

**NSC Position Statement
7 February 2014**

The effect the duty to co-operate has had on the housing numbers

1. The Inspector has requested a position statement from the Council on the effect the duty to co-operate has had on the housing numbers.

Legal duty

2. The duty to co-operate was introduced by the Localism Act 2011 with more detailed guidance provided in the National Planning Policy Framework published on 27 March 2012. This was published in the period between the Inspector's Report (15 March 2012) and Core Strategy adoption (10 April 2012). The draft NPPF had been taken into account during the Core Strategy examination process, including a formal period for interested parties to make representations, and the implications of both the Localism Act and NPPF were referenced in the Inspector's report (paragraph 5).
3. The Inspector's Report maintained that as the Core Strategy had been prepared and submitted by the date of royal assent of the Localism Act, no duty could be imposed on the Council prior to that point because the duty was not in existence. He concluded that "accordingly, taking into account all views expressed upon this new legislation, no action is taken in this examination regarding the duty to co-operate, albeit cross-boundary issues are germane to the ultimate conclusions of this report" (paragraph 5).
4. This specific point was tested at the University of Bristol's high court challenge and the Inspector's position vindicated. The Judge's conclusions in respect of this issue as set out in the Approved Judgment 14 February 2013 were as follows:

"To summarise my conclusions on the first ground of challenge, the duty to co-operate introduced by s.110 of the 2011 Act as s.33A of the 2004 Act did not come into force until 15 November 2011 after preparation of the Core Strategy had completed and it had been submitted for examination. Accordingly it did not apply to preparation of the Core Strategy and s.112(6) does not have the effect of retrospectively imposing the duty. The Inspector did not misconstrue the 2011 Act and there was no duty to co-operate which the Inspector had to consider for the purposes of s.20(7) of the 2004 Act as amended." (Paragraph 132).

5. The duty to co-operate was also addressed by the South Gloucestershire Core Strategy Inspector in his Report (15 November 2013). His starting point was that because the submission of the South Gloucestershire Core Strategy for examination pre-dated the duty coming into force, "it cannot impose an obligation which did not exist prior to the submission of a plan" (paragraph 23).
6. The argument put forward by objectors at the examination, as reported by the Inspector at paragraph 24, was that post-submission changes recommended by the Council were put forward after the Act came into force, refer to strategic matters and form part of the plan preparation process. "In any event, it is argued, the duty to co-operate has not been complied with and there is no statutory provision for the post submission changes put forward by the Council" (paragraph 24). The Council's view was that the post submission changes were made to address potential deficiencies in response to concerns raised by the Inspector and must be regarded as suggestions to provide the basis for any modifications required to make the plan sound.
7. The South Gloucestershire Inspector emphasised that there is a clear demarcation between the plan preparation stage which is the responsibility of the local planning authority, and the examination stage which begins on submission of the plan and transfers responsibility for the document to the Inspector. The mechanism for the plan to be further modified through the examination process "is separate to plan preparation and the duty to co-operate because any further changes become the sole responsibility of the Inspector" (paragraph 26).
8. The Inspector concluded that as the duty to co-operate did not exist at the time it cannot apply to the submission Core Strategy.

"The subsequent work and consultation by the Council following suspension of the examination was carried out in response to concerns about the soundness of the Plan. These fell within the examination process and as potential modifications they are subject to similar consultation and sustainability appraisal processes as are required during plan preparation. However, S33A only applies to plan preparation and does not apply to modifications which may come forward through the examination process." (Paragraph 28).

9. At the Bath and NE Somerset Core Strategy examination, on 22 January 2012 the Inspector issued a statement in response to developer submissions on S110 of the Localism Act and the duty to co-operate (B&NES examination document ID/23). The B&NES Inspector made it clear that the plan was not subject to the duty to co-operate when it was submitted for examination and that, consistent with the South Gloucestershire position, the duty is not triggered. At the hearing held on 10 December 2013 the B&NES Inspector was again asked about the duty to co-operate and whether the plan was in conformity with NPPF. He again reiterated the plan was not subject to

the duty to co-operate when submitted, and therefore the statutory duty was not triggered.

10. The North Somerset Core Strategy policies affected by the legal challenge were remitted to the Planning Inspectorate for re-examination. In other words, the remitted policies have been returned to the examination stage, not the plan preparation stage, and therefore the duty to co-operate as set out in s110 of the Localism Act cannot apply.

Duty to co-operate in practice

11. Setting aside legal arguments around whether or not the Inspector has a duty to consider the duty to co-operate, the Council's plan making process involved constructive engagement with other local planning authorities and public bodies on strategic matters. This has continued on an active and on-going basis post-Core Strategy submission.
12. Evidence was submitted to the original examination on the duty to co-operate. 'North Somerset Council: Joint working with neighbouring authorities' (ED/14) outlined the joint working arrangements which supported the development of strategic planning policies through the Core Strategy.
13. The duty to co-operate
- relates to sustainable development or use of land that would have a significant impact on at least two local planning areas
 - requires that councils set out planning policies to address such issues
 - requires that councils and public bodies 'engage constructively, actively and on an ongoing basis' to develop strategic policies
 - requires councils to consider joint approaches to plan making.

Paragraph 156 of the NPPF sets out the strategic issues where co-operation might be appropriate. Paragraphs 178-181 of the NPPF give further guidance on 'planning strategically across local boundaries', and highlight the importance of joint working to meet development requirements that cannot be wholly met within a single local planning area, through either joint planning policies or informal strategies such as infrastructure and investment plans.

14. Evidence was submitted to the original examination on the duty to co-operate. 'North Somerset Council: Joint working with neighbouring authorities' (ED/14) outlined the joint working arrangements which supported the development of strategic planning policies through the Core Strategy. This explained the role of the West of England Partnership and the Local Enterprise Partnership and summarised the sub-regional working within both the West of England and with Somerset authorities.

15. An update to ED/14 on more recent activity where the local authorities have been working together to articulate their shared issues and priorities and to demonstrate their continued commitment to joint working is provided below. This is summarised in the North Somerset Annual Monitoring Report (December 2013), while more details can be found on the West of England LEP website (<http://www.westofengandlep.co.uk/transport-and-infrastructure/duty-to-cooperate-planning>).

(i) West of England Strategic Framework (Appendix A)

The Strategic Framework is subtitled 'planning strategically across local boundaries' and sets out how the four authorities have co-operated to arrive at a shared understanding of the challenges and opportunities facing the West of England region and a positive approach to delivery that maximises the opportunity to secure long term sustainable growth. This was signed by the portfolio holders in the four authorities. The principal objective of the Strategic Framework is to set out in one place the over-arching development, investment and growth ambitions for the sub-region, including the identification of priority growth locations and investment requirements. The locations identified as being strategic priorities include the J21 Enterprise Area and Weston town centre.

(ii) Duty to Co-operate Schedule (Appendix B)

The duty to co-operate schedule highlights those issues that the West of England authorities have cooperated on, or that they will co-operate on with neighbouring authorities and other statutory bodies (as set out in the National Planning Policy Framework). This document records how the authorities have achieved compliance with the duty to co-operate as part of fulfilling their strategic planning responsibilities in preparing and keeping under review their Local Plan delivery programmes.

The purpose of the schedule is:

- to identify the strategic planning issues affecting more than one unitary authority area in the West of England;
- to define the processes for taking these issues forward; and
- to document the outcomes delivered.

The duty to co-operate schedule provides a framework to ensure effective cooperation throughout the plan making process. The schedule ensures that strategic issues are concisely and consistently recorded, regularly monitored and updated and reported upon. This will ensure that evidence base preparation is considered jointly to inform future Local Plan reviews.

(iii) Strategic Housing Market Assessment (Appendix C)

The West of England authorities together with Mendip, Sedgemoor and Wiltshire are preparing a new Strategic Housing Market Assessment. Work commenced in March 2013 with the publication of the pre-

production brief. Following consultation, the project brief was agreed by the joint West of England Planning, Housing and Communities Board on 1 July 2013. This set out the structures and governance arrangements and proposed timetable.

The publication of a new SHMA in early 2015 will provide the evidence base for a roll-forward of the strategic planning framework to 2036. This post-SHMA assessment will be undertaken by the West of England authorities on a joint basis through the duty to co-operate. The details of this process are still to be formalised but one option under consideration is the possible preparation of a joint planning strategy setting out the overall quantum of housing and jobs across the West of England, the district apportionment, strategic priorities and infrastructure requirements.

(iv) LEP draft Strategic Economic Plan (Appendix D)

The West of England Local Enterprise Partnership brings together businesses and local authorities to support economic growth and attract jobs and investment into the sub-region. The LEP is currently finalising a Strategic Economic Plan which will identify how it is proposing to stimulate growth to 2020 and which will be used to negotiate a 'growth deal' with government to secure a share of the national 'local growth fund' and EU structural and investment funds. The SEP has significant implications for North Somerset in terms of unlocking potential investments in economic growth, particularly at the J21 Enterprise Area. Consultation on the draft SEP closed on 24 January prior to submission to government by 31 March 2014.

16. North Somerset has a long history of constructive joint working with neighbouring authorities across a range of strategic issues including SHMA. This has continued post-Core Strategy adoption, with close liaison on all aspects of strategic plan preparation, particularly in the context of the core strategy examinations. Where criticism of the Council's approach has been raised, the issue appears to be not that co-operation does not take place, but that the strategic approach agreed by the West of England authorities does not accord with the developers' sub-regional aspirations.

Context for the examination of remitted policies

17. The North Somerset Core Strategy has straddled a period of significant change and uncertainty, and the re-examination of the housing requirement needs to balance the context provided by the adopted plan, the task identified through the High Court Judgment and how to respond to new and emerging national guidance.
18. The evidence base underpinning Core Strategy preparation, submission and examination was the 2009 SHMA. This collaborative sub-regional document was prepared in accordance with existing guidance and was identified at the time as a best practice example

(highest ranked in the South West based on quality of the key findings – Ecotec Review of SHMAs in the SW 2009).

19. The publication of NPPF in March 2012 signalled a change as to how SHMAs are to be undertaken in the future. Draft national guidance is provided in the NPPG which is still awaiting final approval. The authorities which comprise the West of England Housing Market Area recognised that the 2009 study needs to be updated and the new SHMA is being prepared in accordance with the new guidance. However, the SHMA findings will not be available in time to inform the current re-examination process.
20. The reason for the examination of remitted policies turned on the High Court Judgment related directly to whether sufficient allowance had been made for latent demand (demand unrelated to the creation of new jobs) within North Somerset given its different demographic structure to that of the West of England. This was a criticism of the methodology used and not a wider failure to plan sub-regionally, and can be resolved through a North Somerset assessment and is not an issue requiring cross-border engagement. The Judgment concluded that:

“As to the second ground of challenge, the Inspector gave clear reasons for rejecting the 26,750 new homes figure in the dRSS and concluding that there should be a fresh appraisal of housing need. He also had regard to the advice in PPS3 as to the use of up to date ONS household forecasts and explained why he declined to follow that advice. However, in his appraisal of the Council’s housing requirement figure of 14,000 he failed to give adequate or intelligible reasons for his conclusion that the figure made sufficient allowance for latent demand i.e. demand unrelated to the creation of new jobs. In consequence the adoption of Policy CS13 of the Core Strategy in reliance on the Inspector’s recommendation was unlawful.” (Paragraph 133).

21. In the Addendum Judgment the Judge dismissed the argument put to her that the consequences for the plan making process were so significant that the delays and additional work required as a consequence of ensuring NPPF compliance would be likely to require a suspension of the process or withdrawal of the plan (paragraph 8). On the contrary, the Judge did not anticipate that the re-examination to be an extensive or lengthy process although “the passage of time may well require the Council to up date its evidence and, potentially, to invite the Inspector to recommend modifications to policies” (paragraph 12).

“Further, it is not inevitable that there will be extensive further delay in re-adopting the policies. The time taken to undertake any further work will be in the Council’s hands. The Core Strategy as a whole was submitted for examination on 8 July 2011 and the Inspector reported on 15 March 2012. Re-examination of the housing policies

in the light of the court's judgment should take considerably less time." (Paragraph 21).

22. At paragraph 18 of the Addendum Judgment the Judge gave an example of the possibility of further provision of 2,000 dwellings being required over and above existing supply. While she is careful to emphasise that this is "by way of hypothetical example only", the use of this figure indicates the possible scale of adjustment that might be required if any re-examination found that either inadequate provision has been made for latent demand, or to take account of the 'passage of time'. The figure of 2,000 dwellings is not dissimilar to the Council's recommended increase from 14,000 to 17,130 dwellings. This reinforces the point that the Judge was not anticipating a significant change in the dwelling requirement.
23. The scope of the North Somerset re-examination of the housing requirement is constrained by the parameters set by the extant Core Strategy and the reasoning set out in the Judgment. The Judge did not anticipate that this would require an extensive process and did not refer to any duty to co-operate implications being required to ensure NPPF compliance.

Is there unmet Bristol need?

24. Much of the developer objection to Core Strategies across the West of England is predicated on an assumption that there is unmet need in Bristol which needs to be provided for elsewhere in the sub-region. This assumption will be tested through the new SHMA evidence, and if necessary delivered through the duty to co-operate.
25. Bristol was the first Core Strategy and was adopted in June 2011. The cross-boundary implications of the Bristol housing requirement and the relationship to other neighbouring districts was a specific issue at the original Core Strategy examination, and covered by NSC position paper HD/02. The Bristol Core Strategy was found sound with housing needs to 2026 provided for without the need to use Green Belt land within the City, with a potential long-term contingency identified at SE Bristol. The Bristol Core Strategy therefore made no provision for unmet need to be found in adjacent areas.
26. The North Somerset Inspector's Report (March 2012) concluded as follows on the issue of Bristol's cross-boundary implications:

"Significantly, the Bristol Core Strategy was found to be sound and adopted in 2010 without reliance upon urban extensions outside its boundary with North Somerset. Even though future urban extensions south west of Bristol are not ruled out, there is evidently no current need for North Somerset to cater for any unmet need from neighbouring Districts over and above its own calculated housing and employment requirements". (Paragraph 27).

27. This High Court challenge in respect of this point failed as demonstrated by the following extracts (paragraphs 127-129) and conclusion (paragraph 134) from the Approved Judgment:

“As for housing to meet the needs of Bristol City, paragraph 27 of the Inspector’s report correctly indicates that the Bristol Core Strategy did not identify a current need for housing that could only be met outside the City boundaries. It is true that the Bristol Inspector’s acceptance of that authority’s housing figures was based on restricted land supply for housing. This was because of the lack of available land within the City, the unsatisfactory nature of developing small pockets of Green Belt land in the City Council’s area and the unwillingness of neighbouring authorities to consider urban extensions in the Green Belt.” (Paragraph 127).

“I recognise there is a ‘chicken and egg’ quality to the two Inspectors’ reports. In Bristol the housing requirement figure was constrained by the unwillingness of North Somerset to consider an urban extension. In North Somerset no urban extension was proposed because it was not needed to meet Bristol’s housing requirement figure.” (Paragraph 128).

“However, the question for the court is whether this Inspector’s conclusion that the Core Strategy was in general conformity with RPG10 was lawful. In the light of the fact that Bristol City’s Core Strategy did not identify a housing requirement that needed land outside the City Council’s area in an urban extension, the Inspector’s conclusion that North Somerset’s Core Strategy need not make provision for an urban extension and in consequence no review of Green Belt boundaries was required to meet such a need was plainly open to him. That conclusion was not inconsistent with the Bristol City Inspector’s report on joint working between authorities. Paragraph 52 of the latter report simply states that it would be short sighted to rule out the possibility of a cross boundary approach to development in the Green Belt in the future, it does not specify when and if such joint working should take place.” (Paragraph 129).

Finally, on the third ground of challenge, the Inspector was entitled to conclude that there is sufficient housing land supply to meet the Council’s 14,000 housing requirement and that there is no need for an urban extension to meet the housing needs of Bristol. Further, he was entitled to conclude that, in consequence, a Green Belt review was not required by Policy SS4 now as part of the Core Strategy. (Paragraph 134).

28. The South Gloucestershire Core Strategy Inspector’s Report found the Council’s approach to determining the housing requirement sound but emphasised the importance of the forthcoming SHMA which will

provide the basis for re-assessing housing needs in a sub-regional context through the duty to co-operate and which may require changes to the housing provision in some or all of the West of England authorities. In Bath and NE Somerset the Core Strategy examination is still in progress and the Inspector is proceeding on the basis of a housing requirement derived from evidence prepared on a Bath SHMA, although the local authority is committed to the need in the future to take account of the implications of the new West of England SHMA.

29. There is no identified unmet need from Bristol. This issue has been tested at all four West of England Core Strategy examinations and each time the answer is the same - there is currently no identified shortfall - but the new SHMA will provide an updated evidence base to re-assess the position to 2036.

Summary

30. The duty to co-operate is not a relevant consideration in respect of the Edge Analytics commission and the consequential recommended increase in the North Somerset housing requirement:

The duty to co-operate as introduced by s110 of the Localism Act does not apply retrospectively to plans which had already been submitted. The remitted policies remain in the examination phase of plan preparation.

Notwithstanding the above, the West of England authorities continue to engage constructively on an active and on-going basis on strategic planning issues.

The West of England authorities are preparing a new SHMA to cover the period to 2036. This will provide the evidence base for the roll-forward of the strategic planning policy framework.

The re-examination of the housing requirement is constrained by the parameters set by the extant adopted Core Strategy and the reasoning set out in the High Court Judgement.

There is no currently identified unmet Bristol housing need.