



Appeal Decision

Hearing held on 10 September 2019

Site visit made on 10 September 2019

by Jonathan Price BA(Hons) DMS DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 1 October 2019

Appeal Ref: APP/P1560/W/18/3215282

Plot adjacent to 24 Mill Lane, Walton-on-the-Naze, Essex CO14 8PE

- 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 Mr Stephen Sibley (Martello Land Properties Limited) against the decision of Tendring District Council.
 - The application Ref 18/00179/FUL, dated 3 February 2018, was refused by notice dated 19 June 2018.
 - The development proposed is a new four bedroom dwelling.
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Decision

1. The appeal is dismissed.

Preliminary Matters

2. The description of the development is taken from the appeal form, which confirms this had been changed from that stated in the application. This had been originally for a three bedroom dwelling. Following the appeal, the scheme was revised internally to remove all habitable rooms from the ground floor, creating at the same time an additional upstairs bedroom.
3. The appeal site is shown on the Environment Agency flood map to be within Flood Zone 3a and thus is at a high probability risk of flooding. The revised design of the dwelling ties in with a Site Specific Flood Risk Assessment (FRA) submitted with the appeal. This means that all habitable rooms would be at above a minimum of 5.9m AOD, providing protection for both a 1 in 200 and 1 in 1000 flood event and allowing for increases in sea levels due to climate change.
4. The revisions propose no changes to the siting, scale, design or external appearance of the proposed dwelling and all interested parties to the application were reconsulted over the appeal. Applying the 'Wheatcroft principles'¹, I am accepting these revised plans since the development is not so changed as to potentially prejudice the interests of any interested parties or deprive those who should have been consulted on the changes such an opportunity.
5. At the Hearing a Unilateral Undertaking (UU) was provided to the Council securing payment of a Recreational Disturbance, Avoidance and Mitigation Contribution in respect of mitigating the effect of the dwelling on Hamford

¹ Bernard Wheatcroft Ltd v SSE [JPL 1982 P37]

Water Ramsar site and SPA, designated primarily to protect wading birds and wildfowl. The UU is a material consideration in this case and is a matter to which I return later.

Application for costs

6. At the Hearing an application for costs was made by Mr Stephen Sibley (Martello Land Properties Limited) against Tendring District Council. That application is the subject of a separate Decision.

Main Issue

7. The main issue is whether the dwelling proposed is appropriate in this location with regard to local and national policies relating to development in areas at risk of flooding.

Reasons

8. The proposal is for a detached dwelling with accommodation on three floors, the upper of which is within the roof space. The site is a small undeveloped gap within an otherwise complete frontage of residential development along Mill Lane. The housing is to the landward side of the flood wall to Walton Mere, part of a tidal estuary on the opposite side of the road. Mill Lane continues onwards to serve a yacht basin and boatyards alongside the Mere. The appeal site is disused and was formerly an entrance to the Martello caravan site that once occupied land to the rear of these frontage dwellings.
9. This Martello site has since been largely re-developed for housing and retail and is now served by a separate access. The evidence shows that the new housing was focussed on the parts of the site with the lowest risk of flooding. The planning brief for the regeneration of the Martello site was evidently the Walton-on-the-Naze Regeneration Framework². The appeal site had not been intended for building upon, with this document showing it as part of a wider area intended for parking. The appeal site was not subsequently required for its intended purpose and currently serves no role connected with the regeneration of the adjacent land. Left over from the redevelopment of the Martello site, the appellant considers that the appeal site now offers potential as a windfall housing plot.
10. The appeal site is within the Settlement Development Boundary defined for Walton-on-the-Naze in both the current Tendring Local Plan³ (LP) and its emerging replacement⁴ (emerging LP). LP Policy HG3 and emerging LP Policy SPL2 direct residential development to within defined settlement boundaries, subject to this meeting specific planning criteria. Whilst the proposal might meet these criteria, the principle of a dwelling being permissible in this location still depends on meeting the policy tests applicable in areas at high risk of flooding.
11. The National Planning Policy Framework (the Framework) is a material consideration that carries significant weight. Paragraphs 155 to 165 address planning and flood risk. The supporting Planning Practice Guidance (PPG) provides more detailed advice and underlines the general planning approach to

² Walton-on-the-Naze Regeneration Framework Executive Summary January 2010

³ Saved Tendring Local Plan 2007.

⁴ Tendring District Local Plan 2013-2033 and Beyond Publication Draft – June 2017.

- development and flood risk. This refers to the Framework setting strict tests to protect people and property from flooding, which all local planning authorities are expected to follow. Where these tests are not met, national policy is clear that new development should not be allowed.
12. This national policy approach directs development that is inappropriate on flood risk grounds away from areas with the highest risk of flooding by applying a Sequential Test. That approach is designed to ensure that areas at little or no risk of flooding are developed in preference to areas at higher risk, the aim being to keep development out of medium and high flood risk areas (Flood Zones 2 and 3). Development should not be permitted where there are reasonably available sites, appropriate for the proposal, in lower flood risk areas. If the Sequential Test shows it is not possible for the development to be located in zones with a lower risk of flooding (taking into account wider sustainable development objectives) the Exception Test may have to be applied. The PPG⁵ classifies dwellings as development 'more vulnerable' in respect of flood risk. Should the appeal proposal satisfy the Sequential Test, it would therefore then also need to meet an Exception Test, based on it being a more vulnerable development located within a Zone 3a, high probability flood risk area.
 13. LP Policy QL3 concerns minimising and managing flood risk. The policy pre-dates the Framework but remains broadly consistent with it, in seeking to avoid inappropriate development in areas at high risk of flooding through applying the Sequential and Exception Tests. Based on the close degree of consistency with the Framework, LP Policy QL3 can be afforded significant weight. For the same reason I also give significant weight to emerging LP Policy PPL1, as this addresses development and flood risk specifically in line with the Framework requirements.
 14. As the Council cannot demonstrate a five year supply of deliverable housing sites, the relevant LP policies are deemed out of date under paragraph 11 of the Framework. It follows that if the Framework policies regarding flood risk did not provide a clear reason for dismissing the appeal, the so-called 'tilted balance' would apply. Consideration would then need to be given to allowing the appeal unless any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the Framework policies taken as a whole.
 15. The Sequential Test and Exception Test requirements are addressed by the revised FRA. Paragraph 33 of the PPG⁶ advises that for individual planning applications where, as in this case, there has been no prior sequential testing as a development plan allocation, the area to apply the Sequential Test across will be defined by local circumstances relating to the catchment area for the type of development proposed. This advice continues by stating that for some developments this catchment area may be clear, for example, that for a school. In other cases this may be identified from other Local Plan policies, such as the need for affordable housing within a town centre, or a specific area identified for regeneration. In this case, the appeal scheme relates to a four bedroom market dwelling, with no case being made, so far as I am aware, for the essential siting of the development in this high risk area.

⁵ Table 2 in paragraph: 066 Reference ID: 7-066-20140306

⁶ Paragraph: 033 Reference ID: 7-033-20140306

16. The appeal site falls within the Walton Seafront and Town Centre Urban Regeneration Area (URA). The boundary for that is the same as that proposed for a Priority Area for Regeneration (PAR) identified in the emerging LP Policy PP14 as a focus for investment in social, economic and physical infrastructure and initiatives to improve vitality, environmental quality, social inclusion, economic prospects, education, health, community safety, accessibility and green infrastructure. From the evidence, the URA and PAR areas derive from Priority Areas for Economic Regeneration originally identified in the former Essex and Southend-on-Sea Replacement Structure Plan as pockets of deprivation within the Region. These were defined by a number of criteria including above average unemployment rates, high levels of social deprivation, low skill levels, dependency on declining industries, derelict urban fabric, peripherality and insularity.
17. I agree with the appellant that the extent to which this proposal contributes towards these regeneration objectives is not a matter that determines the catchment area for the Sequential Test, but is a consideration when subsequently applying the Exception Test. Paragraph 33 of the PPG recommends a pragmatic approach to the availability of alternatives when applying the Sequential Test. The appeal relates to a small plot that is no longer part of the Martello redevelopment site, which now provides a mix of uses including over 200 homes. However, as a single dwelling, providing a self-build opportunity, there is not a strong correlation between the appeal scheme and the broader regeneration objectives for this specific area identified by the development plan.
18. I am made aware of a quite recent appeal for three houses on land at nearby Holland-on-Sea,⁷ which was dismissed on 21 July 2017. Unlike this case, that site was not within a regeneration area. The Sequential Test area (STA) used by the applicant in that case was based on the local primary school and medical centre catchments and the Ward and resident's association boundaries, which essentially confined the area of search to the settlement of Holland-on-Sea. However, the Inspector was not persuaded that Holland-on-Sea required extra housing in the flood zone to sustain itself. If that had been the case, then he thought it would have been identified in the emerging local plan and addressed through a housing allocation, or by being identified as some form of regeneration area. He concluded that the STA could be reasonably expanded to the urban area of Clacton on Sea or beyond and that there was nothing to suggest the borough as a whole could not reasonably comprise the search area. It was noted in this regard, that this was the geographical area from which the windfall allowance in the development plan was taken, as covered by the Strategic Housing Land Availability Assessment.
19. Inasmuch as the current appeal site falls within a regeneration area identified in the LP, it differs from the Holland-on-Sea case. In my view, however, the regeneration of this area is not dependent on further single dwellings like this in the high risk flood zone. This is particularly so as the redevelopment of the Martello site had expressly steered the 'more vulnerable' housing to lower flood risk areas within that larger site. Accordingly, I consider that the regeneration area is too restrictive a basis on which to define the STA for this single dwelling proposal. Moreover, Tendring District is not shown to be comparable to a large

⁷ APP/P1560/W/17/3172030

urban authority like Bristol where the Sequential Test needs to be applied to smaller regeneration areas, rather than the entire local authority boundary, due to the high reliance on these for delivering development⁸. Unlike Bristol, the evidence in the current case is that urban regeneration areas in Tendring derive from the need to address pockets of deprivation, which infers comparatively smaller and more focussed geographical areas. The proposal is a windfall dwelling that in principle could be located anywhere.

20. There is no evidence that Tendring as a District has a particularly high proportion of its geographical area within high risk Flood Zones 2 and 3. Notwithstanding its largely rural character and a significant shortfall in a five year housing land supply⁹, there is no case either that Tendring as a whole is lacking in settlements with either allocated or windfall sites that would offer opportunities for residential development in low flood risk locations. The Inspector in the Holland-on-Sea case noted the LP directs housing to a number of urban areas throughout the district, so it would be logical to include these areas in the STA in the absence of local circumstances that suggest otherwise. I concur similarly in this case.
21. The revised FRA accompanying the appeal uses the wider Frinton and Walton settlement boundary as the STA. The Council's reasons for refusal and subsequent appeal statement specified a number of examples of extant permissions for single dwellings. However, there is no good reason, in my view, to restrict the area of search on that basis. Indeed, it seems to me that the design of the current scheme derives largely from the plot size and the flood risk-related need for habitable rooms to be at above ground floor level. Pragmatically, personal preferences, such as garaging, boat storage and waterside qualities and aspirations, need not limit options on reasonably available and sequentially more preferable sites. For example, whilst the appeal scheme would not fit on the site approved for a dwelling adjacent to 132 Kirby Road, it is not unreasonable to suppose that an alternative four bedroom scheme, without a non-habitable ground floor layout, could be designed for that particular site.
22. The Council did not apply the Sequential Test to a recent application to build 16 dwellings in North Street¹⁰, also within Flood Zone 3a. Although planning permission was refused, the reasons did not relate to flood risk policy. It appears from the delegated report that the Council may, in that case, have conflated the Sequential and Exception tests. Irrespective of the differing regeneration merits of that proposal and the present scheme, the North Street decision does not fetter the requirement for me to apply national policy and guidance in the correct manner in relation to the current proposal.
23. In determining an appeal¹¹ for three houses on a site at 27 Hall Lane, Walton-on-the-Naze it would seem, on the basis of the information submitted, that the Inspector in that case was unable to conclude whether or not the Sequential Test would have been satisfied. Again, the appeal was dismissed for reasons other than flood risk. Although the Inspector speculated that the Exception

⁸ Bristol City Council's Flood Risk Sequential Test Practice Note August 2013

⁹ As recently concluded by the Inspector in a recent appeal decision in Tendring DC over a proposed up to 200 dwellings and other development on land at the Lifehouse Spa and Hotel in Thorpe-le-Soken (APP/P1560/W/18/3194826)

¹⁰ 18/01098/OUT

¹¹ APP/P150A/14/2216703

Test would have been passed, linked partly to the site being within the URA, that decision provides no clear steer as to an appropriate STA in respect of this current case. I am aware that the Council subsequently allowed¹² a single dwelling on that site, on the basis that it replaced an unsightly garage building, but, again, the apparent failure to apply the Sequential Test in that instance does not compel me to take a similar approach in this case.

24. Based on paragraph 34 of the PPG¹³ it falls to me in relation to this appeal decision to come to a view as to whether the Sequential Test has been satisfied in respect of the particular circumstances in this case. As explained above, the areas proposed by the appellant are unduly restrictive given the general residential nature of the proposal and provide an inappropriate basis for applying the Sequential Test. Accordingly, the Sequential Test has not been robustly applied or passed. Therefore, the proposal would conflict with LP Policy QL3 and emerging LP Policy PPL1, as well as with the Framework, insofar as these set strict tests to resist inappropriate development within high risk flood areas and steer this to more suitable, low risk locations.

Conclusion

25. The overriding aim of flooding policy is to direct new development away from areas at highest risk. For the reasons set out above, I find no essential reason to locate the dwelling proposed in a high flood risk area and thus the Sequential Test is not passed. Given that finding, there is no requirement to apply the Exception Test. The application of Framework policies to direct inappropriate development away from areas with the highest risk of flooding provides a clear reason for refusing the development. Having regard to footnote 6 in the Framework, the aforementioned 'tilted balance' in Framework paragraph 11 is consequently not engaged.
26. LP Policy QL6 supports development that reinforces and/or enhances the function, character and appearance of the URA and contributes towards regeneration and renewal. The single dwelling would contribute only slightly towards these aims and those equivalent in emerging LP Policy PP14. The absence of any material conflict with LP policies EN6 (biodiversity), EN6a (protected species), HG9 (private amenity space), HG14 (side isolation), QL9 (design of new development), QL10 (designing new development to meet functional needs), QL11 (environmental impacts and compatibility of uses), TR1A (development affecting highways) and TR7 (vehicle parking at new development) are mainly neutral considerations conferring little if any positive weight. The same applies to the UU provided to the Council in respect of SPA and Ramsar site mitigation.
27. The modest benefits provided by the proposal would not offset the significant harm that would arise from locating the dwelling within Flood Zone 3a, an area with a high probability of flooding. As a consequence, the proposal conflicts with the development plan taken as a whole. In the absence of any material considerations that lead to a contrary view, I conclude on balance that the appeal should be dismissed.

Jonathan Price INSPECTOR

¹² 16/00177/FUL

¹³ Paragraph: 034 Reference ID: 7-034-20140306

