217 HIGH STREET, YIEWSLEY

A D V I C E

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1. INTRODUCTION

1.1. I am asked to advise Taylor Wimpey ("TW") in relation to its planning application for *"Erection of 5 and 6 storey buildings to provide a Health Facility (approximately 10,000 sq.ft) and 233 residential apartments with associated parking, communal podium garden, landscaping, pedestrian and cycle canal link and external works following demolition of the existing buildings"*. The London Borough of Hillingdon is the Local Planning Authority ("LPA").

1.2. The Site lies in Flood Zones 1, 2 and 3a, predominantly in Zone 2.

1.3. Despite encouraging engagement between my Instructing Planners, Progress Planning, with officers of the LPA as to the scoping and acceptability of the Sequential Testing work required by the NPPF in relation

to development proposals on unallocated sites lying within Flood Zones 2 and 3, the most recent communication from officers has indicated that they are not satisfied with the Sequential Test submitted with the application. The response raises issues of principle about the interpretation and application of NPPF policy and related issues about two sites, which it suggests are sequentially preferable.

1.4. Accordingly, I am asked to advise as to the interpretation and application of the NPPF and in relation to the way in which the two relevant sites should be treated for the purposes of the Test.

2. NPPF and NPPG

2.1. NPPF Chapter 14 is entitled *"Meeting the challenge of climate change, flooding and coastal change"*. Key passages include:

> "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.
>
> - 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.
>
> - 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.

- 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.

- 161 Both elements of the exception test should be satisfied for development to be allocated or permitted.

- 163 When determining any planning applications, local planning authorities should ensure that flood risk is not increased elsewhere. Where appropriate, applications should be supported by a site-specific flood-risk assessment[1]. Development should only be allowed in areas at risk of flooding where, in the light of this assessment (and the sequential and exception tests, as applicable) it can be demonstrated that:

  (a) within the site, the most vulnerable development is located in areas of lowest flood risk, unless there are overriding reasons to prefer a different location;

[1] A site-specific flood risk assessment should be provided for all development in Flood Zones 2 and 3. In Flood Zone 1, an assessment should accompany all proposals involving: sites of 1 hectare or more; land which has been identified by the Environment Agency as having critical drainage problems; land identified in a strategic flood risk assessment as being at increased flood risk in future; or land that may be subject to other sources of flooding, where its development would introduce a more vulnerable use.

(b) the development is appropriately flood resistant and resilient;

(c) it incorporates sustainable drainage systems, unless there is clear evidence that this would be inappropriate;

(d) any residual risk can be safely managed; and

(e) safe access and escape routes are included where appropriate, as part of an agreed emergency plan."

(Emphasis added)

2.2. Extracts from relevant paragraphs of the NPPG are as follows:

"The sequential, risk-based approach to the location of development

What is the sequential, risk-based approach to the location of development?
This general 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. The aim should be to keep development out of medium and high flood risk areas (Flood Zones 2 and 3) and other areas affected by other sources of flooding where possible.
Application of the sequential approach in the plan-making process, in particular application of the Sequential Test, will help ensure that development can be safely and sustainably delivered and developers do not waste their time promoting proposals which are inappropriate on flood risk grounds. According to the information available, other forms of flooding should be treated consistently with river flooding in mapping probability and assessing vulnerability to apply the sequential approach across all flood zones.

The aim of the Sequential Test
What is the aim of the Sequential Test for the location of development?
The Sequential Test ensures that a sequential approach is followed to steer new development to areas with the lowest probability of flooding. 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). Where there are no reasonably available sites in Flood Zone 1, local planning authorities in their decision making should take into

account the flood risk vulnerability of land uses and consider reasonably available sites in Flood Zone 2 (areas with a medium probability of river or sea flooding), applying the Exception Test if required. Only where there are no reasonably available sites in Flood Zones 1 or 2 should the suitability of sites in Flood Zone 3 (areas with a high probability of river or sea flooding) be considered, taking into account the flood risk vulnerability of land uses and applying the Exception Test if required.
Note: Table 2 categorises different types of uses and development according to their vulnerability to flood risk. Table 3 maps these vulnerability classes against the flood zones set out in Table 1 to indicate where development is 'appropriate' and where it should not be permitted. Within each flood zone, surface water and other sources of flooding also need to be taken into account in applying the sequential approach to the location of development.

Applying the Sequential Test to individual planning applications

How should the Sequential Test be applied to planning applications?

See advice on the sequential approach to development and the aim of the sequential test.

The Sequential Test does not need to be applied for individual developments on sites which have been allocated in development plans through the Sequential Test, or for applications for minor development or change of use (except for a change of use to a caravan, camping or chalet site, or to a mobile home or park home site).

Nor should it normally be necessary to apply the Sequential Test to development proposals in Flood Zone 1 (land with a low probability of flooding from rivers or the sea), unless the Strategic Flood Risk Assessment for the area, or other more recent information, indicates there may be flooding issues now or in the future (for example, through the impact of climate change).

For individual planning applications where there has been no sequential testing of the allocations in the development plan, or where the use of the site being proposed is not in accordance with the development plan, the area to apply the Sequential Test across will be defined by local circumstances relating to the catchment area for the type of development proposed. For some developments this may be clear, for example, the catchment area for a school. In other cases it may be identified from other Local Plan policies, such as the need for affordable housing within a town centre, or a specific area identified for regeneration. For example, where there are large areas in Flood Zones 2 and 3 (medium to high probability of flooding) and development is needed in those areas to sustain the existing community, sites outside them are unlikely to provide reasonable alternatives.

When applying the Sequential Test, a pragmatic approach on the availability of alternatives should be taken. For example, in considering planning applications for extensions to existing business premises it might be impractical to suggest that there are more suitable alternative locations for that development elsewhere. For nationally or regionally important infrastructure the area of search to which the Sequential Test could be applied will be wider than the local planning authority boundary.

Any development proposal should take into account the likelihood of flooding from other sources, as well as from rivers and the sea. The sequential approach to locating development in areas at lower flood risk should be applied to all sources of flooding, including development in an area which has critical drainage problems, as notified to the local planning authority by the Environment Agency, and where the proposed location of the development would increase flood risk elsewhere."

(Emphasis added)

2.3. It can be seen from these extracts:

(1) that there is a broad policy objective to steer development away from Flood Zones;

(2) that policy recognises that objective (1) will not be capable of achievement in all circumstances;

(3) therefore a locational test is in place to assist in making the judgment inherent in principle (2);

(4) that locational test is called the *"sequential test"*, summarised as being that development should not be permitted if there are *"reasonably available sites appropriate for the development"* in areas of lower flood risk;

(5) it is for the decision maker – the LPA or the Secretary of State/Inspector on appeal – to make a planning judgment about reasonable availability and appropriateness;

(6) that planning judgment relates to *"the development"* – in the case of a planning application, this will be *"the development"* the subject of the application;

(7) the planning judgment as to whether or not it is possible to locate development in lower risk flood zones is to be made taking into account wider sustainable development objectives;

(8) if the Sequential Test is passed, then the Exception Test may need to be applied (based on potential vulnerability of site and proposed development);

(9) flood risk must not be increased elsewhere and, within the site, various design criteria must be met to steer the most vulnerable development to areas of lowest risk and to ensure safety, resilience, management of risk and sustainable drainage systems;

(10) pragmatism is required in relation to the availability of alternative sites, having regard to the development proposed.

2.4. Given the importance of the *"no reasonably available sites"* criterion within the Sequential Test, it is informative to note other parts of NPPF/NPPG which might be relevant, at least tangentially, including the guidance for conducting housing and economic land availability assessment. This is because a similar concept is used, albeit for a different purpose. NPPG paragraph 019 Reference ID: 3-019-20190722 states: *"A Site can be considered <u>available for development</u>, when, on the best information available ..., there is confidence that there are no legal or ownership impediments to development. For example land controlled by a developer or landowner who*

has expressed an intention to develop may be considered available". (Emphasis added)

2.5. The other national policy area where sequential testing is well established is Town Centre policy. Current NPPG includes the following:

> ***How should the sequential test be used in decision-making?***
> It is for the applicant to demonstrate compliance with the sequential test (and failure to undertake a sequential assessment could in itself constitute a reason for refusing permission)…….
>
> ……In line with paragraph 86 of the National Planning Policy Framework, only if suitable sites in town centre or edge of centre locations are not available (or expected to become available within a reasonable period) should out of centre sites be considered…….
>
> (Emphasis added)

2.6. The guidance also contains specific reference to *"flexibility"* with particular reference to town centre uses.

3. CASELAW

3.1. Recent caselaw on the NPPF approach to flooding does not shed any light on the differences of approach being advocated in this case by the LPA and the Applicant.

3.2. Sequential testing in the town centre context, however, has been the subject of consideration by the courts, including at the highest level in Tesco Stores Ltd v. Dundee City Council [2012] UKSC 13. Lord Reed, with whom the other judges agreed, said, at para.21: *"The question whether ' a provision' which requires an assessment of whether a site is 'suitable' for a particular*

purpose…….is concerned with suitability for one purpose or another is not a question of judgment; it is a question of textual interpretation." At para 28, he noted that the relevant Scottish policy referred to *"flexibility and realism"* and, at 29, he stated that whilst the developer was to take account circumstances, *"to have given consideration to scope for accommodating…..in a different form….and thoroughly assess sequential preference on that footing. But if he has done so, the question remains whether an alternative site is suitable for the proposed development, not whether the proposed development can be altered or reduced in order to make it fit an alternative site."*

3.3. Lord Hope, whose reasoning was adopted by Lord Reed, at paras 36 – 37, approved the earlier case of *Lidl UK GmbH v The Scottish Ministers* [2006] CSOH 165. He said: *"the appellants appealed against a decision of the Scottish Ministers to refuse planning permission for a retail unit to be developed on a site outwith Irvine town centre. The relevant provision in the local plan required the sequential approach to be adopted to proposals for new retail development outwith the town centre boundaries. Among the criteria that had to be satisfied was the requirement that no suitable sites were available, or could reasonably be made available, in or on the edge of existing town centres. In other words, town centre sites were to be considered first before edge of centre or out of town sites. The reporter held that the existing but soon to be vacated Lidl town centre site was suitable for the proposed development, although it was clear as a matter of fact that this site could not accommodate it. In para 13 Lord Glennie noted that counsel for the Scottish Ministers accepted that a site would be "suitable" in terms of the policy only if it was suitable for, or could accommodate, the development as proposed by the developer. In para 14 he said that the question was whether the alternative town*

centre site was suitable for the proposed development, not whether the proposed development could be altered or reduced so that it could fit in to it."

3.4. In the subsequent English High Court case of Aldergate Properties Ltd v Mansfield District Council & Anor [2016] EWHC 1670 (Admin), Ouseley J said, at para 42, *"Sequential test is not just one of suitability; it covers availability: 'only if suitable sites are not available should out of centre sites be considered……..'Available' …… must mean available for the type of retail use for which planning permission is sought."*

3.5. Whilst there are obviously differences in precise wording and context, the approach taken to all of these cases is, in my opinion, applicable to the interpretation of the concept set out in NPPF 158 of *"no reasonably available sites appropriate for the proposed development"* and *"the development"* when these phrases are used in the policy and guidance on the flooding sequential test in national policy and guidance. The issue of the relevant object of the assessment of suitability is exactly the same in each context. It is clear that what is to be assessed is suitability and availability for the development proposed in the application, making allowances on both sides for *"pragmatism*", the word used in the flooding context, as opposed to *"flexibility*" in the town centre guidance.

3.6. Finally, when considering what *"the proposed development"* (NPPF 158) is, all material elements must be taken into account. This is clear from the approval by the Supreme Court of Lidl, where the application was for a new store incorporating features (disabled provision and better retail environment generally) which it was impossible to accommodate on the existing site and which were regarded as relevant for planning purposes.

3.7. The classic statement of principle as to materiality for planning purposes was by Cooke J in Stringer v. MHLG [1971] 1 AER 65 at 77: *"In principle, it seems to me that any consideration which relates to the use and development of land is capable of being a material planning consideration."* A matter of specific relevance in this case, which has been

addressed in caselaw is enabling development / cross subsidy. The Court of Appeal held in R v. Westminster CC ex p Monahan [1989] JPL 107 (the Royal Opera House case) that such considerations could, in principle, be material to a planning determination. Kerr LJ said that it would be *"unreal and contrary to common sense to insist that" financial considerations must be excluded. He went on: "A commonplace illustration is having to decide whether or not to accept compromises or sacrifices in granting permission for developments which could, or would in practice, otherwise not be carried out for financial reasons. Another….illustration would be a similar balancing exercise concerning composite or related developments, i.e. related in the sense that they can and should properly be considered in combination, where the realisation of the main objective may depend on the financial implications or consequences of others. "*

3.8. The principle was upheld by the Supreme Court in R (oao Sainsbury's Supermarkets Ltd) v. Wolverhampton CC [2011] 1 AC 437. Similarly, in R (oao Derwent Holdings Ltd) v. Trafford BC [2011] NPC 78, the Court of Appeal upheld a decision to grant planning permission on a joint application involving the development of a superstore which would result in money being provided to develop local cricket facilities. The Court decided that, because the sites were in close proximity and physically linked, and that it had therefore been reasonable to include them in a single planning application, it would not have been legally objectionable for members to have taken the financial benefits into account (though it was not established in the facts that they had done so).

4. APPLICATION TO THIS CASE

4.1. The full planning application is for a new Health Centre and 233 dwellings and the scheme has been designed holistically. The centre would be let for a lengthy period at a heavily subsidised rent resulting in a discount of some £3.5M accruing to the NHS, over that time. That subsidy would be secured by way of section 106 obligation, as would the phasing of development, in order to ensure its delivery. As in Derwent Holdings, it is plainly appropriate for these two elements to form one application and there has never been any question about this, the application having been duly registered.

4.2. The LPA have never suggested, so far as I am aware, that the proposed s.106 obligations do not comply with Regulation 122 of the CIL Regulations 2010 and therefore should not be regarded as material, and there would be no basis in law for such a suggestion.

4.3. A viability assessment has been prepared by Gerald Eve ("GE") on NPPG compliant principles which demonstrates:

a) that the application scheme is viable to deliver the health centre (a position agreed by the Council's viability experts, BNP);

b) by means of sensitivity testing that residential development in the order of 200 units is necessary in order to break even and is therefore necessary to deliver the health centre, but they warn that this conclusion is subject to somewhat optimistic assumptions being made in an era of great uncertainty because of Covid 19 and Brexit and a more prudent approach endorses the need for the full 233 of the application.

4.4. The NHS has written to explain that, in the absence of this scheme and, specifically, the enabling subsidy which it offers, it would not be in a position to proceed with the new health centre which the LPA accepts is urgently required. Moreover, it has searched for a site for this facility and has been unable, over a period of 10 years, to find one which can be made to work financially. This fact accounts for the failure of previous schemes in which the NHS had hoped to be able to collaborate with the Council.

4.5. In my opinion, it is clear, applying the principles established in caselaw on sequential testing and enabling / cross subsidizing development, that *"the proposed development"*, means the development the subject of the planning application. In this case, there is no scope for pragmatism or flexibility taking the form of looking for smaller sites which might accommodate materially less residential development, because the extent of subsidy required is such this order of residential development is required to achieve the desired outcome of a new health centre. Whilst I cannot comment on individual sites, the principles to be applied in considering the submitted Sequential Test information clearly require the

application to be treated as one entity which cannot be disaggregated to fit other sites which the LPA might, theoretically, prefer it to fit. The test applies to sites which are reasonably available for the development comprised in the application.

4.6. As I understand it, there are two sites in issue, one of which is the site of the existing, outdated Health Centre. The Lidl case referred to is apposite because the local authority's contention there was that the store could, with modification, have been accommodated on its existing site. That contention was rejected by the Court (with the subsequent approval of the Supreme Court) because the argument involved an error of law, namely, not assessing the relevant development proposal. Furthermore, in this case, the Council do not appear to have considered the impracticability of continuing to operate the Health Centre without a decant to some unidentified site, a point noted, but not answered by BNP. The letter of 11th December 2020 from Rob James of Apollo Medical, however, considers the practical implications, which would, in his expert view, be suboptimal for patients and a wasteful use of healthcare resources. Moreover, the site in question is not large enough to accommodate the necessary amount of enabling housing development, even on a *"pushed"* basis, which is suboptimal in planning design terms. These elements of the evidence base are certainly sufficient to support the conclusion in the Sequential Test report that re-use of the current Health Centre site is not *"appropriate for the proposed development"* and therefore not a relevant site for the purposes of NPPF 158 and the accompanying guidance.

4.7. The other site in issue is at Trout Road. Quite apart from the fact that it is only large enough to accommodate 150 dwellings alongside a health centre, well below the viability threshold, the owner, although a developer, appears not to be interested in entering into discussions with the Applicants, despite their repeated attempts to contact him. Therefore, once again, I conclude that there is relevant evidence which must be taken into account which demonstrates that this site is neither *"appropriate for the proposed development"* nor *"available"* within the meaning of NPPF 158 and the accompanying guidance. With regard to availability, whilst the NPPF policy and guidance on housing land supply is not directly in point, it provides a common sense pointer to the concept. Part of the site is in occupation for employment purposes and the fact that it enjoys an extant planning permission for

conventional residential and commercial development, without any s.106 funding obligation to support healthcare delivery, as well as an affordable housing contribution below current policy expectations, is all relevant, along with the apparent disinterest on the part of the landowner.

5. CONCLUSION

5.1. For all the reasons set out above, I endorse the lawfulness of the approach taken to sequential testing in the Applicants' most recent report, which is supplemented by the GE viability appraisal, which I consider to contain information highly relevant to the Council's consideration of the matter. The evidence submitted in support of the sequential testing in this case is robust and, in my opinion, satisfies the procedural requirements of national policy and guidance.

MORAG ELLIS QC
10. xii. 2020

Francis Taylor Building
Inner Temple
London
EC4Y 7BY

DX 402 4DE

217 HIGH STREET, YIEWSLEY

A D V I C E
