



Appeal Decision

Site visit made on 4 September 2023

by S Dean MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 15 September 2023

Appeal Ref: APP/A2335/W/22/3309054

Land Rear of Cemetery, Back Lane, Carnforth, Lancashire, LA5 9BH

- 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 Graham Wallbank against the decision of Lancaster City Council.
 - The application Ref 22/00351/FUL, dated 17 March 2022, was refused by notice dated 1 June 2022.
 - The development proposed is "A Self build, new four bedroom detached house with integral garage for family use. Infilling an existing ditch and creating a wildlife corridor. A new flood defence wall on the western boundary to replace inadequate existing wall protect existing properties and safeguarding private open space for flood storage. New hedging along the north, south and east boundaries."
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Decision

1. The appeal is dismissed.

Preliminary Matters

2. The description of development in the heading above has been taken from the planning application form. In their Decision Notice the Council described the proposal as the "Erection of one detached dwelling (C3) with associated access, alterations to boundary wall, and alterations to existing watercourse". Part E of the appeal form states that the description of development has not changed but, nevertheless, the wording used by the Council has been entered. As neither of the main parties has provided written confirmation that a revised description of development has been agreed, I have used the one given on the original application. I am satisfied that no prejudice arises from this position.
3. The appellant has, in their Statement of Case suggested two alternative approaches to dealing with the first reason for refusal, around the issue of hydraulic modelling, flood defence and whether or not therefore the proposal satisfies the requirements of the Sequential Test (the ST).
4. The first of these is for me to issue a split decision, allowing those elements found acceptable, but not those found unacceptable. I have considered this point in my reasoning below.
5. The second is for the appeal to proceed on the basis of an updated submission, which removes the proposed replacement wall, relocates the proposed dwelling and has a different approach to other elements of work within the site.
6. The Procedural Guide: Planning appeals – England is clear that the appeal process should not be used to evolve a scheme, and that it is important that what I consider at appeal is essentially the same as was considered by the

Council and any interested parties in the application. Revisions intended to overcome reasons for refusal should normally be tested through a fresh application. I have had regard to the Wheatcroft Principles, which require me to consider (although not exclusively) whether the amended proposal is so changed that to grant it would deprive those who should have been consulted on the changed development of the opportunity of such consultation.

7. In making this judgement, I note that the changes proposed are significant. Works to replace the existing wall are removed, the location of the dwelling within the site is changed, and as a result, its relationship to nearby houses is fundamentally, and in my opinion, materially altered. Other changes include the relocation of the proposed footbridge, the retention and protection of the existing ditch and banks as well as surrounding the house with permeable block paving. Whilst I accept that there was very limited third-party engagement with the application and this appeal, I cannot rule out this being a result of third-parties simply having no comments to make on the application proposal. I cannot therefore know that reaction to the amended proposal would be the same.
8. Given that, as well as the detailed, technical engagement required with the Environment Agency (the EA) and other consultees, I conclude that my considering the amended proposal would deprive those who should have been consulted on the changed development the opportunity of such consultation.
9. I note the appellant is frustrated that the Council chose to issue their decision on the application rather than undertake further negotiations to potentially reach an agreement leading to planning permission. However, I do not agree that this was inappropriate, or that it is counselled against by the Planning Practice Guidance (the PPG) references I have been directed to. Nor do I consider that the approach of the Council to the appeal application justifies my considering the amended proposal before me, particularly in light of my consideration of the Wheatcroft Principles above.
10. As the matters which the amendments seek to address are fundamental to the proposal, and in the interests of fairness, I have therefore determined the appeal on the basis of the proposal that was before the Council when it made its decision and on which parties were consulted.
11. The appellant has also referred in their Statement of Case to a financial contribution towards flood risk infrastructure, an offer to provide land to deliver it and reference to the maintenance of such land for that purpose. As there is no formal agreement, draft or otherwise before me to secure that, I give it little weight in my determination of this appeal.

Main Issues

12. The main issues are therefore whether or not the proposal considered by the Council;
 - satisfies the requirements of the Sequential Test,
 - can be suitably drained without increasing flood risk elsewhere, and
 - would result in a loss of biodiversity.

Reasons

The Sequential Test

13. The appeal site lies partly within Flood Zones 2 and 3, areas of medium and high probability of flooding. The proposed dwelling would be within Flood Zone 2. In their Officer Report, the Council note that part of the site is Flood Zone 3b, that is, functional floodplain comprising land where water has to flow or be stored in times of flood.
14. The National Planning Policy Framework (the Framework) requires a sequential, risk-based approach to the location of development, taking into account all sources of flood risk and the current and future impacts of climate change, to avoid where possible, flood risk to people and property.
15. This should be done through the application of the ST which seeks to steer new development to areas with the lowest risk of flooding. The Framework requires that development not be permitted if there are reasonably available sites appropriate for the proposed development in areas with a lower risk of flooding. The Framework goes on to set out the Exception Test (ET) which may apply where it is not possible for development to be located in areas with a lower risk of flooding.
16. The Planning Practice Guidance (the PPG) is clear that ultimately the local planning authority needs to be satisfied that a proposal would be safe throughout its lifetime and not lead to increased flood risk elsewhere.
17. Policy DM33 of the Local Plan for Lancaster District 2011-2031, Part Two: Review of the Development Management DPD, 2020 (the DM-DPD) echoes this approach. It seeks, amongst other things, to minimise risk of flooding to people and property by taking a sequential approach which directs development to areas at the lowest risk of flooding. In doing this, it requires development proposals to satisfy the requirements of the ST and the ET where necessary.
18. The proposal is a dwelling which is defined by the Framework as “more vulnerable” and lies within Flood Zone 2. Whilst it is clear that within the site, the location of it is sequentially preferable to those parts which are within Flood Zone 3b, there is nothing before me that makes it clear whether or not there are any reasonably available sites appropriate for the proposed development in areas with a lower risk of flooding. Indeed, the Council is clear that this exercise has not been carried out.
19. Whilst I acknowledge that the appellant has assessed their proposal against the ET, it is not appropriate for me to consider that, as I do not have evidence sufficient for me to know if it is not possible for development to be located in areas with a lower risk of flooding. I do not consider that the evidence before me means that it is appropriate for me to move to the second stage, the ET.
20. As noted in my Preliminary Matters above, the appellant requested that I issue a split decision, granting planning permission only for those parts of the proposal found acceptable. Above, I have found that the proposal does not satisfy the requirements of the ST and I am uncertain as to whether or not it can be suitably drained without increasing flood risk elsewhere.

21. Whilst I have the power to issue a split decision, I am not obliged to do so. The appellant has directed my attention to the relevant part of the PPG which states that a split decision may be appropriate in exceptional circumstances and will only be appropriate where the acceptable and unacceptable parts of the development are clearly distinguishable. I must also be certain that any acceptable parts are clearly physically and functionally separable from any unacceptable parts.
22. Having had regard to the consultation responses, the issues in the appeal, and the detail shown on the drawings, including the site sections, I am not satisfied that the acceptable and unacceptable parts of the development are clearly distinguishable, or clearly physically and functionally separable.
23. I might have been able to draft a condition excluding the proposed replacement wall from any approval. However, I do not consider that removal of the unacceptable proposed infilled and culverted ditch, particularly given its relationship to the proposed dwelling (as shown on the sections) and subsequent site levels, potentially altered drainage flows and overall layout could be clearly distinguishable from the otherwise acceptable principle of, and location of, a dwelling on this site. Given the issues on this site, particularly with regard to flood risk and drainage, I would also be uncomfortable without detailed assessment of such changes. To my mind therefore, attempting to remove the unacceptable parts of the development would give rise to uncertainty and any such associated conditions would fail the tests in the Framework, requiring precision and enforceability. Turning directly to the wording of the PPG, I do not find anything in this proposal, or the case put to me that there are otherwise any exceptional circumstances that would require, or otherwise merit a split decision.
24. As such, I do not consider that a split decision would be appropriate.
25. I note that in their consultation responses, the EA accept that house alone would pass the ET, but in so doing, refer back to the Council as the determining body for the ST. Their position relates solely to the dwelling, which as I have set out, is not clearly physically and functionally separable from the elements of the proposal which are unacceptable. As such, it does not change my conclusions on this point.
26. Given the Council's position on the ST set out in their decision, the detailed consultation responses of the Engineers, coupled with the EA comments on the wall and the required modelling, I do not find that I am able to reach any conclusion other than that reached by the Council that the proposal fails to meet the requirements of the ST.
27. In reaching this conclusion, I acknowledge that the proposal seeks to replace an existing wall, in apparently poor condition, with a better designed and constructed one. However, although the wall exists, and appears to carry out a function in certain circumstances, the EA are clear that it does not exist within their modelling, and that their recommendations can only follow on from that. It is clear to me though, that they do not rule out altering their recommendations should modelling which includes that existing wall, be provided to their satisfaction. Absent such modelling, their responses, which I am guided by, are unchanged at this point.

28. I find that none of this can be outweighed by any benefits of the proposal in terms of sustaining the existing community and reducing flood risk overall, as without verified modelling which is acceptable to the Council as local planning authority and the EA, I cannot be certain that those benefits arise or that risk elsewhere is appropriately reduced.
29. As such, the proposal conflicts with Policy DM33 of the DM-DPD, which requires that development proposals minimise the risk of flooding to people and property by taking a sequential approach which directs development to the areas at the lowest risk of flooding, before considering any other factors. It would also therefore conflict with national policy set out in the Framework, and guidance in the PPG.

Drainage

30. As set out by the EA in their consultation responses, the lack of detailed modelling of the effects of the proposal as a whole, both on the immediate site and the wider area is a fundamental failing of the proposal from a technical perspective. The Council has also raised detailed concerns over the drainage of the site, particularly surface-water, and the use of certain areas for water storage.
31. In response, the appellant has now submitted a detailed drainage design. However, it relates to the amended scheme. I can give it no weight in this appeal as it does not address concerns over how the proposal which the Council considered would or could be drained such that it did not increase flood risk elsewhere.
32. I accept that in principle, the use of SUDS could be conditioned, as could the overall drainage design. However, I do not consider it would be appropriate to do so in this case, given the sensitivity of this proposal to flood risk effects within and without the site, where the wider effects have not been modelled to the satisfaction of the Council and the EA.
33. Taken in combination with the uncertainty over the necessary modelling on flood risk, I cannot therefore be sure that the site can be drained without increasing flood risk elsewhere. The proposal would therefore conflict with policy DM34 of the DM-DPD, which seeks to ensure that surface-water run-off and drainage is appropriately dealt with.

Biodiversity

34. Following the decision of the Council, it has been confirmed that the existing watercourse along the northern boundary of the site was assessed in the Biodiversity Net Gain (BNG) calculations. However, this was included within the dry land habitat calculations, as it does not hold water for the majority of the year, a requirement to be classed as a ditch in BNG calculations.
35. As such, it has been demonstrated that the proposal would not cause a net loss of biodiversity across the site. It has also therefore been shown that in combination with the arboricultural and landscaping information, the site could result in BNG.

36. I note that the Council still objects to the infilling of the watercourse due to its location within a wildlife corridor, as well as for drainage reasons. However, in relation to the reason for refusal, the proposal would not conflict with policy SP8 of the Local Plan for Lancaster District 2011-2031, Part One: Strategic Policies and Land Allocations DPD, 2020 or Policy DM44 of the DM-DPD, which seek, amongst other things to protect the natural environment and deliver BNG. It would also not therefore conflict with national policy on the same, set out in the Framework.

Other Matters

37. It is clear from the evidence in the appeal that there has been a lengthy history of discussion and negotiation between the appellant, the EA and various responsible authorities over several years around the use and development of this site. These have included the relationship of development aspirations to its use, whether formally or informally, for flood water storage, and its role in wider flooding and drainage issues in the area. Whilst I have some sympathy with the position of the appellant, this sympathy cannot extend to setting aside the clear requirements of national and local policy for development in relation to flood risk and drainage.

38. I note that the appeal proposal is for a self-build dwelling. Whilst this is a type of housing supported by national policy in the Framework, it does not outweigh my conclusions above.

39. The appeal site lies within the buffer to the Morecambe Bat Special Area of Conservation, Morecambe Bay and Duddon Estuary Special Protection Area and Morecambe Bay Ramsar site. The proposal could also have an effect on the interest features for which Morecambe Bay Site of Special Scientific Interest have been notified. Although Natural England have provided a consultation response to the appeal application, as I am dismissing the appeal for the grounds stated, it is not necessary to address this in any further detail.

Conditions

40. The appellant has suggested certain issues be dealt with by condition and proposed particular wording for some of them. I have had regard to these, as well as to the guidance in paragraph 55 of the Framework to consider whether otherwise unacceptable development could be made acceptable through the use of conditions or a planning obligation.

41. However, given the fundamental issues with the proposal, set out in my reasoning above, I do not consider that the conditions proposed, or indeed, any such other conditions as I could draft, could appropriately overcome the harm and development plan conflict I have found.

Conclusion

42. I have found that the proposal could deliver BNG as required by the development plan. However, I have also found that it does not satisfy the requirements of the ST, nor do I have the certainty I require that it can be suitably drained without increasing flood risk elsewhere. This development plan conflict is significant, and I find, not outweighed by any other material considerations which might otherwise weigh in favour of the proposal, including BNG, or the provision of a self-build family dwelling in a sustainable location.

43. For the reasons given above I therefore conclude that the proposal as a whole conflicts with the development plan and there are no material considerations which indicate that a decision be taken other than in accordance with it.

44. The appeal should therefore be dismissed.

S Dean

INSPECTOR