



Appeal Decision

Hearing held on 28 January 2025

Site visit made on 28 January 2025 (accompanied) and 29 January 2025 (unaccompanied)

by Mr D Szymanski BSc (Hons) MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 7 March 2025

Appeal Ref: APP/C1435/W/24/3343709

Land at Old Orchard House, Horebeech Lane, Horam TN21 9DZ

- The appeal is made under section 78 of the Town and Country Planning Act 1990 (as amended) against a refusal to grant consent subject to conditions of consent, agreement or approval of details required by conditions of a planning permission.
 - The appeal is made by Mr Chris Baron of Chailey Homes Ltd against the decision of Wealden District Council.
 - The application Ref WD/2023/1687/CD sought approval of details pursuant to conditions 5, 6, 7, 8, 9, 11, 12, 13, 14, 15, 16, 18, 20, 21, 23 and 24 attached to planning permission Ref WD/2021/2346/MAO (APP/C1435/W/22/3297371).
 - The development proposed is the erection of up to 38 dwellings, access, landscaping and other associated infrastructure, granted on 12 July 2022.
 - The conditions in dispute are Nos 13 and 18 which state that:
 - 13) Before preparation of ground levels of the development approved by this permission a scheme for foul drainage shall be submitted to and approved in writing by the local planning authority. The scheme shall be implemented as approved before any of the dwellings served are occupied.
 - 18) There shall be no discharge of foul or contaminated drainage from the site into either the groundwater or any surface waters, whether direct or via soakaways. Prior to being discharged into any watercourse, surface water sewer or soakaways system, all surface water drainage from parking areas and hardstandings shall be passed through trapped gullies and silt traps to BS 5911:1982, with an overall capacity compatible with the site being drained and shall be retained thereafter.
 - The reasons given for the conditions are:
 - 13) In the interests of ensuring suitable foul drainage.
 - 18) To safeguard against ground or surface water pollution.
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Decision

1. The appeal is dismissed.

Application for Costs

2. An application for costs was made by Mr Chris Baron of Chailey Homes Ltd against Wealden District Council. This application is the subject of a separate Decision.

Procedural Matters

3. The description of the development proposed in the banner heading above reflects that for which outline planning permission (OPP) was previously granted. The appellant sought to discharge several planning conditions covering a variety of matters through the submission of the appeal application. This reflects the conditions referred to in the description in the banner heading. The Council approved many of the schemes. Two it did not, are those pursuant to conditions 13 (foul drainage) and 18 (discharge of foul, contaminated and surface water).

4. At the hearing I sought the main parties' views in respect of whether condition 18 could be discharged. It was agreed the condition is an on-going compliance condition that is largely parasitic on schemes under other conditions. It is not a condition requiring a scheme for approval, and there is no jurisdiction to approve, refuse or discharge a scheme under it. Accordingly, while I have had regard to its requirements in considering the scheme under condition 13, my decision cannot approve a scheme under, or discharge, condition 18.
5. The reasons for conditions in the banner heading are taken from the Inspector's Decision Letter. While no specific policies are referenced in the reasons for the condition, the main parties' Statement of Common Ground (SoCG) drew attention to some relevant paragraphs of the National Planning Policy Framework (2024) (the Framework), SPO15 and Policy WCS7 of the Core Strategy Local Plan (2013) (the CSLP). I have had regard to these and the evidence before me in setting out the main issues below.

Main Issues

6. The main issues are whether the scheme submitted pursuant to condition 13 would ensure suitable foul drainage, having particular regard to:
 - pollution;
 - biodiversity; and,
 - flood risk.

Reasons

Pollution

7. In granting the OPP, that Inspector was made aware of pre-existing concerns from various interested parties in respect of foul water infrastructure and noted 123 dwellings under construction nearby¹. Southern Water (SW) had expressed the view that additional flows from the appeal development, may lead to an increased risk of foul flooding from the sewer network, and there may be a need for SW to carry out reinforcement. The matter was sought to be addressed by condition 13.
8. Under this appeal scheme foul water would be pumped to SW's Horebeech Lane Wastewater Pumping Station (the WPS), then to the Vines Cross Wastewater Treatment Works (WWTW). SW states that in this part of the catchment, at times, there is rainwater ingress into the foul and surface water systems. SW has not disputed the Council's assertion that this rainwater ingress causes outflows outside the specific circumstances in which such outflows are permitted at the WPS and WWTW². From the submissions before me, these are exceedances outside those permitted under 'exceptional conditions', defined as being rainfall or snowmelt that exceeds normal climatic conditions³. I am informed that the overflows discharge combined flows including sewage.
9. In-light of the foregoing, the evidence before me is that the wastewater system is not able to cope with the current demands. The WPS has an overflow to a water

¹ Paragraph 6 of decision letter Ref. APP/C1435/W/22/3297371.

² Appendix A of EIR by Southern Water dated 18 March 2024.

³ Regulation 4A of the Urban Waste Water Treatment (England and Wales) Regulations 1994.

course east of the appeal site and the WWTW has an overflow into a water course called the Waldron Ghyll. Both flow to the Cuckmere River. SW's Clean Rivers and Seas Plan identifies the WPS and WWTW annually average of 30 and 39 releases respectively, although it is unclear over what period this is. However, the Council cites publicly available data from the Rivers Trust (RT) that in 2022 the WPS overflow spilled 45 times for a total of 490.18 hours and the WWTW overflow spilled 44 times for a total of 564.21 hours.

10. The Council stated that in 2023 there were around double the outflows of 2022 and interested parties advanced figures which were not inconsistent with the Council's. One year may have incorporated a particularly wet year, but I have no reason to assume there could not be other similar years in the future. At my visit I could see where effluent had flowed out of the WPS outlet and built-up over time.
11. While not the statutory undertaker, the RT uses publicly available Event Duration Monitoring (EDM) data. The EDMs monitor the time and duration of outflows by an undertaker, which are verified by them and then submitted to the Environment Agency (EA). From Defra evidence, I understand that 83.6% of EDM devices were able to measure storm overflow performance for at least 90% of the recording period⁴. Therefore, the EDM data is likely to be a reliable source of evidence, and the RT data should attract significant weight.
12. The Council is not necessarily seeking off-site works to the system, but sufficient evidence there is capacity in the public wastewater system. In-light of what I heard and the evidence before me, there are reasonable grounds to seek such evidence. The appellant's submissions provide a limited substantive analysis of off-site capacity, with their grounds of appeal largely reliant upon SW's advice.
13. In response to the application to discharge condition 13, SW carried out a desktop assessment and used a base hydraulic model to represent the sewer system with real sewer data. Although, I understand the appellant does not have the details of that modelling, and the SW correspondence does not confirm it was data from the subject sewers. SW's view is there is enough capacity to deal with the flows from this development, which would be minimal, and it would not impact the volume or frequency of overflows. However, SW provide limited explanation of this.
14. SW explains the difference between their response to the OPP and this appeal scheme, is due to their approach to now use desktop assessment for wastewater enquiries. This means that a hydraulic analysis is only necessary if the proposal exceeds 50 dwellings, or if the system identifies 5 or more sewerage incidents within a given distance and number of years. SW emphasises that discharges at the WWTW and WPS are attributed to rainwater, not growth, and the answer is to prevent rainwater getting into the sewer network.
15. While this proposal would result in proportionally limited increases in inputs into the system, it seems illogical that additional inputs would have no consequence to outflows of foul water when the system is overwhelmed by rainfall. SW's clarifying correspondence does not dispute there are outflows above those permitted and does not dispel the Council's concerns that the additional dwellings would worsen the situation. Therefore, I give SW's explanation on this matter limited weight.

⁴ Letter from Robbie Moore MP (Parliamentary Under Secretary of State for Environment, Food and Rural Affairs.

16. The Baseline Risk and Vulnerability Assessment (BRAVA) in the SW Vines Cross Wastewater System Plan (2021) (the SP) indicates concerns. Planning Objectives for Pollution Risk, Sewer Collapse Risk and Good Ecological Status/Potential were graded as 'very significant' risks in 2020. Internal sewer flooding, storm overflows and flood risk due to hydraulic overload were assessed as 'moderately significant'.
17. The SP states the primary driver for internal sewer flooding incidents is a lack of capacity to convey rainfall (hydraulic), contributing to 56% of incidents reported. Hydraulic matters are cited as the driver of storm overflow performance and flooding due to hydraulic overload. The cause of the pollution risks is described as asset operational issues, contributing to 50% of incidents. While there were no records of water quality compliance failure from 2018-2020, it gives little assurance after 2020. Of note is that Defra's online catchment explorer shows the Waldron Ghyll has a 'poor ecological status' with sampling showing a change from 'moderate' to 'poor' from between 2019 to 2022⁵.
18. Framework paragraph 201 states the focus of decisions should be on whether a development is an acceptable use of land, rather than the control of processes or emissions, where subject to separate pollution control regimes. Decisions should assume the regimes will operate effectively. This is policy that regimes 'should' be relied upon, but not that they shall or must be relied upon. The weight attributed to is a matter for the decision maker, so I do not agree, a Local Planning Authority (LPA) has no jurisdiction over the matter.
19. SW is obliged by the Water Industry Act 1991 (the WIA) to accept flows and provide the necessary capacity to drain property within their area, with charges to provide any upgrades needed. Section 2 of the WIA has a general duty that the Secretary of State secures that the functions of the water and sewerage undertakers are properly carried out, in the manner which he or it considers is best calculated. If SW fails to make necessary upgrades to prevent foul sewerage discharge, then OFWAT has a duty to step in as the regulator. However, what I heard suggests the WIA alone is not a pollution control regime.
20. I heard at length submissions in respect of Barratt appeal⁶ and supreme court⁷ judgements, concerning the scope of the WIA and the role of the LPA. There are differences between that case and this, such as that the undertaker does not object to this scheme. However, the differences do not appear to diminish the principle that a negatively worded condition can make permission conditional upon there being adequate sewerage facilities in place off-site in the network, which may not necessarily be within the developer's control.
21. Though the judgements are based upon the Planning Policy for Wales (2002), Framework paragraph 198 is similar, in stating decisions should ensure new development is appropriate for its location taking into account the likely effects including cumulative effects, of pollution on health, living conditions and the natural environment. Therefore, while I note the findings of the Inspector in the decision at Clappers Lane⁸, based upon what I heard in relation to this appeal, the findings in the Barratt judgements are applicable to this case.

⁵ Defra's online catchment explorer for the Waldron Ghyll dated 3 August 2023.

⁶ Barratt Homes v Dwr Cymru Cyfyngedig (Welsh Water) [2008] EWCA Civ 1552.

⁷ Barratt Homes v Dwr Cymru Cyfyngedig (Welsh Water) [2009] UKSC 13.

⁸ Ref. APP/L3815/W/22/3291160.

22. The wording of the Barratt condition is very similar to this condition 13. I see no reason to disagree, the Inspector imposed condition 13 having regard to the Newbury tests⁹, to allow the Council to ensure sufficient certainty adequate infrastructure would be in place in-light of SW's concerns. Were I to take the view that condition 13 should be discharged simply due to the existence of the WIA, it would serve no planning purpose.
23. The full evidence before Inspectors of appeal decision letters provided is not before me. At Clappers Lane, SW had expressed a concern about capacity. Permission was therefore granted subject to a condition to prevent occupation until SW confirmed there is sufficient capacity. This lends further weight to the view that off-site wastewater capacity matters can be the subject of planning conditions.
24. From the West Wittering¹⁰ decision letter it is understood there was no off-site capacity problem declared by SW, and no substantive evidence SW were unable to adequately deal with sewage. While acknowledging the WIA, the Inspector imposed a condition in respect of on-site drainage only. These circumstances are not directly comparable to those of this scheme.
25. At Rosemead¹¹ just northeast of this appeal site, the Inspector found at that time, the proposal was supported by adequate information to persuade them that proper foul and surface water drainage could be achieved via detailed design, to be dealt with by condition. The Inspector would not have imposed the condition if it was believed it could not be discharged. That it is imposed, requires capacity be demonstrated, and agreed with the LPA, is recognition of a network capacity issue.
26. At north of Cambridge North Station¹² a water credits market was subsequently developed to resolve the issues raised, so it is not directly comparable to this appeal proposal. Moreover, a Grampian-style condition was imposed to ensure the provision and implementation of suitable foul drainage. Overall, I see no reason why the findings in those decisions justify allowing this appeal.
27. The An Taisce judgement¹³ concerns the reliance upon what is described as a stringently operated UK nuclear regulatory regime for future control. Decision makers can have regard to other regulatory regimes, but the weight given to them, depends upon the specific circumstances in each case. It is also likely that regime differs from the regulatory regimes concerning this appeal scheme.
28. As well as the WIA, the WPS and WWTW operate under the Environmental Permitting (EP) regime, which is a pollution control regime, regulated by the Environment Agency (EA), who can impose penalties. The appellant sought data on spills and non-compliances from SW and the EA. There is little evidence of substance from SW, and I am informed the EA declined to provide evidence upon spills or non-compliances for the public domain.
29. Defra advised the Council¹⁴ the issue of water quality and pollution is a priority. If water companies are found to be in breach of their permits and failing to meet their

⁹ the conditions imposed must be for a planning purpose and not for any ulterior one, ... they must fairly and reasonably relate to the development permitted. Also, they must not be so unreasonable that no reasonable planning authority could have imposed them....

¹⁰ Ref. APP/L3815/W/21/3286315.

¹¹ Ref. APP/C1435/W/23/3334439.

¹² Ref. APP/W0530/W/23/3315611.

¹³ R (An Taisce) v SSECC [2014] EWCA Civ 1111.

¹⁴ Letter dated 6 February 2024.

legal duties, there will be no hesitation in holding companies to account. However, the letter does not demonstrate there is sufficient capacity in the system in this location, and there is no other substantive technical evidence advanced giving adequate demonstration there is sufficient capacity in the network to deal with demands by these additional houses.

30. It is not the appellant's case that stopping-up the existing sewer crossing the site and SUDS would reduce rainwater ingress to off-set the volume changes. I heard constraints to developing alternative solutions on the site by the appellant, and that it may not be possible to persuade SW to resolve a problem it does not believe exists. Though it was suggested the condition may not be reasonable, this is not an application to amend or remove the condition. Moreover, it is not demonstrated there are not solutions to resolve the issue of infiltration available.
31. Therefore, for the reasons set out above, it has not been demonstrated the proposed scheme would ensure satisfactory drainage with particular reference to pollution. This would conflict with Policy WCS7 of the CSLP which aims to ensure sufficient capacity is available in local infrastructure to meet the requirements of new development, and that any improvements are provided at the time they are needed. It would also conflict with the aims of SPO15 of the CSLP insofar as this seeks that adequate infrastructure is provided to support new development.
32. While my decision would conflict with Framework paragraph 201, there is sufficient justification for this having regard to the development plan and Framework paragraph 198, the relevant provisions of which are set out above.

Biodiversity

33. The Council specified concerns of the scheme effects upon the Sites of Special Scientific Interest (SSSIs) of Arlington Reservoir, Milton Gate Marsh, and Seaford to Beachy Head. This is because the Waldron Ghyll and brook adjacent to the appeal site flow into the River Cuckmere, which has hydrological connectivity with the SSSIs, that include aquatic habitats. Based upon sampling, the Waldron Ghyll is defined as having a poor ecological status because of pollution from wastewater and rural areas¹⁵. The Council has provided extracts of sampling data near the WWTW and at other areas near the SSSIs it is concerned about.
34. Natural England (NE) has published views about the management of the three SSSIs. The single threat to Arlington is listed as water company discharges causing water pollution, which is regarded as a high potential threat. For Milton Gate Marsh a threat is listed as drainage, although this is somewhat unspecific and unclear. For the Seaford to Beachy Head SSSI, water company discharges causing water pollution, are regarded as a high potential risk.
35. This appeal scheme is not of the type to trigger a consultation within NE's Impact Risk Zones, so a risk is regarded as unlikely. Of the chemicals and compounds listed in sampling catchment data, the outflow of foul water includes phosphates and ammonia, and biochemical oxygen demand can also be a sign of foul water entering a freshwater system. Headline evidence from sampling indicates that between 2019 – 2022 Ammonia levels changed from High to Good and Phosphate from Moderate to Poor. However, when questioned the Council was unable to

¹⁵ Paragraphs 37 – 42 of the Council's Statement of Case citing Defra's online catchment explorer.

quantify what the effect would be from this scheme on the levels of these in water, and in turn their effect upon the ecological status of water courses and SSSIs.

36. NE states that because all foul water is being discharged to the WWTW, and SW has confirmed there is sufficient headroom to accept flows, they are satisfied none of the SSSIs are likely to be affected by the appeal scheme. In addition, as no Impact Risk Zones are triggered, they consider it unlikely the project will result in a significant effect upon any designated sites. While noting the Council's concerns, having regard to the proximity and hydrological connectivity, and an absence of an identified impact pathway, NE maintains no objection to the proposal¹⁶.
37. The Council's case is reliant upon what it describes as the logical fallacy of SW's approach, and that because NE's advice is based upon this, it is unsound. Other than this, the Council has not advanced a written statement of evidence from an ecologically qualified professional and did not call such a person at the hearing. Despite my questions, the Council could not explain exactly what effect changes in outflows would have upon the listed features of interest of the SSSIs. Therefore, I have no substantiating evidence that there would be an impact pathway and adverse effects upon the SSSIs and their features of interest.
38. During my visit, at points I was able to view the Waldron Ghyll and the Cuckmere River south of the WWTW and WPS. I could see they increase in flow volume as they flow south to Arlington and beyond. At these points, additional discharges from the WWTW and WPS from the development would be contextually very minor. It would seem they could well be regarded as ecologically insignificant at the SSSIs approximately 10 km south of the appeal site.
39. In respect of the receiving tributary and Waldron Ghyll, I was informed of concerns about the general ecological effects from increased outflows, such as upon invertebrate species. The Waldron Ghyll has a poor ecological status, and it is cited in the system plan as having an EA-status as bad due to phosphates, with the activity recorded as 'sewage discharge (continuous)'. Again, I am given no substantive quantifying evidence in respect of changes in compounds and chemicals. Therefore, while the effect of the development could be negative, there is nothing before me to demonstrate this would be of any ecological significance.
40. Initially the Council inferred a concern about the Pevensy Levels Special Area of Conservation (the SAC) and SSSI. However, it was subsequently clarified through the SoCG there are no concerns of the Council and the appellant about the effect upon its integrity. The appeal site lies outside any designated zone of influence, and from what I heard there is no hydrological connectivity between the receiving watercourses and the SSSI and SAC. NE has also confirmed its view that no European designated site is likely to be affected by the proposal. Therefore, having regard to the Conservation of Habitats and Species Regulations (2017) (as amended) I am satisfied there would be no effect upon the SAC.
41. For the reasons set out above, notwithstanding the general concerns in respect of pollution, the case is not made that the scheme does not ensure suitable foul drainage with particular reference to biodiversity. Therefore, I do not find a conflict with paragraphs 187 and 193 of the Framework, insofar as they seek to protect sites of biodiversity value, minimise impacts and prevent harmful effects to SSSIs.

¹⁶ Correspondence from NE dated 13 and 27 January 2025.

As they relate to local infrastructure requirements, I have not concluded against SPO15 and Policy WCS7 of the CSLP in respect of this main issue.

Flood risk

42. The Council set out a concern in respect of flooding of local houses from deficient local infrastructure. The original Flood Risk Assessment (FRA) was predicated upon the assumption there would be capacity in the foul water network, which I am informed will not always be the case. The consequence of the proposal would be increased foul water inputs with outflows into watercourses at certain times. The additional flows would be both in 'exceptional conditions' and when there are rainfall events which are not exceptional but result in rainwater ingress.
43. I am informed by the Council there would be an approximately 20% increase in the number of dwellings discharging to the WPS. These dwellings would be built to modern water efficiency standards and increased outflows would be for foul water only. Due to this, and that I am informed some existing dwellings are expected to be discharging surface water into the foul drainage, there would not be a 20% increase in water in the foul water system, the proportion of increase would be very much smaller.
44. I am given no reason to believe the volume from outflows at those times of exceptional events are not accommodated in the watercourses downstream of the discharge points. So, I see no reason to conclude there would be an increased risk of flooding from water courses during less than exceptional events when the WWTW and WPS could be discharging foul water.
45. The Council has not detailed the timing and location of past or anticipated sewer flood events. While I heard of some past issues of sewers backing up on private properties, and references to flooding at Rosemead by interested parties, their nature and the burden on the network at that time is simply not clear. SW's register does not have an incident report of a specific event I was referred to, and it is unclear, for example, if the events were due to rainfall ingress, or a different matter altogether, such as a blockage.
46. The appellant's chartered engineer informed me this proposal and the WPS is downstream of the properties of concern, and given the likely path of any water, there would not be an increased risk of flooding as a result of the proposal. The engineer assured me they have had regard to the capacity and volumes and are satisfied that there would not be an increased risk of flooding elsewhere.
47. In the absence of substantive evidence to the contrary, while there would be increased foul water it is not substantiated that the proposal would result in the increased risk of flooding to people and property. On this basis it would ensure suitable drainage with particular reference to flood risk. Therefore, it would not conflict with the aims of paragraph 181 of the Framework, insofar as this aims to ensure that flood risk is not increased elsewhere. As they relate to local infrastructure requirements, I have not concluded against SPO15 and Policy WCS7 of the CSLP in respect of this main issue.

Other Matters

48. A planning obligation (UU) is submitted to secure the payment of a Surface Water Development Contribution to the Pevensy & Cuckmere Water Level Management

Board for the cost of works from accepting surface water into the drainage network. The Council does not object to the UU. However, as it relates to surface water drainage under condition 18 and not foul water being considered under condition 13, it is not directly related to the appeal scheme and not necessary to make it acceptable. Therefore, it could not be a reason to allow the appeal.

Conclusion

49. For the reasons set out above, it is not demonstrated the submitted scheme would ensure suitable foul water drainage, due to the potential for increased pollution in the water environment. This would conflict with the reason for the imposition of the condition and with Policy WCS7 of the CSLP and the Framework. There are no other considerations advanced that outweigh this finding. Therefore, for the reasons given, the appeal should not succeed.

Mr D Szymanski

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Miss Sioned Davies, Barrister, No 5 Barristers' Chambers;

Mr Chris Baron, Managing Director, Chailey Homes;

Mr Michal Wojcieszak BEng CEng MICE, Director, Monson Engineering;

Mr Mark Best BA (Hons) MTP MRTPI, Director, Parker Dann;

Mr Chris Wojtulewski BA (Hons) MTP MRTPI, Director, Parker Dann;

FOR THE COUNCIL:

Mr Richard Moules, Kings Counsel, Landmark Chambers;

Mr Sam Batchelor MRTPI, Development Manager, Wealden District Council;

INTERESTED PARTIES:

Councillor Cornelia Usbourne, Wealden District Council;

Councillor Mike Gadd, Wealden District Council;

Dr Stephen Hall, Local Resident;

Councillor Sue Lane, Horam Parish Council;

Councillor Mark Fairweather, Wealden District Council;

Councillor David White, Wealden District Council.

DOCUMENTS ACCEPTED AT THE HEARING

HL-1: Planned talking points (Appeal Statement) from Dr S Hall (dated 23/01/2025).

HL-2: Letter from Southern Water to Chris Baron of Chailey Homes Ltd (20/01/2025).

HL-3: Section 106 Unilateral Undertaking given by Chailey Homes Limited to Wealden District Council, dated 30 January 2025.