



Appeal Decision

Hearing Held on 28 November 2019

Site visit made on 28 November 2019

by J Moss BSc (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 13th January 2020

Appeal Ref: APP/L5240/W/19/3232831 91 High Street, Thornton Heath CR7 8RY

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
 - The appeal is made by Luxury Leisure against the decision of the Council of the London Borough of Croydon.
 - The application Ref 18/06057/FUL, dated 14 December 2018, was refused by notice dated 8 February 2019.
 - The development proposed is the change of use of the ground floor to an adult gaming centre (sui generis) and external alterations and associated works.
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Decision

1. The appeal is allowed and planning permission is granted for the change of use of the ground floor to an adult gaming centre (sui generis) and external alterations and associated works at 91 High Street, Thornton Heath CR7 8RY in accordance with the terms of the application reference 18/06057/FUL dated 14 December 2018, subject to the following conditions:
 - 1) The development hereby approved shall be begun within three years of the date of the permission.
 - 2) The development hereby approved shall be carried out in accordance with plans numbered 1420 (S) 02 revision P1 – Location Plan, 1420 (0) 11 revision P1 – Existing Floorplan and Elevation, and 1420 (0) 12 revision P1 – Proposed Floorplan and Elevation.
 - 3) Prior to the commencement of the use of the premises hereby approved, noise mitigation measures shall be implemented in accordance with details that shall first have been submitted to and approved in writing by the Local Planning Authority. The details submitted shall accord with the recommendations of the Hepworth Acoustics Noise Assessment dated May 2019 and shall include the following:
 - details of the insulation to be installed between the ground floor unit and first floor unit above;
 - the make, model and detailed specification of the two new condensers to be erected in the light-well;
 - details of how the noise generated by the external condenser units will not exceed at any time 54 dB(A) Lw when measured from the first-floor apartment of 91 High Street; and

- details of how all other mitigation measures shall achieve a rating level of 10 dba below the measured background noise levels.

Once installed, the noise mitigation measures shall be retained in perpetuity.

- 4) Prior to the commencement of the use of the premises hereby approved, details of the means of external illumination of the premises, including the level of illumination, shall be submitted to and approved in writing by the Local Planning Authority. Any external illumination of the premises shall only be in accordance with the approved details.
- 5) The operating hours of the use hereby permitted shall be limited to 07:00 to 00:00 hours Monday to Saturday and 07:00 to 23:00 hours on Sundays and Bank Holidays.

Procedural Matter

2. Following the grant of a licence to operate an adult gaming centre by the London Borough of Croydon¹, the appellant confirms that the permission now sought is no longer for a 24-hour operation, but for operating hours that accord with those granted under the licence, i.e. from 07:00 to 02:00. At the hearing alternative opening hours were also discussed which are set out in my reasons below.
3. Furthermore, in the event that I conclude that planning permission should not be granted for the use in accordance with the licenced operating hours, the appellant requests that consideration be given to a conditional grant of planning permission and suggested several options for operating hours which were discussed during the Hearing. My decision has been set out below dealing with each of the suggested alternatives separately.

Main Issues

4. The main issues are as follows:
 - i. The effect of the development on the vitality and viability of the Thornton Heath district shopping centre;
 - ii. The effect of the development on the living conditions of nearby residents, with regard to noise and disturbance; and
 - iii. The effect of the proposed shop front alterations on the character and appearance of the host property and the surrounding area.

Reasons

Vitality and Viability

5. The development plan for the area includes the Croydon Local Plan 2018 (CLP), which identifies the appeal site as being within a secondary retail frontage of the district shopping centre of Thornton Heath. Policy DM4 (Development in Croydon Metropolitan Centre, District and Local Centres) of the CLP deals with development in Croydon's centres. The supporting text of the policy explains that, whilst retailing is at the heart of the borough's town centres, they are also

¹ Licence granted under section 164 of the Gambling Act 2005.

places where a wide range of other uses help to ensure vitality and viability is maintained. To maintain the right balance the policy seeks to control uses by location.

6. The proposed use of the appeal site as an adult gaming centre (AGC) does not fall within a defined use class² and, as such, is within a use class of its own; otherwise known as a 'sui generis' use. Policy DM4.2 (which is within Policy DM4) of the CLP does not permit such uses within secondary retail frontages and, as such, the proposal would conflict with the policy. However, the appellant has drawn my attention to the material considerations in this case that would justify a departure from the policy and suggests that, in any event, the development in this case would comply with the aim of the policy to maintain and increase the vitality and viability of the district centre.
7. In this regard, and to address the Council's concerns with regard to the marketing campaign, at the Hearing it was clarified that the premises had been marketed since September 2017 and the full marketing of the premises continued up to the grant of the licence in May 2019. This exceeds the Council's suggestion during the Hearing of a minimum of 18 months of marketing. Despite around 21 months of marketing, the property owner was unsuccessful in securing any policy compliant occupier. The appellant's evidence confirm that the property had been marketed in a number of locations and web sites. The appellant also confirmed that, as no interest had been shown by any party in occupying the ground floor alone, both the ground floor and basement were advertised for rent.
8. With regard to the advertised rent for the property, the appellant has provided details of the rent values sought for other premises in the area. Whilst I acknowledge that the appeal premises does not directly compare to the examples given, the Council has not provided what it considers to be an appropriate rent value or any evidence to support this.
9. Accordingly, and having regard to the evidence before me, I can only conclude that the marketing campaign was satisfactory and that there is a genuine lack of interest in the property by a policy compliant occupier. Policy DM4 and its supporting text do not set out how to consider proposals for non-policy compliant uses in such circumstances. Nevertheless, this would be a significant material consideration in this case.
10. In addition to the above, the appearance of the appeal premises draws attention to the fact that it is vacant. The condition of the premises clearly has a detrimental effect on the character and appearance of the area. Such a negative effect would only continue if the premises remains vacant. The propose development would result in the provision of a new shop front, the design of which would be open and active. The development would, therefore, result in a significant improvement to the contribution this premises makes to the character and appearance of the area. In view of the period of time this premises has remained in its current condition, I view this as a benefit of the scheme, along with the creation of jobs. These matters would contribute to the vitality and viability of the Thornton Heath shopping centre.

² Defined in the Town and Country Planning (Use Classes) Order 1987 (as amended)

11. The Council highlight the benefits of retaining class A³ uses within the primary and secondary retail frontages of the district centre. These include the linked trips that are common within a high street of small retail premises, and the support that active retail high streets provide to the community. Whilst the appellant admits that an AGC would not ordinarily provide a social environment, evidence has been provided to demonstrate that the proposed use would, in all likelihood, create some linked trips from customers visiting the premises.
12. Furthermore, that the permission sought would only apply to the ground floor of the premises and not the basement would not be a determinative matter in this case. Having inspected the premises internally, there is little potential for a separate occupier for the basement and I cannot envisage any potential problem resulting from the lack of an active use of the basement. The appellant only seeks permission for the proposed use of the ground floor of the wider property and, more importantly, it is likely that the permission granted in this case would result in an active use of this ground floor premises.
13. My attention has been drawn to the recent and ongoing regeneration of the Thornton Heath district centre and the recent uptake of vacant premises in the area. Notwithstanding the fact that the appeal premises was not one of these properties, despite being marketed during the regeneration period, the proposed use would not jeopardise the positive momentum of the centre's regeneration, particularly in view of my findings above.
14. I acknowledge the Council's reference to the appeal decision relating to 76A High Street, Croydon⁴, where an Inspector reached a different conclusion having regard to the same CLP policies. The particular circumstances of that case were, however, different to those considered in this appeal. For example, the decision does not suggest that the premises in question was in a particularly poor condition, or that it had remained vacant for a significant period of time, to the detriment of the wider area. The Council were unable to confirm the length of the marketing campaign in that case, and I note the Inspector's conclusions with regard to the lack of persuasive evidence to suggest that the business in that case could not continue to operate successfully from its existing premises in the same metropolitan centre. This decision does not, therefore, alter my conclusions on the first main issue.
15. In summary on this first main issue, the proposed use would not be one that is permitted by Policy DM4.2 of the CLP. However, having regard to the evidence before me, the particular use proposed would not conflict with the aims of the wider Policy DM4 to maintain the vitality and viability of the borough's centres, particularly as the CLP recognises that a wide range of non-retail uses can help to achieve this aim. Sufficient steps have been taken to secure a policy compliant occupier of the premises. These efforts have been unsuccessful, and the property has remained vacant, in a condition that has adversely affected the character and appearance of the wider area for a substantial period. Accordingly, I conclude that the proposal would have a positive impact on (or enhance) the vitality and viability of the Thornton Heath district centre. Although the proposed sui generis use would conflict with Policy DM4.2 of the CLP, in this particular case the benefits that the scheme would bring about justify a decision not in accordance with the development plan.

³ Uses falling within class A of the Town and Country Planning (Use Classes) Order 1987 (as amended)

⁴ Appeal reference APP/L5240/W/18/3195213

Living Conditions

16. As noted above, the appeal site is within a secondary retail frontage of the district centre. The Council confirmed in the Hearing that these defined areas are generally away from the main shopping area and are more likely to be closer to residential properties. Indeed, I observed residential properties close to the appeal site, including those above the row of commercial units within which the appeal site is located. The local Councillor confirmed that some of the residential units above this row are of a size to accommodate families with children.
17. The Council's concerns with regard to this first main issue relate to the noise and disturbance caused by people entering and leaving the premises, and by customers gathering outside the premises to smoke or chat. Such activity in the evening is, however, common in the vicinity of the appeal site with a number of other commercial units close by operating during the evening hours. Indeed, the Council confirmed during the hearing that it does not object to the proposed use on the basis of any noise and disturbance it would generate in the evenings.
18. The Council do, however, maintain an objection with regard to noise and disturbance that would be generated by the development during night time hours, particularly between the hours of midnight to 07:00.
19. As noted above, the appellant has been granted a licence to operate an AGC by the London Borough of Croydon. The licence requires access to the premises to be restricted from 20:00 hours onwards, with the main door being locked and customers having to ring a silent bell to gain entry. The appellant also confirmed that persons under the age of 18 would not be permitted onto the premises at any time and that such premises are never granted a licence to sell alcohol. These matters were not disputed by the Council.
20. With regard to the anticipated level of activity during these night time hours, the appellant has provided the results of a one-off survey of customer numbers in other adult gaming centres that it operates⁵. This shows that the number of customers ranged from 1 to 10 at any one time between the hours of 23:00 to 02:00. The appellant suggests that there would be 3 to 4 customers per hour during these times, although the updated noise assessment⁶ indicates a likelihood of two or three customers arriving or leaving the premises every 15 minutes during the night time.
21. The noise assessment submitted with the planning application has been updated to include an assessment of the likely impact of outdoor customer noise. It suggests that, although customers generally arrive and leave alone during this period, it is likely that the noise generated by customers chatting outside would be just below the measured average night time noise levels and that, based on this, the noise impact is predicted in the assessment to be low.
22. The likely customer numbers to the premises during night time hours could be regarded as relatively low and I acknowledge the appellant's evidence that such premises are not usually visited by groups of people. Nevertheless, the evidence indicates that there would be a regular flow of customers through the night and such activity would have the potential to generate noise. Whilst I

⁵ Appendix 6 of the appellant's statement of case.

⁶ Hepworth Acoustics Noise Assessment dated May 2019.

note the conclusions at paragraph 4.13 of the updated noise assessment, external noise generated by customers would, by its very nature, be intermittent and may, on occasion, exceed the speech noise levels suggested. Such incidents, whilst infrequent, have the potential to cause disturbance to local residents, particularly those sleeping above the premises.

23. I acknowledge the other sources of night time noise in the area that have been drawn to my attention, including the night time bus services and the other premises in the vicinity of the site that are open as late as 04:30. However, their existence would not justify the approval of a use that could result in an additional source of disturbance during the night, particularly in view of the prevalence of a number of residential properties within the immediate vicinity of the appeal site.
24. That the appellant operates adult gaming centres in similar locations elsewhere in the country does not alter my findings above. I have found harm in respect of this first main issue, having considered the particular circumstances of this case.
25. I have had regard to the licence granted for the premises that would allow the AGC to operate up to 02:00. However, during the Hearing it was confirmed that the licencing regime operates in a different manner to the planning regime and would allow for the Council to vary or revoke the licence if problems with the operation of the AGC arise. Furthermore, the matters considered in this appeal are not similar to those considered by the Council when determining whether or not to issue a licence. It would be appropriate, therefore, for me to conclude that planning permission should not be granted for a use despite it having been considered acceptable in the context of separate legislation.
26. I have had also had regard to the appeal decisions referred to by the appellant, many of which permit the AGC in those cases to operate during night time hours. I have not been made aware of the particular circumstances of these cases and, as such, I am unable to make an informed comparison to the case before me. Nevertheless, I note that the effect of the development on the living conditions of nearby occupiers was not considered as a main issue in any of the cases referred to. These decisions do not, therefore, alter my conclusions above.
27. Having regard to my conclusions above, I now consider the appellant's suggestion for a conditional grant of planning permission with alternative hours of operation to those permitted by the licence. During the Hearing the Council suggested operating hours up to 23:00, although it indicated that the operation of the AGC up to 00:00 may not, necessarily, be objectionable. The appellant confirmed that the operation of the AGC would render it unviable if restricted to a 23:00 close every day.
28. Of the operating hours suggested by the appellant during the Hearing, a 07:00 to 00:00 operation Monday to Saturday with a 07:00 to 23:00 operation Sundays and bank holidays is the closest to the Council's suggestion of what would be acceptable.
29. The evidence before me suggests the area within the vicinity of the appeal site is likely to be active during the evening hours with a number of premises nearby having regular opening times up to 23:00 and 00:00 throughout the week. For the reasons set out earlier in my decision, any opening hours for the

AGC beyond 00.00 would, in all likelihood, cause an unacceptable degree of harm. Accordingly, the use of the premises in accordance with the above-mentioned opening hours suggested by the appellant would, on balance, result in a form of development that would not have an unacceptable effect on the living conditions of nearby residents. In this regard the development would not conflict with Policy DM10.6 of the CLP, which requires new development to protect the amenity of the occupiers of adjoining buildings. It would also comply with Policy DM16 (Promoting Healthy Communities) of the CLP and its requirement for development to be designed so as to mitigate any negative impacts on health and wellbeing.

Character and Appearance

30. The appeal premises is within a terrace row of properties with commercial and retail units at ground floor and residential accommodation above. The style of shop fronts within the row is mixed, as is the character of built development in the wider district centre.
31. The Thornton Heath Clock Tower is near the appeal site and, whilst not a listed structure, the view of it along High Street is recognised as important under Policy DM17 (Views and Landmarks). Within this Policy, DM17.1 states that development should not create a crowding effect around, obstruct or appear too close or too high to any local designated landmarks, including the clock tower.
32. As mentioned earlier, the shop front of the appeal premises is in a particularly poor condition. The scheme proposes the wholesale replacement of the existing with a new contemporary shop front and fascia sign. The Council have confirmed that it has no objection to the design of the new shop front and I have no reason to disagree with their view on this. However, their objections concern the illumination of the yellow door surround, which forms part of the scheme. The Council suggest that this would have a beacon like effect that would unduly draw the eye and interrupt the protected view of the clock tower.
33. There is variety in the type of illumination I observed at the time of my site visit, although much of this is used for illuminating advertisements either within the shop windows or for external signage. Within this context, a brightly illuminated shop surround would be an incongruent feature. Whilst I note that on the proposals map the protected designated view (Policy DM17) does not start until the footway to the front of 93 High Street, I was able to view the clock tower from High Street with the appeal site in my peripheral view. A brightly illuminated feature on the shop front would detract from one's appreciation of the landmark.
34. In order to mitigate the effect of the illuminated door surround the appellant has suggested the imposition of a condition to allow for a limit to be imposed on the level of illumination, which would allow this feature to be more subdued. It would, therefore, be less prominent and integrate with the existing illuminated shop windows that are in close proximity to the appeal site.
35. Accordingly, subject to the imposition of a condition controlling the level of illumination to be used in the door surround, the development would have an acceptable effect on the character and appearance of the host property and the surrounding area, in compliance with Policy DM11 (Shop Front Design and Security) of the CLP, which requires the design of new shop fronts to respect

the scale, character, materials and features of the buildings of which they form part. Furthermore, the development would not conflict with the aim of Policy DM17 to protect the designated view of the local land mark, that being the clock tower.

Other Matters

36. I acknowledge the strength of objection to the development and the suggested negative influence it may have on vulnerable people. It is also suggested that a gambling establishment would be inappropriate in close proximity to the leisure centre used by children, as well as the two schools at either end of High Street. Concerns regarding the potential for anti-social behaviour and littering have also been raised.
37. Whilst the objections of interested parties are noted, the appellant's evidence confirms, amongst other matters, that people under the age of 18 would not be permitted on the premises; that the sale of alcohol would also not be permitted; and that there would be a very low cap on the maximum stake on any machine in the premises. Many of the concerns raised are more relevant, and better dealt with, under the licencing regime. Based on the evidence before me, I have no reason to withhold planning permission for the use, provided it is operated in accordance with the conditions I have imposed.
38. Furthermore, whilst I acknowledge the representations made with regard to access to the premises and facilities for those with mobility impairment, I note the Council have not objected to the development on this basis and I have no reason to conclude otherwise.

Conditions

39. The conditions imposed are based on those suggested by the Council and the appellant. Where necessary I have amended the wording of these in the interests of precision and clarity in order to comply with advice in the Planning Practice Guidance.
40. As I have allowed the appeal and grant planning permission for the development, I attach a condition requiring the completion of the development in accordance with the submitted details. The condition requiring the details and implementation of noise mitigation measures is in the interests of the living conditions of the residents living above the premises.
41. In the interests of the character and appearance of the area and the living conditions of neighbouring residents' conditions are also required in relation to the type and level of external illumination, and opening hours.

Conclusions

42. For the reasons given above, and having had regard to all other matters raised, I conclude that the appeal should be allowed.

J Moss

INSPECTOR

APPEARANCES

FOR THE LOCAL PLANNING AUTHORITY:

James Udall	Case Officer - London Borough of Croydon
Helen Furnell	Deputy Team Leader - London Borough of Croydon
Victoria Bates	Senior Planning officer - London Borough of Croydon

FOR THE APPELLANT:

Dennis Pope	Planning Director - Lichfields
Mark Thompson	Head of Risk and Compliance - Luxury Leisure
Shaun Hooper	Regional Operations Director - Luxury Leisure
Sean Heaney	Acquisitions - Luxury Leisure
Elizabeth Speed	Group General Counsel - Luxury Leisure
Thomas Bailess	Principle Consultant - Hepworth Acoustics

INTERESTED PERSONS:

Councillor Pat Clouder	London Borough of Croydon
Councillor Karen Jewitt	London Borough of Croydon
Linda Watson	Local Resident
Gaetane Jones	Local Resident
Andrea Perry	Local Resident and member of Thornton Heath Community Action Team

HEARING DOCUMENTS

1. Agreed and signed Statement of Common Ground.
2. Survey of Admiral customers - October 2019.
3. Copy of the Licence granted by the London Borough of Croydon.
4. London Borough of Croydon Environmental Health Officer's consultation response.
5. Extract from the draft London Plan.
6. Extracts of CLP.
7. List of suggested conditions.