

IN THE MATTER OF AN APPEAL UNDER SECTION 78 OF THE TOWN & COUNTRY PLANNING ACT 1990
LAND AT BIRD IN EYE FARM, SOUTH OF BIRD IN EYE HILL UCKFIELD

Pins Ref: APP/C1435/W/22/3307820

LPA Ref: WD/2021/21198/MAO

Inquiry Opening: Tuesday 12th September 2023 & adjourned on Friday 22nd September 2023

CLOSING SUBMISSIONS ON BEHALF OF RULE 6 PARTY KASSIE SMITH KC

List of Abbreviations used: EIC means evidence in chief; XX means cross examination & RX means re-examination

AT KC =Andrew Tabachnik KC and VH = Victoria Hutton

Witnesses are referred to by their initials &/or firms i.e. SMB= Simon Maiden Brooks from Herrington; SB= Steven Brown from Woolf Bond Planning (WBP) AH=Amy Hensler from Stantec, RN = Roger New on behalf of ESCC, RW = Richard White of the Miles White Partnership (MWP) and MT=Matthew Twinberrow from Bellamy Roberts (BR)

Introduction

1. These are the closing submissions on behalf of the Rule 6 party. We begin with some comments on the way the Appellant has framed their case and on the general approach we invite you to adopt to certain matters. Finally, we turn to deal with flood risk & drainage and highway safety & sustainability issues. The headline point is that there are multiple reasons why the tilted balance should be disengaged and planning permission should be refused including failures to comply with the sequential test, failure to address flood risk at the very point of pedestrian & cycle access where existing bus stops are located, failure to secure adequate mitigation for severe impact on the town centre congestion in terms of traffic, and an unsafe new vehicular/cyclist access point. There are also other factors which weigh negatively in the overall planning balance so that the adverse impacts of granting permission do not significantly and demonstrably outweigh the benefits. Put shortly, this is not sustainable development.

General Approach

Section 38(6) PCPA 2004

2. The Appellant's planning witness, SB from WBP, rightly acknowledged both in his written proof of evidence¹ and in XX on behalf of ("obo") by Wealden DC ("WDC") that the scheme underlying this appeal is contrary to the development plan. Necessarily therefore, this is a case where the Appellant needs to demonstrate material considerations which indicate a decision otherwise than in accordance with the development plan.

NPPF

3. Essentially the application was made, and the appeal against non- determination pursued, to capitalise upon deficiencies in housing land supply. But if, as NPPF 2023 exhorts, [130 e]

¹ Paragraph 1.5

development should create places that are safe, inclusive and accessible, this appeal proposal singularly fails to do so and so should be refused.

4. The Appellant acknowledges through the oral EIC of SB, that if you conclude that the proposed access arrangements are unsafe, you should dismiss the appeal in accordance with the NPPF 2023 [110 b]. It was also conceded that flood risk, like ancient woodland and heritage, is a footnote 7 matter capable of disengaging the tilted balance that arises because of shortfall in housing land supply ("HLS").
5. Furthermore, it was also conceded in my XX of SB that the benefits of the scheme and weight to be attributed to those benefits would necessarily be reduced if you as the decision maker were unsure as to whether the scheme could be delivered within the public highway and the red line boundary of land by the current landowners and controlled by Croudace.

Landscape

6. SB also accepted that the fact that there was no landscape reason for refusal by WDC did not mean of itself that there would no adverse landscape impact arising from the introduction of 290 dwellings into this greenfield site. The landscape evidence submitted in the hearing statement did not conclude that there would be no harm rather than the harm would not be *"any significant adverse landscape, townscape or visual effects"*². As he acknowledged the reasonable inference behind that conclusion is that there would be less than significant or as I put it moderate harm to landscape. We would refer you back to Town's letter of 6th April 2023 for our submissions on landscape.

2009 decision

7. From time to time in his XX AT KC took the inquiry back to the 2009 appeal decision – in relation to heritage, highways, housing land supply and landscape matters, as if to suggest that you should somehow feel reluctant to reach different a conclusion on certain matters to the inspector or Secretary of State. Given the absence of any evidence as to the nature of the outline scheme being considered at that appeal and how it compares to the appeal proposal before you and the wholly different national and local plan policy context, in our submission conclusions reached then are of little assistance to you now. As you rightly observed during the inquiry, it is for you to exercise your own planning judgement in determining this appeal.

SANG

8. The application before you includes the provision of strategic suitable alternative green space ("SANG") to offset additional recreational pressure because the site lies within 7 km of the Ashdown Forest SPA in accordance with policy WCS12³. Whilst, as was accepted by SB in XX, there is no policy stipulation that this be provided onsite, this is what Croudace have chosen to do in conjunction with the landowner. In fact, as SB sought to explain in EIC⁴, all 26 ha⁵ is apparently needed in order to provide the circular route of 2.7 ha⁶ required by Natural England's SANG guidance.⁷ In addition

² CDC2 paragraph 8.3 pdf 371/1586

³ CDE.1 pdf page 75/88

⁴ Although this is not actually asserted by CSA in their landscape statement see paragraph 1.19 CDC.2 pdf 346/1586

⁵ CDA.51 suggests SANG land is 26.17 ha although at paragraph 1.2 of CSA Environmental's BNG Report at CDC.2 pdf 178/1586 suggests 25.25ha.

⁶ As described by CSA in their landscape statement at para 6.5 (iii) CDC.2 pdf 364/1586

⁷ CDG9

Natural England were insistent on two pathways through Bird in Eye Shaw be created to avoid a bottleneck.⁸ Providing this SANG has also been included in the habitat creation and enhancement required to form the baseline of the BNG calculation⁹.

9. Equally as SB accepted in my XX, the appellant has provided no analysis of current SANG capacity in order to demonstrate the need for additional SANG capacity now or in the future. There is no evidence that SANG actually needs to be provided on site. Nor do you have any evidence as to the likelihood of any relevant development being able to utilise the spare capacity for some 1073 additional units that would be generated¹⁰. Thus, the so-called benefits of the wider SANG capacity are wholly unproven. This could turn into a white elephant if no other permitted scheme emerges to potentially take advantage of it¹¹. Thus, you cannot be sure that this additional SANG capacity is being provided in the right location. Nor is it in fact the case that the release of this additional SANG capacity will be in the hands of the Lands Trust as SB suggested in his evidence. The 106 obligation makes no such provision. Rather it is the landowners who are able to fix the open market price that they wish to extract¹². In these circumstances we invite you to attach no weight to the unproven so-called benefits of spare SANG capacity. They are not a relevant material consideration to your decision. They are not necessary, let alone fairly and reasonably related to the proposals for 290 homes. As such they breach both policy in NPPF [57] as well as Regulations 122 (2) of the Community Infrastructure Levy Regulations. We support WDC in this regard. Alternatively, even if the additional SANG capacity was capable of being a material consideration, which is not accepted, it should attract no weight on the facts of this case for the reasons set out.
10. We turn now to the first of the two technical issues which were the subject of our evidence, namely flood risk.

Flood Risk & Drainage

The inadequate FRA

11. The FRA which accompanied the application which underlay this appeal was patently inadequate and misleading. It did not include all of the land which is the subject of this application as required by NPPF [167] FN55. The fact is that the drainage officer and the LLFA from the outset were not presented with a FRA which accurately assessed all of the red line of the application site including the layout of the SANG and the footpaths through FZ2&3. Nor was it apparent at the time of the FRA that development would indeed need to extend into¹³ the watercourse on the western boundary outside the redline on land that also lies in FZ2 & 3.

⁸ CDA.23 Sang Design Framework Management Plan at paragraph 1.15

⁹ paragraph 5.43 of CSA Environmental's BNG Report at CDC.2 pdf 189/1586

¹⁰ See CDA.23 Sang Design Framework Management Plan at paragraph 1.11 repeated in SB's main proof

¹¹ Oblivious one suspect the real motivation behind the strategic SANG is to offset recreational pressure from both the appeal site and potentially BIEN.

¹² Despite SB suggesting that the Land Trust would be responsible for allocating the additional capacity and that it would be in their interests not to overcharge for it that is not what the section 106 provides for, as produced on the last day of the inquiry – see schedule 4 para 3.3 on page 54 of the unexecuted 106. Instead, it allows the second owner and not any successor in title to the second owner to allocate any residual SANG capacity. Moreover, the promises made by Mr & Mrs Berry are deliberately stipulated NOT TO BE ENFORCEABLE BY THE COUNCIL UNDER SECTION 106.

¹³ the outfall pipe

12. Subsequent updates all failed to address NPPF 2021 & 2023 [167 & FN 55] as Stantec's AH accepted in XX. Subsequent updates failed to properly address the revised PPG updated and reissued in August 2022. Nor did they reference at all the substantial body of work in the 2022 SFRA¹⁴. It was not until AH produced her main proof of evidence that an assessment of the whole site was undertaken as required by NPPF 2021/2023 which identified for the first time flood risks from all sources.
13. Climate change was not addressed properly as required by NPPF [161] and the drainage calculations contained errors and did not reflect the approach that had been agreed beforehand of including everything upstream in the calculations for the sizing of the SUDS basin. This is particularly important here given the site's proximity to AW and its reliance on discharge into Framfield Stream, lying in FZ 2&3, prone to fluvial and surface water flooding although none of that was identified in the FRA.
14. The FRA and subsequent updates, still failed to address the requirements of a site-specific flood risk assessment set out in PPG ID70-020-20220825 as this should include the evidence for the LPA to apply, if necessary, the Sequential Test, and to determine whether the development will be safe, as well as climate change allowances.
15. At various points in his XX, AT KC took SMB to a report Herrington had produced in 2015 for Croudace in the context of advancing part of the land at BIES for inclusion in a list of sites to go forward to be considered as a potential site to be allocated in a local plan. In our submission, none of that line of questioning was remotely useful in helping you to determine whether this appeal should stand or fail on account of flood risk and drainage issues judged in the context of the current (quite different) proposal and current policy.

Drainage

16. Although WDC withdrew their drainage RfR shortly before the exchange of evidence on account of the August position statement of the LLFA¹⁵, they do not appear to have grasped the errors and failing in the Stantec approach. None was mentioned in CDB.32. Nor do they reference at any point the NPPF 2021's "all flood risks" approach, the new PPG or indeed the guidance to developers in the SFRA 2022. The need for compliance for ST was not referenced at all in CDB.32.
17. SMB explained in his EiC how that proposed detention/infiltration basin had grown in size from an initial capacity of circa 3,000 cubic metres to 4,750 cubic metres¹⁶ identified in AH rebuttal evidence at paragraph 2.6.8. However, as SMB noted in his EIC, these calculations omit the retained commercial areas of built development upstream even though there is absolutely no survey or other objective evidence as to the adequacy of their drainage services over the lifetime of the development. Secondly, the residential gardens, also upstream, were also excluded from the calculations. If these areas were included, as SMB evidence suggests was agreed in the first place at the pre app stage, the basin would need to be a further 40% greater.
18. Thus, you cannot safely conclude that 290 homes and an adequately sized basin can be accommodated within the confines of the land use/parameter plan¹⁷ for which outline consent is sought. The consequences of the revised basin assessments at SK09 and SK10, introduced in AHs rebuttal, cannot simply be brushed aside on the basis of what turned out to be an erroneous density

¹⁴ CDE.10

¹⁵ CDB.32

¹⁶ AH Rebuttal Proof Revised Basin Assessment 1 & 2 48494/2002/SK09 and SK10

¹⁷ CDA.51

calculation of 19 dpa. The plan produced on the last day the inquiry sat, which numbered properties but not parking spaces, did not suggest a density of that order.

19. We deal with the requirements of the 2022 SFRA not addressed in the FRA, its updates or AH's evidence separately.

Relevance of the definition of development

20. In his XX, SMB agreed that his evidence did not take account of the definition of development. However, the mere fact that the application includes a change of use of land to use as strategic SANG does not exclude the application, now appealed, from compliance with the requirements of the NPPF for an appeal of this size to be supported by a FRA. This was one of several examples of AT KC flying his own kite and taking lines in XX unsupported by his own evidence. Moreover, often a change in the use of land is unachievable without the need for operational development to facilitate that change of use. This appeal is a case in point. In order to achieve the proposed SANG the application includes access into the site¹⁸, a new car park for 30 vehicles as well as the provision of footpaths and fencing which all involves development of one sort or another. As SMB put it in XX, the housing and the SANG are subservient to each other.

Wathen-Fayed v Secretary of State for LUH&C

21. In his XX, SMB was taken to CDJ.16, a decision of the High Court in Wathen-Fayed v Secretary of State for LUH&C [2023] 92 (Admin). There were several points of principal to emerge from reference to this case which we do not dispute. The first is that whether or not compliance with the sequential test is required is a matter of planning judgement for the decision maker, properly applying national policy and guidance. Secondly, on the facts in that case it was permissible to take into account a suggested planning condition. We explain a little more about the facts in that case in order to distinguish them from the facts in this appeal in a separate appendix at the end of these submissions.
22. In our submission it is helpful for you as decision maker to note the Judge's reasoning at paragraph 118, with which we agree: *"It was plainly necessary for the inspector to approach the question whether the sequential test should be applied to the proposed development on a proper understanding of the relevant policy in the Framework. It was also reasonable to expect that the inspector would follow the approach set out in the Practice Guidance, at least unless he had a good reason to depart from it"*.
23. Secondly, it is important to note how the PPG has changed since the inspector allowed the crematorium appeal. We note the previous guidance at paragraph 25 of the court judgment and invite you to compare that to the current PPG issued in July 2022. Updated ID7-023 under the heading *"what is the aim of the sequential test"* is materially different to the PPG at the time of that inspector's decision letter set out at paragraph 25 of the judgment. Crucially the PPG no longer advises *"The flood zones as refined in the Strategic Flood Risk Assessment for the area provide the basis for applying the Test. The aim is to steer new development to Flood Zone 1 (areas with a low probability of river or sea flooding)"*. This was the very guidance in play when Stantec in their FRA¹⁹ assumed the sequential test was passed because of the site's allocation (incorrectly) and asserted the exception test was passed because all development would be within flood zone 1. Instead,

¹⁸ Which access is to be shared with the existing commercial & c3 uses which will remain as well as the proposed new 290 new homes.

¹⁹ CDA 18 pdf page 20/141

under the same heading “what is the aim of the sequential test” the PPG now advises, in guidance updated on 25 August, at 2022 ID7-023:-

“The approach is designed to ensure that areas at little or no risk of flooding from any source are developed in preference to areas at higher risk. This means avoiding, so far as possible, development in current and future medium and high flood risk areas considering all sources of flooding including areas at risk of surface water flooding. Avoiding flood risk through the sequential test is the most effective way of addressing flood risk because it places the least reliance on measures like flood defences, flood warnings and property level resilience features. Even where a flood risk assessment shows the development can be made safe throughout its lifetime without increasing risk elsewhere, the sequential test still needs to be satisfied. Application of the sequential approach in the plan-making and decision-making process will help to ensure that development is steered to the lowest risk areas, where it is compatible with sustainable development objectives to do so, and developers do not waste resources promoting proposals which would fail to satisfy the test. Other forms of flooding need to be treated consistently with river and tidal flooding in mapping probability and assessing vulnerability, so that the sequential approach can be applied across all areas of flood risk”.

24. We address the consequences of this new guidance later in these closing submissions when dealing with the sequential test. There is however one striking similarity. As the Judge in the crematorium case accepted the submission that the FRA had misstated the position (see paragraph 121 in the Appendix) on the sequential test, which the inspector also recognised, so here the Stantec FRA misstated the position when it asserted firstly that all development would be in FZ1 and that as a consequence the requirements of the site specific sequential test and exception test were met.²⁰ Moreover, at paragraph 4.3.2 of the FRA it wrongly assumed the site is allocated and so that therefore the sequential test has been applied by the council and passed. That was another mistake as SMB pointed out in his evidence²¹. The first mistake was repeated again in the consultee response as SMB also drew attention to. At no point does the LLPA or WDC as LPA seem to have grasped this error.
25. The facts underlying the flood risk are different. The uses and their land and their vulnerability classifications are different. Residential development is in the more vulnerable classification. The SANG is not just amenity open space, it has to be of a certain standard and be available for use at all times in order to function as a facility to offset additional recreational pressure on the Ashdown Forest as SMB explained in his XX. The crematorium case involved a site entirely in FZ 1 which was also identified in the FRA to be a location which the Council's SFRA showed as having potential for groundwater flooding at the surface²². This appeal site is not entirely in FZ1. Parts of the appeal site are in FZ2 and 3, or to use the language of the PPG in areas of medium and high flood risk. The flood risk is both from fluvial and pluvial sources. Additionally, the SFRA 2022 shows the appeal site is in an area of groundwater concern. That concern is highlighted by the abandonment of the infiltration testing due to high ground water levels and the apparent failure to undertake testing and disclose results over a winter of varying ground water levels despite leaving equipment on site to do just that.

Reliance on consultation responses in respect of the need for the ST

²⁰ It seems more than one set of consultants were misled by the now defunct PPG advice on the sequential test.

²¹ See SMB at paragraph 3.2.2 & 3.2.3 of this evidence quoting from CDA.18 at page 1

²² Inspector DL at paragraph 33 set out in paragraph 54 of the judgement

26. Given the failures of the FRA & many subsequent updates, as well as the new 2022 PPG guidance and the new Stantec evidence, it was surprising that so much time and effort was spent on the apparent reliance upon the rather dated consultation responses from LLFA & WDC to the FRA. SMB was & remains right in his PoE at 3.2.3 to describe the statement that *“all built development lies entirely within flood zone 1 the requirements of the Sequential test and Exception tests are met”* as misleading. Yet it was this very same statement that self- evidently misled the drainage officer into confirming that the *“sequential test is met and the exception test is not required”* in this consultation response²³ as SMB further describes at 3.2.22 of his PoE.
27. There is every good reason in this particular case not to attach much if any weight to the consultation responses from the LLFA & WDC’s drainage officer on the need for compliance with the sequential test to be demonstrated. Not for the first time during the inquiry, in his XX of SMB, AT KC sought to introduce new evidence²⁴, to the effect that the Appellant had sent this evidence to the LLFA. Unsurprisingly there is no further information evidencing their views on this new material and in any event, it now falls to you as decision maker to satisfy yourself as flood risk and drainage issues. We invite you not to infer anything about the unreported views of the LLFA or the drainage officer on all this new evidence. You have absolutely no evidence one way or another and it would be inappropriate to speculate.

The Need for the ST

28. Despite Stantec positively asserting that the ST was met in their FRA, they sought to avoid addressing this issue in AH’s PoE. Rather, it was left to SB in his evidence to address the sequential test. The mistaken and dated consultation response from WDC’s drainage officer is the very same evidence that SB relies upon in his main proof of evidence at 8.64 to assert that as all residential related development lies in FZ1 the sequential test is passed. This is simply not the case. The red line site includes areas of FZ2 & FZ3 for fluvial & pluvial reasons. These areas cannot be excluded from consideration on account of their size. Neither NPPF policy, PPG guidance or the application of the precautionary approach²⁵ justifies such an approach. Nor is it an answer to suggest that because a sequential approach has been applied to the masterplan²⁶ so it does not need to be applied to the site itself. Nor is any answer to suggest the ST need not be applied because the access and egress is safe, a point we dispute for highway and flood risk reasons. The current PPG is quite explicit that passing the exception test does not mean that there is no need to apply the sequential test. Moreover, further areas lay just beyond the site boundary, just beyond where the proposed footway /cycleway will meet the public highway which is also in a medium and high flood risk area.
29. Next, SB relies on the fact that only minor works are proposed in FZ3 referencing the footpath, fencing and bridge improvement works none of which have been the subject of any detailed design. These works all involve the AW as well as the ordinary watercourse to the south of main development site in Bird in Eye Shaw. Contrary to the guidance in the SFRA 2022 CDE.42 section 5.3 at paragraph 121, there has been no risk assessment or modelling of flood risk in this watercourse as AH accepted in XX. The depth and velocity of water in this watercourse at times of pluvial or fluvial flooding is unknown. Absence this assessment no-one can second guess what

²³ CDB.8 dated 25 October 2021

²⁴ AH was asked to confirm this in her EIC & did so although she did not provide written evidence

²⁵ Which AH accepted should be applied in XX

²⁶ Setting aside that it places the SANG access through FZ2 & 3 as well as the single combined pedestrian & cycle access through FZ 2 & 3 albeit offsite on the public highway.

works would be required to facilitate the required footpath and protect the AW from users of it. The footpath is a crucial part of the circular route required to offset additional recreational pressure on the Ashdown Forest.

30. SB also relies upon the *Wathen -Fayed* case although both he and AT KC failed to note and acknowledge the important changes to the PPG guidance and the factual differences between the assessed flood risks in that case and this, noted above.
31. Another matter disregarded by SB was the clear advice to developers in the SFRA 2022, despite NPPF [162] policy that the SFRA will provide the basis for applying the test. Although the SFRA 2022 predates PPG August 2022 it nevertheless makes clear at “*developers are to apply the ST to all development sites unless the site relates to one or more of the following criteria:*
 - *A strategic allocation and the test has already been carried out by the LPA;*
 - *A change of use (except to a more vulnerable use);*
 - *A minor development (householder development, small non-residential extensions with a footprint of less than 250m²); or*
 - *A development in Flood Zone 1, unless there are other flooding issues in the area of the development (i.e. surface water, ground water, sewer flooding). ”*
32. I put this point to AH in XX which drew criticism from AT KC despite the fact that policy and guidance steers authors of site-specific FRA to this very guidance. I also put this point to SB in his XX. Plainly the site relates to much more than a simple change of use so that carve out does not apply. Nor does carve out in respect of FZ1 does apply here given the development site is beyond only FZ1 and includes land in FZ2 & 3 in respect of pluvial and fluvial flood risk. In addition, there are other known flooding issues beyond the site which will affect access/egress to & from the development. It is perfectly clear applying the knowledge of all flood risks within site and in the area of the development ie the area beyond the red line, that this is a case where the ST needs to be applied. The very last place you want to put more homes is in a location where residents will be exposed the flood risks²⁷ as they go to and from their homes to local shops and services relying on public flood warnings to warn them when that route is liable to flood and expose them to a degree of hazard objectively classified as dangerous for most people according to an industry standard methodology Flood Risks to People²⁸. Applying NPPF 162 there is a clear need for the applicant to demonstrate compliance with the ST.

The Sequential Test Exercise

33. On a without prejudice basis the developer commissioned an exercise²⁹ whose objective was to demonstrate that the ST had been applied to an effort to identify that there are no sites at lower risk of flooding and so the test has been passed. National policy states that the aim of the ST exercise is to steer the development, in this case principally the residential development, to areas with the lowest risk of flooding from any source. The PPG is clear this means avoiding flood risk

²⁷ There was no disagreement as to frequency of such events with a 20-34 % chance of flood events of the magnitude of the November 2022 event occurring every year , nor the degree of hazard “dangerous for most people” identified by SMB at 3.4.12 and 3.4.2 of his PoE respectively.

²⁸ SMB 3.4.16- 3.4.21 which was unchallenged and added to only by reference to the length of such an event currently between 11 and 20 hours according to AH rebuttal at pages 3 and 4.

²⁹ SB Appendix 2 the Arc Planning Associates Sequential Test report

from all sources as far as possible because this is the most effective way of addressing flood risk because it places least reliance on flood defences and flood warnings and property level resilient features.

34. This exercise was not undertaken in the accordance with the PPG guidance nor the SFRA. Firstly, it deliberately limited and confined the site search to 7 km of the Ashdown Forest which is a wholly artificial and unwarranted obstacle. The justification for this approach was that the SANG was one of the key components of the scheme and not only to mitigate the impact of the appeal scheme but also the impact of another 1,000 dwellings³⁰. The starting point is not the catchment of the Ashdown Forest for the purposes of providing SANG. Rather it is the district wide housing needs which this application is aimed at addressing.
35. As SB accepted in XX, the housing need case was not advanced on an Uckfield specific basis. The catchment of the housing is plainly district wide. Applying a pragmatic approach,³¹ the area of search should not have been confined to such a limited area. Just as in the Little Bushey Heath Hertsmere GB appeal *“any residential scheme such as the appeal scheme would contribute to meeting housing need wherever it was located”*³². Also in the Hertsmere case the inspector judged that as other community facilities would not be out of place on other sites in Hertsmere³³ nor would SANG be out of place on another sites in Wealden if they were required. In other words, it is not necessary to have SANG on the same site or indeed at all if the search shows that lower risk sites can be found which do not in fact need SANG. SANG should not be dictating the area of search.
36. Rather the starting point for the area of search should be the housing. The whole of the district should be the starting point and only if and when you cannot find enough sites to accommodate 290 homes on no or low risk sites do you then extend into sites at higher risk irrespective of the need for SANG. Even then the SANG would not necessarily have to be provided on site.
37. The SFRA assesses a total 992 sites, 848 of which are entirely within flood zone 1 across the district³⁴. Thus, the SFRA information provides much information on sites across the district which the developer could and should have deployed in accordance with NPPF 162 & the SFRA 2022 to look to establish if the 290 homes could be accommodated on sites with no or only low flood risk across all potential sources. We draw a parallel with the area of search deployed in the Little Bushey Heath Hertsmere GB appeal³⁵ where the whole district was assessed by the Appellant which the inspector concluded *“was a reasonable and pragmatic area of search”* in the face of criticism from the LPA that in fact the area of search should have widened to include the whole HMA.
38. Finally, the site search was further confined to sites which could only accommodate 100 or more dwellings. This is another completely arbitrary search criteria which serves to further limit the area of search thus undermining the aim of the sequential test. The requirement in the PPG is *“to include a series of smaller sites and/or part of a larger site if these would be capable of accommodating the development”*. The justification for the 100 threshold is the alleged assertion that you would need

³⁰ 4.7 of SB main PoE App 2

³¹ As advised in PPG ID7-027-20220825 “the area to apply the test to will be defined by local circumstances relating to the catchment area for the type of development proposed... a pragmatic approach needs to be taken ...”

³² SMB App1 paragraph 84 of the Little Bushey Heath

³³ ditto

³⁴ CDE.10 PDF p75/313 paragraph 8.1 with the overview of flood risk at these sites summarised in paragraph 8.2 on the next page. 848 were located entirely within FZ1

³⁵ Paragraphs 80- 84 of SMB APP 2

a site of 100 dwellings in order to be able to deliver the necessary SANG. That assertion is not evidenced. It also ignores the fact that houses could be provided in areas of no or low flood risk within WDC which did not need to provide SANG at all. It also ignores the possibility that SANG can be provided separately off site. These artificial constraints serve to undermine the whole aim of the ST.

39. Once again, we invite you to note that in the recent dismissed Green Belt appeal the entire borough was searched³⁶. That must be the right approach for those promoting strategic housing sites outside the plan led system in locations of medium and high flood risk³⁷. Indeed, any other approach is at odds with the basic aim of the ST which is not to find sites that replicate the appeal site but rather to find sites which can accommodate the development at no or lower flood risk.
40. For all these reasons we invite you to conclude that as an unallocated site in an area of medium & high fluvial and pluvial flood risk on and offsite, with known concerns about groundwater the development needs to demonstrate compliance with the sequential test. The onus is on the developer to do this and the exercise undertaken is unnecessarily restrictive. They should have conducted a borough wide search, not confining themselves to sites of 100 or more units. As such they have failed to demonstrate compliance with the ST and so in accordance with NPPF 161,162 & 167 the appeal should be dismissed. This reason also leads to the need to disapply the tilted balance applying NPPF para 11 FN7.
41. We also take issue with the suggestion from AH that for the purposes of demonstrating both compliance with 167 d) & e) residual and safe access can be managed. In the inevitable event of a flood which presents a hazard for those trying to access Uckfield the main access does not offer a safe access whether for motorised & non-motorised users. The suggestion that everyone can safely access Uckfield by turning right out of the main access and travelling east out of the site is wholly unproven. Self-evidently NMUs are not catered for at that access. We remind you that were this proposal would provide 101 new affordable homes. The unchallenged statistics from RW demonstrate that not all households in Uckfield own a car and many have access to only one³⁸. On this basis nearly half of the households could find themselves relying on NMU access during a typical working day.

Sustainability and Highways

Sustainability

42. We begin with buses. According to MT's own evidence³⁹ the walking distance to existing bus stops are between 240 and 900 m distance. Most homes will be significantly more than the 400m recommended distance "traditionally ...regarded as the upper limit.." ⁴⁰. RW's rebuttal⁴¹ produced the CHIT document at App A which explains that maximum distances should be no more than 500m on core bus corridors with two or more high frequency services. Stagecoach as an operator also advise 400 m is the maximum distance. These distances are minimums for healthy active people not those with impairments.

³⁶ SMB App 1 paras 67-99

³⁷ Although permission is being sought to challenge that decision letter refusing development in the GB, that challenge does not go to the principle of the need to comply with the sequential test or the decision on the area of search.

³⁸ 6.15 of his main proof- 13.4% of households do not have access to a car and 38.6% have access to only one car.

³⁹ App 13 Distance to Bus Stop Plan 5330/035

⁴⁰ 4.25 of MT main proof.

⁴¹ RW Rebuttal page 6-7

43. In the context of the table of agreed distances to facilities in Uckfield, MT went out of his way in his EiC to infer that secondary school pupils could get from the site to school at Uckfield College 2.5 km away via the bus. That is simply incorrect as he accepted in XX. The 29A bus route does not go northwards to the school. On the contrary the route goes south out of Uckfield. That little vignette showed he was prone to put gloss on his evidence.
44. At the time the appeal hearing statement was submitted by SB, highway matters were dealt with at App B where a statement by MT can be found. At that stage with regard to bus accessibility MT suggested that it was “evident that a solution is achievable to significantly improve bus accessibility for future residents⁴²”. At Appendix 7⁴³ a plan was suggested showing how this might be achieved. That solution is no longer on the table and residents will have to access existing services from existing bus stops- so long as they are not flooded.
45. The appellant refers to an appeal in Polegate⁴⁴ where the inspector allowed a C3 appeal where the minimum distance was circa 500m from a bus stop and the appellant was making a contribution to increase the frequency of the buses. The bus contribution secured by the 106 obligation in this appeal does no such thing. It merely retains the current service for a 3 year period from 2026. There is absolutely no evidence that at the end of this three year period the bus service will be self-funding as SB frankly accepted in XX. Hence its future is by no means assured for the lifetime of the development. The nearest bus stops are also in the very same area liable to flood.
46. In addition, another distinct disadvantage, missing altogether in Polegate appeal, is the very poor quality of the walk along Framfield Road⁴⁵ with narrow footways of poor & uneven quality, missing altogether on the northern side of the road by the Alma Arms pub where the suggested zebra crossing might go in, with many parked cars and various entrances to developments & side roads for pedestrians to navigate. The suggested location of the crossing is not close to the point where it is most needed i.e. where the pavement narrows. Instead, it seems randomly located in front of the pub where there is no public footpath and parked vehicles and the entrance to the pub car park close by. Gradients at either end add to the challenges a walker will face. MT’s main proof was quite simply wrong to suggest that the footways accord with *Inclusive Mobility* as he did at 4.23 of that proof. The suggested improvements do not fundamentally alter the narrow footways.
47. All in all, this development cannot be made sustainable (NPPF 105). It lacks attractive and well designed walking & cycling networks to and from Uckfield (NPPF 106 d). It does not facilitate access to a high quality public transport route nor does the layout, as once promised, maximise the catchment area for buses (NPPF 112 a). Nor will it create a place that is safe secure and attractive (NPPF 112 c). As RN rightly observed, this site is not a site where 17% of journeys are ever likely to be undertaken by foot. That claim in the travel plan is another example of MT’s poor judgment.

Traffic Generation

48. Although the TA ⁴⁶ was clear that junction capacity improvements would be required by 2027 at both Framfield Road/High St/Bridge Farm junction and the High St/Bell Lane junction having regard to already committed development, by the time of the hearing statement MT had changed his tune

⁴² CDC2 pdf p231/1586 paras 2.56-2.57

⁴³ CDC2 pdf p331/1586

⁴⁴ CDK.7 at paragraph 10 of the DL

⁴⁵ A distance of only 1 m for 45 m well above the 1 m permitted over short distances of 6 m where for example where is a tree, column or post that narrows the road, see DoT *Inclusive Mobility* CDI.8 pdf p31/131

⁴⁶ CDA.15 at para 7.7 and suggested a SCOOT system linking the two sets of traffic lights system.

and was asserting the impact would not be severe and no improvements were necessary. This was no doubt because the ESCC 's reaction was that it would be necessary to look at a much wider cross town set of improvements. However, given this was not a plan led application, ESCC have not undertaken any such scheme design work nor has the Appellant. Instead, MT has changed his tune yet again. His PoE⁴⁷ once again accepts *“both High Street junctions will operate with increased congestion, particularly during the PM peak period. A Degree of Saturation in excess of 90% occurs on two arms which is generally taken to be the maximum acceptable.”*⁴⁸

49. The suggested solution in the proof is once again linking two of the town centre junctions this time using a MOVA system. There is no before and after set of tables presented together with junction analysis proving what the system can achieve, nor does MT himself offer any evidence of costings. The contribution made in the 106⁴⁹ of a very round £100,000 is derived from ESCC's attempts to provide a “ball park” figure⁵⁰ for a wider scheme as yet undesigned, as RN confirmed at the end of his EiC. It goes without saying that if a scheme is undesigned its effectiveness cannot be tested, in terms of the extent of relief from traffic congestion that it may achieve.
50. The 106 obligation at Sch 8, part 4 and clauses 1 and 2 merely requires the developer to pay the sum prior to the commencement of development. It does not secure that any works will be undertaken nor does it inhibit occupation until these works are in place. Thus, there is no certainty that the increased congestion which the development will cause- a severe impact in terms of capacity & congestion- will in fact be mitigated. Indeed, it may very well remain unmitigated. It is for the developer to secure and deliver the necessary mitigation. Paying off ESCC with £100,000 is not good enough. Absent a Cil compliant scheme, the development will give rise to unacceptable and severe impacts on the town centre of Uckfield which themselves would have adverse consequences for the efficiency and effectiveness of public transport.
51. If the ballpark figures turn out to be too low (because for example there are services in the road that are affected) there is no evidence of the availability of other funds. The Appellant has not provided any evidence that ESCC or WDC are holding other funds for town centre improvements. In these circumstances you cannot be certain the ballpark figure is compliant with the Cil regulations, nor that any works will be done despite improvements being necessary. You can consider imposing a Grampian condition but absent a known scheme you cannot be precise enough in the formulation of such a condition. The Appellant has not sought to put in place a separate planning obligation with the County securing the commitment to the delivery of a TC scheme before the occupation of the dwellings. Nothing short of this will do in our submission in order to satisfy NPPF 110 d). This is one reason why planning permission should be refused, applying NPPF 111.
52. *Accident Records*
RW unchallenged evidence⁵¹ assessed the accident records by reference to the IHT Risk Assessment Matrix noting the risk is medium or high on Framfield Road, which risk would be increased by the additional traffic movements.

⁴⁷ Tables 11 and 12 on page 42 we took him to in XX.

⁴⁸ Page 42 para 5.70 of his PoE.

⁴⁹ Signal optimisation system contribution using SCOOT or MOVA plus three signalised pedestrian crossings (the latter three improvements are unassessed in MT's TA and evidence)

⁵⁰ MT App 34

⁵¹ Paragraph 3.32-3.35 of his main proof

Means of Access

53. In another sign of his lack of experience, it took MT until towards the end of the inquiry to provide a plan for approval with regard to pedestrian and cycle access into the site⁵². That was another matter he had suggested that could be left to detailed design. He was somewhat opaque on the question of whether the shared footway/cycle way would be two ways for cycles despite being clear in his earlier hearing statement⁵³, put to him in XX, that there were in fact problems with so doing. We suggest he knows full well the difficulties for cyclists navigating a steep uphill bend whilst also having to prepare to move across into the right-hand lane, if proposing to enter the main site access on bike⁵⁴.

Unsafe Access

54. Despite the considerable latitude and resources that have deployed by both the appellant & ESCC in considering the continuous stream of varied proposals post the submission of the appeal, the fact is the only proposed vehicular access left on the table, namely Revision P, has still not been demonstrated to be safe. Instead, it is another clear reason why permission should be refused in accordance with NPPF [111]. Whilst MT was said to be “still a supporter of rev K” by AT KC, this just revealed his poor judgement more than anything else. Rev K was rightly not pressed in XX and certainly did not get sign off from the road auditor.
55. On this particular issue you have had the benefit of hearing from three highway witnesses; two of whom, namely Mr New and Mr White have considerably more experience than Mr Twinberrow. Messrs New and White presented as a wholly straightforward, sensible and credible witnesses. Their evidence was not prone to exaggeration. We submit their conclusions as to the dangers posed by the new access for both the development and the existing commercial traffic are well founded.
56. As MT accepted in XX by VH, considerable weight ought to be given to the expert views of ESCC as highway authority.
57. Indeed, RN in particular could not have been more forgiving of the weaknesses of the proposed scheme, yet on the critical issue of highway safety he was clear that the new substandard access would be unsafe. RW was less forgiving but equally clear.
58. The 10 m radius which was eventually introduced via rev M, is accepted by all not to DMRB compliant⁵⁵. To be so it would need to be 15m in extent.
59. RW drew attention, in his rebuttal, to the erroneous claim by MT in his evidence that the Y distances were arrived at based on the 85th percentile of the higher approach speeds given as 118.3 and 120.7m⁵⁶. That was not the case as they were fixed prior to County’s latest speed survey in 2023 and not altered. In fact, the 113 m site line/y distance looking to the west is substandard judging by

⁵² ID 17 which was later revised

⁵³ CDC2 pdf p230/1586 at paragraph 2.50

⁵⁴ We do not disagree with the inspector in the Framfield Appeal at CDK.5 para 10 but note she was not considering cyclists in the context of this appeal scheme and the significant traffic it would generate whilst also retaining the commercial traffic.

⁵⁵ Although once again MT failed to make that clear to the safety auditor it seems. All the safety auditor noted at MT A29 was the increase in the corner radii would allow for better manoeuvrability. That may be true but the previous transgressions into opposing lanes remains.

⁵⁶ MT main proof at 3.7

the latest speed survey. The 113 m is also only achieved by not correctly drawing the Y line to the middle of the nearside lane as per DMRB CD123 as I put to MT in XX⁵⁷.

60. They both rely on the tracking⁵⁸ that clearly shows that refuse vehicles, rigid 12 m and articulated HGVs exiting and entering into the site would all be forced to encroach in varying degrees into the oncoming path of cars coming in and out of the junction. This was the very issue the auditor was concerned with⁵⁹. The issue remains, as App 28 demonstrates. In response to RW's observations another set of tracking plans were produced replicating a supermarket food delivery vehicle with a car. That showed just how tight the access arrangements are. No room for wing mirrors or cyclists. What it also revealed is how the access arrangements would not allow just a vehicle and another similar sized vehicle to pass safely let alone one such vehicle and a larger commercial vehicle. Given the new access has to cater for existing unrestricted commercial traffic as well as 290 homes and all the home deliveries they can generate this is unacceptable. Moreover, drivers of these vehicles have no particular licence.
61. Much was made of the experience of HGV drivers, but the issue identified by the inspector of blind spots, accepted by MT, affects them just as much. Also, MT suggested the risk is small because drivers waiting at the mouth of the new junction would be aware of what is coming but reliance on that is once again misplaced, given the admitted blind spot, the speed of vehicles travelling- well in excess of 40 mph - and the reduced y visibility distance to the left.
62. The Appellant sought to downplay this obvious danger. As already stated, much reliance is placed on the experience of HGV drivers. This is no substitute for safe accesses. Either the access is safe or not.
63. For the first time in his proof of evidence MT majored on the inadequacies of the existing access. You are not assessing that junction rather you are being asked to grant permission for the new access. One existing substandard junction does not justify a new substandard junction especially when that new junction is expected to cater for significantly more traffic -1278 vehicles on a 12-hour basis, and that excludes any SANG generated traffic.
64. Next, having majored on the existing allegedly inadequate junction, a late attempt was made in August to quantify the traffic using that junction. By then the holidays were in full swing so the survey could not possibly be considered as representative. No objective TRICS analysis data was introduced for robustness. No survey of existing business was undertaken asking them of their reliance on or the frequency of deliveries/collections by transits/lorries or HGVs. No assessment of their waste collection arrangements was made.
65. The current businesses are uncontrolled in planning terms and as MT confirmed in his XX no existing rights are being offered up by way of a reduction or elimination of any particular lorry movements. MT seems to have led the auditor astray by suggesting to him that there would no articulated HGVs going forward "following construction."⁶⁰ But RN who seemed prepared to accept the August surveys was clear that, even on their basis of frequency, the risk of 2000 serious accidents per year is unacceptable. We agree, although we invite you to regard these as absolute minimum figures. Whatever the numbers the risk is real, unacceptable.

⁵⁷ See figure 3.4 on page 22 of DMRB

⁵⁸ MT App 28 5330/227rev H & 228 rev H & 224 rev D

⁵⁹ MT App 22 page 9 for example looking at rev K

⁶⁰ App 22 page 9 "as stated in the Audit Brief, articulated vehicles HGV will not require access to the development following construction"

66. Looking back perhaps it seems obvious why MT sought to resist the need for a right turn to be included in the design at the outset and for so long afterwards. He must have known then how difficult it would be to accommodate this within the application site and highway land. Or perhaps his own failure to apply the redline of the application site on his highways drawings led him astray in his desire to overcome the highway's authority's objection.
67. For all these reasons we invite you to conclude the site is not sustainable, there is no agreed and properly costed scheme to mitigate the otherwise unacceptable traffic impact and the access is unsafe for this development combined with the existing commercial enterprises. The scheme fails national and local transport policy TR3.
68. In conclusion this is not sustainable development for a number of compelling reasons. The tilted balance should be disengaged, planning permission should be refused in accordance with section 38(6) because material considerations do not indicate otherwise in this instance.

Mary Cook
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Monday, 2nd October 2023

Appendix on the Wathen-Fayed v Secretary of State for LUH&C case

- A1 This was an unsuccessful challenge in the High Court to the grant of permission on appeal for a crematorium in the Green Belt. The application had been refused in October 2020 and the inquiry took place in August 2021 after the introduction of NPPF 2021¹ in July but before the introduction of the revised PPG in August 2022². The second ground of challenge to High Court is relevant for our purposes. It is summarised at paragraph 2 of the judgment as *“The inspector erred in concluding firstly, that having regard to the relevant policies of the National Planning Policy Framework [‘the Framework’] and relevant guidance in Planning Practice Guidance [‘the Practice Guidance’], there was no need for a sequential assessment of sites for the proposed development; and secondly, that there were no reasonable alternative sites upon which to bring forward the proposed development”*³. In the event the first part of this challenge failed on the facts. No error of law was found.
- A2 The critical part of the inspector’s decision letter are set out in paragraph 54 of the judgment “In DL32 and DL33 he addressed the issue of flood risk:-

“32. Objections to the proposal from interested parties refer to the absence of a sequential approach to flood risk. As set out in Framework paragraph 162, this is to steer new development to areas with the lowest risk of flooding from any source and for this not to be permitted if there are reasonably available sites appropriate for the proposed development in areas with a lower risk of flooding. The site is mapped by the Environment Agency as within Flood Zone 1, an area of low probability of flood risk, where the PPG advises it is not normally necessary to apply the Sequential Test, unless the Strategic Flood Risk Assessment (SFRA) for the area, or other more recent information, indicates there may be flooding issues now or in the future.

33. The proposal’s Flood Risk Assessment (FRA) refers to the Council’s SFRA showing the site having potential for groundwater flooding at the surface. The FRA says that site investigation will be carried out to establish the groundwater levels on the site, and development designed to take cognisance of these. I note the Lead Local Flood Authority (Surrey County Council) has raised no objections to the scheme subject to conditions. Were I to conclude the sequential test was necessary due to a medium degree of flood risk from groundwater sources, the PPG advises a pragmatic approach on the availability of alternatives. The proposed new crematorium to the north of Farleigh in Tandridge District is proposed as such. However, this has been refused planning permission and an appeal decision is pending. Currently, I consider there to be no reasonably available sites at a lower risk of flooding to this scheme. In any case, I am satisfied with the conclusions of the proposal’s FRA that there is not the requirement for such a sequential test to be undertaken.

¹ See paragraphs 21-24 of the judgment.

² See paragraphs 25 of the judgment and compare that to the current PPG issued in July 2022. Updated ID7-023 under the heading “what is the aim of the sequential test” is materially different to the PPG at the time of that inspector’s decision letter set out at paragraph 25 of the judgement. Crucially it no longer advises “The aim is to steer new development to Flood Zone 1 (areas with a low probability of river or sea flooding).” This was the very guidance that was relied upon to assert there was no need to comply with the sequential test because all development would be within flood zone 1.

³ See paragraph 6 of the court’s judgment.

Subject to conditions, I find no substantiated objection to this proposal on grounds of flood risk".

- A3 At paragraph 57 the Judge noted *"The inspector granted planning permission for the proposed development subject to 18 conditions. In DL53, the inspector said that he had imposed condition 6 in order to ensure sustainable drainage arrangements –*

"6) The development hereby permitted shall not commence until details of the design of a surface water drainage scheme have been submitted to and approved in writing by the local planning authority. The details shall include:

a) The results of infiltration testing completed in accordance with BRE Digest: 365 and confirmation of groundwater levels.

b) Evidence that the proposed final solution will effectively manage the 1 in 30 and 1 in 100 (+40% allowance for climate change) storm events, during all stages of the development.

c) Detailed drainage design drawings and calculations to include: a finalised drainage layout detailing the location of drainage elements, pipe diameters, levels, and long and cross sections of each element including details of any flow restrictions and maintenance/risk reducing features (silt traps, inspection chambers etc).

d) A plan showing exceedance flows (i.e. during rainfall greater than design events or during blockage) and how property on or off site will be protected.

e) Details of drainage management responsibilities and maintenance regimes for the drainage system.

f) Details of how the drainage system will be protected during construction and how runoff (including any pollutants) from the development site will be managed before the drainage system is operational. The development shall thereafter be carried out, and ground infiltration of surface water drainage thereafter only permitted, in accordance with the approved surface water drainage scheme".

- A4 The Judge addressed the ground 2 challenge at paragraphs 112-126 of his judgment:-

"116. The principal issue between Horizon on the one hand and the OLRG and Mercia on the other hand in relation to flood risk was whether the sequential test should have been applied to the proposed development. The site specific flood risk assessment for the proposed development, the FRA, had asserted that the sequential test did not apply because the site was located entirely within Flood Zone 1. The objectors contended that on a proper application of the policy stated in paragraph 162 of the Framework and in accordance with the Practice Guidance, the sequential test did apply. It did so because the stated aim of the sequential test was to steer new development to areas with the lowest risk of flooding from any source, not merely from coastal or fluvial sources. In the present case, there was clear evidence that the site was at risk of flooding from groundwater rising to the surface. That risk had been identified in the SFRA and was attested to by local experience that the site was known to be subject to surface water flooding.

117. The inspector addressed the question whether the sequential test should have been applied to the proposed development in DL32 and DL33. He stated his conclusion on that issue in the penultimate sentence of DL33, where he said that he was satisfied that the sequential test did not need to be applied to the proposed development.

118. It was plainly necessary for the inspector to approach the question whether the sequential test should be applied to the proposed development on a proper understanding of the relevant policy in the Framework. It was also reasonable to expect that the inspector

would follow the approach set out in the Practice Guidance, at least unless he had a good reason to depart from it.

119. In DL32, the inspector summarised his understanding of policy aim of the sequential test. He said that the policy aim was to steer new development to areas with the lowest risk of flooding from any source. Development should not be permitted if there are reasonably available sites appropriate for the proposed development in areas with a lower risk of flooding. That summary seems to me to have been an accurate encapsulation of the policy aim of the sequential test as promulgated in paragraph 162 of the Framework.

120. The inspector went on in DL32 to summarise the approach to be taken to applying the sequential test where, as in the present case, development is proposed on a site which lies within Flood Zone 1. The inspector referred to paragraph 033 of the Practice Guidance on the topic of "Flood risk and coastal change" which I have set out in paragraph 25 of this judgment. Paragraph 033 was headed "How should the Sequential Test be applied to planning applications?". The guidance given in answer to that question was that it would not normally be necessary to apply the sequential test to development proposals in Flood Zone 1, unless the SFRA for the area or other more recent information indicates that there may be flooding issues now or in the future. In DL32 the inspector recorded the advice of the Practice Guidance accurately in those terms

121. Mr Brown submitted that paragraph 3.3 of the site specific flood risk assessment, the FRA, misstated the position. It asserted that as the site lay within Flood Zone 1, the sequential test was "irrelevant" to the proposed development. I accept that submission. However, the inspector's reasoning in DL32 shows that he was not misled by that paragraph of the FRA. On the contrary, in DL32 the inspector clearly recognised that, as a matter of national planning policy and practice guidance, the location of the site within Flood Zone 1 was not sufficient in itself to avoid the need to apply the sequential test to the proposed development. The inspector proceeded on a correct understanding of the position, that it was necessary to consider the risk of flooding from any source, not merely from coastal or fluvial sources. It was necessary to consider that risk on the basis of the findings of the SFRA and also of any other information which indicated that there may be present or future flooding issues at the site.

122. Since the site's location within Flood Zone 1 was not determinative of the question whether the sequential test should be applied to the proposed development, it fell to the inspector to decide that question in the exercise of his planning judgment. The inspector made that judgment in DL33. His reasoning in that paragraph reveals the basis on which he did so. Firstly, in accordance with paragraph 162 of the Framework and paragraph 033 of the Practice Guidance, the inspector considered the findings of the SFRA which indicated that the site had the potential for groundwater flooding manifesting itself at the surface of the site. Secondly, he took into account the advice of the FRA that a site investigation would be carried out to establish the groundwater levels on the site; and that the design of the proposed development would respond to the findings of that site investigation. Thirdly, the inspector took account of the position of the Lead Local Flood Authority, which had not raised any objection to the proposed development subject to the imposition of appropriate conditions. Fourthly, he took account of the objectors' contention that the findings of the SFRA and the evidence of surface water flooding at the site constituted a medium degree of flood risk.

123. I am unable to accept that the balance of these factors was so firmly weighted in favour of the application of the sequential test to the proposed development, that it was irrational for the inspector to reach the contrary conclusion. As I have already found, he approached

that question on a correct understanding of the policy aim of the sequential test and of the practice guidance as to the application of that test to sites which are located within Flood Zone 1. He based his evaluation of the potential for flooding issues at site on the findings of the SFRA. In evaluating the degree of risk, he took into account both the evidence of the objectors and the reported position of the Lead Local Flood Authority. It will be recalled that the OLRG had urged Tandridge to seek the views of that authority on the issue of flood risk. He took account of the arrangements proposed in the FRA for the purpose of managing the flood risk identified by the SFRA, through the design of the proposed development.

124. Mr Brown submitted that it was wrong in principle for the inspector to take account of the requirements imposed under condition 6 in determining whether the sequential test should be applied to the proposed development. The basis for that submission was that the policy aim of steering development to sites at lower risk of flooding would be frustrated if the assessment of flood risk is only undertaken after planning permission has been granted. In my view, that submission goes too far. I see no reason in principle why the ability effectively to manage the risk of flooding at the site through conditional controls should not be brought into account, for the purpose of making an overall planning judgment whether the sequential test should apply to a site located in Flood Zone 1. In the present case, it was plainly the judgment of the Lead Local Flood Authority that such conditional controls would enable the delivery and operation of the proposed development with effective management of groundwater flooding at the site. In my view, the planning inspector was entitled to take the controls imposed by condition 6 into account in reaching his conclusion that the sequential test need not be applied in this case.

125. For these reasons, in my judgment, the Claimant's criticisms of the inspector's determination of the question whether the sequential test needed to be applied to the proposed development are not justified. There is no force in the argument that the inspector misunderstood or misapplied the relevant policy of the Framework and the relevant advice of the Practice Guidance. The inspector's conclusion in the exercise of his planning judgment that the sequential test did not need to be applied to the proposed development cannot fairly be impugned as irrational. His reasoning in DL32 and DL33 is sufficient in law to explain why he reached that conclusion in the circumstances of this case."

(Emboldened text added for emphasis).