Recent planning appeals and the sequential test

A briefing note from the TCPA
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1 What is the sequential test?

The 'sequential test' is the basis of flood risk policy for planning in England. It seeks to direct development away from areas most at risk of flooding. For plan making, it means that local planning authorities must account for flood risk in their spatial strategies and site allocations, ensuring sites least at risk of flooding are chosen preferentially above those at higher risk. For decision making, the onus is on developers to check whether there are 'reasonably available' alternative sites at lower risk of flooding, where the proposed development could take place.[1]

If sites at lower risk of flooding are available for development, planning permission should be refused. If there are no sites at lower risk of flooding available for the development, then the 'exception test' is applied. This test is designed to ensure that development takes place only where it can be demonstrated that 'sustainability benefits' 'outweigh the flood risk'[2] and that development can be made safe over its whole lifetime.

2 What is the presumption in favour of development?

The 'presumption in favour' is shorthand for paragraph 11 of the National Planning Policy Framework (NPPF), which explains that planning applications will be granted where there is no up to date development plan, unless certain policy protections 'provide a strong reason for refusing the development.'[3] Footnote 7 of the NPPF lists policies that apply in this circumstance, which includes 'areas at risk of flooding or coastal change.'[4] In December 2024, the wording of this paragraph was altered slightly, from 'provides a *clear* reason for refusing the development', to 'provides a *strong* reason for refusing the development' (emphasis added).

The update to the NPPF in December 2024 increased the housing requirement for the majority of local planning authorities in England, meaning a high number of development plans are now considered 'out of date' because more authorities are unable to demonstrate a five year supply of housing. This has led to an increase in speculative planning applications for housing coming

[1] *National Planning Policy Framework*. MHCLG, December 2024. (Paragraph 174).
[2] Ibid. (Paragraph 178).
[3] Ibid. (Paragraph 11d).
[4] Ibid.

forward on sites that are not allocated in development plans, where the presumption in favour applies.

3 How have the Planning Inspectorate applied these policies in recent appeals?

There have been two recent planning appeal decisions that the TCPA is concerned represents a backward step in the interpretation of flood risk policy for planning. These are summarised below.

3.1 Yatton, North Somerset

In March this year, the Planning Inspectorate (PINS) allowed an appeal by Persimmon Homes for 190 homes in Yatton, North Somerset. The site is not allocated in the development plan, but its housing policies are deemed out of date as the council cannot demonstrate a 5 year housing land supply. The site is in flood zone 3a, at risk of tidal flooding. The failure of the sequential test was a ground for refusal by North Somerset Council (NSC). The Inspector agreed that the sequential test had been failed.

The Inspector found that site mitigations, which largely rely on raised floor levels, would be suitable for the ‘design’ flood event modelled by the developer. The Inspector agreed that there was a ‘residual’ risk of flooding to the site, but the weight attached to that in the planning balance was reduced due to the slow rate of water inundation and the flood management plan, which included proposals for flood warning and evacuation. This is despite the modelling showing a residual risk of access to the site being flooded during a severe flood event.

The key point of this appeal is that the Inspector concluded that the failure of the sequential test did not represent a *strong* reason for refusal when considered in the planning balance. To support this, he draws on a recent court case (see below): *‘the judgment in Mead makes clear that a failure to comply with the sequential test is not automatically fatal to a planning application. Other material considerations, including housing need, may outweigh such a failure.’*[5]

The Inspector’s decision is available here.

3.2 Faversham, Kent

This appeal by Gladman Developments for 250 dwellings in Faversham in Kent was allowed in June this year, again in flood zone 3a for tidal flood risk, and again subject to the presumption in favour due to Swale Borough Council not having a five year housing land supply. In the design flood scenario, the flood risk assessment showed that two corners of the site area where buildings were proposed would flood, as well as the access road and some areas of open space. The Inspector was satisfied that proposals for land raising would mitigate the risk to the buildings and access road.

In this case, the applicant did not undertake the sequential test at all. Despite this, the Inspector found there was ‘no real world harm’ from this failure on account of the proposed mitigations. Again, the decision rested on the Inspector’s interpretation of a ‘strong’ reason for refusal,

[5] To access the court judgement, see here.

which the Inspector felt should be based on harm rather than ‘mere technical conflicts’ with national policy.

The appeal decision is available to read here.

3.3 Mead Realisations / Redrow vs the Secretary of State

As indicated above, a background factor that may have had a bearing on these two decisions arises from a recent court judgement in relation to two development sites:

- Mead Realisations, whose planning application for 75 homes in flood zone 3 was refused by North Somerset Council, and
- Redrow homes, a refused application for 310 homes on a site with surface water flood risk and areas of flood zones 2 and 3 in Hertsmere.

Both sites were subject to appeal which were dismissed by PINS, decisions which the developers then challenged in court, and were heard together. Although the High Court dismissed the claims, the judgment included content on the application of the sequential test which characterises the sequential test as an aspect of the planning balance, whereby a decision maker may reduce the weight given to a failure to pass the sequential test against other considerations, such as in circumstances where there are not enough ‘sequentially preferable locations’ to meet unmet housing need.

The relevant court judgement is available here.

4 The need to strengthen national planning policy for flood risk

The cases described above effectively bypass the sequential test which is the foundation of the Government's approach reducing flood risk in planning decisions. The cases are examples of the misapplication of national policy, and illustrate a consequent need to clarify the application of both the presumption in favour of development and the sequential test in the specific context of applications which are contrary to local plan policy.

The presumption in favour of development at Paragraph 11 of the NPPF is assumed to provide a tilted balance in favour of applications where relevant local plan polices on the quantum of housing are out of date.[6] We note that this does not apply to other relevant policy in a local plan, including policy relating to flood risk which would still need to be applied. The presumption in favour is heavily caveated to ensure, first, that certain categories of land and assets are excluded from the general presumption, and second, that the polices in the NPPF taken as a whole are applied to decisions to ensure they avoid demonstrable and significant harm.

Paragraph 11 of the NPPF states the presumption should lead to approval unless ***‘the application of policies in this framework that protect areas or assets of particular importance provides a strong reason for refusing the development’***. Footnote 7 of the NPPF specifically identifies categories of development which benefit from this caveat - food risk and coastal change are one such category. As a result, flood risk represents a special

[6] As defined in footnote 8 of the NPPF

consideration when applying the presumption which acknowledges the risk to people of failing to ensure the safety of a development over its whole lifetime.

The important conclusion is that no part of the construction of the presumption in favour of development in paragraph 11 justifies downplaying the specific requirements of national policy on flood risk nor their special weighting in the planning balance. In short, a failure to meet housing targets in no way allows national policy on flood risk to be deprioritized or disapplied in decision-making. However, the cases highlighted in this briefing indicate that decision makers are doing precisely that.

In determining whether flood risk represents a justification for refusal, sub paragraph 11 (d) (ii) makes clear that the decision maker must apply the policies set out in the NPPF, taken as a whole, to demonstrate that there is no significant and demonstrable harm. This requires the decision maker to first engage with the approach set out in Chapter 14 of the NPPF, which makes clear that the sequential approach should be applied both in plan making and decision making. Secondly, as a result of applying this policy, the decision maker must have sufficient and detailed evidence of the potential flood risks. This logically means the financial and social impact of those risks, the credibility of mitigations proposed, and particular consideration of residual risk.

No part of national planning policy allows for the sequential approach to be disapplied to the scale of development identified in the three case studies. A failure to adopt the sequential approach bypasses the principal mechanism for securing community safety from flood risk. By removing the need to identify alternative and intrinsically resilient sites the decision maker is placing the full emphasis on mitigation measures which produce complex residual risks. In the cases illustrated in this briefing, those mitigation measures represented significant residual risks including, in one case, a reliance on evacuation. As a result, it is not safe for either courts or the Planning Inspectorate to conclude that not applying the sequential test can do no real harm in a particular case.

The risk arising from these decisions indicate that national planning policy on flood risk and the presumption in favour must be strengthened and clarified to avoid further developments being allowed in areas at high risk of flooding. Our suggestion for achieving this is set out below in section 6.

5 What are the possible implications of these decisions?

The Yatton and Faversham decisions risk undermining the integrity of the sequential test, which is intended as a backstop to prevent development in areas at risk of flooding, particularly for vulnerable development such as housing where flood events can put lives at risk.

These decisions imply that planning policy for flood risk has been unintentionally weakened by the seemingly subtle change in the December 2024 NPPF wording from ‘clear’ to ‘strong’ in the presumption in favour, and the interpretation of the Mead / Redrow Court judgement by PINS.

The implications of these decisions for flood risk could be significant because:

- They undermine the strategic intention of the sequential test, which is to direct inappropriate development away from areas at risk of flooding, regardless of the specific mitigations that could be made at specific development sites in a high-risk areas.
- They rest on an incorrect application of the presumption in favour which could be replicated elsewhere (as explained in section 4).
- They weaken the incentive for developers to correctly apply flood risk policy for speculative development sites, of which there are likely to be many over the coming years due to the high number of ‘out of date’ local plans.

6 What can be done?

The TCPA are concerned that these decisions set a dangerous precedent whereby developers may evade flood risk policy tests, and lead to more housing in high flood risk areas. This must be resolved as a matter of urgency through:

- A clear statement from MHCLG that confirms the intention of the sequential test and its application to speculative development proposals.
- The strengthening of the sequential test through updates to the NPPF and PPG to provide clearer direction on application of the sequential test to decision making. This could most simply be achieved in the short term through simply replacing the word ‘should’ with ‘must’ at paragraphs 172 and 173 of the NPPF, as illustrated below.

> 172. All plans ~~should~~ **must** apply a sequential, risk-based approach to the location of development – taking into account all sources of flood risk and the current and future impacts of climate change – so as to avoid, where possible, flood risk to people and property.
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> 173. A sequential risk-based approach ~~should~~ **must** also be taken to individual applications in areas known to be at risk now or in future from any form of flooding, by following the steps set out below.