



Appeal Decision

Site visit made on 2 July 2025

by Mr D Szymanski BSc (Hons) MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 15th July 2025

Appeal Ref: APP/V2255/W/24/3356302

Ivy Pham House, 123 Marine Parade, Sheerness ME12 2BX

- The appeal is made under section 78 of the Town and Country Planning Act 1990 (as amended) against a refusal to grant planning permission.
 - The appeal is made by Miss Ivy Van against the decision of Swale Borough Council.
 - The application Ref is 22/505772/FULL.
 - The development proposed is Erection of three-bedroom detached dwelling and associated amenities.
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Decision

1. The appeal is dismissed.

Application for costs

2. An application for costs was made by Miss Ivy Van against Swale Borough Council. This application is the subject of a separate Decision.

Main Issues

3. The main issues are:
 - whether or not the proposal is compliant with policies in respect of flood risk;
 - the effect of the proposal upon highway operation and safety; and,
 - the effect of the proposal upon designated habitats sites.

Reasons

Flood risk

4. Policy DM21 of the Swale Borough Local Plan (2017) (the SBLP) requires that proposals accord with national planning policy and practice guidance and avoid inappropriate development in areas at risk of flooding. Paragraph 170 of the National Planning Policy Framework (2024) (the Framework) states that inappropriate development in areas at risk of flooding should be avoided by directing development away from areas at highest risk.
5. Framework paragraphs 172 and 173 require the application of a sequential approach to locating development to avoid, where possible, flood risk to people and property. Framework paragraphs 174 and 175 explain the aim of the sequential test is to steer new development to areas with the lowest risk of flooding from any source, now and in the future, and that development should not be permitted if there are reasonably available sites appropriate for the development in areas with a lower risk of flooding.

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6. The Planning Practice Guidance explains that avoiding flood risk through the sequential test is the most effective way of addressing risk, as it places the least reliance on measures like flood defences, warnings and property resilience. Even where a Flood Risk Assessment (FRA) shows a scheme can be made safe for its lifetime without increasing risk elsewhere, the sequential test still needs to be satisfied¹.
7. While the appeal site is currently protected by tidal defences, it is within Flood Zone 3, so is deemed at high flood risk now or in the future. The previous permission² on the site expired in March 2024³, and there is no indication it was commenced, and I could see nothing at my visit to lead me to an alternative view. Therefore, this appeal scheme would result in a new dwelling and occupiers in Flood Zone 3, increasing the risk of flooding to people and property.
8. As no sequential test is provided and there is insufficient evidence to demonstrate there are no other appropriate sites reasonably available in areas with a lower flood risk, the sequential test is not satisfied. The appellant's FRA sets out the Framework policy that development should only be allowed in areas at risk of flooding where, in the light of an FRA, and the sequential and exception tests as applicable, demonstration of certain scheme specific criteria are addressed (paragraph 181). Therefore, the use of resistance, resilience, and other measures do not overcome the need to first, correctly address the sequential test.
9. The Council has explained its change in approach to the lapsed scheme and there is no evidence demonstrating that its subsequent approach and justification, is in principle, incorrect. The Environment Agency's absence of objection appears to be in respect of the residual risk in the FRA only. The FRA seeks demonstrate the new house (but not the whole appeal site and development) would be safe for its lifetime, which does not address the sequential test.
10. The previous permission, community, social and economic and other benefits outlined, compliance with some Framework objectives and policies such as ST1 and ST3 of the SBLP, flood resistance and resilience measures are material considerations, and have relevance in applying the exception test. However, Framework paragraphs 177 and 179 explain that the exception test is applied, after having applied the sequential test. The matters advanced by the appellant do not obviate, or outweigh, the need to address the sequential test, which is a fundamental tenet of national and development plan flood risk policies.
11. Therefore, for the reasons set out, the proposal is not compliant with policies for flood risk. It conflicts with Policy DM21 of the SBLP as a whole, and Framework paragraphs 170 and 172, the relevant provisions of which are set out above.

Highway safety

12. The previously permitted scheme showed the visibility splays across the front gardens and driveways of the neighbouring Nos 123 and 125 Marine Parade, either side of the appeal site. At that time, my understanding is the appeal site owner also had control of No 123, so the owner had control of the western splay not within the highway, and so could secure compliance with splay standards.

¹ Ref. Paragraph: 023 Reference ID: 7-023-20220825.

² Ref. 19/503267/FULL.

³ Para 5.13 of the Appellant's Appeal Statement.

Those plans showed a significant incursion over No 123, but there was a much more limited incursion over the front of No 125 to the east.

13. This scheme alters the point of access and alignment of the splays. I see no reason to conclude pedestrian visibility splays could not be achieved. However, to the east the 2.4m x 43m vehicular splay line shows a greater incursion over the front garden of No 125 than the previous scheme. As the appeal site is now under separate ownership to No 123, the appellant does not have control over the land necessary for the westerly splay. If it was not possible to see over the privately owned land within the drawn splays either side, the actual splays would be markedly narrowed, and visibility of oncoming traffic would be at much-reduced sight stopping distances.
14. At my visit the closest fence panel to the highway at both neighbouring properties was quite low fencing, but that they are no higher than 0.9m is unclear. Even if they were, the eastern splay included a wide, open driveway, with a van parked, illustrating that an absence of development does not mean a splay is guaranteed. The western splay included fencing, a driveway, a wall, and vegetation of a height well above 0.9m, obstructing visibility to the nearby bend. The plans illustrate 2.4m x 43m above 0.9m splays expected by the Highway Authority (HA), but all indications are that the splays that could be secured would be very short of that.
15. This new access with the potential for rather narrow splays, has clear potential to result in user conflicts, inhibit the flow of traffic, and be prejudicial to highway operation and safety. Though my visit can only represent a brief snapshot in time, I observed quite a frequent traffic flow. Given the highway alignment, extent of double yellow lines and absence of parked cars on them, vehicles appeared to be travelling close to the 30mph speed limit. This adds to my concern.
16. There is no substantive flow and speed survey, or analysis of technical guidance, to demonstrate standards should be relaxed, and if so, to what specification, and that the splays would meet this. I accept that there appeared to be a few driveways relying upon neighbouring land for visibility (e.g. No 125) and/or may have been obstructed (e.g. No 123) and no data is provided demonstrating previous accidents. However, the below standard splays did not appear reflective of prevailing arrangements along this part of Marine Parade, and from what I observed, does not of itself justify adding this below standard access point.
17. While being a scheme for only a single dwelling, given the splays that can be assured, it is not demonstrated this scheme implications would not be severe or unacceptable. Though the Council imposed a pre-occupation Grampian-style condition upon the previous permission, I have no substantive assurance any such similar condition has any prospect of securing safe and satisfactory splays.
18. Therefore, for the reasons set out, it is not demonstrated the proposal would not be prejudicial to the operation of the highway and highway safety. This conflicts with SBLP Policy DM14 which requires development achieves safe vehicular access. It also conflicts with paragraph 115b) of the Framework, which states it should be ensured that safe and suitable site access can be achieved for all users.

Habitats sites

19. The Conservation of Habitats and Species Regulations 2017 (as amended) (the Regulations) require that where a plan or project is likely to result in a likely

- significant effect (LSE) on a designated habitats site, a competent authority is required to make an appropriate assessment of its implications on the integrity of the designated site, in view of its conservation objectives. Any LSEs from a scheme need to be considered alone and in combination with other development in the area, adopting the precautionary principle.
20. The appeal site is in proximity to the Swale Special Protection Area (SPA) and Ramsar site and the Medway Estuary and Marshes SPA and Ramsar site. These sites provide important habitats for wintering, migratory and breeding waders, seabirds, and waterfowl (the qualifying features). Their conservation objectives are to maintain or restore their integrity, by maintaining or restoring the extent, distribution, structure, function and supporting processes of the habitats of the qualifying features, the population of the qualifying features, and the distribution of the qualifying features within the site.
 21. New homes within this proximity of the SPAs are likely to lead to increased visits and recreational use by occupiers, with activities such as walking, dog walking, cycling and jogging that can disturb the qualifying features⁴, constituting LSEs upon them. This scheme would result in an additional dwelling and occupiers in a proximity to the habitats sites where it has been identified there would be likely to be resultant visits, disturbance and LSEs upon the qualifying features of the habitats sites, which is a matter the appellant does not dispute.
 22. A strategic package of measures to mitigate LSEs are outlined by the Thames, Medway and Swale Strategic Access Management and Monitoring Strategy. It requires a costed per dwelling contribution to fund the mitigation package for each dwelling, which must be secured before permission can be granted. The appellant is willing to enter a financial agreement, but no such agreement is before me.
 23. The Council holds a payment for the lapsed consent, but it is well below the current mitigation cost. I have no evidence to demonstrate it was index linked to reflect the current mitigation cost and would do so at the time of delivery. I also have no guarantees it would be legally secured against this appeal scheme, such that as the competent authority, I have certainty it would be used only to deliver mitigation for this specific scheme, and at the time it needs to be delivered.
 24. In consequence, applying the precautionary principle, as the competent authority I do not have sufficient certainty the mitigation is secured, will be delivered in full, and would adequately mitigate LSEs upon designated habitats sites. The appeal scheme makes no other provision to mitigate the LSEs. In consequence, I cannot be satisfied the development makes adequate provision to mitigate the LSEs, and so maintain or restore the integrity of the habitats sites, so would fail to adhere to their conservation objectives.
 25. Imperative reasons of overriding public interest do not exist and it is not demonstrated there are no alternative solutions, or that other adequate measures are secured and will be provided. Section 63(5) of the Regulations states the competent authority may agree to a plan or project, only after having first ascertained that it will not adversely affect the integrity of habitats sites, so this precludes the proposal from proceeding. Therefore, it would not be appropriate or acceptable to address this matter by conditions.

⁴ Section 2 of the Phase I Bird Disturbance Report by Footprint Ecology (July 2012).

26. For the reasons set out above, I cannot be certain the appeal scheme would not have LSEs upon designated Habitats sites, which is in conflict with the aims of Policies ST1, DM14 and DM28 of the SBLP. These require proposals conserve the natural environment and apply international, national and local policies, and regulations for areas designated for their biodiversity importance. It would also conflict with Framework paragraph 193a) which states that if significant harm to biodiversity cannot be avoided, then planning permission should be refused.

Planning Balance

27. The appeal scheme would result in a small temporary economic benefit during construction, and once complete a small on-going spend in the local economy. It would be consistent with policies to make a more effective use of land and deliver homes. Even if the Council had an acute shortage of housing supply and delivery, the contribution of this single dwelling would be a modest benefit. This scheme might be regarded as resulting in an overall limited positive benefit to character and appearance, and there might be some limited scope for overall gains in biodiversity, landscaping and drainage provision. On the above basis, overall, the benefits of the proposal attract moderate weight in favour of the scheme.
28. Were I to agree the scheme would, or subject to imposing planning conditions could, be compliant with policies and standards in respect of matters such as the location of development, the living conditions of future and neighbouring occupiers, flood resilience, renewables, resource and energy efficiency measures, parking provision and refuse storage and collection, these would all be neutral matters.
29. The proposal conflicts with a fundamental aspect of development plan and Framework policies in respect of flood risk, which attracts significant weight against the scheme, so is matter that alone, outweighs all the benefits of the appeal scheme. However, I also cannot be certain the appeal scheme would not be prejudicial to the operation of the highway and highway safety, which is an important matter. That I cannot be certain the scheme would not result in LSEs upon designated habitats sites, attracts substantial weight against it. Overall, the benefits of the development are significantly outweighed by the policy conflicts and harm that would result. Moreover, section 63(5) of the Regulations precludes the scheme from proceeding. Therefore, the appeal should not succeed.

Conclusion

30. The proposed development would be contrary to the development plan read as a whole, the Framework read as a whole, and the Regulations. There are no considerations advanced, including the policies of the Framework, which outweigh this finding. Accordingly, for the reasons given, the appeal should not succeed.

Mr D Szymanski

INSPECTOR



Costs Decision

Site visit made on 2 July 2025

by Mr D Szymanski BSc (Hons) MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 15th July 2025

Costs application in relation to Appeal Ref: APP/V2255/W/24/3356302

Ivy Pham House, 123 Marine Parade, Sheerness ME12 2BX

- The application is made under the Town and Country Planning Act 1990, sections 78, 322 and Schedule 6, and the Local Government Act 1972, section 250(5).
 - The application is made by Miss Ivy Van for an award of costs against Swale Borough Council.
 - The appeal was against the refusal of planning permission for Erection of three-bedroom detached dwelling and associated amenities.
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Decision

1. The application for an award of costs is refused.

Reasons

2. Parties in planning appeals normally meet their own expenses. However, Paragraphs 16-028-20140306 and 16-030-20140306 of the Planning Practice Guidance (the PPG) advise that, irrespective of the outcome of an appeal, where a party has behaved unreasonably, and this has directly caused another party to incur unnecessary or wasted expense in the appeal process, they may be subject to an award of costs.
3. Paragraph 16-049-20140306 of the PPG states that authorities are at risk of an award of costs if they behave unreasonably with respect to the substance of the matter under appeal. This includes preventing development which should clearly be permitted, and not determining similar cases in a consistent manner.
4. The appellant considers the Council has behaved unreasonably because of the length of time it took to determine the application which was clearly similar to the dwelling approved on the appeal site, and based upon that permitted scheme, the appellant had no reason to believe the appeal application would be refused. During the determination period the permission lapsed. However, the Council refused the application based upon the same policies for flood risk and highway matters under which the previous scheme was found acceptable, effectively introducing new reasons for refusal.
5. From what is before me, the application was not determined until around 18 months after its submission. The full timeline of events during the determination period and content of correspondence is unclear. However, I have noted the amended plans and various consultation responses from the Highway Authority (HA), suggesting discussions took place on highway matters to resolve some of the reasons for HA objections. Though this was not ultimately possible in respect of vehicle visibility.
6. If a Local Planning Authority does not determine similar cases in a consistent manner, then it should have clear reasons for doing so. In respect of the access,

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Costs Decision APP/V2255/W/24/3356302

the change in its location and land forming part of a splay no longer being in the same ownership as the appeal site, are material changes to the situation from when the previous application was assessed. For reasons set out in my decision letter, I cannot be satisfied this proposal would not be prejudicial to highway operation and safety. Therefore, the Council has not behaved unreasonably in respect of highway matters.

7. In respect of flood risk, there have been no material changes in circumstance to the appeal site situation. The Council cites an appeal decision letter¹ as a material consideration that post-dates the previous permission, justifying a departure from that decision in respect of the approach to flood risk policies. Though that decision is over 3 years old, key aspects of the policies cited and referred to by the Council are carried into the latest iteration of the National Planning Policy Framework.
8. The reason the Council refused the application are fundamental matters of national and development plan policy that need to be appropriately addressed and/or balanced in the determination of any application. As set out in my decision letter the matter of the sequential approach has not been satisfactorily addressed, and there are not matters advanced that outweigh it, so the Council has not behaved unreasonably in respect of its overall decision on this matter.
9. The appellant implies they were not aware of the Council's flood risk concerns for some time, and the appellant has provided a copy of an email sent by the Council in May 2024 expressing concerns in respect of flood risk. Were this to have been the first time the appellant was made aware of the Council's concerns, it might be well arguable that this constitutes unreasonable behaviour.
10. I have sympathy that the appellant's permission has lapsed during the Council's determination of the appeal application. However, it was within the appellant's gift to appeal against the non-determination of the appeal application after the statutory period expired. Moreover, even were an appeal to have lodged then it would seem highly likely the matter of flood risk would need to have been addressed, as well as highways matters and the Conservation of Habitats and Species Regulations 2017. Therefore, as these matters would have needed to have been appropriately addressed, I cannot conclude there has been unnecessary or wasted expense incurred by the appellant in the appeal process.

Conclusion

11. Therefore, for the reasons set out above, unreasonable behaviour that has resulted in unnecessary or wasted expense in the appeal process, has not been demonstrated, so an award of costs is not warranted.

Mr D Szymanski

INSPECTOR

¹ Ref. APP/V2255/W/21/3277228.