APPEAL REF: APP/P4605/W/23/3336011

Appellant: Midland Properties and Finance (Birmingham) Ltd

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.

334-340 High Street Harborne and 8-22 Harborne Park Road, Birmingham B17 9PU

REPLY TO THE APPELLANT'S COSTS APPLICATION
ON BEHALF OF THE
LOCAL PLANNING AUTHORITY

Introduction

1. On 10th May 2024 (the final day of the public inquiry) the Appellant submitted a written costs application.

2. The application is based on allegations of unreasonable behaviour by the Council of both a 'procedural' and 'substantive' nature.

Procedural

3. The Appellant relies on the following matters (italicised) to which the Council responds as follows:

    a. *The Council refused the application without waiting for a revised viability appraisal which it knew was to be prepared (¶12). Once it was prepared and submitted, the Council withdrew the relevant RfR (¶13).* **Response:** Even on the basis of the appellant's submission the conduct of the Council has caused no additional cost to the appellant. The work to demonstrate the 'viability case' had to be done and it was done. The evidence was submitted with the appeal. The Council refused the application on 4/7/23 which was some 10 months after the application was validated (31/8/22). The Council refunded the £3,500 plus VAT the appellant had paid for the Council to instruct consultants to review viability. It cannot be said that the Council rushed with unseemly haste into a refusal decision.

b. *The Council failed to disclose the totality of the City Design Manager's comments during the application process (¶14). The prejudice alleged is the loss of the opportunity to negotiate further (¶14).* **Response**: There is no evidence that any such further negotiation would have led to the approval of the application. Nor is there any evidence that this caused any additional expense over and above that in dealing with the substance of the issue (for which see below).

c. *The council included a housing mix RfR without first having raised the lack of family housing as an issue with the Appellant. It then withdrew the RfR once the Appellant had produced further "analysis" and evidence; had Mr Wells been given the opportunity to provide the evidence earlier, then there would have been no RfR (¶15).* **Response**: The same applies as per para 3a. above. The new evidence was submitted with the proofs of evidence. To the extent that this added to the costs of producing the proof, the extra work would have been the same had the Council raised the issue "earlier".

d. *The Council raised for the first time an issue relating to amenity in the officer's report and RfR; had the appellant been given the opportunity to provide the evidence earlier, then there would have been no RfR (¶16).* **Response**: This stands or falls on whether the substance of the RfR was unreasonable.

e. *The Council did not correctly list the development plan policies relevant to RfR1 on the face of the decision notice (¶16).* **Response**: There is no evidence that this caused any additional expense at all. It was a point put to Mr Fulford in XX in order to make him feel uncomfortable. The appellant was not confused or prejudiced in any way at all.

f. *The Transportation Officer's consultation response was not made available until after the decision notice was issued (¶17).* **Response**: This has not added to the costs of the appeal at all. There is no evidence that had it been made available earlier the decision would have been any different. Again, this matter stands or falls on the substance of the decision not process (see below).

4. It is interesting to note at ¶18, the Appellant avers that these procedural / process complaints "feed into" its argument of alleged substantive unreasonableness. If that is the case, then there is no application on procedural grounds at all. Either there were clear breaches of procedural expectations / rules or there were not. Further, for any such procedural breach to give rise to an award of costs, it must be clearly shown that the breach caused / gave rise to additional expense that was incurred as a result. For the reasons given above, that is simply not the case.

5. The council continued to keep their case under review throughout the appeal process, working with appellants to narrow the matters of disagreement which resulted in 3 reasons for refusal being withdrawn. This was entirely reasonable behaviour that saved substantial inquiry time.

6. The Council's agreement to the parking monitoring proposals and the securing £25,000 contribution was a pragmatic approach to ensure that there was a contribution to try and address any residual parking concerns even though it was felt that the measures would not be likely to be entirely effective.

Substantive

7. The appellant relies on the following:

   a. *"The Council has continued to defend three of its reasons for refusal, while offering no credible evidence in support" (¶10). "They had no expert evidence, nor … any other detailed assessments and properly considered assessments to back up their assertions (¶19). The Council included a design RfR which was unsupported by the City Design Manager (¶14).* **Response**:

      (1) While it is true that the City Council did not call a "design" or "highways" expert, that is not unreasonable *per se* and nor was it unreasonable on the facts of this case. The matters raised were perfectly capable to being dealt with by an experienced planning officer. It was not unreasonable for the Council to adopt this approach, particularly given the well-known overall financial position of the Council.

(2) In any event, the planning judgments on both issues fall to be made by planning professionals. The "expert" consultees were just that - consultees.

(3) It is wholly wrong to suggest that either the design or highways evidence of the Council lacked any proper assessment. The impacts were considered and judgments reached. The Council's planning officers were consistent throughout both the pre-app and application process in maintaining that given the character of the area the development should be reduced to 4 storeys on High Street and 3 storeys on Harborne Park Road [see appendix A of the SOCG (CD11.1) (letter dated 9th Dec 2019) and appendix A of Mr Saunders proof (CD9.2) emails from Mr Fulford dated 13th Oct 2022, 23rd Nov 2022]. The appellants continually ignored requests to substantially reduce the scheme despite being given time to provide 2 sets of amended plans through the life of the application.

(4) The planning judgments reached were properly considered against the appropriate policy framework.

(5) It is simply wrong to suggest that there was "no credible evidence". While the judgments were not shared by the appellant, that does not mean that they were not credible or unreasonable.

b. *This case should never have been at appeal (¶10). The whole inquiry should have been avoided (13). It was unreasonable to defend the decision given the lack of a 5YHLS (¶19). The appeal scheme plainly accords with the most important policies in the Development Plan and when read as a whole; there were no material considerations that could have outweighed such compliance and the benefits of the scheme (¶20). No harm results from the appeal scheme (¶21). Even if there is some harm it "defies logic" that it could outweigh the benefits (¶22).* **Response**:

(1) The suggestion that there was a "no harm" depends on planning judgment. Considering whether there was compliance with the polices in the development plan similarly calls for planning judgment.

(2) It is flawed to suggest that the Council's approach to the planning balance defied logic. Substantial harm arising from a small number of matters can significantly and demonstrably outweigh a longer list

of benefits, even when the tilted balance is applied. This all depends on planning judgment. This has been shown through many appeal decisions, and as Mrs Buckley-Thomson identifies, it is neither a mathematical nor scientific exercise.

(3) As the Council made clear, in the overall balance of adverse impacts and benefits nothing substantial was left out of account. The weight to these matters is always a matter for professional judgment. And in this case given that the principle of residential development was accepted as common ground, insisting on high quality design was a perfectly legitimate and reasonable planning response.

Conclusion

8. The application for costs should be refused.

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