CO/1226/2015

Neutral Citation Number: [2015] EWHC 2167 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Tuesday 16 June 2015

B e f o r e:

MRS JUSTICE PATTERSON DBE

Between:

THE QUEEN ON THE APPLICATION OF CENTRAL BEDFORDSHIRE COUNCIL

Claimant

v

SECRETARY OF STATE FOR COMMUNITIES & LOCAL GOVERNMENT

Defendant

THE PLANNING INSPECTORATE

Interested Party

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(Official Shorthand Writers to the Court)

Miss Saira Sheikh QC and **Mr Charles Streeton** (instructed by Sharpe Pritchard) appeared on behalf of the Claimant
The Defendant was not represented, did not attend
The Interested Party was not represented, did not attend

J U D G M E N T
(As approved)

1. MRS JUSTICE PATTERSON: This is a renewed oral application for permission to bring judicial review proceedings. Permission was refused on the papers by Foskett J on 11 May 2015 where his remarks included the following reasons:

> "The error suggested is that the Inspector applied a standard of co-operation that was too high by reference to what the statute of Parliament intended and that net effect of his decision was to require the claimant to meet the whole of Luton's HMA's housing need in order to fulfill its duty to co-operate. I do not consider that this is realistically arguable when the decision letter is read as a whole against the background of material presented to the Inspector. He set out the correct parameters for the decision. He gave detailed reasons and reached a conclusion that - certainly at face value - appears to be well within the bounds of reasonableness. It was his duty to consider whether it was reasonable for him to reach the conclusion that he did. He addressed that and concluded that it was. This gives a margin of appreciation contended for. It is a fair point that there is not a great deal of legal authority on the way in which statutes should be interpreted although there is some. But the general parameters within which a challenge to fact-sensitive issues such as that involved are well established, and particularly where the fact-finding exercise would involve considerable [matters] the scope for intervention by way of judicial review is limited. I do not consider that the relatively rare circumstances in which such a challenge can successfully be made arise in this case."

2. The challenge arises from a decision letter dated 16 February 2015 issued by Brian Cook, an Inspector appointed by the defendant to examine Central Bedfordshire Council's ("CBC") Development Strategy. CBC is the unitary authority for Central Bedfordshire. It shares an administrative boundary with nine district and unitary legal authorities, including, of particular relevance here, Luton Borough Council ("LBC"). The defendant has not appeared at this hearing. It has notified the court by letter dated 8 June that it rests upon its summary grounds of defence.

3. The grounds of challenge are that the Inspector erred in law in that he misinterpreted Section 33A of the Planning & Compulsory Purchase Act 2004 by (i) applying a standard of co-operation higher than that intended by Parliament (that is ground 1); (ii) that he misunderstood the scope and margin of appreciation and failed to give that margin to the claimant (that is ground 2); (iii) that he failed to have sufficient regard to the potential for other authorities within Luton Housing Market Area, including Luton Borough Council itself, to meet Luton's unmet housing need in the future (that is ground 3).

The Relevant Factual Background

4. In submitting its development strategy for examination, the claimant prepared and submitted a Duty to Co-operate paper called Submission Document DPD 10 dated October 2014. On 3 December 2014, the Inspector wrote to CBC saying that he had significant concerns about whether the duty to co-operate (DtC) had been met. Because

of those concerns he considered that the most effective use of everyone's time and resources was if the hearing sessions in the development strategy were split. He continued:

> "3 ..... I propose to consider matters relating to the DtC and the objectively assessed needs and then pause while I consider how the examination should continue. It may be that it proceeds in accordance with the timetable or it may be that a suspension is necessary while additional work is carried out. In the worst case (that the DtC has not been met) the examination will not proceed further since in that circumstance I must recommend that the DS not be adopted."

5. The rest of his letter then considered, first, the duty to co-operate:

> "The DtC
>
> 5 A good number of those making representations are of the view that the Council has failed to meet the DtC in preparing the DS. Significantly, this view is held by a number of those bodies specified in s33A (1) of the 2004 Act. S33A states that bodies on whom the Duty falls must co-operate in maximising the effectiveness of (in this case) the preparation of the DS by engaging '..... constructively, actively and on an ongoing basis ..... ' in the activity of preparing it. Under S20 (7) (b) (ii) I have to be clear in all the circumstances that it would be ' ..... reasonable to conclude ..... ' that the Council has complied with the DtC. Case law has confirmed that this is a matter of judgement as is the way that a local planning authority discharges certain aspects of the DtC.
>
> 6 The Council's evidence on this matter is in examination document DPD10. Paragraph 1.2 states that the submission version has been prepared in thelight of the representations received at publication stage. The concerns that were expressed then are not confined to the housing issue; they also embrace Green Belt, employment, retail and infrastructure strategy, policy and delivery. Given what is said in paragraph 1.2 it is surprising therefore to see no reference to Luton Borough Council in section 6.6 (Green Belt).
>
> 7 The Appendices to examination document DPD10 are primarily lists of the dates when meetings have taken place or letters have been sent. It is not appropriate therefore in my view to characterise Appendix 3 as an audit trail of key decisions and processes. That would set out the nature of the discussion, the matters at issue and the reasons for that being the case and the involvement of members in the process leading to that decision. I note too that the Memorandum of Understanding (MoU) relates only to housing and has not been signed by all those to whom it relates. I believe that Luton Borough Council has refused to become a signatory in the circumstances it describes in its extensive representation and that North Herts has also not signed.

> 8 While the body of examination document DPD10 sets out what the Council considers to be the outcomes from the DtC process, the perceptions of some others is clearly different. This will need to be explored in detail at the hearing session.
>
> 9 A number of issues are clearly not yet either resolved (dealing with Luton's unmet housing need) or even at a point where the necessary work for a positively prepared plan is very far advanced (see paragraph 6.3.6 regarding the Functional Economic Market Area study). While I appreciate that the Council is keen to get an adopted plan in place, several of those making representations have seen this as the driving force behind what they see as the Council's approach to the DtC. In this context, the Council will need to evidence its assertion in the final sentence of paragraph 1.6 ('The DtC must therefore be interpreted in a pragmatic way that enhances, but does not delay, plan making.') since I am not aware that either the National Planning Policy Framework (the Framework) or the Planning Practice Guidance (PPG) says anything to permit that interpretation.
>
> 10 The topic paper that the Council will be asked to prepare for the hearing session will therefore need to address the points made in the various representations, especially those made by Luton Borough Council, and present evidence that it considers will allow me to reasonably conclude that engagement has been active, constructive and ongoing."

6. The second part of the Inspector's letter then turned to the issue of objectively assessed need. Within that section he indicated that he would need to hear and consider evidence about the appropriate HMA to be planned for:

> "15 ..... The extent to which all those Councils have been engaged with in assessing the objectively assessed housing need will also need to be clear. The point they have reached in their own plan preparation may also be material to my considerations about how the DS should progress ..... "

He noted also:

> "17 Others did not agree with the approach taken and adopted different methods with different outcomes for the objectively assessed housing need. The hearing session will need to examine these competing arguments so that I can come to a considered view."

He noted also that he would need to consider objectively assessed employment and retail needs. The remaining four paragraphs of the letter dealt in summary with evidence that you would expect to see in relation to those matters.

7. In relation to employment need, he said:

> "21 I appreciate that the 27,000 figure that appears in the DS is an

aspiration of the Council that is expressed by way of policy as explained later in examination document TR6. However, it is far from clear that in the objective assessment of employment need, which in my understanding should not be influenced by the policy that the Council may wish to follow, the same approach has been used in both the housing and the employment assessments."

8. The claimant replied on 12 December 2014 and agreed to split the hearing sessions as the Inspector suggested.

9. On 3 February 2015 - which was fixed to consider a number of the Inspector's matters including matter 1 (leave for compliance and the duty to co-operate) - the Inspector set an agenda which included the following:

> "B: THE DUTY TO CO-OPERATE
>
> Issue: DPD10 sets out how the Council considers it has met the Duty to Co-perate. This has been produced and updated in the light of the representations. Would it be reasonable for me to conclude from the evidence in that document that the Council had engaged constructively, actively and on an ongoing basis with those prescribed in statute in maximising the effectiveness with which the preparation of the Plan has been undertaken? If not, in what specific ways has the Council failed to meet the Duty?
>
> .....
>
> Housing
>
> 9 Should paragraph 3.7 of the Council's Matter 1 hearing statement be taken to mean that the Council does not accept the scale of Luton's unmet need? Have the two Councils not shared information and come to a view about Luton's urban capacity?
>
> 10 On a similar theme a concrete example of good co-operation between the two Councils (and others) is the preparation of the SHMA Refresh (TR1). My understanding is that the 2012-based household projections will be published on 27 February by DCLG. Both Councils address this in their Matter 2 hearing statements (the Council at paragraph 2.21, Luton at Matter 2 (ii) paragraph 3). Given its importance as an evidence base for the plans of both authorities, do they have an agreed approach to the recommendation at paragraph 4.6 of TR1 and, if so, what is it and what are the implications for this Examination?
>
> 11 In any event, I am not clear from the documents (for example TR4) how the outcomes of the SHMA refresh (TR1) have been carried forward into the Plan following discussion between the sponsoring bodies since, as I understand it, the Council does not plan to meet its share of the Luton HMA need. Like Luton, I am unclear how the 'extra' but spatially

unspecified 5,400 dwellings contribute towards Luton's unmet need. A number of representations observe that the SA never investigated as a 'reasonable alternative' meeting that unmet need in full since the figure to be tested would fall somewhere between the options 3 and 4 assessed. What then is the justification for the second sentence of paragraph 3.11 of the Council's Matter 1 hearing statement? Participants' views as to whether all of this is a DtC point or a soundness point are welcome.

12 Bearing in mind the purpose of the DtC and the nature of the understandings North Hertfordshire explicitly set out in eventually agreeing to become a signatory, can those authorities who are party to the Memorandum of Understanding explain how it will work to deliver the unmet housing needs of Luton? Can the Council also explain whether it envisages returning to the matter in accordance with paragraph 6 and, if so, why not address it before the Plan is/was submitted? Although we are discussing housing specifically, why does this Memorandum not encompass other matters where cooperation is equally important, such as employment?

Employment

13 It is clear from the hearing statements that of those listed in the Regulations as prescribed bodies Luton, Milton Keynes and, perhaps still, Stevenage have concerns about the extent and nature of the engagement that has taken place. Section 6 of the Council's Matter 1 hearing statement does not address the points made on this by those and many others making representations since it refers either to things that are going to happen (the FEMA assessment) or to information that became available very close to the submission date (paragraph 6.3). Neither can have had any effect on the content of the submitted Plan. Having regard to the points made in the Joint Opinion (Appendix 8 paragraphs 56 to 58 of the Abbey Land Matter 1 hearing statement) how do participants consider that this should be addressed?

14 Having regard to questions 4 and 5 above, and what Stevenage says in its Matter 2 (iv) hearing statement what is its position regarding compliance with the DtC on employment matters?"

10. The agenda referred also to a joint opinion appended to representations made by Abbey Land Developments Ltd who had issued a hearing statement, and which opinion concluded that the council had failed to comply with its duty to co-operate.

11. The hearing session took place on 3 February 2015 at which all parties were given opportunities to make representations on the question set out in the Inspector's letter and the agenda for the hearing session. The claimant council was represented by counsel.

12. The Inspector reported on 16 February 2015, and said in paragraph 4:

> "4 Unfortunately, I have concluded that the Council has not complied with the Duty. This is not a conclusion that I have come to lightly since I recognise the effect for the progress of the Plan. However, I consider that it is the correct judgement to make in all the circumstances and on the evidence before me having regard to the purpose of the Duty. The reasons for my conclusion are set out below."

13. The Inspector then set out the statutory framework and guidance on the interpretation of the duty to co-operate, making particular reference, first, to the National Planning Policy Framework (NPPF) at paragraphs 156 and 178 to 181; and, secondly, to the National Planning Policy Guidance which was published in April 2014. He summarised the regional and local context from DPD10. He then considered the evidence supplied by the claimant.

14. At paragraph 18, under the sub-heading "The evidence given - introduction to the appraisal", the Inspector said as follows:

> "18 As a first preliminary point, I agree with the Council's assessment of the main issues in contention; there are however others including Green Belt and infrastructure. As a second preliminary point, participants were unanimous that preparation of the Plan ended on 24 October 2014 when it was submitted for Examination. Therefore nothing that happened thereafter can be taken as evidence of compliance with the Duty."

15. The Inspector proceeded to analyse evidence given at the hearing, including that on housing, and traced the development of the claimant's position at the hearing. He recorded that from January until 21 May 2014 the focus of the work carried out by the claimant was evidenced with the preparation of the Strategic Housing Market Appraisal Refresh document. He continued at paragraph 31 and said:

> "31 ..... There were two 'Duty' member engagement meetings during this period. That on 17 April 2014 appears from the issues discussed and those giving presentations to have been the first time that members from the nine authorities were advised of the implications for them of the Duty in addressing Luton's unmet need and its potential distribution. The next meeting was on 21 May 2014. This appears to be in effect a 'sign-off' meeting for TR1 and the agreement of the MoU.
>
> 32 During this period the Council must have been undertaking a sustainability appraisal of the Plan since the document (DPD7) is dated June 2014. It does not include an assessment of an option that would address the whole of the unmet need arising from Luton. As a number of participants pointed out, this would have been the case had all the options at Issues and Options stage been assessed."

16. At paragraph 36 of his decision letter, under the sub-heading "Appraisal - housing", the Inspector set out questions which he felt needed to be considered in the appraisal:

"36 Having regard to the Guidance set out above, I believe the following questions need to be considered in this appraisal:

a. What are the outcomes of the Duty process?

b. How have they influenced the Plan?

c. What has been the role of members in leading the process?

d. What steps have been taken to secure effective policy delivery on cross boundary strategic matters?"

He then proceeded to deal with those questions.

17. In relation to the first [question] - what are the outcomes of the Duty process? - he noted that Luton Borough Council had not signed the Memorandum of Understanding (MoU) which the Inspector regarded as important because it brought into doubt whether or when the work required under Clause 3 of and around an understanding would take place. Clause 3 related to Luton Borough Council's estimate of its own capacity of six-thousand. The decision letter then continued in relation to the MoU (paragraph 48):

> "48 The MoU therefore fails to meet the guidelines for such a document. In particular, it does not establish clearly the scale of the unmet need nor does it set out how and where this will be met. Moreover, it has not been signed by all of the authorities, most notably LBC. To that extent it cannot be relied upon by the Council as a mechanism for demonstrating that through the Duty process the need of the Luton HMA will be delivered, even in the future."

18. The Inspector dealt with his second question (paragraphs 49 and 50):

> "49 Turning now to question (b), my conclusion must be 'hardly at all' simply from the timing of events. LBC's evidence, which the Council has not disputed, is that the report to the meeting of the Executive held on 27 May 2014 was published on 19 May. This report seeks authority to publish the Plan for the purposes of Regulation 19. The report was prepared therefore before the 'sign off' meeting of the SHMA steering group on 21 May. I accept that the draft findings would have been available before that date but from the events listed in Appendix 1 of the Council's Matter 1 hearing statement this would not seem to have been any earlier than the 8 May officer steering group meeting.
>
> 50 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."

19. The Inspector dealt with his third question (paragraphs 51 and 52):

> "51 I now move on to the third question. The Duty came into effect in November 2011. The advisory visit in 2013 emphasised the importance of the two authorities working together. Shortly after that meeting, early guidance was available stressing the role of members in the Duty process. There is a history of difficult working relationships between the two authorities evidenced by, for example, the robust exchanges of correspondence and LBC's legal challenges to planning permissions granted by the Council on land allocated in the Plan. It seems somewhat surprising in all these circumstances that, on the available evidence, the first meeting outlining members' role in the Duty process did not take place until 17 April 2014; barely a month before the publication of the report to the Executive meeting on 27 May.
>
> 52 On the evidence provided to me it would be reasonable to conclude that the answer to the question I have posed is 'limited'."

20. The Inspector dealt with his final question (paragraph 56):

> "56 In effect therefore the Council has deferred to later plans that either it or others will prepare an issue that it could and should have addressed now under the Duty. The necessary steps to secure effective policy delivery on cross boundary strategic matters have not been taken in respect of housing. I acknowledge that in considering this issue the distinction between a failure to comply with the Duty and a failure to agree with others (and LBC in particular) is a matter of judgement that is not always clear. In making that judgement however I consider it reasonable to conclude on the evidence that the Council has failed to comply with the Duty in that regard."

21. The Inspector then moved on to deal with the issue of employment where, he said, the failure to comply with the duty was clearer:

> "58 The Plan identifies land to support the delivery of an additional 27,000 jobs over the Plan period. This is stated to be an aspirational figure and, as far as I can tell from the limited discussion held during the Examination to date, is only tenuously linked to any assessment of future employment growth.
>
> 59 There is no evidence that the Council has undertaken the identification of the functional economic market area(s) (FEMA) affecting Central

Bedfordshire as advocated in the PPG. It took part in an inception meeting on 13 October 2014 to establish the extent of one with NHDC and SBC. Although that appears to be primarily for the preparation of those two authorities' plans paragraph 6.7 of the Council's Matter 1 hearing statement implies that there may be land-use implications for the Council.

.....

61 The Council appears to derive its objectively assessed employment need from the East of England Forecasting Model (EEFM). However, the outputs from this appear to fluctuate wildly on an annual basis. For example, the Council's Matter 2 hearing statement confirms that the 2013 model output for Central Bedfordshire was 15,000 jobs while the interim 2014 figure was 23,900. This had increased to 26,700 by the time of the hearing session (ED32). The headroom that can be regarded as aspirational within the 27,000 proposed therefore varies from year-to-year.

62 In the Plan the Council says in paragraphs 6.16 and 6.17 that, in summary, provision is being made to accommodate some of Luton's job growth that cannot be met within the LBC administrative area. In his letter to Cllr Timoney dated 23 June 2014, Cllr Young defends the Plan's approach to employment provision suggesting that LBC's emerging homes:jobs provision is not balanced and that a more flexible approach to employment land could boost housing supply in Luton where it is most needed. This reinforces my observation about the lack of acceptance of LBC's urban capacity estimate. It also appears to be prejudging the outcome of the further work envisaged in the MoU and the response of LBC in its emerging local plan.

63 Put simply, LBC says that this approach had never been discussed and contends that it is not necessary in any event since there is no unmet employment need arising within the Borough. LBC argues that in the absence of such a study on an important cross-boundary issue the Council's assertion that the Plan should provide for any unmet need is not justified.

.....

65 Both MK and BBC expressed concerns about the effect of the Plan on commuting patterns between their respective areas and Central Bedfordshire. Although at the hearing sessions both authorities were keen to stress that this was not a Duty issue for them but one of soundness, that is not the message conveyed in the MK Matter 1 and 2 hearing statements.

.....

67 In summary, there is almost no evidence of any active, constructive and ongoing engagement on this important cross-boundary issue. The differences between the Council and LBC seem to be part of their wider failure to reach an accommodation on housing provision. The uncertainty of other neighbouring authorities over the nature and effects of the employment approach pursued in the Plan simply could not have arisen in my judgement had the Duty been complied with on this matter."

22. There was then a section on "Other matters relating to the Duty to co-operate" (paragraphs 68 to 71):

"68 In the light of my conclusions on housing and employment matters I shall deal with these shortly. On Green Belt it seems to me that the difference between the Council and LBC is one of perception. The Council feels it has engaged with LBC when it consulted over the sites that would be proposed (most of which were in the Green Belt) whereas LBC was expecting a more extensive engagement over methodology. However, as with aspects of the employment issue, the very fact that a difference of perception still exists is, in my view, itself indicative of a failure to engage fully.

69 In my letter (ED09) I referred to the various issues that had been raised in the representations and in paragraph 10 invited the Council to present evidence to allow me to reasonably conclude that engagement has been active, constructive and ongoing. In its Matter 1 hearing statement the Council concentrates on housing and employment matters. I therefore have no further evidence in respect of others such as infrastructure.

70 It is a requirement to report on the steps taken to comply with the Duty in the Annual Monitoring Report. The Council has not given any evidence about this and I could not find any relevant information in Document TR25.

Conclusion on the Duty

71 For the reasons set out above it would not be reasonable for me to conclude that the Council has complied with the Duty."

23. The Inspector's overall conclusions are set out (paragraphs 82 to 84):

"82 I recognise that my conclusion with regard to the Duty is not one that the Council will welcome. However, I believe it to be the only conclusion that I could reasonably draw on the evidence that was presented both at submission and in response to both my initial letter (ED09) and my agendas for the Matters 1 and 2 hearing sessions. In simple terms there should be much clearer evidence of the co-operation required for the effective delivery of the homes and jobs needed in the Luton and Central Bedfordshire area.

83 I fully appreciate that the Duty is not a duty to agree. However, even in that context, I do not consider that there is sufficient evidence that the various authorities have taken the necessary steps through the Duty process to secure the delivery of the homes and jobs needed by authorities such as LBC that are constrained in their ability to meet their own needs. I do not underestimate the challenge that achieving the necessary co-operation presents in this particular area. However, all reasonable steps must be shown to have been taken to secure that co-operation before it would be reasonable to conclude that the Duty had been complied with. As I have explained, I consider the co-operation between the Council and LBC in particular has fallen short of the required level.

84 Having come to that conclusion, under s20 (7) (A) of the 2004 Act I must recommend non-adoption of the Plan. There are two options now open to the Council. First, the Council could choose to receive my report. In substance, that would be the same as this letter and must reach the same conclusion. Second, the Council could chose to withdraw the Plan under s22 of the 2004 Act. That would seem to me to be the most appropriate course of action but that is clearly a matter that you will wish to consider."

The Legal Framework

24. Section 33A of what was the Localism Act introduced the duty to co-operate. It reads:

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

(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,

(c) the preparation of marine plans under the Marine and Coastal Access Act 2009 for the English inshore region, the English offshore region or any part of either of those regions,

(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, and

(b) sustainable development or use of land in a two-tier area if the development or use —

(i) is a county matter, or

(ii) has or would have a significant impact on a county matter.

(5) In sub-section (4) —

'county matter' has the meaning given by paragraph 1 of Schedule 1 to the principal Act (ignoring sub-paragraph 1 (1) (i)),

'planning area' means —

(a) the area of —

(i) a district council (including a metropolitan district council),

(ii) a London borough council, or

(iii) a county council in England for an area for which there is no district

council,

but only so far as that area is neither in a National Park nor in the Broads.

(b) a National Park.

(c) the Broads.

(d) the English inshore region, or

(e) the English offshore region, and

'two-tier area' means an area —

(a) for which there is a county council and a district council, but

(b) which is not in a National Park.

(6) The engagement required of a person by sub-section (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.

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

(8) A person, or description of persons, may be prescribed for the purposes of subsection (1) (c) only if the person, or persons of that description, exercise functions for the purposes of an enactment.

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

(10) In this section —

'the English inshore region' and 'the English offshore region' have the same meaning as in the Marine and Coastal Access Act 2009, and

'land' includes the waters within those regions and the bed and subsoil of those waters.

(2) In section 16 of the Planning and Compulsory Purchase Act 2004 (applying Part 2 for purposes of a county council's minerals and waste development scheme) after sub-section (4) insert —

'(5) Also, sub-section (3) (b) does not apply to section 33A (1) (a) and (b).'.

(3) In section 20 (5) of the Planning and Compulsory Purchase Act 2004 (development plan documents: purpose of independent examination) after paragraph (b) insert -

'; and

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

25. Section 20 of the Planning & Compulsory Purchase Act provides for the independent examination of development plan documents (DPDs). A local planning authority must submit every DPD, when it believes it is ready, to the Secretary of State for independent examination. The examination must be carried out by an inspector appointed by the Secretary of State. Section 20 (5) provides:

> "(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 section 17 (7) and any regulations under section 36 relating to the preparation of development plan documents;
>
> (b) whether it is sound."

26. The duty to co-operate has been considered by the courts. A specific challenge was made to an inspector's finding that there had been a duty to co-operate in Zurich Assurance Ltd v Winchester City Council [2014] EWHC 758. In his judgment, Sales J (as he then was) said:

> "110 The obligation (see sub-section (1)) is to co-operate in 'maximising the effectiveness' with which plan documents can be prepared, including an obligation 'to engage constructively [etc]' (sub-section (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 sub-section (2) includes, in particular, 'considering' adoption of joint planning approaches (sub-section (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: sub-section (7).
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> 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."

27. In Gallagher Homes Ltd v Solihull Metropolitan Borough Council [2014] EWHC 1283, Hickinbottom J agreed with the approach of Sales J in his judgment (paragraph 105), stating that the question of whether there has been compliance with a Section 33A duty is a matter of planning judgment for the Inspector.

Ground 1 - Did the Inspector misinterpret the standard of co-operation required?

28. The claimant submits that the standard of co-operation is a question of law. Whether the standard has been met is a question of planning judgment. That much is common ground with the defendant. The issue here is agreed to be whether the standard was met. The claimant submits that the Inspector placed standard of co-operation too high. He used a fine line to distinguish between the duty to co-operate and a duty to agree. In this, the Inspector effectively required the claimant to agree. The thrust of the Inspector's position was that the claimant was required to meet all of LBC's unmet housing need in order to comply with the duty to co-operate. Notwithstanding the Inspector's express reference to his understanding that the duty to co-operate was not a duty to agree, the effect of his decision was to require the claimant to meet the full unmet housing needs of Luton Housing Market Area contrary to the standard of co-operation required by the 2004 Act. The Inspector wrongly and implicitly conflated the requirement to co-operate with the assessment of soundness under Section 20 (5) of the 2004 Act. He did not separate the two statutory requirements.

29. The decision letter, further, failed to appreciate the purpose of the growth option study to the claimant as a party, as confirmed in the letter of 23 October 2014, was to establish whether other authorities could and should provide a proportion of LBC's

unmet housing need. In any event, the claimant had a mechanism - the allocations plan - capable of meeting as much of Luton's HMA as the growth option study suggests was necessary. That was a permissible approach, but the Inspector had said (paragraph 56 of his decision letter) that the claimant had deferred until later an issue which could and should have been addressed as part of the process before him.

30. The claimant submits that the standard of co-operation required under Section 33A (2) (b) requires a local authority to engage constructively, actively and on an ongoing basis. That is what the claimant has done. Section 33A (6) (a) requires that engagement is to consider whether to consult and compare and to enter into and publish agreements on joint approaches to the undertaking of activities under sub-section (3). The requirement is not to do so but to consider doing so. The claimant contends that that stance is supported in Zurich Assurance, supra, where Sales J emphasised not that actual agreement is achieved but that proper efforts were made. Often it was the case that authorities could not reach complete agreement. DPD10 made it clear that much of the site assessment direct findings for housing were drawn from previous work. Strategic sites had been agreed and developed with LBC. That co-operation had remained the case even after the Joint Core Strategy had been withdrawn in September 2011. Thereafter engagement remained active until the submission of the development strategy as is evident from Appendix 3 to DPD10.

31. On employment, officer liaison meetings were held in January, March and April 2014. On 13 October 2014 the claimant agreed to undertake a joint Function Economic Market Area study (FEMA) with North Hertfordshire District Council and Stevenage Borough Council. All local authorities, apart from Luton Borough Council, agreed that the claimant had complied with its duty to co-operate. The claimant contends that the Inspector's finding that the claimant had not was therefore irrational.

Discussion and Conclusions

32. In the Inspector's letter to the claimant of 3 December 2014, he said that he would need to be persuaded that there was active, constructive and ongoing engagement between the parties. For the hearing on 3 February 2015 the Inspector set the agenda which followed the wording of the statutory provisions. His decision letter reported that the duty to co-operate was not a duty to agree. But his concern was that every effort had been made to secure co-operation on strategic cross-boundary matters. He then proceeded to examine the evidence to see if that was, in fact, the case on the evidence before him.

33. In addressing the housing issues and the four questions which the Inspector posed himself in paragraph 36, he went on to record that there was some evidence of positive and ongoing engagement (see paragraphs 39 and 40). The Inspector recorded that the claimant had responded to other authorities preparing their plans but did not seem to have considered the contribution that it should make to needs of their HMAs. In relation to Luton Borough, the claimant agreed that the whole of the objectively assessed need could not be met within Luton, but how much could be met and where did not seem to be agreed between the two authorities so that there had been no

advancement since 2011 when the previous Joint Core Strategy was withdrawn (see paragraph 41).

34. An MoU had been drawn up albeit not signed by LBC which should have guided housing provisions. However, because of failings within the MoU such as a failure to state the scale of housing need or how and where it would be met, it failed to comply with the guidelines for such a document and it did not provide a mechanism for demonstrating that the need of Luton's HMA would be delivered even looking forward.

35. On the other questions the Inspector had posed for himself, from the timing of events he concluded that the meetings which had occurred had very little influence on plan making. On a proper reading, he did not require the claimant to meet the unmet housing needs for Luton in full but commented that, for it not to have considered alternative options, which could have been the subject of active engagement, was an omission.

36. On the role of members in leading the process, the Inspector remarked that the advisory visit from PINS had emphasised the importance of the claimant working with LBC but no meetings between members took place until April 2014, barely a month before the publication of the report to the Executive.

37. Lastly, on steps to secure effective policy delivery on cross-boundary strategic matters, the Inspector acknowledged many references within the claimant's submissions to addressing the duty in a pragmatic manner and that CBC saw the plan as the first step on the road to other plans, including the Allocations Local Plan, which it would bring forward, to meet the needs in the area.

38. The Inspector concluded that such an approach meant a deferral of issues which CBC could and should have addressed at that stage as part of the duty to co-operate. As such, necessary steps to policy delivery had not been taken.

39. On employment, the Inspector found that there was an aspirational figure of 27,000 for jobs over the planned period. There was no evidence that the claimant had undertaken the identification of a Functional Economic Market Area. It appeared to derive its objectively assessed employment need from the East of England Forecasting Model but there the outputs had fluctuated wildly on an annual basis. Initially, provision was made to accommodate some of Luton's job growth which could not be met within its administrative area. But the claimant contended that a more flexible approach to employment land could boost housing supply in Luton where it was most needed.

40. The Inspector concluded that reinforced his observations that the claimant had not accepted LBC's urban capacity estimate. LBC's evidence was that the claimant's approach had never been discussed and that there was no unmet employment need within the borough. Without a study on such a matter, the claimant's assertions were unjustified. By the time of the hearing the claimant had developed its position so that it was no longer necessary for the plan to make provision for any unmet employment needs in Luton. There was now an opportunity to contribute to part of Stevenage's unmet employment needs.

41. By way of evidence in support, the claimant referred to Appendix 1 of Matter 1 in the hearing statement which referred to officer meetings on 31 January, 28 March and 28 April 2014. The Inspector concluded that there was no evidence of active, constructive and ongoing engagement. The uncertainty of neighbouring authorities over the nature and effect of the employment approach on the part of the claimant would not have arisen had the claimant complied with its duty to co-operate.

42. On other matters: first, Green Belt. The Inspector found that there was a difference in perception between the claimant and Luton Borough Council which was illustrative of a failure to engage fully. On infrastructure, he found there was no evidence at all before him. On the Annual Monitoring Report, which was to record steps taken as part of the duty to co-operate, there was no evidence that it had done so. For those reasons he concluded that there had been no compliance.

43. Discussion and Conclusions

44. It is clear from all of the above that, first, when the Inspector was considering matters relating to housing need and found that the claimant's conduct was non-compliant to the duty to co-operate he had an evidential basis for so doing. In considering the issue of compliance, he did not regard, on a fair reading, a duty to co-operate as synonymous or indeed almost synonymous with a duty to agree. His concern was with the noticeable gaps in what should have been an active, ongoing and positive programme of engagement between the claimant and the other relevant authorities. Luton Borough Council's unmet housing need remained a live issue to which no satisfactory solution was suggested. It follows that he found that the claimant's approach to housing did not engage adequately with the adjacent authorities. All of that is a matter for his planning judgment.

45. Secondly, on employment, there were misunderstandings with adjacent authorities which, the Inspector recorded, were such that it was evident that the claimant had not discharged its ongoing duty. The varying stance of the claimant in dealing with unmet employment need on the part, first, of Luton Borough Council and then on the part of Stevenage, he found, was illustrative of the failure of that duty. Again, that was a matter for his planning judgment.

46. Third, on Green Belt, he recorded the misunderstanding of the adjacent authorities as being akin to the misunderstanding which there had been in relation to employment issues.

47. Fourth, in relation to other matters such as infrastructure, he found that there was no evidence to support what was claimed in relation to that, nor were there reporting steps to comply with the Annual Monitoring Report.

48. Those matters also are matters for the Inspector's planning judgment. There were, therefore, ample reasons to conclude, on the part of the Inspector, that there had been no compliance applying the correct test. There is simply no evidence that the Inspector was irrational in coming to the conclusion that he did. Nor is there any evidence that on a fair reading the Inspector misunderstood or misinterpreted the duty upon him

imposed by Section 33A. He expressly set out what that duty was within his decision letter and applied his mind to that.

49. The claimant has contended that the Inspector conflated the duty to co-operate with the separate duty of soundness or at least it is arguable that the Inspector did so. It is contended that by straying into soundness the Inspector elided the two statutory tests.

50. I reject that submission as completely unarguable.

51. The letter dated 3 December set out a way forward which the Inspector was proposing to follow, with which the claimant agreed. The Inspector set the agenda for the hearing on 3 February as one which was relevant to the first statutory duty. Indeed, the claimant makes no criticism of the agenda as mis-stating the basis for improvements. To come to a planning judgment 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. It follows that ground 1 is unarguable.

52. Ground 2: Whether the Inspector misunderstood the scope of the margin of appreciation given to the Local Planning Authority under Section 33A and failed to accord it to the claimant.

53. The claimant submits that there are two issues. First, what is the scope of the margin of appreciation? And, second, did the Inspector afford that margin to the complainant here? The statutory provision - Section 20 (7B) - reads:

> "(7B) Sub-section (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 sub-section (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."

Section 20 (7C) reads:

> (7C) 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 sub-section (5) (a), and

(b) is sound."

54. The claimant submits that the wording of the statutory provisions conveys a wide margin of appreciation to the local authority. The starting point is whether the local authority can reasonably be said to have complied with the duty to co-operate. The Inspector did not take that starting point. He started from the opposite direction as is evident from paragraph 56 of his decision letter where he said:

> "56 ..... I consider it reasonable to conclude on the evidence that the Council has failed to comply with the Duty in that regard."

Discussion and Conclusions

55. On a plain reading of statutory words, the word "reasonable" plainly applies to the judgment of the Inspector, ie, whether it would reasonable for him to conclude that the authority had complied with its duty of co-operation as part of the preparation of the submitted document. For the Inspector to reach such a conclusion, there must be reasonable grounds for so doing. The claimant submits that when the development strategy was submitted the claimant reasonably considered that it was sound. Self-evidently, that is the case or else it should not be submitted. However that does not mean that the claimant has discharged its duty. It simply means that it considered - "it" being the claimant - that it could discharge its duty. It is for the Inspector to consider whether the duty had been discharged. The Inspector has set out in some detail in his decision letter, as I have set out above, the positive and negative factors as part of the discharge of his duty. His decision was an entirely rational one. There is no evidence that in coming to his conclusion he did not afford the claimant a wide margin of appreciation. Indeed, from his decision letter it is clear that he did. This ground is without any merit.

56. Ground 3: Whether the Inspector had failed to have regard to a material consideration or to took a flawed approach to housing need. As the claimant accepts, some of this overlaps with ground 1. The claimant contends that the Inspector failed to have regard to the possibility that the claimant would not be required to meet all of LBC's unmet housing need. His conclusion, it is contended, of failure on the part of CBC in the duty to co-operate is premised on the fact that the claimant had an obligation to take Luton's unmet housing need.

57. The claimant submits: (1) that it and the other local planning authorities did not accept the conclusions of LBC's Strategic Housing Market Assessment. There was a possibility that LBC may be required to meet some of its own housing need. The Inspector had no evidential basis to reach the conclusion that he did.

58. (2)7 other authorities as well as the claimant agreed to the MoU which provided that the claimant would provide initially 4,500 houses to meet Luton's unmet need; later, later revised upwards to 5,400. The agreed figures meant that other local authorities as well as the claimant would contribute something.

59. (3) In St Albans District Council v Hunston Properties Ltd [2013] EWCA Civ 1610, the Court of Appeal accepted that some degree of shortfall may be unavoidable which contradicts the Inspector's conclusion that the claimant would inevitably be required to meet Luton's shortfall.

60. All three points are material considerations to which the Inspector failed to have regard.

Discussion and Conclusions

61. The Inspector noted in his decision letter at paragraph 23:

> "23 ..... Luton is tightly constrained by Green Belt and is surrounded in large part by Central Bedfordshire. The bulk of what the two authorities agree is the Luton HMA is in these two administrative areas. Planning in Central Bedfordshire is therefore of key importance to LBC although the reverse link may be weaker. I believe an understanding of the chronology of events that can be gleaned from the evidence is important and I turn to this now."

62. The Inspector then outlined the chronology of events from 2008. The starting point, therefore, was that the claimant was required to consider the implications of Luton having unmet housing needs. The Inspector noted (at paragraph 32 of his decision letter):

> "32 During this period the Council must have been undertaking a sustainability appraisal of the Plan since the document (DPD7) is dated June 2014. It does not include an assessment of an option that would address the whole of the unmet need arising from Luton. As a number of participants pointed out, this would have been the case had all the options at Issues and Options stage been assessed."

63. The Inspector noted that in the MoU only clauses 1 and 2 were definitive statements with clause 1 stating that objectively assessed need for Luton was 17,800 and clause 2 stating that objectively assessed need for CBC was 25,600. Paragraph 43 of his decision letter recited clauses 3 and 4 of the MoU which related to LBC's estimate of its urban capacity at 6,000 and its unmet housing need at 11,800. He recorded that the council committed to provide an eventual figure of 5,400 within its plan. Clauses 6 and 7 of the MoU steered the whole of the unmet housing need to areas within Luton Housing Market Area so that it was appropriate to look at the approach of the other authorities with parts of their administrative areas within Luton HMA to be able to form a judgment about the likely effectiveness of the MoU in meeting Luton's unmet housing needs.

64. Apart from Luton, the other authorities had signed the MoU. However, in their Housing Statements, Aylesbury Valley said it did not understand how the council could consider 5,400 to be a reasonable contribution to LBC's unmet need. It went on to say that, in fact, its position would be clarified following the further work required by

clauses 6 and 7 on the MoU. Bedford Borough Council adopted a similar position. Stevenage Borough Council did not consider that it would make any notable contribution given its poor geographical links with Luton. The fact that Luton had not signed the MoU brought into doubt whether the work required by clause 3 of the MoU would take place. The Inspector therefore concluded that the MoU could not be relied upon as a mechanism for demonstrating that, through a duty to co-operate, the needs of Luton's HMA would be delivered. He concluded in paragraph 55, as I have set out above.

65. The words "in the first instance" are important. They do not indicate that the Inspector had concluded that the claimant was bound to provide all of Luton's unmet housing need. Failing that, on the facts, a large part of Luton's Housing Market Area was within the claimant's administrative area and the MoU which the claimant had signed sought to steer the whole of the unmet need to areas within Luton's HMA. The starting point, therefore, would be with the claimant authority.

66. It was perfectly rational, given the background, on the part of the claimant to take that, as the initial stance, into account. Matters relating to the Allocations Plan and any review were procedural steps that the Inspector was not satisfied demonstrated that there had been active and ongoing co-operation in the factual circumstances of the development strategy before him. It follows that the Inspector did not omit any material considerations in relation to housing on the evidence before him and which he considered at the hearings. His decision is one which is both lawful and justified. Ground 3 is also one which is unarguable.

67. (To counsel) Miss Sheikh, you will have seen that in the letter from the Treasury Solicitor they ask that if the claim is dismissed - this is the letter of 8 June - they seek costs of their acknowledgement of service in accordance with the schedule which is £5,614. Alternatively, it is to go on written representations. I will happily hear you on that. I should make it clear you raise the issue about whether it is an Aarhus claim. In any event, on those levels it is within.

68. MISS SHEIKH: It is within.

69. MRS JUSTICE PATTERSON: Obviously, the position would be that your clients would pay the acknowledgement of service costs.

70. MISS SHEIKH: I will just take very brief instructions. (Pause) I do not object to the amount or the principle.

71. MRS JUSTICE PATTERSON: In those circumstances the claimant to pay the costs of the defendant in the sum of £5,614.