APPENDIX LIST

3  Coventry City Council, Core Strategy DPD Examination Inspector’s Report 2013

4  Mid Sussex District Council, District Plan Inspector’s Report 2013

5  Bolsover District Council, Local Plan Strategy Inspector’s Report 2014

6  Samuel Smith Old Brewery (Tadcaster) v Selby District Council [2015] EWCA Civ 1107, 2015
Introduction

1. On the 13 December 2012 an exploratory meeting was held at which I set out my concerns about whether in the preparation of the Coventry Local Development Plan – Core Strategy (the Plan) Coventry City Council (the Council) had discharged its duty to cooperate as required by Section 33A of the Planning and Compulsory Purchase Act 2004 (the 2004 Act). A minute of the meeting has been published [ExM2] as have the Council’s comments on these [CCC5].

2. Following this meeting I wrote to the Council on 17 December 2012 confirming my reservations about whether the Council had discharged its duty to cooperate and setting out an agenda for a preliminary hearing session. [IC6]

3. Subsequently on the 1 February 2013 a preliminary hearing session was held to consider this matter further. Specifically the point at issue was whether the Council had engaged constructively, actively and on an ongoing basis with neighbouring local planning authorities on the strategic matter of the number of houses proposed in the Plan and in so doing had maximised the effectiveness of the plan making process?

4. There was no discussion at the preliminary hearing session about the soundness of the Plan. Discussions were limited to whether or not the Plan was lawful – the point being that if it were decided that the Council had not carried out its statutory duty to cooperate then there would be no remedy, the Plan would be unlawful and the Examination would proceed no further.

Background

5. Before considering the duty to cooperate further it is useful to set out the background to the Plan. The situation in Coventry is highly unusual, if not unique, in that the Council has withdrawn a Core Strategy that was found sound in 2010. That withdrawn Core Strategy made provision for some 33,500 dwellings (26,500 of which would have been in Coventry, 3,500 in Nuneaton and Bedworth and 3,500 in Warwick). The Plan, on the other hand, makes provision for 11,373 houses – a significant reduction in housing numbers.

6. The Council confirms that one major reason for this withdrawal was the collapse of the sub-regional agreement which underpinned the previous Core Strategy. This occurred when Nuneaton and Bedworth Borough Council withdrew from its commitment to accommodate 3,500 houses. In the Council’s view this left it with an undeliverable plan.

7. A number of representors also point to the change in political control within the Council and the emergence of a clear political mandate that sites within the Green Belt would not be released for housing.

8. It is also relevant to note that the Plan only seeks to make provision for Coventry’s own housing requirements while the withdrawn Core Strategy made provision for housing requirements originating in south Warwickshire,
particularly Warwick and Stratford. It is, however, unclear what role this has played in the reduced housing figures now being proposed.

The Duty to Cooperate
9. In paragraph 3.10 of the Plan the Council acknowledges that it has a duty to cooperate but goes on to state that “...it is not yet clear what, when or how this can be demonstrated...” While this statement has introduced an element of doubt into the minds of representors as to whether the Council understood the requirements of the duty to cooperate, the Council considers it simply acknowledges that this is an area that would benefit from appropriate guidance – a point also made in the Taylor Review.
10. In my view there is little to be gained from undertaking a forensic analysis of this sentence. It is more relevant to assess what the Council actually did in seeking to discharge its duty to cooperate and to consider this in the light of the advice that does exist, most notably in the National Planning Policy Framework (the Framework) paragraphs 178 to 181.
11. The Council’s efforts to comply with the duty to cooperate are set out in its Duty to Cooperate Topic Paper [CS22] as amplified in its responses to my questions on this matter [CCC1].
12. Broadly speaking the Council has sought to cooperate with local planning authorities in the metropolitan area through its involvement with The Metropolitan Area’s Duty to Cooperate and Finish Group and to cooperate with local planning authorities in Warwickshire through its membership of The Coventry, Solihull, Warwickshire Association of Planning Officers.

Cooperation within the Metropolitan Area
13. The Metropolitan Area’s Duty to Cooperate and Finish Group produced a document entitled The Strategic Policy Framework for the West Midlands but this has nothing direct or specific to say about housing numbers in the Plan. Nonetheless, relatively late in the process of preparing the Plan, one of the members of this group, Birmingham City Council, made representations to the effect that the Council had not met its objectively assessed need for housing or explained how any shortfall would be accommodated. It was concerned that this could have knock on implications for Birmingham and other local planning authorities. This was not a matter on which the Council and Birmingham City Council were able to reach agreement.
14. However, while this sends a signal that cooperation on the matter of housing requirements had not been entirely constructive – a matter I will return to – the nub of the dispute between the two Councils is whether Coventry had taken the ‘right’ approach to assessing its housing requirements and this is not an issue of lawfulness but rather an issue of soundness.

Cooperation within Warwickshire
15. The Coventry, Solihull, Warwickshire Association of Planning Officers has produced a Draft Statement of Common Ground and Cooperation for the Coventry, Solihull and Warwickshire Sub-Region (SOCG). This has been signed by the Chief Executive Officers of the Warwickshire Councils and endorsed by members of the Council and of North Warwickshire District Council. The intention is that it will also be endorsed by the members of other Warwickshire Councils. Solihull Metropolitan Borough Council did not participate in drawing up this statement and will not sign it.
16. One of the members of this group, Nuneaton and Bedworth Borough Council, has made representations on the Plan questioning whether Coventry is proposing to meet its long term housing requirements and expressing concern over the implications of it not doing so. Once again, however, this is a situation where the nub of the disagreement between the Councils relates to whether Coventry had taken the ‘right’ approach to assessing its housing requirements and this is a matter of soundness not of lawfulness.

17. However, as with the representations from Birmingham City Council, it does send a message that cooperation in this matter has not been entirely constructive. Indeed Nuneaton and Bedworth are of the opinion that while the SOCG identifies matters of cross boundary interest it does not resolve them.

The SOCG

18. It is necessary, therefore, to look in more detail at what the SOCG says. Under the sub heading ‘Level of Housing Provision’ four points are made in this document. Firstly paragraph 4.1 states that although there is no sub-regional Strategic Housing Market Assessment (SHMA) there is broad consistency between the methodologies and assumptions used in individual SHMAs.

19. Secondly, paragraph 4.2 states that the current interpretation of evidence shows that all member authorities are capable of meeting their housing requirements within their borders and there is no requirement for any local authority to meet any part of its housing requirements in another area.

20. Thirdly, paragraph 4.3 states that local planning authorities in the sub-region will continue to plan to accommodate their own needs. This is, I note, different to the situation which prevailed with the previous Core Strategy where Coventry was accommodating housing requirements originating in the south of the County.

21. Fourthly, paragraph 4.3 states that if an authority cannot accommodate its own needs (because an increased housing requirement and because of strong evidence of constraints on the provision of housing sites within its boundaries) then, and only then, would the shortfall be addressed through discussions with neighbouring authorities within and beyond the sub-region.

22. Dealing with these points in reverse order. In my view the mechanism for dealing with any shortfall in housing provision amounts to no more than an agreement to seek to agree in the future. It simply says that, if it arises, a shortfall will be discussed with neighbouring authorities but there is no commitment from those authorities to assist in remediying the shortfall.

23. As to the statement that local planning authorities will continue to plan for their own needs, the significance of this depends to a degree on the consistency of the evidence which demonstrates that they can accommodate their own needs. This in turn, when we are discussing housing, depends to a considerable extent on the robustness of the statement that there is broad consistency between the methodologies and assumptions used in individual SHMAs.

24. The Coventry SHMA [CSH2] that will be discussed further below is a comprehensive document which examines a wide range of factors which influence the need and demand for market and affordable housing. It is neither necessary nor appropriate at this time to discuss the content of this document in detail, it is sufficient to note that, as with many such documents, it contains various population projections and the housing figures that emerge depend on the projection selected.

25. In the Coventry SHMA an economic led projection based on a forecast of employment growth derived from the West Midlands Integrated Policy Model
was selected as providing the most appropriate basis for Coventry’s future housing requirements. This projection produced the second lowest population figure of all the alternative projections considered and is presumably the basis for the reference on page 13 of the Coventry SHMA to it ‘taking a more cautious approach to future housing provision in the City than indicated by recent population trends...’.

26. This is not the place to discuss the rights and wrongs of this approach. However, Coventry forms part of a sub-regional housing market area including not only Coventry itself but also Nuneaton & Bedworth Borough Council, Rugby Borough Council and Warwick District Council. It is, therefore, relevant to explore whether the SHMAs relied on by those other councils base their recommended housing figures on the West Midlands Integrated Policy Model.

27. Rugby Borough Council, which has an adopted Core Strategy, did not use this model, its housing figures are derived from 2004/6 household projections. Nuneaton and Bedworth Borough Council is not using this model. It has commissioned a different economic model - how different it is has yet to be established - which will feed into a joint SHMA that it proposes to prepare with Rugby Borough Council and North Warwickshire District Council.

28. Warwick District Council, which now shares Group Manager of Planning and Building Control/Head of Development Services with the Council, prepared a SHMA using the same consultants as the Council. The housing figures which emerged from this were derived from population projections and not from the West Midlands Integrated Policy Model, although that model was the basis for one of the projections in the SHMA. Since then further work has been commissioned in connection with a major planning application proposing up to 14,000 jobs and this work does make use of the West Midlands Integrated Policy Model. Warwick District Council is now looking afresh at the evidence base for its plan with a view to incorporating this evidence.

29. It is not possible from this to conclude with any certainty that there was broad consistency between the methodologies and assumptions used in individual SHMAs when the SOCG was drawn up or that there is now. At best the situation can be described as fluid with one council moving towards taking an approach that is consistent with Coventry’s while others are apparently not.

30. This is significant because the lack of broad consistency in the way housing need is being calculated between the various local planning authorities in the Coventry housing market area calls into question the statement that they are all capable of meeting their housing requirements within their borders and that consequently there is no requirement for any local authority to meet any part of its housing requirements in another area.

31. It also makes it difficult to judge whether the full and objectively assessed need for market and affordable housing in the housing market area is being met as paragraph 47 of the Framework makes clear should be done.

32. The Council considers this paragraph to be ambiguous. They ask whether it means Coventry should meet the whole needs of the housing market area, or should it set housing targets for its neighbours or does it mean that it should use the best available evidence to identify the needs for market and affordable housing?

33. To my mind this ambiguity falls away if the need for market and affordable housing has been consistently assessed, for example by way of a joint SHMA. In order to consider the question of a joint SHMA it is necessary to look in more detail at the background to the preparation of the Coventry SHMA.
Coventry SHMA
34. As has already been established the housing market area for Coventry crosses local authority boundaries.

35. Clearly the Council was aware of the benefits of a joint SHMA because in March 2011 it initiated discussions with neighbouring councils with a view to undertaking just such an exercise. This did not prove possible. North Warwickshire District Council, Rugby Borough Council and Warwick District Council confirmed that they were too far advanced in their work to take part in a joint SHMA. Nuneaton and Bedworth Borough Council did not make a definite response but has subsequently stated that the approach was made to its Housing Department and its Planning Department did not know about the Coventry SHMA until it had been commissioned.

36. Consequently Coventry prepared its own SHMA which, as it acknowledges at paragraph 2.60 of Housing Topic Paper [CS24], does not consider wider housing needs or requirements.

37. It is relevant to note that this approach to neighbouring local planning authorities took place before the duty to cooperate came into force in November 2011 and before the publication of the Framework in March 2012 - paragraph 159 of which specifically states that, where housing market areas cross administrative boundaries, local planning authorities should work with neighbouring authorities in preparing a SHMA to assess their full housing needs.

38. While the Council accepts at paragraph 2.60 of the Housing Topic Paper that the SHMA ‘...could be considered to lack some cooperation with Para 159...’, it did not treat the introduction of the duty to cooperate or the publication of the Framework as a prompt to renew its efforts to produce a joint SHMA.

39. The Council is of the view that the use of the word ‘should’ in paragraph 159 implies that it will not always be possible to produce a joint SHMA. Respondents point out that paragraph 159 also states that local planning authorities ‘should’ have a clear understanding of housing needs in their area and it would be a nonsense to interpret this as meaning that there may be circumstances in which this is not possible.

40. However, whatever the merits of these arguments, there are a number of reasons why the production of a joint SHMA is particularly important in this instance.

41. Firstly, reference has previously been made to the breakdown in the sub-regional agreement that underpinned the withdrawn Core Strategy. While such a breakdown will not have created particularly fertile ground for cooperation it should, paradoxically, have emphasised the critical importance of effective cooperation in assessing housing needs.

42. Secondly, during the preparation of the SHMA it will also have become apparent that the assessment of housing need that was emerging (11,373 dwellings) was significantly different to that in the withdrawn Core Strategy (33,500 dwellings, 26,500 of which would have been in Coventry, 3,500 in Nuneaton and Bedworth and 3,500 in Warwick) – a Core Strategy which had recently been found sound. Such an abrupt change in approach towards housing provision could, on the face of it, have an effect on neighbouring local planning authorities in the housing market area and is another reason why further consideration should have been given to cooperating with them to ensure a consistent approach to the assessment of housing need.

43. Thirdly, it will also have become apparent during the preparation of the SHMA that the emerging assessment of housing need, unlike those of neighbouring...
local planning authorities, was well below that of the Phase II Review of Regional Strategy for the West Midlands.

44. Phase II is not, however part of the development plan and there is no reason in principle why its assessments of housing need should not be replaced by more up to date local assessments. They do, however, provide a useful point of comparison which gives some indication that housing needs may not be being assessed in a consistent way across the housing market area. The preparation of a joint SHMA would have avoided such an apparent anomaly.

45. Fourthly, it is also the case that two neighbouring Councils (Birmingham City Council and Nuneaton and Bedworth Borough Council –the latter being in the same housing market area as Coventry) have expressed concern about the Council’s apparent under provision of housing and the effects that this would have on them. This is another indication of the merits of producing a joint SHMA in which a common approach to the assessment of housing need would be considered and agreed.

Conclusions

46. The duty to cooperate plays a critical role in the planning process. It is the mechanism for ensuring that, to use the words of paragraph 179 of the Framework, “...strategic priorities across local boundaries are properly co-ordinated and clearly reflected in individual Local Plans.” The importance of this role is emphasised by the severity of the sanctions which apply if this duty is not discharged - in other words the Plan would be found unlawful and there would be no remedy for this.

47. In this instance the Council accepts that the level of housing provision is a strategic priority planning issue that crosses local boundaries. However, it has not collaborated with its neighbours to produce a joint SHMA for the housing market area even though paragraph 159 of the Framework says it should and even though there are a number of factors, enumerated above, which point to the desirability of it doing so. It cannot, therefore, be established that the needs of the housing market area have been considered in the round.

48. In seeking to demonstrate that it has complied with the duty to cooperate the Council lays emphasis on the SOCG which it has signed along with neighbouring authorities. However, as far as the Coventry housing market area is concerned, the significance of this SOCG is undermined by the absence of a joint SHMA - a crucial piece of evidence in understanding the housing needs of the area - and uncertainty as to whether individual SHMAs have used broadly consistent methodologies and assumptions.

49. This in turn undermines the statement, insofar as it relates to the Coventry housing market area, that each council can meet its own housing need within its own area. Finally the mechanism for dealing with any shortfall, should one arise, is no more than an agreement to seek to agree in the future.

50. These factors significantly reduce the overall substance of the SOCG in as far as it relates to the Coventry housing market area. I share the view expressed by Nuneaton and Bedworth Borough Council that while the SOCG identifies matters of cross boundary interest it does not resolve them.

51. As the Council points out, cooperation is not a one way street and it would have been open to its neighbours to take more of an initiative in cooperating with Coventry. It notes, in particular, that Nuneaton and Bedworth Borough Council has, it considers, declined an invitation to prepare a joint SHMA and then objected on the basis that a joint SHMA has not been prepared.
52. But it is the Council and not its neighbours that has submitted its plan for examination and it is the Council not its neighbours that is required to demonstrate that it has discharged its duty to cooperate.

53. It is clear from the evidence that it has not ignored the duty to cooperate and it has actively sought to discharge that duty on an ongoing basis. However, that is not the end of the story. Section 33A of the 2004 Act also requires the Council to engage constructively with its neighbours. The evidence does not show that cooperation between Coventry and its neighbouring councils has been constructive, as required by the 2004 Act, or effective as is expected by paragraph 181 of the Framework.

54. I conclude, therefore, that the Plan does not meet the legal requirements of the 2004 Act in that the Council has not engaged constructively with neighbouring local planning authorities on the strategic matter of the number of houses proposed in the Plan and consequently it has not sought to maximise the effectiveness of the plan making process.
To: Claire Tester  
Head of Economic Promotion and Planning  
Mid Sussex District Council

Dear Ms Tester

**Mid Sussex District Plan**  
**Duty to Co-operate**

1. Further to the Exploratory Meeting (EM) held on 16 September 2013 and the Hearing Session held on 12 November, I set out below my conclusions with regard to the duty to co-operate (the duty).

Preamble

2. At the hearing session the Council stated that there were inaccuracies in the evidence submitted by Brighton and Hove City Council on behalf of four local planning authorities. Brighton and Hove were not represented at the session and therefore, at my request, Mid Sussex District Council documented the alleged inaccuracies and the documentation¹ was sent to the four objecting authorities (and other interested parties) for their comment. I have taken into account the assertions of the Council, and the responses received, in my consideration of whether or not the duty has been met.

3. The response from the four coastal local planning authorities (submitted by Adur and Worthing Councils) confirms that in their view there are no factual inaccuracies in their statement²; rather there is a difference of opinion between them and Mid Sussex District Council. The response concludes by suggesting that I should take a flexible approach and proceed with the examination ‘as this would enable the housing issues to be considered in detail’. Similarly one participant at the hearing session suggested I could adopt some form of sliding scale that would enable me to conclude that, although in his view the Council had not fully met the requirements of the duty, it had made sufficient progress to be deemed acceptable. There is no room for such flexibility in the legislation – either the requirement has been met or it has not and it is on that basis I have considered the evidence.

4. At the EM it was suggested that if the submitted District Plan (DP) (which covers the period up to 2031) were to be found sound, then it should be subject to an early review, which would be based on a thorough assessment of cross-boundary issues. However, the legislation on the duty does not provide for such an approach to be followed.

¹ MSDC - 12  
² Ref: 16438-01
Background

5. The National Planning Policy Framework (NPPF) confirms that public bodies have a duty to co-operate on planning issues that cross administrative boundaries, particularly those that relate to strategic priorities, such as the delivery of homes and jobs needed in an area. The duty requires the Council to have engaged constructively, actively and on an on-going basis. Strategic priorities across local boundaries should be properly co-ordinated and clearly reflected in individual local plans. The implication is that local planning authorities should work together to assess the opportunities that exist for the substantiated unmet development requirements of one local authority to be met within the area of one or more nearby local authorities. The NPPF was published over a year before the DP was submitted for examination.

6. For the DP to be found sound it must be positively prepared and effective. This means it must be based on effective joint working on cross-boundary strategic priorities and where appropriate and sustainable, on a strategy which seeks to meet unmet requirements from neighbouring authorities.

7. I have taken into account the fact that there is no duty on local planning authorities to agree to accommodate the needs of a neighbouring authority but if that is the conclusion that has been reached, it must be based on clear and robust evidence and on a proper consideration of all the issues.

8. I believe that the Council understands the responsibility it has in terms of the duty. For example there are references to the duty in a Report to the Council on the Revised Draft District Plan (27th June 2012)\(^3\) and in the Agenda for Scrutiny Committee for Planning and Economic Development dated 18th July 2012\(^4\).

9. In a Report to West Sussex Joint Leaders (which includes Mid Sussex) dated 4 October 2012\(^5\) it is stated that:

   - there has to be evidence of meaningful cross-boundary working and the early signs are that Inspectors will be expecting to see positive outcomes from this work (para 5.1)
   - there is a need for the relevant authorities to agree which 'larger than local' issues need to be addressed and to agree the mechanisms for co-operation and collaboration. The outcomes of engagement also need to be captured (para 5.2); and
   - the duty cannot be met retrospectively; that is work cannot be undertaken following submission of a local plan to make it legally compliant (para 5.6)

10. Appendix B of that Report (extract from Draft Strategic Priorities Schedule) confirms that, for example in terms of housing provision, Mid

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\(^3\) Core document EP27(i)
\(^4\) Core document EP30
\(^5\) Core document: MSDC-06 (Appendix B)
Sussex should be seeking co-operation with the Councils of Adur, Arun, Crawley, Horsham, Worthing, Brighton and Hove and Lewes and the South Downs National Park Authority. It is Brighton and Hove (on behalf of three other Councils) that has submitted a representation that concludes that Mid Sussex has not met the duty with regards to housing provision (ref: 16438).

**Processes Undertaken**

11. The Council did not establish a robust framework within which ‘co-operation’ could be monitored – for example in terms of frequency, issues to be addressed, outcomes to be anticipated and bodies to be involved. Rather than follow the advice in the Report referred to in paragraph 9 above, regarding agreeing ‘the mechanisms’, the Council appears to have taken a rather ad hoc approach and relied on existing established meetings to give consideration to the duty. The Council argued that there is no specific requirement in the legislation to take a structured approach, and that is correct. However, the Council needs to demonstrate co-operation, co-ordination and continuous engagement and one way this may be achieved is through a more transparent process that can be appropriately managed and monitored.

12. In a Report to the Scrutiny Sub Committee for Planning and Economic Development (5th March 2013) entitled ‘Housing Numbers for the District Plan’ (EP31), paragraph 28 confirms that ‘discussions with neighbouring authorities need to continue over the next few months to clarify their positions and agree mechanisms for addressing cross-boundary issues where practical and consistent with the strategy and objectives of the District Plan’.

13. Firstly there is no record of any significant ‘mechanisms’ having been agreed prior to the submission of the DP and secondly the officer appears to be precluding any discussions if they relate to issues that might conflict with the Council’s strategy and objectives of self-containment. Neither of these factors add weight to the Council’s contention that it has met the duty.

14. Although I have not tested the evidence in the updated Housing Market Assessment (October 2012) I do consider that it represents a level of joint working between Mid Sussex, Crawley and Horsham. And there are other examples of where these three local planning authorities have co-operated. However, no similar approach has been taken towards the Sussex Coastal local planning authorities. I acknowledge that there are two different housing market areas involved but, as the Council agreed, the boundaries of such areas cannot necessarily be considered to be discrete.

15. One of the ‘Next Steps’ in the Sussex Coast HMA Partners Housing Study (Duty to Co-operate), which was published in May 2013, was ‘to consider with adjoining authorities longer-term development options, potentially

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6 Paragraph 6.55
working jointly with other authorities within Northern West Sussex’. I am
told by Brighton and Hove City Council that a meeting took place in
August 2013 at which Mid Sussex was present and at which it was
confirmed that a Duty to Co-operate Agreement would be prepared.
However, this is too late in the process to have any consequences for the
content of the submitted DP.

Has Engagement been Constructive?

16. There has been engagement between nearby local planning authorities
but there is little evidence that the Council has approached the matter in
a helpful and positive way. Meetings have been held and doubtless
appropriate issues have been discussed but it needs to be demonstrated
that appropriate conclusions have been drawn at those meetings and that
the Councils have acted on those conclusions. It is inevitable that there
will be difficult issues to address. An example is the situation regarding
the proposed Memorandum of Understanding between Mid Sussex and
Lewes Councils, which was drafted over 18 months ago but which has not
been signed. This does not indicate that a constructive approach has
been adopted.

Has Engagement been Active?

17. The Council prepared Appendix D of MSDC/06 (a list of meetings) but it is
difficult to draw conclusions regarding the effectiveness of these meetings
because any ‘outcomes’ that are recorded are succinct. However, it is
clear that meetings between Mid Sussex and Lewes have taken place
since March 2010 and with Brighton and Hove (and other coastal
authorities) since June 2012. At the meeting on 18th June 2012 I am told
that the ‘constraints of each authority’ were discussed, so although I have
not been given any Minutes, I consider it likely that the issues of
accommodating objectively assessed housing need were addressed. This
would tie in with the formal request from Brighton and Hove City Council
dated September 2012 for Mid Sussex to consider meeting some of its
housing need8.

18. With regard to that request Brighton and Hove notified Mid Sussex that
such a request would be forthcoming at an officer meeting on 6
September 2012 but the recorded outcome of that meeting in MSDC – 06
(Appendix D) was ‘agreement to meet again’. There is reference to a
meeting on 7 December 2012, which discussed the potential for a
Statement of Common Ground but no such Statement had been agreed at
the time the DP was submitted.

19. The evidence indicates that a number of local planning authorities in the
area will be unable to meet their objectively assessed housing needs in a
sustainable way. Whilst I understand it is not always easy to take an
active approach in terms of considering the needs of other local planning
authorities and also that localism has a role to play in any deliberations,

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7 Statement 16438 -01
8 Appendix B of EP31
those factors should not be seen as a reason to take a back seat and rely on others to seek solutions to cross-boundary problems.

20. A wide range of interested parties have been consulted by the District Council but it is worth recording that in Appendix E of MSDC - 06 under policy DP5 – Housing, the bodies listed by Mid Sussex as being ‘involved in co-operation’ do not include Brighton and Hove or any of the other coastal authorities.

Has Engagement been On-going?

21. Co-operation should start with the ‘initial thinking’ (NPPF paragraph 181) and evidence of effective co-operation should be demonstrated at the time the Local Plan is submitted. There has been much recent activity in terms of demonstrating that co-operation has occurred but little evidence that this principle was embedded in the Council’s approach during the earlier stages. For example, between the Council publishing the draft DP for consultation in November 2011 and the submission of the DP in July 2013 there are a number of instances when the issue of co-operation has been raised. However, there is no indication in the submitted plan that serious consideration has been given to the concerns that were voiced. The opportunity was there for the Council to conclusively demonstrate, one way or the other, that it had considered the concerns of nearby local planning authorities and drawn appropriate conclusions. However, there are no significant references in the DP to any cross-boundary issues. The meetings that have been held could not accurately be described as frequent and the evidence does not demonstrate that consideration of cross-boundary issues has been taking place from ‘initial thinking’.

Has Engagement been Collaborative?

22. I have considered all the evidence submitted but my attention was drawn by the Council to what it described as three examples of collaborative engagement.

23. The *Gatwick Diamond Local Strategic Statement and Memorandum of Understanding* (EP20 and EP21) are dated March 2012 and I was told they are currently under review. The Memorandum is a brief document which broadly establishes the objectives of joint working in the Gatwick Diamond. It commits the local planning authorities to developing and implementing ‘a programme for jointly addressing strategic planning and development issues’ but I have seen no such programme.

24. The *Northern West Sussex Position Statement* indicates that consideration is being given by Mid Sussex Council to issues of concern in Crawley and Horsham. However, the Statement is dated September 2013, so has been agreed following submission of the District Plan. The document acknowledges (in the paragraph numbered 6.17) that the local plans being prepared by the three Councils ‘will not fully meet objectively

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9 MSDC - 08 (under 1.1)
10 MSDC - 02
assessed housing needs’ and in paragraph 6.15 it is confirmed that technical joint working on housing requirements and discussions on housing delivery will continue. The issue has therefore not been satisfactorily resolved. Crawley is one of three Councils that has informally indicated that it may request Mid Sussex to consider accommodating some of its unmet housing needs (paragraph 7 of EP31).

25. The third example cited is the **Statement of Common Ground** between the Council, Brighton and Hove, Lewes, all the West Sussex local planning authorities, Eastbourne and Wealden Councils. However, the copy attached to the Council’s statement only has one signatory (Mid Sussex) and it is dated 21 October 2013 – well after submission of the District Plan.

26. Other documentation submitted includes a draft Memorandum of Understanding between Mid Sussex and Lewes Councils dated 26th April 2012 but this has not been progressed and in my opinion provides an indication that the commitment to the duty is not being appropriately fulfilled and that collaboration is currently failing. With regard to Adur and Worthing it is stated\(^\text{11}\) that since January 2012, when Mid Sussex was alerted to likely capacity constraints, no ‘joint approach on housing provision’ has taken place.

27. My broad conclusion with regards to the evidence submitted by the Council is that it demonstrates that although mechanisms are being put in place to engender co-operation, these should have been available earlier in the plan making process, thus ensuring that the DP is truly based on a collaborative process. I accept that it is inevitable that different Councils will be at different stages in terms of plan preparation but that is not the case with all the nearby Councils (e.g. Brighton and Hove) and I would have expected more robust evidence of collaborative engagement. No joint committees have been established specifically to address the Duty to Co-operate and no joint planning policies are currently proposed. At the time of submission no Memoranda of Understanding had been signed. This reflects a lack of positivity and commitment to joint working.

28. In response to the request from Brighton and Hove in September 2012 for joint consideration of the issues (Appendix B of EP31) the Council states that until work on producing evidence for the DP has been completed ‘we will be unable to respond to your request’. It seems to me that this would have been an appropriate time for the Council to have engaged with nearby local planning authorities, before decisions on the submission version of the DP had to be made. This would have contributed to the evidence that the Council was collecting and would have demonstrated collaborative working for mutual benefit.

*Has Engagement been Diligent?*

29. No in-depth analysis of the issues facing the local planning authorities in the area has been undertaken and no robust assessment of how those

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\(^{11}\) Statement 16438 - 01
issues should be addressed has been prepared. The lack of commitment to seeking a way forward is demonstrated by the lack of progress on the Memorandum of Understanding between Mid Sussex and Lewes Councils. Therefore in terms of fulfilling the duty I would describe the foundations upon which the approach of the District Council is based, as at best, shaky.

*Has Engagement been of Mutual Benefit (the broad outcomes)?*

30. Clearly the answer to this question must be no, because there are objections to Mid Sussex’s approach from four nearby local planning authorities. Mutual benefit has not been sought yet alone achieved. As I have intimated elsewhere, it may not be possible to achieve a high level of mutual benefit but if that is the case then the evidence has to be available to demonstrate that at least the achievement of mutual benefit has been sought.

31. The DP does include a table entitled strategic objectives (page 9), but they appear to be based on a concept of self-sufficiency and there is no reference to any cross-boundary issues. At the hearing session the Council confirmed that it considers the strategic priorities of the area to include housing, employment, infrastructure provision and habitats protection. However, the DP makes few references to any cross boundary issues (e.g. paragraph 1.4 and policy DP14) and is silent on the accommodation of wider housing needs. Consequently it can be concluded that strategic housing priorities across boundaries are not properly addressed or co-ordinated and that any engagement has not been of mutual benefit.

*Housing Need*

32. One of the main strategic priorities is to meet housing need and Mid Sussex forms part of the Housing Market Area that also encompasses Crawley and Horsham, but it is clear that there are some links to other nearby housing markets, for example those relating to a number of Sussex coastal authorities. This is not disputed by Mid Sussex. It is therefore appropriate that consideration is given to the housing needs of all nearby local planning authorities.

*Housing Need in Mid Sussex*

33. The Council’s evidence, which has not been subject to examination, indicates that if it were to follow recent population trends then about 8,200 dwellings would be required in Mid Sussex over the plan period. However, in order to engender economic growth, the Council is proposing to provide about 10,600 dwellings.

34. If it is accepted that the 10,600 dwellings exceeds the full objectively assessed need, then that is to be supported. However, that ‘excess’ in housing provision is to meet the objectives of the District itself and its purpose is not to meet the needs of nearby local planning authorities who are unable to meet their needs within their own area. The District Plan
confirms in paragraph 3.10 that the 10,600 figure ‘is considered best to reflect the needs and aspirations of Mid Sussex’.

Housing Need in Nearby Local Authority Areas

35. The Coastal West Sussex Strategic Planning Board (which represents Brighton and Hove, Adur, Arun, Chichester, Lewes, Worthing and the South Downs National Park) published, in May 2013, a Housing Study (Duty to Co-operate)\textsuperscript{12}. I am unable to give full weight to the conclusions included within this Study because I have not tested the evidence on which it is based. However, I have no reason to doubt that it provides a reasonably justified indication of the situation because it pulls together evidence from a range of other studies. This Study suggests that housing delivery over the period to 2031, across the Coastal Housing Market Area, is likely to be at least 20% below objectively assessed needs – equivalent to at least 495 dwellings a year. In Brighton and Hove, for example, there could be a shortfall of about 4,700 dwellings over the plan period. On the assumption that the Study is at least partly reflective of the current situation there are local planning authorities, for example Brighton and Hove, who are unlikely to be able to meet their objectively assessed housing need within their own boundary in a sustainable way.

36. The Council argued that it hasn’t been clearly demonstrated by Brighton and Hove, for example, that it could not accommodate a higher level of housing development than is currently being proposed\textsuperscript{13}. I cannot draw a conclusion one way or the other because I have not seen all the evidence but similarly the District Council does not appear to have made a robust assessment of the situation which it could have undertaken if it had collaborated with Brighton and Hove to seek an outcome of mutual benefit to all parties.

37. I have given very careful consideration to the Report to Scrutiny Committee for Planning and Economic Development (5th March 2013) entitled ‘Housing Numbers for the District Plan’\textsuperscript{14}. One of the purposes of the Report was to enable Members to consider the approaches made by other local authorities to accommodate some of their unmet housing needs (in particular Brighton and Hove City Council).

38. The Report refers only to two previously considered strategic sites, at Sayers Common (New Town) and Crabbet Park. These were considered when the Council was assessing ways to accommodate the 17,100 dwellings required by the former South East Plan. It is clear that detailed consideration has been given to these two sites and the conclusions that are made in the Report appear at face value to be reasonable. However, the Report describes consideration of these two sites as ‘a starting point’, implying that other options may be available. However, there is no reference to any other potential strategic sites being assessed.

\textsuperscript{12} See representation 16438
\textsuperscript{13} Local Plan Examination is currently in progress
\textsuperscript{14} Core Document EP31
39. ‘Other Site Proposals’, which are described as ‘less strategic’, are not specified and it is suggested that these should be considered as part of the Neighbourhood Plans process. The role that such sites could play in accommodating unmet needs appears to have been given little reconsideration following the request from Brighton and Hove. At the hearing session the Council confirmed that some of these sites could be categorised as strategic.

40. The Council states, in MSDC – 11, that the reason the Explanatory Notes and the Brighton and Hove Committee Report were not specifically put before Mid Sussex Members was because ‘they do not add anything to the Mid Sussex Report’. I disagree. The Explanatory Notes refer to the tight constraints around the urban area of Brighton and Hove and indicate that it is the City Council’s assessment that it can accommodate about 11,315 dwellings over its plan period, whereas the requirement falls between 15,800 and 19,400 dwellings. I can find no references to such matters in the Report of the Head of Economic Promotion and Planning entitled ‘Housing Numbers for the District Plan’. There is, however, a comment that other authorities such as Crawley, Adur and Lewes have indicated that they may make such requests in future (paragraph 7). In light of this existing and potential future pressure on Mid Sussex, I would have expected a more robust defence of the Council’s position and a clearer explanation of that position in the DP itself.

**The Effectiveness of the District Plan**

41. To be effective the DP must be based on effective joint working on cross-boundary strategic priorities (for example housing provision). I understand the conclusions that the Council has drawn with regard to accommodating additional growth but those findings do not appear to be based on collaborative working or effective co-operation with other bodies. It may be that the Council’s conclusions are correct but on the evidence before me I am unable to confirm that Mid Sussex District Council has given adequate consideration to helping meet the development needs of other nearby local planning authorities.

42. I have taken into account all the submissions on the matter (a comparatively high number) but in particular that the nearby Councils of Brighton and Hove, Lewes, Worthing and Adur (jointly) all consider that the duty has not been met by Mid Sussex. Although the Councils of Horsham and Crawley consider that the duty has been met from their perspective, there is no opportunity for a Council to be selective over which of its ‘neighbours’ it co-operates with. I am also mindful that Crawley, Lewes and Adur Councils have said that they may request Mid Sussex to meet some of their housing need

**Conclusion and the Way Forward**

43. The evidence does not enable me to conclude that prior to the submission of the DP, Mid Sussex District Council gave satisfactory consideration to

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15 Core document EP31 (para 7)
meeting the unmet development needs (in particular in terms of housing) of nearby local planning authorities. The requirements of paragraphs 178 to 181 of the National Planning Policy Framework have not been met. Therefore **it is with regret that I must conclude that the Duty to Co-operate has not been met.** As the Plan has not been based on effective joint working on strategic priorities and because currently there is insufficient evidence to demonstrate that the DP has been positively prepared, there is also the risk that the Plan could be found to be not sound.

44.There is evidence of some co-operation between the Council and nearby local planning authorities following the submission of the DP but these meetings are too late to be effective because the outcomes of this co-operation (which I would describe as being at an early stage) have not been embedded as an integral element in the plan making process. Nevertheless it does demonstrate a more robust commitment to meaningful engagement and in the months to come there is the potential for significant progress to be made.

45.It must be emphasised that this does not mean that Mid Sussex should be expected to accommodate additional growth – that is not necessarily the case. What it does mean is that the Council should give detailed and rigorous consideration to the development needs of nearby authorities and draw robust conclusions with regards to whether or not any of those needs could be met in a sustainable way within the District, bearing in mind the environmental and other constraints that exist.

46.I understand that this is not the conclusion that the Council would have wanted and that there may be consequences in terms of the Council being unable to meet its 5 year housing land supply requirement. Nevertheless this cannot outweigh the need for effective joint working. I must advise the Council to withdraw the Plan, undertake a more rigorous assessment of cross-boundary issues and in so-doing ensure that it meets the requirements of the Duty to Co-operate, carry out the necessary consultation and re-submit the Plan as soon as possible.

47.This also means that the Mid Sussex Community Infrastructure Levy: Draft Charging Schedule will have to be withdrawn because there will be no up-to-date relevant Plan for the area.

Yours sincerely

David Hogger
Inspector

2\(^{nd}\) December 2013
Dear Mrs Fairfax,

Bolsover Local Plan Strategy Examination

1. Thank you for your Council’s letter of 29 April 2014 which asked if I would set out a full report on the issues which were raised and discussed at the hearing sessions on the Local Plan Strategy which I held on 1, 2 and 3 April 2014. This letter is the best means of complying with that request, for reasons which will become clear.

2. I set out below my reasoning and conclusions on the legal issues of the Duty to Co-operate and the Sustainability Appraisal (Matter 1), and on the soundness of the provision of employment (Matter 6) and of gypsy, traveller and travelling showpeople sites (Matter 5). I also explain the implications of these findings for the Examination. These are the key areas where I presently have concerns about the legal compliance and soundness of the Plan.

3. I have not dealt here with housing provision, settlement hierarchy, and affordable housing, which were also the subject of hearing sessions, because I have not yet heard or received all of the evidence on them. There are other related hearing sessions which have not yet taken place and there is other evidence to come, especially that on the Plan’s viability. Thus it would be premature and unfair for me to comment without having considered all the evidence. This also applies to the other matters and policies heard at the three days of hearings, such as developer contributions.

4. In summary, I find that the Council has not complied with the legal requirements for the Duty to Co-operate or for the Sustainability Appraisal, and
that the Plan is presently not sound in respect of its provisions for employment and for sites/pitches for gypsies, travellers and travelling showpeople.

**Duty to Co-operate**

**Background**

5. The concerns about the Duty to Co-operate centre on the former Coalite Chemical Works site (roughly 58 hectares) to the north-west of Bolsover which straddles the Council’s boundary and so partly lies in Bolsover (about 30 hectares) and partly in North East Derbyshire (approximately 28 hectares). The Council accepted that Chesterfield Borough Council also has an interest in the future of the Coalite site due to its proximity to a shared boundary (EX19h).

6. This is a complicated brownfield site with viability and remediation concerns. The present landowner has suggested that it requires comprehensive redevelopment (across both Districts) with up to 800 houses and nearly 95,000 square metres of commercial floorspace including various other uses such as a transport hub, an energy centre, a museum/visitors centre, a local centre, a neighbourhood equipped area of play, a local equipped area of play, a park, and a local habitat area. There are current planning applications for these proposals (References 14/00089/OUTEA and 14/00145/OL). I was told that retail and further housing development had also been discussed as alternatives.

7. The Council accepted at the hearing that the development of this site was a "strategic matter" as defined in s33A (4) of the Planning and Compulsory Purchase Act 2004 (as amended) which would have a significant impact on at least two planning areas. Therefore, Bolsover, North East Derbyshire and Chesterfield are required to "co-operate ... in maximising the effectiveness" of "the preparation of development plan documents", and the three Councils must "engage constructively, actively and on an ongoing basis in any process by means of which" this might be achieved.

8. "Engage" is not defined, but the National Planning Policy Framework (the NPPF) includes phrases such as "... joint working on areas of common interest ..." (178) and "... work collaboratively with other bodies ..." (179). NPPF 181 states that "Co-operation should be a continuous process of engagement from initial thinking through to implementation, resulting in a final position where plans are in place to provide the land and infrastructure necessary to support current and future levels of development."

9. The Planning Practice Guidance (the PPG) says that "The duty to cooperate is not a duty to agree. But local planning authorities should make every effort to secure the necessary cooperation on strategic cross boundary matters before they submit their Local Plans for examination” (ID 9-001-20140306).

**Duty evidence**

10. Around mid-2010 the Council decided to explore the potential for an Area Action Plan which would have included the whole Coalite site and a wider area of land within both Bolsover and North East Derbyshire Districts. However, by late 2010 the Council decided not to pursue this plan-making option as North East Derbyshire Council and the then key landowners had decided not to participate in it. Therefore, both Councils decided to deal separately in their
forthcoming Plans with that part of the Coalite land that lay within their own particular area (EX19b to EX19f and EX19h).

11. **In April 2011 Bolsover and North East Derbyshire entered into a Strategic Alliance and now have a joint Chief Executive Officer and Senior Management Team, which includes a joint Assistant Director for Planning and a joint Planning Policy Manager.**

12. **On 20 May 2013 the Council’s Senior Principle Solicitor wrote to the Coalite site landowner about various development proposals on that site, in the course of which he said, “... whilst the proposals for a significant amount of employment land within Bolsover District would appear to reflect Bolsover's emerging strategy, the proposals for a significant amount of housing within North East Derbyshire appear to raise strategic cross boundary issues that have not to date formed part of any earlier plan-making process.”** (Appendix 1 of Bolsover Land’s Matter 1 hearing statement).

13. **The Coalite site is not mentioned in the Council’s November 2013 Statement of Co-operation for the Local Plan Strategy (KSD8). Nor is it defined by the Council as being a “main potential cross-boundary issue” with North East Derbyshire in its December 2013 Local Strategy Statement update (paragraph 11.28 in KSD9). This latter document identified strategic cross boundary issues and set out how the Council proposed to deal with them. It is not mentioned in any Memorandum of Understanding that the Council has entered into with other councils, or within any working group’s terms of reference (KSD9).**

14. **The Council’s evidence relies in large part (but not exclusively) upon the inputs to and outcomes of the joint Local Plan Liaison Meetings held between Bolsover District Council, North East Derbyshire District Council, Chesterfield Borough Council and others (EX19h). I understand that each authority has its own mechanisms in place to brief elected members on matters arising at these Meetings. The Council said that through these Meetings “all parties kept each other informed and involved in their progress in preparing their new Local Plan documents” (EX19h).**

15. **At the hearing session I asked the Council to provide me with written evidence about the working relationships between it and North East Derbyshire concerning the Duty and the Coalite site. I specifically asked for copies of any formal joint agreements at elected member or officer level; for any Council or Committee resolution regarding formal joint working arrangements; for any minutes of any relevant joint working groups; for notes of any relevant meetings between officers and/or elected members of either council; or for any correspondence on this issue between the two councils. I also asked for evidence of any officer working arrangements between the two councils and Chesterfield Borough Council. I have only been provided with the evidence set out above.**

16. **In early March 2014 Derbyshire Dales District Council requested that Bolsover assist in meeting its unmet housing need (some 73 dwellings per annum). The Derbyshire Dales email did not indicate how much unmet housing should be allocated in Bolsover, or over what period. It was clear from the email that it was a general request which had been sent out to local planning authorities within the wider Derbyshire Dales Housing Market Area.**
Conclusions on the Duty

17. I do not regard the March 2014 Derbyshire Dales request to meet some of its unmet housing need as being a Duty failure. This is because, firstly, its request came after the Plan had been submitted and so the Duty does not apply; secondly, because its request was generalised and non-specific; and, thirdly, because Bolsover’s links with Derbyshire Dales are weak and so provision in Bolsover may not be the right solution – for instance, KSD9 shows that 0.9% of those working in Bolsover live in Derbyshire Dales and 1.3% of Bolsover’s residents commute to Derbyshire Dales to work.

18. So far as the Duty on the Coalite site is concerned, I am not persuaded that the Local Plan Liaison Meetings were anything other than consultative and information sharing gatherings. The extracts of the various meeting notes (EX19f) are all written in that manner, and do not indicate any constructive, active or on-going work to jointly and proactively plan for the Coalite site. It has not been demonstrated that appropriate conclusions have been drawn at those Meetings or that the councils have acted on those conclusions.

19. In April 2012 the Liaison Meetings resulted in a joint Memorandum of Understanding between six authorities. Although the Council said that the Memorandum covered “all significant activity and development plans relating to land in the authorities in the Housing Market Area ... on matters which are likely to have significant cross border implications” (KSD8), it does not mention the Coalite site and nor was any action taken under the terms of the Memorandum to jointly plan for the site in any positive or constructive or ongoing manner.

20. The PPG warns that effective co-operation “is unlikely to be met by an exchange of correspondence, conversations or consultations between authorities alone” (ID 9-011-20140306). The 2004 Act, the NPPF, and the PPG use the term “co-operation” and not “consultation”. If the Duty had been merely to consult then the 2004 Act and subsequent Government policies would have said so. I have to test the outcomes of co-operation and not just whether the Council approached others (PPG ID 9-010-20140306).

21. I conclude that the Local Plan Liaison Meetings do not provide adequate evidence of “sustained joint working with concrete actions and outcomes” as required in the PPG (ID 9-011-20140306).

22. It is clear that in 2010 no formal co-operation or joint working concerning the Coalite site existed between the three Councils apart from the Local Plan Liaison Meetings. A suggestion for a joint Area Action Plan in that year was ultimately not pursued. In April 2011 Bolsover and North East Derbyshire entered into a Strategic Alliance but it has not resulted in any evidence of the type of co-operation required under the Duty for this site. The 2012 Memorandum did not deal with the site, nor has any joint working on the site flowed from the Memorandum. The letter by the Council to the Coalite site landowner in May 2013 confirmed that the strategic cross boundary issues raised by the site’s potential development had not up to then formed part of any earlier plan-making process.

23. At the end of 2013 the Council’s submission documents with the Plan giving its evidence on the Duty (KSD8 and KSD9) did not deal with the Coalite site and it is not mentioned in them as being a strategic cross boundary issue. The
Council’s relies, in large part, on the Local Plan Liaison Meetings but, for the reasons I have explained above, these do not show compliance with the Duty.

24. The Council said that the reason for the lack of joint action with North East Derbyshire was because "work on its [North East Derbyshire’s] Core Strategy was delayed by resourcing issues and was not far enough advanced to indicate how the former Coalite site would be addressed ...” and that "... this still remains the position” (EX19a). It also pointed to the fact the North East Derbyshire had not raised any objections to the submitted Plan alleging any lack of compliance with the Duty.

25. The PPG says that "Where Local Plans are not being taken forward in the same broad time frame, the respective local planning authorities should try to enter into formal agreements, signed by their elected members, demonstrating their long term commitment to a jointly agreed strategy on cross boundary matters. Inspectors will expect to see these agreements at the examination. A key element of the examination will be to ensure that there is sufficient certainty through the agreements that an effective strategy will be in place for strategic matters when the relevant Local Plans are adopted" (ID 9-017-20140306).

26. There is no such formal agreement. I appreciate that the PPG is relatively new, but the consideration of such agreements is a requirement of the 2004 Act [s33A (6) (a)] and this has featured in the NPPF (181). The fact that North East Derbyshire and Chesterfield did not make any Duty objections to the submitted Plan are not conclusive indications that that the Duty has been fulfilled. The key point here is that it is this Council’s legal requirement to comply with the Duty that is being tested at this Examination, and not North East Derbyshire’s or Chesterfield’s.

27. It does seem that after the failed attempt in 2010 to prepare an Area Action Plan that the Council focussed too much of its attention on the planning proposals and planning applications coming forward from the Coalite site landowners, and put to one side, or forgot, the strategic plan-making requirements of the Duty which came into force at the end of 2011. It appears that here the actions and proper efforts necessary to comply with the Duty were not embedded as an integral element in the plan-making process by the Council. As the PPG advises, "Co-operation should take place throughout Local Plan preparation ... until plans are submitted for examination and beyond, into delivery and review” (ID 9-012-20140306).

28. Overall, there is no comprehensive or robust evidence of the efforts that the Council should have made to co-operate, or of any outcomes achieved, on the Coalite site strategic issue (PPG ID 9-003-20140306). In particular, there is no evidence of "a proactive, ongoing and focussed approach to strategic planning and partnership working” or that the Council’s councillors and officers have adequately engaged in "discussion, negotiation and action to ensure effective planning” on an ongoing, constructive basis for this important strategic matter in its plan-making processes (PPG ID 9-004-20140306).

29. Therefore, I consider it is reasonable to conclude that the Plan does not comply with the legal requirements of s33A of the 2004 Act in that there has not been constructive, active and ongoing engagement during its preparation between the Council, North East Derbyshire District Council and Chesterfield Borough Council with regard to the acknowledged strategic matter of the Coalite site.
30. In reaching my conclusion, I have considered carefully all the representations made after the hearing by the Council and by others, and I have taken into account the potentially significant implications of my decision. I have also carefully considered the judgement in Zurich Assurance Limited v Winchester City Council and the South Downs National Park Authority [2014] EWHC 758 (Admin) in EX13f, cited by the Council (particularly the sections it thought especially relevant), and also my colleague’s Report on the examination of the Chesterfield Local Plan Core Strategy of June 2013 (EX19g). However, their circumstances are not the same as those here and they do not, in my view, form a precedent binding on this Duty issue which concerns a single strategic matter cross boundary site with a particular and unique history and sequence of events.

31. I realise and understand that the Council will be very disappointed by my conclusion. However, I consider no alternative conclusion can be reached.

32. I should also mention that as the Plan has not been based on effective joint working on strategic priorities then there is also a high risk that the Plan could be found not to be sound in terms of the ‘effective’ soundness criterion in paragraph 182 of the NPPF.

Sustainability Appraisal

33. The submission Sustainability Appraisal (SA) at KSD1 does not clearly set out the reasons for the selection of the Plan’s proposals and the outline reasons why the other reasonable alternatives were not chosen during preparation. I accept that some of these matters were set out earlier and that the SA process is an iterative one, but the submission SA does not set out whether the reasons for selecting the Plan’s proposals are still valid as opposed to the reasonable alternatives. These are legal requirements, and the need for them to be satisfied is well known and has been stated in many court cases such as Heard v Broadland District Council & Ors [2012] EWHC 344 (Admin). The SA process has to provide “an outline of the reasons for selecting the alternatives” (Regulation 12 and paragraph 8 of Schedule 2 of the Environmental Assessment Regulations 2004).

34. The Council said in its hearing statement on this issue that “a full narrative of how the Plan has moved through subsequent stages of reasonable alternative options selection would be set out within the Final Sustainability Report on adoption of the plan and hence meeting the requirements of Part 4, Reg. 16(4)(e) of the 2004 Regulations.” Unfortunately, this would be too late (post-adoption) to meet the requirements of the Regulations. A description of what alternatives were examined and why they were rejected has to be available for consideration at each stage, even if only by reference back to earlier documents. Appendix 3 of the submission SA report (KSD1) does not, as the Council claims, properly undertake this task because it is so brief in its reasoning on most alternatives and does not adequately explain why the Plan’s proposals were better.

35. Without this information people would be denied the opportunity to understand and make representations on the foundational bases of the Plan. In this case it does not seem possible for consultees to know from the submitted SA what were the reasons for rejecting some reasonable alternatives, such as those at
Clowne North and the Coalite site, or the reasons for the selection of the various policies and proposals in the Plan without going on a paper chase through other older Council documents.

36. Nevertheless, the Council published with its hearing statement an advance draft of the narrative tables making more explicit the Plan’s selections made across its previous iterations in relation to alternative policy options (Appendix to its Matter 1 hearing statement). Even so, this is still flawed because at least one alternative being canvassed at the Examination - a mixed use scheme at the Coalite site - still does not appear to have been clearly considered, and because the chosen employment option (see below) is not adequately assessed compared to other reasonable alternatives such as the provision of employment land to meet the objective assessment of need.

37. Where this situation has occurred before, the courts have held that the SA can be corrected during the Examination, then consulted upon, and any resulting representations considered by the Inspector before the submission of his or her report [see, for example, Cogent Land LLP v Rochford District Council & Bellway Homes [2012] EWHC 2542 (Admin)]. Had the Examination continued that would have been my intended course of action in this case, i.e. I would have suspended the Examination to allow for this work to be programmed and undertaken by the Council.

Employment provision

38. The evidence for employment land need primarily rests on the Bolsover Employment Land Study (KBD2) published in August 2006, which is itself based on data from 2004 and the 2001 census. That Study does not cover the plan period to 2031 as it only goes up to 2026. The East Midlands Northern Sub-Region Employment Land Review of March 2008 (KBD7) reviewed the 2006 Study but did not produce new demand (need) projections. The 2008 Review supported the conclusions of the 2006 Study, saying that the Study’s "projections appear appropriate" although "estimated demand" would likely be at the higher end. The 2008 Review’s main effort was to "add value" to the 2006 Study’s site appraisal work.

39. The most up-to-date source of employment land assessment material available is that in the Council’s Employment Topic Paper (TR3) of December 2013. However, the only forecast in the Topic paper of future needs is based on the policy objective in the Plan of matching the number of jobs in the District with the number of households divided by employment density to derive the area of employment land required (paragraphs 6.7 to 6.10, and 6.17 to 6.18).

40. The PPG says that authorities should "develop an idea of future needs based on a range of data which is current and robust" and "consider forecasts of quantitative and qualitative need ... broken down by economic sectors", together with the particular characteristics of employment land in the area (ID 2a-032-20140306). This is a reflection of previous Government policy in the NPPF (160 and 161) which requires a clear understanding of business needs and existing and future employment land supply, working together with the business community and other key stakeholders.

41. The forecasting models and the base information, including the past take-up of employment land, have altered considerably since the 2006 Study. It is now
completely out of date and unreliable. It was not updated by the 2008 Review and, even if it was, that Review is itself now out of date. Both documents were prepared before the economic downturn of 2007/2008. Neither document is current or robust. Consequently, I can place very little weight upon them.

42. The 2013 Topic Paper is not a forecast or projection of future needs using the methodologies advised in the NPPF or the PPG. Nor does it identify whether there is a mismatch between quantitative and qualitative supply of and demand for employment sites. Instead, it mathematically works out how much employment land should be provided to meet a pre-determined policy objective. The Topic Paper has not been prepared in close liaison with the business community; or used market intelligence; or used market signals; or considered the recent pattern of employment land supply and loss; or considered the locational and premises requirements of particular types of business; or identified oversupply and market failure (PPG ID 2a-030-20140306). The Topic Paper does not identify how much employment land should be provided in each economic sector, and nor does the Plan. The Plan also does not give any indication of when the employment land provision would be delivered (although the Council did suggest a main modification to rectify this deficiency).

43. The submitted SA does not deal with any reasonable alternatives to the Plan’s strategic aim of matching the number of jobs in the District to the number of households. The Council’s draft additions to its submission SA in the Appendix to its Matter 1 hearing statement do not consider the reasonable alternative of meeting the objective needs for employment land provision. Instead they are based upon various methods of dealing with commuting. As I have mentioned above, that would need to be corrected.

44. I conclude that the Plan is not sound in respect of employment land provision because there is no current or robust objective assessment of this key matter, and the only up-to-date information is designed solely to meet an already decided strategic aim (called a “Spatial Principle”). The Plan is not positively prepared, justified, effective or consistent with national policy.

45. Given that I would have suspended the Examination in any event to enable the above SA work to be carried out, I would, on its own, have required that a current and robust employment land and/or economic assessment be undertaken in conformity with Government policies during that suspension period and for the Council to suggest any necessary main modifications (and consult on them) before the Examination resumed.

**Gypsy, traveller and travelling showpeople sites provision**

46. The Council has recently completed a draft Gypsy and Travellers Accommodation Assessment for Derbyshire, jointly commissioned by a number of local authorities. Unfortunately, the findings of the Assessment may require negotiations between authorities, which may take some time, and the document cannot be released until then. There may, I understand, be an agreed final version sometime this month.

47. The Council has a criteria based policy at LP7 which is intended to operate between and beyond this Plan and the forthcoming Allocations and Policies
Local Plan, which is scheduled to be adopted in February 2016 and which will allocate sites to meet the needs set out in the above Assessment.

48. Paragraph 9 of the Government’s *Planning for travelling sites* says that a Local Plan should identify and update annually a supply of specific deliverable sites sufficient to produce five years’ worth of sites against their locally set targets, and a supply of specific, developable sites or broad locations for growth for years 6 to 10 and, where possible, for years 11 to 15. The Council says it has made good progress in meeting previously identified needs, but I do not know until the Assessment is published whether there is an immediate short-term requirement for sites for pitches to be allocated between now and when the Allocations and Policies Local Plan is likely to come into effect. In addition, this Plan should clearly state any need in order that planning applications (and appeals) can be properly considered on the basis of policy LP7 (to which modifications have been suggested) and that need.

49. I conclude that the Plan as submitted is not sound because it is not positively prepared to meet objectively assessed requirements for gypsies, travellers and travelling showpeople, it is not justified by evidence, it is not effective, and it is not consistent with national policy.

50. Again, on its own, given that I would have suspended the Examination in any event to enable the above SA work to be carried out, I would have required that the Accommodation Assessment be published during that suspension period and for the Council to suggest any necessary main modifications (and consult on them) before the Examination resumed.

**The implications for the Examination**

51. The PPG advises that “if an Inspector finds that the duty has not been complied with they will not be able to recommend that the plan is adopted. In this context the most appropriate course of action is likely to be for the local planning authority to withdraw the plan and engage in the necessary discussions and actions with other relevant local planning authorities and partners. The precise stage of the plan preparation process that the local planning authority will need to go back to will depend on the specific facts of the case. But the revised plan will need to be re-published for consultation and comment before being re-submitted for examination (ID 9-018-20140306).”

52. Sections 20 (7B) and (7C) of the 2004 Act do not provide for the repair of a failure to meet the s33A Duty through main modifications. Thus, the consequence of my conclusion that the submitted Plan is not legally compliant is that I cannot continue any further with the Examination. The Council may choose to receive my report on the Plan which will not deal with any other planning issues and, following s20 (7A) of the 2004 Act, would recommend non-adoption of the Plan.

53. Alternatively, the Council may choose to withdraw the Plan under s22 (1) of the 2004 Act and so return to the preparation stage (s33A (3) (a) of the 2004 Act). Were the Council to follow this route it should seek to remedy the Duty defects I have identified. In my opinion, this would involve detailed, proactive discussions and negotiations with North East Derbyshire and Chesterfield at both officer and elected member levels, and the signing (by elected members) of a memorandum setting out the strategic principles governing the
development of the whole of the Coalite site, so far as these can be agreed. This process may well result in alterations or modifications to the submitted Plan.

54. The submitted SA is not legally compliant and will need to be revised. The evidence base for the provision of employment and for gypsy, traveller and travelling showpeople sites and pitches is inadequate as it is not current or robust. Consequently the Plan is not sound in its policies for those policy aspects. There would be a need for a substantial amount of additional work to rectify the deficiencies I have identified. The resulting modifications to the policies in the Plan from the revisions to the SA and the policies as a result of the new evidence could well be significant.

55. Therefore, the main modifications required to make the Plan sound could well make it fundamentally different to that submitted in terms of its strategy and the approach to these policy areas. In the light of this, and notwithstanding the implications of the failure to comply with the Duty, my present view is that the cumulative impacts of these three concerns would mean that suspension of the Examination would not be appropriate. Making what might be significant modifications would be unfair to those who engaged on the basis of the Plan as submitted and who would be denied the opportunity to affect the Plan’s strategic direction, and thus its consequent detail, at its early formative stage. This may be another reason for the Council to decide to withdraw the Plan.

56. I would be grateful if you would confirm as soon as possible (via my Programme Officer) the Council’s decision as to whether it wishes me to issue a non- adoption report on the Duty or whether it wishes to withdraw the Plan. In the meantime, it would obviously be inappropriate for me to reschedule the further hearing sessions. The Council’s website should be updated to reflect the situation. A copy of this letter should be placed on the website and made available on request.

Yours sincerely,

David Vickery

Inspector
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION, PLANNING COURT
MR JUSTICE OUSELEY
CO/1724/2013

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/11/2015

Before:

LORD JUSTICE MOORE-BICK
LORD JUSTICE SALES
and
MR JUSTICE LINDBLOM

Between:

SAMUEL SMITH OLD BREWERY (TADCASTER) Appellant
- and -
SELBY DISTRICT COUNCIL Respondent

Mr Peter Village QC & Mr James Strachan QC (instructed by Pinsent Masons LLP) for the Appellant
Mr Alan Evans & Mr Freddie Humphreys (instructed by the Solicitor to the Council) for the Respondent

Hearing date: 22 October 2015

Judgment
Lord Justice Sales:

This is the judgment of the court, to which all its members have contributed.

Introduction

1. This appeal concerns a challenge to the adoption of a development plan document under the relevant provisions of the Planning and Compulsory Purchase Act 2004, on the ground that the local planning authority’s duty under section 33A(1) of the 2004 Act – the so-called “duty to co-operate” – was engaged but not complied with.

2. The subject of the challenge is the Selby District Core Strategy, which was adopted by the respondent, Selby District Council, in October 2013. The appellant, Samuel Smith Old Brewery (Tadcaster), is a long established company with a brewery in Tadcaster, in North Yorkshire. It also owns a large amount of land in and around that town. Over the years it has played an active part in the successive processes of plan-making undertaken by the council. It submitted objections to the core strategy with which these proceedings are concerned. Upon the adoption of the core strategy it applied to the court under section 113 of the 2004 Act for an order to quash the core strategy, on several grounds. In three of those grounds (grounds 1, 2 and 3) it contended that, in the course of the process leading to the adoption of the core strategy, section 33A of the 2004 Act having come into force during a period when the independent examination had been suspended to allow the council to prepare main modifications, the council ought to have complied with the duty to co-operate but had failed to do so. The other grounds are no longer active in this appeal, and there is no need to refer further to them.

3. In a judgment given on 27 October 2014 Ouseley J. rejected the challenge on all grounds. Permission to appeal against Ouseley J.’s order, solely on the ground of appeal relating to the duty to co-operate, was granted by Sullivan L.J. on 21 February 2015. When granting permission, Sullivan L.J. accepted that this ground was arguable, and also acknowledged that “if the implied power to suspend the examination of a plan is more widely exercised by Inspectors the question whether the section 33A duty applies to work done during the period of suspension which would have constituted plan preparation had it been undertaken before the submission of the plan for examination is an issue of more general importance which justifies the grant of permission to appeal”.

The relevant statutory provisions

4. Part 2 of the 2004 Act, as amended by several subsequent Acts of Parliament including the Localism Act 2011, contains the statutory framework for the production of development plan documents. The amendments made by the Deregulation Act 2015 have no bearing on these proceedings and can be ignored.

5. Section 15 requires a local planning authority to prepare and maintain a local development scheme, specifying, among other things, the local development documents which are to be development plan documents. Section 17(3) provides that “[the] local planning authority’s local development documents must (taken as a whole) set out the authority’s policies (however expressed) relating to the development and use of land in their area”.

6. Section 19 provides for the “Preparation of local development documents”:

“(1) Development plan documents must be prepared in accordance with the local development plan scheme.

…

(2) In preparing a development plan document or any other local development document the local planning authority must have regard to –

(a) national policies and advice contained in guidance issued by the Secretary of State;

(b) the regional strategy for the region in which the area of the authority is situated … ;

…

(f) the sustainable community strategy prepared by the authority;

(g) the sustainable community strategy for any other authority whose area comprises any part of the area of the local planning authority;

(h) any other local development document which has been adopted by the authority;

(i) the resources likely to be available for implementing the proposals in the document;

(j) such other matters as the Secretary of State prescribes.

(3) In preparing the local development documents (other than their statement of community involvement) the authority must also comply with their statement of community involvement.

…

(5) The local planning authority must also –

(a) carry out an appraisal of the sustainability of the proposals in each development plan document;

(b) prepare a report of the findings of the appraisal.

…”.

7. As amended by the Localism Act, section 20 provides for the “Independent examination” of the development plan document:
“(1) The local planning authority must submit every development plan document to the Secretary of State for independent examination.

(2) But the authority must not submit such a document unless –

   (a) they have complied with any relevant requirements contained in regulations under this Part, and

   (b) they think the document is ready for independent examination.

…

(4) The examination must be carried out by a person appointed by the Secretary of State.

(5) The purpose of an independent examination is to determine in respect of the development plan document –

   (a) whether it satisfies the requirements of sections 19 and 24(1), regulations under 17(7) and any regulations under section 36 relating to the preparation of development plan documents;

   (b) whether it is sound; and

   (c) whether the local planning authority complied with any duty imposed on the authority by section 33A in relation to its preparation.

(6) Any person who makes representations seeking to change a development plan document must (if he so requests) be given the opportunity to appear before and be heard by the person carrying out the examination.

(7) Where the person appointed to carry out the examination –

   (a) has carried it out, and

   (b) considers that, in all the circumstances, it would be reasonable to conclude –

      (i) that the document satisfies the requirements mentioned in subsection (5)(a) and is sound, and

      (ii) that the local planning authority complied with any duty imposed on the authority by section 33A in relation to the document’s preparation,

the person must recommend that the document is adopted and give reasons for the recommendation.
Where the person appointed to carry out the examination—

(a) has carried it out, and

(b) is not required by subsection (7) to recommend that the document is adopted,

the person must recommend non-adoptions of the document and give reasons for the recommendation.

Subsection (7C) applies where the person appointed to carry out the examination—

(a) does not consider that, in all the circumstances, it would be reasonable to conclude that the document satisfies the requirements mentioned in subsection (5)(a) and is sound, but

(b) does consider that, in all the circumstances, it would be reasonable to conclude that the local planning authority complied with any duty imposed on the authority by section 33A in relation to the document’s preparation.

If asked to do so by the local planning authority, the person appointed to carry out the examination must recommend modifications of the document that would make it one that—

(a) satisfies the requirements mentioned in subsection (5)(a), and

(b) is sound.”

Subsection (5)(c) was inserted by section 110(3) of the Localism Act, with effect from 15 November 2011 (see section 240(5)(i) of the Localism Act). Subsections (7), (7A), (7B) and (7C) were substituted for the original subsection (7) by section 112(2) of the Localism Act, with effect from 15 January 2012 (see section 240(1)(h) of the Localism Act).

Section 22 of the 2004 Act (“Withdrawal of local development documents”) provides that a local planning authority “may at any time before a local development document is adopted under section 23 withdraw the document”.

Again as amended by the Localism Act, section 23 provides for the “Adoption of local development documents”:

“…

(2) If the person appointed to carry out the independent examination of a development plan document recommends that it is adopted, the authority may adopt the document—

(a) as it is, or
(b) with modifications that (taken together) do not materially affect the policies set out in it.

(2A) Subsection (3) applies if the person appointed to carry out the independent examination of a development plan document—

(a) recommends non-adoption, and

(b) under section 20(7C) recommends modifications (“the main modifications”).

(3) The authority may adopt the document –

(a) with the main modifications, or

(b) with the main modifications and additional modifications if the additional modifications (taken together) do not materially affect the policies that would be set out in the document if it was adopted with the main modifications but no other modifications.”

11. Subsections (2), (2A) and (3) were substituted for the original subsections (2) and (3) by section 112(3) of the Localism Act, with effect from 15 January 2012 (see section 240(1)(h) of the Localism Act).

12. Section 33A, which contains the “Duty to co-operate in relation to planning of sustainable development”, was introduced into the 2004 Act by section 110(1) of the Localism Act, with effect from 15 November 2011 (see section 240(5)(i) of the Localism Act):

“(1) Each person who is –

(a) a local planning authority,

(b) a county council in England that is not a local planning authority, or

(c) a body, or other person, that is prescribed or of a prescribed description,

must co-operate with every other person who is within paragraph (a), (b) or (c) or subsection (9) in maximising the effectiveness with which activities within subsection (3) are undertaken.

(2) In particular, the duty imposed on a person by subsection (1) requires the person –

(a) to engage constructively, actively and on an ongoing basis in any process by means of which activities within subsection (3) are undertaken, and
(b) to have regard to activities of a person within subsection (9) so far as they are relevant to activities within subsection (3).

(3) The activities within this subsection are –

(a) the preparation of development plan documents,

(b) the preparation of other local development documents,

…

(d) activities that can reasonably be considered to prepare the way for activities within any of paragraphs (a) to (c) that are, or could be, contemplated, and

(e) activities that support activities within any of paragraphs (a) to (c),

so far as relating to a strategic matter.

(4) For the purposes of subsection (3), each of the following is a “strategic matter” –

(a) sustainable development or use of land that has or would have a significant impact on at least two planning areas, including (in particular) sustainable development or use of land for or in connection with infrastructure that is strategic and has or would have a significant impact on at least two planning areas, …

…

…

(6) The engagement required of a person by subsection (2)(a) includes, in particular –

(a) considering whether to consult on and prepare, and enter into and publish, agreements on joint approaches to the undertaking of activities within subsection (3), and

(b) if the person is a local planning authority, considering whether to agree under section 28 to prepare joint local development documents.

…

(9) A person is within this subsection if the person is a body, or other person, that is prescribed or of a prescribed description.
The facts

13. The facts are very clearly and fully set out in paragraphs 2 to 4 and 15 to 24 of the judgment of Ouseley J., and they can be shortly summarised here.

14. The council presented the submission draft of the core strategy to the Secretary of State for public examination on 5 May 2011. The independent examination was undertaken by the Secretary of State’s appointed inspector, Mr Martin Pike. The inspector opened the examination hearing on 20 September 2011. It soon became clear to him that, in at least two respects – the deliverability of the new housing envisaged in Tadcaster and the implications for the Green Belt – the core strategy could not at that stage be regarded as sound. He made these concerns known to the council.

15. On 28 September 2011 the council asked the inspector to suspend the examination to enable it to carry out further work to tackle the inspector’s concerns, including the introduction of a policy to protect the extent of the Green Belt with a localised review at Tadcaster to make it possible for the objectives of the core strategy in that part of the district to be achieved, having regard to the requirements of the regional strategy. The council’s request for a suspension of the examination was opposed by Samuel Smith and other objectors. On 10 October 2011 the inspector ruled in favour of suspending the examination, for a period of six months, to give the council time in which to propose changes to the core strategy dealing with the problems he had identified. The inspector indicated to the council that it should establish the principles governing the review of the Green Belt boundary and apply those principles in determining the appropriate level of growth for Tadcaster. He also indicated that the scale of housing development for which the council was planning, based on the delivery rate of 440 dwellings a year derived from the regional strategy, might be inadequate. Whilst these matters went to the soundness of the core strategy, they were, in his view, capable of being addressed in main modifications to the core strategy as submitted.

16. On 15 November 2011, during the period of suspension, and while the council was undertaking the further work necessary to address the problems identified by the inspector, section 33A of the 2004 Act came into force.

17. In January 2012 the council published its proposed changes to the core strategy. It undertook public consultation on those proposed changes, carried out a sustainability appraisal of them and presented them to the inspector, requesting him to recommend that it make them as main modifications to the core strategy.

18. The inspector resumed the examination on 18 April 2012, and was then invited by Samuel Smith to rule on the question of whether the duty to co-operate in section 33A applied after the submission of the core strategy for examination. On 27 April 2012 he ruled that it did not. He concluded that the duty to co-operate applied only to development plan documents submitted for independent examination on a date after 15 November 2011. The council had submitted the core strategy for examination in May 2011, six months before the duty to co-operate came into effect. The work it had done during the period when the examination was suspended between September 2011 and April 2012 did not constitute plan preparation. The duty to co-operate had
therefore not been engaged in this plan-making process, and the council had not failed to comply with it. In paragraph 10 of his ruling the inspector said this:

“S20(7B) establishes that the duty to cooperate is not capable of remedy at examination stage. The phrasing of S20(5), which refers to *satisfies* (present tense) in S20(5)(a) and *complied* (past tense) in S20(5)(c), affirms that a failure to comply with S19 and other procedural requirements may be capable of remedy, whereas a failure to comply with the S33A duty to cooperate is not. Thus the point that any changes necessary to make a seriously flawed plan sound should not be exempt from the duty to cooperate is not reflected in the legislation. The re is no provision for revisiting the duty to cooperate at examination stage even if a plan is seriously flawed – the duty to cooperate is part of the plan preparation process and, at examination, the test is whether or not it has been complied with.”

19. After a further period of suspension lasting about six months, the examination was eventually concluded on 27 February 2013. The inspector reported to the council on 19 June 2013, concluding that the core strategy as submitted was unsound in a number of respects and, in accordance with section 20(7A) of the 2004 Act, could not therefore be recommended for adoption as it stood, but that with the 34 main modifications he recommended it did satisfy the requirements of section 20(5) and met “the criteria for soundness in the National Planning Policy Framework”. The council adopted the core strategy, as thus modified, and with certain minor modifications, on 22 October 2013.

20. In his judgment (at paragraph 10) Ouseley J. accepted, and indeed it was not in dispute before him, that there is no express statutory power “to suspend, halt temporarily or adjourn the public examination for good and sufficient reason”, but he regarded such a power as “necessarily implicit in the exercise by the independent Inspector of his functions in s20”. It was also common ground before Ouseley J. that the work done by the council during the suspension of the examination would have been “preparation” of a development plan document had it been undertaken before the core strategy was submitted for examination (see paragraph 26 of Ouseley J.’s judgment). Ouseley J. accepted (in paragraph 28 of his judgment) that there was “force and sense” in the submissions of Mr Peter Village Q.C. for Samuel Smith that the effect of section 33A having come into effect during the suspension of the examination meant that the core strategy as a whole became subject to the duty to cooperate, or, at the very least, that the further work involved in the production of the main modifications, undertaken during the suspension of the examination, was subject to that duty. But having regard to the provisions of sections 19 and 20 of the 2004 Act, Ouseley J. was in no doubt that the stage in which a development plan document is being prepared is the only stage to which the duty to cooperate applies, and that that stage comes to an end with the submission of the development plan document for examination “however major or minor its shortcomings, and whatever further work is required, unless the plan is withdrawn”. He agreed with observations to similar effect made by H.H.J. Robinson, sitting as a deputy judge of the High Court in *University of
21. In paragraphs 29, 30 and 32 of his judgment Ouseley J. said this:

“29. The 2004 Act makes the position quite clear: there is a clear distinction maintained throughout this group of sections between plan preparation on the one hand and examination to adoption on the other, and in the powers which the Council has at those two stages. The different stages are apparent from ss19 and 20. S19 clearly deals with the duties on a Council during preparation, and s20 deals with the obligation to submit it for public examination. Preparation is then over. The duties are laid upon the Inspector. The plan is out of the Council’s hands, apart from the possibility of withdrawing or in effect abandoning the plan, until it can exercise the tightly constrained powers of adoption.

30. The duty to co-operate in s33A does not apply after the conclusion of the preparation stage, and so the fact that it came into force while work was being done during the period of suspension is legally irrelevant. No such duty of co-operation applied to that further work, even though if done at the earlier stage of plan preparation, it would clearly have been plan preparation, to which the duty of co-operation, if in force would have applied. If the duty to co-operate had been in force before the plan was submitted for examination, the duty would still not have applied to the further work done by the Council during the period of suspension. The effect of the suspension was not to remove the plan from the scope of public examination. It remained in that phase, under the control of the Inspector as to timing, procedure and substance.

…

32. … [The council] cannot change the plan after submission. It can only ask the Inspector to recommend modifications to it. Those modifications may or may not be ones which the Council itself has devised or worked on or promoted in some way. The plan, in relation to which the Inspector recommends modifications, is not the plan as the Council may suggest that it should be modified during the public examination. He takes the plan as submitted as the plan which is to be modified if he so recommends. I regard that as a potent illustration of the fact that the Council’s preparation of the plan was ended by its submission, and by the powers that are then granted to the Inspector, and the limited role which the Council has thereafter. Asking the Inspector to recommend modifications to make the plan sound, is not plan preparation, whether the Council has worked on the modifications or not. Working on modifications which it may ask the Inspector to recommend is not plan
preparation either, regardless of the nature of the work which the Council may undertake for that purpose.”

The rival arguments in the appeal

22. In his written and oral submissions in the appeal Mr Village emphasises the significant changes made to the system of local plans by the Localism Act, which, he says, balanced the abolition of the regional tier of planning and the strengthening of local decision-making with the duty to co-operate imposed on local planning authorities in the new section 33A of the 2004 Act.

23. Mr Village argues, as he did before Ouseley J., that both the wording of the relevant statutory provisions and the evident object and purpose of the statutory scheme make clear that Parliament intended the duty to co-operate to apply in circumstances such as arose in this case. If it is possible to imply into section 20 of the 2004 Act a power for an inspector to suspend the examination process to enable further “preparatory work” to be done with a view to making a plan sound, it is obviously consistent with the statutory scheme, and unsurprising, that in those circumstances the authority should have to comply with the duty to co-operate. Alternatively, even if such work is not in itself “preparation” for the purposes of section 33A, it is plainly either activity that can reasonably be regarded as preparing the way for the preparation of a plan, within section 33A(3)(d), or activity that supports the earlier preparation work, and so within section 33A(3)(e).

24. Therefore, submits Mr Village, the interpretation of the statutory provisions adopted by Ouseley J., with its rigid distinction between “preparation” and “examination” was wrong. Neither section 19 nor section 20 of the 2004 Act, nor indeed any other provision of the 2004 Act, contains any limitation upon the concept of plan preparation to work done before the development plan document is submitted for examination. This cannot depend, says Mr Village, on the local planning authority’s own view of whether the local plan development preparation is complete under section 20(2). It is clear that in many cases further work, which is truly work of plan preparation, may be required before the plan in question will be capable of being judged sound. In this case, as Mr Village points out, the council prepared substantially new and different policies for development in Tadcaster during the suspension of the examination, undertook a sustainability appraisal of those new policies, and consulted upon them. All of this, submits Mr Village, was activity firmly within the scope of the statutory requirements applicable to plan preparation, in section 19 of the 2004 Act and the regulations made under section 19 – in particular, Part 6 of the Town and Country Planning (Local Development) (England) Regulations 2004 (S.I. 2204/2004) and subsequently, after 6 April 2012, the Town and Country Planning (Local Planning) (England) Regulations 2012 (S.I. 767/2012). Mr Village submits that, properly construed, the statutory provisions do not exclude such major work from the ambit of plan preparation. If such work had been done before submission, as it ought to have been, it would necessarily have been subject to the duty to co-operate. Mr Village emphasises the breadth of the duty to co-operate, as defined in section 33A(2)(a), which is not only to engage “constructively” and “actively” with the other authorities and bodies concerned, but also to do so “on an ongoing basis”. Thus, says Mr Village, the duty should be understood as continuing, or at least being capable of continuing, during the period of the examination if, at that stage, further work has to be done in preparing the strategy and policies of the plan, at least in so far as that
work was work “relating to a strategic matter” (section 33A(3)). A practical illustration of this point in this case is that major development in the northern part of the council’s area, which includes Tadcaster, would be likely to require co-operation with the neighbouring local planning authorities for the cities of York and Leeds. This was how the Government’s “localism agenda”, of which the duty to co-operate was an essential part, was intended to operate.

25. Mr Alan Evans for the council supports Ouseley J.’s analysis. He submits that the distinction between “preparation” and “examination”, which lies at the heart of that analysis, is a true and necessary distinction. Ouseley J. was right to conclude that the duty to co-operate cannot be activated after the preparation of a plan under section 19 of the 2004 Act has been completed. It cannot be engaged in the course of the examination stage of the process, even if the examination itself is suspended while the local planning authority gets on with work that might have been “preparation” had it been done before the plan was submitted to the Secretary of State. The statutory scheme will not bear the construction Mr Village seeks to place upon it. The alternative argument based on the provisions of section 33A(3)(d) and (e) is also misconceived. Work done after a plan has been prepared and submitted for examination cannot be regarded as either preparatory to its preparation or in support of that activity.

Was the duty to co-operate engaged in this case?

26. In our view Ouseley J.’s analysis, which led him to conclude that the duty to co-operate was not engaged in this case, is correct.

27. This conclusion flows from the natural construction of the statutory provisions governing the preparation, examination and adoption of local development documents in sections 19, 20 and 23 of the 2004 Act.

28. The stages of the plan-making process constituting, respectively, the preparation of a local development document, as provided for in section 19, and independent examination, as provided for in section 20, are distinct and separate from each other. The language of section 19 is consistent in referring to the activity of “preparing” the plan. The language of section 20 is consistent in referring to the “examination” of a plan that has, by then, been prepared and submitted to the Secretary of State for this further exercise to be carried out as the next stage of the total process. Section 20(2) states that an authority can only submit a plan for examination when the authority has “complied” with any relevant requirements (that is to say, the authority has finished doing everything required of it regarding the preparation of the plan as set out in section 19 and, when it applies, in section 33A) and the authority thinks the document is ready for independent examination (i.e. the authority thinks its preparation is complete and at an end). A plan can only be submitted for public examination once it has been prepared, and not while its preparation is still going on. The concept of plan preparation by the local planning authority and independent examination by an inspector being in any sense concurrent and overlapping stages of the process is alien to the statutory scheme. They are sequential stages. Preparation comes to an end before examination begins. The former is an activity undertaken by the local planning authority, the latter an activity undertaken by the inspector, albeit with scope for him
to call for further work to be done by the authority with a view to making the plan sound. As Ouseley J. observed in paragraph 29 of his judgment, once the plan passes from the stage of preparation to the stage of examination, it leaves the authority’s hands – save for the authority’s power of withdrawal under section 22 – until it is able within the constraints of section 23 to adopt it.

29. In the examination stage, the decision what should happen to the plan is that of the inspector, who is in control of the examination process. This includes what happens where problems are identified by him with the plan document and the authority wishes to ask him to recommend modifications to address those problems. The power of the authority to make such a request under section 20(7C) only arises where the inspector has formed certain views as set out in section 20(7B); it is a matter for the inspector’s discretion when and how to communicate those views to the authority and whether to grant an adjournment of the examination to allow the authority time to carry out further work and to formulate proposals for modification of the plan in support of a request for the inspector to recommend such modification; and under section 20(7C) it is the inspector’s decision whether to accept any proposed modifications and recommend adoption of the plan as so modified.

30. No other provision in Part 2 of the 2004 Act is inconsistent with that understanding of sections 19 and 20.

31. The provisions of section 33A may themselves be seen as reinforcing the separation between plan preparation under section 19 and independent examination under section 20. The activities to which the duty to co-operate in section 33A relates, as delineated in section 33A(3), include (at section 33A(3)(a)) “the preparation of development plan documents”, subject to the general qualification that such activity must relate to “a strategic matter”. This activity plainly corresponds to that specified in section 19, where the requirements of an authority in undertaking the preparation of a plan are comprehensively set out. The same may also be said of the activities referred to in section 33A(3)(d) and (e) – respectively activities that “can reasonably be considered to prepare the way for activities within any of paragraphs (a) to (c)”, and activities that “support” activities within any of those three paragraphs. Activities preparatory to plan preparation, or supportive of it, are by their nature activities within the range of section 19. By contrast, the activity embraced in section 20, which sets out the requirements of an inspector in conducting an independent examination, does not match any of those referred to in section 33A(3). The duty to co-operate is framed as a duty of the local planning authority in preparing the plan, which the authority must have performed at that stage to the satisfaction of the inspector who later carries out the examination. It is not a duty for the authority to perform, or perform again, after the examination stage has begun.

32. The provisions of section 20, in our view, put this understanding of the statutory scheme beyond any sensible doubt.

33. Section 20(5) poses for the inspector conducting an independent examination three specific questions, namely, first, whether the development plan document “satisfies the requirements of sections 19 and 24” and the relevant regulations relating to the preparation of development plan documents (section 20(5)(a)); secondly, whether the development plan document is “sound”; and thirdly, whether the local planning authority “complied with” its duty under section 33A “in relation to its preparation”.
It is to be noted that subsection (5)(a) is expressed in terms of the development plan document itself satisfying the relevant statutory requirements, rather than in terms of the local planning authority having complied with the relevant procedural requirements of the specified statutory provisions. As Ouseley J. observed in paragraph 116 of his judgment, albeit when dealing with a different ground of the challenge:

“The statutory issue for the Inspector was whether it was reasonable to conclude that the plan satisfied the requirements of s19. There is a marked contrast between the language of s20(7)(b)(i) and (ii), to be found elsewhere in s20 as well. The Inspector has to consider whether the Council has complied with any s33A duty, but not with any s19 duty. It is the plan which the Inspector has reasonably to conclude satisfies s19.

…”

34. A similar point can be made in relation to section 20(7C). When asked to do so, an inspector must recommend modifications of the local plan that would make the plan one that satisfies the requirements in subsection (5)(a) and render it sound. He does not have any power or obligation to require the local planning authority to do further things to comply with its own duties regarding preparation of the plan under the provisions mentioned in subsection (5)(a). This supports the view that under the legislative scheme the preparation of the plan is regarded as having been completed before the plan is submitted for independent examination.

35. The drafting of section 20(5)(c), which uses the past tense, “complied with”, in referring to any duty imposed on the authority by section 33A “in relation to [the plan’s] preparation”, lends some additional support to the proposition, accepted both by the inspector in his ruling of 27 April 2012 and by Ouseley J. in his judgment, that Parliament regarded the performance of the duty to co-operate in section 33A as a step belonging to the stage of plan preparation and preceding the submission of the development plan document for examination. And we consider that this understanding of section 20(5)(c) sits well with a similar interpretation of section 20(7), (7A), (7B) and (7C).

36. The suite of provisions in subsections (7), (7A), (7B) and (7C) envisage three scenarios. In the first situation, provided for under subsection (7), the inspector is compelled to recommend adoption if, having carried out the examination, he considers that it would be reasonable to conclude that the plan satisfies the requirements mentioned in subsection (5)(a) and is sound, and that the authority “complied with” its duty under section 33A “in relation to the document’s preparation”. The second situation, provided for in subsection (7A), compels the inspector to recommend non-adoption if he has carried out the examination and is not required by subsection (7) to recommend that the plan is adopted.

37. The third situation is identified in subsections (7B) and (7C), which must be read together. It arises during the examination in the particular circumstances described in subsection (7B), which are that the inspector does not consider that it would be reasonable to conclude that the plan satisfies the requirements mentioned in subsection (5)(a) and is sound, but does consider that it would be reasonable to conclude that the authority “complied with any duty imposed on the authority by
section 33A in relation to the document’s preparation”. In those circumstances the inspector, if asked to do so by the authority, must recommend modifications of the plan to overcome its failure to satisfy the statutory requirements in subsection (5)(a) and to render it sound.

38. The effect of subsection (7B)(b) is that an inspector will only be in a position to take that course if he has found that it would be reasonable to conclude that any duty to co-operate imposed on the local planning authority by section 33A has already been complied with when the plan was being prepared. This is a prerequisite of the procedure provided for in subsection (7C), in which the inspector recommends modifications to the plan. If the inspector does not consider it would be reasonable to conclude that the authority complied with any duty to co-operate to which it was subject, he is bound to recommend against the plan’s adoption. As the inspector in this case observed in paragraph 10 of his ruling of 27 April 2012, section 20(7B) makes it impossible for a failure by the local planning authority to comply with “any duty” to co-operate under section 33A to be put right at the examination stage of the process. The statutory scheme contains no provision by which, at that stage, an authority can be rescued from such a failure at the earlier stage of its preparing the plan under section 19.

39. There is a further and perhaps still more powerful point to be made about these provisions, which we did not find was cogently answered in Mr Village’s submissions. The provisions of subsection (7B) and (7C) are plainly directed to the putting right of defects in the plan as prepared by the local planning authority and submitted for examination – be they shortcomings in the plan’s compliance with the statutory requirements specified in subsection (5)(a) or its evident lack of soundness, or both. This is the intended purpose of the modifications the authority may ask the inspector to recommend. Subsection (7C) effectively defines the inspector’s remit in dealing with such modifications as a twofold task: to consider whether, with those modifications made to it, the plan would both satisfy the requirements mentioned in subsection (5)(a) and be sound. Those are the only two questions for him at this stage. Subsection (7C) does not require any further consideration of the authority’s compliance with section 33A, either generally or specifically in respect of the modifications themselves. There is no provision here, or anywhere else in the statutory scheme, requiring the inspector to determine whether, in preparing and promoting the modifications during the examination of the submitted plan or in an adjournment or suspension of the examination, the authority has complied with any duty to co-operate. The contrast with the drafting of subsections (5)(a) and (7B)(b), both of which explicitly call for the inspector to consider whether the authority complied with any duty to co-operate “in relation to [the plan’s] preparation”, is striking and clearly deliberate. Had Parliament intended the section 33A duty to apply in relation to any additional work by the local planning authority to support a request for modification of the plan under subsection (7C), it would have made no sense to exclude compliance with such duty from scrutiny by the inspector under subsection (7C).

40. One sees there, in our view, a clear indication that the duty to co-operate applies, and only applies, to the stage of the plan-making process that is properly to be regarded as plan preparation under section 19, which is the stage prior to submission of the plan for examination. The duty does not subsist during the examination stage, nor does it
revive if the examination is adjourned or suspended for main modifications to be produced and presented to the inspector with a view to making it possible for him to conclude the plan, as thus modified, satisfies the statutory requirements mentioned in section 20(5)(a) and is sound. The other relevant provisions of the statutory scheme are all to the same effect.

41. It is true, as Mr Village submits, that a local planning authority will often undertake further work to refine or amend the provisions of the submitted plan once the examination stage of its plan-making process is under way, whether on its own initiative or prompted by the inspector to do so. And it may well be that such work, had it been done before the submission of the plan to the Secretary of State, would have qualified as activity in the preparation of the plan, within section 19. Sometimes that work will be done while the examination is running, on other occasions during a suspension or adjournment, as happened in this case. However, as Ouseley J. held, the carrying out of such work, in whatever circumstances it is done after the examination stage has begun, does not displace the autonomous role of the inspector in conducting the examination, nor does it take the process back to the preparatory stage, or create a hybrid phase in the process comprising plan preparation and independent examination in a single composite stage. Otherwise, as Ouseley J. pointed out (in paragraph 36 of his judgment) and as Mr Village accepts, not only would the duty to co-operate arise under section 33A, but the other statutory requirements applicable to plan preparation, including those relating to consultation, would have to be complied with again.

42. The notion that the duty to co-operate might be engaged during the suspension of an examination, on the basis that the plan-making process reverted in those circumstances to the preparatory stage, but not if the examination continued, would lead to an arbitrary distinction in the statutory arrangements. Ouseley J. found this proposition distinctly unattractive, as he explained in paragraphs 38 to 40 of his judgment. We agree. As Ouseley J. observed (in paragraph 40), Part 2 of the 2004 Act, as amended by the Localism Act, lacks the intricate provisions one would have expected to see had Parliament intended the duty to co-operate to arise upon the suspension of an examination for further work to be done. The absence of such provisions in the amended Part 2 is, we think, telling.

43. Contrary to the submission of Mr Village, interpretation of sections 19, 20 and 23 of the 2004 Act in line with their natural sense and in accordance with their evident scheme does not create a significant gap in the responsibility of a local planning authority to engage as appropriate with neighbouring authorities when considering what potential modifications to a local development plan document to propose to an inspector pursuant to section 20(7C) of the 2004 Act. There is no clear and pressing policy need which could justify adoption of a strained or distorted reading of the provisions.

44. A degree of co-operation by a local planning authority with neighbouring planning authorities is required as an aspect of satisfying an inspector as to the soundness of a development plan document (including any modifications of it), quite apart from under section 33A. This is because of the relevant parts of the National Planning Policy Framework requiring public bodies to co-operate on planning issues that cross administrative boundaries (paras. 178 to 182) and also by reason of the general public law duty resting on a local planning authority and an inspector, which the provisions
of the National Planning Policy Framework reflect, to make reasonable enquiries in relation to relevant matters affecting the performance of their duties (see, e.g. Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 1014, 1065 per Lord Diplock). In the present case, in his final report the inspector did examine the extent to which there had been co-operative engagement by the council with neighbouring authorities in relation to the modifications proposed to the plan by reference to the provisions of the National Planning Policy Framework, in the context of his assessment whether the plan as modified would be sound, and found that the engagement with them had been sufficient.

45. The practical effect of not applying the section 33A duty to work done in the post-submission examination stage is to leave the inspector to review an authority’s co-operative engagement with other authorities in relation to any further work and make a nuanced, fact-specific assessment as to its impact on the overall soundness of the plan with the proposed modifications. This may be seen as serving the public interest of achieving the promulgation of satisfactory planning policy documents in good time. By the stage of examination of a plan and proposed rectifying modifications, the inspector is in charge of the process and can make the relevant assessment of the soundness of the plan by reference to its substance, without needing to rule upon compliance by the authority during that stage with a formal statutory obligation of the kind contained in section 33A, which is appropriately relevant to the earlier preparation stage before the inspector becomes involved.

46. Lastly, for essentially the same reasons, we cannot accept Mr Village’s alternative submissions based on the subsections (3)(d) and (3)(e) of section 33A. As Mr Evans submits, work done after a plan has been prepared and submitted for examination cannot be regarded as either preparatory to its preparation or as having been done in support of its preparation. Mr Village’s argument strains these provisions beyond their proper and obvious meaning. They plainly relate to activity undertaken in, or associated with, the preparation of the plan before its submission for examination, and not to activity subsequently carried out in the course of the examination itself.

Conclusion

47. In conclusion, therefore, one comes back to a straightforward reading of the relevant statutory provisions. Both a literal and a purposive interpretation of those provisions, in particular sections 19, 20 and 23, yield the understanding of them that informed both the inspector’s ruling of 27 April 2012 and Ouseley J.’s analysis in rejecting grounds 1, 2 and 3 of Samuel Smith’s application to the court under section 113 of the 2004 Act. The duty to co-operate in section 33A of the 2004 Act which came into effect after the council’s core strategy had been prepared and submitted for examination, was not engaged when the council prepared its proposed main modifications during the suspension of the examination, and there was no failure on the part of the council to comply with that duty. It follows that the council’s subsequent adoption of the core strategy was not vitiated by any such error in the plan-making process, and was lawful.

48. We therefore dismiss this appeal.