

**Matters for consideration by Jenny Wigley QC – Kingston Council Decision
22/00602/FUL - SUMMARY**

1. Heritage and Heritage Balance

a. Officers based their advice to Members on misleading and incomplete information that tilted the balance in favour of approval and played down heritage harm

The company, Alan Baxter, was appointed by the council to carry out a Heritage Townscape and Visual Impact Assessment on which officers relied in giving information to Members about the heritage impacts of the development and in conducting their heritage balancing exercise. However, officers did not disclose to Members the possible conflict of interest arising from the fact that Alan Baxter helped design the scheme

Officers omitted any reference to NPPF policy 200 and how the development responds to this requirement which is a material consideration

Officers did not apply, assess and advise Members on NPPF Policy 200 (b) as it relates to Grade II* listed Cleave's Almshouses, and to assess the impact on the view south from the Almshouses and their quadrangle towards the development. This was raised in response to the consultation by The Kingston Society, but not reported to Members

Officers did not consider or present to Members vital information contained in the Conservation Areas Designation Document 1984 which forms the basis of designation of Fairfield/ Knights Park Conservation Area (paragraph 109 of officer report) even though it is obviously material to the decision

Historic England guidance states that severing the last link between a heritage asset and its historical setting will compromise the significance of the asset¹. This guidance was ignored in the heritage assessment and by officers recommending that Members approve a scheme that is dominant in height and scale that will cut The Fairfield/ Knights Park Conservation Area off from the wider historical area around it, creating a dominant barrier between the Conservation Area and the low rise area beyond, including the Cattle Market and the Old London Road where the Grade II* listed Cleaves Almshouses sit and vice versa

Officers misled members about policy requirements relating to the heritage balance and did not weigh any "public" benefits from the scheme

See Appendix for details

b. Officers breached the Local Government Act 1972 s 100 D

Under the Local Government Act 1972 s 100D, council officers should have disclosed any response to the consultation of the application from Historic England and from "independent heritage consultants" RPS (para 108 of officers' report) to the public as background information². This did not happen. Officers should also have declared the contents of both reports to Members. Only a selected short excerpt from the report by RPS was shared with Members in the Officers' report. Officers made no mention of any comment made by Historic England relating to this planning application either in their report to Members or at the Committee meeting at which approval was given

¹ Historic England GPA3 – The Setting of Heritage Assets

² Holborn Studios vs LB Hackney; R (Kinsey) vs LB Lewisham <https://www.39essex.com/planning-permission-for-sydenham-hill-scheme-quashed/>

c. Historic England failed its statutory duties in relation to this planning application, undermining the decision for approval

Given the lack of any mention of a response from Historic England by officers in presenting the planning application for approval, there is a question over when the response was written

Historic England relied in their response to the consultation on the Heritage Townscape and Visual Impact Assessment, written by company Alan Baxter in a situation where a conflict of interest appears to be present

Historic England did not fulfil its statutory role in not requiring information on or advising on the effect of the development on the setting of Grade II* listed Cleave's Almshouses, particularly as viewed south from its quadrangle, the oldest part of the building

2. Officers indirectly misled Members by referring to irrelevant transport statistics, undermining assumptions about the sustainability of the centre

The statement officers made in paragraph 138 of the report to Members that *"It is expected that only 24% of trips will be by car or taxi with the remaining using public transport or walking or cycling"* is based on TfL statistics in the Transport Assessment that are not relevant to Kingston and which had been recategorized in a way that is irrational and unjustified. The statement was indirectly misleading and undermines assumptions made about the high proportion of people who it is assumed will travel to and from the leisure centre by public transport by bicycle or on foot.

The lack of robust assumptions on transport and traffic relating to the development is highlighted by the officer's response to a question from a Member asking for information on traffic statistics (01.58.43³). The response is that they cannot give any information because "some of the details need to be interpreted or data taken out" (02.11.05).

See Appendix for details

3. Officers misled Members about policy requirements and the situation relating to flood risk arising from the proposed development which may have influenced their decision on the scheme

Officers did not inform Members about NPPF policy 166 relating to the assessment of flood risk for schemes that have already been considered at plan making stage and to inform them whether, under this policy, this development required or did not require further investigation for its impact on flooding

When assessing flood risk, the split nature of the site between Flood Risk Zones One and Two is a material consideration which was not clearly and unambiguously presented to Members alongside policy requirements that the proposed development should meet as a result of the fact

Officers did not disclose the basis on which The Kingfisher Leisure Centre site was allocated for development in the Kingston Town Area Action Plan ("KTAAP"), which should have been a material consideration for Members in applying NPPF policy 166 to this planning application

Officers state in paragraph 189 of their report that the sequential test is not required for the proposed new leisure centre as the site is allocated in the Development Plan and a sequential test has already been carried

³ All times given relate to the video recording of the Planning Committee of Kingston Council on 26 May 2022 at which this planning application was decided [Planning Committee - Thursday, 26th May 2022 at 7:30pm - Kingston Council \(public-i.tv\)](#)

out for the “upgrade or replacement” of The Kingfisher Leisure Centre in the Kingston Strategic Flood Risk Assessment (which was the SFRA 2007) that accompanied the preparation of the KTAAP in which the site was allocated. This is misleading and ignores the requirements of NPPF policy 166

Appendix B of the SFRA 2007 also includes a specific constraint for the “*retention and enhancement of local open space*” in any redevelopment or upgrade of The Kingfisher, a condition that was not considered when considering the loss of open space resulting from this planning application

See Appendix for details

4. Officers did not take account of material considerations in Kingston Council's Planning Obligations Supplementary Planning Document 2017 (“SPD 2017”) which are key to determining this application on this site

Officers did not refer Members to the SPD 2017, which states that it is a material planning consideration responding to The Town and Country Act (Local Planning) Regulations 2012. The SPD 2017 states that a reduction in open space should only be allowed “in exceptional circumstances” (point 3.47) and that planning obligations should be secured for the recording of archaeological remains and that findings will be published and placed on the Greater London Historical Environment Records (3.52).

Officers did not consider whether the loss of protected open space as a result of this development constituted exceptional circumstances and nor did they advise Members on this matter. This omission would have had a material impact on the decision Members were being asked to make

5. Officers did not consult on the planning application with Design South East (“DSE”), depriving Members of consideration of material considerations in their decision

DSE, which led the design review panel for the planning application, was consulted twice at pre-application stage and still had fundamental problems with the last pre-application proposals. Consultation with the Panel at the pre-application stage was obviously insufficient given that the Panel remained critical of the pre-application scheme. Officers nevertheless did not think to re-consult with the Design Review Panel or DSE on the submitted planning application, despite the fact that their opinion on the planning application would be a material consideration (*R (Kinsey) v LB Lewisham*)

Officers did not give weight to the Design Review Panel/ DSE’s opinions in their balancing act, in breach of NPPF Policy 129 and despite a requirement to do so as a result of Design Review being endorsed by the NPPF

6. Officers materially misled members by omitting policies that were material considerations, thus tilting the balance in favour of their recommendation to approve the planning application

Trees

Officers did not disclose requirements of NPPF policy 131 regarding the requirement for the long term maintenance of new trees. Condition 19 in the officers’ report only secures health of trees for a maximum of just over 5 years. London Plan policy G7 requiring the value of existing trees to be measured and replaced was also overlooked. No information was presented on policy DM 10 of the Core Strategy regarding the impact of this development on the “Leafy Character” of the Borough – given the additional loss of trees on the site from a separate planning application - and whether there is “appropriate commensurate replacement” for mature trees to be lost

Access

Officers did not disclose National Planning Policy Framework Policies 92, 112, London Plan Policies T7, D5 and D8, and Core Strategy 2012 Policies S4 and DM8 relating to access. These are an obviously material consideration given that existing access to The Kingfisher Leisure Centre is by pedestrian footpath only but will be replaced with a route used also for vehicular access. Vehicles will be thus regularly crossing an area between the playground and the leisure centre and café where people are gathered or walking and playing

Open Space

Officers did not disclose and assess the planning application in context of London Plan policies S5D and Core Strategy policy DM5A and C which raise material considerations relevant to the proposed development

Fire Safety

Officers did not disclose London Plan policy D12 B1b and acknowledge that no provision has been made in the application for an evacuation assembly point

7. Officers did not define, let alone weigh, the “public” benefits of the scheme as required by NPPF policies 201 and 202, thus undermining the conclusions made in the heritage balance

Officers did not identify and weigh public benefits of the scheme against heritage harm

Officers did not inform Members that benefits from the scheme to the “public at large” could not be rationally or fairly measured because of the lack of any conditions agreed for Members for community use and pricing for use of any of the sporting, gym and other facilities in the centre. The only community use agreed by Condition at Committee was for use of a meeting room in the facility and for public access to toilets. However, this Condition is not explicitly stated in the final Decision Notice issued on 15 July 2022

By their failure to assess and advise Members on the “public benefits” generated by the proposed developments, officers breach Policy 202 of the NPPF which states that *“where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal”*

8. Material changes to Conditions that were laid out by officers and agreed by Planning Committee have not been implemented

Conditions 1, 3, 5, 29 (2), 34, 36, 45 and 49 have been materially changed in terms of what they require from the requirements agreed in the wording presented to Planning Committee in the Officers’ report and as discussed and agreed with Members

Planning Committee agreed with officers to the following changes/ additions to Conditions that have not been made in the Decision Notice:

- *Condition 8:* “requiring the management of coach drop off including having a banksperson to manage coach movements”
- *Condition 12:* At 01.59.39, officers stated that this condition would be required to meet the requirements of Kingston Council’s Sustainable Transport Supplementary Planning Document
- *Condition 45:* The applicant should demonstrate why they cannot go above a 4.8% biodiversity net gain (02.46.07)
- *Condition 48:* Should be a requirement for an Operational Management Plan covering the community room and toilet facilities (02.25.02 and 02.46.07)
- *Additional Condition:* Requirement for an Acoustics Strategy (02.50.03)
- *Additional Condition:* To explore the possibility of an additional accessible parking spaces off-site, but this has instead been added as an “informative”.