

TOWN & COUNTRY PLANNING ACT 1990, SECTION 78

APPEAL BY PERSIMMON HOMES SEVERN VALLEY

LAND AT RECTORY FARM (NORTH), YATTON

PINS REFERENCE: APP/D0121/W/24/3343144

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OPENING STATEMENT BY NORTH SOMERSET COUNCIL

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### **Introduction**

- 1 Sustainable development means meeting the needs of the present without compromising the ability of future generations to meet their own needs.<sup>1</sup> Housing meets the most basic of human needs. There is an urgent requirement to deliver many more homes, now, in North Somerset, and, indeed, throughout England and Wales. No one disputes that. However, since the publication of the first version of the NPPF in March 2012 governments of the day have consistently emphasised in strong and clear terms that sustainable development means steering new homes away from areas at a high risk of flooding to areas that present a lower risk, and where that is not possible only to allow development to proceed if in those difficult circumstances the sustainability benefits of a proposal outweigh the risk of flooding and the development can be made safe for its lifetime without increasing flood risk elsewhere. And since the lifetime of housing development is at least 100 years that approach requires decision makers to take a long-term perspective of flood risk, especially the increased risk of flooding that is caused by climate change.
  
- 2 In practical terms, good planning to achieve sustainable development therefore means that new homes should not be built on land at a high risk of flooding now and in the future absent a compelling reason to do so. And only the most

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<sup>1</sup> NPPF para 7

optimistic developer is likely to conclude there are compelling reasons for building homes on land at a high risk of flooding if they could be built on land that does not present that risk.

### **The main issue**

- 3 The main issue in this appeal is, therefore, whether the risk of the inundation by the sea of houses the Appellant would like to build on the appeal site would be sustainable development. The National Planning Policy Framework requires that issue to be assessed by the application of the sequential test and, if necessary, the exception test. That assessment is of pivotal importance in the application of the s.38(6) P&CP Act 2004 balance, which requires the benefits of the scheme to be considered alongside the harm that would be inflicted on people and properties by a “design flood”. Those are the matters the Council will focus on in this appeal. That is not to suggest meeting housing need is not important. But homes must be provided in the places that will not expose future occupiers to the severe burden of flooding.

### **The vulnerability of the site to flooding**

- 4 The risk posed to future residents of the appeal site by flooding is of overriding importance in this appeal. The appeal site is located in flood zone 3a of the Environment Agency’s Flood Map for Planning. That means it has a “high probability of flood risk” equating to a 0.5% annual probability of inundation from the sea, or a 1:200 year event.<sup>2</sup> The site is protected from flooding in the present day by flood defences along the frontage of Woodspring Bay and the banks of the Congresbury Yeo against all but a 1:1,000 year event. However, some of the defences are in a poor condition. Flood defences can be breached. They may also be overtopped as sea levels rise due to climate change. Modelling carried out by the Appellant indicates that in the present day if the flood defences fail

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<sup>2</sup> PPG ID7, Table 1

during a 1:200 year “design flood” event the site would flood up to a depth of 1.17m. Assuming the Appellant’s housing has a standard design life of 100 years by 2122, the rise in sea level will result in a 1:200 year flood overtopping the flood defences and inundating the site to a maximum depth of between 2.73m and 3.12m.<sup>3</sup> The Appellant intends to build new its new houses with ground floor levels set at 6.68m AOD. In the event of a 1:200 year flood that would mean homes would flood up to a depth of 1.2m.

- 5 The Council (through Mr Bunn) will show that the result of such deep flooding would be a substantial repair cost of up to £18m, serious short term and long-term damage to residents’ physical and mental health, and serious environmental impacts associated with the repair and replacement of property.

#### **The application of the sequential and exception tests**

- 6 Against that background, the Appellant is required to demonstrate 190 new homes cannot be directed to land at a lower risk of flooding. If that sequential test is passed it must then be shown the development will provide substantial sustainability benefits to the community that outweigh flood risk, and be safe for its lifetime taking account of the vulnerability of residents, without increasing flood risk elsewhere.
- 7 The evidence will show that the scheme fails each of those tests.

#### **The sequential test**

- 8 The Council (through Mr Hewlett) will show there are 36 sites that are reasonably available to accommodate 190 new homes on land at a lower risk of flooding. The Appellant (through Ms Ventham) says there are 7<sup>4</sup> such sites. The evidence will show Mr Hewlett’s evidence is to be preferred; he has a detailed working knowledge of sites in North Somerset and his approach to the sequential test

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<sup>3</sup> A11, p.16, Table 4

<sup>4</sup> D1, p34, 6.10.37

was approved by Inspector Davies in the Lynchmead Farm appeal. The key point is though that whoever is right, the availability of reasonable alternatives means there is no need to apply the exception test.<sup>5</sup> Instead, the potential to build the new homes that are required on land which is at a lower risk of flooding weighs heavily against the grant of planning permission.

### **The exception test**

- 9 However, in case the sequential test is passed, the Council (through Mr Bunn) has applied the exception test. Mr Bunn's evidence is that the scheme fails the second part of the test because it will not be safe for its lifetime and will increase flood risk elsewhere.
- 10 The scheme is not safe for its lifetime because the Appellant's flood modelling shows that in the future there will not be a safe way of accessing or leaving the site in the event of a 1:200 year flood.
- 11 The DAS<sup>6</sup> and submitted masterplan<sup>7</sup> indicate only one access to the northern part of the site via Shiner's Elms.<sup>8</sup> A second access is mooted via Chescombe Road. Shiners Elms falls within flood zone 3a in the present day. Chescombe Road will fall within flood zone 3a as a result of climate change, flooding to up to 1m deep in a 1:200 year flood. Passage along Shiners Elms would present a danger to all. Movement along Chescombe Road would present a danger to most.<sup>9</sup> Those assessments are made assuming land raising proposals which have been abandoned<sup>10</sup>. The Appellant's response is to argue coastal flooding can be predicted, its onset at the appeal site would be slow, and those who will not or cannot leave when they are warned to evacuate their homes could move

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<sup>5</sup> ID7-033

<sup>6</sup> CD A8, p.45

<sup>7</sup> CD A30

<sup>8</sup> Cf that attached to the Appellant's statement of case, which dates from January 2022 (ie more than a year before CDs A8 and A30) which shows a southerly access via Chescombe Road.

<sup>9</sup> CDA11, pp.36-39

<sup>10</sup> CDA11, p.37, note to Fig 22

to a safe refuge<sup>11</sup>. That would be of no comfort to an elderly or immobile resident who is unwilling or unable to leave and is taken ill in their home during a flood event.

- 12 Turning to the increase in flood risk elsewhere, the Appellant’s modelling indicates that land raising associated with the scheme would increase the depth of flooding in properties to the east of the site.<sup>12</sup> Since September 2023 it appears the Appellant has worked hard behind the scenes to try and persuade the EA that flood risk will not increase elsewhere. Those efforts have hinged on its decision to abandon its original proposal to minimise flood risk by raising finished floor levels to 8.48AOD<sup>13</sup>. That would place new homes above the level of a 1:200 year flood throughout their design life. The Appellant expressly adopted this approach because it believed it to be “in line with national and local policy”.
- 13 The Appellant now proposes to limit land raising to about 6.43m AOD<sup>14</sup> so that FFL will be 6.68m AOD.<sup>15</sup> The driver for this change is admitted to be a conflict between “ground raising and drainage, ecology and landscape etc”.<sup>16</sup> Mr Mirams adds that the change of approach was also prompted by “neighbouring and visual amenity”.<sup>17</sup>
- 14 Whatever motivated the Appellant’s change of approach, it believed it would avoid increasing flood risk elsewhere. The EA disagreed, and objects to the development on that basis<sup>18</sup>. The Appellant argues the predicted increase in flood risk to the east of the site arises from legitimate “tolerances” in the flood modelling that was submitted with its planning application. It relies on modelling

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<sup>11</sup> CDA11 p.37

<sup>12</sup> CDB5, p.4, para 2.11

<sup>13</sup> CDA11 p.36, para 4.11 and p.40

<sup>14</sup> The levels proposed by the Appellant vary. By way of example, in an email dated 2 July 2024 amending the Appellant’s SoC Ms Ventham stated ground levels would be raised to 6.28m.

<sup>15</sup> Mirams PoE, para 2.19

<sup>16</sup> CDD1 p.27, para 6.9.26

<sup>17</sup> Mirams PoE para 2.19

<sup>18</sup> CDN20

undertaken by a consultant, Brookbanks, dated September 2023<sup>19</sup> to make good its case.

- 15 The Appellant’s argument is problematic. When it was canvassed in the Appellant’s SoC the Council asked for a copy of the September 2023 Brookbanks’ FRA. Ms Ventham replied by email dated 2 July 2024 (to the Council’s Max Smith) in the following terms:-

**“Brookbanks FRA**

Please strike out all references to the Brookbanks FRA as this document was never submitted – apologies for any confusion caused. This work resulting in a draft Flood Risk Assessment in September 2023 (which the EA was aware had been prepared) was rapidly superseded by discussions with the EA and then the Rappor technical note (2024). To assist in understanding the Hydrock / Brookbanks / Rappor relationship – our flood consultant moved companies (From Hydrock to Brookbanks; then from Brookbanks to Rappor) and took the work with him on each occasion for project continuity. Therefore the approach was consistent across the reports as it was the same consultant leading and evolving the work following discussions with the EA.”

- 16 However, whether what Brookbanks produced is characterised as an “FRA” or a “draft FRA” the Council has never seen it or any other technical assessment dated September 2023 which makes good its case. It is unclear whether the whole or part of that (or any other document) was provided to the EA. The Appellant has also failed to provide copies of other documents referred to in its SoC and Mr Mirams’ PoE, (or any document) which indicates clearly the whole of what the Appellant told the EA and the ensuing dialogue between the parties, which might better illuminate why the EA maintain its objection. In short:-

- (1) Based on the Appellant’s modelling<sup>20</sup> there is evidence the development will increase flood risk elsewhere.

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<sup>19</sup> Mirams PoE, 2.16-2.21

<sup>20</sup> Eg CDB5

- (2) The EA is not satisfied the development will not increase flood risk elsewhere.
- (3) The Appellant's disagreement with the EA's objection is based on evidence which has not been disclosed or is partial and apparently self-serving.
- (4) In the circumstances, it is proper to conclude there is a real possibility the development would increase flood risk elsewhere.

17 That is strong evidence the development is not appropriate.<sup>21</sup>

#### **Other consequences of the Appellant's change of approach**

- 18 The Appellant's decision to abandon its initial land raising proposal has other consequences that feed into the planning balance. Climate change will cause sea levels to rise and overtop the flood defences that protect the appeal site during the present day during a future design flood. The Appellant argues the flood defences will be raised. However, there is no proposal to raise the defences, there is no capital funding to raise them, and for the reasons given by Mr Bunn<sup>22</sup> it cannot be assumed the defences will be upgraded.
- 19 That uncertainty is highly material. A risk of 1:200 year flood does not mean there will be one such flood every 200 years. Therefore, the reduced ground and finished floor levels now proposed by the Appellant will expose properties to the risk of repeated extensive damage, resulting in significant cost and environmental harm and injury to the mental and physical well-being of residents. Whether or not the exceptions test is required to be applied, those disbenefits must be placed in the overall planning balance and weigh against allowing the appeal.<sup>23</sup>

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<sup>21</sup> PPG ID7-033

<sup>22</sup> PoE pp.17-24

<sup>23</sup> CD12, p.9, para 55

### **Conflict with the development plan and the planning balance**

- 20 The Council's case is that Core Strategy Policy CS3 is the most important development plan policy for determining the application and that the proposal's compliance with it is determinative of its assessment under the first limb of s.38(6) PCPA 2004. That position is not precluded by the decision of the Court of Appeal in *Corbett v Cornwall Council [2020] EWCA Civ 508*; and is consistent with the approach taken by Inspector Davies in the recent Lynchmead Farm decision, which raised strikingly similar issues. Policy CS3 has two parts. The first provides that development will only be permitted where it is demonstrated it complies with the sequential test set out in the NPPF. The second part of the policy sets out criteria for identifying reasonable alternative sites. Inspector Davies found this part of the policy is inconsistent with the NPPF.
- 21 Other policies relating to the need for housing (CS13), the distribution of that housing between and around sustainable settlements (CS14 and CS32), and for the provision of affordable housing are plainly important but of a lower order compared with CS3. The sheer scale of the development, which is not "small scale" in the terms of CS14 and nearly 8 times that permitted by CS32 plainly conflicts with those policies.
- 22 Viewed in the round, the proposal therefore conflicts with the development plan.
- 23 Turning to the second limb of the s.38(6) balance the Council acknowledges the provision of market and affordable housing represent substantial benefits. However, viewed in the round it will be shown that their collective relative benefit is moderated by 7 considerations:-
- (1) A marginal shortfall in the deliverable supply of housing compared with a policy compliant 4 years supply.
  - (2) A reasonable record of housing delivery, based on the objective metrics of the HDT.



- (3) The agreed fact that the Council does not fall into the category of authorities that have a record of significant under-delivery.
- (4) A relatively strong record of delivery of market and affordable housing in Yatton compared with other service villages.
- (5) An acceptable level of affordable housing delivery district wide compared with the requirement of the Council's affordable housing policy, CS16.
- (6) The "baking in" of higher levels of affordable housing delivery through the uplift that is applied by the standard method, which is used as the benchmark for assessing and meeting housing needs in North Somerset.
- (7) The sub-optimal mix of affordable housing that is offered by the Appellant compared with the policy of CS16 and the regulation 18 draft Local Plan, coupled with the real risk at least 38 of the 95 affordable homes that are offered will be substituted by market housing.

24 The scheme also possesses ecological, community and economic benefits. The Council (through Mr Smith) attributes them limited or moderate weight for a variety of reasons, including the point that certain benefits ought to be regarded as mitigation or are otherwise necessary to make the scheme acceptable. It is also relevant to note Inspector Davies' observation that at the stage of granting outline planning permission there is uncertainty as to the character and amount of certain benefits, such their true value will not be established until the grant of a reserved matters approval.

25 Set against those benefits is the harm that would be caused if the development were to flood irrespective of any measures that might be introduced to make new homes resilient to the deep flooding that is liable to occur during the lifetime of the development.

26 Finally, the risk of flooding requires the application of NPPF footnote 7. It provides that even though the most important policies of the development plan may be out of date the presumption in favour of sustainable development does not operate in favour of the grant of planning permission. Instead, the risk that

the development would experience deep flooding in the future and the harm that would cause provides a clear reason for refusal which is not outweighed by the benefits of the scheme, not least because the new housing that is contemplated could be built where flooding is unlikely to occur.

**Conclusion**

- 27 In summary, the proposal would conflict with the development plan taken as a whole and with national policy on minimising flood risk to new development. Since other material considerations do not outweigh the harm that would be caused by the flooding of people's homes at the conclusion of the inquiry you will be invited to dismiss the appeal.

TIMOTHY LEADER

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Dated Tuesday 24 September 2024