



Costs Report to the Secretary of State for Housing, Communities and Local Government

By Frances Mahoney MRTPI IHBC

an Inspector appointed by the Secretary of State for Housing, Communities and Local Government

Date: 14 May 2021

TOWN AND COUNTRY PLANNING ACT 1990

APPEAL BY THE KEEPERS AND GOVERNORS OF THE FREE GRAMMAR
SCHOOL OF JOHN LYON (HARROW SCHOOL)

MAYOR OF LONDON (DIRECTION)

Inquiry commenced on 30 April to 16 May 2019

Harrow School, 5 High Street, Harrow, HA1 3HP

File Ref: APP/M5450/W/18/3208434

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- The application is made under the Town and Country Planning Act 1990, sections 78 and 320, and the Local Government Act 1972, section 250(5).
- The application is made by The Keepers and Governors of the Free Grammar School of John Lyon (herein Harrow School) for a full/partial award of costs against the Mayor of London (the Mayor).
- The Inquiry was in connection with an appeal against the refusal of planning permission for demolition of existing buildings: existing sports building, Peel House, Museum Cottage, gardeners compound, Boyer Webb pavilion, pavilion next to the athletics track; construction of new sports building over 3 levels (7269 sqm); new science building over 3 levels (3675 sqm); new landscaping core from existing Chapel Terrace to the athletics track at the base of hill; new visitors car parking on Football Lane adjacent to maths and physics school buildings; rerouting and regrading of private access road; alterations to landscaping and servicing for dining hall; relocation of multi-use games area for Moretons boarding house to south west of dining hall (Updated Metropolitan Open Land Approach Statement and Revised Community Uses Agreement submitted).

Summary of Recommendation: The application for a full award of costs should be dismissed but the application for a partial award of costs should be granted.

Preliminary matters

1. This application for costs is connected to the above appeal against the decision of the London Borough of Harrow Council (LBH) (under direction from the Mayor of London (The Mayor)) to refuse an application for planning permission as described above.
2. The appeal was recovered on the 9 October 2018 under Section 79 and paragraph 3 of Schedule 6 of the above Act by the Secretary of State, because the appeal relates to development in Metropolitan Open Land (MOL), to which London Plan Policy 7.17 affords the same level of protection as Green Belt. As there is no recovery criterion applicable directly to MOL the appeal was recovered due to those particular circumstances.
3. The appeal was heard by way of an Inquiry held by another Inspector on 30 April to 16 May 2019. Subsequently an Inspector's Report (IR) was submitted to the Secretary of State for determination and the appeal was allowed on the 31 October 2019.
4. The Mayor then challenged that decision along with the decision on the accompanying application for costs¹. The Hon Mr Justice Holgate sitting as a Judge of the High Court roundly rejected the challenge to the decision of the Secretary of State to grant planning permission², a decision which stands. However, in respect of the challenge to the Costs decision, the Judge concluded that the decision was fundamentally flawed, there being 'yawning gaps' in the reasoning within the Inspector's Costs Report (ICR) upon which the Secretary of State had relied. The internal contradictions and legal errors in the ICR were fundamental to the recommendation that a 'full award' of costs be made and the Secretary of State's decision to accept that conclusion. As a result, the decision of the Secretary of State on Costs was quashed³. The consideration of the application for a full award of costs made by Harrow School against the Mayor was remitted to the Secretary of State for re-consideration and determination.
5. As a result, this costs application case has now fallen to me to consider and recommend a decision to the Secretary of State. Both parties submitted full statements of application⁴ and response⁵ at the time of the Inquiry. Following the quashing of the Costs Decision further representations from both the applicant⁶ and the Mayor⁷ were submitted. I have based my recommendation on

¹ Report Doc 1 - Neutral Citation Number: [2020] EWHC 1176 (Admin), Case No: CO/4849/2019 & CO/4851/2019 – handed down on the 12 May 2020.

² I do not intend to go into the grounds of challenge nor the Judge's conclusions in respect of the outcome of the failed challenge to the Secretary of State's decision to grant planning permission for the appeal proposal. These are matters which do not go to the heart of the re-determination of the costs application before me.

³ Report Doc 1 - relevant paragraphs 136 – 170.

⁴ Report Doc 2.

⁵ Report Doc 3.

⁶ Report Docs 5, 6 & 8.

⁷ Report Docs 4 & 7.

that submitted evidence, which does cross reference through to the evidential sources of the allowed appeal decision, which is not in question.

6. I did not consider it necessary to re-hear the arguments in respect of this costs application which can be dealt with by written representations⁸. There is no need to test the evidence further and both parties have already submitted considerable written response. Therefore, dealing with this matter by means of written representation is a proportionate and fair means of re-determining the costs application.
7. The applicant initially made an application for a full award of costs. Following the quashing of that decision the applicant has amended the application to include a partial award should the Secretary of State be so minded. Both parties in their recent written submissions have considered directly or indirectly the option of a partial award. Therefore, I consider it reasonable to take this promoted amendment forward in the consideration of this costs application.
8. I have also considered the observations made by the Judge in his approved judgement which, whilst being made in passing, were to assist in promoting future good practice⁹. These have been reflected upon and accepted within the shortcomings of the now quashed Costs Decision.
9. The case for the applicant alleging unreasonable behaviour is set out below followed by the response from the Mayor.

Cost application on behalf of Harrow School¹⁰

The submissions of the applicant¹¹

10. This is an application for a full award of costs and, in the alternative, for a partial award on the basis the Mayor's refusal of planning permission was unreasonable behaviour which has caused the applicant to incur unnecessary or wasted expense in the appeal process¹².

- Ground 1¹³

11. Unreasonable behaviour includes unreasonably preventing development which should have been permitted, having regard to the development plan, national policy and other material considerations. Planning permission was refused on the basis of the Direction of the Mayor¹⁴. The power of direction is a two-stage process. It is deliberately sequential. It is for the Mayor to declare his position and make a decision as to strategic conformity at Stage 1, if necessary by seeking further information in order to do so, then to make a decision at Stage 2

⁸ Planning Inspectorate Procedural Guide (July 2020).

⁹ Report Doc 1 - relevant paras 163 – 168.

¹⁰ The applicant.

¹¹ Based on Report Docs 2, 5, 6 & 8.

¹² Planning Practice Guidance (PPG) Ref: 16-030-20140306).

¹³ See paras 6.40-6.47 of the appellant's Statement of Case Report Doc 9.

¹⁴ London Borough of Harrow (LBH) had resolved to grant permission for the proposal subject to conditions.

based upon and consistent with his decision at Stage 1. The process was not intended to give the Mayor two opportunities to object to a planning application, or an opportunity merely to reconsider his decision made at Stage 1.

12. The Mayor must as a matter of law be consistent in his decision making and cannot alter his decision merely because he changes his mind on an application from one of support and acceptance at Stage 1 to one of objection and refusal at Stage 2. It cannot be based upon political reasons as opposed to planning ones. There must be a material change of planning circumstances for him to change his mind at Stage 2. It cannot be based on matters which he ascertained at Stage 1 but wished to reconsider at Stage 2.
13. In the case here, there were no material changes in circumstances between Stage 1 and Stage 2. The Mayor sought to change his mind on factors which he considered at Stage 1 but sought to reopen at Stage 2. This he was not entitled to do. Once his Stage 1 decision had been issued, he was bound by it and his Stage 2 decision had to be consistent with it. Here it was not consistent, no material change in circumstances existed and on the facts of the case and in law he is bound by his Stage 1 decision. His Stage 2 decision was therefore made in error of law and in consequence carries no weight.
14. So if the Secretary of State agrees that the Mayor was in error of law and so the Direction of Refusal was unlawfully made, then the resolution of the LBH to grant planning permission should have prevailed making the appeal unnecessary.

- *Ground 2*¹⁵

15. The Mayoral decision also failed to follow established case-law on alternatives, gave unreasonable reasons for reducing the weight to the extension of MOL and failed to take into account and give due weight to the accordance of the scheme with the adopted Harrow School SPD 2015 (SPD).
16. The Direction to refuse planning permission was heavily reliant upon there being a purported alternative scheme¹⁶ on the site of the existing sports centre which was relied upon to weigh against the case for the Harrow School in respect of¹⁷:
 - harm to openness¹⁸,
 - harm to heritage assets¹⁹,
 - to discount the material considerations of the Harrow School need²⁰, and
 - to discount the benefit of the community use²¹.
17. This approach was unreasonable and proceeded wrongly on the basis that alternative sites fell to be considered as a matter of law but then went on to

¹⁵ Para 10-26 of Report Doc 2.

¹⁶ This alternative scheme included a much reduced footprint on the site of the existing sports centre - Report Doc 11 Stage 2 report – paras 38, 51, 53 – Report Doc 2 para 20.

¹⁷ Report Doc 11.

¹⁸ Para 51 Report Doc 11.

¹⁹ Para 53 Report Doc 11.

²⁰ Para 58 Report Doc 11.

²¹ Para 59 Report Doc 11.

weigh the existence of a preferred alternative multiple times. It was used to increase harm to openness and heritage assets and decrease the weight to be given to need and community use²². The terms of the reason for refusal refer to 'location' and 'footprint' and from the pre-direction discussions between the Greater London Authority (GLA) officers and the appellant it was clear the Mayoral view was that the proposed sports building was unacceptable on its proposed site and must be located on the site of the existing sports centre with a reduced footprint²³. The alternatives presented to the Mayor included a reduced footprint and a consequential stacking of functions resulting in a taller building. The Stage 2 letter refers to the need for stacking²⁴ but these were not features taken forward by the Mayor in evidence to the Inquiry²⁵.

18. In respect of the alternative options promoted by the Mayor, none of which included a reduced footprint or stacking, these were introduced late in the process, paid little attention to site constraints and could not reasonably be taken into account as realistic and viable alternatives. There was no submitted evidence to the Inquiry that, were he to be the appropriate planning authority to determine the planning application, and this is a matter in dispute, that he would have been minded to grant permission for any or all of his concept options. This in itself should justify a partial award of costs. However, if the Mayor relied upon an alternative²⁶ in directing refusal of the scheme then this should lead to a full award of costs as it underpinned the refusal and necessitated the appeal and all costs which flow from that.
19. The Stage 2 Direction Letter²⁷ set out the Mayor's thinking that the heritage designations meant that the MOL area was 'unlikely to be developable irrespective of whether this land would become designated as MOL or not'. Using this reasoning to discount the weight to be given to the MOL extension is unreasonable. It fails to recognise that different policies apply to development within the setting of heritage assets from development within MOL. Also, the Mayor did not object to the proposed Science building, a substantial building in the conservation area and one of his promoted alternative options for the sports building was also within the same conservation area. This presents itself as illogical and unreasonable thinking.
20. Finally on this ground the Mayor's Direction of refusal failed to apply and give appropriate weight to a significant material consideration which was the accordance of the proposal with the SPD. It was mentioned in the Stage 2 Letter and Report but it was not applied and given appropriate weight. The appeal scheme seeks to site both the sports and science buildings exactly where they were proposed in the SPD. This weighs heavily in favour of the scheme and the failure to take this into account was unreasonable.

²² Very Special Circumstances Report Doc 11 paras 37, 38, 51, 53, 58 and 59.

²³ Report Doc 12.

²⁴ Report Doc 11 para 38.

²⁵ The landscape witness for the Mayor said in cross-examination he would not have been able to support a taller building than those proposed as alternatives, nor to the principle of stacking.

²⁶ The alternative in the Mayoral view was for the proposed new sports building to be situated on the site of the existing sports hall and with a much-reduced footprint.

²⁷ Report Doc 11 para 35.

- *Ground 3*

21. The Mayoral case at the Inquiry did not substantiate its reason for refusal²⁸ but pursued a different case to the one identified in those reasons, the Stage 2 letter and report and the Statement of Case²⁹.
22. The reason for refusal centred on the harm to the openness of the MOL by reason of its excessive footprint and its location. The listed offended policies both local and national did not include any policies which dealt specifically with heritage matters. The case run by the Mayor at the Inquiry went beyond the terms of the directed reason for refusal³⁰.
23. Location and footprint were the two offending elements which the Mayor initially (pre-appeal) identified to be remedied. At the Inquiry this was expanded to include such matters as height, volume, depth and scale which are different parameters to those initially identified. Essentially the Mayor ran a landscape and visual impact case, including harm to users of public footpaths, against the scheme which was not mentioned in the reason for refusal or the Stage 2 letter and report. There was also the introduction of a heritage case against the proposal with an allegation of an upper end level of harm on the sliding scale of less than substantial heritage harm³¹. The Stage 2 Report set out that the public benefits of the community use agreement alone are sufficient to outweigh the less than substantial harm to heritage assets and so did not warrant a reason for refusal. Further, in the Mayor's opening statement to the Inquiry it was alleged that the benefit of community use should be downplayed as a result of the School's charitable status. This was a surprise to the appellant as was the downplaying of the School's need on the basis that it was simply the need of a particular landowner³².
24. The Mayor was acting unreasonably in pursuing a materially different case in evidence, cross-examination and submission.

- *Ground 4*

25. This is a scheme which in light of the material considerations which include undisputed educational and boarding school need, undisputed community need, the community use agreement, the MOL extension, the SPD and various policies encouraging the development of school and sports facilities, ought clearly to have been permitted.
26. The case for an award of costs whether full or partial solely based on how the Mayor treated the issue of alternatives is overwhelming. This is on procedural

²⁸ Report Doc 13.

²⁹ Report Doc 15.

³⁰ In accordance with Article 35 of the Town and Country Planning (Development Management Procedure) Order 2015 reasons must be clear, precise and full specifying all policies in the development plan relevant to the decision.

³¹ National Planning Policy Framework (The Framework) para 196.

³² Report Doc 14 para 24.

grounds of unreasonable behaviour (introducing significant new evidence in proofs of evidence without giving notice – wholly different to the Mayor's case in the direction for refusal and accompanying letter, wholly different to the Mayor's Statement of Case which referred to a single alternative on the site of the existing Sports Building, and with no communication or warning given in advance to the appellant before exchange of proofs).

27. The wasted costs incurred by Harrow School included the costs of the appellant's consultants and legal team working many extra hours, including over a weekend, in order to prepare rebuttal evidence and seeking to avoid an adjournment of the Inquiry, having regard to the fact that the 8 day Inquiry had been timetabled many months previously to suit diaries and Inspector availability, with a Rule 6 Party involved.

Response of the Mayor of London³³

- Lack of promptness of application

28. Harrow School did indicate in its opening statement to the Inquiry that it intended to make a full application for costs and this was the first mention of their intention. The actual application was finally received after the Inquiry had completed seven days of sitting. The PPG provides that 'where circumstances allow' costs applications should be made in writing before the Inquiry³⁴; 'circumstances' most certainly did 'allow' the appellant to have made this application for costs before the start of the Inquiry. The PPG is provided with the intention of ensuring that any application for costs is made in a timely manner and at the earliest possible stage, in order that the Inspector and the party against whom that application is made is given proper notice of that intended course and has a fair and reasonable opportunity to consider the application and to respond to it. The appellant's failure to respect or to adhere to these basic and well-established elements of the PPG, and to have failed to have made its costs application in a timely manner, is regrettable, and led to much wasted time during the sitting period of the Inquiry and put the Mayor at a disadvantage.
29. Further the appellant's Statement of Case³⁵ in alleging that the Mayor acted unlawfully in shifting his position between the time of the Stage 1 and Stage 2 Reports, is a misconceived position in fact and law and makes no reference to any intended application for costs. Given that this point was clear to the appellant at the time that its Statement of Case was submitted, there was no excuse whatsoever for the appellant's failure to formulate and declare an intention and grounds for an application for costs.
30. In respect of Grounds 2-4, the appellant contends that these are grounds which arose during the course of the Inquiry and through the Mayor's witnesses' evidence. All of the points complained of as giving rise to unreasonable behaviour on the part of the Mayor were points which were raised as part of the

³³ Report Docs 3, 4 & 7.

³⁴ PPG Reference ID: 16-035-20161210.

³⁵ Report Doc 9.

Mayor's reason for refusal at Stage 2, in the Mayor's Statement of Case and in the written evidence of the Mayor's professional witnesses.

31. Therefore, there is no justification, which can excuse the delay in the appellant's application for costs, which came two thirds of the way through the Inquiry. The actions of the appellant in this regard were also unreasonable. This of itself should be a sufficient reason for the Secretary of State, in the exercise of his discretion, to reject the application.

- *General observations*

32. The Mayor should only be the subject of a full or other award of costs if he has acted unreasonably in refusing planning permission thereby triggering the appeal or otherwise in his conduct during or in the lead up to this appeal. Before considering this response further it is informative to consider the substance of the Mayor's basis for directing refusal of planning permission, and the extent that there is common ground between the Mayor and the appellant in that:

- the proposed development includes, through the intended new sports building, inappropriate development in MOL³⁶;
- the proposed new sports building would cause harm to the openness of MOL. The Appellant agrees³⁷;
- the proposed new sports building causes harm to MOL purposes; the Appellant agrees³⁸;
- these elements of harm attract substantial weight³⁹;
- planning permission may only be granted for the proposed development if other considerations clearly outweigh MOL and other harm, so as to give rise to very special circumstances; and
- the needs of Harrow School for replacement and additional indoor sports facilities and the increased commitment to allow community use do not, themselves, generate very special circumstances⁴⁰.

33. The only element of disagreement is that the appellant considers that, cumulatively, a range of relevant considerations, including in particular, the land swap, amount to very special circumstances and the Mayor disagrees. This ultimately, however, is a matter of planning judgement for the Secretary of State.

34. The Mayor, as advised by his officers, concluded that the development constituted inappropriate development in MOL that was harmful, and that the

³⁶ Report Doc 16 para 5.1.6.

³⁷ Report Doc 16 para 5.1.6.

³⁸ Report Doc 16 para 5.1.7.

³⁹ Report Doc 16 para 5.1.7.

⁴⁰ Core Docs - APP-D-0203 p.27; APP-E-0105 Planning Statement paras. 5.9-5.10.

harm generated was not clearly outweighed by other considerations. The Secretary of State striking the MOL policy balance differently to the Mayor, reaching a different overall conclusion, does not render the Mayor's decision unreasonable. The Mayor exercised his functions entirely reasonably and cannot be criticised in this regard.

- *Ground 1 - the Mayor's Stage 2 decision and reason for refusal was unreasonable in light of the Mayor's Stage 1 Report having regard to the Mayoral Order 2008*

35. This demonstrates a fundamental misunderstanding of the decision-making process undertaken by the Mayor under the Town and Country Planning (Mayor of London) Order (The Order'). A planning application of potential strategic importance must be referred to the Mayor, by a London Borough. Under Article 4 of the Order, the Borough is required to notify the Mayor of the application as soon as reasonably practicable after it was made, following which the Mayor has 6 weeks to provide the local planning authority with a statement setting out whether he considers that the application complies with the London Plan, and his reasons for taking that view⁴¹. If the local planning authority is minded to allow the proposal the application must then be referred to the Mayor at Stage 2, at which point, the Mayor is required to make a decision as to whether to intervene in respect of the application, including by directing refusal of planning permission in exercise of his power under Article 6 of the Order. Stages 1 and 2 are distinct processes.
36. The appellant has failed to understand the distinction suggesting the Mayor is bound by the Stage 1 statement when making the decision at Stage 2. Such an approach would fetter the discretion of the Mayor acting in an unlawful context. At Stage 2, when all relevant information is available, there is required to be a self-standing and holistic consideration of the proposed development against the London Plan and in the context of the decision which the Mayor is required to take then in terms of the exercise of his powers of intervention (Article 6 of the Order). When considered in its proper context, the Mayor's Stage 2 decision was one which was open to him.
37. The Mayor was given, and accepted, professional advice at Stage 2 concerning impact on MOL, which included a different conclusion as to the impact on MOL to that expressed by officers when giving the Stage 1 Statement. Officers were entitled at Stage 2 to give that advice and the Mayor was entitled to accept it.
38. The Stage 1 Statement⁴² set out that whilst the Mayor considered the application is generally acceptable in strategic planning terms, the application does not fully comply with the London Plan⁴³. It also required that the application would need

⁴¹ Art. 4(2) Stage 1 Report – the Mayor directed that he would need to be consulted again under Art 5 of the 2008 Order if the Local Planning Authority decided to grant planning permission.

⁴² Report Doc 10 – issued on 27 June 2016.

⁴³ Report Doc 10 para 86.

to be referred back to the Mayor if the Council resolved to grant permission⁴⁴ and that the Stage 1 report was a statement rather than a decision⁴⁵.

39. The report also clarified that there is no obligation at this present stage for the Mayor to indicate his intentions regarding a possible direction, and no such decision should be inferred from the Mayor's statement and comments⁴⁶, thus clarifying how the referral is intended to work. The Stage 1 report is not a decision but an advisory statement, given at the early stage of the application process which may be subject to change before and at Stage 2.
40. Between the 15 months from the Stage 1 statement to Stage 2 decision the Mayor was provided with additional information which included revised drawings, updating reports, views of statutory consultees, Stage 2 briefing pack⁴⁷, the Planning Committee report and resolution to grant planning permission and the outcomes of the four workshops attended by the Mayor's officers and the appellant's consultants⁴⁸. All of this had to be considered in making the Stage 2 decision. This new information was relevant to the assessment of MOL impact and affected the overall planning balance and the weight to be given to the need for a new sports hall in the proposed location at Stage 2. This additional information constituted a material change in planning circumstances which justified a change of mind for the then decision-maker at Stage 2. Importantly, the Mayor's decision to direct refusal was consistent with the advice and recommendation he received from his professional officers, as set out in the Stage 2 Report⁴⁹. The Mayor's approach in arriving at his Stage 2 decision was thus perfectly reasonable.
- *Ground 2 - the Mayor acted unreasonably in taking into account a purported alternative that cannot lawfully form the basis for refusing permission, giving reduced weight to the MOL extension, and failing to take into account the Scheme's conformity with the Harrow School SPD.*
 - *Alternative sites*
41. The appellant, throughout the planning decision-making process, provided evidence to the Mayor and the LBH on alternative site options in support of its case on very special circumstances to demonstrate and champion that it is both necessary and operationally preferable for the proposed new sports building to be located on the appeal site in question. The appellant's planning witness in cross-examination at the Inquiry also accepted that the availability or otherwise of alternative sites for the proposed sports building development was a material consideration. It was no surprise to the appellant that alternative locations and

⁴⁴ Report Doc 10 para 3 - Pursuant to article 5 (2) of the 2008 Order it was open to the Mayor in this case to notify the local planning authority that he did not wish to be re-consulted on the application under Article 5. Instead he specifically directed the LBH in his Stage 1 Report that it had to consult the Mayor again in the event that it decided to grant permission.

⁴⁵ Report Doc 10 para 1.

⁴⁶ Report Doc 10 para 84.

⁴⁷ Including an options analysis which explored the potential to locate the new sports building on the site of the existing sports hall.

⁴⁸ A full list is detailed at Report Doc 3 para 31.

⁴⁹ Report Doc 11.

forms of development should be further considered as this was referred to in the Mayor's Stage 2 report⁵⁰. Also within the Statement of Common Ground⁵¹, agreed between the main parties, the robustness of the alternative site selection exercise and discounting of other potential suitable sites within the School's ownership that could result in less harm to MOL, was identified as a matter in dispute. It was reasonable to introduce evidence of alternatives in these circumstances.

42. It is common ground that the appellant's proposal for a new sports building would result in substantial MOL policy conflict and harm to openness⁵². That notwithstanding, the case of the appellant is that there is a clear need for a new sports building in this location which is capable of outweighing the harm to the MOL. In these circumstances it is relevant to consider whether alternative sites capable of meeting the school's need and resulting in a lesser degree of harm are available.
43. The Mayor accepts that the consideration of alternative sites in many cases may not be relevant to the determination of a planning application. However, in cases such as the present one where the proposed development gives rise to adverse effects, the possibility of an alternative site lacking such drawbacks necessarily itself becomes a relevant planning consideration. Moreover, where need is advanced as a basis to overcome a policy of strong restraint, alternative means of meeting that need which avoid or reduce resulting planning harm must logically become material as planning considerations to be weighed in the balance.
44. The Mayor's approach was to consider the potential availability of a less harmful alternative in the round and as a relevant consideration in the overall planning balance when considering whether the alleged need for this development was capable of outweighing the acknowledged harm⁵³. Several of the options considered by the appellant and discussed with GLA officers were not limited to the precise footprint of the existing sports building. This demonstrates that the appellant recognised that the Mayor was not seeking to confine the new development to the precise footprint of the existing sports hall.
45. The Mayor's purpose was not to design an alternative sports hall scheme for the School but to demonstrate the feasibility and availability of alternative sites which would result in less harm than the proposed scheme and against which the School's case on very special circumstances should have been considered.
46. In conclusion, the consideration of alternatives has been part of the appellant's planning case from the outset, even if the appellant's conclusion was to reject those alternatives. In that context, the Mayor was entitled to advance evidence, which challenged the robustness of the appellant's alternative options analysis and proposed three alternative, feasible site options which were relevant to the weight to be given to the appellant's case on need for a new sports building. The

⁵⁰ Report Doc 11 paras 36-38.

⁵¹ Report Doc 16.

⁵² Report Doc 16 - page 13 para 5.1.6.

⁵³ Report Doc 11 para 11.

purpose of the Mayor's evidence on alternatives was to address and contextualise the appellant's case on the need for a sports hall in this proposed location and the purported lack of alternative sites. The Mayor's case was not dependant on the existence of a suitable alternative. There is absolutely nothing unreasonable in the Mayor's approach.

- *Land swap*

47. The appellant's MOL land swap is proposed as compensation for the harm to MOL caused by the proposed sports building⁵⁴. The weight to be attached to it as a material consideration must therefore involve a comparative assessment of the impact of the proposed development on MOL openness and purposes compared to the quality and circumstances of the donor land. The Mayor's position is that the proposed donor land does not provide adequate mitigation or compensation for the harm caused by the proposal. The fact that the openness of the donor land is substantively secured by the range of policy and other constraints which apply to it is highly relevant in the assessment of weight to be attached to the land swap. Can land which is currently open and whose openness will be lost to development, be compensated for by subjecting other donor land in effect to MOL policies where the openness of that donor land is largely secured already in any event? The appellant's suggestion that the current policy and wider context of the donor land is irrelevant to the weight to be attached to the proposed land swap is not credible.

- *Inappropriate weight given to the SPD*

48. The Mayor took the Harrow School SPD into account in his decision-making. The fact that the appellant disagreed with the Mayor over the weight that should be given to the SPD in determining the appeal, is not an arguable basis for a costs application. The SPD makes clear, the acceptability of any particular land swap arrangement needs to be considered in the context of the details of the development proposed, assessed against the wider development plan policies. The planning witness of the Mayor accepted that the SPD was a material consideration to which only limited weight was to be given due to its inconsistency with the local development plan. The development specific comparative exercise required by the SPD⁵⁵ needs to be carried out, as the Mayor did. The SPD could not be determinative in respect of the acceptability of any form of sports building in the proposed location and any proposal would be required to be considered on its merits. No unreasonableness therefore arises in respect of matters of weight and planning judgement.

- *Ground 3 - the Mayor has behaved unreasonably in his interpretation of his RfR and has presented evidence which has departed from the RfR in material respects. The interpretation of evidence in answer to this ground is set out below.*

⁵⁴ Reg 122(a) of the Community Infrastructure Levy Regulations 2010.

⁵⁵ Report Doc 17– pages 27 and 37.

49. - The interpretation of the term excessive footprint in the context of the RfR, due to harm to MOL openness, should be applied sensibly and in its proper context. The appellant's case that the Mayor was unreasonable in advancing a case of harm arising through the footprint of the proposed sports building was contradictory, as the appellant accepted such harm to openness caused by the proposed development arises by reason of its footprint⁵⁶, as the Statement of Common Ground records, at para.5.1.7⁵⁷. However, the substantial harm to the openness of the MOL is not caused just by reason of the footprint but by the location of the sports building which the terms of the RfR reflects. The Mayor was entitled to consider harm to openness by reference to the full and true impact of the proposed development, including through its height, scale, mass and bulk and position. The conclusion that there would be harm to openness arising from the proposed development in this regard, was agreed with by the decision-maker.
50. - Presentation of a heritage case against the proposal. The Mayor made clear throughout that he was not advancing the impact on the significance of heritage assets as a freestanding reason for refusal. The consideration of heritage impacts came in the context of the consideration of other harm within the planning balance under the MOL policy tests. The Mayor's position was that the result of the Framework paragraph 196 balancing exercise was that the public benefits of the scheme were considered to outweigh the harm in heritage terms. It does not follow from that there would be no heritage harm which falls to be considered as other harm for the purposes of the MOL policy test.
51. - Presentation of a landscape and visual impact case. It is well-established that harm to openness has a visual dimension⁵⁸. Therefore, it was appropriate for the Mayor to have put forward evidence which addressed the proposal's impact on openness and MOL purposes in visual, as well as volumetric and spatial terms. The evidence of the Mayor's landscape witness was that the proposed building would have the same impact on openness wherever it was located in MOL and that such impact would need to be looked at in context with location being an important factor⁵⁹. The Mayor was not advancing an objection on landscape or visual impact per se.
52. - The provision of the new axial route on the eastern side of the hill and the opening up of views from the Chapel Terrace were promoted as a benefit of the appellant's scheme being both part of its transformative masterplan. The appellant argued that this benefit was capable of, or contributes to, outweighing the harm in MOL and other terms arising from the scheme. The Mayor is entitled to offer evidence which goes to the weight which the decision-maker should attach to the axial routes and other landscaping enhancements as benefits.

⁵⁶ The meaning of footprint cannot be just two-dimensional but must include the impact of the building which fills that footprint and as such imports considerations as to the scale and mass of that building. Both parties interpreted in this way.

⁵⁷ Report Doc 16 – the new sports building causes harm to the openness of MOL by reason of its siting, footprint and scale.

⁵⁸ Turner v Secretary of State [2017] 2 P.& C.R. 1.

⁵⁹ This was the evidence of the Mayor's landscape witness not as reported by the appellant in the costs application para 35.

53. - Weight to be afforded to the community use agreement. The appellant advanced the community use agreement as a significant benefit of its scheme capable of amounting to very special circumstances which clearly outweighed the harm to MOL. The Mayor was perfectly entitled to have had regard to the matters set out in determining the weight to be attached to increased community use.
54. - Weight to be given to the School's need for a new sports building. The Mayor accepted that the School required a new facility and additional indoor sports capacity. However, he did not accept that this consideration clearly outweighed the harm which the development would cause.
55. In all of the above matters, in respect of the response of the Mayor to Ground 3, he was entitled to exercise his planning judgment to determine the weight, as considerations contributing to very special circumstances, to be attached to the need case. No unreasonableness can be attributed to this approach.
- *Ground 4 - the appeal proposal ought to have been granted planning permission*
56. This is a scheme which the appellant accepted was inappropriate development and which would result in substantial harm to the openness of the MOL. That harm must be clearly outweighed by very special circumstances. Through the evidence of the Mayor to the Inquiry, the case of the appellant was shown as being incapable of substantiating such a case. The Mayor clearly substantiated his RfR.
57. The Mayor's responses to the appellant's claims of unreasonable behaviour as set out in the PPG are summarised below.
- a) - the development proposal, which was inappropriate in the MOL and caused substantial harm to openness and MOL purposes, to which significant weight must be attached, thereby giving rise to a serious conflict with development plan policy. He did not prevent or delay development which should clearly be permitted, having regard to its accordance with the development plan, national policy and any other material considerations;
- b) - the Mayor reached his decision in accordance with the professional advice and recommendation of his officers and, at the Inquiry, produced substantial evidence in support of and to substantiate his RfR;
- c) - the basis of the Mayor's objection arising from the impact of the proposed development has been clearly stated and supported by objective analysis and evidence; and
- d) - the Mayor reached his decision in accordance with relevant case law concerning in particular the relevance of alternatives for the development and in direct and proportionate response to the appellant's case.
58. None of the examples of substantive unreasonable behaviour, set out in the PPG, on which the appellant relies as its key points have been made out and therefore, a full award of costs is not justified.

Inspector's conclusions

59. At the outset the Mayor suggested that the costs application was not made in a timely fashion, the intention to apply for costs being first mentioned in the applicant's opening statement⁶⁰. However, in my experience this is not unusual. This was an Inquiry which extended over three weeks and some of the grounds included elements which emerged from the cross-examination of witnesses over the course of the Inquiry. So, it is understandable that to provide a comprehensive claim, this would not have been finalised until the latter part of the Inquiry. With the Mayor put on notice of the costs claim at the beginning of the event, and with an experienced legal/professional team defending the Mayoral decision, there was sufficient time for a response to be formulated which amounted to a full and comprehensive written response dated 15 May 2019⁶¹. Therefore, the application for costs was made in a timely fashion, giving notice to the Mayor of the pending grounds, and a full response was made before the close of the Inquiry, which would be the normal course of events. There was no disadvantage to the Mayor in respect of the timing of the submission of the application for costs. Further, following the quashing of the original costs decision both parties have had the opportunity to submit additional written representations which have been taken into account in the consideration of this application⁶².

60. The PPG⁶³ states that irrespective of the outcome of an appeal, costs may be awarded against a party who has behaved unreasonably, and this has directly caused another party to incur unnecessary or wasted expense in the appeal process.

61. I shall deal with each ground in turn as specified by the applicant.

Ground 1

62. This allegation is founded in a difference in understanding between the applicant and the Mayor of the decision-making process where Mayoral Direction imposes decisions upon Councils within his sphere of responsibility.

63. In the GLA Stage 1 Consultation Response Report⁶⁴, the Mayor makes it clear that the application does not fully comply with the London Plan. The Report is dated the 27 June 2016.

⁶⁰ Report Doc 18.

⁶¹ Report Doc 3.

⁶² Report Docs 2,3,4,5,6,7 & 8.

⁶³ Planning Practice Guidance: Appeals – ID:16.

⁶⁴ Report Doc 10.

64. This conclusion is placed in the context of the arrangements set out in Article 4 of the Town and Country Planning (Mayor of London) Order 2008 (the Order) which states that the Mayor is required to provide the local planning authority (in this case the LBH) with a statement setting out whether he considers that the planning application complies with the London Plan, and his reason for taking that view (Stage 1 Consultation Response Report⁶⁵). This the Mayor did. The Stage 1 Report indicated that the application was broadly acceptable in strategic planning terms, but on balance did not fully comply with the London Plan⁶⁶. The Report did go on to indicate that specified changes 'might' remedy the identified deficiencies and could possibly lead to the application becoming fully compliant with the London Plan. In a plain reading of the Mayor's Stage 1 Report it did not say the specified changes would lead to full compliance with the London Plan, just that they might. This indicates further consideration of the application would be required in the circumstances of the submission of additional explanatory submissions in relation to the scheme.
65. The Stage 1 position of the Mayor was just that, an expression of the Mayoral thinking at this stage of the application process based on the initially submitted application documentation. It was not a decision but a statement of compliance with the spatial development strategy and the reasons for taking that view⁶⁷.
66. The Report makes it clear that at this stage⁶⁸ there is no obligation for the Mayor to indicate his intentions regarding a possible direction, and no such decision should be inferred from the Mayor's statement and comments⁶⁹.
67. The Mayor has indicated that following the issuing of the Stage 1 Report there was an intervening 15 month period where additional information, including revised drawings, updated reports, views of statutory consultees and a Stage 2 briefing pack were submitted and the outcomes of four workshops attended by the Mayor's officers and the applicant's consultants fed into the continuing process of consideration of the proposal⁷⁰.
68. The period between Stage 1 and Stage 2, which was a protracted period of time, would have allowed for further reflection on both sides. This would have been in the context of the on-going conversation between the parties, both at the workshops, a term itself which implies intensive discussion and activity on a project, and in respect of the additional submitted information. However, it was for the applicant to decide how best to proceed with the proposal into Stage 2.
69. Once the Council has reached the point of resolving to make a draft decision, they must consult the Mayor again under Article 5 of the Order, in order that the Mayor may decide whether to allow the draft decision to proceed unchanged or direct the Council under Article 6 of the Order to refuse the application.

⁶⁵ Report Doc 10.

⁶⁶ As detailed at Report Doc 10 para 86.

⁶⁷ The Order Article 4(2).

⁶⁸ Stage 1.

⁶⁹ Para 84 Report Doc 10.

⁷⁰ The workshops comprised a series of joint meetings and design workshops with the applicant and the officers of the GLA to fully explore the associated assumptions and constraints that had led the applicant to propose development at the largely greenfield location.

70. In this case on the 29 January 2018 a Direction was issued by the Mayor to refuse planning permission under the powers set out in Article 6 of the Order. This was the decision stage of the two-stage process.
71. A common-sense understanding of the process is, as it transpired, that the Stage 1 Report in essence dealt with compliance with the London Plan and provided 'helpful hints' on what might need to be addressed going forward to Stage 2 based on an initial consideration of the proposal. Stage 2 is the decision stage where the Mayor must weigh into the balance of the decision all aspects of the proposal, including additional information submitted between the two stages and the most up to date advice of his officers. The Stage 2 Direction also included an update on the application since the Stage 1 Report, acknowledging the submission of various revisions, including an updated visual impact assessment and further details of the site selection process and, in particular, to investigate the potential for the location of the new sports building at the existing sports hall site. The Mayor also indicated that he would be minded to withdraw the Direction if the applicant were to submit revisions to the application that would propose a new sports building (of significantly reduced footprint to that currently proposed) on the site of the existing sports hall. That was clearly not the scheme the applicant had applied for and following the fulfilment of the Direction to refuse planning permission the School proceeded to appeal.
72. Through the articles of the Order, the Mayor is entitled to adopt the two-stage approach. In a fair reading of the Stage 1 Report, the application of the caveat of non-inference of a future direction, which should then be applied to the status of the Statement⁷¹, is clear, and the applicant in reading the Report would have been aware of it.
73. For these reasons, whilst acknowledging the frustration of the applicant in what the School sees as a change of position by the Mayor from the Stage 1 Report to the Stage 2 Direction, I consider that this was a Direction issued at Stage 2 of the process, properly considered by the Mayor in terms of the relevant Articles of the Order and which resulted in the refusal of planning permission by the Council.

Ground 2

74. From the evidence it would seem that alternative locations for the new sports hall were requested to be considered/investigated initially by LBH. Re-siting the sports hall outside of the MOL was a starting point in this regard and, as an alternative, to locate the new building on the site of the existing sports hall⁷². Following further investigations, the Council subsequently accepted the justification provided by the applicant and resolved to grant planning permission in the applicant's preferred greenfield location subject to referral to the Mayor.
75. The four workshops, already referred to above, then moved negotiations forward between the officers of the GLA and the applicant's consultants. They involved a

⁷¹ Report Doc 10 para 84.

⁷² Report Doc 11 para 36.

more detailed exploration of the feasibility of alternative locations for the sports building.

76. The challenges of site topography, spatial separation of functions and the various planning and heritage designations across the school estate allowed for many alternative sites to be quickly discounted, and GLA officers focused on potential options for providing the sports building on the existing sports hall site. This was just not a site that the School considered would work for them there being a number of constraints including the need to provide temporary sports facilities during construction; disruption to existing community use; need to divert a sewer; proximity to Grade II Listed music building; potential impacts on local views; and, potential impacts on woodland.
77. The Stage 2 Direction strongly encouraged the applicant to revise the scheme in order to locate the proposed sports building on the site of the existing sports hall, and to deliver a significant reduction to the currently proposed sports building footprint through: the stacking of internal functions; cutting into the landscape; and, investigation of any new opportunities for delivering internal efficiencies⁷³.
78. However, that was not the scheme which the School had applied for and the Stage 2 Direction was for the LBH to refuse planning permission on the basis that the proposal was inappropriate development in the MOL and would cause substantial harm to its openness⁷⁴ by reason of its excessive footprint and its location. The identified harms, given substantial weight, were not clearly outweighed by other considerations. Consequently, very special circumstances did not exist, and the conclusion was therefore that the proposal was contrary to, amongst other policy documents, the London Plan⁷⁵.
79. The Mayor was entitled to suggest alternative locations for the proposed sports hall. However, there had to be some recognition and analysis of site constraints in the case of each alternative for the exercise of looking at alternatives to be of any value. The promoted Mayoral alternative would have involved a significant reduction in the footprint of the proposal and a stacking of internal functions which to me implies, at a fair reading, a building of a number of stories of increasing vertical height and scale. Such a building had not been through a design appraisal nor had it been thoroughly tested against, amongst other things, the topographical nature and landscape and heritage considerations relevant to this site. I am also conscious that at the Inquiry the stacking element of the design solution, initially promoted by the Mayor, was not given any further credence and the evidence of the Mayor's landscape witness was that he could not support a taller building than that proposed. This clearly undermines the Mayor's preferred sports hall siting as expressed in the Stage 2 Direction and creates a confusion in an understanding of the case being promoted by the Mayor for the applicant, a confusion with which I concur.

⁷³ Report Doc 11 para 38.

⁷⁴ It was an agreed position between the parties that, in addition to harm through inappropriateness, the new sports building caused harm to the openness of MOL by reason of its siting, footprint and scale and to MOL purposes. In line with Development Plan policy such harm should be afforded substantial weight (IR para 23 (v)).

⁷⁵ Report Doc 11 Letter of Direction dated 29 January 2018.

80. Further the alternative options promoted by the Mayor at the Inquiry were similarly untested against the constraints and design considerations of the appeal site and its environs to any useful degree, and insufficient for a view to be taken that these alternative sites may offer a less harmful location than that proposed, in respect of it being inappropriate development and the impact on MOL purposes and openness. At best they were no more than concepts at extremely early stages of thought.
81. However, the applicant, in the interests of trying to address the Mayor's issue around the existence of a less harmful alternative site/scheme, then went on to consider a reduction in the footprint and a consequential stacking of functions as reflected by the Stage 2 Direction. This essentially sent the applicant up a blind alley particularly taking into account the comment of the Mayor's landscape witness on the acceptability of a taller building. Without a thorough analysis of each alternative in the context of its location and the relevant constraints, this exercise was of little value. The outcomes would have been so general as to have had no impact on the quantifying of harms to be weighed into the balance in respect of very special circumstances.
82. The Mayor's lack of reference to and acknowledgement of the SPD⁷⁶ in his assessment of his promoted alternatives does give me cause for concern. This is a document which, it is reasonable to suppose, would set up a starting point for any future development of the School, a document the Mayor would have been aware of, and presumably involved with, in some manner in its formulation and outcomes. Nonetheless, he promoted vague alternatives at the Inquiry which did not follow the broad suggested locations within the SPD. In addition, it is noted that the proposed sports hall is proposed to be located on the identified site within the SPD, and yet the location of the building was a matter of objection. The Mayor is right that proposals should be considered on their merits. Nonetheless, the SPD should have been a material consideration, but the weight to attribute to it is a matter for the decision-maker. The Secretary of State gave it considerable weight in permitting the sports hall in accordance with the SPD. The lack of clarity from the Mayor over the weight to give to the SPD, and why, is perhaps another limb in the issue of the muddled nature of the Mayoral case.
83. In the IR the appellant's proposed scheme is recorded as being carefully planned over a number of years, moving from a concept stage where a number of sites and various layouts were considered, based upon the Council's adopted SPD for the School, and appears to be a pragmatic, detailed, thoughtful and a well-designed scheme⁷⁷. It strikes me that this summation of the evolution of the proposed scheme and the depth of analysis of its final design iteration, hands down, negates any of the other alternatives proffered⁷⁸.
84. Therefore, I consider the Mayor did exhibit unreasonable behaviour by introducing alternative schemes into evidence at the Inquiry which, having established his interest in alternatives as far back as the pre-Stage 2 Direction workshops, was very tardy in bringing such matters forward. This required the

⁷⁶ The SPD was mentioned in the Stage 2 Report.

⁷⁷ IR para 59.

⁷⁸ The Secretary of State agreed with this point in granting planning permission.

applicant to analyse and address the suitability, feasibility and design concept of each alternative in the context of a comparative exercise which would ultimately quantify harms to MOL. It was necessary for the applicant to produce a robust refutation of the other potential sites within the School's ownership where the degree of harm to the MOL could vary to that of the appeal proposal. The additional expense of producing such evidence in the intensity of the Inquiry timetabling/programming, engaging professional witnesses to appear at the Inquiry and the Inquiry time taken to examine such alternatives was the result of the unreasonable behaviour of the Mayor in this regard.

85. However, I am satisfied that in reaching the Stage 2 Direction the Mayor, having accepted the proposed building as being inappropriate development in the MOL, an uncontested point, causing substantial harm to the openness of the MOL by reason of its excessive footprint and its location, reached the view of directing the refusal of planning permission without factoring in the favoured alternative location/scheme into the balance of the decision. It was certainly there in the Mayoral thinking but did not get properly considered until the Inquiry. From the terms of the decision of the Secretary of State, the Mayor was not agreed with in his quantifying and weighing of other considerations against the harms to MOL, but he did not act unreasonably in this weighing aspect, the alternatives being set outside of the balance of the Decision and considered in the round. I accept the Mayor's point that his case was not dependant on the existence of a suitable alternative.
86. The reference to the weight to be attributed to the MOL land swap, proposed as compensation for the harm to MOL caused by the proposed sports building, seems to me to be a matter for the decision-maker. The Secretary of State sets out that the proposed extension of the MOL to restrict any further development in this area is a pragmatic and reasonable approach, but that he considers this should carry minimal weight due to a number of other factors⁷⁹. There is no reason to question this conclusion and it is not a matter for me to consider further in respect of this costs report.

Ground 3

87. The RfR was concise and centred on whether very special circumstances existed where the identified harms to the MOL by reason of inappropriateness, and any other harms resulting from the proposal was clearly outweighed by other considerations.
88. The alleged offence is that the Mayor pursued a different case at the Inquiry, raising heritage issues, along with a visual and landscape impact case which were not identified as being offended in the RfR.

- Heritage

89. Within the Stage 1 Report, there is an absence of any considerations of heritage matters. In the Stage 2 Letter and Report, consideration of heritage matters is contained within Paragraphs 52 and 53 under the heading other harm, which

⁷⁹ These factors are not relevant in this consideration.

relies upon harm identified by Historic England (HE). This identifies heritage harms and quantifies them as being less than substantial⁸⁰. HE does offer some sense of a balance being made between the heritage harms and identified public benefits, although not explicitly in the pure terms of the Framework paragraph 196. They conclude the identified less than substantial harm to heritage assets does not warrant a reason for refusal (RfR). The Mayor adopted this approach.

90. The Mayor does appear to have undertaken the statutory duty required of him by Sections 66(1) and 72(1) Planning (Listed Buildings and Conservation Areas) Act 1990 which requires that special regard shall be had to the desirability of preserving listed buildings or their settings or any features of special architectural or historic interest which they possess and the desirability of preserving or enhancing the character or appearance of a conservation area. This was within the Stage 2 Letter and Report⁸¹, but was poorly expressed.
91. Whilst the Mayor indicated that he was not advancing the impact on the significance of heritage assets as a freestanding RfR the Mayor's heritage witness at the Inquiry was clear that the sports building element of the proposal would, in his view, fail to preserve the setting of the nearby listed buildings and would fail to preserve or enhance the character or appearance of the Harrow School Conservation Area. He went on to conclude that the proposal would result in less than substantial harm to the significance of the heritage assets; harm which would need to be considered against public benefits under Paragraph 196 of the Framework.
92. Great weight should be afforded to the conservation of heritage assets⁸². Considerable importance and weight to the desirability of preserving the settings of listed buildings must be undertaken in any balancing exercise.
93. The heritage witness appears to have left the Framework paragraph 196 balance to the planning witness who was surprised that there was no specific RfR on heritage grounds put forward by the Mayor. It is reasonable to infer from this that the witness considered that an outcome of a balance of heritage harms v public benefits would be in the negative and that heritage matters should have been included as a RfR. However, this balance outcome is not explicitly expressed in the evidence nor reflected in the RfR. I am also conscious that it was for the Mayor to define his RfR which did not include a heritage objection per se but unspecified heritage harm was added into the balance of the decision under the heading 'other harms' and I have no reason to question this assertion.
94. Whilst I appreciate the Mayor very much relied on HE advice, I find the Mayor's position on heritage matters to be muddled and inconclusive in respect of levels of heritage harm, lacking any comprehensive appraisal in the context of the statutory duty or the Framework paragraph 196 balance. Had the Mayor's position on these matters been clearer the degree to which this topic was caused to be examined at the Inquiry may have been considerably reduced.

⁸⁰ Framework para 196.

⁸¹ Report Doc 11 paras 52-53.

⁸² Framework para 193.

95. However, in any case heritage matters would have needed to be examined at the Inquiry as the Secretary of State as decision-maker must clearly exercise the statutory duties already detailed above. In the confusion of the Mayoral position on heritage the applicant was caused to cover all bases within heritage considerations. That said I cannot be sure that this would not have been necessary in any case to ensure that heritage was adequately examined to enable the decision-maker to have full and complete information to make a balanced decision in this regard. Therefore, whilst I find that the Mayor's behaviour was not helpful to the process of assessing, evaluating and then balancing heritage harms it does not amount to unreasonable behaviour.

- *Landscape and visual matters*

96. Openness in respect of MOL has a visual component within it. It was not specifically mentioned in the RfR but in assessing impact on openness the visual dimension is a legitimate factor to be considered. Therefore, this was a legitimate element for the Mayor to pursue at the Inquiry to establish any harms to openness and as a result of that analysis any other harms such as to those taking in the views in the surrounding landscape.

97. When considering the impact of the proposal in the landscape there will be some crossover with visual impact. However, in isolation landscape was not an issue which the Mayor laboured upon in his promoted case.

98. I do not find the behaviour of the Mayor in regard to these elements of his case to be unreasonable.

- *Location and Footprint*

99. These were the elements identified in the RfR as causing substantial harm to openness of the MOL. The RfR was concise and focused on the issues of the building's excessive footprint and location. At the appeal this then morphed into concerns about height, volume, depth and scale. This approach did not assist the applicant in reaching a clear understanding of what the matters to be addressed at the Inquiry were and just added to the resultant muddle. The attempt to argue at the Inquiry that the term footprint used in the RfR was more than a 2-dimensional consideration was unconvincing.

100. The approach of the Mayor in the introduction of these additional elements so late in the process, having been so specific about the objectionable elements within the terms of the RfR, just made for further confusion and ambiguity in respect of exactly what were the objections to the proposal in this case. I consider this to amount to further unreasonable behaviour by the Mayor. However, in respect of costs the Mayor is saved by the view that for the decision-maker to come to a fully informed, well considered decision it would have been necessary to contemplate the proposed building in the round, considering design matters beyond the footprint and location to come to a balanced view of the proposed development⁸³ in any event.

⁸³ There would also be an element of such consideration in the scrutiny of heritage matters.

- *Ground 4*

101. This final ground alleges that the Mayor has prevented and delayed development which should have been permitted, having regard to its accordance with the development plan, national policy and any other material considerations.

102. It is an agreed position between the parties that the appeal proposal represents inappropriate development which would result in substantial harm to the openness of the MOL. That harm should be afforded substantial weight⁸⁴. This weighty harm must be clearly outweighed by other considerations for very special circumstances to exist⁸⁵.

103. The refusal of planning permission based on the Mayoral Stage 2 Direction did set out harms to the MOL along with other considerations. Within the appeal process that case was expanded upon which did cause some consternation, but it is reasonable to suppose that the elements that the Mayor weighed into the balance of his decision at the Direction stage, including some heritage harm as other harm, were sufficient to tip the balance of the decision into the negative at that stage⁸⁶. Therefore, there was identified a lack of compliance with the development plan, national policy and other material considerations. This resulted in the refusal of planning permission for the proposed scheme and the applicant making the choice to go to appeal, a situation which appeared to be inevitable in respect of protesting the decision.

Conclusion

104. The application was foremost for a full award of costs. Having found in grounds 1 and 4 that the decision to refuse planning permission was appropriately taken in terms of procedure and of the decision-making, including the weighing of the planning balance, this appeal was inevitable⁸⁷. Thus, a full award of costs is not justified there being legitimate issues which required to be examined at appeal⁸⁸ and reported upon to the Secretary of State for his determination.

105. The applicant did add a claim for a partial award of costs on the grounds of unreasonable behaviour on the part of the Mayor by introducing fresh and substantial evidence at a late stage necessitating extra expense for preparatory work that would not otherwise have arisen.

106. Ground 2 sets out that the Mayor did behave unreasonably by introducing alternative schemes into evidence at the Inquiry at a late stage⁸⁹. This required the applicant to analyse and address the suitability, feasibility and design concept

⁸⁴ IR para 23.

⁸⁵ Framework paras 143 & 144.

⁸⁶ The resolution of any planning balance is a matter of planning judgement. The Secretary of State agreed with the Mayor that the development represented inappropriate development and that it caused harm to openness and other harm. However, the Secretary of State struck the balance differently to the Mayor and determined that the benefits of the development clearly outweighed the harm and therefore very special circumstances existed.

⁸⁷ It was the choice of the applicant to pursue to appeal.

⁸⁸ Inquiry.

⁸⁹ Para 84 of this Report.

of each alternative in the context of a comparative exercise which would ultimately quantify harms to MOL. It was necessary for the applicant to produce a robust refutation of the other potential sites within the School's ownership where the degree of harm to the MOL could vary to that of the appeal proposal. The additional expense of producing such evidence in the intensity of the Inquiry timetabling/programming, engaging professional witnesses to appear at the Inquiry and the Inquiry time taken to examine such alternatives was the result of the unreasonable behaviour of the Mayor in this regard⁹⁰.

107. Ground 3 alleged that the Mayor pursued a different case at the Inquiry, raising heritage issues, along with a visual and landscape impact case which were not identified as being offended in the RfR. Overall, the Mayor's approach to what actually constituted his case, in respect of matters of objection identified within the RfR, was muddled and, in the round, his behaviour was unreasonable. However, it was considered that there would have been no additional costs to the applicant in addressing these issues as they were considerations which the decision-maker would need to address in any case, so there was no wasted expense in relation to this ground.

108. In conclusion I consider that there has been only one justifiable instance of unreasonable behaviour on behalf of the Mayor⁹¹ which have resulted in the applicant incurring unnecessary and/or wasted costs.

Recommendations

109. In line with the above conclusions I would recommend that the application by Harrow School for a full award of costs be rejected and a partial award of costs be granted.

110. Should the Secretary of State not agree with my assessment the claims for a full or partial award of costs are still available to the decision-maker for his determination.

Frances Mahoney

Inspector

⁹⁰ Para 84 of this Report.

⁹¹ Ground 2.

Report Documents

APP – Core Documents

Other references are documents submitted at the Inquiry or subsequently.

- Report Doc 1 – Judgement in the High Court of Justice, Queen’s Bench Division Planning Court before the Hon Mr Justice Holgate between the claimant the Mayor of London and first defendant the Secretary of State for Housing, Communities and Local Government, second defendant the Keepers and Governors of the Free Grammar School of John Lyon (Harrow School), third defendant the London Borough of Harrow- Neutral Citation Number: [2020] EWHC 1176 (Admin), Case No: CO/4849/2019 & CO/4851/2019
- Report Doc 2 – Costs Application on behalf of Harrow School dated 12 May 2019 - APP L 0100
- Report Doc 3 – Response of Mayor of London to Costs application dated 15 May 2019
APP L 0101
- Report Doc 4 – Representation of the Mayor of London in response to the invitation of the Secretary of State to submit representations concerning any implications of the quashing of the cost decision dated 4 September 2020
- Report Doc 5 – Response of Harrow School undated to Report Doc 4
- Report Doc 6 – Submissions of Harrow School following the quashing of the Secretary of State’s costs decision undated
- Report Doc 7 - Response of the Mayor of London dated 24 September 2020 to submission of Harrow School in support of its application for costs dated 24 September 2020
- Report Doc 8 – Reply of Harrow School dated 13 October 2020 to response of Mayor of London dated 24 September 2020 (Report Doc 5 above)
- Report Doc 9 – Appellant’s Statement of Case dated July 2018 - APP H 0001
- Report Doc 10 – Mayor of London Stage 1 Report - APP G 0002
- Report Doc 11 – Mayor of London Stage 2 Decision Letter - APP G 0006
- Report Doc 12 – GLA Stage 2 Package - APP F 301
- Report Doc 13 - Refusal of Planning permission Ref P/1940/16 – APP G 0007
- Report Doc 14 – Opening Statement of the Mayor of London - MAYOR2
- Report Doc 15 – Mayor of London’s Statement of Case - APP H 0251
- Report Doc 16 – Statement of Common Ground - APP H 0260
- Report Doc 17 – Harrow School SPD 2015 - APP D 0203

Report Doc 18 – Opening statement on behalf of Harrow School - APP2