

IN THE MATTER OF CHESHUNT FOOTBALL CLUB

APPEAL REFERENCE: APP/W1905/W/213271027

OPENING STATEMENT ON BEHALF OF THE LOCAL PLANNING AUTHORITY

1. LW Development's ("the Appellant") scheme was refused by Broxbourne Borough Council ("the Council") on the basis of 4 reasons for refusal; 1 (on air quality) has been withdrawn.

2. The three remaining reasons relate to the following issues:
 - a. The failure of the scheme to provide affordable housing and public infrastructure contributions;
 - b. The unacceptable affect on the living conditions of existing residents in Montayne Road;
 - c. The harm which will be caused to townscape by the design of the residential parts of the scheme.

Reason 1 - The Viability of Providing Affordable Housing and Other Section 106 Contributions

3. The Appellant's case on viability has shifted and altered markedly through the life of this appeal. The Council's case initially related to the disproportionality of

the Appellant's proposal in respect of the level of costs associated with the stadium aspect of the proposals.

4. Because the Appellant has apparently accepted that its costs were in error, this aspect of the refusal has now been addressed (and explained in the Council's statement of case); I set out how that has occurred further below.
5. But the result of the Appellant's complete reappraisal of the scheme means that two issues remain: (a) whether it is appropriate as a matter of policy to apply a standard developer profit when assessing the ability of the scheme to deliver affordable housing and infrastructure contributions; and (b) whether the costs of the commercial, club house and residential parts of the scheme have been overstated by the Appellant.
6. Correctly answered, these issues establish that the proposal can deliver affordable housing and other contributions but fails to do so, contrary to policies PO1 and H2 of the Local Plan. While, therefore, the ground has moved through the Appellant's shifting position, the substance of the refusal reason remains.

The Stadium Costs

7. The Appellant's failure to accurately describe and cost the scheme has led to unnecessary debate and analysis by the Council. The Appellant (at the application stage and at the time of the statement of case in March 2021) promoted a development which delivered a 5,000 capacity stadium at a fantastically high sum of £3,684,983¹ (and on the basis of 2018 prices); this was, moreover, a proposal which didn't reflect the scheme which was being applied (which was a 2,000 capacity stadium). This was specifically pointed out to the appellant's viability consultant, Mr Maidment, by the Council's viability witness, Mr Wade, following the Case Management Conference.

¹ PM proof v. 1, pg. 14.

8. The Appellant's response was to provide in Mr Maidment's proof (having sent through a summary sheet of the appraisals which were incapable of scrutiny two days before proofs were to be exchanged) a viability appraisal based upon a completely different scheme seeking to provide 1330 seats. But this scheme included stadium infrastructure (including roofs) which appeared to wholly surround the pitch at a grossly exaggerated level of 6,736m² and which bore no relationship to either the development applied for or the earlier scheme. The stadium costs were then put at £2,645,312 for phase one of a two phase scheme². No explanation was given in the evidence for this change.
9. The Council then queried the basis for this calculation in the meetings between viability experts after delivery of the evidence and in Mr Wade's rebuttal on the basis of the identified physical extent of the canopies (represented by 6,376m²). The result was yet another change in the Appellant's position with an entirely new set of viability appraisals contained in a replacement proof of evidence of Mr Maidment based upon a roof canopy area at 1,800 m². This has produced a figure of £1,227,400³. The Appellant's current development appraisal is based upon this figure.
10. To enable the Inspector to understand the difference between the parties, Mr Wade set out his own viability appraisal based upon a stadium capacity of 2,000 (as the appellant had applied for) with a spectator capacity of 700 seats and 1,300 standing. The stadium costs for this scheme (based upon the rates used in the Appellant's appraisals) stands at £1,016,370.
11. The result is this. Because the Appellant has now presented a stadium which has been reduced by (at least⁴) £2.45 million since producing its statement of case and only c. £200,000 stands between the Council's and the Appellant's respective appraisals for the stadium, the Council no longer argues that the scheme disproportionately provides for an exaggerated level of facilities. They are now

² PM proof v. 1, pg. 33.

³ PM proof v. 2, pg. 38.

⁴ It would be higher if 2021 prices were used for the 2018 scheme costed at the appellant's statement of case stage.

within the boundaries of the Council's expectations (even though it could be readily argued that the proposal should only deliver 700 seats rather than 1,300).

12. But the appraisals contain fundamental problems, as I deal with below.

Developer Profit

13. The Appellant's argument is that the scheme is (and always has) been unviable without any contribution towards affordable housing and other infrastructure costs because, against a profit-based residualised calculation, the profit on GDV ("PoGDV") is below the standard 15 – 20% PoGDV set out in the PPG.
14. However, the PPG and the recent RICS guidance indicates that this is not a fixed rate and that circumstances can justify a different rate. The purpose of the PPG guidance is important. It is to provide guidance on the means by which the non-provision of affordable housing and other s. 106 contributions are justified since, if they were required, the development will not proceed.
15. But in circumstances where it has been shown that the developer will proceed at a much lower profit rate, this will justify adopting such a profit rate when assessing viability since the true position is that with that rate (and with the s. 106 contributions) the development will achieve its aims.
16. Here, the Appellant has said in terms it will proceed with the development at 6.09% PoGDV and even indicated it will proceed at 3.5% PoGDV. This is because the Appellant, delivering this enabling development, is content to use its profits from that development to fund the Club upgrade – the reason for this unusual situation is because the Club is run by the same individual who is an integral part of the Appellant and wishes, for his own reasons, to use LW's profits for other purposes.
17. Now that the viability of the scheme has improved with the reduction of the stadium costs identified above, these cost savings should not be used to boost the overall profit beyond that which the Appellant formerly expected – it should go

to affordable housing and infrastructure costs instead. To quote the PPG and the RICS guidance, viability appraisals should be based, in part, on a developer's "own profit expectations"⁵. Those expectations were no higher than 6.09% PoGDV. The relevance of a developer's willingness to proceed at less than standard profit levels was accepted in the Delamere Forest School appeal decision⁶.

18. The shift in the overall PoGDV of the Appellant's scheme is from 6.09% PoGDV (with the scheme as it stood in 2018) to 10.38% PoGDV (today). The actual difference in value is between £3,919,859 (at 2018 values) to £7,961,655 (at 2021 values). Whilst noting the difference in dates for calculating the values, an extra £4 million profit windfall will be obtained in this scheme, without any affordable housing or other contributions being made. It would be still greater if the true profit rate that the Appellant was willing to proceed at was 3.5%.

Non-Stadium Costs

19. The second area relates to the non-stadium build costs. These costs were substantially amended in the viability appraisal produced in Mr Maidment's first proof of evidence. At the time of the Appellant's statement of case, the 2018 cost rates were relied upon. No information on these increases was provided before the exchange of the proofs of evidence despite the issues of cost levels being discussed in meetings following the CMC.
20. The Appellant's revised costs are over-inflated showing an average increase of 18% (and in respect of individual costs, very significantly more⁷). The increases result in a total build cost of £55,441,279 (from a 2018 base of £48,131,130). The costs are based upon the experience of one cost consultancy, Madlins, and are

⁵ RICS para. 1.2.2. and para. 002, PPG, viability.

⁶ 2016, CD3.27, paras. 35-40.

⁷ With demolition costs up 30%.

sought to be evidenced by a small number of example developments which are incapable of any scrutiny.

21. The Council's development appraisal⁸ has used a generous (to the Appellant), standard rate of increase under the BCIS General Building Cost index of 10.025% producing a build cost of £48,901,872. I say "generous" because, given that Madlins are stating that the scheme is to be competitively tendered, a tender price index figure of c. 2.5% is readily capable of being used. The Council's position is robust and the Appellant's decidedly shaky.
22. The difference in these two positions is, as can be seen above, some £6.5 million; if the Council is correct, this amount is (largely⁹) capable of being used for affordable housing. If the (generous) cost increases under the BCIS General Building Index is used, the Council's appraisal shows that the scheme PoGDV would be c. 17.5%.

Summary

23. These two remaining matters establish that the Appellant's viability appraisal is defective and does not justify a conclusion that affordable housing and other contributions cannot be viably delivered, contrary to policies PO1 and H2 of the Local Plan.

Reason 2 - effect on amenities

24. The proposal will have a significant effect on residents of Montayne Road, through actual or perceived overlooking. The development site is at a higher level than those residents' houses which will result in occupants feeling

⁸ Appx 1, GW Rebuttal.

⁹ Since there will be the additional of some costs to this figure before its effect on profitability can be shown.

encroached upon through the existence of windows in side elevations and balconies. This relationship breaches the Council's SPG requirements and is not capable of being ameliorated either through the provision of obscure glazing or existing tree cover and new planting. The Council's protective policies will be breached. This reason will be dealt with in the roundtable session by Ms. Thompson.

Reason 4 - effect on townscape

25. The character and appearance of the area will be harmed by this scheme. The housing development has been designed to reflect a town or city centre location, unrelated to a location adjacent to suburban housing, parkland and open space. A kinetic experience of the area, moving through the locality, will expose residents and others to a jarring, disjointed environment to the detriment of the area's character. Again, this matter will be dealt with further by Ms Thompson in the relevant roundtable session.

Housing Land supply, benefits and Planning Balance

26. As a result of the above matters, the scheme is contrary to the development plan. The development falls to be refused unless material considerations indicate otherwise.
27. There is a shortfall in housing land supply (albeit limited) and the scheme fails to comply with the housing delivery test. As a result, the tilted balance in paragraph 11 of the NPPF applies. But the weight to be given to the relevant policies which are contravened by the scheme remains significant and limited weight should be applied to the housing shortfall given its degree.
28. The benefits associated with the Club proposal are noted but should be given limited weight in the balance particularly as a scheme which is compliant with

policy (delivering affordable housing, with no amenity affects and in a way which respects the area) would be capable of being delivered (it is not suggested otherwise by the Appellant).

29. The Council will refer to the contents of the draft s. 106 obligation, but this does not overcome the issues relating to affordable housing (the review clause is only engaged if what the appellant contends is the right PoGDV figure is exceeded and a review clause could not overcome the Council's case that affordable housing etc can and should be provided now); the other measures go in the main to the community use of the Club, the benefits of which are referred to above. But there are serious deficiencies with the obligation given that the Council and Hertfordshire County Council will not be signing the obligation as higher interest holders.
30. Returning to the tilted balance, the Council says it is obvious that the harm in this case significantly and demonstrably outweighs the benefits of the scheme when assessed against the policies of the NPPF taken as a whole.
31. For all of the above reasons, it follows that the proposal should be refused and the appeal dismissed.

MATTHEW REED Q.C.

Landmark Chambers,
180 Fleet Street,
London,
EC4A 2HG.

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