
Appeal Decision

Inquiry held on 23-26 September 2014

Site visit made on 26 September 2014

by Christina Downes BSc DipTP MRTPI

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

Decision date: 18 November 2014

Appeal Ref: APP/D0515/A/14/2210915

Land east of East Delph, Whittlesey, Cambridgeshire

- 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 Showfields Ltd against the decision of Fenland District Council.
 - The application Ref F/YR13/0714/O, dated 19 August 2013, was refused by notice dated 20 December 2013.
 - The development proposed is erection of up to 249 dwellings with associated infrastructure, vehicular and pedestrian access, public open space and associated land compensation works.
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Decision

1. For the reasons given below, the appeal is dismissed.

Procedural Matters

The nature of the application

2. The application was made in outline with all matters reserved for future consideration. It was however accompanied by an Indicative Masterplan (Plan A/1), which indicated the land proposed for housing development and the area proposed for open space and a play area. The land within the application site further to the east was proposed for the flood compensation works. This is particularly relevant in this case because much of the application site is in Flood Zone 3b (functional floodplain). Without the Indicative Masterplan housing development could take place anywhere on the application site. This is not the Appellant's intention so, in this case, the Indicative Masterplan, whilst illustrative, assumes a considerable degree of importance.
3. The Council's reason for refusal alleged that there was insufficient information to demonstrate that the scheme could be accommodated without detriment to three matters. Following the submission of further information the Council was satisfied that the concerns regarding landscape impact and highway safety had been satisfactorily addressed.
4. Whilst access is a reserved matter, the application was accompanied by an indicative access layout showing a "T" junction with East Delph. The Indicative Masterplan also shows access from this road with a secondary access from Teal Road. The removal of the Council's objection to highway matters came as a

result of detailed discussions with Cambridgeshire County Council as Highway Authority and it is clear that these were based on the main point of access being from East Delph. I am not aware that any of the discussions proposed access solely from one of the roads to the south. It is not unreasonable in the circumstances of this case to surmise that the main access would be from East Delph in roughly the position shown on the Indicative Masterplan.

5. The Showfields Action Group (SAG) were given Rule 6 status at the Inquiry and fully participated in the proceedings. An evening session of the Inquiry was also held in Whittlesey to allow local people to come and give their views.

My Ruling

6. At the Inquiry the Appellant requested that I make a Ruling on a proposed amendment to the scheme as shown on the Revised Masterplan (Plan B). This was accompanied by an associated planning condition, which had been included in one of the proofs of evidence. The Appellant argued that the change would accord with the *Wheatcroft* principles¹ in that the red line of the application site and the description of the development would remain the same. The difference would be a reduced development area with all housing at or above 5 metres AOD². This would negate the requirement for land compensation works other than in respect of the access road. The Council and the Rule 6 Party objected to this revision on the basis that it would significantly change the nature of the scheme. The land compensation works were considered to be an integral part of the application considered by the Council. Also there was objection to it being introduced late in the day without public consultation, raising the issue of potential prejudice and unfairness.
7. My Ruling took account of the Planning Inspectorate's *Good Practice Advice Note 09*, which advises on accepting amendments to schemes at appeal stage. It also paid careful regard to the *Wheatcroft* principles referred to above. The land compensation proposals would involve the raising of part of the site to bring it above the 5 metre AOD contour. It would be lowered in the eastern part of the site to compensate for the loss of flood storage within the functional floodplain. The application description and the Appellant's representations at appeal stage made clear that this element was "integral" to the proposal as a whole.
8. Although the overall site area would not change the outcome would be that a similar number of houses could be accommodated on a smaller area of land. This is because the application is for "up to" 249 dwellings and therefore the maximum number could be built. Such an increase in density may have implications for residential amenity and landscape impact, for example, which no-one has had a chance to consider. I considered that within the context of this particular proposal the change that I was being asked to accept would be a significant one. Furthermore there would be the potential for unfairness to both the Council and third parties because it had been introduced late in the day without any consultation with anyone. My Ruling was that the amendment should not be accepted and my decision is based on the originally submitted scheme on which the Council made its decision. This was accepted by the parties and the Inquiry proceeded on this basis.

¹ Bernard Wheatcroft v Secretary of State for the Environment.

² The 5 metre AOD contour is used by the Environment Agency to define the limit of the functional floodplain (Zone 3b).

Reasons

Background and Policy Context

9. The appeal site is on the northern side of Whittlesey and presently comprises a number of fields separated by tall native hedgerows. It is about 18.45 hectares in extent and has a varied topography which, notwithstanding local undulations, slopes down in a northerly direction towards the River Nene. Immediately to the south the site is bordered by residential properties, including those within the area locally known as the Birds Estate.
10. The overarching strategy in Policy LP1 of the recently adopted *Fenland Local Plan* (the LP) (May 2014) is to deliver sustainable growth. Policy LP3 sets out the spatial strategy which seeks to place the majority of new housing within 4 market towns, one of which is Whittlesey. Policy LP4 establishes an approximate target for the town of 1,000 homes, to be delivered between 2011 and 2031. The policy goes on to set out the criteria for assessing housing proposals. Large scale developments, which are defined as being 250 dwellings or more, are directed to the broad locations for sustainable growth. In the case of Whittlesey this is on the eastern side of the town under Policy LP11.
11. Policy LP4 indicates that small scale housing proposals below 250 dwellings, which would include the appeal scheme, are not confined to land within a settlement boundary but rather the LP applies a flexible approach to potential housing sites. In the case of Whittlesey it indicates that 350 dwellings are expected to come forward in this way. It goes on to say that such sites are expected to include the remaining allocations from the former *Fenland District Wide Local Plan* (1993). One such allocation was land on the northern side of Whittlesey, which included the appeal site and was enclosed by a new by-pass. This road was never built and it is unclear from the Proposals Map to what extent the allocation included land which is part of the functional floodplain.
12. In the case of small scale housing proposals within or on the edge of the market towns Policy LP4 directs the decision maker specifically to Policy LP16. This includes a large number of provisions which seek to deliver high quality environments across the district. There is no evidence that the appeal scheme, which is in outline form, would conflict with this policy. However it is also necessary to consider the proposal in terms of all relevant policies in the LP, including those dealing with flood risk. Policy LP11 for example, which relates specifically to Whittlesey, indicates that development proposals, especially to the north of the town, should have particular regard to all forms of flood risk.

Main Issue: Whether the Proposed Development Would Cause Undue Harm to Flood Risk

13. Policy LP14 includes provisions relating to flood risk and makes clear that all development proposals should adopt a sequential approach. This accords with the National Planning Policy Framework (the Framework) as would be expected with a recently adopted local plan. It must however first be considered whether the appeal site is within an area of flood risk. As has already been mentioned, much of it is below the 5 metre AOD contour, which the Environment Agency (EA) treat as the boundary of the functional floodplain.

14. The Nene Washes are an area of low lying land to the south of the River Nene. They play an important role in the defence of towns such as Peterborough from flooding. The Dog-in-a-Doublet sluice is immediately to the north of Whittlesey and is at the limit of the tidal river. At times of high tide it can be closed to upstream river flows and levels can be kept below 4.3 metres AOD thus avoiding over-topping Cradge Bank on the southern side of the river. High flows upstream can be diverted into Morton's Leam via the Stanground Sluice and if necessary the water spills out onto the Washes and is contained to the south by either the South Bank or the natural topography and to the north by Cradge Bank. Generally speaking in such circumstances the water levels would remain below 4.3 metres AOD.
15. That the Washes do their job is illustrated by photographs and a booklet provided by local residents and entitled "*Whittlesey in Flood 2012-2013*". It is clear that extensive areas flood to the north of the town and it is understandable that local people are very worried about any development within this area that may compromise the proper working of the flood defence system.
16. Flooding above 4.3 metres AOD may happen with more intense weather events, for example when a prolonged series of high tides coincides with high rainfall or snow melt. Such events were described in the Statements of Common Ground as "extreme" or "very extreme". In such circumstances it may not be possible to manage the levels as described above and the water could rise to over-top Cradge Bank. The EA has determined that the 5 metre AOD contour defines the extent of the flood storage area. There was a considerable amount of debate at the Inquiry about the actual risk of a flood reaching this point. The highest water level recorded in the Nene Washes was in the 1947 flood where it rose to 4.82 metres AOD at Stanground Sluice. In 1998 the peak at Whittlesey was 3.94 metres AOD.
17. The likelihood of an extreme event occurring is difficult to assess because there are many different hydrological scenarios, each with its own probability and this results in a complex statistical analysis. It is however a reasonable proposition that extreme events will become more likely in the future with climate change. The Appellant's expert witness estimated that a rise in flood levels to the 5 metre AOD mark, taking account of climate change, would increase the annual probability to around 1 in 800 years, although it was emphasised that this was a judgement based on experience. Such an event would necessitate very high tides and rainfall to coincide over a prolonged period.
18. The EA has indicated that with climate change there is a 1 in 100 year annual probability of a maximum water level of 4.57 metre AOD occurring at various nodal points along Morton's Leam to the north of Whittlesey, taking account of climate change. However it seems a reasonable assumption that the 5 metre level representing the edge of the functional floodplain includes some allowance for wave action. This has shown to be a feature of local flooding as evidenced by the DVD provided by local flood wardens. There may also be an allowance for surge tides, which would suggest that the limits of the floodplain have been set by the EA taking a precautionary approach. This seems entirely reasonable in view of the many variables involved.

19. Although the appeal site extends to over 18 hectares, a large part of it would be used for either open space, playing fields or land compensation works. The latter would entail the ground being lowered in order to balance the raising of the development platform on which the houses and access road would be built. In the Government's Planning Practice Guidance (the PPG) dwelling houses are classed as "more vulnerable" development and would not be appropriate in Flood Zone 3 unless a sequential test and an exception test had been passed. Following the mitigation works all of the houses would stand on land above 5 metres AOD and thus in Flood Zone 1, which would have less than a 1 in 1,000 annual probability of flooding and is considered by the EA to be suitable for housing development in this case.
20. The EA has agreed that overall there would be no net reduction in the flood storage area and the capacity of the functional floodplain would not be diminished. In short, the level-for-level compensation works would ensure that flood risk would not be increased. In technical terms the EA is satisfied with the proposal and has raised no objections in this respect. It was agreed, as a result of more detailed topographical survey work, that the land raising would result in about 13% of the application site being taken out of the functional floodplain.
21. The main difference between the parties is whether the failure to undertake a sequential test is fundamental to the acceptability of the appeal scheme in terms of flood risk. SAG and the Council both consider that the sequential test should be applied to all land that is within Zone 3b prior to mitigation. There was a slight difference in approach because SAG believed that the site as a whole should be tested whereas the Council considered it should just be the proposed area for housing. I am inclined towards the Council's view because the PPG classes open space, playing fields and compensation works as "water compatible development" for which the sequential test does not have to be undertaken, providing various conditions are met. There was no evidence that these conditions would provide an obstacle in this particular case. In the circumstances it is the 13% or so of the net developable area that is currently in Flood Zone 3b that is at issue. Whilst the majority of the built development would be in Flood Zone 1, a significant part of it would not.
22. The sequential approach in national and local planning policy seems to me to be based on the underlying principle of sustainability. This is that development should be directed to areas with the lowest probability of flooding and that reliance should not be placed in the first instance on flood defence and flood mitigation. The Framework makes it quite clear that it is only if there are no sites with a lower flood risk that consideration should be given to whether the development could be made safe and not increase the risk of flooding elsewhere through a Flood Risk Assessment and the application of the exception test. The Appellant has jumped straight to the latter part of the process, without considering whether there is better located land to accommodate the development in question. The evidence seems to indicate that there is but, in any event, there is no evidence that there is not.
23. The Appellant contends that the Council's approach is solely policy driven without any consideration of the actual harm that would arise. Attention is drawn to the wording of Policy LP14 which indicates that development in areas known to be at risk of flooding will only be permitted following "the successful completion of a sequential test (if necessary), having regard to actual and

residual flood risks". There was some debate at the Inquiry about what the bracketed words actually mean. The Appellant contends that it means that the sequential test does not have to be applied if there is no actual or residual risk. It was agreed that there is no residual risk but the Appellant's argument is that there are no actual risk either. This is because it is alleged that the risk is so small that it will in reality never happen. For present purposes I start from the proposition that the Appellant's policy interpretation is correct and consider the matter of actual risk.

24. Despite the fact that the flood event would need to be extreme or even very extreme, the probability cannot be exactly known due to the many different hydrological scenarios which could combine in a variety of ways. Whilst the Appellant thought that a flood would only reach the 5 metre AOD level every 800 years that was no more than an informed judgement. Even if it were correct it would still be classified in the PPG as Zone 2, where there is a "medium probability" of flooding. However as already mentioned no account has been taken of the effect of wave action or strong surge tides and the actual probability could be much lower bearing in mind these variables. So in my opinion there would be actual risks and these would give rise to harm which should not be discounted.
25. The sequential test is a necessary requirement in this case for all of the reasons given above. It would only apply to part of the developable site but that is not an insignificant area of land. In any event there is nothing in the Framework, PPG or development plan policy that suggests the sequential test should only be applicable to sites that lie wholly within the flood risk area. It is for the Appellant to undertake the sequential test and for the Council to decide whether it has been successfully completed. The lack of objection from the EA does not infer that this aspect has been satisfactorily resolved. Even though the floodplain could technically be raised and lowered to accommodate such development safely that should not be done without exploring other more benign options first.
26. The Appellant referred to an appeal decision on a site at Steeple Claydon, where 13 dwellings were granted planning permission. This appears to be land within the floodplain with compensation measures being accepted as mitigation. However the Inspector dealt with flood issues very briefly as an "other matter" and it is not made clear whether the sequential test had been applied or not. Reference was also made to development at Oundle Marina but from the information provided it is not possible to draw meaningful conclusions that would be helpful in the context of the current appeal.
27. The PPG makes clear that "flood risk" is a combination of the probability and potential consequences of flooding from all sources and I turn briefly to consider the other identified source, which is surface water. A Drainage Strategy has been submitted and this has been attached to the *Statement of Common Ground on Flood Risk and Surface Water Drainage*. It has been agreed by the Environment Agency, North Level District Internal Drainage Board (IDB) and the Council. It establishes two main options for the surface water drainage of the site but it is likely that the final solution would be somewhere between the two. The matter would be finalised at reserved matters stage but the important point is that the statutory authorities are satisfied that the site could be drained without a risk of flooding from this source.

28. It seems likely that the surface water drainage system would be adopted by the IDB. The provisions for future management and maintenance are included within the Planning Obligation and the Appellant covenants a payment for this purpose for the first 50 years. This is considered appropriate because by then the IDB would have adopted the system and it would be paid for through their funding streams. Whilst it is appreciated that there are concerns about the failure of existing estates to drain properly this is a historic situation and there is no reason why the appeal development should suffer from similar problems. It is relevant that the IDB is a signatory to the Planning Obligation and will assume responsibility for the surface water drainage system in perpetuity.
29. The Drainage Strategy also takes account of water draining from the existing residential development to the south by means of the ditches that cross the appeal site. The evidence shows that there would be no harmful effect in terms of surface water flood risk either to existing properties or to the houses proposed on the appeal site. SAG was concerned about the movement of the 5 metre AOD contour closer to the rear boundaries of properties in Moorhen Road as a result of the land compensation works. Whilst it is the case that the land would be re-modelled in this area there would still be a considerable distance between the rear fence lines and the area where gradients would be reduced. The existing flood risk to these properties would not change as a result of the appeal proposal.
30. In conclusion there would be no significant impact in terms of risk from surface water flooding. However the fluvial flood risk would be unacceptable for all of the reasons given above. The appeal proposal would thus be contrary to Policies LP11 and LP14 in the LP and policies in the Framework relating to flooding. There are no material considerations that indicate that the appeal scheme should be determined other than in accordance with the development plan in this respect.

Imposition of Conditions

31. It was suggested by the Appellant that in the event that I do not accept its evidence in terms of flood risk then the matter could be resolved through the imposition of planning conditions. These would restrict the development to the land at or above 5 metres AOD. In order to overcome the concern about prejudice to third party interests a condition would limit density and maximum housing numbers up to a maximum of 212 dwellings.
32. The evidence was confused and confusing as to whether I was being asked to consider making a "split decision". The PPG indicates that it may be appropriate to grant permission for only part of a development in exceptional circumstances. I am not convinced that such circumstances apply here. Furthermore the PPG advises that such circumstances will only apply where the acceptable and unacceptable parts of the proposal are clearly distinguishable. In this case, for the reasons given in my Ruling, the compensation works are an integral part of what has been applied for. Even if they were not needed for the housing element they would still be required in association with the access from East Delph, which includes land presently below 5 metres AOD. It is unclear what the extent of the cut and fill would be, where it would take place and what the EA view on it would be.
33. The Appellant refers to Policy LP1 of the LP which requires the Council to adopt a pro-active approach with applicants in order to find solutions. There are

similar exhortations in the Framework. From the submitted evidence it would appear that all parties have worked together in the spirit of co-operation in order to try and resolve differences wherever possible both at application stage and in connection with the appeal.

34. It is difficult to see how what was being proposed towards the end of the Inquiry by way of conditions could result in a scheme that would be substantially the same as the application considered by the Council. Although this is an outline proposal with all matters reserved, the Indicative Masterplan is of considerable significance for the reasons given in Paragraph 2 above. The Appellant is effectively suggesting that the Revised Masterplan (Plan B), which I rejected in my Ruling, should be accepted as the basis for the conditions now being put forward. Whilst I acknowledge that it is now being advanced for a different purpose it would seem perverse for me to accept a plan that I had previously rejected. In any event I do not agree that in this particular case the developable area can be changed in the way proposed by the Appellant without fundamentally altering the scheme on which the Council made its decision. The PPG makes clear that a condition that modifies the development in such a way as to make it substantially different from that set out in the application should not be used. That is the case here.
35. In the circumstances I do not consider that the imposition of conditions would satisfactorily remove the flooding objections to the appeal proposal.

Other Matters

36. At the start of the Inquiry I identified a number of other issues to reflect the various objections raised by SAG and local people. Particular concerns included traffic generation, highway safety, visual amenity, ecology and the effect on the internationally important nature conservation site of the Nene Washes. I do not discount the importance of this evidence which was presented to the Inquiry at some length. However in view of my conclusions on flood risk it seems to me unnecessary to consider whether there are additional harmful impacts for the purposes of this decision.
37. The Appellant disputed that the Council could demonstrate a 5 year supply of deliverable sites to meet housing requirements. Indeed it was considered that the appeal site, which was within a swathe of land identified for development in the 1993 Local Plan, forms part of the housing land supply under Policy LP4. However this is a broad area enclosed by a proposed by-pass that was never built. It is difficult to believe that the recently adopted LP would have been found sound if its supply had relied on building houses on land that falls within the functional floodplain.
38. Paragraph 47 of the Framework indicates that there should be a significant boost in the supply of housing. The appeal scheme would offer a number of advantages. Whittlesey is identified in the LP for some housing growth and the proposal would make a useful contribution to housing delivery. In addition it would deliver a policy compliant scheme of affordable homes for which there is a considerable need. The development would also provide a large area of open space that would benefit existing residents as well as new occupiers and would address an acknowledged shortfall in the northern part of Whittlesey. Furthermore the site is recognised as being in an accessible location where a number of trips could be undertaken by non-car modes.

39. The Framework states that there are three inter-related dimensions to sustainability. The appeal scheme would contribute towards the economic and social roles for the reasons given in the preceding paragraph. There would also be some environmental benefits, including landscape enhancements that would result in gains to biodiversity. However a not insignificant part of the housing area is within an area of high flood risk. The Framework makes very clear that the aim of the sequential test is to steer new development to areas with the lowest probability of flooding. Following such an approach is not merely a slavish adherence to policy as the Appellant suggests but rather it is central to an understanding of sustainability objectives. If this needs reinforcing, Paragraph 14 of the Framework makes it crystal clear. There is a presumption in favour of sustainable development but even if the development plan is absent, silent or relevant policies are out of date, permission should not be granted where specific Framework policies indicate it should be restricted. Locations at risk of flooding are specifically highlighted as one such policy in Footnote 9.
40. In this case the appeal proposal would be contrary to development plan policy, including Policies LP1, LP11 and LP14 in the LP. Even if there were a shortfall of housing land there is no suggestion that these are housing supply policies. In any event the "adverse impact" test in Paragraph 14 of the Framework would not apply because it is inherently unsustainable and thus harmful to build houses in the floodplain unless there are specific reasons why it is necessary to do so. No such reasons are applicable here because the sequential test has neither been undertaken nor passed.
41. I have considered all other matters raised but have found nothing to alter my conclusion that the appeal should not succeed.

Christina Downes

INSPECTOR

He called:

Mr R Lobley	Associate with BWB Consulting
Mr S Taber BSc(Hons) MSc MCIEEM	Senior Ecologist with Ecology Solutions
Mr N Taylor	Lay witness and local resident

INTERESTED PERSONS:

Mr S Barclay MP	Member of Parliament for NE Cambridgeshire
Mr M Curtis	Cambridgeshire County Councillor for Whittlesey North
Ms D Laws	Whittlesey Town Councillor
Ms C Carlisle	Headteacher at the Alderman Jacobs Primary School
Mr P Nightingale	School Governor and local resident and
Mr M Wollaston	Volunteer Flood Warden and local resident
Mr A Jones	Local resident
Mr I Fleming	Local resident
Mr G M Baldrey	Local resident
Mr K Mawby	Local resident
Mr R Gale	Local resident
Mr J Burch	Local resident
Mrs L Jones	Local resident
Ms S Fleming	Local resident

DOCUMENTS

- 1 Council's notification of the Inquiry and list of persons notified
- 2 Fenland Local Plan (adopted May 2014)
- 3 Five Year Housing Land Supply – Final Report (September 2014)
- 4 Statement of Common Ground on Flood Risk and Surface Water Drainage
- 5 Statement of Common Ground on Housing Land Supply

- 6 Statement of Common Ground on Ecology
- 7 Planning Inspectorate Good Practice Advice Note 09
- 8 Copy of e-mail from North Level District Internal Drainage Board (17 September 2014)
- 9 Copy of letter from Cambridgeshire County Council on transport matters (14 July 2014)
- 10 Relevant sections of the Planning Practice Guidance on the use of conditions prepared by Mr Flood
- 11 Development Framework plan of the Snowley Park development submitted by Mr Crean
- 12 Extract from the Snowley Park Planning Statement submitted by Mr Potts
13 Response on behalf of the Appellant by Stirling Maynard to highway and transportation issues raised by third parties
- 14 Whittlesey in Flood 2012-2013 provided by the third parties
- 15 Written statement to complement oral submissions by Ms C Carlisle
- 16 Written statement to complement oral submissions by Mr P Nightingale, including photographs
- 17 Written statement to complement oral submissions by Cller Laws, including photographs and other information
- 18 Written statement to complement oral submissions by Mr Woolaston, including photographs, a map and a DVD
- 19 Written statement to complement oral submissions by Mr Jones
- 20 Written statement to complement oral submissions by Mr Fleming
- 21 Written statement from Mr and Mrs Baldrey to complement oral submissions by Mr Baldrey
- 22 Written and photographic material to complement oral submissions by Cller Curtis
- 23 DVD of photographs to complement oral submissions by Mr Gale
- 24 Written representations from local residents submitted during the Inquiry
- 25 Supporting information provided by the County and District Councils on planning contributions, affordable housing, Travel Plan and play space requirements
- 26 Draft planning conditions including suggested conditions relating to a restricted development area

- 27 Supporting information on affordable housing, travel plan and play space provision
- 28 Planning Obligation by Agreement dated 26 September 2014

PLANS

- A/1-A/4 Application Plans including the Indicative Masterplan
- B Revised Masterplan (Plan 5)

Richborough Estates