

**APPEAL REFERENCE 3295556
LAND ADJACENT TO HMP GARTH AND HMP WYMOTT**

**ULNES WALTON ACTION GROUP (UWAG)
RESPONSE**

FLOOD RISK

UWAG notes the representation made by Ulnes Walton Parish Council, and the response dated 16 May 2024 by the Appellant. It also notes that the Appellant does not resist the representation being taken into account, and suggests that it merits a response. UWAG agrees.

UWAG has not taken, at any stage, a flood risk assessment point. It does not have flood risk expertise.

However, it makes the following observations:

1. The NPPF provides, at §168:

“The aim of the sequential test is to steer new development to areas with the lowest risk of flooding from any source. 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.”

2. The reference to “*any form of flooding*” is a reference to non-fluvial, including surface water, flood risk.
3. It appears clear that the Appellant accepts that the Planning Practice Guidance, at least, requires a Sequential Test to be carried out in respect of this proposal (see §1.5 – §1.6 of the MoJ’s response). The requirement is not limited (if it indeed ever was) to cases of fluvial flood risk. It accepts that some parts of the appeal site “*are at medium and high risk of surface water flooding*”.
4. That reading of the national policy position appears consistent with the recent case of Mead Realisations Ltd v SSLHC and others [2024] EWHC 279 (Admin). In that case, the submission that the PPG was subservient to, or less important than, the NPPF (specifically in relation to flood risk assessment) was rejected:

“62. I do not think that it is accurate or helpful to say that PPG is only guidance, as if to suggest that it has a different legal, as opposed to policy, status from the NPPF, or that fundamental legal principles on policy do not apply to both. In Hopkins Lord Carnwath referred to the NPPF as “guidance”. Neither the NPPF nor the PPG has the force of statute. Neither has a binding legal effect. The ability of the Secretary of State to adopt either derives from the same legal source of power as the central planning authority. The NPPF does not have some special legal status, the effect of which is to restrict the ability

of the Secretary of State to change such national policy (or the role of the courts in interpreting any such change) to an amendment made to the NPPF itself.”

5. At [9] of his judgment in Mead, Holgate J followed the above excerpt from the NPPF with the following observation:

“The sequential test applies not only to plan-making but also to development control decisions. The words “from any form of flooding” refer not only to flooding from rivers or the sea, but also surface water flooding.”

6. As such, it appears common ground that national policy requires the carrying out of a sequential test before permission for these proposals can be granted.
7. No sequential test has been carried out.
8. The Appellant suggests that this failure to do as it accepts national policy requires it to do:
 1. Is a ‘limited conflict’ with the PPG; and
 2. Should attract ‘limited’ (§1.8) or ‘very limited’ (§1.9) weight.
9. Neither proposition makes any sense to UWAG.
10. Firstly, the requirement to carry out a Sequential Test where one is required is the centrepiece of national policy on flood risk. It is how national policy seeks to direct development away from areas of high risk of flooding. To fail to carry out a Sequential Test where one is required is a direct, and significant, breach of national policy. It is not a ‘limited conflict’.
11. Second, it is a requirement to carry out a procedure, rather than an end in itself. Carrying out a Sequential Test is intended to show *whether* the proposed development satisfies the policy imperative to locate development away from areas at most risk of flooding. In that context, the failure to do so where one is required cannot ‘carry limited weight’; it amounts to a fundamental failure to demonstrate compatibility with national policy on flood risk.
12. Third, the Appellant’s case to the re-opened inquiry was to consider *only* the question of highway safety. It resisted, in strident terms, the suggestion that the Inspector might revisit any of the matters of planning balance or weight arising: see §1 of its Closing Submissions. He should confine himself, it said, to “*addressing the question of whether the highway safety issues have been satisfactorily addressed, and should not revisit his overall recommendation.*”
13. Now, it seems to have changed its mind: it invites the Inspector – in this specific area – to revisit the planning balance, consider what weight to give - indeed suggests a specific quantum of weight that should be attached to - the absence of a Sequential Test in direct breach of national policy. That is a bold position. It should not be entertained.
14. It seems to UWAG that the Inspector should either:

- (i) Accept the representation, and the parties' responses, and simply alert the Secretary of State to the absence of a Sequential Test in circumstances where it is common ground that national policy requires one; or
- (ii) Require the Appellant to carry out a Sequential Test.

15. In response to the Appellant's 'reasons' for attaching only limited weight to the absence of a Sequential Test (adopting the same numbering convention):
16. The claimed urgent need for the development is a matter for the planning balance. It is not to be revisited by the Inspector, on the Appellant's own case. It cannot (in any event) affect the weight given to this issue. It might – in theory – be judged to *outweigh* the failure to carry out a requirement of national policy, but that is a matter for the planning balance.
17. The surface water drainage strategy is not relevant to the question of whether there are other, alternative locations for this development which are at lower risk of flooding. That is the question, and there is no answer to it at present.
18. The length of time since the application, and the stage presently reached, is not an answer to this failure. In any event, the Appellant has not been slow in advancing new or additional matters despite the late stage of proceedings. If the point requires answering, it requires answering whatever the stage of proceedings.
19. The reference to Kirkham and Stakehill is misconceived (and rather underlines the point) – sequential testing would be required of those sites, too, were they to be promoted (as UWAG says they should be) for a new prison. The Sequential Test would show – at least in relation to surface water flood risk – which of the three sites is preferable.

Conclusion

20. Although UWAG deprecates any further delay, it wishes the decision on this appeal to be made robustly and in the context of full and complete information.
21. Given the apparent agreement that a requirement of national policy on flood risk assessment has been neglected, it suggests that the Inspector takes one of the two courses set out at paragraph 14 above.

16 May 2024