



Appeal Decision

Hearing (Virtual) held on 19 October 2023 and 12 December 2023

Site visit made on 20 October 2023

by D Wallis MRTPI, BSc (Hons), PGDip (Environmental Planning)

an Inspector appointed by the Secretary of State

Decision date: 13th December 2023

Appeal Ref: APP/G5180/W/23/3321134

33-41 Masons Hill, Bromley, BR2 9HD

- 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 Cobalt (Bromley South) Limited against the decision of London Borough of Bromley.
 - The application Ref DC/21/00741/FULL1, dated 23 February 2021, was refused by notice dated 4 November 2022.
 - The development proposed is Demolition of the existing buildings and redevelopment of the site for a new part 8/ part 11 storey building comprising flexible commercial floorspace (Use Class E) at ground floor with residential units (Use Class C3) above, along with the associated amenity space, ancillary refuse and recycling storage, cycle parking and wheelchair parking.
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Decision

1. The appeal is dismissed.

Applications for costs

2. An application for an award of costs has been made by Cobalt (Bromley South) Limited (the appellant) against the London Borough of Bromley (the Council). A separate application for an award of costs has been made by the Council against the appellant. These applications are subject of a separate decision.

Preliminary Matters

3. During the Hearing on 19 October 2023, I asked questions about the flood risk sequential test to the main parties, noting that an objector had stated the test had not been undertaken properly. The Council subsequently agreed with the interested party and, although refraining from making this a further reason for refusal, suggested I had to take this into account. The appellant, having not been made aware of the Council's position prior to the Hearing, requested an adjournment in order to address this issue.
4. In the interests of procedural fairness and to ensure I had all the information necessary upon which to make my decision, I adjourned the Hearing to allow for this additional information to be produced and consulted on. The Hearing was resumed on the morning of 12 December 2023 and, after receiving oral representations, I closed the Hearing on the same day.
5. The Council confirmed that whilst the Town Centre Supplementary Planning Document had been adopted on 18 October 2023, there was no identified conflict between its objectives and the appeal proposal. I have taken this into account in my decision.

6. A unilateral undertaking (UU) pursuant to section 106 of the Town and Country Planning Act 1990 (as amended) was submitted with the appeal. I shall return to this later in my decision.
7. The appeal site is in proximity to the grade II listed St Mark's School and falls within 400 metres of the Bromley Town Conservation Area. I am mindful of the statutory duties¹ upon me, though note no objections from the Council or its advisors in respect of effects on heritage assets. Whilst a third party did query this, I am not presented with any substantive evidence that heritage harm would occur, particularly given the eclectic mix of buildings in the locality. For this reason, I agree with the conclusions of the appellant and the Council on this matter, and do not consider heritage matters any further in my decision.

Main Issues

8. The main issues for the appeal are:
 - whether or not the development passes the flood risk sequential test;
 - whether or not the development would give rise to an unacceptable risk of flooding; and
 - the effects of the development on social infrastructure.

Reasons

The sequential test

9. The appeal development would see a building of both 8 and 11 storeys constructed across the majority of the appeal site, with some existing Victorian properties within the land demolished. The building would be a mix of commercial uses and residential flats.
10. The appeal site falls within Flood Zone 2, which is agreed by all parties in the Statement of Common Ground². In such circumstances, the national planning practice guidance³ (PPG) requires a sequential test to be undertaken, seeking to direct new residential development to areas with a lesser risk of flooding.
11. The appellant has argued two main points. Firstly, that the appeal site actually falls within flood zone 1 because the flood risk maps from the Environment Agency (EA) were based on a historic flood event in 1967. Since then, flood defences have been installed thus removing the need to undertake a sequential test. Secondly, that if the appeal site does indeed fall in flood zone 2, there are no reasonably available alternative sites within a borough-wide search and thus the sequential test is passed.
12. In respect of the first point, I have not been presented with any substantive evidence to determine that the appeal site falls in flood zone 1 in either the original or the amended flood risk assessment. The fact that the main parties signed a statement of common ground agreeing the appeal site falls within flood zone 2 reinforces my position on this. A sequential test is therefore necessary to prove the development could not be safely accommodated elsewhere.

¹ Sections 66 and 72 of the Town and Country Planning (Listed Building and Conservation Areas) Act 1990 (as amended)

² Paragraphs 2.9, 6.57

³ Paragraph 079 Reference ID: 7-079-20220825

13. On the second point, the appellant produced a written sequential test following the adjournment of the Hearing on 19 October 2023. Whilst the Council confirmed at the Hearing of 12 December 2023 that the scope and methodology were satisfactory, there were a number of results from the assessment that were not agreed, which I shall now turn to in summary. In doing so, I am mindful that the PPG advises that for a site to constitute a reasonable alternative, it should be in a suitable location with a reasonable prospect that the site is available to be developed. In determining such sites, the PPG does not rule out a series of smaller sites or part of a larger site if they would be capable of accommodating the proposed development. The absence of a 5-year land supply is not a relevant consideration for the sequential test for individual applications⁴.
14. The appellant's agreed sequential test methodology rules out sites providing less than 10 units or less than 0.06ha in site size. Whilst the Council did suggest that the site size figure was arbitrary, I consider this to be a rational starting point given the likelihood of being able to accommodate the minimum agreed threshold of 10 dwellings on such plots.
15. I was informed verbally that circumstances had changed at three⁵ of the sites considered in the sequential test such that all three had been taken off the market. I was not presented with any documentary evidence of this, though was content to take matters as stated by the appellant following agreement with the Council.
16. In the sequential test, judgements appeared to have been made on the basis of vacancy, along with other statements that the Council found confusing or to go against the agreed methodology. However, the appellant gave verbal reasoning at the Hearing that went well beyond what was written in the formally submitted sequential test. Amongst this additional reasoning, the appellant relied upon planning policies, other planning decisions and the exercise of professional judgement on the likelihood of sites being capable of accommodating the proposed development.
17. I accept that, of the sites discussed, the first floor of the building containing Orpington Village Hall and the commercial unit at No.33 Green Lane would be significantly small and constrained so as not to meaningfully contribute towards delivering the appeal development. I also agree with the appellant that redeveloping the specialist housing accommodation at Oakwood Avenue would not be a suitable option due to the displacement of residents with specific healthcare needs.
18. However, larger sites such as Site 10⁶, the Bromley Civic Centre, Crystal Palace Park and 156-160 High Street Bromley are all physically capable of accommodating the proposed number of housing units. I shall consider each one in turn.
19. Site 10 sits to the west of Bromley High Street and is purported to be an allocation for 1,230 units. I heard evidence that site was in multiple ownership and there were viability concerns if a certain quantum or height of development was not allowed. However, I note this has not stopped parcels within that

⁴ PPG Paragraph Reference ID: 7-028-20220825

⁵ The White Swan, Beechcroft and Mottingham Road sites

⁶ Paragraph 3.15 and 3.16 of the Appellant's Flood Risk Assessment Addendum

allocation coming forward on application and I have not been presented with conclusive evidence to demonstrate that land ownership represents an insurmountable issue. Ultimately, I have no substantive evidence before to show that a proportion of the appeal development could not come forward within a 5-year timeframe. I also do not believe that the preference for a masterplan approach to the allocated site would, together with the other constraints, limit the amount of potential development.

20. Bromley Civic Centre is an allocated site, although the appellant points to a policy desire to retain community functions on the land as well as an existing multi-storey car park. The Council iterate that the site would become available once the Council itself, with all related civic functions, has moved off the land into new premises in 2024 and thus the site would be available for any type of development. In this respect, until the Local Plan allocations and policies were updated, the Council would be open to applications for alternative uses where such use would contribute to meeting an unmet need.
21. Given that other parts of this allocated site are promoted for residential purposes, I do not see any substantive reason to rule out the site's potential for accommodating the appeal scheme. There may be timetabling and design constraints but, given the changed circumstances in the relevance of planning policies to this land, I consider that there is no convincing reason to discount this site in the sequential test.
22. Crystal Palace Park was stated to be a major regeneration scheme, with restoration planned across the whole estate and those restoration works to be funded in part by enabling housing development. I recognise that the housing element was restricted on coming forward until a certain amount of restoration works had been undertaken. I also acknowledge that any residential development would require viability testing given that sales would contribute towards the funding for the park's restoration. Nonetheless, I am told an outline scheme of 210 units was granted permission and that progress is being made towards obtaining funding to commence restoration works in 2024. I am optimistic that housing could therefore be realised on this site within a 5-year period and agree with the Council that the possibility for development on this site should not be ruled out.
23. 156-160 High Street sits within an area where retail uses are preferred and protected by planning policies seeking to maintain an active frontage. Aside from this, the appellant suggests the site is unsuitable due to the depth of the original building and limitations on height. I accept that the appeal development proposes flexible commercial floorspace, as opposed to just retail, but that would not preclude any proposal coming forward that meets the policy objectives of both the appellant and the Council. With regards to size and height, I consider it unreasonable to rule out a site on the basis that a bespoke design solution would have to be pursued.
24. On the whole, I consider that the cited policies and perceived design complexities would not represent a significant impediment to the delivery of some, if not all, of the appeal development on these alternative sites. Time constraints and the need for enabling housing at Crystal Palace Park may make that site potentially undeliverable, but not unavailable in my view. Varying degrees of occupancy across the sites would not significantly preclude housing

coming forward, particularly where such sites are either allocated or on the sales market at present.

25. I conclude that there are reasonably alternative sites within flood zone 1 that are capable of accommodating the proposed development, following the guidance in the PPG. For this reason, the sequential test is not passed. The appeal proposal therefore fails to meet the requirements of the policy SI 12 of the London Plan 2021 (the LP) and policy 115 of the Bromley Local Plan 2019 (the BLP), which together seek to avoid inappropriate development in relation to flood risk.

Risk of flooding

26. The appeal site falls in between St Mark's Road to the east and an unnamed access road for the Bromley Police Station to the west, with Masons Hill to the south. The appeal site's western boundary is formed with a retaining wall of varying height, with the unnamed road on notably higher ground. Although not visible, the main parties have confirmed the location of a culvert for the River Ravensbourne running broadly underneath the retaining wall and part of the footpath alongside the unnamed road. It was confirmed orally that the culvert structure fell outside the application site and on land that is partially unregistered and partially belonging to the police station.
27. There was dispute over whether the culvert constituted a flood defence and, if it did, then policy SI 12 of the LP and policy 115 of the BLP would both be engaged. In my view, the culvert is designed to convey water through an urban area efficiently and any blockages of the culvert would likely result in flooding to occur upstream. It logically follows that it serves to drain and carry water, including surface water, from the Ravensbourne away from the inhabited urban areas. To not do so would increase the risk of flooding. The Council have attributed a lack of flooding in the 1970s to the culverting of the river, whilst the appellant stated orally that flood defences had been installed after the historic flood event in 1967. It is highly likely in my opinion that the culvert represents a flood defence, and I am content to consider it on these terms even if not formally designated.
28. No suggestions were made that the appeal development of itself would pose an unacceptable risk to the structural integrity of the culvert, subject to suitable engineering solutions. However, both the Council and the EA submit that should the integrity of the culvert fail in the future, the lack of space around the appeal development would prevent effective reparations to the culvert and that could give rise to an increased risk of flooding elsewhere.
29. Policy SI 12 of the LP states that proposals should make space for water and aim for development to be set back from watercourses. Policy 115 of the BLP relies upon the Council's Strategic Flood Risk Assessment (SFRA) in order to manage and reduce flood risk, which states development should be set back a minimum of 8 metres from main rivers in accordance with EA guidance.
30. I acknowledge the appellant's submissions that neither policies SI 12 nor 115 prescribe a setback distance. I also heard during the Hearing that there is no active embargo on any development within 8 metres of a main river from the EA, just an additional need for a developer to seek consent under the Environmental Permitting (England & Wales) Regulations 2016. However, the majority of information before me sends a clear message that the residual risk

of flooding should be managed and one of the ways of doing so would be to setback a development from a watercourse. I note the policy objectives that this setback should be sufficient to allow for future maintenance and upgrading.

31. To this extent, I note the appeal scheme would be setback 1 metre from the edge of the culvert's eastern wall, which the appellant believed would be more than sufficient. In addition, the appellant stated that working on the eastern side of the culvert would be possible from the opposite bank, with access from the unnamed road.
32. Both the Council and the EA submit a 1 metre setback represents an unacceptable distance. The EA was unable to detail the exact nature or scale of the equipment required for revealing and subsequently carrying out works upon the culvert, but stated the options for remedial actions available would be severely impaired by the appeal development. The EA continued that reaching over to repair the eastern wall of the culvert from the higher west bank would potentially result in far greater works than if direct access could be achieved.
33. I consider that a 1 metre gap, whilst representing a setback, would be a very restrictive working corridor in which to undertake any meaningful excavation and repair work. Due to the land level difference that I observed on my site visit, I consider there would be practical difficulties in undertaking works from the opposite bank of the culvert, making a possible simple solution into a more complex and costly exercise.
34. I heard evidence from the appellant that routine and regular inspection of the culvert by the EA through non-intrusive methods would identify any defects early enough to allow planned maintenance to take place, rather than any likelihood of sudden damage or integrity failures occurring. However, I cannot rule out the prospect of an emergency situation, particularly during the pressures of inclement weather.
35. I recognise that the appeal scheme would sit adjacent to Perignon Heights, which is a mixed-use multi-storey development granted permission on appeal in 2015. That development was permitted within 2.2 metres of the culvert and obtained a flood risk activity permit from the EA, with no objections on flood risk grounds from either the EA or the Council. I note however that since the determination of that appeal, the LP and BLP have been adopted together with the SFRA, an updated National Planning Policy Framework (the Framework) and updated PPG, together emphasising a much greater policy concern regarding flooding and flood risk. In any event, 2.2 metres represents double the separation distance proposed in the appeal development and provides greater scope for reparations than a 1 metre gap.
36. I acknowledge that construction difficulties may be overcome by engineering solutions. However, for the purposes of policies SI 12 and 115, I do not consider a 1 metre distance between the edge of the culvert and the appeal scheme to be a sufficient setback to allow space for efficient maintenance to take place. The appeal development would limit the options available to undertake repairs, potentially resulting in less cost-effective management measures being implemented, contrary to criterion A of policy SI 12.
37. Criterion F of policy SI 12, relevant to flood defences, states unless exceptional circumstances are demonstrated for not doing so, development proposals should be set back from flood defences to allow for any foreseeable future

maintenance and upgrades in a sustainable and cost-effective way. The appellant confirmed orally that no exceptional circumstances case was made.

38. Nonetheless, the appellant stated the appeal scheme represented betterment over the current situation by demolishing the existing Victorian buildings, which are approximately 300mm away from the culvert. I recognise that increasing the distance from 300mm to 1 metre represents some benefit, but this is only on the southern portion of the appeal site. Any benefit would be marginal in my view because the remainder of the appeal site, which is currently open, would be occupied by buildings to within 1 metre of the culvert, thus constraining a greater area around the culvert.
39. I have considered whether planning conditions could be used, taking into account those submitted with the Statement of Common Ground and those applied to Perignon Heights. However, I do not consider any could be practically imposed or enforced that would make the development acceptable.
40. I therefore conclude that the appeal development would be in too close proximity to the culverted River Ravensbourne, failing to provide an acceptable setback to enable works to be undertaken. Flood risk would be likely to unacceptably increase in the event the culvert became inaccessible or able to be worked on in any effective and sustainable manner. Therefore, the proposal would conflict with policies SI 12 of the LP and 115 of the BLP, which together seek the management and reduction of residual flood risk.

Effects on social infrastructure

41. The UU submitted with the appeal, signed and dated 17 October 2023, covered matters of affordable housing, car club membership and contributions towards other social infrastructure including public realm improvements.
42. The Council confirmed verbally and in writing that the UU secured all the necessary obligations to make the development acceptable and to mitigate the impacts upon social infrastructure. I have read the Council's Community Infrastructure Levy compliance statement and consider that all obligations sought meet the relevant statutory tests. I also consider that the construct and content of the UU are acceptable and would appropriately secure the necessary obligations and contributions.
43. On this basis, I conclude that the appeal development would provide an acceptable planning obligation to deliver the necessary social infrastructure, in accordance with policy DF1 of the LP and policy 125 of the BLP.

Other Matters

44. Section 38(6) of the Planning and Compulsory Purchase Act 2004 indicates that my determination must be in accordance with the development plan unless material considerations indicate otherwise. For the reasons set out above, the development proposed is contrary to the development plan. It is therefore necessary for me to consider whether there are any material considerations of sufficient weight to indicate that determination should be made otherwise than in accordance with the development plan.
45. It is common ground that the Council cannot demonstrate a robust five-year housing land supply. My attention is therefore directed to paragraph 11(d) of

the Framework, though there is dispute between the main parties as to whether footnote 7 applies.

46. Having found the appeal development fails the sequential test and would inhibit the proper maintenance of a flood defence, it is logical that policies of the Framework relevant to planning and flood risk are engaged. As a whole, the Framework is clear that development should not increase flood risk elsewhere, flood risk should be managed from all sources and development should be directed away from areas at risk. In respect of paragraph 160 of the Framework, the SFRA informs BLP policy 115 and the advice from the EA is that the development would conflict with flood management infrastructure.
47. I therefore find that footnote 7 does apply and that the Framework provides a clear reason for refusing the development. I do not therefore need to consider the scheme's benefits in any detail since significant harm and policy conflict has been identified. This finding is a material consideration in this appeal and ultimately supports the position I have found regarding conflict with the Development Plan. There are no reasons to warrant a decision other than in accordance with the Development Plan.

Conclusion

48. For the reasons given above, I conclude that the appeal should be dismissed.

David Wallis

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Douglas Edwards KC	Counsel for the Appellant
Mark Gibney	Planning Advisor
Guy Laister	of Water Environment
Fiona de Mauny	of Water Environment
Mike Barrett	Barrett Structural Engineering
Dean Thody	ECE Architecture
Stephen Eyton	SLR Consulting
Rob Sargent	Cobalt (Bromley South) Limited
Gerry Dowd	Cobalt (Bromley South) Limited

FOR THE LOCAL PLANNING AUTHORITY:

Claire Brew	Development Management Team Leader
Ben Johnson	Head of Planning Policy and Strategy
Paul Courtine	Senior Lawyer
Robert Williams	Environment Agency Flood and Coastal Risk Management Advisor
Kayleigh Wyatt	Environment Agency Major Projects Officer

INTERESTED PARTIES:

Alan Banfield	Chairman of the Bromley Civic Society
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