



## Appeal Decision

Inquiry held between 23-25 May 2023

Site visit made on 23 May 2023

**by Guy Davies BSc (Hons) DipTP MRTPI**

**an Inspector appointed by the Secretary of State**

**Decision date: 20<sup>th</sup> June 2023**

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**Appeal Ref: APP/D0121/W/22/3313624**

**Land at Lynchmead Farm, Ebdon Road, Wick St Lawrence,**

**Weston-super-Mare BS22 9NY**

- 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 Mead Realisations Ltd against the decision of North Somerset Council.
  - The application Ref 20/P/1579/OUT, dated 12 June 2020, was refused by notice dated 8 July 2022.
  - The development proposed is an outline planning application (with all matters reserved except access) for a residential development of up to 75 dwellings and associated infrastructure.
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### Decision

1. The appeal is dismissed.

### Preliminary Matters

2. The application is made in outline with all detailed matters reserved for later consideration other than for access. A layout plan has been included but this is for illustrative purposes only. It was confirmed at the inquiry that access relates to the two junctions proposed with the Ebdon Road and their associated geometry. It does not extend to the internal roadways shown on the illustrative layout plan.
3. Amended location and access plans were submitted by the appellant, but subsequently withdrawn. I have therefore determined the appeal based on the plans on which the Council made its decision.
4. Two legal undertakings have been submitted with the appeal. I comment on these obligations later in my decision.
5. During the course of the appeal, the main parties reached agreement that the effect of lighting within the site on foraging bats could be adequately mitigated through design, the details of which could be secured by condition. This overcomes the third reason for refusal on the Council's decision notice. I address the need for an appropriate assessment under other matters.

### Main Issue

6. The main issue is the effect on the development of flood risk, including application of the sequential test and, if necessary, the exception test.

7. It is also necessary to consider the benefits of the scheme, and housing land supply. I do this as part of the overall planning balance.

## **Reasons**

### *Flood risk*

8. The site lies within Flood Zone 3 as defined on the Environment Agency's Flood Map for Planning. Within the flood zone there is a high probability of flooding from the sea. At present the site and surrounding land is protected by coastal flood defences but the Planning Practice Guidance (the PPG) advises that for the purposes of the sequential test the presence of existing flood risk management infrastructure should be ignored, as the long-term funding, maintenance and renewal of this infrastructure is uncertain. The risk of flooding is likely to increase over time due to climate change.
9. For development proposals in areas known to be at risk from flooding, national planning policy as set out in the National Planning Policy Framework (the Framework) requires the application of the sequential test. The aim of the test is to steer new development to areas with the lowest risk of flooding from any source. Development should not be permitted if there are reasonably available sites appropriate for the proposed development in areas with a lower risk of flooding. Only if it is not possible for development to be located in areas with a lower risk of flooding should development be considered, subject to the exception test.

### *Development plan policy*

10. Policy CS3 of the North Somerset Council Core Strategy 2017 (the Core Strategy) requires that development in Flood Zones 2 and 3 will only be permitted where it is demonstrated that it complies with the sequential test as set out in the Framework and, where applicable, the exception test. Reference is also made to associated technical guidance although this has now been withdrawn and I have therefore not placed any weight upon it.
11. For the purposes of the sequential test Policy CS3 sets out 2 further sections to aid interpretation of what constitutes a reasonably available site.
12. The first section states that the area of search for reasonably available alternative sites will be North Somerset-wide. This is accepted by both main parties.
13. The second section states that a site is considered to be reasonably available if all of the following criteria are met: the site is within the agreed area of search, the site can accommodate the requirements of the proposed development, and the site is either owned by the applicant, for sale at a fair market value, or publicly-owned land that has been formally declared to be surplus and available for purchase by private treaty. The section also states that sites are excluded where they have a valid planning permission for development of a similar character and scale and which is likely to be implemented.
14. The appellant argues that none of the 39 alternative sites put forward by the Council are reasonably available, because they fail one or more of the criteria set out in the second section of Policy CS3. Notwithstanding the Council's closing submissions, the evidence presented by its witnesses does not seek to challenge that argument to any great extent, relying instead on the

assessment of reasonably available sites as defined in national flood risk policy and guidance rather than the second section of Policy CS3, which it considers to be out of date. Nevertheless, it is necessary for me to start by assessing how the appeal proposal rates against Policy CS3, before moving on to consider other material considerations in the Framework and PPG.

15. Applying the criteria set out in the second section of Policy CS3, all the sites lie within the agreed area of search, which is the district of North Somerset. However, only approximately one third of the sites<sup>1</sup> when taken individually could accommodate up to 75 dwellings, which is a requirement of the proposed development as set out in its description.
16. None of those larger sites are owned by the appellant. The appellant does own 2 smaller sites<sup>2</sup> but neither of these individually would enable a development of 75 dwellings. ST17 has a resolution to grant permission for up to 70 dwellings, and ST34 is allocated for 74 dwellings in the current development plan. Both get very near that now proposed in terms of unit numbers but would not accommodate all of the requirement of the proposed development.
17. The appellant advances the argument that there needs to be a commonality of ownership to accord with the relevant criterion, and that while ST17 and ST34 are owned by the applicant, the appeal site is not<sup>3</sup>. Reading the criterion on its face that is not relevant; it is whether the applicant owns alternative reasonably available sites. However, that is a moot point given my finding that neither are sufficient to accommodate the appeal proposal.
18. Of those sites able to accommodate 75 dwellings neither party has provided me with definitive evidence on whether the sites are for sale at a fair market value or not. Many are already owned by developers whose current intention is to develop them, but that would not necessarily prevent a sale being negotiated. Conversely, while the appellant notes that some of the sites<sup>4</sup> are not being actively marketed by their owners they were submitted to the local plan call-for-sites carried out in 2020, which indicates a willingness to offer the land for development. Notwithstanding those considerations, I do not have positive evidence that any of the sites are actively for sale, or that if they are the asking price reflects a fair market value.
19. In terms of publicly owned land, the Council owns 2 sites<sup>5</sup> which could accommodate 75 dwellings. Although ST9 in particular appears ready and available for development I was provided with no evidence to show that either met the more onerous requirements of the relevant criterion that they have been formally declared to be surplus and that they are available to purchase by private treaty. The Council suggests that sites such as ST9 acquired for the purpose of redevelopment do not need to be declared surplus in order to be sold. However, that is not how the criterion in Policy CS3 has been worded.
20. It is also argued by the appellant that town centre sites such as ST9 could not accommodate the requirements of the proposed development because they would be of a higher density than that envisaged for the appeal scheme. I

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<sup>1</sup> ST9, ST14, ST16, ST18, ST21, ST47, ST55, ST68, ST69, AS1, AS6, AS7, AS9

<sup>2</sup> ST17, ST34

<sup>3</sup> I was informed the owners of the appeal site are Alistair Mead and Katherine Hawke

<sup>4</sup> ST14, ST16, ST21

<sup>5</sup> ST9, ST18

consider this issue in more detail later in relation to interpretation of the PPG, but it is a moot point in terms of ST9 for the reason given above.

21. Some of the sites are subject to extant planning permissions<sup>6</sup> and are therefore precluded by the last paragraph in Policy CS3.
22. Taking these factors together, I conclude that there is insufficient evidence to demonstrate that any of the alternative sites proposed as reasonable alternatives by the Council meet all of the bulleted criteria set out in the second section of Policy CS3.

#### *National flood risk policy*

23. Moving on to consideration of the proposal against national planning policy, the second section of Policy CS3 is now inconsistent with the Framework. Although the wording of national planning policy on flood risk in the Framework is largely the same as it was when Policy CS3 was adopted, the interpretation of it has been clarified by more recent guidance contained in the PPG.
24. In the PPG, reasonably available sites are defined as those in a suitable location for the type of development with a reasonable prospect that the site is available to be developed at the point in time envisaged for the development.
25. The PPG says that these could include a series of smaller sites and/or part of a larger site if these would be capable of accommodating the proposed development. There is nothing in the PPG that requires smaller sites to be adjacent to one another, as suggested by the appellant. A series of separate small residential sites would still provide suitable alternative land for equivalent development at a lower risk of flooding.
26. The PPG also says that such lower-risk sites do not need to be owned by the applicant to be considered reasonably available. Reasonably available sites can include ones that have been identified by the planning authority in site allocations or land availability assessments. There are no exclusions in the PPG relating to sites with planning permission or that publicly owned land must be formally declared to be surplus.
27. Paragraph 219 of the Framework states that due weight should be given to development plan policies, according to their degree of consistency with the Framework. In this case, because of the inconsistency between the documents as to what is meant by reasonably available, I give lesser weight to the second section of Policy CS3 than I do to the newer and more up to date Framework as interpreted by the PPG.
28. There are also differences between the main parties in the interpretation of some of the wording used in the PPG.
29. The first relates to the meaning of the phrase 'type of development'. I consider that this means any site that is capable of accommodating residential development, the 'type' of development being 'residential'. Although the appellant may anticipate the appeal proposal to consist of lower density suburban houses, the application has been made in outline with all matters other than access reserved. The only constraint on the type of development proposed is that contained in the description, which is for '...a residential

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<sup>6</sup> ST68, ST69, AS9

development of up to 75 dwellings...'. I have also had regard to the general approach to planning for residential development in the district, where spatial policies do not constrain the types of dwellings within allocated or windfall sites. Even where some sites require developments to be of a higher density, they would still have the effect of providing residential dwellings on sites with a lower risk of flooding than the appeal site and would therefore achieve the purpose of the sequential test.

30. The second relates to the meaning of the availability of a site 'at the point in time envisaged for the development'. It was estimated on behalf of the appellant that, subject to permission, the appeal scheme could start on site by early 2025. Although that may be an optimistic estimate it is not unreasonable and would mean that an alternative site would need to be available to be developed by that time.
31. However, 'available to be developed' means just that. It does not mean that development of an alternative site would have to follow the same timescale envisaged for the appeal scheme. It is sufficient that there is a positive indication that the land is available to be developed. The start date for development and the rate of build out may be affected by many site-specific factors, such as the need to relocate infrastructure or undertake hydraulic testing, but that does not alter the fact that the land would be available to be developed.
32. On that basis I consider that those alternative sites which have planning permission for residential development (or a resolution to grant), are allocated for residential development in the development plan, or which in principle accord with the spatial strategy of the development plan (including suitably sized development on the edge of existing built-up areas) are available to be developed at the point in time envisaged for the proposed development. Those which do not accord with the spatial strategy of the development plan and are reliant on the emerging plan to be allocated, I consider would not. I reach that view because the emerging plan is still at an early stage in its development, may well change, and in any event is unlikely to be adopted before early 2025.
33. The appellant also suggests that housing need is a relevant consideration in the sequential test. I disagree. I can see no reason for interpreting the Framework in that way. I consider that for individual applications 'the proposed development' means that sought, not the housing needs of the district. There may be a perverse incentive to promote larger rather than smaller schemes in areas of flood risk, but that is hypothetical at best as larger schemes outside settlement boundaries are likely to conflict with the Council's spatial strategy. In any event it is not relevant in this case as I am required to consider the proposal in front of me.
34. The Council and the Environment Agency have jointly published an advice note on flood risk<sup>7</sup>. The advice note has been written to help explain how the Council will consider planning applications where flood risk is an issue. It refers to national guidance which differs from the criteria in Policy CS3 and says that the Council will give greater weight to the more recent guidance.
35. It is agreed between the main parties that the advice note cannot be used to modify or impose additional requirements on existing policies in the

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<sup>7</sup> Development Management Advice Note – development and flood risk issues, November 2019

development plan<sup>8</sup>. I accept that to be the case, as the advice note has not been through the statutory process for adoption of development plan documents as set out in regulations<sup>9</sup>. However, the guidance provided in the PPG is a material consideration which I have taken into account in my decision. Since I have considered this guidance directly, I do not need to place reliance on the advice note.

36. Drawing these matters together, I consider that for the purposes of applying the sequential test in this appeal, a reasonably available alternative site is one whose location lies within the district of North Somerset, can accommodate residential development, and would be available for development at the point in time envisaged for the proposal as interpreted above. The alternative sites could include a series of smaller sites so long as collectively they are capable of accommodating the proposed development. There is no need for such smaller sites to be contiguous. Sites do not need to be owned by the applicant, nor are they excluded because of an extant planning permission or resolution to grant. So long as a site is available to be developed there is no need for further evidence that they are for sale or, in the case of publicly owned land, declared to be surplus and available for purchase by private treaty.
37. Applying those criteria to the alternative sites put forward by the Council, I find that many fall within the meaning of reasonably available in the Framework, as set out in the PPG<sup>10</sup>.
38. Even if a more restrictive definition of the type of development were to be used, taken to mean residential development of a suburban nature, and the availability of sites for development was taken to be now, in the sense that they either have extant planning permission (or a resolution to grant) for residential development or are allocated for residential development in the current development plan with delivery expected at least in part by 2025, then there are still many alternative sites that would meet the Framework definition of reasonably available<sup>11</sup>.
39. Other than in specific instances, individual sites were not discussed in detail at the inquiry as both main parties accepted that the question of whether a site was deemed to be reasonably available depended largely on my conclusions on the differences in interpretation of the wording of the PPG, and the respective weight given between Policy CS3 on the one hand, and the Framework as informed by the PPG on the other.
40. I conclude that the proposed development fails the sequential test as set out in the Framework because there are reasonably available sites for residential development appropriate to the proposed development on land with a lower risk of flooding than the appeal site.
41. The first part of Policy CS3 requires that development will only be permitted where it is demonstrated that it complies with the sequential test set out in the Framework. As I have concluded that the Framework's sequential test would not be complied with, it follows that the proposed development is in conflict with the first part of Policy CS3. Other than for the definition of the area of

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<sup>8</sup> Legal Statement of Common Ground, 2 May 2023

<sup>9</sup> Town and Country Planning (Local Planning) (England) Regulations 2012

<sup>10</sup> ST5, ST8, ST9, ST10, ST14, ST16, ST17, ST21, ST24, ST26, ST29, ST33, ST34, ST35, ST36, ST40, ST41, ST52, ST68, ST69, AS8, AS9, AS10, AS11, AS12

<sup>11</sup> ST5, ST17, ST21, ST24, ST26, ST29, ST33, ST35, ST40, ST52, ST68, ST69, AS8, AS9, AS10



search being North Somerset-wide, I consider the remainder of the second part of Policy CS3 to be out-of-date because it is inconsistent with the Framework. I therefore conclude that the proposed development conflicts with Policy CS3 overall. As Policy CS3 was agreed as being the most important policy in determining this appeal, I conclude that the proposal also conflicts with the development plan when taken as a whole.

## **Other Matters**

### *Legal undertakings*

42. Two legal undertakings have been submitted with the appeal. The first secures obligations to provide 30% affordable housing, financial contributions towards employment support, bus stop provision, sustainable travel and fire hydrants, an agreement covering employing local labour during the construction phase, and on-site play space together with maintenance arrangements.
43. Having considered the reasons for these obligations as set out in the Council's compliance statement and discussed at the inquiry, I am satisfied that they meet the requirements of Regulation 122 of the Community Infrastructure Levy Regulations 2010 (as amended) (the Regulations) in addressing additional demands placed on infrastructure and public facilities arising from the development or to meet policy requirements in the development plan. I place weight on them in reaching my decision.
44. The second legal undertaking contains further obligations relating to flood mitigation by lowering ground levels on land within the River Banwell catchment area, and financial contributions towards automation of a sluice gate on the River Banwell and sports pitch provision at the Priory Community School. These additional obligations have been put forward by the appellant as wider sustainability benefits for the purposes of the exception test.
45. While these additional obligations may bring indirect benefits, paragraph 57 of the Framework requires that obligations must only be sought where they meet all of the three tests set out in the Regulations. In this case, while the flood mitigation and sluice gate automation may reduce the risk of fluvial flooding from the River Banwell, that is not the source of flood risk which materially affects the appeal site, which comes from tidal flooding. Future occupants of the development might benefit from improved and additional sports facilities at the Priory Community School. However, the Council has earmarked the community infrastructure levy to help fund sport and leisure infrastructure, and does not therefore seek separate contributions for that purpose.
46. Having regard to the above, I consider that these additional obligations are not necessary to make the development acceptable in planning terms, nor in the case of flood mitigation and sluice automation are they directly related to it. The obligations therefore fail at least one of the tests in the Regulations, and I give them little weight in this appeal.

### *Appropriate assessment*

47. The site lies some distance from the North Somerset and Mendip Bats Special Area of Conservation but there is evidence that it is being used by Greater Horseshoe bats as part of their foraging and commuting grounds. Development on the site therefore has the potential to indirectly affect the Special Area of Conservation.

48. Agreement has been reached between the main parties and Natural England on suitable mitigation to avoid any adverse effects, which could be secured by condition. Although it would be normal for me to carry out an appropriate assessment in accordance with the Conservation of Habitats and Species Regulations 2017, given my decision on the appeal that is not necessary in this case, and I have not considered this issue any further.

### *Appeal decisions*

49. Twelve appeal decisions have been included in the core document list. Although some were referred to during the inquiry, neither party place a great deal of reliance on them. Given the site-specific differences between them and the appeal site, and the policy differences with those on sites outside the district, I do not find them particularly relevant to the issues raised in this appeal. Other than where I have specifically referenced an appeal decision in my reasoning, I have therefore given them little weight.

### **Planning Balance**

50. It is necessary for me to consider what benefits would flow from the proposed development and to weigh those against the harm that would arise from the development being at risk of flooding.
51. So far as benefits are concerned, the most important would be the provision of up to 75 new dwellings to meet housing demand in the area. Given the lack of housing land supply in the area, which most recently has been found to be of the order of 3.5 years<sup>12</sup>, that provision would be of significant benefit. The provision of 30% of dwellings as affordable would also be of significant benefit in helping to meet the needs of those unable to afford housing on the open market.
52. Some economic benefits would accrue from the development, both during the construction phase for the building industry and local employment, and in the longer term indirectly through additional spend in the local economy and the availability of a larger labour force. The Framework places significant weight on the need to support economic growth and productivity<sup>13</sup>. In my view that policy is aimed more at growth in the commercial and industrial sectors, but I acknowledge that the economic effects of the development would be of benefit and I give them moderate weight.
53. There would also be some ecological and community benefits arising from the inclusion of open space and play areas within the scheme. Although at this stage those benefits are unquantified because landscaping is a reserved matter, based on the information I have before me I nevertheless give them some limited beneficial weight.
54. Other matters covered by the obligations in the first of the submitted legal undertakings or those agreed between the main parties as regards limits on external lighting are necessary to make the development acceptable in planning terms or to address wider policy requirements. These are of neutral weight in the planning balance.

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<sup>12</sup> APP/D0121/W/21/3285624 – Land at Farleigh Farm and 54 and 56 Farleigh Road, Backwell

<sup>13</sup> National Planning Policy Framework, paragraph 81



55. Set against those benefits is the harm that would arise if the development were to flood. Evidence provided by the Council indicates that tidal flood waters could be deep. Such flooding would enter dwellings and surcharge drains. Standing water would be likely to be present for some time before water levels returned to normal. Such flooding would cause extensive damage both to buildings and their contents, requiring significant repair or replacement. There may also be adverse health and environmental impacts. The risk of this harm occurring weighs significantly against the proposal.
56. Irrespective of the degree of risk of flooding occurring or measures that could be taken to make the development resilient to flooding during its lifetime, the Framework is clear that development should not be permitted if there are reasonably available sites appropriate for the proposed development in areas with a lower risk of flooding. I have found that there are such sequentially preferable sites available. This weighs heavily against the proposal.
57. Paragraph 11 of the Framework requires that where the policies most important for determining the application are out-of-date, to grant planning permission unless the application of policies in the Framework that protect areas or assets of particular importance provides a clear reason for refusal. I have determined that Policy CS3, which is the most important policy for determining this appeal, is partly out-of-date. It is also the case that due to the lack of a 5-year housing land supply, for applications involving the provision of housing, footnote 8 of the Framework deems that policy to be out-of-date.
58. However, footnote 7 of the Framework clarifies that national policy relating to areas at risk of flooding or coastal change is one of the policies in the Framework that protects areas or assets of particular importance. As that policy provides a clear reason for refusal, the presumption in favour of sustainable development (sometimes referred to as the 'tilted balance') is not engaged in this case.
59. Although the benefits of providing housing, including affordable housing, in an area with an acknowledged shortfall of housing land would be significant, I conclude that the failure to meet the sequential test and the significant harm that would arise if the development were to flood outweigh those benefits and the other advantages outlined above.
60. As I have concluded that the development fails the sequential test and should not be allowed, there is no need for me to apply the exception test in this case.

## **Conclusion**

61. I conclude that the proposal would conflict with the development plan when taken as a whole, and that it would also conflict with national planning policy on minimising flood risk to new development. Other material considerations do not outweigh the harm so caused. The appeal should therefore be dismissed.

*Guy Davies*

INSPECTOR

## **APPEARANCES**

### **FOR THE APPELLANT:**

Charles Banner KC, counsel for the appellant, who called:

Ian Jewson	Director, Oneleven Property Ltd
Nick Bosanko	Technical Director, Vectos

Proofs of evidence were also submitted by:

Alban Henderson	Director, Walsingham Planning
Dr Matthew Cowley	Director, EAD Ecology Ltd

### **FOR THE COUNCIL:**

Timothy Leader, counsel for North Somerset Council, who called:

Simon Bunn	Flood Risk Manager, North Somerset Council
Marcus Hewlett	Principal Planning Officer, North Somerset Council

Alistair Mead for the appellant joined the discussion on sites ST17 and ST34.

Neil Underhay for the Council attended the discussion on conditions and the legal undertakings.

### **INTERESTED PARTY:**

Councillor Marcia Pepperall	Weston-super-Mare North Worle Ward
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## **DOCUMENTS**

Received during or after the Inquiry:

1. Opening statement for the appellant
2. Opening statement for the Council
3. Legal Statement of Common Ground and appendices
4. Closing statement for the Council
5. Closing statement for the appellant
6. Completed legal undertakings.