

**IN THE MATTER OF:**  
**RECTORY FARM (NORTH), YATTON**

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**OPINION**

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**Introduction**

1. I am instructed by Persimmon Homes Severn Valley (“**Persimmon**”) regarding their application for a 190-dwelling residential development of the above named site. An updated pack of information is currently being prepared to support that application, and any necessary appeal thereafter. I understand that this Opinion will be submitted as part of that pack.
2. The site is within flood zone 3, and therefore the sequential and exception tests under the NPPF need to be considered.
3. I shall assume that the reader of this Opinion is familiar with the relevant paragraphs of the NPPF (para. 162) and the PPG (para. 7-028) and I therefore do not quote them here.
4. The sequential test, as set out by NPPF para. 162 and elucidated by the PPG, was recently considered by the High Court (Holgate J.) in *R (Mead Realisations Ltd. & Redrow Homes Ltd.) v. Secretary of State for Levelling Up, Housing and Communities* [2024] EWHC 279 (Admin) (“**the Judgment**”). That judgment is currently the subject of a prospective appeal. Whilst Persimmon consider that the appeal should succeed, they have asked me to advise on what the implications of the judgment are in the meantime until such time as the prospective appeal is determined by the Court of Appeal.
5. Specifically, I am asked to advise on the implications of the Judgment in

relation to the following matters:

- a. The **type** of development to which the sequential search should relate;
- b. What is meant by a “*series of smaller sites*” for the purposes of the guidance on the sequential search in PPG para. 7-028
- c. What **timescale** for development should the sequential search be directed at; In the event that the sequential test is failed what is the relevance of **need** and **other planning considerations** (eg planning constraints affecting sequentially preferable sites, such as Green Belt and AONB)?

### **Type**

6. The critical paragraphs of the Judgment are at paras. 102-103. Specifically Holgate J. held that “*a developer may put forward a case that the specific type of development he proposes is necessary in planning terms and/or meets a market demand*” (para. 102), which “*could be based on a range of factors, such as location, the mix of land uses proposed and any interdependence between them, the size of the site needed, the scale of the development, density and so on*” (para. 103).
7. These factors may be relevant to **both**: (i) “*the appropriate area of search*” **and/or** (ii) “*whether other sites in lower flood risk zones have characteristics making them “appropriate” alternatives*” (para. 104).
8. Holgate J. also made clear, in the same paragraphs of the Judgment, that whether an applicant/appellant has made out their case in these respects is a matter of planning judgment for the decision-maker (i.e. the LPA or an Inspector / the Secretary of State on appeal) based upon an analysis of the evidence put forward in the particular application/appeal in

question.

9. A failure by the LPA to consider the factors summarised at para. 6 above, either in relation to the area of search or in relation to the consideration of sequentially preferable alternative sites, would therefore be an unreasonable dereliction of the planning judgment which policy requires them to exercise.

### Series

10. At para. 110 of the Judgment, Holgate J. held (emphasis added):

“I note that the PPG refers to a “series of smaller sites.” The word “series” connotes a relationship between sites appropriate for accommodating the type of development which the decision-maker judges should form the basis for the sequential assessment. This addresses the concern that a proposal should not automatically fail the sequential test because of the availability of multiple, disconnected sites across a local authority’s area. **The issue is whether they have a relationship which makes them suitable in combination to accommodate any need or demand to which the decision-maker decides to attach weight.**”

11. At para. 163, Holgate J. criticised the Inspector in the Redrow case for considering “*an alternative based on a number of smaller, unconnected sites*” without addressing “*the case advanced by Redrow that that approach could not deliver the range of interconnected benefits which the appeal would deliver and for which there was a need*” (emphasis added).

12. It therefore follows that in considering whether there are multiple sequentially preferable sites that can, as a “series”, deliver the proposed development, it is mandatory to for the LPA to consider whether those sites, taken together, “*have a relationship which makes them suitable in combination to accommodate any need or demand to which the decision-maker decides to attach weight*”; or in other words whether they would in combination “*deliver the range of interconnected benefits which the appeal would deliver and for which there was a need*”.

### **Timescale**

13. At paras. 106 and 121 of the Judgment, Holgate J. made clear that there was no absolute requirement for sequentially preferable alternatives to “*align closely*” (para. 106) with the proposed development, or for there to be “*precise alignment*” (para. 121). There is, according to Holgate J., a degree of flexibility in this respect, subject to the rational planning judgment of the decision maker. That begs the question: how much flexibility? The answer to this lies in para. 170 of the Judgment, where Holgate J. criticised the evidence base put forward by Redrow in its planning appeal on the basis of “*the lack of evidence to show that alternative sites would take **materially longer** to come forward*” (my emphasis).
14. In other words, precise or close alignment is not strictly necessary; the question is whether the sequentially preferable sites would take *materially* longer to come forward, “*material*” in this context meaning material in planning terms having regard to the nature of the evidenced need/demand for the type of development proposed.

### **Need and other planning considerations**

15. As noted above, Holgate J. held that a specific need for the particular type of development proposed could inform the catchment of the sequential search.

16. At paras. 173-174 and 178 of the Judgment, he went on to hold that:

“173 ...Where [*in the context of plan making*] there remains unmet need which cannot be allocated to areas satisfying the sequential test, that factor together with any other constraints, may lead to a policy decision that not all of the identified need should be met. Alternatively, it may be decided that all or some part of that residual need should be met notwithstanding that the sequential test has not been satisfied. Either way, the treatment of unmet need is not an input to the sequential assessment for identifying reasonably available alternative sites. The sequential approach is not modified in those circumstances. **Instead, the policy-maker will decide what to do with the outcome of applying the sequential test.**”

174. **A similar analysis applies in the determination of planning applications. Where there is an unmet need, for example a substantial shortfall in demonstrating a 5-year supply of housing land, that shortfall and its implications (including the contribution which the appeal proposal would make to reducing that shortfall) are weighed in the overall planning balance against any factors pointing to refusal of permission (including any failure to satisfy the sequential test). If the total size of sequentially preferable locations is less than the unmet housing need, so that satisfying that need would require the release of land which is not sequentially preferable, that too may be taken into account in the overall planning balance. But these are not matters which affect the carrying out of the sequential test itself. Logically they do not go to the question whether an alternative site is reasonably available and appropriate (i.e. has relevant appropriate characteristics) for the development proposed on the application or appeal site. Instead, they are matters which may, for example, reduce the weight given to a failure to meet the sequential test, or alternatively increase the weight given to factors weighing against such failure.”**

...

178. I can see that **if Redrow had submitted to the Inspector that there was a substantial need for housing which could not be met entirely on sequentially preferable sites (and even more so in the next 5 years), so that additional sites with a similar or worse flood risk would need to be developed, that would be a significant factor to be addressed in the overall planning balance. It could reduce the weight to be given to the failure to satisfy the sequential test. Here the Inspector gave that failure “very substantial weight” (DL 100). It would have been arguable that the**

flood risk implications of satisfying the unmet need for housing land was an “obviously material consideration,” such that it was irrational for the Inspector not to have taken it into account (*R (Friends of the Earth Limited) v Secretary of State for Transport* [2021] PTSR 190 at [116] to [120]). Alternatively, it could have been said that there was a failure to comply with the duty to give reasons in relation to a “principal important controversial issue” between the parties.”

17. It is clear beyond doubt from this part of the Judgment that Holgate J. did not consider that a failure to comply with the sequential test was automatically fatal to a planning application, either within the parameters of the NPPF or having regard to material considerations under s.38(6) of the Planning and Compulsory Purchase Act 2004. Other material considerations, including housing need and a lack of a 5 (or 4, as the case may now be depending upon the application of the December 2023 changes to the NPPF) year housing land supply may mean that a failure to comply with the sequential test is outweighed by the housing delivery and/or other benefits of the proposed development in question. Certainly, a refusal by the LPA to consider this issue, and instead to consider the failure of the sequential test to be automatically fatal to an application/appeal without further consideration, would be a clear and unreasonable misapplication of the Judgment.

### **Conclusion**

18. I have nothing further to add as currently instructed. If those instructing me have any further questions, please do not hesitate to contact me in Chambers



**LORD BANNER K.C.**

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**15<sup>th</sup> March 2024**