IN THE HIGH COURT OF JUSTICE Claim Number:

QUEEN'S BENCH DIVISION

PLANNING COURT

BETWEEN:

The QUEEN (on the application of ELAINE MARTIN)

Claimant

-and-

FOLKESTONE AND HYTHE DISTRICT COUNCIL

Defendant

STATEMENT OF FACTS AND GROUNDS FOR JUDICIAL REVIEW

References: in the form CB/Y/x are to Tab Y, page x in the Claim Bundle.
Essential Reading: Officer's Reports dated 31st July 2018 at [CB/3/105-201] and 12th July 2019 at [CB/3/240-255]; Proposed site plan at [2/101]; Flood Zone map at [CB/2/103]; Policies at Tab 7.

Introduction and Summary of Conclusions

1. This is an application for judicial review to quash the decision ("the Decision") of the Defendant, Folkestone and Hythe District Council ("the Council"), dated 18th July 2019, to grant planning permission (ref: Y17/1042/SH) for a leisure centre, up to 150 dwellings and associated commercial development ("the Permission") at Princes Parade Promenade, Hythe, Kent ("the Site").

2. The Claimant is a local resident and a member of Save Princes Parade, a group of residents who objected to the application for planning permission which resulted in the Permission.

3. In summary, there are two grounds of challenge:

   (1) Ground One: The Officer's Report ("the OR") [CB/3/105-201] significantly misled the Planning Committee by failing to advise it that the application breached policies CSD7 of the Council's Core Strategy Local Plan (2013) ("the Core Strategy") [CB/7/602-605] and Policies TM8 [CB/7/615-616] and LR9 [CB/7/618-619] of the saved policies of the Shepway Local Plan (2006) ("the Local Plan"). This is a virtually identical error to that found in R(Butler) v East Dorset District Council [2016] EWHC 1527 (Admin) (see paras. 14-22 and 34-38 of that judgment);

   (2) Ground Two: The OR significantly misled the Planning Committee by failing to apply policies in the National Planning Policy Framework ("NPPF") in relation to *"areas at risk of flooding"*.

Factual Background

4. The factual background so far as it relates to each ground of claim is set out under that ground. However, by way of summary:

   (1) The Site covers approximately 10.07 ha of land owned by the Council. It is located in a prominent position on the coast. It is located to the south of the Royal Military Canal ("RMC"), which is a Scheduled Monument ("SM") under the Ancient Monuments and Archaeological Areas Act 1979. Scheduled monuments are *"assets of the highest significance"* under paragraph 194(b) of the NPPF.

   (2) To the south of the canal is a tow path, the Site, the coastal highway (the road), the sea wall promenade and the beach. The site excludes the RMC, the tow path and the beach below the high water line (which is owned by a third party). In the 1960s and 1970s, the Site was used as a waste disposal site by the Council, which has resulted in widespread ground contamination. The majority of the Site is now covered in scrub vegetation and is relatively flat.

(3) The RMC was an important part of the country's defences constructed between 1804 and 1809 in response to a fear of invasion by Napoleon's army. It was built to delay the advance of a landing force while the British army mustered inland. The RMC, together with the chain of Martello towers along the coast, form the best preserved monuments to this chapter of the country's history. Since 1986 the entire length of the RMC has been a scheduled monument in recognition of its national importance.

(4) In particular, the general lack of built development between the canal and the shoreline helps to retain a sense of openness. The openness of the canal to the coast on its southern side, and the vista offered to this, particularly from long range views from the east at Hospital Hill and between the more built up coastal areas of Sandgate/Seabrook and Hythe, contribute strongly to the setting and interpretation of the heritage asset. This was recognised by Historic England in its consultation response, who stated: *"Although much has changed since the 19th century, the fundamental components of the beach and open land before encountering the canal remain"* [CB/3/114].

(5) The proposed development of the Site would extend up to the tow path alongside the southern boundary of the RMC. As such, the built form of the development would result in the loss of open space between the RMC and the coast, diminishing its open setting and tranquillity and changing the qualities of the space.

(6) In August 2017, the Council applied for planning permission for the Development ("the Application") [CB/5/275-282]. The full description of the development was as follows:

"An application for outline planning permission (with all matters reserved) for up to 150 residential dwellings (Use Class C3), up to 1,270 sqm of commercial uses including hotel use (Use Class C1), retail uses (Use Class A1) and/or restaurant/café uses (Use Class A3); hard and soft landscaped open spaces, including children's play facilities, surface parking for vehicles and bicycles, alterations to existing vehicular and pedestrian access and highway layout within and around the site, site levelling and groundworks, and all necessary supporting infrastructure and services. Full application comprising a 2,961 sqm leisure centre (Use Class D2), including associated parking, open spaces and children's play facility."

(7) The Application first came before the Council's Planning and Licensing Committee ("the Planning Committee") in August 2018, since it represented a significant departure from the development plan (see OR/9.13) [CB/3/201]. It was accompanied by the OR. The OR must be read as a whole, and relevant sections are addressed in the grounds below. The conclusion of the OR was as follows (at OR/9.7) [CB/3/199-200]:

"…The issue for the Council as Local Planning Authority decision maker is whether the changes to the setting of the RMC Scheduled Ancient Monument, the loss of the open views across the site, the impacts on the existing ecological habitat, the rerouting of Prince Parade and change its character and appearance [sic] of the site are outweighed by the benefits to residents and visitors of a new purpose built leisure centre, quality usable open space, an enhanced pedestrian seafront promenade, additional housing, including 45 affordable dwellings, to meet the district's current and future housing need and the cleaning up and bringing back into use a contaminated underused site."

(8) At the meeting, the Planning Committee resolved as follows:

"That the Planning and Licensing Committee authorise the Development Management Manager to grant planning permission for the proposed development subject to the Environment Agency withdrawing its objection to the application following further discussions and any necessary amendments to the application relating to surface water drainage.

That the Development Management Manager be authorised to grant planning permission subject to the conditions set out below with any additional conditions or amendments to conditions she considers to be necessary following the submission of revised plans and drainage details and subject to a S106 planning obligation relating to the affordable housing and public space management and that delegated authority be given to the Development Management Manager to agree and finalise the wording of the conditions and the legal obligation.

In the event that following discussions the Environment Agency does not withdraw its objection to the application that the application be reported back to the Planning and Licensing Committee to consider the Environment Agency's outstanding concerns."

(9) Following that meeting, revised drainage submissions were presented by way of a Technical Addendum to the Environment Statement ("the ES") [CB/5/378-505], which was reviewed by the Environment Agency who withdrew their outstanding objection to the surface water drainage strategy [CB/6/591-592]. The ES was updated to assess whether the drainage strategy would have any implications for the predicted

environmental effects and proposed mitigation measures as set out in the original ES, with specific reference to Flood Risk & Drainage and Ecology [CB/5/507-577].

(10) There was further consultation followed by a second Officer's Report [CB/3/240-255] addressing the Development's drainage water strategy. On 18 July 2019, the Application was approved and the Permission was issued [CB/4/256-274].

Legal Framework

5. The legal principles underlying a claim for judicial review in the planning context are familiar and were recently summarised in R (Nicholson) v Allerdale BC [2015] EWHC 2510 (Admin) at para. 11 and by the Court of Appeal in Mansell v Tonbridge and Malling Borough Council [2018] J.P.L. 176, at para. 42. In short, the question for the Court is whether the Officer's Report, read fairly as a whole, has materially misled the members on a matter bearing upon their decision, and the error has gone uncorrected before the decision was made.

6. The legal framework underlying each ground of claim is set out below under that ground.

Grounds

7. There are two grounds for judicial review. Each ground will be considered in turn:

Ground One: Failure to advise the Planning Committee of a breach of Policies CSD7 of the Core Strategy and Policy TM8 and LR9 of the Local Plan

8. The OR significantly misled the Planning Committee by failing to advise it that the Application breached policies CSD7 of the Council's Core Strategy and Policy TM8 and LR9 of the Local Plan.

9. This is a similar error to that found in R(Butler) v East Dorset District Council [2016] EWHC 1527 (Admin) (see paras. 14-22 and 34-38) [CB/8/625-639]. Therefore, in order for permission to bring this claim to be refused, the Defendant must demonstrate not only that the claim is unarguable on its own merits, but also that the decision in Butler is unarguably wrong, or can be unarguably distinguished.

Legal Framework

10. Policy CSD7 of the Core Strategy provides as follows (with added emphasis):

> *"Hythe should develop as the high-quality residential, business, service, retail and tourist centre for central Shepway in line with the vision in paragraph 3. 16. New development should respect the historic character of the town and the established grain of the settlement in line with the place-shaping principles set out in policy SS3. Development should contribute to the priorities for investment in the town which include:*
>
> *a. Attracting additional employment to the town, especially in the town centre or in deprived urban communities in west Hythe, including by sustaining demand and labour supply in the local population.*
> *b. Upgrading the stock of business accommodation and the environment of employment areas, and regenerating the appearance and sense of security of west Hythe.*
> *c. Developing new/expanded primary and secondary schools to improve educational attainment, and where appropriate, the delivery of improvements in skills/training in nearby deprived areas.*
> *d. Expanding and upgrading of tourism accommodation and visitor and leisure attractions.*
> *e. Investing in strategic flood defences to protect residents and the Hythe Ranges."*
> *f. Delivering public realm improvements in the High Street and town-centre:*
> *i) improving the setting of historic buildings and the Royal Military Canal,*
> *ii) increasing the ability of shoppers, visitors and residents to access and circulate along the main retail frontage g. Aiming for a convenient, flexible and integrated public transport system, with improvements to services to the west and north of the town, better linking in the town centre and coastal bus routes to railway stations or development in western Hythe."*

11. The easternmost part of the Site is covered by saved policy TM8. The preamble to this policy states:

> *"6.24 The Princes Parade site is an extensive area of open land next to the seafront at Seabrook, Hythe. The site includes the Royal Military Canal which is a scheduled ancient monument of national importance. It was designed as a long distance defensible fortification and communication system and there are no comparable works surviving elsewhere. For this reason, this site has potential for tourism uses which are closely related to the use of the canal but also due to its proximity to the sea. This site is also a suitable location to provide a local park, which would address the open space deficiency in Seabrook.*
>
> *6.25 In order to preserve the open character of the site and to enhance the setting of the Canal, any use should be low key. Built development will only be acceptable where it is essential for the use and should be limited in scale."*

12. Policy TM8 provides as follows (with added emphasis):

"Planning permission will be granted for recreational/community facilities on land at Princes Parade, Hythe as shown on the Proposals Map subject to the following criteria:

(a) The use should take advantage of, and enhance the appearance of, the Canal and the coastline
(b) The majority of the site should remain open
(c) Proposals should not adversely affect the character and setting of the Scheduled Ancient Monument
(d) Built development will only be permitted if justified as essential to the use, and should be small scale, low rise and of a high quality design."

13. The rest of the site is covered by saved policy LR9, which states:

"The District Planning Authority will provide an adequate level of public open space for leisure, recreational and amenity purposes, by protecting existing and potential areas of open space and by facilitating new provision by means of negotiation and agreement.

Loss of open space

Areas of open space of recreation, leisure or amenity value or potential as identified on the Proposals Map will be safeguarded. Development proposals which would result in a net loss of such space will only be permitted if:

a) sufficient alternative open space exists;
b) development does not result in an unacceptable loss in local environmental quality;
c) it is the best means of securing an improved or alternative recreational facility of at least equivalent community benefit having regard to any deficiencies in the locality."

14. Given the duty imposed by section 38(6) of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act"), a local planning authority must, as a general rule when deciding whether to grant planning permission, determine whether the individual material policies in the development plan support or count against the proposed development: see summary of the law in Cooper v Ashford Borough Council [2016] P.T.S.R. 1455 at para. 26:

"In dealing with any application for planning permission a local planning authority is required to have regard to the provisions of the development plan so far as material: see section 70(2)(a) of the Town and Country Planning Act 1990. In this case the assessment identified all the development plan policies to which I have referred and others as relevant development plan policies when considering the proposed development. But reference to relevant policies is not of itself sufficient to discharge that duty. An authority must also interpret the policies correctly and, given the duty imposed by section 38(6) of the Planning and Compulsory Purchase Act 2004, as a general rule, it must also determine (a) whether the individual material policies support or count against the proposed development or are consistent or inconsistent with them and (b) whether or not the proposed development is in accordance with the development plan as a whole: see Tesco

Stores Ltd v Dundee City Council [2012] UKSC 13, [2012] PTSR 983 , per Lord Reed at [17]-[19], [22]; R (Hampton Bishop Parish Council) v Herefordshire County Council [2014] EWCA Civ 878, [2015] 1 WLR 2367, per Richards LJ at [28], [32]-[33]."

15. Reference to relevant policies is not of itself sufficient to discharge this duty: Cooper at para. 26.

16. Failure to advise the Planning Committee of a breach of a relevant development plan policy will amount to an error of law: see Cooper at para. 26 and also R(Butler) v East Dorset District Council [2016] EWHC 1527 (Admin) at para. 27 where (in a similar situation, i.e. a criteria based policy which required no harm to be caused to designated heritage assets), Mr. Price-Lewis QC (sitting as a Deputy High Court Judge) held that:

"So far as heritage assets are concerned only an avoidance of harm is acceptable. Again the officer should have advised members of that. I am satisfied that the OR significantly misled members therefore and this ground is made out."

The approach taken by the Defendant

17. It is clear from the OR that the Planning Officer found that the proposed Development would cause harm to the SM. For example, at OR/8.92 [CB/3/162], the OR states: *"…it is concluded that the proposal will cause harm to the significance of the SM"*. See also OR/8.259, 8/260, 8.262 [CB/3/197-198] and 9.6 [CB/3/199]. This reflects the views of Historic England, who considered that the Development would cause *"serious and unjustified harm to the significance of the RMC and its associated monuments, as a consequence of the proposed major change affecting the setting"* (OR/5.5) [CB/3/114-115].

18. Given this, the Development would plainly not improve the setting of historic buildings and the RMC, in accordance with criterion (f)(i) of Policy CSD7 of the Core Strategy.

19. Further, it would adversely affect the character and setting of the SM, contrary to Policy TM8(g) of the Local Plan.

20. In addition, over half the open space on the Site would be lost (see OR/1.3) [CB/3/107]. As such, the majority of the Site would not remain open, contrary to Policy TM8(f) of the Local Plan.

21. So far as Policy LR9 is concerned, the OR concludes at OR/8.111 [CB/3/166] that criteria (a) and (c) are complied with. It states that *"in relation to part b) issues of environmental quality are addressed elsewhere in the report and balanced against the public benefits of the proposals"*. There is no section in the OR where a clear conclusion is reached in relation to part (b). However, the OR concludes that there would be an adverse impact on the existing ecological habitats on the Site (see OR/8.202) [CB/3/186].

22. Despite these conclusions, at no point did the OR advise the Committee that, on the basis of the Planning Officer's own findings, there was a breach of criteria Policy CSD7 of the Core Strategy and Policy TM8 of the Local Plan. Should the Council seek to contend otherwise, it should clearly identify where in the OR this advice was given to the Planning Committee.

23. Rather, the OR simply states at OR/8.17 [CB/3/143]: *"Consequently, it is clear that there are both competing and complimentary aims within the policies for the site and the wider Hythe Strategy (CSD7) and that these must be balanced and assessed when making a decision on this application"*.

24. Further, the OR states at 9.2 [CB/3/198] that *"matters relating to land use"* are acceptable when considered against policy. That is plainly misleading since Policy TM8 makes clear that recreational facilities (such as the proposed leisure centre) are only acceptable subject to all of the criteria in the policy being met, which was not the case with the Development. Further, the Development includes a significant quantum of development that does not fall within the category of "recreational/community facilities" including up to 150 residential dwellings, retail uses and a hotel.

Submissions

25. The decision to grant planning permission is plainly unlawful:

    (1) Policies CSD7 and TM8 set out various criteria that ought to be met in order for the principle of the Development to be acceptable in this location. One of the criteria that applies to both policies is that no harm is caused to the significance of the SM. In addition, Policy TM8 requires that the majority of the Site should remain open. Again,

this criterion needed to be complied with in order for the principle of Development on the Site to be acceptable.

(2) The Officer's Report found that there would be harm to the SM and that the majority of the Site would not remain open. In the absence of any evidence to the contrary, the Planning Committee is deemed to have accepted this advice from its officers: see R(Siraj) v Kirklees Metropolitan Borough Council [2010] EWCA Civ 1286 at paras. 16-17.

(3) Further, and in any event, significant parts of the Development were not for recreational/community uses, and was therefore unacceptable in principle under Policy TM8 – regardless of whether or not it complied with the specific criteria in that policy.

(4) Notwithstanding this, the Officer's Report failed to inform the Planning Committee of the breach of these material policies:

a. Simply citing the policies (relied on by the Council in its Pre-Action Protocol ("PAP") response at para. 8) is not sufficient: see Cooper at para. 26.

b. It is also not sufficient that any breach of the policies could be inferred (the Council's alternative defence to this ground: see para. 9 of its PAP response). As a "*general rule*" the Council was required to determine whether the Development accorded with these policies (Cooper at para. 26). No reasons have been given for departing from that general rule. Further, this was a matter on which the Committee ought to have been given "*explicit advice*" in order to perform its duties in accordance with the law: see Mansell at para. 42(3).

c. In any event, no clear conclusion was reached on compliance with Policy LR9, and it is not possible to infer whether or not the advice to the Planning Committee was that this policy was complied with or not.

(5) These failures amount to a breach of the duty in section 38(6) of the 2004 Act: Cooper at para. 26. The OR has significantly misled the Planning Committee.

26. The Permission should be quashed:

27. Policies Policies CSD7, TM8 and LR9 are key development plan policies relating to the acceptability in principle of the Development in this location. It is impossible to know what conclusion the Planning Officer, and subsequently the Planning Committee, would have reached had they concluded that the proposal failed to comply with these policies. In particular, this could have:

    (1) Affected the degree of conflict with the development plan and therefore had a material impact on the Defendant's requirement under section 38(6) of the 2004 Act to determine the application in accordance with the development plan, unless material considerations indicate otherwise. In Tesco Stores v Dundee City Council [2012] PTSR 983, at paragraph 22, Lord Reed JSC observed that *"Where it is concluded that the proposal is not in accordance with the development plan, it is necessary to understand the nature and extent of the departure from the plan which the grant of consent would involve in order to consider on a proper basis whether such a departure is justified by other material considerations"*.

    (2) Affected the Council's balancing exercise under paragraph 196 of the NPPF. The OR carries out this balancing exercise at OR/8.259-8.262 [CB/3/197-198]. At OR/8.261 it is concluded that, *"the main purpose of the development is to provide a substantial and much needed public benefit in the form of a new leisure centre to serve the residents of the district"*. This benefit, together with other less significant benefits set out at OR/8.261, were concluded to outweigh the harm to the SM (see OR/8.262). However, Policy TM8 (which has development plan status) has already carried out the balancing exercise between new recreational facilities and harm to the SM, and concluded that recreational facilities are only acceptable in principle provided that there is no harm to the SM. By failing to advise the Planning Committee of this conflict with the policy, the Planning Committee has failed to take this into account in carrying out the balancing exercise under paragraph 196 of the NPPF.

28. Overall, the Court will not exercise its discretion not to quash the planning permission where the Officer's Report has failed to inform the Planning Committee that the application fails to comply with key policies in the development plan: see Butler at para. 37:

"….Policies HE1 and ME5 are policies of a development plan that enjoys statutory priority. Paragraph 134 of the NPPF and its balancing exercise is a material consideration to be taken into account but it is not part of the development plan. In my judgment it cannot be said that the members would have been highly likely to vote to grant planning permission if they had properly been advised that the proposal before them was in breach of the key policy of the development plan dealing with heritage assets, HE1, and in breach of the key policy in the development plan on renewable energy, ME5. Of course on a redetermination of the application for planning permission it will be open to them so to decide in their planning judgment having properly considered the development plan and all material considerations but that will be for them to decide having properly understood and considered the development plan."

29. For these additional reasons, neither permission nor relief can be refused under section 31(3D) of the Senior Courts Act 1981. As such the Permission should be quashed.

Ground Two: Failure to apply NPPF policies in relation to "areas at risk of flooding"

30. The OR significantly misled the Planning Committee by failing to apply policies in the NPPF in relation to *"areas at risk of flooding"*.

Policy Framework

31. Policy SS3 of the Local Plan includes the following:

"*For development located within zones identified by the Environment Agency as being at risk from flooding, or at risk of wave over-topping in immediate proximity to the coastline (within 30 metres of the crest of the sea wall or equivalent), site-specific evidence will be required in the form of a detailed flood risk assessment. This will need to demonstrate that the proposal is safe and meets with the sequential approach within the applicable character area of Shepway of the three identified, and (if required) exception tests set out in national policy. It will utilise the Shepway Strategic Flood Risk Assessment (SFRA) and provide further information. Development should also meet the following criteria as applicable: i) no residential development, other than replacement dwellings, should take place within areas identified at "extreme risk" as shown on the SFRA 2115 climate change hazard maps; or ii) all applications for replacement dwellings, should, via detailed design and the incorporation of flood resilient construction measures, reduce the risk to life of occupants and seek provisions to improve flood risk management. iii) Strategic scale development proposals should be sequentially justified against districtwide site alternatives."*

32. The following policies in the NPPF are relevant to development in areas at risk of flooding [CB/7/621-624]:

(1) Paragraph 155: *"Inappropriate development in areas at risk of flooding should be avoided by directing development away from areas at highest risk (whether existing or future). Where development is necessary in such areas…the development should be made safe for its lifetime without increasing flood risk elsewhere."*

(2) Paragraph 157:

"All plans should apply a sequential, risk-based approach to the location of development - taking into account the current and future impacts of climate change - so as to avoid, where possible, flood risk to people and property. They should do this, and manage any residual risk, by:

a) applying the sequential test and then, if necessary, the exception test as set out below;
b) safeguarding land from development that is required, or likely to be required, for current or future flood management;
c) using opportunities provided by new development to reduce the causes and impacts of flooding (where appropriate through the use of natural flood management techniques); and
d) where climate change is expected to increase flood risk so that some existing development may not be sustainable in the long-term, seeking opportunities to relocate development, including housing, to more sustainable locations."

(3) Paragraph 158: *"The aim of the sequential test is to steer new development to areas with the lowest risk of flooding. Development should not be allocated or permitted if there are reasonably available sites appropriate for the proposed development in areas with a lower risk of flooding. The strategic flood risk assessment will provide the basis for applying this test. The sequential approach should be used in areas known to be at risk now or in the future from any form of flooding."*

(4) Paragraph 159: *"If it is not possible for development to be located in zones with a lower risk of flooding (taking into account wider sustainable development objectives), the exception test may have to be applied. The need for the exception test will depend on the potential vulnerability of the site and of the development proposed, in line with the Flood Risk Vulnerability Classification set out in national planning guidance."*

(5) Paragraph 66 of the Planning Practice Guidance ("PPG") chapter on "Flood risk and coastal change" sets out the Flood Risk Vulnerability Classification. Residential uses are described as being a "more vulnerable" use. In accordance with Table 3 of the PPG the exemption test, set out in paragraph 159 of the NPPF, is required in where

residential uses are proposed in Flood Zone 3a, but not where residential uses are proposed in Flood Zone 1.

(6) Paragraph 160:

"The application of the exception test should be informed by a strategic or site specific flood risk assessment, depending on whether it is being applied during plan production or at the application stage. For the exception test to be passed it should be demonstrated that:

a) the development would provide wider sustainability benefits to the community that outweigh the flood risk; and
b) the development will be safe for its lifetime taking account of the vulnerability of its users, without increasing flood risk elsewhere, and, where possible, will reduce flood risk overall."

(7) Paragraph 161: *"Both elements of the exception test should be satisfied for development to be allocated or permitted."*

(8) Paragraph 164: *"Applications for some minor development and changes of use should not be subject to the sequential or exception tests but should still meet the requirements for site-specific flood risk assessments set out in footnote 50."* Footnote 51 explains that minor development *"includes householder development, small non-residential extensions (with a footprint of less than 250 m2) and changes of use; except for changes of use to a caravan, camping or chalet site, or to a mobile home or park home site, where the sequential and exception test should be applied as appropriate."*

The Defendant's approach

33. So far as is relevant:

(1) The OR states as follows at OR/8.173 [CB/3/180-181]:

"A Flood Risk Assessment (FRA) and Surface Water Management Strategy (SWMS) have been submitted with the proposal. When the application was submitted, the Environment Agency (EA) Flood Map located the whole of the application site within Flood Zone 3a, denoting a high probability of flooding; 1 in 100 greater annual probability for river flooding and 1 in 200 greater annual probability for tidal flooding. However, the EA data has been updated and the maps now show the only area of the application site within zone 3 is the existing Princes road, with the remainder located within zone 1."

(1) In this respect, whilst the proposed residential development is in Flood Zone 1, the boundary of the planning application includes all of Princes Parade road (as noted by the Planning Officer), and the existing promenade. However, the OR fails to record that the front wall of the proposed leisure centre will be on the mid-line of the existing road, and therefore in Flood Zone 3a, and that the proposed access to the leisure centre is also in Flood Zone 3a [see map at CB/2/103].

(2) At OR/8.176 [CB/3/181], it is stated:

"The primary source of flooding risk relates to overtopping under storm surge and high tide conditions, with the closet properties considered at some risk, although insufficient to pose a safety risk to future residents. The existing primary sea wall will protect the site from the direct impact of wave overtopping. Further protection would be provided by the enlarged 11 metre promenade and a requirement to set back development 12 metres from the primary seawall, in conjunction with a secondary seawall at the rear of the promenade (a 1 metre high and 1 metre deep 'splash' wall). This is considered suitable mitigation to protect the scheme and is supported by the EA and can be achieved and maintained via conditions/s 106 on land within the District Council control."

(3) At OR/8.178-179 [CB/3/182]:

"In accordance with the NPPF, due to the residential uses of the proposed development being considered a "more vulnerable" use, the sequential and exceptions test should normally be applied based on the Strategic Flood Risk Assessment (SFRA) and the Environment Agency flood risk zones. However, as the centre of the site where the housing is proposed to be located is now within flood zone 1 this is no longer necessary. This supports the conclusions of the Council's SFRA which identifies that the site is no hazard risk in 2115, taking in to account sea level rise projected for climate change.

As the development can be made safe from flood risk for its lifetime as advised by the FRA with recommendations of flood resilience and resistance proposed to be incorporated into the development that will also ensure flood risk is not increased elsewhere, the development is considered acceptable in this regard."

Submissions

34. The Council erred in failing to apply paragraph 158 of the NPPF which requires a sequential approach to be used in areas at risk of flooding:

(1) Part of the development is located in Flood Zone 3a. As such, under paragraph 158 of the NPPF, a sequential approach was required. The fact that the majority of the development (including the residential elements) is located in Flood Zone 1 does not mean that the sequential approach was not required. The NPPF policy applies where any part of the proposed development is located in an area at risk of flooding: see, for example, Watermead Parish Council v Aylesbury Vale District Council [2017] EWCA Civ 152 [CB/8/640-660] at paras 6 and 7, where planning permission was quashed for failure to carry out a sequential approach where the majority of the development was located in Flood Zone 1, but where the access roads and car park were to be located in Flood Zone 3.

(2) The development is not minor development or a change of use, and therefore paragraph 164 of the NPPF does not apply.

(3) The fact that the exception test may be satisfied is immaterial. As it was put by Lindblom LJ in Watermead (at para. 28):

"If my understanding of the advice the officer gave on the sequential test is correct, I think that advice was not a true reflection of government policy for development in "areas at risk of flooding" in paragraphs 99 to 104 of the NPPF. The sequential test is distinct from, and is to be applied prior to, the exception test, which involves a different exercise (see paragraphs 4 and 5 above). The aim of the sequential test, as paragraph 101 explains, is to "steer new development to areas with the lowest probability of flooding". Where it applies, it involves an assessment of the availability of "sites appropriate for the proposed development in areas with a lower probability of flooding". It is required not only for "new development" proposed on sites which have not previously been developed but also for "new development" on land that is already developed (see paragraphs 52, 67 and 68 of Lloyd Jones J.'s judgment in Tonbridge and Malling Borough Council , quoted in paragraph 19 above). And it is not said to be inapplicable to development that would reduce flood risk. The Government provided expressly for exemptions from it, in paragraph 104. There is a general exemption for developments "on sites allocated in development plans through the Sequential Test", and two specific exemptions – for "minor development" and for "changes of use". None of those exemptions applied here. It follows that if – as I think – the officer's advice in the fourth sentence of paragraph 9.41 of his report was that under NPPF policy a sequential test was unnecessary in this case because the proposal was for "an already developed site", that advice was based on a misinterpretation of the policy. This was an error of law."

(4) As such, the Council should have applied the sequential approach set out in the NPPF. This was also required by Policy SS3 of the Local Plan. The failure to do so is a clear

error of law. That is because in determining a planning application, a local planning authority must apply national policy unless it gives reasons for not doing so: see Nolan LJ in Horsham District Council v Secretary of State for the Environment and Margram Plc [1993] 1 PLR 81 following Woolf J in E. C. Gransden & Co. Ltd. v. Secretary of State for the Environment [1987] 54 P & CR 86 and see Lindblom J in Cala Homes (South) Ltd v Secretary of State for Communities & Local Government [2011] JPL 887 at para. 50. No such reasons were given here.

35. There is no evidence that the Development would have passed the sequential approach. As such, neither permission nor relief can be refused under section 31(3D) of the Senior Courts Act 1981. As such, the Permission should be quashed.

Conclusion

36. For the reasons set out above, the decision of the Council to grant the Permission is unlawful.

37. Accordingly, in the first instance, the Claimant respectfully requests that permission to claim judicial review be granted. Ultimately, the remedies which the Claimant seeks are:

(1) A quashing order of the decision of the Council set out at paragraph 1 above;
(2) Costs; and
(3) Further, or alternative, relief.

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27th August 2019