



Neutral Citation Number: [2023] EWHC 2544 (KB)

Case No: CO/3719/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT

Bristol Civil Justice Centre
2 Redcliff Street
Redcliffe
Bristol BS1 6GR

Date: 12/10/2023

Before:

MR JUSTICE JAY

Between:

DAMON MOORE

Claimant

- and -

SOMERSET COUNCIL

Defendant

Jack Parker (instructed by **Richard Buxton Solicitors**) for the **Claimant**

Christian Hawley (instructed by **SHAPE Legal, Somerset Council**) for the **Defendant**

Hearing date: 3rd October 2023

Approved Judgment

This judgment was handed down remotely at 10:30am on 12th October 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

MR JUSTICE JAY:

INTRODUCTION AND ESSENTIAL FACTUAL BACKGROUND

1. On 30th August 2022 the Mendip District Council granted outline planning permission for a mixed use development on land at Saxonvale in Frome town centre (“the Acorn site”). On 1st April 2023 the Mendip District Council was abolished and Somerset Council as unitary authority became the responsible local planning authority. Although all the relevant decisions in this case were made by the Mendip District Council, I have made an order substituting Somerset Council for it as Defendant to these proceedings. The Defendant owns the land and has entered into a commercial partnership with a developer, Acorn Property Group. The latter has been served as an Interested Party but has not played any active part in these proceedings.
2. Mr Damon Moore (“the Claimant”) owns adjacent land known as the Silk Mill. His land, and the Acorn site, are clearly shown on the plan at page 49 of the Supplementary bundle. Aided by the submissions of counsel, I may properly conclude that the Acorn site occupies at least 80% of Saxonvale.
3. This application for judicial review turns on a narrow issue concerning the interpretation of Core Policy 6 (“CP6”) of the Defendant’s Local Plan Part 1: Strategies and Policies 2006-2029 adopted on 15th December 2014 (“the local plan”). It is common ground that this interpretative exercise is for the Court and not for the Defendant, and that if the latter’s planning officer erred in this regard when the Interested Party’s planning application was granted (his report was accepted by members by the narrowest possible margin) this application for judicial review must succeed.
4. Not merely did this application divide opinion within the Defendant, it was controversial within the local area. The Court is not concerned with these wider considerations. Nor am I really concerned with the parties’ respective attempts to persuade me that their opponents’ cases have shifted both before and after these proceedings began. There may well be some force in these forensic points, but the success or otherwise of this application must turn solely on the application of well-established legal principles to the final iteration of the parties’ submissions.
5. In interpreting policy it should also be borne in mind that explanatory text may be deployed to support this exercise even if it does not itself constitute policy: see Richards LJ in *R (oao Cherkley Campaign Ltd) v Mole Valley DC* [2014] EWCA Civ 567. Both parties relied on what they called the “reasoned justifications” for CP6, and to a lesser extent CP3, in their submissions before me. It should be added that there is also accord between the parties that I should be applying a less rigorous approach to planning policy than would be appropriate to the interpretation of legislation.
6. The outline planning permission covered amongst other things
“mixed-use development for residential dwellings (C3)
including flexible live/work accommodation, residential care
accommodation (C2) and mixed workspace/retail

/café/restaurant/bar/public house/community/cultural/leisure uses (B1, A1, A3, A4, D1 and D2) including an element of flexible use, and associated infrastructure, with details of access.”

7. The planning officer’s report informed members that the application was compliant with CP6. Members were also informed that the application proposal included 4,181m² of non-residential floorspace. As is apparent, this area included an element of retail use which does not fall to be taken into account for the purposes of the relevant provisions of the policy.
8. Frome town centre is marked in yellow on the key diagram within the local plan. It comprises Saxonvale (item 1), the Westway centre (item 2) and Market Place (item 3). The dimensions cannot be deduced with any precision from an examination of the yellow area on what appears to be an indicative diagram, and I therefore asked the parties to submit further evidence. The Agreed LPP1 Policies Map extract shows that Saxonvale in terms of its footprint occupies about half of the Town Centre Development area¹ (the area bordered in orange of the map, and perhaps more clearly shown as such on the inset plan). What is described as the Saxonvale Development Area has approximately 60,000m² of available floorspace, assuming only one storey. The comparable floorspace for Westway is 9,926m². The policies map does not show a delineated floorspace for development within or on Market Place.
9. The 4,181m² figure is important for this reason. It is less than 50% of 11,850m² which is the headline figure for town centre redevelopment in CP6. The significance of this will soon become apparent.
10. Looking in more detail at the figures, the element of retail use within the outline grant has not, as I have said, been quantified. It follows that the extent to which the 4.181m² figure should be reduced correspondingly cannot be ascertained. On a similar theme, but militating in the other direction, the Defendant has not sought to contend that the shortfall of approximately 1,750m² (the difference between 5,925m² and 4,181m²) could be met by taking into account the development potential of 20% of Saxonvale (at best) referred to at §2 above. These two points may live to fight another day.

NATIONAL POLICY

11. Para 23 of the National Policy Planning Framework, 2012 edition (“NPPF, 2012”) obliges local planning authorities to promote competitive town centres. These are defined in the glossary with reference to a geographical location – not necessarily in the centre, or more accurately the middle, of the town, but clearly understood by anyone familiar with the area in question as the “heart” of the town. For present purposes the Town Centre Development Area of Frome forms part of the area marked in yellow on the key diagram. For the avoidance of doubt, all future references in this judgment to the town centre of Frome should be interpreted as references to the Town Centre Development Area. We have seen that by no means the whole of Frome town centre has been earmarked for potential development.

¹ Cross referring to Policy CP6c, sometimes described as CP6C.

12. Under the sixth bullet of para 23 of NPPF, 2012, LPAs are enjoined when drawing up local plans to ensure that the needs for main town centres uses are met in full and, in context, that these needs should be delivered in town centre themselves.
13. Para 24 of NPPF, 2012 is not concerned with planning policies, including local plans, but with planning applications. LPAs are required to follow a sequential approach in relation to such applications. In short:

“They should require applications for main town centre uses to be located in town centres, then in edge of centre locations and only if suitable sites are not available should out of centre sites be considered.”
14. Thus, local plans are expected to relate to town centres, and the extent to which there may be development for town centre uses outside town centres this falls to be addressed on a case-by-case basis, applying the sequential approach I have set out.
15. The present case is not in fact concerned with a non-town centre application. To the extent that national policy is relevant, I consider that para 23 of NPPF, 2012 is more helpful than para 24. There is force in the submission advanced by Mr Jack Parker in his reply that the relevant provisions of CP6 are supported by para 23 in that they emphasise that the needs of main town centre uses (see the sixth bullet of para 23, as summarised above) should be met within (albeit not necessarily exclusively within) geographical town centres.

THE LOCAL PLAN

16. CP3 and CP6 are concerned with the additional floorspace needs to meet employment expansion. Within the Frome area, the mid-range figure for projected job growth is 2,696. The total additional floorspace required to accommodate this need is 24,600m² of which 11,850m² is allocated to “town centre uses (excl. retail)” (see table 10). Educational uses are also excluded.
17. “Town centre uses” are defined in para 4.65 of the explanatory wording for CP3 as follows:

“At the other end of the spectrum are Town Centre Uses such as offices, hospitality, shops and leisure uses which, with appropriate design, can be readily integrated into most urban settings.”
18. At first blush, there is some attraction to the proposition that a “town centre use” *must* be delivered within the physical confines of a town centre. However, I accept the submission of Mr Christian Hawley for the Defendant that a “town centre use” is capable of being accommodated more flexibly. We have already seen that para 24 of NPPF, 2012 suggests a sequential approach (thereby permitting the possibility of straying outside the relevant envelope if all else fails), and paras 4.54 and 5.8 of this local plan are not prescriptive. Even so, accepting this submission does not open the door fully in the Defendant’s favour.
19. Para 2 of CP3 provides:

“The Council will plan for the creation of 9,410 new jobs in the period 2006-2029 and facilitate provision of land and premises in line with the amounts detailed in the following table to accommodate this growth and the needs of business in the area.”

The figures for Frome match those set out in table 10.

20. The third bullet of CP6 provides:

“Town centre redevelopments, including Saxonvale and, in the longer term, the Westway centre, (as identified in the Policies Map as CP6C), will collectively deliver:

- a medium scale foodstore including only an ancillary element of non-food goods – to supplement limited town centre choice and in turn draw back trade from out of town large format foodstores.
- Up to 7,000 sqm of non-food retail space in a range of unit sizes ...
- Residential uses and uses that enhance the attraction of the town to visitors and as an evening destination ...
- Creative and imaginative public realm improvements as well as new urban spaces which integrate new development areas with the town’s historic centre and which also incorporate and enhance the River Frome as a feature within the town centre.
- At least half of the 11,500 sqm of flexible office/studio space requirement (see Table 10) including a permanent site for FETE within the Saxonvale area.”

21. The battleground between the parties has been the fifth indent. It is common ground that the 11,500 figure is incorrect and that it should read 11,850 sqm. The reference to “flexible office/studio space” is a reference to the “town centre uses” set out in table 10, which in my judgment is in turn a reference to para 4.65 of CP3. It is also common ground that FETE is an educational establishment whose surface area is excluded from account.

THE RIVAL CONTENTIONS

22. In oral argument Mr Parker accepted that it was possible for some “town centre uses” to be accommodated outside the physical confines of Frome town centre. Mr Parker’s central submission was that the fifth indent of the third bullet point of CP6 should be interpreted as meaning that at least 50% of the total floorspace requirement should be fulfilled by redevelopments within Saxonvale. Given that 4,181m² is less than 5,925m², and that no reason was given by the planning officer for departing from the development plan (my slight, albeit necessary, elaboration of the Claimant’s case), the only proper

course on this premise was to have refused this planning application. His submissions in support of that overarching contention were as follows.

23. First, the fifth indent refers to two unconnected matters, the FETE site and the “at least half” etc. Given that these two topics relate to entirely different types of development, the only sensible reason for including them in the same indent is that they both relate to Saxonvale. Were it otherwise, there would have been a sixth indent.
24. Secondly, it is said to be “nonsensical in practice” to contend, as the Defendant does, that the true construction of this provision is that at least half of the flexible office/studio space requirement will be delivered through town centre redevelopments. This is because no explanation is given as to where the remaining <50% requirement should be delivered. It follows that the only sensible interpretation of the policy is that at least 50% of the identified need should be met through Saxonvale with the balance being satisfied elsewhere within the town centre.
25. Thirdly, Mr Parker recognised that the clause “will collectively deliver”, relating as it does to “town centre redevelopments” as a whole, must be a reference to all five indents. Mr Parker therefore had to deal with the contention that if the focus of the third bullet is *all* town centre redevelopment, one plausible reading of the fifth indent is that the 5,925m² figure is concerned with redevelopment within the town centre as a whole rather than redevelopment within Saxonvale. Mr Parker’s riposte was that the foregoing analysis would all be correct if and only if the fifth indent stopped after the closing of the brackets. However, and repeating his first submission, the express reference to Saxonvale in the fifth indent cannot be sensibly construed as relating only to FETE.
26. Fourthly, Mr Parker contended that as a matter of language and policy town centre uses should be delivered within the town centre.
27. Finally, and in the alternative to his second submission (on my numbering), Mr Parker strongly submitted that the only sensible construction of the fifth indent is that at least 50% of the specified need should be met in Saxonvale. In other words, he repeated his first submission but qualified it to this important extent: that the remaining need (i.e. the <50%) did not necessarily have to be met in the town centre but could be fulfilled elsewhere in Frome. That was the concession I have recorded at the start of §22 above.
28. Mr Hawley submitted that CP6 should not be construed as an allocation policy but as a high-level, indicative policy which sketched out how needs might be satisfied. In particular, the fifth indent could not be interpreted as setting forth any requirement to the effect *either* that the entirety of the need, including the balance of the less than 50%, be met in the town centre (the Claimant’s primary case) *or* that at least 50% of the need be satisfied within the parameters of Saxonvale with the balance being met elsewhere (the residual or alternative case). Indeed, submitted Mr Hawley, the Claimant’s subsidiary case ultimately collapsed into his primary case, and failed for the same reasons.
29. Mr Hawley submitted that the main issue with the final bullet was that reference to table 10 does not assist in determining what is meant by “flexible office/studio space”. There is no requirement for 11,850 sqm within the development plan. There is an identified figure for 11,850 sqm of “town centre uses (excl. retail)” which would include offices along with all the other uses non-exhaustively defined in para 4.65 of CP3. Mr Hawley’s

point, if I understood it correctly, was that the para 4.65 uses are not restricted to the town centre: he latched onto the clause, “can be readily integrated into most urban settings”.

30. As for the alternative formulation which Mr Parker developed for the first time in his oral submissions, Mr Hawley contended that an accurate consideration of CP3, CP6, Table 10 and the relevant explanatory text leads to the conclusion that at least half of the requirement for “town centre uses (excl. retail)” must be provided within the town centre as a whole and not be limited to Saxonvale, with the remainder being provided either in the town centre or elsewhere in Frome.

DISCUSSION AND CONCLUSIONS

31. HHJ Keyser KC in granting permission on this ground struck at the heart of the problem:

“I regard this ground as properly arguable and give permission for it. The most obvious argument against the proposed construction of Policy CP6 is that the indents under the third bullet are all ostensibly governed by “will collectively deliver”; this would indicate that the only site-specific requirement is the permanent site for FETE within the Saxonvale area. However, it is arguable that in this instance the structure of the third bullet point has led to a breakdown of strict grammar. Paragraphs 4.49ft of the local plan deal with “Supporting Business Development and Growth” and the needs of the Mendip economy. Paragraph 4.65 explains what is meant by “Town Centre Uses”. Table 10 in paragraph 4.67 shows the projected land requirements for different kinds of use, including 11,850sqm for Town Centre Uses in Frome. There is an obvious problem with a construction of CP6 that takes the final indent to set out a strategy of providing only half of the required land for such uses. This might suggest that the sensible construction of the Policy is that at least half of the 11,850sqm of required land (which is presumably what the 11,500sqm refers to) will be provided at Saxonvale (and that this provision will include the permanent site for FETE).”

32. I am able to travel a fair distance along the path set out for me by Mr Hawley but by no means far enough for his purposes. I agree that CP6 is not, strictly speaking, an allocation policy. I also agree, as I have said, that this local plan does not expressly require that all “town centre uses” must be accommodated within the Frome Town Centre Development Area. Such a local policy would, I think, be inconsistent with national policy and is also inconsistent with the paragraphs within the local plan itself that I have already identified.
33. However, the third bullet of CP6 does not lock into para 24 of NPPF, 2012. Rather, its more natural fit is paragraph 23. This third bullet is concerned with redevelopments within Frome town centre, including Saxonvale. It is not concerned with redevelopments outside Frome town centre. These redevelopments, including Saxonvale, “will collectively deliver” the five (or, possibly, six) objectives set out in

the various indents which ensue. These objectives include retail and residential uses as well as “creative and imaginative public realm improvements”. Save for the fifth indent where there is room for debate, all of these objectives will clearly be delivered within the town centre and not elsewhere.

34. This brings me to the fifth indent. Mr Hawley described it as “ambiguous” but a more accurate description would be that it is poorly drafted. It would certainly benefit from the insertion of punctuation. What is clear is that the reference to the “flexible office/studio space requirement” in table 10 must be to the 11,850m² figure in that table which itself refers to “town centre uses (excl. retail)”. This, in turn, is a reference to what is set forth in more detail in para 4.65 (see §17 above). It may therefore be seen that the somewhat elaborate arguments raised under paras 31-35 of Mr Hawley’s written submissions are not correct.
35. It is not just the absence of punctuation that bedevils this provision. The FETE educational site, undoubtedly to be provided within Saxonvale and nowhere else, is completely different in character from the “flexible office/studio space” stipulation. This uncomfortable combination of developments or redevelopments which do not belong together under the same rubric has brought about the present difficulty.
36. The competing submissions of both parties are quantitative and comparative in the following specific sense. The Defendant’s contention as to the meaning of the fifth indent is that at least 50% of 11,850m² floorspace should be delivered within Frome town centre as a whole. That is the quantitative element. The comparative element is implied: if at least 50% must be provided in one particular location, it follows that the balance must be provided elsewhere. The Defendant’s contention is that the elsewhere is anywhere else in Frome, not excluding the town centre. The Claimant’s submission in relation to the quantitative element is that the geographical space within contemplation is smaller (i.e. just Saxonvale). As for the comparative element, the Claimant’s primary submission is that the balance of the requirement must be accommodated within the town centre alone (thereby differing from the Defendant’s argument) whereas his alternative case is exactly the same as the Defendant’s.
37. Particularly if the focus is on the Claimant’s alternative case (and I have already rejected his primary case), it may be seen that the divergence between the parties’ respective positions is very narrow. Moreover, the foregoing analysis shows that it does not matter that strictly speaking this is not an allocation policy. Both parties’ submissions are predicated on what I have called a quantitative element.
38. Had there been a comma after the end of the parenthesis, Mr Hawley’s case would have been stronger. It would have been even stronger if the draftsman had substituted “and” for “including”. It would have been irresistible had there been a fifth indent in these terms, and also a sixth:

“- at least half of the 11,500 sqm of flexible office/studio space requirement (see Table 10)

- a permanent site for FETE within the Saxonvale area.”

I use the adjective “irresistible” because the reference to Saxonvale within the sixth indent would be location specific whereas on my redrafted version the fifth indent

would on a natural interpretation of the third bullet in its entirety have to relate to the town centre as a whole. The reference to “town centre redevelopment” in the preamble coupled with the clause “will collectively deliver” would – on this hypothesis - lead to the conclusion that the fifth indent concerns itself with the town centre as a whole and not with any particular area within it.

39. However, I am not construing this hypothetical wording but the actual wording of the fifth indent. The third bullet point as a whole is concerned with town centre redevelopments, but the wording of the fifth indent appears to be looking at a narrower geographical space. The delivery of this development solely within Saxonvale is wholly consistent with the overall policy objective of enhancing the town centre as a whole. Seen as part and parcel of a nest of provisions, the fifth indent will play its role in collectively delivering that objective.
40. It is true that had there been a comma after the end of the parenthesis and then a second comma after FETE, Mr Parker’s case would have been unanswerable. The absence of punctuation harms the Claimant’s case albeit not to the same extent as it harms the Defendant’s. Even without this additional punctuation, I consider that the more natural reading of the fifth indent is that it is concerned with development within the Saxonvale area. This is explicitly the case in relation to the FETE establishment. I have said that putting two different things within the same paragraph is uncomfortable, but in my view the upshot is all the more uncomfortable if the contention be that under the terms of this local plan the at least 5,925m² of the town centre use requirement could be delivered in Frome town centre as a whole rather than in Saxonvale in particular. There is force in Mr Parker’s submission that the fifth indent, in its two different aspects, is concerned just with Saxonvale.
41. A further question is whether the interpretation I have just advanced, reflecting as it does a textual or linguistic approach, is supported or contradicted by the policies and objectives of the third bullet as a whole. In this context I turn to the further purposive argument highlighted by HHJ Keyser KC. Let me elaborate in this way. Even if the delivery of town centre uses outside the Frome Town Centre Development Area were possible, that is not the preferred option. Both national and local policy point to the obvious desirability and good sense of town centre uses being delivered within Frome town centre. It follows that local policy makers would surely have been aspiring to considerably in excess of 50% of the 11,850m² town centre use requirement being delivered in the town centre. That aspiration *is* achieved by limiting the “at least half” of the relevant figure to Saxonvale, but it would be thwarted if that metric were to apply to the town centre as a whole. On the Defendant’s argument up to 50% of town centre uses could be provided outside the Frome Town Centre Development Area with nowhere in particular for such a potentially high level of use having been identified in the local plan.
42. This consideration is even more persuasive when the respective surface areas of Saxonvale and Westway are taken into account. Given that Saxonvale comprises at least 80% of the Frome Town Centre Development area, it is hardly surprising that local planners should be insisting that at least half of the 11,850m² requirement should be met within Saxonvale.
43. In short, on the approach which I have favoured the fifth indent ensures that the overall policy objectives will be fulfilled, not least because the focus on Saxonvale reflects the

practical reality that this is by far the largest area within the town centre that is ripe for redevelopment, with the sole alternative option being both smaller and more uncertain as to timescale.

44. I have accepted the Defendant's submission that *part* of the town centre use requirement could be met outside Frome town centre. When it comes to development which is not within the fifth indent, because it does not fall within the "at least half etc." provision, I also agree with Mr Hawley that para 24 of NPPF, 2012 considerations are relevant. At that stage of the decision-making process, the Defendant would still, in practice, be prioritising applications for "town centre use" development within Frome town centre. However, these factors provide too flimsy a support for the Defendant's case, placing as they do too much weight on para 24 of NPPF, 2012 and too little weight on para 23. Para 24 considerations are relevant to the determination of individual planning applications but not to the formulation and interpretation of local plans. Nor can these factors begin to displace what I have said under §§41-42 above.
45. Overall, therefore, a combination of a linguistic and a purposive approach has driven me to conclude that the Claimant's case, in its alternative formulation, is correct.

DISPOSAL

46. This claim for judicial review succeeds. The planning permission granted on 30th August 2022 must be quashed.