

Case Name: *Kinsey, R (On the Application Of) v London Borough Of Lewisham* [2021] EWHC 1286 (Admin) (18 May 2021)

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Commentary:

The High Court quashed the decision of Lewisham Council (“the Council”) to grant planning permission for the demolition of 1970s sheltered housing, residential units and garages with redevelopment to provide 110 residential units. The landowner was the City of London Corporation, the Interested Party.

The challenge, which succeeded on four out of the five grounds argued, was brought by a local resident in relation to: the Council’s consideration of heritage impacts in the Officer Report (“OR”); the meaning of “background papers” under the Local Government Act 1972 (“the LGA 1972”); the Council’s conclusions on design and its failure to ask its Design Review Panel to consider the planning application.

Ground 1 was that the Council failed to properly consider the harm to listed buildings and the conservation area, following the Planning (Listed Buildings and Conservation Areas) Act 1990, the National Planning Policy Framework (“NPPF”) and the Planning Practice Guidance (“PPG”). The court’s analysis drew on the rich seam of recent case law on the approach to assessing heritage impacts and how this should be set out in committee reports. Although the NPPF 196 test of weighing less than substantial harm against public benefits was carried out in the OR, Members were not advised of the associated provision in NPPF 194 that any harm “should require clear and convincing justification”, nor that the harm should be given “considerable importance and weight”. Accordingly, what should have been a “weighted or tilted balancing exercise” was carried out in the OR as “an unweighted balancing exercise”. Further, the Senior Conservation Officer’s (“SCO”) identification of the precise levels of less than substantial harm caused (an approach that is endorsed by the PPG) was not reported in the OR. Ground 1 succeeded on these aspects.

On Ground 2, the court considered how the SCO’s written objection (which was withheld from Members and the public) were reported in the OR. Significantly, the OR had omitted and changed several elements of the SCO’s advice as to the extent of harm that would be caused to heritage assets. The result was that Members were materially misled and their assessment might otherwise have been different, so Ground 2 succeeded.

Ground 4 was that the SCO’s written comments were a “background paper” for the OR and so should have been made public. The Council had claimed that this was not the case because the SCO was an officer within the Planning Service, so her advice formed a subsidiary part of the OR. This claim was found to be a misdirection in law and the Ground succeeded. While the court suggested it was likely that the SCO’s comments were indeed a background paper, it cautioned that this decision “is the function of the proper officer [...] and the Court should not supplant his role.”

Ground 5 related to the rationality of the Council’s finding that the development “would make a positive contribution to the surrounding area” while simultaneously stating that it was preferable that it would not be visible in views from Dulwich Park. This was found to be

“perfectly reasonable, and a quintessential exercise of planning judgment”, and the Ground failed.

Ground 6 claimed that the Council’s failure to ask the Design Review Panel to consider the planning application breached a legitimate expectation created by the Council’s Statement of Community Involvement. This succeeded.

The Claimant had also unsuccessfully sought to add a further ground, that not all of the Officer Report (“OR”) to the planning committee had been made public, in breach of the LGA 1972. Seven documents on the agenda had not been made available to the public but the court held that these did not form part of the report, “given its natural and ordinary meaning”.

Case summary prepared by Tom Brooks