



Neutral Citation Number: [2017] EWHC 2738 (Admin)

Case No: CO/67/2017

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**PLANNING COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 03/11/2017

**Before :**

**HIS HONOUR JUDGE JARMAN QC**

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**Between :**

**TRAVIS PERKINS (PROPERTIES) LIMITED**

**Claimant**

**- and -**

**WESTMINSTER CITY COUNCIL**

**Defendant**

**-and-**

**(1) GROSVENOR ESTATE BELGRAVIA**

**Interested**

**(2) THE MOST NOBLE HUGH RICHARD LOUIS**

**Parties**

**SEVENTH DUKE OF WESTMINSTER**

**(3) JEREMY HENRY MOORE NEWSUM**

**(4) FRANCIS ALEXANDER SCOTT**

**Mr Gregory Jones QC** (instructed by **Freeths LLP**) for the **claimant**  
**Ms Saira Kabir Sheikh QC** and **Mr Cain Ormondroyd** instructed by the **defendant**  
**Mr Christopher Katkowski QC** and **Mr Richard Moules** (instructed by **Ashurst LLP**) for  
the **first interested party**

The other interested parties did not appear and were not represented

Hearing dates: 31 October 2017  
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**Approved Judgment**

**HH JUDGE JARMAN QC :**

1. With the permission of Lang J the claimant (Travis Perkins) seeks by way of judicial review to challenge the grant of planning permission by the defendant planning authority (the authority) dated 30 November 2016 for the redevelopment of a timber yard known as Newson's Yard behind Nos 41 to 63 Pimlico Road, London SW1W 8NE. The decision was made by the planning applications committee, on the basis of a report of the director of planning which recommended granting conditional permission subject to an agreement under section 106 of the Town and Country Planning Act 1990 to secure highway and parking benefits.
2. The yard comprises a building which has external brick walls, internal brick pillars and a glass lantern roof. It has been occupied by Travis Perkins as a timber and builders' merchants since the 1990s and is let by the first interested party (Grosvenor), who applied for the permission. Grosvenor is seeking possession from Travis Perkins on the basis of the redevelopment, and those proceedings are presently stayed. The remaining interested parties are the freeholders.
3. The yard is also known as No 61 Pimlico Road and that is where pedestrian and vehicular access/egress is gained to the road. It is enclosed on all four sides by nineteenth century residential buildings. On the Pimlico Road side, the buildings have shops on the ground floor.
4. The permitted development is set out at some length in the permission. For present purposes, it can be summarised as the retention of the facades of Nos 41, 43, 57, 59 and 63 but with new shopfronts, the demolition of No 61 and construction of accommodation and ground to third floor levels, the creation of four Class A1 retail units at basement, ground and mezzanine level, seven Class C3 residential dwellings at first to third floor levels, and the replacement of the yard's glazed lantern roof.
5. The structure and external appearance of the yard building would not be altered materially to accommodate this development, but internally it would be physically subdivided into retail units with each subdivision extended to the buildings fronting Pimlico Road. Accordingly, it would no longer be suitable for use as a timber or builders' merchants.
6. The site lies within Belgravia Conservation Area, and was developed in the early to mid-nineteenth century. The yard was established towards the end of that period but was badly damaged by fire in 1877 and rebuilt. The only original features to survive are the original walls. A draft conservation area audit identified the buildings fronting on to Pimlico Road as "unlisted buildings of merit" which "make a significant contribution to the character and appearance of that part of the conservation area." The yard itself and No 61 was identified as making a neutral contribution.
7. Travis Perkins says that the authority erred in law when it granted the permission, and did so in three ways. The first is that it failed to take into account the harm that the proposed development would cause to the fabric of the yard building and to its historic use, as well as to local consumers, because of the cessation of the timber and builders' merchants use.

8. The second error identified is a failure to take into account or apply policy S25 of the Westminster City Plan, which provides:

“Recognising Westminster’s wider historic environment, its extensive heritage assets will be conserved, including its listed buildings, conservation areas, Westminster’s World Heritage Site, its historic parks including five Royal Parks, squares, gardens and other open spaces, their settings, and its archaeological heritage. Historic and other important buildings should be upgraded sensitively, to improve their environmental performance and made them easily accessible.”

9. The third error relied upon is a failure to take into account paragraph 135 of the National Planning Policy Framework (NPPF), which states:

“The effect of an application on the significance of a non-designated heritage asset should be taken into account in determining the application. In weighing applications that affect directly or indirectly non designated heritage assets, a balanced judgment will be required having regard to the scale of harm or loss and the significance of the heritage asset.”

10. The NPPF defines heritage asset as:

“A building, monument, site, place, area or landscape identified as having a degree of significance meriting consideration in planning decisions, because of its heritage interest. Heritage asset includes designated heritage asset and assets identified by the local planning authority (including local listing.)”

11. Mr Jones QC for Travis Perkins accepts that objections relating to the cessation of the yard as a timber and builders’ merchants, cessation of that use as an historic use, and changes to the internal fabric of the yard building were all referred to in the report, but what he complains of is that the director in analysing the objections on these issues failed to advise the members of the committee how to deal with them and in particular failed to advise that these issues were material considerations to be weighed in the balance.
12. His oral submissions went somewhat further than his skeleton argument by suggesting that the report substantially misled members when it indicated in several places that the subdivision of the internal space of the yard building and the erection of extended mezzanines fell outside planning control. He accepts that internal alterations to unlisted buildings are excluded from the statutory definition of development by virtue of section 55(2)(a) of the 1990 Act. However, he submits that as this application involved works which did amount to development, the report should have made clear that it was within the power and control of the authority to refuse permission taking into account these three considerations.
13. He also accepts that the report did not have to refer expressly to Policy S25 or paragraph 135 of NPPF, as long as it dealt substantively with what was required by these policies. Again, he submits that the report did not do that.

14. Ms Sheikh QC for the authority and Mr Katkowski QC for Grosvenor both accept that these were material considerations and submit that when the report is read fairly as a whole, each of these issues was sufficiently dealt with and that to say otherwise would be to approach the report hypercritically, and thus impermissibly.
15. The proper ambit of the approach of courts to such reports have been the subject of much judicial comment, and the principles were not in dispute before me. It suffices to refer to two recent judgments of Lindblom LJ.
16. The first is *Mansell v Tonbridge and Malling District Council* [2017] EWCA Civ 1314. At paragraph 42 of his leading judgment, Lindblom LJ summarised the relevant principles, which for present purposes may be distilled further as follows:
  - i) Such reports are not to be read with undue rigour, but with reasonable benevolence, and bearing in mind they are written for councillors with local knowledge.
  - ii) The question for the court will always be whether, on a fair reading of the report as a whole, the officer has materially misled the members on a matter bearing upon their decision.
  - iii) It is only if the advice in the officer's report is such as to misdirect the member in a material way, so that otherwise the decision would or might have been different, that the court will be able to conclude that the decision itself was rendered unlawful by that advice.
  - iv) Where the line is drawn between an officer's advice that is significantly or seriously misleading in a material way, and advice which is misleading but not significantly will always depend on the context and circumstances in which the advice is given and on the possible consequences of it.
  - v) Where an officer has simply failed to deal with a matter on which the committee ought to receive explicit advice if the authority is to be seen to have performed its decision-making duties in accordance of the law, then the court will interfere, but only if there is some distinct and material defect in the officer's advice.
17. The second authority is *St Modwen Developments Ltd v Secretary of State for Communities and Local Government & others* [2017] EWCA Civ 1643. Again, Lindblom LJ gave the lead judgment in which at paragraph 7 he said that an officer's report "should not be laboriously dissected in order to find fault."
18. Mr Jones relies upon a passage in the leading judgment of Lewison LJ in *R (Khodari) v Royal Borough of Kensington and Chelsea & Anor* [2017] EWCA Civ 333, which he says is on all fours with his case. After referring to section 55 (2)(a) of the 1990 Act, Lewison LJ had to deal with the argument that the loss of internal features of an unlisted building was nevertheless a material consideration which the local planning authority failed to consider, and at paragraph 21 he said this (with original emphasis):

"I would accept that the loss of internal features is *capable* of being a material consideration even though those features could

be removed without the need for planning permission where that loss is an integral part of development that does need planning permission. However, the officers' report on the first application summarised a number of objections to the proposed development which emphasised the harm that would be caused by the removal of the internal features. The officer's report did not say that these objections were irrelevant. Rather it explained why either the loss was not significant or that there was a countervailing benefit...in increasing the housing stock. That, too, is a question of planning judgment."

19. Mr Jones in this case relies upon the fact that the director's report did not say that these issues were material which ought to be weighed in the balance, but instead focused on the proposition that the proposed internal changes to the yard building were outside planning control. That is irrelevant, he submits, because the application should have been approached holistically and there was no alternative proposal which dealt only with these internal changes nor was there any suggestion that Travis Perkins planned to carry out such changes in any event.
20. On the other hand, Ms Sheikh and Mr Katkowski rely upon the fact that the director's report did not say that the objections on these matters were irrelevant but dealt with them in the mix, to use Mr Katkowski's phrase. Each side submits that the case falls clearly on its side of the line, and that the contrary argument is plainly wrong.
21. In view of Mr Jones' realistic concession that these issues were identified in the director's report and in the documents which accompanied it, I can deal with this part of the background relatively shortly.
22. The application for planning permission was accompanied by a town planning statement of Grosvenor's planning consultants, which in turn referred to a townscape heritage and visual assessment dated May 2016 by Richard Coleman City Designer, and to its conclusion that the proposed works would:

“....result in an enhancement to this non-designated heritage asset with the minor harm to significance caused by the sub-division of the builder's merchants offset by the enhancement to the façade, wider sustainability and accessibility improvements and the opportunity to secure the long-term commercial viability of this retail destination....It is therefore concluded that any harm that will be caused to the significance of any non-designated heritage assets that comprise the site will be more than offset by the enhancements that the scheme will deliver, and the wider benefits of the proposals, in accordance with the test set out at Paragraph 135 of the NPPF.”
23. The assessment was comprised of just under 60 pages which included historic and contemporary plans and photographs of the yard building as well as other aspects of the site. A detailed history of the yard was set out in section 3. Section 9 dealt with unlisted buildings of merit. The effect on the yard building and its use was dealt with as follows:

“The proposal for No 61 retains the fabric, expanding the overall space to the west and subdividing it into large portions of space with mezzanines which include cutaway central sections between the brick piers that retain a sense of height. The existing elements of the fabric remain. While there is the loss of a single large space, the proposals ensure the retention of the building’s character and a sustainable future use for this unusual space.”

24. Section 10 dealt with planning policy and guidance. Paragraph 135 was quoted in full and it was stated in response that the impact on non-designated assets had been analysed within the assessment and found not to be harmful. Policy S25 was also quoted in full and the response was that the development satisfied the City Plan in terms of heritage, views and design.
25. In appendix 2 of the assessment, there were extracts from the decision of an inspectors’ decision letter in 2002, who dismissed appeals based on the non-determination by the authority of an application by Grosvenor for permission to carry out development which included the demolition of the yard building and its replacement with housing.
26. The main issue before the inspector was whether that scheme would preserve or enhance the character or appearance of the conservation area. The inspector noted that English Heritage (as it then was) had just decided not to list the timber yard and had not raised any objections to its proposed demolition. However, he went on to say that the inquiry had been given much more detail about the history of the yard and it was appropriate for him to come to his own conclusion on the evidence before him.
27. The decision letter at paragraphs 31-33, quoted in full in appendix 2 of the assessment, dealt with the yard and its use as follows;

“The timber yard was constructed by one of the local developers of Belgravia, John Newson, in the mid 1840s. it was probably, at least in part, his workplace during the original housing construction phases becoming a component of the area’s social facilities for the sale of timber and other products....Taken over in 1997 by Travis Perkins the timber yard use continues: a continuity of use for more than 150 years. It appears to be a very rare survivor, possibly one of only 4 such yards in Greater London, with just the appeal site staying in its original use.

The timber yard may be a large structure but to my mind the tall boundary walls surmounted by the bold but simple roof are both dignified and attractive....The fact that most views of the external fabric of the timber yard are private ones does not diminish their significance from the conservation area’s point of view.

Seen from the inside (members of the public have access during trading hours) the timber yard takes on an even more imposing

appearance. The smell of the wood together with the tall, almost ecclesiastical, look of the colonnaded aisles and glazed central lantern is an impressive and uplifting experience. The probability that the roof was altered later, in the 19<sup>th</sup> or 20<sup>th</sup> centuries to enclose what might have been an open courtyard, seems to me to be part of the building's development which adds to rather than detracts from its attractiveness and worth.

28. Appendix 3 of the assessment consisted of an advice report dated October 2015 from Historic England, who had again been asked to consider listing the yard building. Its conclusion was that the yard building was not recommended for listing, although it was recognised that it clearly has a strong local historical importance. The principle reasons for the decision included that although it was considered to be the only timber yard in London still operating on its original site, and possibly in the country, a handful of other purpose built commercial timber yards are statutorily listed nationally, at least three of them earlier than 1840. It was also observed that the roof structure and pitch, save for the central lantern, was replaced in 2002, the wooden mezzanine floors were removed then and steel staircases inserted.
29. Objections were made by the Belgravia Society on a number of grounds, which included Historic England's reference to the strong local historical importance, and to the 2002 decision letter. The letter of objection continued "The whole look and feel of the timber yard will be completely lost especially with the damage to the mezzanine floor." Extracts from Policy S25 were cited and the point was made that that policy clearly did not exclude heritage assets that do not fall within listed or other categories in the policy.
30. In its letter of objection, Travis Perkins referred to the long historic use of the site and said that it objected to the application because of loss of the existing employment generation on site and the removal of the long standing uses which was contrary to planning policies. Concern was expressed at the loss of services which are essential to local businesses and trades people, in order to provide for more housing and retail space.
31. As part of its objection to the application for planning permission, Travis Perkins submitted a statement dated August 2016 by Jeffery W George & Associates who are heritage building consultants. That recognised that the yard building was not included on the statutory list of special architectural or historic importance, but relied upon Historic England's reference to it as having strong local historic importance. The statement continued that the consultants had carried out research which showed that the yard was the last surviving timber yard in England and Wales still operating from its original site. The survival of the yard building and the continuity of use was, in the opinion of the consultants, an important heritage consideration to be accorded appropriate weight in protecting significant heritage assets from the impact of detrimental development proposals.
32. A full set of papers including the director's report and letters and emails containing objection to and support of the application was sent to each of the four members of the planning applications committee a week before the committee met to consider the application. The background papers sent with the report included the 2002 decision letter, the objections from the Belgravia Society and Travis Perkins, and the response

of Historic England which simply recommended that the application should be determined in accordance with national and local policy guidance.

33. The director's report included photographs of the interior of the yard and the "historic and existing frontage, 61 Pimlico Road." Four key issues were identified in the summary section, including the land use implications of the reconfiguration of existing retail premises including the timber yard, and the impact on the character and appearance of the conservation area. Immediately following was this passage:

"More than 300 objections have been received on a number of grounds, principally the loss of the timber yard which the objectors consider to be an important local service contributing to the historic and mixed use character of the area...

The majority of the existing timber yard structure will be retained. The works to the timber yard relate primarily to the internal layout which is not subject to planning control. These works of subdivision and alteration could be carried out without planning permission and cannot be considered to have any physical impact on the character or appearance of the conservation area....

In all other respects the scheme is considered acceptable for the reasons set out in the report...."

34. Section 5 of the report dealt with consultations and summarised the objections of the Belgravia Society on the heritage issues. Reference was also made to individual objections on grounds which included "Loss of historic timber yard; The timber yard is the oldest (175 years) in London and should be preserved; Timber yard is an important local service contributing to the historic and mixed use character of the area." This section ended with a reference to a petition with 1235 signatures asking the authority to stop the destruction of a historic 175 year old timber yard.
35. In section 6.1 background information was given and the yard building was referred to as follows:

"The principal building that comprises the majority of the application site is 61 Pimlico Road, a purpose built 19<sup>th</sup> century timber yard building, spanning the rear of 41-63 Pimlico Road."

36. In section 6.2, recent relevant history was set out. Reference was made to the 2001 applications and to the 2002 decision letter. It was noted that the applications were presented to the committee in 2001 where members resolved that had not an appeal been lodged, then the committee would have refused permission and conservation area consent on the grounds of the loss of historic use and buildings to the detriment and character and function of the conservation area and the loss of the timber and builders' merchants.
37. Section 8.1.2 of the report is headed "Proposed retail." After summarising the existing and proposed retail element of the proposal, the report continued thus:



“Objections have been received from both local residents and the current retail occupiers to the reconfiguration and amalgamation of the retail units. The vast majority of objections received, principally object to the loss of the timber yard which is considered to be an important local service contributing to the historic and mixed use character of the area. There are also objections to the loss of the retail uses which occupy the smaller retail units.

There is no adopted policy which resists the reconfiguration [or] amalgamation of these retail units, providing they remain within the same use class. The reconfigured units would remain Class A1 retail, and therefore the proposals are not resisted in land use terms within the context of the NPPF, UDP and City Plan.

Whilst the concerns of the objectors over the local businesses affected is well understood, there is also no adopted policy, or any restrictive planning conditions, that would prevent the loss of the existing tenants from the retail units that comprise the site. In this case, it is the principle of Class A1 retail use that is protected in this location, not the specific retail occupiers. The protection of these specific retail businesses is outside planning control.”

38. Paragraph 8.1.3 of the report, headed “Travis Perkins, 61-63 Pimlico Road,” referred to objections by Travis Perkins and others that the application for planning permission was inaccurate as the lawful use as a timber yard was as a sui generis timber yard with ancillary showroom and trade counter rather than a Class A1 retail unit. Nothing turns upon that argument in the present proceedings. Three paragraphs from the 2002 decision letter on this issue were quoted, and it was pointed out that the inspector concluded that the lawful use was for Class A1 retail purposes. The report continued:

“....even if the use of the yard was to be regarded as sui generis, the proposed development would still be considered acceptable on the basis of the [authority’s] adopted planning policies....If the use of the site were to be regarded as sui generis or a non-A1 retail use, it is not considered that such use could be protected.”

39. Paragraph 8.2 of the report deals with “Townscape and design.” It refers to the fact that the site lies within the conservation area and that the draft audit identified the timber yard as making a neutral contribution, and then continues:

“Despite this attribution, there is no doubt that the builder’s yard as a structure, has some significance and is an interesting and early example of its type. This is expressed by the inspector in his report in 2001 and acknowledged by the applicants in their own submission to this application.

40. This section of the report then referred to the fact that the main interest of the yard building is its interior and “yet there is no planning control to prevent changes to the interior due to the failure to list the building.” It added:

“The works to the builder’s yard relate primarily to the internal layout which is not subject to planning control. These works of subdivision and alteration could be carried out without planning permission and cannot be considered to have any physical impact on the character or appearance of the conservation area. The main alteration is the subdivision of the internal space and the erection of the extended mezzanines. This would have an effect on the appreciation of the internal space and if the building was listed would most likely be a cause for concern. However the building is not listed and these elements are not subject to planning control.”

41. Mr Jones is particularly critical of these last two sentences. In effect, he submits, what is being said is that as the yard building is not listed these alterations to the fabric are not a matter of concern and are outside the ambit of planning control. What the report should have said is that the harm to a non-designated heritage asset should be taken into account and weighed in the balance in the decision whether or not to grant permission, which was a matter of planning control.

42. The section ended as follows:

“Many objectors have raised the matter of the historic use of the site as a timber yard and are of the view that the use is a positive contribution to the character of the conservation area. There is no doubt that the use of buildings can be important factors in the character of a conservation area....With regard to the proposal site, the timber yard is the only use of this type in the area, it does not define the area as one of warehouses and storage yards and nor can it be said to engage the community in any active or convincing manner. Despite its acknowledged historic use, it is not considered that there is any evidence that this use defines or adds to the character of the surrounding conservation area, which is predominantly defined by small upmarket retail and residential uses.”

43. Ms Sheikh and Mr Katkowski accept that these observations appear in the section dealing with the impact on the conservation area. That is not surprising, they submit, because there is a hierarchy of protection, with that afforded to designated heritage assets, such as the conservation area, being the greatest and that to non-designated heritage assets being the least. The director in his report approached the matter as did the inspector in the 2002 decision letter, by having regard primarily to the impact on the conservation area. They submit that nevertheless the harm to the fabric of the yard and the cessation of the historic use and the current service was sufficiently dealt with in the report having regard to the hierarchical approach.

44. Mr Katkowski illustrates this approach by reference to the paragraphs which precede paragraph 135 of the NPPF. Paragraph 132 provides that great weight should be given

to the conservation of a designated heritage asset. Where the proposed development will lead to substantial harm to such an asset, paragraph 133 says that permission should be refused unless it can be shown that the harm is necessary to achieve substantial public benefits which outweigh the harm, or other specified criteria are met. Paragraph 134 says that where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, the harm should be weighed against the public benefits of the proposal. All that is required by paragraph 135 in respect of a non-designated heritage asset is that the effect of an application on the significance of the asset should be taken into account.

45. That, the submission continues, is the only protection in respect of the yard building. Whilst Policy S25 does not distinguish between designated and non-designated heritage assets, the reasoned justification for the policy is that any change to Westminster's significant historic environment should not detract from the existing qualities which makes the city attractive for residents, businesses and visitors. It goes on to say that detailed policies for each type of heritage asset will be set out in City Management policy. As there is no such detailed policy which relates to the timber yard as a non-designated heritage asset, then the impact of the proposal on the yard falls to be dealt with in accordance with paragraph 135 of NPPF.
46. I accept the submissions set out in the three preceding paragraphs. The effect of the application on the significance of the yard should be taken into account, nothing more, and nothing less. At the heart of this case is the question whether the committee did so.
47. I do not accept Mr Jones' submission that it was irrelevant to point out that the internal changes proposed were not the subject of planning control. In my judgment, that is relevant in assessing the harm of these changes. I do accept that there are some passages in the report which suggest that these were of no concern as the yard building is not listed. It would have been more helpful had the report spelt out that these changes and the harm of the proposed development to the historic use of the yard and the service it provides should be weighed in the balance with the benefits identified in the report such as the increase in retail and housing provision and the economic benefits which that increase would bring.
48. However, the focus on a few passages in the report in my judgment, amounts to the sort of dissection which Lindblom LJ has said is not permissible. I have come to the conclusion that the report read fairly as a whole did sufficiently engage with these issues. In my judgment, it did so primarily in the context of the impact on the conservation area, but that is not surprising given that it was that heritage asset which attracted the greatest protection.
49. The report acknowledged that the yard as a structure had some significance, and referred specifically to the 2002 decision letter and Grosvenor's acceptance of that position. It dealt with the impact of the proposed works on the structure, but properly pointed out the internal changes were not within planning control. The historic use of the yard was acknowledged and assessed. So too was the service which the yard provides, but it was properly pointed out that planning protection relates to Class A1 retail use and not to specific retail businesses.

50. In my judgment, the report fulfils the requirements considered by Lewison LJ in *Khodari*. It summarises the objections on these issues. It does not say that these objections were irrelevant, but it assesses the harm. I accept Mr Jones' point that it should not be left to members to go rooting around for the issues in a substantial amount of documentation. I must also have regard to the fact that the report was addressed to the planning applications committee of an authority which deals with many applications. The policies were clearly referred to in the heritage assessment submitted on behalf of Grosvenor and elsewhere. In any event the report sufficiently assessed the harms, as the director was entitled to do. He was also entitled to identify the key issues in the way that he did. Still less did it mislead, when read fairly as a whole.
51. Accordingly, the challenge fails on all three grounds. Although it forms no part of my reasons for coming to that conclusion, I draw a little comfort from the fact that one of the members of the committee voted against the application, citing amongst other reasons objections to the proposed changes to the retail units and the replacement of the yard's glazed roof lantern.