

**IN THE MATTER OF THE DUTY TO COOPERATE IN THE PREPARATION OF
THE SHROPSHIRE LOCAL PLAN**

OPINION No. 2

Introduction

1. I am instructed by Aardvark Planning Law who represent Bradford Rural Estates Ltd (“**BRE**”) to give a further opinion on whether Shropshire Council (“**the Council**”) has complied with the “duty to co-operate” (“**DtC**”) under section 33A of the Planning and Compulsory Purchase Act 2004 (“**the 2004 Act**”) in their preparation of the draft Shropshire Local Plan (“**the SLP**”).

Background

2. My first Opinion set out the factual basis for my previous conclusions and I do not repeat them.
3. The Council has produced a number of documents in response to the Inspectors’ request for further information relating to the Council’s compliance with the DtC. This comprised a covering letter dated 16 September 2022 and a number of emails and letters relating to the Council’s involvement with a number of authorities which are DtC bodies for the purposes of the 2004 Act (I have already highlighted that ABCA was not a DtC body for the purposes of the 2004 Act).
4. I have been asked to consider the effect of this additional information.

Legal framework

5. Before doing so, I reiterate the legal position.
6. The Council has a statutory “duty to co-operate” in relation to the planning of sustainable development. Section 33A of the 2004 Act provides (so far as material):

“33A Duty to co-operate in relation to planning of sustainable development

(1) Each person who is—

(a) a local planning authority,

...

must co-operate with every other person who is within paragraph (a), ... 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,
- ...

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), ...

(7) A person subject to the duty under subsection (1) must have regard to any guidance given by the Secretary of State about how the duty is to be complied with.”

7. The guidance given under section 33A(7) is contained in the NPPF and the PPG (see *Sevenoaks District Council v Secretary of State for Housing, Communities and Local Government* [2020] EWHC). Paras. 24-27 of the NPPF provide (emphasis added):

“Maintaining effective cooperation

24. Local planning authorities ... are under a duty to cooperate with each other, and with other prescribed bodies, on strategic matters that cross administrative boundaries.

25. Strategic policy-making authorities should collaborate to identify the relevant strategic matters which they need to address in their plans. They should also engage with their local communities and relevant bodies including Local Enterprise Partnerships, Local Nature Partnerships, ... , county councils, infrastructure providers, elected Mayors and combined authorities (in cases where Mayors or combined authorities do not have plan-making powers).

26. Effective and on-going joint working between strategic policy-making authorities and relevant bodies is integral to the production of a positively prepared and justified strategy. In particular, joint working should help to determine where additional infrastructure is necessary, and whether development needs that cannot be met wholly within a particular plan area could be met elsewhere.

27. In order to demonstrate effective and on-going joint working, strategic policymaking authorities should prepare and maintain one or more statements of common ground, documenting the cross-boundary matters being addressed and progress in cooperating to address these. These should be produced using the approach set out in national planning guidance, and be made publicly available throughout the plan-making process to provide transparency.”

8. These paragraphs reflect the ultimate objectives of the NPPF which must be achieved through the plan-making process.
9. Paragraph 11 requires that strategic policies in a plan should:

as a minimum, provide for objectively assessed needs for housing and other uses, as well as any needs that cannot be met within neighbouring areas, unless:

 - i. the application of policies in this Framework that protect areas or assets of particular importance provides a strong reason for restricting the overall scale, type or distribution of development in the plan area [which under footnote 7 includes Green Belt land]; or
 - ii. any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole.
10. This objective is the essential requirement which informs the DtC discussions. The aim should be to provide for any needs that cannot be met within neighbouring areas (incidentally, the Council accepts – rightly - that the ABCA authorities are neighbouring authorities for the purposes of DtC discussions – see the Housing Topic Paper, paragraphs 3.20-24) unless there are strong reasons for restricting the levels of development proposed (for example, because the land is in the Green Belt).
11. This approach is reflected in the NPPF, para. 35(a) - the test for soundness includes a requirement for the plan to be “positively prepared”, which includes a strategy which as a minimum seeks to meet the area’s OAN but also “is informed by agreements with other authorities, so that unmet need from neighbouring areas is accommodated where it is practical to do so and is consistent with achieving sustainable development”.
12. The only basis upon which it could be concluded that another neighbouring areas’ needs are not met is where it is not “practical to do so” and consistent with achieving sustainable development. These requirements are directly referable to paragraph 11 of the NPPF which both define the approach to sustainable development and indicate what amounts to “practical” circumstances. In short, another neighbouring area’s needs should be met unless that is “impractical”, i.e., policies in the NPPF protecting assets or areas of “particular importance” provide a strong reason for restricting development.
13. NPPF para. 35(c) – the test for soundness also includes a requirement for the plan to be “effective”, which includes that it is “based on effective joint working on cross-boundary strategic matters that have been **dealt with rather than deferred**, as evidenced by the statement of common ground”.
14. NPPF para. 61 provides: “In addition to the local housing need figure, any needs that cannot be met within neighbouring areas should also be taken into account in establishing the amount of

housing to be planned for”. The phrase “taken into account” means, taken into account as set out in the NPPF; it is not to be considered in a vacuum.

15. NPPF para. 66 states: “Strategic policy-making authorities should establish a housing requirement figure for their whole area, which shows the extent to which their identified housing need (**and any needs that cannot be met within neighbouring areas**) can be met over the plan period”. Paragraph 66 reiterates the objective that must be sought to be achieved by an authority and the parameters for doing so. The requirement is to provide for “any needs” that cannot be met in the housing requirement figure to the extent that they “can” be met: the “can” is a reference back to whether the needs can be met unless there is a strong reason arising from particular protected areas or assets for not meeting those needs.
16. Further guidance on the DtC is contained in the Planning Practice Guidance (“PPG”). Para. 12 of the section entitled “Plan Making” provides the following guidance on statements of common ground and the need to contain information about the distribution of needs (emphasis added):

“What information will a statement of common ground be expected to contain about the distribution of identified development needs?”

When authorities are in a position to detail the distribution of identified needs in the defined area, the statement will be expected to set out information on:

- a. the capacity within the strategic policy-making authority area(s) covered by the statement to meet their own identified needs;
- b. the extent of any unmet need within the strategic policy-making authority area(s); and
- c. agreements (or disagreements) between strategic policy-making authorities about the **extent to which these unmet needs are capable of being redistributed within the wider area covered by the statement.**”

17. Para. 22 provides (emphasis added):

“Are strategic policy-making authorities required to reach agreement on strategic matters, and what should an authority do if they are unable to secure these agreements?”

Strategic policy-making authorities should explore all available options for addressing strategic matters within their own planning area, **unless they can demonstrate to do so would contradict policies set out in the National Planning Policy Framework**. If there they are unable to do so they should make every effort to secure the necessary cooperation on strategic cross boundary matters before they submit their plans for examination. **Authorities are not obliged to accept needs from other areas where it can be demonstrated it would have an adverse impact when assessed against policies in the National Planning Policy Framework.**

Inspectors will expect to see that strategic policy making authorities have addressed key strategic matters through effective joint working, and not deferred them to subsequent plan updates or are not relying on the inspector to direct them. Where a strategic policy-making authority claims it has reasonably done all that it can to deal with matters but has been unable to secure the cooperation necessary, for example if another authority will not cooperate,

or agreements cannot be reached, this should not prevent the authority from submitting a plan for examination. **However, the authority will need to submit comprehensive and robust evidence of the efforts it has made to cooperate and any outcomes achieved; this will be thoroughly tested at the plan examination.**

18. The guidance above is consistent with the terms of the NPPF when it is stated that “authorities are not obliged to accept needs from other areas where it can be demonstrated it would have an adverse impact when assessed against policies in the [NPPF]”. The “adverse impact” is an impact assessed which is delineated by the NPPF – i.e. that which is identified in paragraph 11, where protected areas provide a strong reason for not providing for a neighbouring authority’s area.

19. Para. 31 provides an important warning to local authorities:

“As the duty to cooperate relates to the preparation of the plan it cannot be rectified post-submission, so if the Inspector finds that the duty has not been complied with they will recommend that the local plan is not adopted and the examination will not proceed any further. 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 bodies.”

20. What is required of a planning inspector in examining whether a local planning authority has performed its section 33A duty was spelt out by Patterson J in ***R (Central Bedfordshire Council) v Secretary of State for Communities and Local Government*** [2015] EWHC 2167 (Admin) at [50]:

“To come to a planning judgement on a duty to co-operate involves not a mechanistic acceptance of all documents submitted by the plan-making authority but a rigorous examination of those documents and the evidence received so as to enable an Inspector to reach a planning judgment on whether there has been an active and ongoing process of co-operation. The key phrase in my judgment is “active and ongoing”. By reason of finding there were gaps as the Inspector has set out, he was not satisfied that the process had been either active or ongoing.”

21. The Court in *Bedfordshire* upheld the Inspector’s analysis which included his observation that satisfaction of the duty was connected to issues of soundness in so far as the right issues needed to be considered in discussions.

22. Cranston J expanded upon this in ***R. (St Albans City and District Council) v Secretary of State for Communities and Local Government*** [2017] EWHC 1751 (Admin), at [51]:

“... once there is disagreement, I would add even fundamental disagreement, that is not an end of the duty to cooperate, especially in an area such as housing markets and housing need which involve as much art as science, and in which no two experts seem to agree. ... the duty to cooperate is active and on-going, and that to my mind means active and on-going even when discussions seem to have hit the buffers.”

23. In a recent decision by Inspectors Birkinshaw and Troy dated 7 May 2020, the Chiltern and South Bucks Local Plan was recommended for non-adoption; the essential issue related to the provision of a neighbouring (Slough's) borough's unmet housing needs. The Inspectors noted the relationship between the purpose of discussions and the requirements of paragraphs 11 and 35 of the NPPF, as follows (emphasis added):

"Need for Agreement?"

21. The DTC does not place a requirement on local planning authorities to agree on all strategic cross boundary matters. The PPG10 confirms that where agreements cannot be reached, it should not prevent a plan from being submitted for examination.

22. Nevertheless, in such circumstances the authority "...will need to submit comprehensive and robust evidence of the efforts it has made to cooperate and any outcomes achieved; this will be thoroughly tested at examination." Based on the evidence provided we are not convinced that the Councils have actively engaged with SBC on the issue of unmet housing needs, or adequately demonstrated what outcomes this engagement has resulted in. For example, the Councils do not appear to have actively explored options for growth around Slough, as might be expected as part of considering reasonable alternative strategies in the Sustainability Appraisal. The fact that the draft Statement of Common Ground was sent to SBC in December 2019, three months after submission, only serves to emphasise a lack of constructive dialogue on this key, strategic cross-boundary issue.

23. In response to our Initial Questions the Councils advised that they are "...not in a position to accommodate Slough's request at the present time." Essentially, "If an authority cannot meet its own needs, then it cannot be considered to be in a position to provide assistance for anyone else. This is not considered to be a complex equation."

24. The Green Belt is clearly a significant consideration in deciding how best to deal with SBC's unmet housing need. The PPG11 advises that local planning authorities are not obliged to accept needs from other areas where it can be demonstrated that doing so would have an adverse impact when assessed against policies in the Framework. This reflects paragraph 11 of the Framework, which states that strategic policies should provide for objectively assessed needs for housing, as well as any needs that cannot be met in neighbouring areas, unless the application of policies in the Framework provide a strong reason for restricting the scale, type or distribution of development, or any adverse impacts of doing so would significantly and demonstrably outweigh the benefits.

25. However, there does not appear to have been any detailed analysis as part of the Plan's preparation to determine whether or not the adverse impacts of contributing towards SBC's unmet housing needs would significantly and demonstrably outweigh the benefits. Furthermore, the Framework's policies do not prevent Councils from amending Green Belt boundaries where there are exceptional circumstances in accordance with paragraph 136. The submission version Local Plan actually proposes to release land from the Green Belt for 1,000 homes, 12,000 square metres of office floorspace and a community hub including a new primary school near to Slough at Iver Station (Policy SP BP11). Land is also proposed to be released from the Green Belt adjacent to Taplow Station for around 4,000 square metres of

office floorspace (Policy SP BP14). The Green Belt has therefore not precluded land from being identified for development in the submitted Plan.”

24. In the earlier decision in the Central Bedfordshire examination in 2015 (the subject of the failed challenge by the Council in the *Bedfordshire* case above), Inspector Cook identified, in a similar way to Inspectors Birkinshaw and Troy, the relationship between the objectives of the plan-making process and the duty to cooperate, as follows (emphasis added):

“Furthermore, **there is no evidence that the Council has considered the implications of meeting the unmet need of Luton in full.** As many participants pointed out, a reasonable alternative for assessment through the sustainability appraisal process would have been an additional option with a housing figure somewhere between those of options 3 and 4. Ultimately this is a soundness point given the drafting of Framework paragraph 182. However, this also goes to the Duty since this has been an issue in contention between the two authorities since October 2010 at the latest and is thus indicative of a failure of the Duty process to influence the Plan since no accommodation on this important cross-boundary issue has been reached”.

25. Similarly, in the Castlepoint examination in 2016, Inspector Smith noted that the DtC must be couched in the aims of the NPPF as to what a plan should provide (emphasis added):

“13. Indeed, the impression gained is that the Council believed that continuing activities under the DtC would enable the issue of outstanding housing need to be ‘fixed’. However, that is looking at things the wrong way round. Rather engagement under DtC should seek to bring about the outcome set out in paragraph 179 of the NPPF. There is no duty to agree (PPG ID 9-003-20140306). **However, whilst it might be firmly in view now, there is no clear evidence that consideration of this admittedly difficult issue was attempted as part of the preparation of the New Local Plan. Within that process it has been treated as an ‘afterthought’.**”

26. Paragraph 179 of the NPPF stated at that time: “*Joint working should enable local planning authorities to work together to meet development requirements which cannot wholly be met within their own areas – for instance, because of a lack of physical capacity or because to do so would cause significant harm to the principles and policies of this Framework*”. Inspector Smiths’ analysis is, therefore, consistent with the observations of the other Inspectors.

Analysis

(a) Duty to Cooperate

27. In my view, for the following reasons, it is quite clear that, in spite of the additional information provided by the Council, the DtC has not been met. I concentrate in this Opinion on the contact which the Council has had with the ABCA authorities, whether individually or as a whole.

Incorrect basis for discussion

28. First, I indicated in my first Opinion that there was a systemic error in the discussions between the Council and ABCA. As the various Inspectors' decisions set out above indicate, the DtC discussions must be focussed on the correct objectives of the NPPF. If the DtC discussions address the wrong question, those discussions will necessarily be flawed. Given the need for active and ongoing discussion, there is also a clear requirement to investigate and discuss issues arising from the correct approach to accommodating needs.
29. Paragraph 11 of the NPPF sets out what (in part) a local plan must be required to provide to achieve sustainable development, namely, in respect of strategic policies, that neighbouring needs which cannot be addressed in that authority's area should be met unless either, in respect of (for example) Green Belt, there is a strong reason for not meeting those needs or the adverse effects of delivering those needs significantly and demonstrably outweigh the benefits.
30. I said in my first Opinion that the Council had, at least from what was said in the housing and employment topic papers, failed to take a proper approach in its DtC discussion with ABCA because, as those topic papers stated (paras. 3.72 and 6.63 respectively), the Council considered there was no "methodology" for discussion under the DtC, only that it was required to "take into account" the needs of another authority. This approach was fundamentally in error. There was a methodology: it was necessary to both assess and then discuss with ABCA whether either of the provisos under paragraph 11 meant that less than the full need should be provided and if so, how much less.
31. The additional information now provided by the Council has established that this error was in fact the approach adopted by the Council. There is no evidence at all that there was any investigation, discussion or engagement which sought to grapple with the connotations of providing for the ABCA authorities' full needs or to deal with any factors which might establish why a lesser proportion should be provided for. In fact, the documents provide no evidence that there were any discussions about how to achieve any proportion higher than the notional figure ultimately offered by it.
32. The notional figure offered for housing (and the amount of land later notionally offered for employment purposes) bore no relationship to any discussions with the other authorities as to whether, and if so why, any further provision should not be made. As I said previously, there is no suggestion, nor any evidence, that it had considered the effects of delivering the whole of the ABCA's unmet needs or what level it could sustainably provide having looked at lesser levels of

provision. The further information submitted has substantiated that observation, and it is clear that no discussion was had with either ABCA or any of the ABCA authorities on this point.

33. The Council stated in the housing topic paper that a number of matters were considered by it in order to arrive at the ‘appropriate’ figure (set out at para. 3.113 housing topic paper and para. 6.77, employment topic paper); these were:

“a. The proposed spatial strategy for the level and distribution of development across Shropshire;
b. The interplay between the proposed spatial strategy and any proposal to accept a portion of unmet housing need arising within the Black Country;
c. The known constraints that exist in Shropshire, particularly those elements of Shropshire in closest geographical proximity to the Black Country, including Green Belt;
d. The known opportunities that exist in Shropshire;
e. The relationship between Shropshire and the Black Country (including the component Local Planning Authorities which make up the Black Country) – with particular regard given to such factors as level of proximity, migration patterns, commuting patterns, TTA’s and transport links;
f. The extent of the unmet housing need forecast to arise within the Black Country;
g. The potential for other Local Planning Authorities to positively contribute to meeting the unmet housing need forecast to arise within the Black Country, particularly those Local Planning Authorities within the same HMA and/or FEMA as the Black Country Authorities and/or with significant Brownfield Land opportunities; and
h. The need to ‘future proof’ any proposed contribution, recognising that the review of the joint Black Country Local Plan is ongoing and that not all Local Planning Authorities which receive internal migrants from the Black Country may be able to make an appropriate contribution.”

34. The additional documentation which has been provided indicates that none of these issues, or their merits, were discussed with either ABCA or the ABCA authorities; none were investigated with those bodies in order to arrive at any other conclusion which may uplift the amount of housing and/or employment land provision.

35. As I indicated previously, it is apparent from the Green Belt topic paper that no assessment was made of the effect on the Green belt of delivering all or a significant proportion of ABCA’s needs. In terms, it is stated:

“8.26. Specifically, within the draft Shropshire Local Plan it is proposed that around 1,500 dwellings and around 30ha of employment land will be accommodated in Shropshire during the proposed Plan period to 2038, as contributions to the forecast unmet needs arising in the Black Country. There is recognition that in accepting this level of unmet need from the Black Country Authorities, this would complement the proposed ‘urban focussed’ strategy set out in earlier iterations of the Local Plan Review during the Regulation 18 consultation stages.

8.27. The proposed contributions to unmet housing and employment needs are not proposed to be met on a specific site allocation(s) or within a specific settlement(s), but rather this unmet housing need would be incorporated within the Shropshire Local

Housing Need and met in accordance with the proposed strategy for the distribution of development already advanced during the earlier stages of plan preparation at Regulation 18.

8.28. As such, the decision to seek to accommodate a proportion of the unmet housing and employment needs forecast to arise within the Black Country was not the principal factor in concluding that exceptional circumstances existed to justify the release of land from the Green Belt in Shropshire.”

36. Translated, this means that no further analysis was undertaken about what the effects of greater amounts of housing or employment would be on the Green Belt. The evidence indicates that there was no discussion around this issue.
37. As a result, the DtC discussions proceeded on a fundamentally incorrect basis which meant that the ultimate conclusion on the delivery of housing and employment for ABCA’s purposes was both inadequate and flawed.

No Evidence of any principled basis for discussion

38. Second, I indicated in my first Opinion that, on a purely evidential basis, and even assuming that matters set out in the housing and employment topic papers set out an adequate basis for DtC discussions in principle, there is no evidence that those matters (identified above at paragraph 33) were actually what the Council discussed with ABCA or the ABCA authorities. I said in my first Opinion that such a basis was not set out in the DtC compliance statement or in the response of ABCA to the plan. The evidence has made clear that there is nothing to indicate that this was the basis of discussion.
39. The mere fact that the SoCG has been entered into between ABCA and the Council does not – of itself – determine whether the duty to cooperate has been complied with. As the case law above demonstrates, the planning judgment for the inspectors on whether the duty has been complied with does not involve “a mechanistic acceptance of all documents submitted by the plan-making authority but a rigorous examination of those documents and the evidence received so as to enable an Inspector to reach a planning judgment on whether there has been an active and ongoing process of co-operation” (emphasis added). It is necessary for the inspectors to look into the substance of the process. The additional documentation makes clear that no such discussions took place. Further, the collapse of ABCA is strongly suggestive of a lack of true agreement or discussion with any of the ABCA authorities.
40. Consistently with the duty to co-operate being a duty to “*engage constructively, actively and on an ongoing basis*” (section 33A(2)(a) of the 2004 Act) in my view the Council has not presented any

evidence for offering only very limited cross-boundary support in this case and failing to consider the alternative of greater provision.

41. At the Tonbridge and Malling Borough Council examination, the lack of minutes to justify the assertions made was a critical issue for considering compliance with the DtC. At paragraph 23 of the report, Inspectors Crosby and Fleming stated:

“It seems that regular meetings were held between the Council and SDC during the preparation of the Council’s Plan, but there is no evidence that unmet housing need in SDC was discussed at these meetings and no meeting minutes have been provided to evidence that housing needs were discussed. The Council say that the discussion was predominantly about ‘constraints’ to meeting housing needs but no minutes of any of these meetings have been produced as evidence of what was actually discussed. Consequently, there is no evidence before us, that these meetings were used for constructive and active engagement in an attempt to resolve the strategic matter of unmet housing need and maximise the effectiveness of plan preparation.”

42. Further, as para. 22 of the PPG “Plan-making” section states:

“Authorities are not obliged to accept needs from other areas where it can be demonstrated it would have an adverse impact when assessed against policies in the National Planning Policy Framework.

... the authority will need to submit comprehensive and robust evidence of the efforts it has made to cooperate and any outcomes achieved; this will be thoroughly tested at the plan examination.”

An initial contribution?

43. It is suggested in the Council’s letter of 16 September 2022 that the provision of housing and employment land was “expressly an initial contribution” with a further contribution to be made at a later point.
44. Such a contention is an after-the-event justification. At the time of the DtC discussions, there is nothing to indicate the contribution was an initial one which would be added to at a later point; rather the letter of the Council dated 12 July 2022 indicated that any review would potentially reduce that offer, depending upon the results of the sub-national household projections for the period to 2038. In any event, if the argument is correct, such an approach is akin to making provision for a review which is contrary to the guidance on the DtC in the PPG which is that, if a need exists, discussions should take place on the basis that the need is met during the plan and not deferred (see above at paragraph 17).
45. Additionally, even if this were an appropriate approach to adopt in principle, it would have to be based on an assessment which is consistent with the proper strategic approach I have indicated above. This would entail an identification of what the overall level of need is which

should be accommodated within Shropshire and for discussion to then have been undertaken as to why 1500 dwellings (looking at the housing issue in isolation) was an appropriate proportion of that overall need to be offered in the current plan period. There is no evidence that this had been either considered by Shropshire or discussed with the ABCA authorities.

Conclusion

46. For the reasons given above, in my opinion, having regard to the matters referred to above, the examining inspectors ought to find under section 20(7B)(b) of the 2004 Act that, in all the circumstances, it would not be reasonable to conclude that the duty has been complied with.

MATTHEW REED K.C.

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15 December 2022