



Appeal Decision

Site visit made on 16 January 2018

by **David Richards BSocSci DipTP MRTPI**

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 29 January 2018

Appeal Ref: APP/E1210/W/17/3175948

Vacant brownfield site, part of Willow Way Marina, Adjacent to 9 Kingfishers and 13 Willow Way, Christchurch, Dorset, BH23 1JJ

- 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 & Mrs May and Floodline Developments against the decision of Christchurch Borough Council.
 - The application Ref 8/16/1003/FUL, dated 3 June 2016, was refused by notice dated 24 February 2017.
 - The development proposed is 2 x two-storey, 4-bed, flood resilient detached dwelling houses with associated parking, amenity space and landscaping.
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Decision

1. The appeal is dismissed.

Main Issue

2. The main issue is the effect of the proposal on flood risk.

Reasons

3. Descriptions of the proposed development are included within the Flood Risk Assessment (FRA) and the Design and Access Statement (DAS). In summary, the proposal is to build 2 x 4 bedroom flood resilient, water compatible houses, with on-site parking, gardens and berths for boats. A new 'Can-Float' design is proposed, which uses a flood resilient foundation design to allow the buildings to rise with any flood water. The foundation is designed to ensure that there would be no displacement of water, so there would be no increase in the risk of flooding to the surrounding area. The principle is based on a lightweight timber-frame house on a re-inforced concrete pontoon structure filled with expanded polystyrene. This pontoon would be attached to two concrete and steel guide piles (referred to as 'dolphins') positioned diagonally to the footprint. The pontoon structure sits within a reinforced concrete dry dock located below ground level. When the site floods, water enters the dry dock, raising the pontoon and making the house float under the guidance of the piers and their rollers/sliders.
4. The Appellant states that as part of the design, during a flood event, safe escape routes are provided for pedestrians along 'non-slip' gangways from the front of the houses out towards the highest points on Willow Way. These gangways are attached to the perimeter decking surrounding the houses by pivot joints, allowing vertical movement. They also have wheels at the opposite

- end that sit on the ground. When the house rise, the gangways rise with them, but with the ends staying on the ground within 'safe' egress areas. This would provide a constant escape route even during a 1 in 100-year flood plus climate change event.
5. The design incorporates access panels to the front and back of the dry dock, covered with metal grilles, to allow access for maintenance and cleaning, and also to a low level sump and pump.
 6. The Appellant considers that the proposal is sensitive, appropriate and respectful of the immediate and local context. The layout, scale and appearance of the scheme would be reflective of the quality and nature of this part of Christchurch and would safeguard the local context. The Council's refusal reason was limited to the flood risk issue, and did not suggest that the scheme would be harmful to the character and appearance of the locality, nor to the living conditions of neighbours.
 7. The site falls within the River Stour Frontage, close to Christchurch Town Centre. Development in this part of Christchurch may be characterised as an area of relatively modern development that extends around the river frontage from the Meridians to the edge of the Quomps. It includes a mix of modern riverside apartments and pockets of earlier detached riverside houses, including some with boat moorings. The earlier riverside houses are generally individual properties of some architectural character. They are set close to the river on long narrow plots. Some plots have been subdivided to provide an extra dwelling on the road frontage.
 8. The river frontage has provided a distinctive setting to this area. The river corridor at this point is relatively narrow and sections of the banks are well vegetated with riverside trees. The site is also adjacent to Willow Way Marina, its access road, and the residential property No 13 Willow Way to the west. The marina has gravelled hard standing for formal parking, together with a single storey, pitched roof outbuilding serving as the marina office. No 13 is a 2 and three storey house with pitched roof and multiple hipped ends. The site boundary to the west includes vertical open-slatted timber fencing, rendered brick walls and the entrance gate to the marina.

Planning Policy

9. The Development Plan for the area includes the Christchurch and East Dorset Core Strategy, adopted April 2014 (CS). Policy ME6 addresses flood risk and requires that when assessing new development, the local authorities will apply the sequential and exception tests set out in the National Planning Policy Framework. The Policy is supported by a Level 2 Strategic Flood Risk Assessment. The Council intends to prepare a Supplementary Planning Document on flood risk to provide guidance to developers but this has not happened yet, so consideration of development in relation to flood risk is reliant upon national guidance.
10. The National Planning Policy Framework (The Framework) states that the purpose of planning is to help achieve sustainable development and that development that is sustainable should go ahead without delay. Paragraph 47 of the Framework emphasises that local planning authorities should boost significantly the supply of housing.

11. Section 10 of the Framework sets out national guidance for 'Meeting the challenge of climate change, flooding and coastal change.' Para 100 advises that 'Inappropriate development in areas at risk of flooding should be avoided by directing development away from areas at highest risk, but where development is necessary, making it safe without increasing flood risk elsewhere'.
12. Paragraph 101 states that the aim of the Sequential Test is to steer new development to areas with the lowest probability of flooding. Development should not be allocated or permitted if there are reasonably available sites appropriate for the proposed development in areas with a lower probability of flooding. The Strategic Flood Risk Assessment will provide the basis for applying this test. A sequential approach should be used in areas known to be at risk from any form of flooding. A sequential approach should be used in areas known to be at risk from any form of flooding.
13. If following the application of the Sequential Test, it is not possible, consistent with wider sustainability objectives, for development to be located in zones with a lower probability of, The Exception Test can be applied if appropriate. For the test to be passed it must be demonstrated that the development provides wider sustainability benefits to the community that outweigh flood risk, and that the development will be safe for its lifetime taking account of the vulnerability of its users without increasing flood risk overall and where possible, will reduce flood risk overall. Both elements of the test will have to be passed for development to be permitted (NPPF paragraph 102).
14. More detailed guidance is set out in Planning Practice Guidance (PPG). Under the heading 'Manage and mitigate flood risk' the Guidance advises that 'where development needs to be in locations where there is a risk of flooding as alternative sites are not available, local planning authorities and developers [should] ensure development is appropriately flood resilient and resistant, safe for its users for the development's lifetime, and will not increase flood risk overall.'
15. For the purposes of applying the Framework, areas at risk from all sources of flooding are included, principally land within Flood Zones 2 and 3. In decision-taking, where necessary, local planning authorities also apply the sequential approach. This involves applying the Sequential Test for specific development proposals and, if needed, the exception test.

Reasons

16. The site lies within Flood Zones 2 and 3a. The flood boundaries provided by the Environment Agency (figure 13 of the FRA Report) show the boundaries of the site varying from flood zone 2 at Willow Way to Flood Zone 3b beside the river. However the two property footprints lie within Flood Zones 2 and 3a. A small encroachment by one corner of one of the properties did initially occur, in response to which the Appellants offered to relocate the building back slightly, but the EA did not object to what they considered to be a very minor encroachment.
17. Flood Zone 2 is has a medium probability of flooding, and Zone 3a a high probability (PPG Table 1: Flood Zones).

18. Prior to determination by the Borough Council, the Appellant prepared a revised FRA (Rev B., dated 14 September 2016). In response the EA confirmed that based on the content of the letter from Floodline Consulting Limited dated 20 September 2016 and the revised FRA their objection would be withdrawn. A number of caveats were recorded however, chief of which was that the Council needed to ensure that the development passes the NPPF Sequential Test, and also whether the exception test (Part 1) is passed. They also heightened the need to consider emergency planning and the safety of future occupants.
19. The EA also stated that only the Council could determine whether the development could pass these tests. In an appeal, the responsibility passes to the decision maker. The EA highlighted a recent Appeal Decision (APP/R3650/W/15/3136799) which, while relating to a different authority, concluded that *'The lack of technical objections to the scheme, however, does not override the primacy of steering developments to areas of lower probability of flooding, in this case to sites located within Floodzone 1.'*
20. With regard to the exception test, the EA commented on the contention that the proposal should be considered 'water compatible' and 'less vulnerable', advising that it was for the Council to decide what vulnerability category the development falls in. The EA's view is that the development is for two dwellings (where none at present exist), pointing out the Planning Practice Guidance (PPG) considers dwellings to be 'more vulnerable' development.
21. With regard to flood levels the EA commented as follows:
- 'Assuming the lifting mechanism of the proposed dwellings work as intended for the lifetime of the scheme then the properties will remain 'safe' for future occupants because the revised FRA shows the dwellings can rise to 3.63m AOD (ground floor level), hence 600mm above the design flood level ... While the proposed floating dwellings should remain safe, the site, if developed as proposed, will still be at risk of flooding to depths in excess of 1 meter within the lifetime of the proposal (reference page 35 of the revised FRA).'¹*
22. Finally, the EA commented on the system whereby the two proposed dwellings rise above the flood water: *'The integrity of the buildings may be vulnerable during major flood events, however, by virtue of the presence of debris, movement of flood water and these factors would need to be taken into account by the developer at the final design stage. It is not within our remit to endorse the mechanics of the structure to allow the proposed buildings to rise and fall during flood events. We recommend the LPA seek independent specialist advice to ensure they are satisfied the buildings will remain safe during major flood events for the lifetime of the development.'*

The sequential test

23. The Appellant has undertaken a Sequential Test, which purports to show that there are no appropriate alternative sites suitable for this development within Flood Zone 1. Table 1 of the NPPG categorises the different flood Zones. The appeal site lies within Zones 2 and 3a. Table 2 sets out the vulnerability of different uses to flood risk. This states that buildings used for dwelling houses are classed as 'More vulnerable'. There are also lengthy lists of 'Less

¹ The FRA states that the guide piles will be designed to provide the 1 in 1000 year flood protection, in excess of the design flood level which resulted in the approved 3.63 m max flood level. It states that the finished floor level of the property will remain buoyant 600mm above any given flood level.

vulnerable' and 'Water-compatible development', neither of which include reference to residential accommodation, other than essential ancillary sleeping or residential accommodation for staff required by uses in the water compatible. The Appellant considers that this is not refined enough to recognise the special category of water compatible dwellings, as proposed in the appeal scheme.

24. Paragraph 101 of the Framework states that 'The aim of the Sequential Test is to steer new development to areas with the lowest probability of flooding. Development should not be allocated or permitted if there are reasonably available sites appropriate for the proposed development in areas with a lower probability of flooding.'
25. The Appellant argues that the particular nature of the development – flood resilient, water compatible dwellings are, by definition, only appropriate in specific locations i.e. the edge of flood risk areas with safe access in time of flood. It is therefore unrealistic to consider sites within Flood Zone 1 are appropriate to locate this form of development.
26. To my mind this is a mis-reading of national guidance on flood risk. The guidance identifies dwelling houses as 'more-vulnerable development', for which it is necessary to undertake a Sequential Test where development is proposed on land in higher-categories of flood risk. It does not distinguish between normal dwellings and 'water compatible dwellings'. The Framework requires the Council to apply the Sequential Test when considering proposals in areas of high flood risk. In assessing whether there are sites in lower flood risk categories capable of accommodating the development, there is no requirement in guidance for the local planning authority to make a distinction between normal housing and flood resilient, water compatible housing. The Framework is concerned with boosting the supply of housing, but also with minimising flood risk. In this context the development should be regarded as providing two dwelling houses, without regard to the special nature of the design. If the Council can demonstrate that there are other locations available in areas of lower flood risk, then the appeal proposal does not pass the Sequential Test. It is not necessary to show that there are other sites available for special categories of dwelling such as flood resilient, water compatible dwellings.
27. It is also irrelevant that the land is the only land within the ownership of the Appellant and therefore not reasonably available. The aim of flood prevention policy would not be well served if landownership was to be accepted as a reason to ignore or set aside the sequential test.
28. I have read the submission by Mr Peter Bide CGeol, CEng, FCS, MIMM who I am informed was the author of the relevant text within the Framework and the Practice Guidance. He suggests that 'whilst the Sequential Test has general application, it was appreciated that accommodation needed to be made for small infill plots where the applicant does not have a realistic, reasonably available and comparable site elsewhere. This was one of the reasons that the Exception Test was introduced to accompany the Sequential Test. The key part of the Exception Test in this case is that development is that the development is on previously developed land, or if it is not, there are no reasonable alternative sites. He goes on to say that 'For this reason, if Can-Float or other flood resilient developments on small, non-strategic plots are deemed safe by

the EA they are deemed to have passed the Sequential Test and pass all parts of the Exception Test. Traditional development, however, should continue to be directed to Flood Zone 1 but flood resilient, Can-Float homes can be safe in Flood Zones 2 and 3.'

29. Ultimately it is for the courts to determine the meaning of guidance where there is any ambiguity, but there does not appear to me anything in the Framework or the Practice Guidance which supports this interpretation in relation to dwellings.
30. The Appellant also sought a legal opinion from leading counsel. His advice was that the proposal must be subjected to the sequential test. This advice was subject to two caveats. Firstly, that the application of the sequential test requires judgement, including the assessment of alternatives, such that it would in principle have been reasonable to conclude that the sequential test had been passed. Secondly, that since the Sequential Test is set out only in policy, the local planning authority is not obliged to 'slavishly adhere' to it. The Sequential Test is well and good for the vast majority of cases, but the particular, exceptional circumstances that are found here justify departing from policy and so not applying the Sequential Test at all.
31. In my judgment it is not necessarily to adhere to it 'slavishly' to recognise the utility in a policy which seeks to direct residential development to areas of lowest flood risk. The consequences of not doing so are readily apparent in the regular incidents of flooding which the policy is designed to avoid. There may be exceptions when a different approach is justifiable, as where there is genuinely no alternative prospect of accommodating housing need, but that is not the case here. I do not consider the fact that the Appellants do not own any other land to be a justification for setting aside the requirement to apply the Sequential Test.
32. The Council states that it can demonstrate a 5 year supply of housing land according to the latest assessment (November 2017). The document (which covers the combined Districts of East Dorset and Christchurch) includes a schedule of sites and their potential to make up that supply. The schedule includes numerous sites that the Council considers are capable of accommodating 2 dwellings or more in Christchurch alone.
33. In response, the Appellant has carried out an extensive review of housing land availability, disputing the availability of a 5 year supply, and the suitability and availability of small sites to accommodate 2 dwellings.
34. With regard to the 5 year supply issue, my attention was drawn to a very recent appeal decision concerning Land to the North of Ringwood Road, Alderholt (APP/U1240/W/17/3169111), dated 6 November 2017. The Inspector concluded on the basis of the evidence available to him for the period 2016 – 2021 that the Council could not demonstrate a 5 year supply of deliverable housing sites (Paragraph 34). I acknowledge that the Councils have published an updated assessment for November 2017 which shows a supply of 5.1 years (a surplus of 77 dwellings) based on data for 2017 – 2022. The Appellant puts forward analysis to demonstrate that the Councils have been over-optimistic in their assessment of overall supply to the extent that they cannot demonstrate a supply of specific deliverable sites sufficient to provide a deliverable 5 year supply. The Appellant has applied average delivery rates derived from data provided by national and regional housebuilders to suggest a reduction in

- predicted completions of 197 dwellings, enough to eliminate the Councils' claimed surplus. In addition, the Appellant has undertaken a more detailed analysis of sites allocated as new neighbourhoods in the LP, identifying issues which could delay implementation and delivery, amounting to a shortfall of 1122 dwellings, or a supply of 3.54 years.
35. In the light of the Alderholt Inspector's recent finding of no 5 year supply, and the marginal nature of the claimed supply for 2017 to 2022, I accept on balance that there is some evidence of likely slippage, which could reduce the deliverable supply below 5 years. Nevertheless I do not consider that in the case the 'tilted balance' is engaged, the NPPF advice clearly amounting to a policy which indicates that development should be restricted in areas of higher flood risk, to which Footnote 9 of paragraph 14 of the NPPF applies.
36. With regard to the availability of alternative sites for 2 dwellings in areas of lesser flood risk, the Council has put forward a list of 88 potential sites on the current 5 year housing list (Appendix E of the Council's statement). Of these, the Appellant states that 12 are located in Flood Zones 3 and 2. In the Christchurch Urban Area alone, the Council has identified a list of 42 sites for comparison with the site at Willow Way. Of these, the Appellant states that 7 are located in Flood Zones 3 and 2, 10 sites have already been built, 22 sites are too big for comparison as they are allocated for 4 to 330 houses, 1 site has been excluded by the Council, 5 sites have been refused planning permission, 3 sites are owner occupier and therefore not available, 1 site is in multiple ownership and is not available.
37. To my mind there is no necessity for the Council to demonstrate the availability of sites of exactly equivalent size, or sites which are available to the Appellant, to show the availability of sites in areas of lower flood risk than the appeal site. Nor is there any particular requirement to demonstrate the availability of sites within the urban area of Christchurch, given that the housing market area also covers East Dorset. The Council's list (Appendix E of the Council's statement) clearly show that there is a wide range of small sites capable of accommodating residential development in areas of lower flood risk than the appeal site within the combined area of the Districts. I note the Appellant's claim that the Council has been inconsistent in granting residential permissions on sites in Flood Zones 3 and 2. However my approach to this appeal must be on the basis of my understanding of the advice in the NPPF and the PPG, and previous decisions by the Council should not be regarded as irresistible precedents.
38. I conclude that Sequential Test is not passed in respect of this proposal, in that there are alternative sites in areas of lower flood risk where 2 dwellings could be provided.

The exception test

39. Paragraph 101 of the Framework advises that 'development should not be allocated or permitted where there are reasonably available sites appropriate for the proposed development in areas with a lower probability of flooding. As I have found that there are such sites available, there is no need to apply the exception test.

Planning Balance

40. The Appellant considers that the Council erred in law by finding the development to be contrary to the development plan and the advice in the NPPF, without taking into account material considerations which are capable of outweighing such conflict. It is argued that the two dwellings proposed are only subject to a 'philosophical' flood risk and not a tangible one, as buildings will float 600 mm above any given flood level. Furthermore, that the exception test is passed because (i) the FRA report demonstrates that the development provides wider sustainability benefits to the community and reduces flood risk locally by the large flood storage capacity provided by the foundations of the proposed dwellings (154m³) and (ii) the site specific FRA demonstrates that it will be safe for its lifetime taking account of future residents without increasing flood risk elsewhere but in fact reducing risk by providing extra storage capacity.
41. I accept that the concept of floating houses, though novel in the UK, has precedents in low-lying European countries, and Canada. Technical validation of the system has been provided by an experienced firm of consulting engineers, Messrs Techniker. Whilst the engineering aspect seem feasible, the construction of the floating docks would appear to be energy and resource intensive, which raises a question mark against the scheme's sustainability credentials. The design allows for maintenance of the wet dock and flotation system, though the EAs concern with the potential for storm debris to interfere with the workings of the mechanism, and the potential for occupants to be put at risk is not addressed.
42. Nevertheless, the engineering concept appears sound in principle, and the EA accepts that the design would be safe for its lifetime. Safe access and egress could be provided via Willow Way through the use of movable pathways with the potential to float. I accept that the floating design would avoid increasing flood risk elsewhere, and even contribute a wider sustainability benefit from the provision of additional flood storage capacity amounting to 154m³, though this would have no more than a modest effect in reducing flood levels across the wider area. With regard for the need to boost the supply of dwellings, the construction of two dwellings would represent a positive, though very modest contribution to housing supply, with commensurate modest social and economic benefits.
43. Weighing against this is the clear policy advice in national guidance that development should not be allocated or permitted where there are reasonably available sites for the proposed development in areas with a lower probability of flooding. The guidance identifies residential development as 'more vulnerable development' and does not make any reference to 'flood resilient' or 'water compatible' development in respect of dwelling houses.
44. I have found that there are reasonably available sites for the proposed development in areas of lower flood risk in Christchurch and East Dorset. Notwithstanding the lack of technical objection to the proposal I conclude that the benefits claimed in respect of sustainability and housing supply do not outweigh the primacy of steering developments to areas of lower probability of flooding as set out in the advice in paragraphs 101 - 103 of the Framework, the associated advice in Planning Practice Guidance and Policy ME6 of the CS.

45. I have taken into account the examples drawn to my attention of other authorities which have permitted development in higher risk flood zones. In both cases the authorities decided there was no requirement to apply the Sequential Test to minor schemes. However I consider this to be a misinterpretation of the national guidance, for reasons set out above. It has also been suggested that Christchurch BC has accepted in the past that the fact that there was no other land available to the Applicant justified a conclusion that the sequential test was met. Again, I consider this to be a misinterpretation of the guidance. Such an approach if widely adopted would seriously undermine the intent of policy to steer development to areas of lower flood risk.

46. For all these reasons I conclude that the appeal should be dismissed.

David Richards

INSPECTOR