



Appeal Decision

Site visit made on 22 January 2024

by Guy Davies BSc (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 26th January 2024

Appeal Ref: APP/L5240/W/23/3326319

1a Brighton Road, Croydon CR2 6EA

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant outline planning permission.
 - The appeal is made by Mr Qasim Gulamhusein of 1a CR2 Ltd against the decision of the Council of the London Borough of Croydon.
 - The application Ref 22/04995/OUT, dated 30 November 2022, was refused by notice dated 13 June 2023.
 - The development proposed is for demolition of existing showroom and warehouse and erection of a 5 storey block to contain up to 28 self contained residential units and up to 3 retail units (Reserved matters are access, appearance, landscaping, layout).
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Decision

1. The appeal is dismissed.

Applications for costs

2. Applications for costs were made by Mr Qasim Gulamhusein of 1a CR2 Ltd against the decision of the Council of the London Borough of Croydon; and by the Council of the London Borough of Croydon against Mr Qasim Gulamhusein of 1a CR2 Ltd. These applications are the subject of separate decisions.

Preliminary Matters

3. The application is made in outline with all matters reserved for future consideration other than for scale. I have determined the appeal on that basis. The elevational drawings include some details relating to appearance (for example positioning of fenestration and materials) but I have taken those details as being for illustrative purposes only. I have taken account of the elevational drawings in so far as they define the height, width and length of the proposed building in relation to its surroundings.
4. The description of development in the banner heading varies from that on the application form and was agreed by the appellant by email dated 2 January 2023 prior to the application being validated. Although the word 'commercial' is initially used in the amended description, towards the end of the same email the appellant was happy to further amend the description to say the commercial units would be A1 (retail) units¹. The description used by the Council on its decision notice is consistent with these amendments.

¹ I have taken 'A1' as referring to retail use, although that use class no longer exists, it having been subsumed into Class E (commercial, business and service) of the Town and Country Planning (Use Classes) Order 1987 (as amended).

5. In its statement of case, the Council has suggested a further amendment to the description of development by replacing the words 'up to 28' with 'between 17 and 28'. A change to the description at the appeal stage is not possible as I am required to consider the development as described in the original application and as determined by the Council. That applies whether or not the appellant is agreeable to a change of description.
6. At the time of my visit, the showroom and warehouse had already been demolished under separate consent.
7. A revised version of the National Planning Policy Framework (the Framework) was published on 19 December 2023. This was after the submission of statements of case but before submission of final comments. Neither party has sought to change their arguments in response to the revised Framework.

Main Issues

8. The main issues are the effect of the development on:
 - Risk of flooding
 - Living conditions of future occupants, in relation to space and daylight/sunlight
 - Securing mitigation of the impact of the development on services and the environment
 - Provision of affordable housing
 - Sustainable development, in respect of minimising carbon emissions
 - Character and appearance of the area
 - Optimum density of the site
 - Urban greening.

Reasons

Risk of flooding

9. Consideration of flood risk needs to take place at this stage rather than be deferred for later consideration as part of the reserved matters because it is an issue that needs to be resolved in order to determine whether the scheme is acceptable in principle or not. Notwithstanding the outline nature of the application, sufficient information needs to be provided to enable an informed decision to be made in relation to this issue.
10. The site lies partly within an area with a medium to high risk of flooding. In such areas, paragraph 168 of the Framework requires a sequential test and, if applicable, an exception test. The appellant has queried the accuracy of the Environment Agency's flood map, but in the absence of conclusive evidence that it is wrong, it continues to carry weight.
11. The aim of the sequential test is to steer new development to areas with the lowest risk of flooding. That aim has to take into account wider sustainable development objectives. In this case, the site lies within an existing built up area in a highly accessible location in which development is in principle

acceptable. The site has previously contained buildings and there is an extant planning permission for a mixed use scheme on the site. Having regard to these factors, I consider the redevelopment of the site accords with the sequential test, although consideration still needs to be given to the placement of different uses within the site in relation to flood risk.

12. As the proposal includes residential development and part of the site lies within flood zone 3, an exception test is required in this case. Amongst other requirements, it is necessary to demonstrate that the development would be safe for its lifetime taking account of the vulnerability of its users.
13. The appellant is unwilling at this outline stage to confirm whether or not residential units would be accommodated on the ground floor. In my view it is necessary to know whether that does form part of the proposal as the vulnerability of the residential element differs from that of the retail element in that the former is classified as more vulnerable while the latter is less vulnerable. In that respect, the appeal scheme differs materially from an extant permitted scheme² on the same site which has only commercial uses on the ground floor.
14. A flood risk assessment accompanies the proposal, which suggests that mitigation measures could be used to reduce flood risk to residential units and/or retail units on the ground floor. Paragraph 173 of the Framework says that within a site, the most vulnerable development should be located in areas of lowest flood risk. That applies whether or not mitigation could be provided, because it is always preferable to position vulnerable development in areas with the lowest risk of flooding rather than rely on mitigation measures that might fail or prove to be inadequate. For this site, that points to residential development being accommodated on the upper floors, but not the ground floor. The Environment Agency is opposed to more vulnerable residential development being placed in areas at high risk of flooding and maintains an objection to the scheme. As a statutory consultee on flood risk, I place considerable weight on the advice of the Environment Agency.
15. Due to the uncertainty as to whether residential accommodation would be included on the ground floor of the proposed building, I have to assume that it might be. In that scenario, and given the concerns about the potential risk from flooding and the harm that would cause, I conclude that the proposed development fails the exception test because it has not been shown that the more vulnerable residential use would be located in areas of lowest risk and would not be safe for its lifetime. Consequently, it would conflict with Policy SI 12 of the London Plan 2021 (the London Plan) and Policies SP6 and DM25 of the Croydon Local Plan 2018 (the Local Plan), which seek to protect new development from flood risk.

Living conditions of future occupants

16. The Council expresses concerns about the living conditions of future occupants on two grounds: achieving minimum space standards; and adequate daylight/sunlight to the proposed residential units.
17. The extant planning permission on the site comprises commercial floorspace on the ground floor and 17 residential units on three floors above. Using the

² 19/04199/FUL

appellant's reasoning that an additional floor could comfortably accommodate five additional flats³ that met or exceeded minimum space standards, that would result in a total of 22 units. That is considerably less than the maximum of 28 now sought. If use of the ground floor for residential accommodation is ruled out because of flood risk as I have considered above, that would entail accommodating those units on the upper floors. Compared to the extant scheme, that would inevitably result in smaller space standards for at least some of the units. It is also likely to impact on the mix of different sized units. Additional units would also require proportionally more ancillary facilities, such as cycle and refuse storage, which would further reduce the space available for residential or retail accommodation. Having regard to all those factors, I am concerned that minimum space standards and a suitable unit mix would not be met.

18. Additional evidence on possible layout configurations is included in the appellant's final comments. The submission of late evidence in this way is problematic because the Council has not had the opportunity to comment on it and therefore I give it only limited weight. While I appreciate the sketch layouts are intended to be helpful they are, as noted in the submission, a crude illustration and therefore I have reservations about their accuracy.
19. In relation to daylight and sunlight, the additional height is likely to affect the amount of light reaching lower floors. A difference in unit size is also likely to alter the number of windows for each unit, and therefore potentially reduce the amount of light entering each of them.
20. A daylight and sunlight assessment accompanied the application, but this is missing the sections assessing daylight and sunlight to the proposed building. The conclusion to the assessment is however included and makes reference to only 68% of proposed habitable rooms achieving the amount of daylight recommended in British Research Establishment guidance⁴. While I place little weight on this document because it is incomplete, the conclusion reinforces my concerns over the ability to achieve adequate daylight and sunlight to the proposed residential units.
21. The appellant argues that the living conditions of future occupants is a matter of detail that should be considered at the reserved matters stage, and that the description of development of 'up to' 28 units provides a degree of flexibility should problems achieving minimum standards be encountered at that later stage. However, the proposal for which permission is sought is up to and including 28 units (my emphasis) and it is therefore not only reasonable but necessary to consider whether in principle adequate living conditions could be achieved for the maximum number of units at this outline stage.
22. Based on the evidence before me, there is sufficient reason to be concerned about the living conditions of future occupants in relation to meeting the minimum space standards and mix of units, and adequate levels of daylight and sunlight to at least some of the proposed units. In the absence of accurate evidence to demonstrate that these matters could be achieved on site, I conclude that the development would result in substandard accommodation for future occupiers, thereby harming their living conditions. It would as a

³ Appellant's statement of case, paragraph 3.3.4.8

⁴ British Research Establishment report Site Layout Planning for Daylight and Sunlight: A guide to good practice, Third Edition 2022 (BR 209)

consequence conflict with Policy D6 of the London Plan and Policies SP4, DM10 and DM14 of the Local Plan, which require new development to meet minimum standards and achieve a good living environment for their occupants.

Mitigation of services and the environment

23. Policies in the London Plan and Local Plan require mitigation of the impact of the development on certain services and the environment. These include in the absence of end users the fit out of the proposed retail units, air quality, carbon emission offset, energy requirements, highway works, promotion of sustainable modes of transport, and local employment opportunities. I am satisfied that these requirements are necessary to make the development acceptable in planning terms, are related to the proposal and are proportionate in scale and kind. They therefore meet the relevant tests summarised in paragraph 57 of the Framework.
24. The appellant has no objection in principle to these requirements and suggests in the statement of case that a condition be imposed requiring that a legal agreement be entered into to secure the relevant mitigations. However, the Planning Practice Guidance is clear that a condition requiring an applicant to enter into a planning obligation is unlikely to pass the test of enforceability⁵. A negatively worded condition limiting the development that can take place until a planning obligation has been entered into is also unlikely to be appropriate unless there are exceptional circumstances. I do not consider there to be any exceptional circumstances here, and so such a course of action would not be appropriate.
25. The appellant has belatedly submitted a unilateral undertaking with their final comments. The Procedural Guide: Planning appeals – England requires that an executed and certified copy of the planning obligation is provided no later than seven weeks from the start date of the appeal. That has not happened and causes a problem because the Council has been unable to comment on the wording of the undertaking, the obligations contained in it, or check on ownership title. In any event, the copy of the undertaking submitted has not been dated, signed or witnessed, and is therefore unenforceable. Accordingly, I cannot give it any weight.
26. I have considered whether there are any exceptional circumstances to prolong the appeal to allow the validity of the undertaking to be addressed. However, given my findings on other issues I do not consider such circumstances apply. In the absence of a legally binding undertaking the proposal would fail to mitigate its impact on services and the environment, or to meet policy requirements in the development plan. It would consequently conflict with Policies D4, D6, H4, H5, H6, E11, SI1, SI2 and T1 of the London Plan and Policies SP2, SP3, SP4, SP6, DM4 and DM29 of the Local Plan, which require the mitigation set out above.

Affordable housing

27. The planning statement accompanying the proposal confirms the intention to provide 35% affordable housing by habitable room, with a 60:40 split between affordable and intermediate rent. This in principle meets the fast-track

⁵ Planning Practice Guidance, paragraph 21a-010-20190723

requirements of Policy H5 of the London Plan in respect of the provision of affordable housing for a scheme of this type.

28. The Council raises objection on the grounds that the fast-track procedure is not applicable because other policy requirements are not met, the use of grant funding to increase affordable housing has not been explored, and no early-stage review has been included.
29. The first of those concerns is to an extent hypothetical in that if other policy requirements are not met, then the proposal would be unacceptable on those grounds and the question of affordable housing would not arise. The second concern has now been addressed by the appellant in the statement of case where the use of grant funding has been explored but found to be not practical or not possible to pursue. The Council is now satisfied that the scheme meets this element of the policy. The last concern has also been addressed in principle in that the unilateral undertaking submitted with the appellant's final comments includes an early-stage review.
30. However, it is not possible to secure the provision of affordable housing through imposition of a condition, and the unilateral undertaking is incomplete for the reasons explained in more detail under the issue of mitigating services and the environment. Accordingly, I cannot place any weight on it. In the absence of a valid undertaking, there is no certainty that the scheme would provide a proportion of the units as affordable housing. The development would therefore conflict with Policies H4, H5 and H6 of the London Plan and Policy SP2 of the Local Plan, which require provision of affordable housing in major residential schemes.

Carbon emissions

31. The appellant has indicated that they are committed to meeting and exceeding CO₂ reduction standards.
32. While I have no doubt that is the case, meeting such standards on site is in practice very difficult and in most cases a contribution towards off-site provision is necessary. Such a contribution can only be secured through a legal undertaking. The appellant has indicated their willingness to enter into such an undertaking and have included a carbon off-set clause in the unilateral undertaking submitted with their final comments. However, for the reasons set out in more detail in the section on mitigation of services and the environment, that undertaking is incomplete and I am unable to place any weight on it.
33. In the absence of evidence to demonstrate that the scheme would be zero-carbon or that there is an enforceable undertaking to secure suitable carbon off-set, I conclude that the development would conflict with Policy SI 2 of the London Plan and Policy SP6 of the Local Plan, which set minimum requirements for achieving carbon neutral development.

Character and appearance

34. The area surrounding the appeal site consists of a small neighbourhood centre around the junction of the Brighton Road with a number of minor roads. The ground floors of buildings are generally in retail or commercial uses, with residential accommodation above. The majority of buildings in the immediate vicinity are three storeys high. To the south of the site more modern residential development is four storeys high. The townscape around the junction has a

busy, urban character that differs from the lower density, more suburban character of the wider neighbourhood.

35. There is a wide range of different building styles with ornate detailing to late Victorian/early Edwardian terraces, regularly proportioned mid-20th century buildings with some neo classical features, and plainer modern structures. The former Swan and Sugar Loaf Hotel (now a convenience store) immediately to the north of the appeal site is a decorative building featuring prominently in views in and around the junction and justifies its status as a locally listed building. The more modern buildings are generally of larger scale than the earlier Victorian/Edwardian buildings.
36. The appeal proposal would present a five-storey frontage to Brighton Road, with the upper floor set slightly back, reducing to three storeys at its northern end. It would be most prominent in views along the Brighton Road. It would also be seen in views from the north rising up behind the Swan and Sugar Loaf Hotel building. Parts of the uppermost floors would be seen from the east and south east behind the buildings fronting Selsdon Road, but these would only be visible in medium to longer distant views and seen in conjunction with other roofscapes.
37. In terms of scale, the proposed building would relate reasonably well to the larger three and four storey buildings immediately to its south which front Brighton Road. While it would be an additional one to two floors higher than these neighbouring buildings, that variation would not in my view appear out of place or discordant. The immediately adjoining site at 3 Brighton Road has had permission for a four-storey building although that has lapsed, there is an extant permission for a four-storey building on the site, and permission has recently been granted on appeal to raise the height of 5 Brighton Road to five storeys. There is therefore a real possibility of buildings becoming higher in this part of Brighton Road in due course, in the case of 5 Brighton Road to a height comparable to that now proposed.
38. It is important that the proposal would not dominate the Swan and Sugar Loaf Hotel building. In that respect, there would be separation between the buildings provided by an existing single storey, flat roofed section. The appeal scheme would also step down from five to three storeys at its northern end, closest to the locally listed building. These two elements combined would visually distinguish the two buildings and prevent the appeal scheme appearing dominant or overbearing. The separation between the buildings and stepping down of the northern end would also serve to differentiate the two buildings in views down Brighton Road.
39. I conclude that the scale of the proposed building could be accommodated on the site without causing harm to the character and appearance of the area, including the setting of the adjacent locally listed building. It would therefore accord with London Plan Policies D3 and D4 and Local Plan Policies SP4 and DM10 which promote high quality design while accommodating development needs.
40. The Council accepts that the inclusion of public art as part of the development as required by Policy DM14 of the Local Plan is a matter that can be dealt with by condition.

Optimisation

41. Policies GG2 and H1 of the London Plan require that new development make best use of land and increase housing supply, and proactively explore the potential to intensify the use of land to support additional homes and workspaces, promoting higher density development, particularly in locations that are well-connected.
42. There is an extant planning permission for two commercial units and 17 residential units on the site. The proposed development would intensify the use of the site over and above this extant scheme, both in terms of commercial and residential units, at a higher density. It would therefore in principle accord with the policies outlined above.
43. The Council raises concern about the lack of certainty over the minimum number of units that the development would provide. While the use of the phrase 'up to' in the description introduces the possibility of less than 28 units being provided, I consider that in practice the likelihood of that happening would be small. The intention of the proposal is to increase rather than decrease the amount of development on the site, and that is almost certain to be reflected in an uplift in the number of units over that already permitted. There would still be a degree of control over unit numbers through consideration of the reserved matters and, if it were felt necessary, a condition could have been imposed requiring a minimum number of units, which would have a similar effect to the description change suggested by the Council.
44. Optimisation is about more than just intensification. However, in terms of making better use of the site and promoting higher density development, I conclude that the proposal would accord with Policies GG2 and H1 of the London Plan.

Urban greening

45. The site currently provides no urban greening. While made in outline with landscaping reserved for later consideration, it is apparent that the proposed development would include a communal area at the rear and large areas of flat roof, both of which have the potential to be used to provide green space. It is also the case that the extant permitted scheme on the site has been able to meet the requirements for urban greening.
46. The appellant has indicated in the statement of case the potential to use these areas for urban greening. Although I have not received the illustrative landscaping plan referred to in that document, I have seen the illustrations and draft calculation in the appellant's final comments. I am satisfied that in principle the development would be able to meet the requirement for urban greening. The Council in its statement of case also accepts that a condition could be used to resolve its concerns. I conclude that the proposal would not conflict with Policy G5 of the London Plan.

Other Matters

47. The appellant draws attention to a number of appeal decisions. Other than where I have referred to them in my reasoning, I do not find these other decisions to be particularly useful. Although they may address issues that are broadly similar to those considered in this appeal, the facts of each case are different. Since the decision in this appeal turns on the specific facts of the

scheme being proposed and how it relates to its surroundings, the relevance of other schemes on different sites in different surroundings are of limited help for the purposes of comparison.

48. The appellant also makes reference to a wide range of case law. I do not dispute any of the judgements made in those cases. However, I do not consider that the decision in this case turns on legal interpretation. Rather, my conclusions on each of the issues raised are largely dependent on the proposal itself, its likely effects and the application of policies relevant to it. The outline nature of the proposal does not obviate the need to provide sufficient information to enable informed judgements to be made on the issues that are important to its determination. I have had regard to the cases quoted, but in that context.

Conclusion

49. I have determined that the development would fail the exception test as regards flood risk, would be likely to harm the living conditions of future occupants and, because of the lack of an enforceable legal undertaking, would fail to provide affordable housing, mitigate impacts on services and the environment, and meet the target for reducing carbon emissions. These matters weigh heavily against the proposal.
50. I have also determined that a five storey building of the scale proposed could be accommodated on the site without causing harm to the character and appearance of the area, including the setting of the locally listed building, and that issues relating to optimisation and urban greening could be addressed at the reserved matters stage or through conditions. These carry neutral weight in my decision.
51. I recognise that the development would bring benefits in the sense of making better use of the site and providing residential and retail accommodation to meet need. It would also have economic benefits, both short and long term, including bringing a vacant site back into use.
52. However, these benefits do not outweigh the harm identified above. The development would therefore conflict with the development plan when taken as a whole. There are no other material considerations that indicate the decision should be made other than in accordance with the development plan.
53. Consequently, I conclude that the appeal should be dismissed.

Guy Davies

INSPECTOR