



PLANNING ADVISORY SERVICE
PLAN-MAKING CASE LAW UPDATE
MAIN ISSUE 2: THE DUTY TO COOPERATE

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About this document

This document forms part of a series of 4 documents providing updates on case law in the plan-making sphere, accompanied by the relevant Official Transcripts. The documents are summaries only and are no substitute for seeking qualified internal or external advice, in what remains a highly complex, fast-moving and litigious area.

In summarising the cases, we do not rehearse the facts at any length. These are complex in every case and there is no better description than the text of the judgments. However we have provide lengthy citations from the ratio of the decisions to encourage consideration of the particular way in which the High Court and the Court of Appeal interprets policy. All references to the [National Planning Policy Framework \(NPPF\)](#) are in the format, NPPF x (with x being the paragraph number).

This paper was prepared by No 5 Chambers on behalf of PAS.

Italics and emphasis are our own.

Introduction

1. The Duty to Cooperate gives rise to two principal issues:
 - What is a "strategic matter"?
 - Has the duty been discharged ("actively, constructively and on an ongoing basis")?
2. Only one case has considered the content of the duty in any detail:
 - [Zurich Assurance Ltd v Winchester City Council \[2014\]](#) 578 (Admin) (18 March 2014)

Statutory Framework

3. The fundamental starting point must always be the statutory language, as interpreted by the courts. This provides guidance on how an Inspector should approach the task of investigating whether there has been compliance with the duty, and the extent to which the courts can intervene to correct any error of law.
4. The legal requirements in relation to the duty to cooperate are as follows. The Inspector must determine whether the Council has complied with the duty to co-operate set out in section 33A of the 2004 Act (section 20(5)(a)) as part of his final recommendation. If he is not satisfied that the duty has been complied with, he must recommend non-adoption of the document (section 20 (7A)). In the

event of a failure to comply with duty to co-operate, the inspector has no power to make recommendations that would make the plan sound (section 20(7)(B) and (C)).

5. Insofar as relevant to this matter, the Council has a duty to cooperate with other local planning authorities "in maximising the effectiveness with which activities within subsection (3) are undertaken" (s.33A(1)). One of the activities included within subsection (3) is "the preparation of development plan documents... so far as relating to a strategic matter." What constitutes a "strategic matter" is set out in subsection (4), and includes (s.33A(4)(a)) "sustainable development or use of land that has or would have a significant impact on at least two planning areas...".
6. Section 33A(2) makes clear that the duty to co-operate requires "in particular" (i.e. is not limited to) an LPA to "engage constructively, actively and on an ongoing basis" with other local planning authorities in the preparation of its development plan. Section 33A(6) further clarifies that "engagement" includes, "in particular", "considering whether to consult on and prepare, and enter into and publish, agreements on joint approaches to the undertaking of activities within subsection(3)."
7. It is now well-understood that "cooperation" is to be contrasted with "consultation" (see for example, [the North London Waste Development Plan, decision of Inspector Alan Mead BSc \(Hons\) MRTPI MIQ \(14 March 2013\)](#)).
8. There is no statutory definition of "engage". Nor, it should be added, is there a definition of any of the other key terms: "constructively", "actively" and "on an ongoing basis", or "significant impact". The lack of such definitions would tend to support the view that Parliament's intention was that these terms require an exercise of planning judgment by the Inspector, having regard to all the evidence before him and properly informing himself as to the relevant policy framework and any available guidance, within the context of available judicial authority.
9. The duty is therefore drafted as a number of component parts and benefits from a structured approach. However, it is essential to observe that the language is not prescriptive, and requires a high degree of pragmatism in application, and subsequent examination.

10. That said, this is statutory language, not simply policy, and will inevitably attract the attention of Claimants: particularly on the first two components “actively” and “constructively”, and “maximising the effectiveness”: i.e. with a focus on what “outcomes” have arisen, read against the role played by the duty in the post-RS world.

Policy Framework

11. The policy framework will be very familiar: both the specific references within the NPPF, e.g. NPPF, 159 and 178 and the lengthy chapter of the Planning Practice Guidance.

Case Law

12. The judgment of the High Court, Sales J (as he then was), in *Zurich Assurance Ltd v Winchester City Council* [2014] 758 (Admin) (18 March 2014) remains the leading case on the interpretation of the statutory framework. Accordingly, whilst the decision necessarily turns on its facts, it benefits from full citation:

“109 The duty to co-operate imposed by section 33A applies (so far as relevant in this case) in respect of the preparation of development plan documents “so far as relating to a strategic matter” (subsection (3)), as defined in subsection (4) (“sustainable development or use of land that has or would have a significant impact on at least two planning areas, [etc]”). The question of whether development or use of land would have a significant impact on two planning areas is a matter of planning judgment.

110 The obligation (see subsection (1)) is to co-operate in “maximising the effectiveness” with which plan documents can be prepared, including an obligation “to engage constructively [etc]” (subsection (2)). Deciding what ought to be done to maximise effectiveness and what measures of constructive engagement should be taken requires evaluative judgments to be made by the person subject to the duty regarding planning issues and use of limited resources available to them. The nature of the decisions to be taken indicates that a substantial margin of appreciation or discretion should be allowed by a court when reviewing those decisions.

111 The engagement required under subsection (2) includes, in particular, "considering" adoption of joint planning approaches (subsection (6)). Again, the nature of the issue and the statutory language indicate that this is a matter for the judgment of the relevant planning authority, with a substantial margin of appreciation or discretion for the authority.

112 WCC was required to have regard to the guidance about co-operative working given in the NPPF: subsection (7).

113 The limited nature of the role for the court in a case like the present is reinforced by the structure of the legislation in relation to review of compliance with the duty to co-operate under section 33A. The Inspector is charged with responsibility for making a judgment whether there has been compliance with the duty: section 20(5)(c) of the 2004 Act. His task is to consider whether "it would be reasonable to conclude" that there has been compliance with the duty: section 20(7)(b)(ii) and (7B)(b). A court dealing with a challenge under section 113 of the Act to the judgment of an inspector that there has been such compliance is therefore limited to review of whether the inspector could rationally make the assessment that it would be reasonable to conclude that there had been compliance by a planning authority with this duty. It would undermine the review procedures in the Act, and the important function of an inspector on an independent examination, if on a challenge to a plan brought under section 113 the court sought to circumvent this structure by applying any more intrusive form of review in its own assessment of the underlying lawfulness of the conduct of the planning authority itself. A rationality standard is to be applied in relation to the decision made by the Inspector and in relation to the underlying decision made by WCC.

114 Further, in *Barratt Developments plc v Wakefield MBC* [2010] EWCA Civ 897 it was held that an inspector's duty under section 20(5)(b) of the 2004 Act to determine whether a plan was "sound" was a matter of planning judgment for the inspector, and that judicial scrutiny of his decision was limited accordingly. In my view, the incorporation of review of compliance with the duty to co-operate as a further facet of

review by an inspector under section 20(5) points to the same limited standard of review of an inspector's decision in that regard..."

13. Having thus set out that overarching structure, the judge then continued in respect of the specific facts, notably the correct approach to a "strategic matter":

"116 As set out in the Duty to Co-operate Statement, WCC identified those respects in which the Core Strategy could have a significant impact on neighbouring planning areas and properly engaged with neighbouring authorities on a co-operative basis in such cases. It fully complied with its duties in that regard. It was not obliged to produce joint plans with other authorities and consult on them, only to consider whether that should be done (see also paragraph 179 of the NPPF). The authorities in question similarly did not consider that they should produce joint plans.

117 Where there were cross-boundary planning issues relating to any "strategic matter", WCC actively engaged in appropriate co-operative working and structures with the relevant neighbouring authorities. These were explained in the Duty to Co-operate Statement and included participation in the PUSH joint working arrangements.

118 Where, in particular in relation to Central Hampshire and the area to the north of WCC's district, there were assessed to be no significant cross-boundary planning issues, I consider that the assessment made was lawful and no obligation of co-operative working arose. Even there, WCC engaged in informal co-operative work, and so did more than it was obliged to do.

119 In all these respects, WCC's approach complied with the guidance on co-operative working given in the NPPF: see paragraphs 178 to 181. WCC's Duty to Co-operate Statement, in particular, provided evidence of effective co-operation for issues with cross-boundary impacts: see para. 181 of the NPPF. The Inspector so found and I agree with him.

120 Mr Cahill focused in his submissions on the positions adopted by Fareham BC, Eastleigh BC and Havant BC and also on the fact that WCC had itself made representations to Basingstoke & Deane BC during consultation on its own proposed core strategy. I deal with these points in turn:

i) Fareham BC and Eastleigh BC did raise concerns in relation to infrastructure provision at North Whiteley, which was close to their areas. In its pre-submission stage representations, Fareham BC maintained that WCC had not had due regard to the duty to co-operate. WCC addressed these concerns in the course of the examination in public. The Inspector concluded that those concerns were adequately addressed in the Core Strategy: see, in particular, paras. 77-79 and 80-82 of the Inspector's Report. As WCC submits, Fareham BC's concern as a matter of substance was not that there had been a failure by WCC to engage with it over matters of joint concern – WCC clearly had so engaged, as explained in the Duty to Co-operate Statement and again in its evidence in these proceedings – but rather that its concerns had not been accepted by WCC. The position was similar in relation to Eastleigh BC. But the duty to co-operate does not require that actual agreement should be achieved, only that proper efforts are made to address issues in a co-operative way. Indeed, it may often be the case that ultimate agreement cannot be reached, particularly where there are strong competing local interests between two or more authorities. In fact, in relation to infrastructure provision in respect of North Whiteley, Hampshire CC as the highway authority was in dispute with other authorities regarding the need for a by-pass around Botley and general agreement between all relevant authorities could not be achieved. What is important, however, is that the Inspector found that WCC had complied with its duty under section 33A and also that the Core Strategy was sound. Amongst other co-operative working arrangements, all these authorities engaged with each other through the PUSH arrangement. Neither WCC's conduct nor the Inspector's

conclusions in relation to co-operation with Fareham BC or Eastleigh BC can be impugned as unlawful;

ii) In its pre-submission stage representations, Havant BC (another authority within PUSH) did not complain that WCC had failed to comply with the duty to co-operate, but did raise certain strategic issues which it argued should be accommodated within WCC's Core Strategy and made the point that WCC should make sure that it could accommodate all its additional housing needs within its own area, as Havant BC's area was subject to its own constraints. The Inspector considered the cross-boundary issues affecting Havant BC in the section of his Report dealing with the area West of Waterlooville (see, in particular, paras. 72-75), and again found that there had been compliance with the duty to co-operate and that the Core Strategy was sound. He also found, as set out in the Report (see, in particular, para. 59), that WCC's additional housing needs would be met within its own area, so Havant BC's further concern had been met. Again, neither WCC's conduct nor the Inspector's conclusions in relation to co-operation with Havant BC can be impugned as unlawful;

iii) Basingstoke & Deane BC did not object to the proposed Core Strategy. In fact, in its representations it indicated that it was happy with it. It did not consider that the Core Strategy had any significant negative impact in relation to its area. It did not suggest that there had been any failure by WCC to comply with its duty to co-operate. Accordingly, Basingstoke & Deane BC did not raise any concerns which required to be distinctly addressed by the Inspector in his Report. Instead, Mr Cahill relies on the fact that in March 2012 WCC made an objection to the additional housing requirement figure included in the proposed core strategy promulgated and consulted on by Basingstoke & Deane BC in relation to its own area. However, this objection does not show that there had been any failure of co-operation by WCC in drawing up the Core Strategy. As Mr Bedford submitted, if each local authority, in accordance with the approach they had agreed in the course of earlier co-operative work

between them, made adequate provision for additional housing to meet the needs of its own area (and did not try to displace its housing requirements into the other's area) there would be no "strategic matters" with cross-boundary implications, so the duty to co-operate would not arise in relation to adoption of a development plan such as the Core Strategy which reflected that approach. For the purposes of consideration of WCC's Core Strategy, Basingstoke & Deane BC did not suggest that it would need to seek provision in the Core Strategy to meet its own additional housing needs nor that there was any strategic matter which arose to engage that duty. By contrast, if Basingstoke & Deane BC made under-provision for its own housing needs in its own core strategy and sought to have those needs met by WCC, such issues could arise in relation to the development of Basingstoke & Deane BC's core strategy. It was because WCC was concerned that Basingstoke & Deane BC might be making such an under-provision in its core strategy that WCC made representations in relation to that core strategy to object to it. There was no inconsistency in WCC's position. The duty to co-operate under section 33A potentially arose in relation to Basingstoke & Deane BC and its consideration of that core strategy. However, since both Basingstoke & Deane BC and WCC were agreed in relation to consideration of WCC's Core Strategy that Basingstoke & Deane BC would not seek to displace its own housing requirements into WCC's area, I do not consider that WCC acted unlawfully in any way in making the assessment that it did that no further engagement with Basingstoke & Deane BC was required under section 33A in relation to the preparation of WCC's own relevant development plan document, the Core Strategy. That was also the evidence of Basingstoke & Deane BC's position before the Inspector. The Inspector reviewed WCC's Duty to Co-operate Statement, which covered all co-operative working arrangements with neighbouring authorities, and concluded that WCC had complied with its duty. Again, neither his conclusion nor WCC's underlying conduct can be impugned as unlawful.

121 I do not accept Mr Cahill's further submission that the Inspector applied a presumption in favour of finding compliance with the duty to co-operate and of finding the Core Strategy to be sound. The Inspector's Report contained detailed consideration of the relevant cross-boundary issues, in particular West of Waterlooville and at North Whiteley. Paragraph 6 of the Report, set out above, has to be read in the context of the whole Report, including the passages dealing with those issues. Moreover, in para. 6 the Inspector specifically referred to the evidence adduced by WCC of what it had done to comply with section 33A . The final sentence of para. 6 needs to be read in that context. In my view, on a fair reading of the Report, in para. 6 the Inspector was not indicating that he was applying any such presumption as Mr Cahill alleged, but only that the evidence he had received and considered in the Report was not outweighed by any contrary indication, so that he could positively conclude that the duty to co-operate had been satisfied.

122 On the same basis, on this reading of the Report there has been no failure by the Inspector to give adequate reasons for his conclusion. The reasons he gave met the requirements indicated in Porter (No. 2)."

14. The above demonstrates that whether the duty has been met is a question of planning judgment for the Inspector, subject only to a challenge on rationality grounds.
15. Although the duty is legally distinct from soundness, the assessment of the duty is nonetheless closely related to soundness (see NPPF, paragraph 178).
16. The court further recognised that the threshold is specifically set low: whether it would be "reasonable to conclude" that there has been compliance with the duty. It perhaps goes without saying that a pragmatic approach (as opposed to a rigid and unrealistic one) is required.
17. The court indicates that an Inspector, in exercising his discretion, is permitted to have close regard to the position of the respective

neighbouring authorities, including where there is evidence of agreement.

18. A duty to cooperate grounds was also initially pursued in *Gallagher Estates Ltd v Solihull MBC* [2014] EWHC 1283 (Admin). However, at trial the ground was then argued in a narrower fashion, parasitic on the main soundness ground, [104]-[109], the judgment provides no substantial guidance on the meaning of the duty:

"104 Before me, Mr Lockhart-Mummary restricted his second ground. He simply submitted that, for reasons explored in Ground 1, with a provision of 11,000, the Council will not meet its own objectively assessed housing needs; but it failed to cooperate with neighbouring authorities to devise a strategy whereby its unmet need would be met by adjoining authorities. He relied particularly upon the sentence in paragraph 8.4.2 of the adopted SLP:

"It is considered that 11,000 (net) additional homes can be delivered towards meeting projected household growth of 14,000 (2006–2028)."

That (he submitted) accepts that there is a shortfall of 3,000 between housing needs and housing requirement; and there is no evidence of any attempts to cooperate between the Council and its neighbours to work out how and where this unmet need will in fact be met.

105 As Mr Dove submitted – and Sales J recently emphasised in Zurich Assurance (cited at paragraph 34 above) at [110]-[120] – section 33A imposes a duty to make efforts to address issues in a cooperative way, and the question of whether there has been compliance with the section 33A duty is a matter of planning judgment for the inspector.

106 Mr Lockhart-Mummary's submission is dependent upon the proposition that the Inspector found a shortfall of housing provision compared with full objectively assessed need of 3,000, i.e. 11,000 in the SLP compared with 14,000. However, the Inspector found no such shortfall. For the reasons I have given, the 14,000 figure is not a figure which represents full objectively assessed housing need: indeed, the Inspector

makes clear that he did not take it as such (paragraph 55 of his report). As I have explained, he simply failed to grapple with the issue of what that need was, and there is no figure for it given or derivable from his report and/or the SLP. On the basis of the Inspector's Report, although it may be likely that, had the Inspector addressed his mind to full objectively assessed housing need, he would have found a shortfall between it and 11,000 dwellings in the plan period, he did not in the event address his mind to that issue.

107 As the Inspector did not apply himself to the prior questions of whether there is any shortfall between that need and the provision made and, if there is, the amount of that shortfall, it is impossible to say whether or not there was any breach of the duty to cooperate. Certainly, if and insofar as there is a shortfall, there does not appear to be any evidence of any attempts to cooperate with adjacent authorities, as might be required by section 33A – unsurprising, given that the Council at the time apparently considered the amended WM RSS Phase 2 Revision Draft policy on target to be the relevant need figure. Whether there was a breach of section 33A, would be a matter of planning judgment. In any event, as things stand, I cannot say that there was such a breach.

108 For those reasons, the adoption of the SLP fails to survive Ground 1; and I need not, and cannot appropriately, make any findings in relation to Ground 2."

Prepared by No5 Chambers

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