
Appeal Decision

Site visit made on 5 February 2018

by Graham Chamberlain BA (Hons) MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 19th February 2018

Appeal Ref: APP/D0515/W/17/3180044

250 Creek Road, March, Cambridgeshire PE15 8RY

- 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 Mick Hardiman against the decision of Fenland District Council.
 - The application Ref F/YR17/0042/O, dated 16 March 2017, was refused by notice dated 27 April 2017.
 - The development proposed is 4 new dwellings.
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Decision

1. The appeal is dismissed.

Preliminary Matters

2. The application was submitted in outline with all matters of detail reserved for future consideration save for landscaping and layout. I have considered the appeal on this basis. Fencing is included within the definition¹ of landscaping and therefore the proposed boundary fence is a matter forming part of the appeal scheme. Earthworks can also fall within the definition of landscaping and therefore the appellant's proposal to increase the land levels is also a matter before me.
3. The appeal was originally due to be determined following a hearing but the appellant advised that he would be unable to be professionally represented and would not be able to add anything to his written submissions. As such, it was agreed that the appeal should be considered through the written representation procedure. A number of questions were sent to both the appellant and Council relating to the main issues and I have had regard to the responses received.

Main Issues

4. The main issues in this appeal are whether the appeal site is suitable for housing having regard to;
 - The risk from flooding and local and national policies relating to development in areas at risk from flooding, with particular reference to the adequacy of the submitted sequential test; and
 - The adequacy of the living conditions of future occupants with particular reference to outlook, ventilation, enclosure and noise and disturbance.

¹ See the Interpretation section of *The Town and Country Planning (Development Management Procedure) (England) Order 2015* for the full definition of each of the five reserved matters

Reasons

The risk from flooding

5. The appeal site is located to the north west of March Town Centre and encompasses a forecourt, a workshop and an open area behind. The appeal scheme is to demolish the structure on site, increase the land levels, erect four dwellings and construct a 3 metre high boundary fence. The Environment Agency (EA) flood map for March identifies the site as being positioned within Flood Zones 1, 2 and 3a.
6. The EA flood maps are not always precise, being based, in many cases, on modelled assessments. Strategic Flood Risk Assessments (SFRA) carried out by a Local Planning Authority (LPA) may refine the information on the EA maps but I have not been directed to a Level 1 SFRA that has placed the appeal site outside Flood Zones 2 and 3. I have seen nothing of substance to suggest new development in March, beyond that already planned for, needs to be directed to sites within Flood Zones 2 and 3 in order to sustain the community and realise the spatial strategy for the district. Thus, the absence of a Level 2 SFRA for March, which would inform an approach towards such development if required, is not a significant point in favour of the appeal scheme².
7. Policy LP14 of the Fenland Local Plan 2014 (LP) states that all development should adopt a sequential approach to flood risk and that development in areas known to be at risk from any form of flooding will only be permitted following the completion of a sequential test (if necessary), having regard to actual and residual flood risks. The appellant has argued through a Flood Risk Assessment that the site should be considered to be within Flood Zone 1, as existing flood defences protect it against the 1 in 100 year return period event and the site is not known to have been flooded. As such, he considers the actual flood risk to be low and thus a sequential assessment is unnecessary.
8. However, the adopted Cambridgeshire Flood and Water Supplementary Planning Document (SPD) states that the presence of existing defences should not be considered when undertaking the sequential test. It goes on to state that the maintenance of the defences may change over time and climate change will have an impact on the level of protection that they offer. As such, the EA Flood Maps do not take into account the presence of any flood defences or the possible impacts of climate change. This would seem to suggest that the presence of flood defences would not justify reclassifying a site identified as being within Flood Zones 2 and 3 on the EA Flood Maps as instead being solely within Flood Zone 1.
9. Policy LP14 does not specifically list (in Part B of the Policy) the EA Flood Maps as a matter that will inform an assessment as to whether or not planning permission should be granted. However, the list does include national advice and this refers to the EA Flood Maps as a useful tool in informing an assessment of flood risk.
10. The Flood Risk Assessment sets out measures that would enable the proposal to be flood resilient. Nevertheless, this does not outweigh the need to undertake and pass the ST in the first instance, as housing should only be located in an area at high risk of flooding if it is not possible, consistent with

² . Wisbech is covered by a Level 2 SFRA presumably because high levels of growth will need to be located in Flood Zones 2 and 3.

wider sustainability objectives, for the development to be located in a zone with a lower probability of flooding.

11. Consequently, taking the forgoing points together, the appeal site is in Flood Zone 3a and therefore a Sequential Test (ST) is required.

The adequacy of the sequential test

12. Although the appellant has questioned the need for a ST he has nevertheless provided one. The SPD states that the geographical area over which the test is applied (the Sequential Test Area - STA) should usually be the entire LPA area, although the functional requirements and objectives of the development, or the local need for the type of development, may justify a smaller area.
13. The appeal site is not vacant and there is no evidence before me to suggest there is no demand for it in its current use. Consequently, its redevelopment is currently unnecessary for regeneration. Thus, a STA confined to the appeal site has not been justified. The proposed houses do not need to be located on previously developed land (PDL) and consequently the redevelopment of PDL, which would occur through the appeal scheme and is supported by local and national policy, is not a functional requirement of the development. Thus, a STA, which would only include PDL, has not been justified either.
14. Nevertheless, Policy LP3 of the LP identifies March as a Primary Market Town where the majority of the district's new housing should take place. As such, there is a local functional need for market housing in March. Thus, it would be reasonable to confine the STA to the settlement of March.
15. Both the National Planning Policy Framework (The Framework) and the Planning Practice Guide (PPG) state that the aim of the sequential assessment is to steer new development to areas with the lowest probability of flooding, and that development should not be permitted if there are reasonably available sites, appropriate for the proposed development, in areas with a lower probability of flooding.
16. Reasonably available sites are defined in the SPD as including a site or a combination of sites in the STA that would be capable of accommodating the proposed development. The SPD goes on to say that these may be larger, similarly sized or a combination of smaller sites. This would result in a broad list of potential sites. The approach advocated in the SPD is reasonable given the aim of the Framework to steer development away from sites with the highest risk of flooding. The disaggregation of the proposed development for the purposes of the ST could be a means of achieving this, as would exploring opportunities to include the four homes as part of a larger development. As such, I afford the SPD, and the approach set out within it, significant weight.
17. The ST has considered a long list of sites but these are generally of a comparable size to the appeal site. This is understandable as the consultants were following guidance in the draft SPD that stated at the time that reasonably available sites are those of a comparable size to the proposed development site. It has been suggested that this would have included a 20% tolerance either way. However, restricting the ST to sites of a comparable size would place an arbitrary constraint on the ST.
18. As such, the ST has been predicated on an incorrect definition of what a reasonably available site should be. Therefore, even though the Council has

not provided an alternative list of sites or a detailed commentary on the sites that have been identified, I still consider the ST to be flawed as it was unduly narrow in scope.

19. It would be unreasonable to include strategic allocations within the ST as they are unlikely, in whole or in part, to be reasonably available to a small developer that would be interested in developing the appeal site. Moreover, the timescales for bringing forward the strategic allocations have not been clarified and therefore the extent to which they are currently available for development is unclear.
20. Nevertheless, if the definition of reasonably available sites in the SPD is applied, as I believe it should be, then the ST should have analysed sites that are not of a comparable size to the appeal site to ascertain whether they are reasonably available. In this respect, some smaller sites were discounted from being reasonably available because they are not of a comparable size to the appeal site. For example, sites 13, 17 and 18 in Table 1 of the ST could, in combination, accommodate the appeal scheme.
21. Moreover, some of the sites that have been considered were discounted due to viability concerns. The evidence for this being the length of time between the planning permission being granted and the ST being undertaken. However, there is no evidence from landowners that it is scheme viability preventing the developments coming forward. There can be numerous reasons for sites not being built out and I note, for example, that the appellant has been granted planning permission twice before for a residential development of the appeal site but has not built out the permissions. Consequently, some of the listed sites in the ST appear to have been discounted without adequate evidence.
22. As a consequence, the appellant has failed to establish that there are not sequentially preferable sites that are reasonably available. Thus, the sequential test has not been passed and therefore, in accordance with Paragraph 102 of the Framework, the exception test cannot be applied as a means of attempting to justify residential development in Flood Zone 3a.
23. The Environment Agency has not objected to the ST and is content with the recommendations in the Flood Risk Assessment. This is unsurprising as it will normally not comment on the appropriateness of a sequential test as this is a matter for the decision maker. Therefore, in the absence of a robust sequential assessment the EA's comments are not a determinative matter weighing in favour of the appeal scheme.
24. I therefore conclude that the appeal site is at risk of flooding and that developing it for housing has not been adequately justified through the absence of sequentially preferable sites. The proposal would therefore be contrary to Policies LP2 and LP14 of the LP, which aims to sequentially direct relevant development away from areas at risk of flooding and protect the wellbeing and health of residents.

The adequacy of the living conditions of future occupants

25. The appeal site is located in close proximity to a number of potential noise sources including a road, a rail line and the adjoining commercial unit. To this end a Background Noise Assessment (NA) was requested by the Council and submitted by the appellant.

26. The NA found the dominant noise source to be traffic in Creek Road and noise from the adjacent business. However, the extent of the impacts from the separate noise sources is unclear. The average daytime sound pressure level from all noise sources at the front façade of the existing building was 57dB. The night time average was 50dB. The second monitoring station at the rear façade gave a daytime average of 55dB and a night time average of 49dB. The appellant has also considered a noise impact of 70dB as a representation of a high individual noise event. I have no reason to doubt the accuracy of these findings or the methodology used in the NA.
27. British Standard 8233:2014 (BS) sets out targets for indoor noise and it seems sensible that the appeal scheme should attempt to meet them. The daytime target for a living room and dining room are 35dB and 40dB respectively. Night time targets for a bedroom are 30db. The World Health Organisation (WHO) states that sleep disturbance with a window open will occur when noise passes 45dB ten to fifteen times a night.
28. The noise recordings demonstrate that noise levels at the site are notably higher during the day and night than the targets suggested in the BS and WHO guidance. As such, future occupants of the appeal scheme could be subjected to significant noise disturbance without attenuation. To this end the appellant has suggested that sufficient mitigation could be achieved with suitable glazing, and this would also mitigate from high individual noise events reaching 70dB when applying the WHO guidance.
29. However, the mitigation appears to be reliant on the windows being kept closed at all times with mechanical ventilation provided to the properties³. An analysis suggesting this is a typical situation, or that the guideline noise targets could be met with the windows open, has not been provided⁴. It is not reasonable to expect future occupants of the proposed dwellings to keep their windows closed at all times to prevent them being exposed to significant noise impacts. Living with the windows closed at all times would create a harmful sense of enclosure and opening them could affect their health and well-being due to likely impacts from stress caused by excessive noise.
30. The appellant has suggested that the windows would not need to be closed at all times because the adjoining business does not operate at night. I accept that the business would not disturb sleep and for this reason, taken with my findings below in respect of outside noise levels, the noise impact from the adjoining business alone would not significantly harm the living conditions of the future occupants of the development. Consequently, the appeal scheme would not place an unreasonable constraint on the operation of the adjoining business. Thus, a conflict with Policy LP16 (O) of the LP would not occur.
31. However, the NA does not suggest the adjoining business is the only source of noise or the worst one. The main adverse noise source appears to be traffic. The traffic noise was not particularly loud when I visited the appeal site, which is surrounded by dwellings, but my observations are a limited snap shot in time and are not sufficient to outweigh the findings of an apparently robust NA that has found traffic to be a contributing factor to unacceptable noise levels.

³ Details showing an adequate means of ventilation have been provided by the appellant.

⁴ Open windows can provide some noise attenuation but it is unclear whether they would attenuate noise to the extent necessary to achieve reasonable living conditions.

32. The WHO guidance suggests that serious annoyance will occur if outdoor areas are exposed to noise levels of 55dB during the daytime and evening. The NA found noise levels to be slightly above or equal to this. As such, mitigation is required. The NA recommends a three metre high acoustic fence along the boundary with the adjoining workshop. This would provide noise attenuation of approximately 11.2dB⁵. Moreover, the position of the dwellings would provide some physical attention to the gardens. Overall the noise levels in the gardens could be brought within acceptable guideline values.
33. The gardens serving the proposed dwellings would be reasonably small and the fence has the potential to be an imposing and dominant structure. However, the land levels of the gardens would be increased in height as a requirement of the flood risk assessment and therefore the fence would only appear two metres tall from within the gardens, it could also be softened with planting. This would be a conventional height and therefore the fences would not be harmfully oppressive or unreasonably limit the outlook from the gardens.
34. The outdoor noise environment would be acceptable and the acoustic barrier would not be harmfully overbearing. The inside noise environment could be acceptable if the occupants of the properties kept their windows closed at all times but this would be unduly oppressive. If they opened their windows then there would be unreasonable noise impacts. Consequently, the appeal scheme would not provide adequate living conditions for future occupants contrary to Policy LP2 of the LP, supported by the supplementary planning document 'Delivering and Protecting High Quality Environments in Fenland 2014'.

Other Matters

35. The appeal scheme would deliver a number of benefits. It would be a windfall development in an accessible location on previously developed land. It would support the local economy through construction jobs and the circulation of funds, although this is partially offset by the loss of business floor space. The proposal would also boost housing supply at a time when the Council does not have an adequate supply and support the vitality of the local community. However, as only four dwellings are proposed these benefits would be moderate. They would not outweigh the harm I have identified, which is contrary to both local and national planning policies and thus accrues significant weight as matter weighing against the proposal.
36. I note that planning permission has been granted twice before for housing at the appeal site but neither of the permissions have been lawfully commenced and therefore they are not extant and cannot be considered a fall-back position. Furthermore, planning policies appear to have changed in the intervening period. This is a material change in circumstances between the previous approvals and the appeal scheme before me. For similar reasons the presence of what appears to be recently constructed dwellings near to the appeal site is not determinative, and there is no substantive evidence before me to suggest the Council has been inconsistent in its decision making.
37. I have not been presented with substantive evidence save for a handful of letters from neighbours to suggest the existing use is a 'bad neighbour', that the site's current level of contamination is harmful to health, water quality and biodiversity and that a residential development would result in significant

⁵ See page 21 of the NIA

improvements, which would address these matters and outweigh the harm I have identified. As such the fall-back position of the existing use enduring is not a determinative point in favour of the appeal scheme.

38. There is dispute between the Council and appellant as to whether the Council can currently demonstrate a five year housing land supply. Even if I were to accept the appellant's position and engage the fourth bullet point in Paragraph 14 of the Framework then my conclusion on the main issue would still remain unaltered. This is because the tilted balance in Paragraph 14 of the Framework does not apply if specific policies in the Framework indicate development should be restricted. In this case the policies in the Framework relating to flooding are specific policies that restrict development when the sequential test has not been met. Consequently, it is unnecessary for the Council to demonstrate that the adverse impacts of the proposal would significantly and demonstrably outweigh its benefits.

Conclusion

39. The appeal scheme would be contrary to the development plan taken as a whole and material considerations do not indicate planning permission should be forthcoming in spite of this. Accordingly, for reasons given above, and having regard to all other matters raised, I conclude the appeal should be dismissed.

Graham Chamberlain
INSPECTOR