COSTS APPLICATION
ON BEHALF OF THE APPELLANT
MIDLAND PROPERTIES AND FINANCE (BIRMINGHAM) LTD

IN THE MATTER OF AN APPEAL BROUGHT PURSUANT TO SECTION 78 OF THE TOWN AND COUNTRY PLANNING ACT 1990 ('THE 1990 ACT')

IN RESPECT OF THE REFUSAL BY BIRMINGHAM CITY COUNCIL ('THE COUNCIL') TO GRANT PLANNING PERMISSION FOR "*DEMOLITION OF EXISTING BUILDINGS AND CONSTRUCTION OF 83 RESIDENTIAL APARTMENTS ACROSS TWO NEW DEVELOPMENT BLOCKS, CENTRAL AMENITY SPACE INCLUDING SOFT LANDSCAPING AND PLANTING, CYCLE STORAGE, BIN STORES, PLANT STORE AND ENABLING WORKS*"

AT LAND AT 334-340 HIGH STREET & 8-22 HARBORNE PARK ROAD, HARBORNE, BIRMINGHAM

PINS REF: APP/P4605/W/23/3336011
LPA REF: 2022/06737/PA

MAY 2024

INTRODUCTION

1. This is an application for a full award of costs made against Birmingham City Council ('the Council') in accordance with the Planning Practice Guidance ('the PPG') on planning appeals and the award of costs[1].

2. It is acknowledged that such applications should be made as soon as possible and, in any event, no later than the close of inquiry[2]. The Appellant made clear at the opening of this inquiry that they were seriously considering an application but wanted to be reasonable and consider how the inquiry progressed. Following the conclusion of the evidence in respect of the remaining three RfR, the Appellant informed the Council's barrister, and subsequently the Inspector and inquiry, that an application was going to be made. Moreover, that this was likely to be for a full award, with a partial award in the alternative.

3. This application is short, as costs applications should be. The Appellant relies, in addition to this document, on its closing submissions particularly regarding the irrationality (and thus clear unreasonableness) of the Council's substantive case.

4. The Government has been clear as to the aims of the costs regime, which include encouraging local planning authorities "*to properly exercise their development management responsibilities, to rely only on reasons for refusal which stand up to scrutiny on the planning merits of the case, not to add to development costs through avoidable delay*"[3].

Relevant Guidance

5. Costs may be awarded where a party has behaved unreasonably; and the unreasonable behaviour has directly caused another party to incur unnecessary or wasted expense in the appeal process[4]. The PPG defines 'unreasonable' as being used in its ordinary meaning, as established by the courts in Manchester City Council v SSE & Mercury Communications Limited [1988] JPL 774[5]. It may be either procedural, relating to the process, or substantive, relating to the issues arising from the merits of the appeal[6].

6. An application will need to clearly demonstrate how any alleged unreasonable behaviour has resulted in unnecessary or wasted expense. This could be the expense of the entire appeal or

[1] https://www.gov.uk/guidance/appeals#award-of-costs
[2] Paragraph 035 Reference ID: 16-035-20161210
[3] Paragraph 028 Reference ID: 16-028-20140306
[4] Paragraph 030 Reference ID: 16-030-20140306
[5] Paragraph 031 Reference ID: 16-031-20140306
[6] Paragraph 031 Reference ID: 16-031-20140306

only for part of the process. Costs may include, for example, time spent preparing for an appeal and attending inquiry, including the use of consultants to provide detailed technical advice, and expert and other witnesses. Costs applications may relate to events before the appeal was brought[7]. Though costs can only be awarded in relation to unnecessary or wasted expense at the appeal, behaviour and actions at the time of the planning application can be taken into account in the Inspector's consideration of whether costs should be awarded[8].

7. Insofar as procedural costs, the PPG sets out a non-exhaustive list as to when an award of costs may be made against a local planning authority. However, that list notably includes delay in providing information and the withdrawal of any reason for refusal[9].

8. The PPG also sets out a non-exhaustive list as to when a substantive award of costs may be made against a local planning authority, noting that local planning authorities are at risk of an award of costs if they behave unreasonably with respect to the substance of the matter under appeal, for example, by unreasonably refusing or by unreasonably defending appeals[10]. Relevant to this matter, the list includes[11]:

   8.1 preventing or delaying development which should clearly be permitted, having regard to its accordance with the development plan, national policy and any other material considerations;
   8.2 failure to produce evidence to substantiate each reason for refusal on appeal;
   8.3 vague, generalised or inaccurate assertions about a proposal's impact, which are unsupported by any objective analysis;
   8.4 refusing planning permission on a planning ground capable of being dealt with by conditions risks an award of costs, where it is concluded that suitable conditions would enable the proposed development to go ahead; and
   8.5 not reviewing their case promptly following the lodging of an appeal against refusal of planning permission as part of sensible on-going case management.

9. A full award of appeal costs means the party's whole costs for the statutory process, including the preparation of the appeal statement and supporting documentation, and the expense of making the costs application[12]. A partial award of costs may result from an application for

[7] Paragraph 032 Reference ID: 16-032-20140306
[8] Paragraph 033 Reference ID: 16-033-20140306
[9] Paragraph 047 Reference ID: 16-047-20140306
[10] Paragraph 048 Reference ID: 16-048-20140306
[11] Paragraph 049 Reference ID: 16-049-20140306
[12] Paragraph 040 Reference ID: 16-040-20140306

either a full or a partial award, and may apply where, for example, costs relate to one or some of the grounds of refusal but not all of them[13].

SUBMISSIONS

10. This is a matter that should never have been at inquiry. In fact, the Appellant's position is that a refusal could have been avoided entirely. The fact that the application was refused is down to the Council's delegated decision. That the Council has continued to defend three of its reasons for refusal, while offering no credible evidence in support of the same, is also down to them.

11. The Appellant has had to deal with the Council's complaints by instructing consultants to provide detailed technical advice and expert evidence, together with legal representation for a contested inquiry. The Appellant and those instructed by them have been required to invest a significant amount of money and time in respect of which the Council should pay.

The application process

12. The Appellant submitted a viability assessment with the application[14] and paid a fee to enable the Council to carry out a review. Changes were then made to the Appeal Scheme in response to criticisms raised by the Council[15]. Mr. Fulford explained in XX that the Council had asked their consultants to stop work reviewing the viability assessment. The Council knew that the Appellant intended to submit a revised viability assessment; however, they moved to refuse the application before that could be done. Despite that, the Officer's Report[16] seemingly criticised the Appellant for not having updated their viability evidence[17]. Certainly, the lack of the same was used to suggest that there was insufficient AH resulting in RfR 2, and a further RfR 3 was included in the Decision Notice in respect of a lack of contribution toward public open space.

13. Mr. Fulford accepted in XX that it "*would've been possible*" for the Appellant to have submitted a revised viability assessment and circumvent those RfR. That is an obvious and logical conclusion given that the Council did, in the event, withdraw both RfR following consideration of the Appellant's revised viability assessment in the appeal context and discussion between the

[13] Paragraph 041 Reference ID: 16-040-20140306
[14] CD 1.29.
[15] Paragraphs 4.10 to 4.12 of the SoCG at CD 11.1 assist in explaining this.
[16] See CD 3.2.
[17] See paragraph 7.34: "*The applicant has not offered any affordable housing contribution. A viability appraisal was submitted with the original scheme for 87 dwellings but has not been updated for the amended scheme for 83 units. There is a significant unmet need for affordable housing in the City. The provision of no affordable is unacceptable and contrary to policy TP31 of the BDP*". Mr. Fulford accepted this proposition when pressed in XX.

experts. Though that work would still have been done at application stage if not appeal, it is evidence of the Council's unreasonableness of approach and, in any event, that the Appellant's assertion that the appeal and resultant inquiry in its entirety could have been avoided is made good.

14. Further evidence of the unreasonableness of the Council's approach is gained when considering the lack of full and appropriate disclosure of the City Design Manager's comments during the application process[18]. This meant that neither the Appellant nor Mr. Saunders was fully aware of the concerns the Council had regarding the design of the Appeal Scheme in order to fully negotiate the matter. Moreover, it is clear from those comments that certain matters which made their way into the Council's RfR and Statement of Case were not issues for the City Design Manager, emphasising the lack of reasonable approach on the part of the Council. Examples include the inclusion of 'scale' as part of the RfR despite the City Design Manager's clear view that issues relating to height had been resolved, and that he made no complaint in respect of density, as advanced by the Council under the descriptor 'massing'. This is important because though the Council will no doubt say that Mr. Fulford was not wedded to the City Design Manager's view, cross examination disclosed no rationality to the Council's persistence in respect of both matters. Mr. Fulford also emphasised in application correspondence that he placed significant weight on the City Design Manager's view.

15. The Council's unreasonable approach is further exposed when considering the advice provided to the Appellant at application stage as to Housing Mix. Mr. Fulford accepted in XX that he had told the Appellant three times to reverse the mix so that there were more 2 bed than 1 bed properties, which was done[19]. The Council then randomly changed the goalposts in the RfR raising for the first-time concerns as to the lack of family housing. Mr. Wells produced an analysis which justified the Appellant's approach and confirmed compliance with policy. The Council, following receipt of the same at the stage of exchange of PoEs, withdrew that RfR. Though the Council will no doubt try to emphasise that this was in response to the provision of new evidence, it was the Council's unreasonable approach that resulted in the evidence being provided when it was. The Appellant had done what the Council had asked them to do at application stage. That is why an analysis wasn't provided sooner. Mr. Fulford accepted in XX that Mr. Wells could've produced his analysis at application stage had the concerns been raised

[18] See Section 4.0 of Mr. Saunders' PoE.
[19] See paragraphs 5.3 and 5.4 of Mr. Wells' PoE.

then. He accepted that "*it is possible*" that there would then have been no such RfR. Given the Council's response to Mr. Wells' analysis, it is clear that would have been the result.

16. Further examples of the Council's unreasonableness, which the Inspector can take account of, include that the Council only raised objections in respect of Amenity for the first time in the RfR and accompanying officer's report. Mr. Fulford accepted in XX that this was not raised previously, that had it been the Appellant would have had the chance to comment, and that it was "*possible*" that the RfR might have been avoided. He accepted that the Inspector could fairly accept the Appellant's position on this. The City Design Manager plainly did not have the same concerns as the Council and, again, whilst they will say that is a matter of difference of opinion in planning judgement, the way in which the evidence was brought to bear during the inquiry made plain that the Council's stance was indefensible insofar as justifying a RfR. The Inspector may also want to consider the way in which the Council's RfR were drafted, including policies which were irrelevant to the stated reasons (e.g. the reference to policy DM2 in RfR 1[20], policy TP44 in RfR 4, policy PG3 in RfR 4[21] and policy TP45 in both RfR 2 and 3[22]) and not including policies which the Council relied upon (e.g. TP30 in respect of RfR 1). In respect of the latter, it is of particular note that there was no mention of TP30 being relied upon in respect of Design in the Council's Statement of Case or in the SoCG either and that this was only raised for the first time in Mr. Fulford's PoE, a matter he accepted in XX. It is interesting that the Council did not realise the extent of such errors in their Decision Notice until so late in the day yet on the other hand suggest that they continued to review their case and properly assessed it.

17. It is understood on instructions that the Transportation Officer's consultee response, making clear that there was no objection to the Appeal Scheme, was also not disclosed until after the decision notice was issued.

18. All of the above matters disclose a clear unreasonableness in the approach of the Council procedurally and feed into the argument that the Council's substantive case was plainly unreasonable (the Appellant would go so far as to say irrational).

[20] It should be noted that policy DM2 is the only development management policy that is referenced in RfR 1.
[21] Mr. Fulford accepted in evidence that PG3 was not relevant to this reason.
[22] Paragraphs 5.40-5.41 of the SoCG at CD 11.1 accepts that policy TP45 I not relevant to RfR 2 or 3. It should be noted that policy TP45 is the only policy that is referenced beyond the SPD in RfR 3.

The Substance of the RfRs

19. The Council's reasons for refusal ('RfR') could not stand up to scrutiny. That is why they withdrew three of the six RfR prior to the opening of the inquiry. Though the Council clutched on to the remaining three, forcing an inquiry to ensue, they had no expert evidence nor, with respect, any other detailed assessment and properly considered assessments to back up their assertions. The evidence did not hold up to cross examination and it was abundantly obvious that there was no merit in any of the remaining reasons. It was unreasonable for the Council to continue to defend their decision; and even more unreasonable given their lack of 5YHLS.

20. The Appellant does not regurgitate that set out in their closing submissions in this application, and relies on the same. But, in short, the Appeal Scheme plainly complies with the most important policies in the Development Plan, and in any event when read as a whole. Pursuant to section 38(6) of the Planning and Compulsory Purchase Act 2004 and paragraph 11(c) of the NPPF, it is clear that planning permission should be granted unless it could be said that material considerations indicate otherwise. That there are no such material considerations which could outweigh that compliance, particularly when set against the wealth of benefits of the scheme, has always been absolutely clear.

21. None of the Council's objections have been reasonable. No harm results from the Appeal Scheme. It is a nonsense that the Council asserts that even the unsubstantiated highways RfR alone would be enough to significantly and demonstrably outweigh the benefits of the scheme. All that does is disclose a lack of rationality in the Council's approach. That is particularly so when one considers that Mr. Fulford has accepted the inclusion in the s106 agreement of a contribution towards a possible TRO to address the Transportation Officer's comments as being CIL compliant, yet on the other hand maintains that the highways concerns are not overcome. Even he could not help but acknowledge in XX the potential inconsistency in that approach.

22. Even if the Inspector were to find harm where the Appellant does not, Mr. Wells is right that it would be at best limited even on the Council's evidence. But even if the Council's asserted levels of harm and weight were to be accepted, the appeal proposals generate a wealth of benefits in respect of which Mr. Wells and Mr. Fulford are in broad agreement. Though the exercise of planning judgement and application of planning balance is neither a mathematical nor scientific approach, it defies logic that the harms significantly and demonstrably outweigh the benefits. That is so clear that it is obvious that the Council has acted unreasonably in persisting to defend

an appeal which should never have advanced to this stage had the Council appropriately considered and revised its case per the PPG.

Conclusion

23. The Council, either through refusing the application in the first place or through persisting in defending the appeal, has sought to prevent and delay development which should clearly have been permitted, having regard to its accordance with the Development Plan, national policy and other material considerations. It is abundantly clear that none of the Council's RfR could rationally be sustained such that they acted unreasonably in persisting to defend them, forcing an inquiry.

24. The Appellant should not have to pay for the costs of bringing and engaging in a fully contested appeal with all of the associated expert and professional costs that brings. Accordingly, a full award of costs should be granted against the Council.

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