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## Appeal Decision

Site visit made on 10 February 2025

by David Smith BA(Hons) DMS MRTPI

an Inspector appointed by the Secretary of State

Decision date: 17 February 2025

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Appeal Ref: APP/V2255/W/24/3348112

2 Marsh View, Conyer Road, Conyer, ME9 9HX

- The appeal is made under section 78 of the Town and Country Planning Act 1990 (as amended) against a refusal to grant permission.
  - The appeal is made by Hillrise Associates London Ltd against the decision of Swale Borough Council.
  - The application Ref is 23/501447/FULL.
  - The development proposed is a 2-bedroom house at land adjacent to existing house.
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### Decision

1. The appeal is dismissed.

### Main Issues

2. These are:-
  - Whether the proposed development passes the sequential test in relation to flood risk; and
  - The effect on the integrity of the Swale Special Protection Area.

### Reasons

#### *Flooding*

3. The National Planning Policy Framework establishes that a sequential, risk-based approach should be taken to individual applications known to be at risk now or in future from any form of flooding. The appeal site lies within flood zones 2 and 3a and so has a high/medium probability of flooding. The aim of the sequential test is to steer new development to areas with the lowest risk of flooding from any source. Policy DM21 of the Swale Borough Local Plan 2017 confirms that development should accord with national policy in this respect and seeks to avoid inappropriate development in areas at risk of flooding.
4. A flood risk sequential test assessment has been undertaken by the appellant covering the entire Borough. This considered over 400 sites in total. Of these 31 were of suitable size and yield and were assessed in more detail. Eleven of these are covered in section 5 as part of a review of alternative sites and justifiable reasons are given for discounting them. Six sites identified through a property search were also found to be unsuitable due to their size or, in one case, because the land had been sold.
5. The appellant maintains that all 25 sites provided by the Council from their Strategic Housing Land Availability Assessment have been considered. It is

implied that not all of them required further assessment but the reasons they were considered unsuitable is not clear and neither it is obvious which permission in section 5 refers to which site. Land at Oad Street is listed in the Council's email but it is uncertain as to whether this has been included.

6. The Council questions whether the sites at Newbridge Avenue, Sittingbourne or Minster Road, Minster-on-Sea should have been rejected. No suitable sites were identified in the amended estate agent search accompanying the appeal. However, it is not clear if these sites were part of that exercise and no specific explanation is given as to their status. Finally, the Council claims that the assessment omitted sites with extant permissions. The appellant has not responded to this so it can only be assumed these have not been addressed.
7. The Inspector who decided an appeal (Ref: APP/V2255/W/23/3315636) in Sheerness in 2023 referred to the Planning Practice Guidance on *Flood Risk and Coastal Change*. In particular, that reasonably available sites could include part of a larger site if it would be capable of accommodating the proposed development. In that case, the sequential test had failed to consider these and this was one part of the overall findings. However, neither that decision nor the PPG imply that it must be possible to accommodate the proposed development on sites with a greater capacity in either area or quantum of development.
8. The appellant outlines several operational and financial reasons as to why it is unrealistic to expect sites with permission for more than one dwelling or individual plots on large developer-led sites to accommodate a single house. In general terms there is not always going to be a reasonable prospect that it would be practical to sub-divide larger site allocations. There is no evidence that this has occurred in Swale in the recent past.
9. Taken to extreme it is often likely to be possible to claim that one house could be accommodated on a site at less risk of flooding elsewhere, whether as part of a large-scale development or as a windfall site. The sequential test is not designed to ensure that it can never be passed and a degree of flexibility and pragmatism is required in its application. This is particularly the case in Swale where the vast proportion of the Borough is covered by Flood Zones 2 and 3. This particular criticism is therefore not decisive.
10. However, the Flood Risk Assessment comments that even under the defended condition, the flood hazard to people and property from the 0.5% annual exceedance probability (1 in 200 year) 2125 event is high. National policy underlines that development should not be permitted if there are reasonably available sites appropriate for the proposed development in areas with lower risk of flooding. Because of the detailed omissions and discrepancies, the assessment undertaken does not show this to be the case.
11. The PPG confirms that the exception test should only be applied following the application of the sequential test. It is proposed to raise the finished floor level by at least 300mm above general ground level, to implement flood resilient measures and to utilise the available flood warning service. However, even if the exception test is met, this does not override the failure to pass the sequential test.
12. Whilst having regard to the approach advocated by the judge in *Mead Realisations Ltd v The Secretary of State for Levelling Up, Housing and Communities & Anor* [2024] EWHC 279 (Admin), the sequential test has not been passed. Future

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occupiers would be at long term risk of flooding and to allow development on this basis would be contrary to national policy objectives. There would also be conflict with Policy DM21 as well as the general development criteria in Policy DM14.

*Swale Special Protection Area (SPA)*

13. The Swale SPA is designated for overwintering, on-passage and breeding birds and is of international importance. Because the appeal site is within 6km of it, the proposal has the potential to affect the features of interest of the SPA. In combination with other development in Swale, an additional dwelling would be liable to lead to recreational disturbance and so have a detrimental impact on the birds. There would therefore be a likely significant effect on the SPA.
14. To mitigate this impact, the Council requires that a financial contribution is made towards the Strategic Access Management and Monitoring Strategy. Natural England concurs with this approach. However, although the appellant is willing to do so, there is no mechanism in place to secure the payment. As a result, following an appropriate assessment, the integrity of the SPA would be adversely affected. In these circumstances, the Conservation of Habitats and Species Regulations preclude the proposal from proceeding. It would also conflict with Local Plan Policy DM28 which seeks to conserve and enhance biodiversity.

**Conclusion**

15. The proposal conflicts with the development plan and there are no material considerations allied to the provision of an additional dwelling that outweigh this finding. Therefore, for the reasons given, the proposed development is unacceptable and the appeal should not succeed.

*David Smith*

INSPECTOR