

Case Name: *Flynn v London Borough of Southwark* [2019] EWHC 3575 (Admin) (20 December 2019)

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Commentary: The Planning Court dismissed a challenge to LB Southwark's grant of planning permission of a large and complex site which includes the Elephant and Castle Shopping Centre and the London College of Communication.

On 10 January 2019 the Interested Party, Elephant and Castle Properties Co Ltd, obtained planning permission for a scheme including 35 storeys of mixed use development including 979 residential units and retail office, education, assembly and leisure uses as well as works to London Underground's station at Elephant and Castle. Mr Flynn, a local resident and campaigner for delivery of 35% genuinely affordable housing in new developments, challenged the grant of permission on the following grounds (all related to the affordable housing provision):

1. The defendant Council's decision to grant planning permission is infected by an error of law, based on the contents of the officer's report. There was a paragraph of the officer's report which contained an error of fact, alternatively the report materially and significantly misled the members. The report stated that grant funding had been secured from the GLA and had facilitated an increase in the number of social rented units. In fact, grant funding had not been secured and had not facilitated the offer, so had members been aware of this they may have sought to force a further increase in social housing.
2. The section 106 obligation that was concluded was not properly within the scope of the officer's delegation. The mechanisms for delivery of the social rented units set out in the s106 agreement did not reflect the officer's report.
3. The provisions in place in the review mechanism allowing the Interested Party to deliver the west site as a build to sell development were not accurate – the calculation should have led to the provision of 49 habitable rooms (but only 15 were provided for).

In response to ground (1) Mr Justice Dove held that the paragraph in the officer's report must be read in the context of the whole report, including the addendum reports, and this explained that the grant funding was agreed in principle. The report did not contain a mistake of fact and the members were not misled.

On ground (2) Mr Justice Dove decided that while the s106 obligations arrived at were not a literal reflection of the relevant paragraph in the officer's report, that was not required in order to remain within the scope of the delegation granted by the members. The s106 agreement set out that in the event of a failure to commence the west site triggering the obligation relating to non- delivery of the social rented units, the units could be constructed through other requirements to provide land and money or money's worth to secure that delivery. This was not outside the officer's authorised delegation.

On ground (3) there was nothing unlawful about using the emerging policy referred to as a basis for the calculations, and therefore the provision of 15 habitable rooms of social rent was appropriate, and it was consistent with material in the officer's report. The chosen mechanisms were not outside the scope of the resolution of the members.

Whilst each of the Claimant's grounds were properly arguable and permission to apply for judicial review should be granted, Mr Justice Dove was not satisfied that in substance they should succeed. Therefore the claim was dismissed.

Case summary prepared by Lucy Morton