

Case Name: *Kinsey, R (On the Application Of) v London Borough of Lewisham* [2022] EWHC 1774 (Admin) (11 July 2022)

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Commentary:

In Spring 2021 Lang J upheld the Claimant's judicial review of a decision taken by the London Borough of Lewisham ("the Council") to grant planning permission to the City of London Corporation for the redevelopment of the Sydenham Hall Estate. The development site includes listed buildings and parts fall within a conservation area. The matter was remitted to the Council and in Summer 2021 the Council's planning committee again resolved to grant planning permission. This case concerned whether the Council acted lawfully in granting the planning permission the second time round.

Ground 1 concerned the use in the Officer's Report of the phrase "optimum viable use" which refers to paragraph 196 of the National Planning Policy Framework ("NPPF") which states that "where a development proposal will lead to less than significant harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal including, where appropriate, securing its optimum viable use" (underlining added).

Despite the use of the phrase in a number of different parts of the Officer's Report, all parties were agreed that this paragraph of the NPPF didn't apply to the development proposals as these did not involve a designated heritage asset. Further, no evidence had been provided as part of the planning application as to the viability of the scheme or of any alternative scheme. As such, the Claimant contended the Officer's Report materially misled members of the planning committee.

Mr Justice Fordham found that, although it was regrettable that the phrase had been used, when read as a whole the Officer's Report was not materially misleading, particularly as officers did not introduce a conclusion for which there was no evidence or which was unreasonable in public law terms.

Fordham J also rejected, under s.31(2A) of the Senior Courts Act 1981, the Claimant's contention that a material consideration, in this case an objection by the London Wildlife Trust, had not been taken into account by the Council in its decision-making, leading to an unlawful decision. Fordham J rejected this argument on the basis that had the relevant material consideration been considered, it would have made no difference to the outcome.

The remaining Grounds related to issues regarding the publication (and non-publication) of documents by the Council, and the timing of such publications. The Judge dismissed each of these grounds on the basis that on a proper reading of Section

100D(5) of the Local Government Act 1972 “background documents” that need to be published alongside an officer’s report only include those documents that:

- “have (...) been relied on to a material extent in preparing the report”; and
- “disclose any facts or matters on which (...) the report or an important part of the report is based”.

Case summary prepared by Juliet Munn