

Case Name: *Flynn, R (On the Application Of) v The London Borough of Southwark Council & Anor* [2021] EWCA Civ 827 (28 May 2021)

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Commentary:

This case concerned an appeal against an order to dismiss a claim for judicial review against Southwark Council's grant of planning permission for the redevelopment of the Elephant and Castle shopping centre. The appeal was brought by a member of local housing campaign group, the 35% Campaign, with all grounds concerning the extent of affordable housing secured under the section 106 agreement, which the committee resolution required to be an "appropriate legal agreement". The Court of Appeal dismissed the appeal on all six grounds raised.

Under the first two grounds, the appellant alleged that the judge erred in his approach to the vires of the section 106 agreement, in that (i) he applied the wrong test for ascertaining the scope of the committee's delegation to the Director of Planning; and (ii) the section 106 agreement departed from the committee's resolution. The appellant argued that the officer's report was an "instrument of delegation", which necessitated transfer of both land and money to the Council for delivery of the social rented units if commencement was delayed. The Court of Appeal held that the committee resolution was in fact the instrument of delegation, and not the officer's report, which would only be incorporated if expressly referenced by the resolution. The phrase "appropriate legal agreement" used in the resolution left the officers with a broad scope to exercise their professional judgment. The position in the section 106 agreement was properly authorised by the resolution, and sufficiently secured the transfer of land and money to the council as required.

The third and sixth grounds alleged the judge erred in his approach to lawfulness regarding (i) the review mechanism for the "build to sell" housing on the west site; and (ii) his failure to recognise the 'material difference' between social rented and social rent equivalent accommodation (the latter being provided in relation to 15 units). The Court of Appeal rejected the appellant's argument that the affordable housing tenure split in the section 106 agreement failed to meet the 50:50 social rented and intermediate requirement under policy – they found the agreement properly provided for this tenure split. It was further held that, while social rented and equivalent accommodation were not the same, there was "no significant difference" on the facts. The officers had been granted discretion to flesh out the mechanism for provision and review of affordable housing, and they acted legitimately within the scope of that discretion.

The remaining two grounds concerned the fact that the officer made reference to "agreement in principle for grant funding from the GLA", which was not in fact secured. The appellant alleged (i) the judge wrongfully concluded that this did not materially mislead the committee; and accordingly (ii) the judge exercised his 'discretion' under section 31(2A) of the Senior Courts Act 1981 impermissibly. The court held the officer's statement was an accurate reflection of the situation and did not suggest funding was secured. The threshold

under case law required members to be “materially misled”, which had not occurred here. The crucial issue for the development was whether the affordable housing was contingent on this funding, which it was not.

Case summary prepared by Jed Holloway