with which any of the benefits can be delivered": OR, §131.

58. I should for completeness address a specific argument made on behalf of SWP in writing, and returned to in Mr White KC's oral submissions in reply that there is a special category of case where deliverability will always be a material consideration (in other words, where it will always be irrational for a decision-maker to conclude that deliverability is not relevant to the planning merits of the application). This is said to be a situation where there is said to be a statutory bar to development. I found this submission difficult to follow but it is in any event unsupported by case law.

59. 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 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. 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. 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 Mr White KC.

60. 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.

61. SWP's further argument was that the Defendant ought to have considered the implications for the proposed development if only part of the land said to be subject to the Statutory Trust was eventually released. The Defendant did consider partial delivery. I note it ensured that there was a considered package of controls through the imposition of conditions and an agreement under section 106 of the 1990 Act that ensured that the development could only come forward in an appropriate manner. These controls are independent of the Statutory Trust and Restrictive Covenants and will continue to control the development even if there are any implementation difficulties.

62. In short, the Defendant's decision on the relevance of deliverability (applying to both the Statutory Trust and the Restrictive Covenants) was a planning judgment rationally exercised and having regard to appropriate and relevant factors. Given that I have found it was rational for the Defendant to find that deliverability of the development did not in the particular circumstances affect the merits of granting planning permission, then the means for overcoming potential obstacles in the way of development did not fall for consideration.

63. I dismiss Ground 1.

V. Ground 2: NPPF para.202 and heritage assets

64. Under this second ground, Mr White KC argued that the Defendant failed to consider whether land use management choices at the site amounted to deliberate neglect of a heritage asset, namely the Grade II* listed Wimbledon Park Registered Park and Garden ("the RPG"), contrary to paragraph 202 of the NPPF. Paragraph 202 of the NPPF provides:

> "...where there is evidence of deliberate neglect of, or damage to a heritage asset, the deteriorated state of the heritage asset should not be taken into account in any decision."

65. The core complaint made by Mr White KC is that the OR failed to consider the issue of "deliberate neglect of, or damage to, a heritage asset" as it applied to the development. Instead, it is said that the proposals to address various elements affecting the heritage significance (which the SWP consider to have arisen through deliberate acts which have caused damage to the significance of the asset) were simply treated as benefits of the scheme.

66. The Defendant and the Club responded that this ground proceeds on an incorrect factual premise. First, they say that the Defendant did in fact consider paragraph 202 of the NPPF. Second, they say it also dealt with the substance of the concern raised. Nor, they argue, was there any misinterpretation of the policy. They submit that the suggestion that "*deliberate neglect*" can occur when the significance of an asset is inadvertently changed through lawful land-use management decisions is both novel and contrary to the Government's own explanation of how the policy is intended to operate in the National Planning Practice Guidance on the Historic Environment (Ref.: ID: 18a-014-20190723 Revision date: 23 07 2019) ("the PPG").

Discussion

67. The OR dealt with the RPG, its state, significance, and the effects of the development on it at OR, §§453-465. The following points are relevant (and were not put in issue by SWP):

(i) The Golf Course was established in 1898 prior to both planning control and the listing of the RPG. When planning control came into effect in 1948, existing uses became lawful uses of land. The Golf Course is, therefore, a long-standing and lawful use of the land that pre-dates the listing of the RPG in 1987.

(ii) The main impacts of the creation of the Golf Course on the RPG occurred at the time of its creation and prior to the listing. The construction of the Golf Course did not, therefore, damage the RPG as there was no RPG.

(iii) The OR identified the significance of the RPG as deriving from the elements of a designed landscape which survive all the changes over the years including the laying out of the Golf Course, reflecting what was there when listed.

(iv) The entry of the RPG on Historic England's Heritage at Risk Register raised no concern in relation to deliberate neglect or damage.

(v) Deliberate damage or neglect was not raised by Historic England in its consultation response nor indeed by any other statutory consultee.

(vi) SWP did raise the point, but the full extent of its submission was to quote paragraph 202 and then to assert: "All the degradation mentioned above has come about through the deliberate interventions of owners of Wimbledon Park". SWP's point was summarised in the OR.

68. In the light of the above, Officers provided the following advice about the RPG and the causation underlying its poor state:

> "The sports and recreational uses, most notably the layout and significant management for the golf course use, have tended to erode significant features. The legibility of the remnant historic planting, including designed planting, has been eroded by later planting relating to the RPGs use as a golf course. This has affected the naturalistic form and siting of the planting (which also changes the canopy cover) and introduced inappropriate

> species; it has also affected the views that form a key part of how the RPG is experienced..."

69. The words "deliberate neglect", imply "...a conscious decision to fail to take proper care of a heritage asset.": R (Meyrick) v Bournemouth Borough Council [2015] EWHC 4045 (Admin) per Cranston J at [57]). Paragraph 202 of the NPPF also applies to deliberate damage, i.e. (on the same analysis) involving a conscious decision to do harm to a heritage asset. I accept the Defendant's submission that the purpose of paragraph 202 of the NPPF is to remove any incentive for rogue owners to increase the prospect of getting planning permission and listed building consent by deliberately running down the condition of a heritage asset (as is reflected in paragraph 014 of the PPG). That rationale was accepted by Mr White KC.

70. The level of detail contained in officers' reports to planning decision-makers is a matter of judgment for officers. In BT plc v Gloucester City Council [2001] EWHC Admin 1001; [2002] 2 P&CR 33 Elias J, observed (at [118]):

> "It is important that the principal issues and the key information are put to [members], but it is not necessary, or indeed desirable, that the report should be exhaustive. Plainly there will always be room for dispute as to whether the report should in certain respects have been fuller, or whether certain guidance should have been expressly referred to, particularly in a development which is as large and significant as this one. But it is not for the court to second guess the officers."

71. A failure to reference an issue in an officer's report does not mean it was not taken into account and a contrary conclusion will only be appropriate where all other known facts and circumstances point overwhelmingly to that conclusion: see R (Davies) v RBKC [2024] EWHC 2711 (Admin) at [31].

72. I do not accept the Defendant failed to have regard to paragraph 202 of the NPPF. The substance of SWP's concern, including express reference to this paragraph, was squarely before the Defendant because it was set out in the OR. In addition, in my judgment, Officers correctly explained their understanding of how and why the RPG had arrived in the condition that it had at the time of the decision. Had it been considered that paragraph 202 of the NPPF applied, that would have been stated. As it was, Officers explained that significant features of importance to the RPG had been eroded by the lawful use of the land as a golf course. It is implicit in this account that Officers did not consider that there had been any "conscious decision to fail to take proper care of a heritage asset" or damage it. Rather, the "erosion" of features of the RPG had been caused by planting which facilitated the lawful use of the land, not in order to cause it damage.

73. Insofar as the SWP argues that is a misinterpretation of the NPPF, I consider that submission to be plainly wrong: (i) paragraph 202 relates to deliberate neglect or damage to heritage assets, and "deliberate" action requires intent; (ii) the underlying

purpose of the policy (as identified in the PPG, set out above) is to prevent an applicant for planning permission seeking to improve their prospects of gaining planning permission, and that purpose is not engaged on the facts where all that has happened is that a lawful use has been maintained; and (iii) Meyrick makes it clear that "deliberate" equates to a conscious decision to act in a certain way.

74. As to SWP's complaint that the OR did not expressly state a conclusion on paragraph 202 of the NPPF or descend into more detail on this question, that complaint is unsustainable. In short, in my judgment, there was no obligation to descend into any further detail in relation to paragraph 202 of the NPPF where there was no evidence of deliberate neglect or damage to the RPG. This is particularly the case where no concerns had been raised in this regard by any statutory consultee, including Historic England.

75. In my judgment, the OR did exactly what was required of it by appropriately summarising the issues for the decision-maker.

76. Ground 2 is dismissed.

VI. Ground 3: NPPF para 103 and sports and recreation

77. This ground is about the interpretation of paragraphs 102 and 103 of the NPPF which provide, insofar as material, as follows under the heading "Open Spaces and Recreation":

> "102. Access to a network of high quality open spaces and opportunities for sport and physical activity is important for the health and well-being of communities, and can deliver wider benefits for nature and support efforts to address climate change. Planning policies should be based on robust and up- to-date assessments of the need for open space, sport and recreation facilities (including quantitative or qualitative deficits or surpluses) and opportunities for new provision. Information gained from the assessments should be used to determine what open space, sport and recreational provision is needed, which plans should then seek to accommodate.
>
> 103. Existing open space, sports and recreational buildings and land, including playing fields, should not be built on unless:
>
> ...
>
> (b) the loss resulting from the proposed development would be replaced by equivalent or better provision in terms of quantity and quality in a suitable location; or
>
> (c) the development is for alternative sports and recreational provision, the benefits of which clearly outweigh the loss of the current or former use."

(When I refer to the "exceptions" below, it is to these two sub-paragraphs (b) and (c))

78. Mr White KC relied on the fact that the OR considered that the proposed development met paragraph 103 because the whole development was considered to be "for alternative sports and recreational provision" (OR, §266), the benefits of which were held to clearly outweigh the loss of the current or former use. Read in context, he argued that the reference in paragraph 103 of the NPPF to "alternative sports and recreational provision" is intended to refer to "sports and recreational provision" which benefits the "health and well-being of communities": see NPPF paragraph 102. He also underlined that it comes in a chapter of the NPPF which is all about "Promoting healthy and safe communities" and referred to paragraph 96(c), where it is said that decisions should aim to "enable and support healthy lifestyles, especially where this would address identified local health and wellbeing needs – for example through the provision of safe and accessible green infrastructure, sports facilities...".

79. In writing, but not orally, SWP argued that as a matter of interpretation of policy, paragraphs 103(b) and (c) of the NPPF do not apply to or support the delivery of "commercial" sports grounds or stadiums. It was not clear to me that Mr White KC was still running this point at the hearing, but I will address it below (I will call it the "Commercial Provision Point" by way of shorthand). It was said the OR did not address the need which the relevant paragraphs of the NPPF are intended to address i.e. access to open space and opportunities for sport and physical activity for communities. SWP relied on the fact that the vast majority of the proposed development amounts to the commercial exploitation of tennis as "sports and recreational provision". In this regard, it was said that limited opportunities for tennis to be played by members of the public are to be provided as part of the proposed development; and this use would replace the ability of Merton residents and the public generally to use the Golf Course Land for recreation throughout the year.

80. In response, Mr Westmoreland Smith KC and Mr Harris KC argued that applying a straightforward interpretation of paragraph 103 of the NPPF, there is no basis to exclude commercial sports stadiums from the scope of the exception in paragraph 103(c). Further, they say that given the recreational provision in the development, the Defendant was entitled to find that the development, taken as a whole, "comprises development that is substantially for alternative sports and recreational provision" (OR, §266), and that the exception was engaged in any event. Further, reliance is placed on the fact that in concluding that exception (b) applied, the OR took into account both the quantitative and qualitative changes brought about by the development and in accordance with well-established case law was entitled to set one off against the other and conclude that, overall, this exception was also met. They say one or both of the exceptions was properly engaged.

Discussion

81. I start with the uncontroversial proposition that the interpretation of a planning policy should not be undertaken as if it were a statute or a contract. Planning policies are designed to shape and guide practical decision-taking, and should be interpreted with that purpose clearly in mind. They can be broadly expressed and may not lend themselves to detailed legal analysis. Mr Westmoreland Smith KC is right to submit that policies often call for the exercise of judgement in their application. Questions of application are matters of judgement for the decision-maker: see Canterbury CC v SSCLG [2018] EWHC 1611 (Admin) at [23] and Suffolk Coastal DC v Hopkins Homes [2017] UKSC 37 at [24]. Further, as explained in Mansell at [41]:

> "Planning officers and inspectors are entitled to expect that both national and local planning policy is as simply and clearly stated as it can be, and also – however well or badly a policy is expressed – that the court's interpretation of it will be straightforward, without undue or elaborate exposition."

82. Turning to the specific paragraphs of the NPPF in question, it is not in issue that the three exceptions in paragraph 103 of the NPPF are disjunctive so that the policy is complied with where only one of the exceptions is met: see: R (Loader) v Rother DC [2016] EWCA Civ 795 ("Loader") at [22]. As to paragraph 103(b) of the NPPF, in Brommell v Reading BC [2018] EWHC 3529 (Admin), Lang J held (at [28]) that the correct approach was that: "...whether or not the provision is equivalent or better must be judged in terms of both quantity and quality. The word 'and' simply makes clear that both quality and quantity are relevant parameters in judging whether the provision is 'equivalent or better.'"

83. Turning to the facts, the development includes sports and recreational provision and public open space. On the former, I note that in addition to the construction of a new permanent "show court", there would be thirty eight seasonal, grass tennis courts. I accept that when not required for the Championships, these would be available for wider tennis use such as organised events in conjunction with local schools and other community tennis programmes. In addition, seven courts would be available for the local community to hire for private tennis play: OR, §§91-94 and OR, §291. As to public open space, the development proposes 11.1ha of new public park (OR, §111-112) and for the enhancement of Wimbledon Park in a number of ways (OR, §§9-16). At OR, §266, the Officer's conclusion on paragraph 103 was set out as follows:

> "GLA Officers are of the view the proposed tennis use comprises development that is substantially for alternative sports and recreational provision. Additionally, the GLA Officers consider that proposal would result in a qualitative improvement to the current public open space provision. Therefore, the proposal would accord with two of the exceptions listed under paragraph 103 of the NPPF."

84. In my judgment, the Defendant properly considered the implications of the development on public open space on each of the Precautionary and the Alternative Approaches. I will deal with each briefly.

85. On the Precautionary Approach, assuming the existence of the Statutory Trust, "the proposal would represent the loss of approximately 18.6ha of the former golf course (with a total area of 29.7ha) as publicly accessible open space" (OR, §272). However, Officers went on to advise (OR, §274) that: "...it is noted that a statutory trust would not create an obligation for [the Club] to maintain the land to any particular standard. In this regard, the provision of the 11.1ha of publicly accessible, managed, and maintained land would result in a substantially more usable, functional, and better

designed parkland than would otherwise be available on the assumption that a statutory trust does exist. That is considered a significant qualitative benefit".

86. On the Alternative Approach, Officers advised that "the proposal would not result in any quantitative loss of publicly accessible open space" but rather would "significantly enhance access to this site especially in an area where deficiencies have been identified": OR, §275.

87. Officers went on to consider the sports use of the site, referring to London Plan Policy S5 relating to sports and recreational facilities which is in similar terms to paragraph 103 NPPF. At OR §§288-291 they advised of a local insufficiency of capacity for tennis and a need to increase supply. Officers considered that the provision of additional tennis courts on the site "provides an alternative sport and recreational use that is in accordance with local demand strategies": OR, §290.

88. These considerations were drawn together towards the end of the OR, with (at OR, §§841-846) Officers concluding: "...whilst the harm identified to the protected open space is very significant on the Precautionary Approach, the countervailing accessible, managed and maintained open space and many additional recreational related public benefits across the site and wider area are very significant. Under the Alternative Approach these benefits would also be regarded as very significant (to a much higher level than the Precautionary Approach). Under either approach, these benefits are considered clearly to outweigh the identified harm". In my judgment, there was no legal error and this was a lawful assessment.

89. Applying Loader, SWP has to show that the Defendant misinterpreted both exception (b) and exception (c) in order for this ground to succeed (exception (a) not being applicable on the facts). In my judgment, SWP fails on both for the following reasons.

90. As to the Commercial Provision Point, I agree with Mr Westmoreland Smith KC that it is not supported by the relevant language of the NPPF. Paragraph 103 of the NPPF is simply stated. It does not exclude commercial enterprises and could easily have done so had that been the intention. Accordingly, what constitutes "sport and recreational provision" for these purposes, and whether they benefit the "health and wellbeing of communities", is a matter for the judgement of the local planning authority acting rationally. Moreover, I note that the Defendant plainly considered that the development would directly benefit the health and wellbeing of communities, whether by directly providing access to high-specification sport facilities for use by communities or, indirectly, by securing the expansion and improvement of public spaces or supporting a range of grassroots groups and charities.

91. It is not in dispute that the development does in fact include both provision for the playing of tennis (sport) and public open space (recreation, the development proposing a 11.1ha of new public park and providing for the enhancement of Wimbledon Park in numerous ways). In these circumstances, it was plainly rational to conclude that the development fell within the scope of paragraph 103(c).

92. For completeness, I should address the reliance by Mr White KC on the case of Thames Water Utilities Ltd v Oxford City Council (1999) 77 P. & C.R. D16. I did not find this case of assistance. It was not about the interpretation of paragraph 103 of the NPPF. Rather, the case concerns the scope of a private law covenant which restricted the use

of the land to "recreational and ancillary purposes" which the Court held was designed to restrict development on the site to that which had been permitted in an earlier planning permission on which the sale value of the site had been based. In other words, the commercial use of the stadium in that case fell outside of the scope of what was permitted by a restrictive covenant on the facts of that particular case.

93. SWP's complaint in relation to paragraph 103(b) is that the Defendant gave "no consideration of the quantitative loss of open space and/ or sports and recreational provision" (it concedes in its skeleton that consideration was given to qualitative matters). This remaining complaint is unfounded: the Defendant in fact considered the quantitative element of paragraph 103(b). The OR sets out the quantum of development being proposed including in relation to open space (and associated contributions to improve Wimbledon Park): see OR, §§9-16, 111-112, 843-845. The amount of provision of open space was plainly understood and taken into account. Accordingly, quantity was considered expressly in the OR and the suggestion that it was not is untenable.

94. Ground 3 is dismissed.

VII. Conclusion

95. The claim is dismissed.

ANNEXE: PLAN OF THE DEVELOPMENT SITE