

# The risk of flooding

*Rebecca Clarkson and Roy Pinnock explore the conflict between planning policy preventing development in flood zones and the need to build more housing*



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**'As well as flood protection and mitigation measures, planning policy also has an important role to play in preventing development in unsuitable areas, and ensuring that developments are designed to robustly protect against future flood risks.'**

**A**spate of major floods across the UK, warnings that global warming will lead to more frequent heavy rainfall events and increased risks of flooding have put the topic back at the top of the pile for planners.

A report from the Committee on Climate Change (CCC) in June 2015 (see reference box on p21) warned that not enough progress is being made in managing vulnerability to flooding, noting that new houses are currently being built in England's high-risk flood areas at almost twice the rate of areas at low or no risk of flooding. In its report, the CCC notes that the rate of residential development in areas with a 'high likelihood of flooding' (1 in 30 years or greater) has been on the increase for the period from 2011 to 2014, averaging 1.2% a year. In contrast, housing in Flood Zone 1 areas (see box on p19) averaged only 0.7% a year over the same period. Lord Krebs, head of the CCC's adaptation sub-committee, recently warned that if these trends continue, 'we are storing up problems for the future because flooding is going to get more frequent' (*The Telegraph*, 29 December 2015).

Recent floods such as those caused by Storms Desmond and Eva in December 2015 have hammered home (quite literally) how disruptive and costly flooding can be. There is increasing political recognition of the need for robust flood defences, with the Chancellor announcing an increase in flood defence and resilience funding of £700m by 2020-21 (funded by a 0.5% increase in the standard rate of insurance premium tax) in the 2016 Spring Budget, as well as

an additional £130m to help repair the damage caused by the December 2015 floods.

As well as flood protection and mitigation measures, planning policy also has an important role to play in preventing development in unsuitable areas, and ensuring that developments are designed to robustly protect against future flood risks.

## National policy

National planning policy aims to prevent inappropriate development in areas of flood risk, and is primarily set out in the National Planning Policy Framework (NPPF), supported by the *Technical Guidance to the National Planning Policy Framework* (Technical Guidance) and the National Planning Policy Guidance (NPPG).

Local planning authorities (LPAs) are required to adopt 'proactive strategies to mitigate and adapt to climate change', including taking full account of flood risk (NPPF para 94). Inappropriate development in areas at risk of flooding should be avoided by directing development away from areas at highest risk, but where development is necessary, it should be made safe without increasing flood risk elsewhere (Department of Communities and Local Government, see reference box on p21).

'Areas at risk of flooding' are defined in the Technical Guidance as:

- land within Flood Zones 2 and 3 (see box on p19); or

- land within Flood Zone 1 which has critical drainage problems and which has been notified to the local planning authority by the Environment Agency.

To assist LPAs in identifying and preventing inappropriate development, the NPPF requires that local plans are supported by a strategic flood risk assessment, and should contain policies to manage flood risk from all sources. Such policies should be developed in consultation with relevant flood risk management bodies, primarily the Environment Agency (para 100, NPPF).

Strategic flood risk assessments assess the risk to an area from flooding from all sources, now and in the future, taking account of the impacts of climate change. They also assess the impact that land use changes and development in the area will have on flood risk.

LPAs should apply a sequential, risk-based approach to the location of development, both in allocating land within their local plans and when considering individual planning applications, where appropriate.

Local plans should aim to avoid flood risk to people and property where possible and manage residual risk by:

- applying the sequential test;
- applying the exception test (if required);
- safeguarding land required for current and future flood management;
- utilising new developments to reduce the causes and impacts of flooding; and
- seeking opportunities for relocation, where climate change is expected to increase flood risk so that existing development may not be sustainable in the long term.

The aim of the sequential test is to steer development to areas with the lowest probability of

flooding, using flood zones and the local plan strategic flood risk assessment as the starting points for analysis. Development should not be permitted if there are alternative sites available with a lower flood risk.

If the sequential test shows that development is only possible in an at-risk area, the exception

It is clear that there is strong policy and guidance in place to prevent inappropriate development in areas at risk of flooding. However, with the UK currently in the grip of a serious housing crisis, these policies can often come into conflict with the need for new housing. It is unsurprising therefore that flooding risk is an issue considered

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test must be passed for development to be permitted, namely that:

- the development provides wider sustainability benefits to the community that outweigh flood risk; and
- the development will be safe for its lifetime without increasing flood risk elsewhere and, where possible, will reduce flood risk overall.

The NPPG states that most residential development is potentially appropriate in Flood Zone 2, except for 'highly vulnerable development' such as basement dwellings, mobile homes intended for permanent use and developments storing hazardous substances. The exception test has to be passed for residential planning applications in Flood Zone 3.

in a number of planning appeals, with some of the most recent examples being discussed below.

### Hartlepool, County Durham

A major mixed-use scheme (including a 700-bed residential care home, 300 residential care apartments, 50 apartments, 80 new homes, 80 key worker apartments, retail, offices and car parking) was allowed on appeal, despite the site having a history of flooding, and being allocated for employment use.

The proposals generated significant opposition at the time of the application, including a petition. Despite the council withdrawing its opposition during the appeal process, two neighbouring residents continued to oppose the development. Their main concern was the recent flooding that had

## Flood zones

- Zone 1 – land having a less than 1 in 1,000 annual probability of river or sea flooding.
- Zone 2 – land having between a 1 in 100 (1 in 200 for coastal flooding) and 1 in 1,000 annual probability of river flooding.
- Zone 3a – land having a 1 in 100 or greater annual probability of river flooding (1 in 200 or greater for coastal flooding).
- Zone 3b – land where water has to flow or be stored in times of flood.

occurred at their properties, adjacent to the appeal site. The floods appeared to have occurred as a result of surface water discharging from the appeal site, much of which was classified as within Flood Zone 3a.

It was agreed that Hartlepool Borough Council did not have a five-year supply of housing land, so the presumption in favour of sustainable development was

rectify this, the appellant proposed a scheme to increase the capacity of the culvert under the site, as well as removing the main river culvert downstream, allowing the river to flow in open channel through parts of the site. Additional flood-water capacity would be provided adjacent to the river through the site development earthworks and the capacity of the overflow culvert would also be increased.

its lifetime without increasing flood risk elsewhere and would reduce flood risk overall, allowing the site to be redesignated as Flood Zone 1.

### **Attleborough, Norfolk**

A residential development of 350 dwellings was allowed on appeal on a floodplain on the edge of Attleborough, on the basis that detailed flood prevention conditions could alleviate local residents' concerns that the area was prone to flooding and development may increase flood risk. Breckland District Council had refused the application solely on the ground of flood-risk considerations but did not pursue it at appeal.

The council could not identify a five-year housing land supply. Although the proposals conflicted with the council's housing policies, lying unallocated outside the designated settlement boundary of Attleborough, the inspector noted that the policies had to be regarded as out of date due to the council's housing land shortfall. The main issue for the inspector was therefore whether the proposals represented sustainable development, having particular regard to a number of concerns, with the main issue being flood risk.

The inspector noted that the site was composed of a mixture of Flood Zones 3 and 2, with the Flood Zone 3 areas primarily located in the western part of the site and proposed for open space uses. To address the risk of flooding, including the potential impacts of climate change, the appellant proposed to restrict housing on the site within parcels identified in the eastern part of the site which were sufficiently elevated to stand outside of the floodplain of Attleborough Brook. The appellant also proposed engineering works to displace a small amount of floodplain while compensating for this through the excavation of some additional floodplain area, complemented by a range of attenuation measures to mitigate run-off from the development.

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### *The inspector noted that the scepticism of local residents regarding the proposed flood prevention measures was understandable.*

engaged, subject to the benefits of the scheme outweighing the loss of the site as employment land and the risk of flooding.

The appeal site was within an existing employment area, but the inspector concluded that retention of the land for employment was not justified as there was no possibility of the site being redeveloped for business use. The business operating from the site had been running at a loss for some time, additionally there was an excess of employment land in the area.

In relation to flooding, the inspector noted that the site formed part of the flood plain of the river Stell, with a river running in a culvert under the site. The appellant's river modelling report and flood risk assessment suggested that past flooding had been caused by inadequate capacity in the culvert during heavy rainfall. To

The inspector was satisfied that implementation of this scheme, which had been approved by the Environment Agency and the council's drainage engineer, would reduce the risk of flooding to a low level. In light of this, and the lack of justification to retain the employment land allocation, the appeal was allowed. Applying the two-part exception test, the decision confirmed that:

- the social benefits of providing much-needed accommodation for the elderly, the economic benefits of new purpose-built office space and the accessible location of the site outweighed the economic and environmental concerns; and
- the scheme proposed by the appellant to address the flooding issues would ensure the development was safe for

### **Local planning authorities' duties**

Local planning authorities should:

- Assess flood risk – by undertaking the strategic flood risk assessment.
- Avoid flood risk – by applying the sequential test and exception test.
- Manage and mitigate flood risk – by:
  - ensuring development in areas at risk of flooding is appropriately flood resilient and resistant; and
  - working with developers to reduce the causes and impacts of flooding.

understandable in light of recent flooding events in the UK and associated publicity. However, after reviewing the technical evidence, he considered that the appellant's proposals were acceptable. The Environment Agency did not object to the development provided appropriate conditions were imposed; the previous reservations of the local internal drainage board had been addressed, leading to them withdrawing their initial objection to the proposals.

Having studied the appellant's flood risk assessment and supplementary material, and having heard evidence from the appellant's engineers, the inspector was satisfied that in principle, the site could be developed in line with the appellant's proposals so as to avoid conflict with the council's flooding policies and the intentions of the NPPF. The inspector considered that the design principles were sufficiently robust to enable the risk of overland flooding from developed land to the south to be adequately managed, subject to the imposition and discharge of detailed conditions including flood prevention works and design features such as raised floor levels.

The inspector was satisfied that other concerns regarding archaeological resources, highway capacity and social infrastructure could be addressed by means of conditions and planning obligations, including financial contributions. He concluded that the economic benefits of the scheme in providing 350 dwellings (including at least 20% affordable housing) were significant, and outweighed the partial loss of the rural character of the site.

**Analysis**

It is interesting to note that in both the appeal decisions considered above, the local authorities failed to demonstrate a five-year housing land supply, thus rendering their housing supply policies out of date under para 49 of the NPPF, and engaging the presumption in favour of sustainable development under para 14.

As noted by the inspectors in both cases, the presumption meant that they should grant permission, unless specific policies indicated that development should be restricted. These 'restrictive policies' are set out in a non-exhaustive

**References**

Committee on Climate Change, *Progress in preparing for climate change, 2015 Report to Parliament*, June 2015, see [www.legalease.co.uk/committee-on-climate-change](http://www.legalease.co.uk/committee-on-climate-change)

Department for Communities and Local Government, *Technical Guidance to the National Planning Policy Framework*, March 2012, see [www.legalease.co.uk/dclg-technical-guidance](http://www.legalease.co.uk/dclg-technical-guidance)

list in footnote 9 to the NPPF, and include policies relating to locations at risk of flooding.

The interpretation of para 49 of the NPPF was recently considered by the Court of Appeal in *Suffolk Coastal District Council v Hopkins Homes Ltd*

flooding concerns can often be overcome with appropriate mitigation strategies and conditions – as illustrated in the appeal decisions considered. The exception test permits developers to engineer solutions to flooding concerns, allowing proposals to still be treated

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[2016]. As part of their judgment, the judges confirmed the importance of the restrictive policies in footnote 9, noting that:

39 ... The purpose of the footnote... is to underscore the continuing relevance and importance of these NPPF policies where they apply... such policies will continue to be relevant even 'where the development plan is absent, silent or relevant policies are out-of-date'...

[...]

47 ... There will be many cases, no doubt, in which restrictive policies... are given sufficient weight to justify the refusal of planning permission despite their not being up-to-date under the policy in paragraph 49 in the absence of a five-year supply of housing land.

**Conclusions**

While the Court of Appeal in *Suffolk Coastal* concluded that restrictive policies (including in relation to flooding) can prevent permission being granted, even in the absence of a five-year housing land supply,

as sustainable development for the purposes of para 14 of the NPPF.

However, building in areas of Flood Zone 2 and higher will always carry some level of risk, especially in relation to the future safety of developments. Climate change appears to be causing wetter winters with more frequent heavy rainfall events, resulting in flood defences being breached more regularly, and some places suffering '1 in 100 year' floods repeatedly within the space of a few years.

Despite the concerns, with many local authorities continuing to struggle to meet even their five-year housing land supply targets, the disadvantages of building in high or medium flood risk areas look set to continue to be regularly outweighed by the almost overwhelming need for new homes. ■

**Attleborough appeal** – Land north of Norwich Road, Attleborough, Norfolk NR17 2JY, decision 27 January 2016, ref APP/F2605/W/3131981

**Hartlepool appeal** – Land at Brenda Road, Hartlepool TS25 2BJ, decision 21 March 2016, ref APP/H0724/W/15/3005751  
*Suffolk Coastal District Council v Hopkins Homes Ltd & anor* [2016] EWCA Civ 168