R (Harvey) v Mendip District Council [2017] EWCA Civ 1784 – Further analysis

The case concerned a 'rural exception' scheme proposal for a site on the edge of the small village of North Wootton in Somerset. The site was a large paddock owned by a Mr and Mrs Gordon. They sought outline planning permission for a development described as *"up to 6 affordable homes and 1 open market dwelling"* on the site, with the intention that they would live in the open market dwelling.

The Mendip Local Plan regarded North Wootton as too small and lacking in facilities to have a development limit so the site (and the rest of the village) were treated as countryside, where development would only be permitted in *"exceptional circumstances"* to meet local needs. There was, however, a policy for 'rural exception' schemes: Policy DP12. This allowed such schemes (including an element of market housing where justified on viability grounds), provided its criteria were met. One criterion was that the proposal would *"provide affordable homes that meet a clearly identified need for affordable housing as identified in the latest Local Housing Needs Assessment specific to that settlement".*

At the time of the planning application the latest Local Housing Needs Assessment (undertaken by the Parish Council) showed a need for 5 affordable homes at North Wootton. The Council's housing officer disputed even that level of need and considered there was at best a need for 1 affordable home. The Council's planning officer recommended refusal on the basis that the scheme did not satisfy Policy DP12. The Members granted planning permission, and it was accepted in the subsequent proceedings that they did so on the basis the proposal was in accordance with the Local Plan. This seemed to be what was implied by the decision notice which granted the planning permission. Unusually, this gave reasons for granting permission. Those reasons included that the Council thought that the proposal was *"acceptable"* in terms of Policy DP12

Mr Harvey, a local resident, brought a judicial review to challenge the decision. The application was unsuccessful at first instance (HH Judge Jarman QC) but permission to appeal was granted by Lewison LJ on one ground only: namely whether the Council must have misinterpreted Policy DP12 if it considered the grant of permission was in accordance with that policy. The Court of Appeal (McFarlane and Sales LJJ) allowed the appeal for this reason and quashed the grant of planning permission. Sales LJ gave the only judgment.

Sales LJ said that with an 'exceptions' type policy, the proper context for the purposes of a Tesco v Dundee interpretation was one of policy restraint. In that context, since the evidence of need in the Local Housing Needs Assessment was for 5 affordable homes, meeting this need did not allow for an excess above the identified need, and so a scheme for up to 6 affordable homes could not be in accordance with the policy (at para 39). He said that in DP12 the term "meets" meant "meeting and not exceeding" and it did not mean "meets more or less" or include some element of flexibility. Thus, if the Council thought that the proposal complied with DP12 this could only be because it must have misinterpreted the policy (at para 39).

This aspect of the case is worth noting because it provides an example of a decision being quashed on the basis of the misinterpretation of policy where the decision maker has applied a policy to the facts of a case rather than made any explicit statement about what the policy means. The Court of Appeal was quite satisfied that if Policy DP12 was applied to the facts

there could be only one outcome: non-compliance, and therefore any other outcome had to be the result of a misinterpretation.

Secondly, the Court of Appeal was not prepared to accept that there was any element of planning judgment involved in the operation of this part of Policy DP12. It set out the source data that needed to be examined to see if there was a need for affordable housing: the latest local housing need assessment. Whatever that data said was determinative, for the purposes of policy compliance. It was not open to the decision maker to make a planning judgment that a need for 5 affordable dwellings could be met by the provision of 6 affordable dwellings.

Thirdly, the Court of Appeal was dismissive of the argument that an outline application for *"up to 6 affordable homes"* gave the Council scope at the reserved matters stage to approve less than 6 dwellings under the guise of controlling *"scale"*. Sales LJ referred to the GDMPO 2015 definition of the reserved matter of *"scale"* and said that it did not include the quantum of housing to be approved (at para 41).

Fourth, the case illustrates the Court being prepared to grant a time extension where notice of appeal was made in time but was served on the defendant some 7 days late, and in the intervening time the defendant had incurred expenditure preparatory to implementing the planning permission. Sales LJ considered that the defendant had acted precipitously and that enquiries should have been made of the claimant (who had lost at first instance) before concluding that there was to be no appeal (at para 53).

Lastly, the case shows that a good point that is made in the claim will not be denied relief simply on the ground that the point was not taken in an earlier letter sent to the Council and warning of judicial review before legal proceedings were in fact commenced (at para 56).