

Our Ref: AW/CF/CANNON HILL NEIGHBOURHOOD FORUM/01312-001

Your Ref:

19 October 2009

FAO: John Culligan
Assistant Director of Planning
Planning and Regeneration
Birmingham City Council
Alpha Tower
PO Box 28 Suffolk Street
Birmingham B1 1TU

Dear Sirs

**RE: Land at Edgbaston Road, 308-330 Pershore Road, and off Constance Road,
Warwickshire County Cricket Club, Edgbaston, B5 7QU
Ref. No.: S/05827/08/OUT**

We are instructed by the Cannon Hill Neighbourhood Forum in connection with the above matter. We have considered your decision of 4 September 2009 to grant outline planning permission and take the view that it is unlawful. Accordingly we are instructed to make an application for judicial review to seek an order from the Administrative Court quashing the decision. This letter is drafted in accordance with the judicial review pre-action protocol.

The Claimant

Cannon Hill Neighbourhood Forum

Reference Details

As above

The details of the matter being challenged

The decision of the Council's Planning Committee of 4 September 2009 to grant outline planning permission to allow development at land at Edgbaston Road, 308-330 Pershore Road, and off Constance Road, Warwickshire County Cricket Club, Edgbaston, B5 7QU.

The Issues

Background

We do not intend in this letter to release the background to this matter which is well known to the Council. The details are set out in your officer's reports to the Planning Committee of 8 January 2009 and 2 April 2009.

Legal Submissions

Environmental Impact Assessment

1. The Council's screening opinion of 16 January 2009 (which concluded that EIA was not necessary) was flawed for the following reasons:
 - a. There is a misdirection in relation to the floodlighting proposal where it is said that its impact is "*a matter of amenity and character, not environmental impact*". It is submitted that an effect on amenity is capable of being an environmental impact and that the planning officer's distinction was wrong in law.
 - b. That at a number of points in the opinion reliance is placed on reports which were to be produced in the future. It is submitted that insufficient information was available at the time of the opinion to support its conclusions.
 - c. That in view of the size of the development guidance indicates that EIA would generally be required. It is submitted that in light of this greater explanation was required as to why the officer considered it appropriate to depart from the guidance and why the effects of the development were not considered significant.
2. In the Council's committee report of 2 April 2009 (page 30) the screening opinion is relied upon.

Floodlighting

3. In light of the Council's committee report of 2 April 2009, we submit that the decision is also unlawful as a result of the way the way in which the floodlighting proposal has been approached. We refer to the planning appeal decision of 17 August 2000 in relation to the earlier application by the club to erect floodlights at the ground. While we accept that this decision cannot be determinative and that it was necessary for the Council to consider the new application afresh, we submit that it is nevertheless the case however that the Authority are required to have regard to the earlier decision to satisfy themselves that the reasons previously given for refusal had been addressed satisfactorily by the developer.
4. The issue of the floodlighting is addressed by the planning officer in his issues report of 8 January 2009. At page 10 of this report the officer writes:

"The dismissed floodlighting appeal proposed for floodlight units of 52m height to the top of the lamp headframe. The headframes measured 11.5m tall by 5.5m wide and contained 120 lamps. By comparison, the five floodlighting units now propose measure 50m and 49m at their highest point, with headframes of 10m tall by 8m wide, and 8m by 6.4m. There would be 95 or 52 lamps. The overall headframe would appear to be reasonably visually permeable, whilst the refused scheme had lamps more tightly grouped together in a solid bank. The refused scheme was utilitarian in design, with straight columns and a rectangular lighting bank. The proposed scheme has been subject to aesthetic design in addition to the functional requirements, with the cranked columns and 'e' shaped lamp arrangements.

The Inspector dismissed the appeal due to the effects of the large structures on the character and appearance of the area, and on residential amenity.

Apart from the dimensional and design changes to the floodlights compared to their appeal scheme, the second principle factor to consider with respect to the Inspector's conclusion on local character and appearance is how that local character has changed, and could change. Areas of 'no change' immediately around the cricket club lie mostly to the north: Hunter Court student accommodation and all the family housing to the north and north east. The indoor cricket school was under construction/nearly completed at the time of the appeal decision. The twenty-storey Wickets Tower is close to the west, and the twenty-storey Century Tower is slightly further to the west.

A significant change to local character, however, has occurred at Edgbaston Mill, where former playing fields and other non-developed land has planning consent for a mixed use development which is part completed with the Hemisphere flatted development. This provides the first important change in local characters since the appeal decision. Secondly are the application proposals themselves – the proposed new stand, and the mixed-use development adjacent. Should planning consent be granted for these developments the proposed floodlights would be seen within a significantly more intensive built context than existing today.”

5. The problem in our submission is that having identified the issues, the planning officer did not, in advising the members, correctly address these points.
6. As the planning officer says the planning Inspector refused the floodlight development first time round for two reasons. First, because of its impact on the character and appearance of the area. Secondly, because of its effect on local amenity.
7. In dealing with the first issue the Inspector accepted that the proposed floodlights would have a significant visual impact:
 - a. within the ground; and
 - b. outside the ground.
8. In respect of the impact in the ground the Inspector held that the existing ground had “*an intimacy of scale*”. He held that the height of the proposed floodlights, including their substantial light arrays would dominate the ground, be out of character and add a visually discordant and intrusive element. Accordingly, the Inspector concluded that the floodlights would not represent a high quality improvement to the county ground.
9. With respect to the effect outside of the ground the Inspector held that the floodlights would be in close proximity to residential areas and would be intrusive and discordant. He also held that the lights would be unacceptably intrusive to the nearby Cannon Hill Park. The Inspector concluded that while the floodlights' impact would vary according to the angle of presentation of the light array “*I came to the clear view that the height of the lights would intrude upon what I consider, in this large city, to be a sylvan urban landscape*”.
10. In summary the Inspector found that having regard to the character and appearance of the local area that the development would cause substantial harm and would conflict with both the development plan and national planning guidance.
11. In addressing the second main issue – the effect of the floodlights on local amenity - the Inspector broke down this issue into the elements:

- a. dominating visual impact
- b. light intrusion
- c. noise and disturbance

12. With respect to visual impact the Inspector found that the proximity of the floodlights to residential dwellings would be “*unacceptably dominating for local residents*” and that “*many houses would become substantially less pleasant places in which to live*”

13. With respect to light intrusion the Inspector found that this issue was neutral.

14. With respect to noise and disturbance the Inspector broke this down into two further elements:

- i) the moving of vehicles, starting of car engines and slamming of car doors; and
- ii) the noise disturbance arising from the ground from the progress of play

15. As to these the Inspector concluded that notwithstanding conditions which could be imposed to ameliorate noise, there would be a substantial diminution in the quality of the residential environment.

16. Overall the Inspector concluded with regard to local amenity, that floodlights would result in substantial harm to the living conditions of nearby residents in terms of dominating visual impact and noise and disturbance and would conflict with both the development plan and national planning guidance.

17. It is submitted that the officer’s report of 2 April 2009, and thus the reports of 14 May 2009, do not engage fully with the Inspector’s reasons of 2000 for refusing to allow floodlighting development at the ground.

18. The officer deals with the permanent floodlights at pages 20 to 23 of his 2 April report. Unlike the planning Inspector the issues are broken down into the following headings:

- Scale and appearance
- Illumination
- Evening noise

Scale and Appearance

19. The officer notes that the new development proposes five floodlight as opposed to four in the 2000 appeal. The new lighting columns are slightly lower than those previously opposed but, the officer notes, the most significant differences are the design of the columns and the headframes. The columns are designed to pivot away from the edge of the ground towards the centre. The headframes are smaller and due to the number of lights contained within them are considered to be more ‘permeable’, less intrusive and aesthetically more pleasing. Having regard to this the officer concludes that:-

“the current proposals have been designed with technical requirements and aesthetics to the fore, resulting in a lighter upper structure sited further away from local residents and the general wider area. As such, I consider the current proposals an improvement upon the dismissed appeal with lesser impact upon local amenity”.

20. This does not address fully the issues raised by the planning Inspector in 2000. As will be noted the officer's conclusions as set out above relate only to local amenity. The officer does not go on to address the character and appearance of the area. As to this it will be recalled that the planning Inspector considered that there were two issues arising: the impact on the ground and the impact on the surrounding area. With respect to both he concluded that the development would result in a reduction in environmental quality causing substantial harm to the character and appearance of the area.

21. The importance of the above is recognised in the issues report of 8 January 2009. There the officer clearly identifies the issue:

“Apart from the dimensional and design changes to the floodlights compared to the appeal scheme, the second principal factor to consider with respect to the Inspector's conclusion on local character and appearance, is how that local character has changed and could change” [Page 10, final paragraph].

22. The officer then goes on to explain that it may be contended that there has been a change to local character through the emergence of other development in the vicinity principally at Edgbaston Mill.

23. The purpose of the issues report however is only to raise issues. No conclusions are reached. The purpose of the officer's report of 2 April 2009 (and those which follow it) on the other hand is to advise members and to set out the officer's conclusions about the issues. It is submitted that with respect to character and amenity he does not do this.

24. It is submitted that the issue cannot be considered to be implicit in the 2 April 2009 report. It is not, in our view, self evident that changes to local character are sufficient to outweigh the harm to the character and appearance of the local area which this development would cause. The officer recognises in his report of 8 January 2009 that there are significant areas of 'no change' around the cricket club (the family housing to the North and North East). Accordingly it is submitted that even if members had been advised properly it was still necessary for them to weigh up and reach a conclusion about whether changes to the surrounding local conflict with the development plan. As far as can be ascertained from the officer's report and the minutes they simply did not do this.

25. In summary we submit that having regard to the Inspector's findings in 2000 members failed to address character and appearance and to articulate why they had reached a different conclusion to that of the Inspector.

Illumination

26. In his report of 2 April 2009 the officer correctly states that the Inspector concluded that this was a neutral issue on the basis that the light nuisance to the surrounding residents could be balanced against the improvement which would result by the installation of permanent floodlights (as against the continuing use of temporary floodlights). The officer states that notwithstanding the Inspector's earlier conclusion it is necessary to address this issue again. As to this the officer relies upon the evidence of the Council's lighting consultant.

27. The consultant appears to have concluded:

- a) that some of the light Institute of Lighting Engineers (ILE) guidance limits for light spillage (as set out in the Council's supplementary planning guidance) will not be met;
- b) that the proposed new design would reduce spill compared to the development which was dismissed in the appeal of 2000.
- c) that residential properties in the proposed outline development with windows facing the stadium will almost certainly experience light levels in excess of those recommended.
- d) that alternative floodlighting proposals would not necessarily be more harmful.

28. In the concluding paragraph of this section of the officer's report he states:

"in summary your lighting consultant and regulatory services consider the floodlighting can be approved".

29. Having regard to the lighting consultant's report however the officer's statement does not accord with its conclusions. The expert does not state in terms that the floodlighting development can be approved. This, it is submitted, was a matter for members to decide having regard to the impact of the development on the surrounding community. As above, it is submitted that it was necessary for members to weigh up the issues having first been properly advised by the officer. It is submitted that this did not occur.

Evening Noise

30. With respect to noise the Inspector considered that there were two elements:

- a) the noise of parking vehicles, associated manoeuvring, starting of engines, slamming of car doors etc; and
- b) the noise from within the ground itself during the progress of play.

31. In his report of 2 April 2009 the planning officer concludes that improved strategies for controlling parking would result in a reduction in the noise associated with vehicular movement.

32. With respect to the second issue the officer refers to the developer's noise consultants and notes that having regard to the extra crowd capacity in the new stands noise from within the ground would increase (albeit marginally).

33. From these findings the planning officer states:

"Therefore, I am satisfied that the Inspector's second area of concern resulting from floodlighting can also be satisfactorily addressed, and the regulatory services concur".

34. It is submitted that the officer's conclusion does not follow from his findings. The Planning Inspector's conclusion was that having regard to the increased levels of noise arising from the extended use of the ground there would be a substantial diminution in the quality of the residential environment. He took account of undertakings proposed by the developers to attenuate noise but said:

"my balance of judgment is that it would not outweigh the harm identified".

35. In the present report it is found that there would be a reduction in noise as a result of changes to parking control but that there would be an increase in noise as a result of the increase in the capacity of the grounds.

36. It follows that it was necessary for members to weigh these changes against each other and reach a conclusion about whether noise disturbance would, overall, increase or decrease. Even if the officer had concluded that noise would decrease, it was still then necessary for members to reach a conclusion about whether this level of harm would still result in such a substantial reduction in the quality of residential environment as to indicate for refusal. It is submitted that they did not do this.

37. In summary it is submitted that it was not simply enough for members to conclude that the noise position would be improved. They needed to find that the improvement was sufficient to outweigh the harm identified by the Planning Inspector. In considering this it was relevant that the Inspector's findings about noise within the ground were not solely related to the noise from music and announcements via the tannoy system which the officer said could be controlled¹.

The details of the action that the Defendant is expected to take

The Defendant is functus. The Defendant is asked to indicate whether it is prepared to consent to an order quashing the decision under challenge.

The details of the legal advisors, if any, dealing with this claim

Public Law Solicitors.

The details of any information sought

The Defendant is asked to provide any information which would indicate how the matters raised in this letter were taken into account.

The details of any documents that are considered relevant and necessary

The Defendant is asked to provide copies of any letters, emails, notes, minutes, memoranda or reports relevant to this decision which go to the issues raised in this letter. In particular the Defendant is asked for any documentation in which its lighting consultant indicated that the development could be approved.

¹ In his Appeal Decision the Inspector, on the basis of evidence from the City Council, appears to have concluded that noise could not be controlled (see para 32).

The address for reply and service of court documents

As per our letterhead above.

Proposed reply date

Monday 2 November 2009.

Yours faithfully

Public Law Solicitors