Neutral Citation Number: [2014] EWHC 3441 (Admin)

Case No: CO/17241/2013

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

IN THE MATTER OF AN APPLICATION UNDER SECTION 113 OF THE PLANNING AND COMPULSORY PURCHASE ACT 2004

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/10/2014

Before :

MR JUSTICE OUSELEY

Between :

SAMUEL SMITH OLD BREWERY (TADCASTER)	**Claimant**
- and -	
SELBY DISTRICT COUNCIL	**Defendant**

Peter Village QC and James Strachan QC (instructed by **Pinsent Masons**) for the **Claimant**
Alan Evans (instructed by **Selby District Council**) for the **Defendant**

Hearing dates: 10th, 11th and 14th July 2014

Approved Judgment

MR JUSTICE OUSELEY :

1. Samuel Smith Old Brewery (Tadcaster), SSOBT, the Claimant, is a long established brewery and major landowner in Tadcaster and elsewhere in the area of Selby District Council in North Yorkshire. Its head offices are in Tadcaster.

2. Selby District Council, the Defendant, presented its Submission Draft Core Strategy, the SDCS, a local development plan document, for public examination on 5 May 2011, under s20 of the Planning and Compulsory Purchase Act 2004. The independent Planning Inspector, appointed by the Secretary of State for Communities and Local Government, commenced the public examination on 20 September 2011. One of his statutory tasks was to determine whether the SDCS was sound. If he found it to be unsound, the District Council could not adopt it in that form. It became apparent to the Inspector early on in the process that, in at least two and potentially three respects, the SDCS was unsound. He suspended the public examination for six months to give the District Council time to propose changes to deal with the problems he identified.

3. On 15 November 2011, during the period of suspension and while the further work was being undertaken, s33A of the 2004 Act, as inserted by s110 of the Localism Act 2011, came into force. S33A imposes on local authorities a duty to co-operate in relation to strategic planning matters.

4. The Inspector ruled that the duty did not apply after the SDCS had been submitted for examination. He found the SDCS to be sound if subjected to significant modifications, including those proposed by the Council as a result of work it carried out during the period of suspension. The SDCS was adopted by the District Council on 22 October 2013.

5. SSOBT seeks to quash the adoption of the SDCS under s113 of the 2004 Act on the grounds that it fell out outside the powers of the District Council, and because of procedural failings, prejudicial to SSOBT. Its principal ground of challenge related to the Council's non-compliance with the duty to co-operate, by which SSOBT said it was bound, but which the Council denied.

6. SSOBT's other grounds included (1) an allegation that the core of the housing policies was tainted by apparent bias and therefore unlawful; (2) a sustainability appraisal of the quantification of windfall housing was unlawfully omitted; (3) two villages were wrongly designated as suitable for further development; (4) the Council had failed to "engage" with SSOBT as a major landowner over the deliverability of the Council's Strategy, particularly over housing land in Tadcaster; this was a breach of a policy based duty or legitimate expectation; (5) the Council ought also to have treated SSOBT's strategy or "Vision" for Tadcaster as a reasonable alternative, but in breach of the Strategic Environmental Assessment Directive and domestic Regulations had failed to do so.

The statutory framework

7. Section 19 of the Planning and Compulsory Purchase Act 2004 sets out certain requirements in connection with the preparation of local development documents of which the SDCS was one. It provides, so far as relevant:

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

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

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

(5) The local planning authority must also—

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

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

8. The development document is then submitted to the Secretary of State who appoints an Inspector to carry out an independent public examination. This is dealt with by s20, as amended by the Localism Act 2011:

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

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

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

(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;

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

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

(a) has carried it out, and

(b) considers that, in all the circumstance, it would be reasonable to conclude-

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

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

the person must recommend that the document is adopted and give reasons for the recommendation.

(7A) Where the person appointed to carry out the examination—

(a) has carried it out, and

(b) is not required by subsection (7) to recommend that the document is adopted, the person must recommend non-adoption of the document and give reasons for the recommendation .

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

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

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

(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 –

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

is sound."

9. Mr Village QC, for SSOBT, contended that the preparation phase under s19 continued through to adoption, or at least revived during any period of suspension of the public examination to cover work carried out by the Council to produce policies to make the SDCS sound.

10. There is no provision in the 2004 Act or in the Town and Country Planning (Local Development) (England) Regulations 2004, SI 2004 No 2204, in force until 6 April 2012, or in the successor Town and Country Planning (Local Planning) (England) Regulations 2012, SI No 767, which provides for or covers the effect on the operation of ss20 and 23 of the suspension of the public examination. No party however contended that the Inspector lacked the power to suspend, halt temporarily or adjourn the public examination for good and sufficient reason, and I regard such a power as necessarily implicit in the exercise by the independent Inspector of his functions in s20.

11. Section 23, which was also amended by the Localism Act 2011, provides for the power of the Council in response to the Inspector's recommendations, and for the adoption of development plan documents as follows:

> "(2) If the person appointed to carry out the independent examination of a development plan document recommends that it is adopted, the authority may adopt the document—
>
> (a) as it is, or
>
> (b) with modifications that (taken together) do not materially affect the policies set out in it.
>
> (2A) Subsection (3) applies if the person appointed to carry out the independent examination of a development plan document—
>
> (a) recommends non-adoption, and
>
> (b) under section 20(7C) recommends modifications ("the main modifications").
>
> (3) The authority may adopt the document—
>
> (a) with the main modifications, or
>
> (b) with the main modifications and additional modifications if the additional modifications (taken together) do not materially affect the policies that would be set out in the document if it was adopted with the main modifications but no other modifications."

12. The authority must not adopt a development plan document unless it does so in accordance with subsection (2) or (3).

13. The Localism Act 2011 brought into force a change reflecting the abolition of Regional Planning Boards and Regional Strategies: very broadly, the removal of the regional tier of planning strategies to which local plans generally had to conform, leading to greater scope for local decision-making, was qualified by a duty on local authorities to co-operate in strategic planning matters. The duty in s24 of the 2004

Act to ensure that development plan documents generally conformed to the Regional Strategy has not yet been abolished. But it was rendered ineffectual by the abolition of Regional Strategies themselves; in this case, the Yorkshire and Humber Regional Strategy was revoked with effect from 22 February 2013, shortly before the final session of the public examination.

14. S110 of the Localism Act introduced s33A to the 2004 Act, in force from 15 November 2011. This is the statutory duty to co-operate, to which these grounds relate. For almost all of the period leading to the adoption of the SDCS, this duty ran in tandem with s24. s33A provides:

> "(1) Each person who is-
>
> 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,
>
> (b) the preparation of other local development documents,
>
> (c) …
>
> (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)-(c), so far as relating to a strategic matter.
>
> (4) For the purposes of subsection (3), each of the following is a "strategic matter"—

> (a) sustainable development or use of land that has or would have a significant impact on at least two planning areas, including (in particular) sustainable development or use of land for or in connection with infrastructure that is strategic and has or would have a significant impact on at least two planning areas…
>
> (6) The engagement required of a person by subsection (2)(a) includes, in particular—
>
> (a) considering whether to consult on and prepare, and enter into and publish, agreements on joint approaches to the undertaking of activities within subsection (3), and
>
> (b) if the person is a local planning authority, considering whether to agree under section 28 to prepare joint local development documents.
>
> (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."

The facts

15. On 22 September 2011, the third day of the public examination, the Inspector expressed the provisional view that objectors' concerns over whether the housing envisaged at Tadcaster could actually be provided, and hence over Green Belt issues, appeared well founded. One important cause for his view was the statement on behalf of SSOBT that it would not release land from its holdings in Tadcaster for that purpose, contrary to what the Council had assumed. The Council produced a written response on 28 September 2011, acknowledging the need for further work and requesting a suspension of the public examination while that was carried out. Its Position Statement proposed that the Core Strategy should include a policy protecting the general extent of the Green Belt with a localised review at Tadcaster to meet the requirement of the Regional Strategy and the objectives of the Core Strategy. There was to be a District wide review of the Green Belt through the later Site Allocations Development Plan Document. The Core Strategy however would establish the principles for that review. It continued:

> "The Council propose to gather proportionate evidence and carry out public consultation on the methodology for the review and set out the parameters in a new Core Strategy policy. The methodology and policy will be subject to Sustainability Appraisal."

16. This request for a suspension of the public examination was opposed by SSOBT, among other objectors.

17. On 10 October 2011, the Inspector ruled in favour of the suspension, for a period of 6 months. There is no challenge to the lawfulness of that decision. But the purpose of the period of suspension matters.

18. The Inspector agreed that the SDCS was unsound in respect of Green Belt and growth at Tadcaster. The Council should establish the principles governing Green Belt boundary reviews, and apply them to Tadcaster as part of determining the appropriate level of growth for the town, rather than treating the level of growth it envisaged as determining where the Green Belt boundary should be drawn. He did not think that such changes would be fundamental to the strategy. He also thought that there was a significant risk of unsoundness in the overall scale of housing development. The Council's reliance on the Regional Strategy figure of 440 dwellings per annum might not be robust in the light of evidence that a significantly higher figure was necessary. This latter concern could potentially lead to changes undermining the whole strategy, and the immediate withdrawal of the plan. More work was required, without going back to the start of the process. It was while this work was underway that the s33A duty to co-operate came into force.

19. In January 2012, the Council published its proposed changes, along with background and other papers, which went out to public consultation closing on 15 February 2012. It carried out a sustainability appraisal of the changes it proposed. The various papers were submitted to the Inspector.

20. These proposed changes were modifications which the Council requested the Inspector to recommend it make; they were not amendments made to the Core Strategy simply upon their submission to the Inspector as representing the Council's position.

21. The examination resumed on 18 and 19 April 2012 to consider the three papers produced in response to the concerns which had led to the suspension of the examination. The Council published, but for later consideration, a paper in response to the newly published National Planning Policy Framework, NPPF.

22. It also published a paper on the new statutory duty to co-operate, which was the subject of controversy, and included its statement of what it had done to comply with the duty to co-operate, if it applied to the three topics considered during the period of suspension. The Inspector ruled on the scope of this duty on 27 April 2012. This ruling did not concern the policy duty as expressed in the new NPPF. I do not need to set out his ruling in any detail, carefully considered though it was, since developed arguments on whether the duty applied were presented to me. He concluded that the duty applied to those plans submitted after 15 November 2011. The plan once submitted for examination was not covered by the duty to co-operate. The work done by the Council during the period when examination was suspended from September 2011 to April 2012 was not plan preparation, because the plan had already been submitted for examination and so had ceased to be in preparation by 15 November 2011- a brief foretaste of the submission before me. He also decided that, in the light of his conclusion that there was no duty to co-operate, he did not need to decide whether the three topics which had led to the suspension were "strategic matters"

within s33A(3), nor whether the Council had complied with the s33A duty in any event, as the Council had contended.

23. There was a further suspension of the examination of the SDCS between September 2012 and February 2013, when it concluded.

24. The Inspector finally reported to the Council on 19 June 2013. He concluded that the SDCS as submitted was unsound in a number of respects, and so he could not recommend it for adoption as it stood. But it would satisfy the requirements of soundness and other criteria in s20(5) of the 2004 Act, subject to the main modifications requested by the Council. The Council adopted the SDCS with those thirty-four main modifications, as well as further minor ones, on 22 October 2013.

Grounds 1-3: The duty to co-operate

25. I take these together as they overlap to a considerable degree.

26. It was not at issue but that the work done during the period of suspension would have constituted plan preparation had it been undertaken before the submission of the plan for examination. It was also not at issue but that the duty to co-operate in relation to "strategic matters" applied to each paragraph of subsection (3) to s33A, and not just to paragraph (a).

27. Although Mr Village submitted that the effect of the coming into force of s33A during the period of suspension meant that the whole plan then became subject to the duty to co-operate, he pursued more strongly the limited submission that the duty at least applied to the further works of plan preparation carried out during the period of suspension. He submitted that ss19 and 20 of the 2004 Act contained no words limiting the concept of plan preparation to work done before submission. Although a planning authority might think that the document was ready for public examination under s20(2), that might be an unduly optimistic view, and further work of preparation might then be required before the plan could be judged sound. The Council had carried out a sustainability appraisal of the new proposed policies, and had consulted upon them, thus meeting requirements only applicable to plan preparation, respectively in s19(5) of the 2004 Act, and Part 6 of the 2004 Regulations, made under s19, and other powers. The Council would not have been doing that if the work did not require it. It would be strange if those obligations did not apply to major work which ought to have been done before submission for the plan to be sound, but which was done after submission; and if the duty to co-operate had been in force before submission, that it would not apply to such major work after submission. This was further supported by the "ongoing" nature of the s33A duty as expressed in s33A(2)(a), although Mr Village suggested that if further work during a public examination did not necessitate suspension of the examination, work of that sort "may well" not engage the duty to co-operate; he had in mind that additional supporting work was a common place for Councils during a public examination. The Inspector had no power to recommend modifications under s20(7C) unless he had concluded that the Council had in fact complied with the duty to co-operate. The Inspector had not ruled upon the Council's contention that it had in fact complied with the duty. The pattern of development proposed in the northern part of the Council's area, including Tadcaster, could be affected by co-operation with the neighbouring Councils of York and Leeds.

28. There is force and sense in these submissions but I do not accept them. I prefer those of Mr Evans for the Council. In coming to this conclusion, I am in agreement with the decision in *University of Bristol v North Somerset Council* [2013] EWHC 231 (Admin); HHJ Robinson sitting as a Judge of the High Court. The stage of plan preparation is the only stage to which the duty to co-operate applies. That stage ends with the submission of the plan for examination, however major or minor its shortcomings, and whatever further work is required, unless the plan is withdrawn. Otherwise, all the further work either supports the plan as it stands or supports possible modifications proposed to the Inspector for him to recommend to the Council.

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

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

31. This is supported by the functions of the Inspector, and the powers of the Council. The purposes of the independent public examination by an Inspector are to "determine" three issues or requirements; s20(5). If the Inspector considers that it would be reasonable to conclude that the requirements are met, he "must recommend that the document is adopted…."; s20(7). But if not required to recommend adoption, the Inspector "must recommend non-adoption…"; s20(7A). Specific provision is made by subsection (7B) for what is to happen where the Inspector concludes that the plan is not sound, but considers that the Council "complied with any duty imposed…by section 33A in relation to the document's preparation." What is to happen is set out in subsection (7C). The Inspector "must recommend modifications" which would make the plan meet certain requirements and make it sound, but only "If asked to do so by the local planning authority…."

32. This latter point is of particular note in understanding the very real limits on the Council. It itself cannot change the plan after submission. It can only ask the Inspector to recommend modifications to it. Those modifications may or may not be ones which the Council itself has devised or worked on or promoted in some way. The plan, in relation to which the Inspector recommends modifications, is not the plan as the Council may suggest that it should be modified during the public examination. He

takes the plan as submitted as the plan which is to be modified if he so recommends. I regard that as a potent illustration of the fact that the Council's preparation of the plan was ended by its submission, and by the powers that are then granted to the Inspector, and the limited role which the Council has thereafter. Asking the Inspector to recommend modifications to make the plan sound, is not plan preparation, whether the Council has worked on the modifications or not. Working on modifications which it may ask the Inspector to recommend is not plan preparation either, regardless of the nature of the work which the Council may undertake for that purpose.

33. What the Council is doing, when it carries out further work during the examination stage, whether during a period of suspension of the examination or not, is preparing itself to ask the Inspector to make recommendations to it for modifications, which it is likely to have influenced. This reduces the risk that the Inspector will refuse to make recommendations for the modification of the plan, which would then have to start its preparation process all over again. The Council here carried out an informal consultation process, giving its suggested modifications a better chance of being recommended to it by the Inspector. True it is that this is not provided for by statute, but that is not because this work is to be ignored; it is precisely because it is not the subject of any statutory requirements, that the extent to which the statutory requirements applicable to preparation are met informally, goes only to the weight which the Inspector may attach to the requested modifications.

34. Section 23 underlines the distinction between preparation and examination to adoption. The Council can only adopt a plan with minor modifications, i.e. those which do not materially affect the policies in it, unless the Inspector has recommended "main modifications" and the Council adopts those, along with immaterial modifications of its own. So the control over the plan, minor or immaterial modifications apart, is no longer with the Council after submission of the plan for examination. The operative period for the duty to co-operate has passed. That makes complete sense in the context of the very limited statutory powers left to the Council after submission, and the powers given to the Inspector. Failure in relation to co-operation in the preparation of the plan, as submitted, leads to adoption not being recommended; and the Council cannot adopt the plan. Thus, any failure in that respect cannot advance the Council. The ongoing duty of co-operation does not need to survive the submission of the plan.

35. There is modest force in the grammar of s20, in the switch of tenses, in showing that the duty has to be fulfilled before the conclusion of preparation and that preparation must have concluded upon submission. The Inspector has to determine under s20(5) "whether it satisfies" various requirements in relation its preparation, whether it "is sound", but also whether the local authority "complied" with any s33A duty "in relation to its preparation." The same contrast is present, more importantly, in subsection (7), although wavering in the first part of subsection (7B)(a), but not so as to undermine the contrast between the present tense for soundness and the past tense for the duty to co-operate.

36. Mr Village accepted that it was commonplace for an authority to undertake further work during the examination stage of a plan, whether of its own volition to shore up a crumbling position, to devise better polices to meet objections, or at the behest of the Inspector. He had to deal with the question of whether all such work could fall into the category of plan preparation. He perceived the risk of onerous extra requirements

befouling his interpretation. But I do not accept Mr Village's suggestion that uncertainty over the further work to which the duty to co-operate applied could be resolved by distinguishing between further work carried out during a period of suspension of the public examination and work carried out during its programmed sessions. That distinction is not warranted by statute. The question can only be whether the work qualifies as plan preparation. If so, not merely would the duty to co-operate arise, but so too would all the other statutory requirements, including consultation. Parliament would not have enacted ss19, 20 and 23 as it did, if it had been its intention that, suspension or not, any further work post submission on "strategic matters" which, carried out before submission would have been "plan preparation", would be work to which the duty to co-operate applied and which would also have to satisfy all the statutory requirements of plan preparation.

37. I also do not accept the further distinction drawn by Mr Village between "topics" which are the subject of the further work during a period of suspension, and topics which are the subject of the further work without a period of suspension. The Act does not contemplate parts of plans being separately considered for their compliance with statutory duties. The plan as a whole is subject to the duty to co-operate. Of course, that also reflects the interdependence of various policies. Were he correct that the duty to co-operate arose during the period of suspension, I do not accept that the duty could stop short at the three topics. This is a further indication that the coming into force of s33A was not intended to interrupt the course of an examination once embarked upon.

38. Mr Village's next point under this heading, which he really developed as part of his third ground, was that the duty to co-operate in s33A was part of a package of reforms to give effect to the "localism agenda", making decisions at a more local rather than central or regional level. The greater local freedom was balanced by a duty to co-operate. The Inspector was limited by s 20(7) to considering soundness, and not what might be the competing merits of two sound policies. He could only recommend material modifications which would make the plan sound. This in reality pointed towards the duty to co-operate arising in relation to any plan to which s20(7) applied, so as to give effect to the package nature of the reforms. The Inspector applied s20(7) and (7B), and the Council adopted the plan on that basis; the duty to co-operate had to bite to give effect to the package of reforms.

39. I accept that the reforms were part of a package much for the purpose described by Mr Village. But I cannot go so far as he submits. If no further work on the plan had been necessary, s20 would still have applied and he could not have contended that the duty under s33A applied. If there had been no need for a suspension, and there had been no co-operation, the provisions governing recommendation and adoption in ss20 and 23 would still have applied. His argument that it was the fact of suspension which made the duty applicable to the further work would draw a quixotic distinction in the package between those circumstances where there was no suspension and those where suspension took place, within the same statutory structure in relation to s20 and the duty to co-operate. Even more curious would be the distinction were the duty to apply afresh to the whole plan, even where the subject of further work was rather more confined, and perhaps did not relate to "strategic matters" at all. His argument was little more persuasive when confining the duty of co-operation to the three new topics, since that restriction, more for forensic convenience than any clear reasons of

statutory construction or purpose, would not have applied to the whole plan which would nonetheless be governed by s20.

40. The simple fact is that the various parts of the package were not brought in in that way. There was none of the more elaborate provision which I would have expected if Parliament had intended that the duty to co-operate applied upon suspension for further work, or to further work after submission more generally. The package argument also suffers from the problem that during the period of suspension, the Council was not entitled to ignore the Regional Strategy: the statutory duty to prepare a plan which conformed generally to it remained in force, as at that time did the Regional Strategy itself. That obviously limited the scope for the operation of a duty to co-operate. The package was a work in progress, with an important aspect of the previous regime still demanding conformity.

41. I do not accept Mr Village's further contention that the consequence of s33A not applying to the further work, is that s20(7) and (7B) should be interpreted as preventing the Inspector concluding, as he must, that it would be reasonable to conclude that the local planning authority had complied with "any duty imposed on the authority by section 33A in relation to the document's preparation". Again, Mr Village relied on the package nature of the reforms: the greater local freedom in s20 balanced by the duty to co-operate. The Inspector considered and rejected these submissions in a ruling on 26 February 2013, and referred to them again in his report.

42. This argument begs the question of whether there was in fact any duty to co-operate on the Council. If there were none, there was no requirement to be satisfied. It would be absurd to interpret the provision so as to require the Inspector to hold that the duty had not been complied with when it did not arise at all, for whatever reason. Compliance with the duty is required; that can only happen where it arises. The operation of s20(7) and (7B) cannot be limited to those circumstances in which the duty to co-operate was complied with, or did not arise because there were no "strategic matters" at issue in the plan. The statutory words simply do not permit such an interpretation.

43. The last point under this heading, raised by Mr Village, assumed that the duty to co-operate was inapplicable. He contended however that the imminently expected duty to co-operate would have applied to a plan which had to go through the plan preparation process again, and that this was a factor which the Inspector should have considered in deciding whether to suspend the examination, or to find the plan unsound, requiring the Council to go back to the drawing board.

44. I disagree. The Inspector was not asked to consider this point by SSOBT. It was not a point so obviously material that he was bound to consider it, whether or not raised by a party. His decision was plainly not irrational, rather a harsh adjective for a failure to consider a point which SSOBT's team, not backward in devising points, did not itself take. The Inspector was in any event obliged or at least entitled to judge the position by reference to the law as it stood, rather than to anticipate the coming into force of s33A in a manner not provided for by Parliament.

45. The Inspector considered the practical issues to which the duty to co-operate might relate in paragraphs 64-65 of his report. He said that cross-boundary housing was the main strategic matter to which the duty applied. He noted the various strands of sub-

regional bodies, aiming to co-ordinate cross-boundary working in the two relevant regions, at a time when the Regional Strategy was the mechanism for tackling cross-boundary issues, and in which the Council had participated. As there was no issue over whether an authority should meet needs from the area of another authority, which he regarded as the important point, "it is reasonable to conclude that the main duty to cooperate requirement of the Framework is satisfied".

46. It is difficult to see, in the light of the obligation at that stage for the SDCS to comply generally with the Regional Strategy, quite what scope there was for the duty to co-operate to lead to a different result. Mr Village could not point with any realism either to any issue upon which the co-operation of Selby District Council with another local authority could bear, at least in relation to an issue which SSOBT wished to raise. No neighbouring local authority had complained of a want of co-operation. Granted there was an issue over the distribution of housing in the northern part of the District and in Tadcaster in particular, that was not an issue over whether Selby District Council should co-operate with Leeds or York in taking more of their housing; Selby was not doing so. Whether Selby housing need should be met in neighbouring areas was not at issue, and would not have been an issue for co-operation by Selby. SSOBT's point related to the distribution of housing within the Council's own area.

47. The fact that the duty to co-operate set out in paragraph 182 of the NPPF also came into force during the period of suspension gives rise to no better a point. Mr Village rightly says that compliance with the duty to co-operate may be relevant to soundness. But if that had been the point made to the Inspector, the obvious retort would have been that soundness is what he would be considering anyway. His duty to consider soundness continued up to the date of his report, determination and recommendations.

48. Accordingly, I reject the first three grounds of this challenge.

Ground 4: apparent bias

49. This ground concerns the way in which a particular policy evolved. Policy CP1, which became CP1A and then SP4, dealt with the management of residential development in settlements, on sites not allocated for development. The particular aspect of it at issue here related to development in secondary, i.e. smaller, villages.

50. The Council's Policy and Resources Committee, PRC, set up a Task and Finish Group, TFG, consisting of four PRC members, in December 2007; the TFG chose Councillor Percival as its Chairman. It was not a sub-committee but an advisory group. Its task was to consider the Council's housing policies and to advise on the adoption of interim housing policies, IHPs, pending full consultation on the policies of the Core Strategy. In 2008, it recommended against pursuing IHPs. The PRC set up a second four man advisory TFG, which Councillor Percival again chaired; its task was to consider and make recommendations on the development of, among other matters, the Core Strategy.

51. The TFG meeting relevant for this challenge was held on 30 June 2010. It considered an officer's report on consultation on the draft Core Strategy, as it then was. The Government's Planning Policy Statement, PPS3, would help resist "garden grabbing" but would reduce opportunities for housing development in smaller villages. Responses suggesting a preference for greater flexibility in smaller villages led the

officer's report to conclude that there "might on balance be a case for relaxing the policy in Secondary Villages to make small scale infilling acceptable" within their development limits, whether on previously developed land or on Greenfield sites. An anomaly relating to the development of farmsteads was also to be removed. The TFG agreed to accept those recommendations for amendments to the relevant draft policy, then CP1.

52. The relevant part of CP1 had read "Limited amounts of development will be absorbed in secondary villages (inside development limits) through small scale development on previously developed land, or through redevelopment or extension of existing premises, provided development does not adversely affect the character of the area." The change recommended by the officer and TFG read: "secondary villages- conversions, replacement dwellings, development/redevelopment on pdl and "filling of small linear gaps in otherwise built up frontages"...."

53. This was considered by the PRC on 27 July 2010. A councillor on the TFG, not Councillor Percival who was not present, put forward a further relaxation of this part of the policy, which the PRC accepted. So far as material, CP1 then read: "secondary villages- conversions, replacement dwellings, sensitive development/redevelopment on previously developed land and "filling of small linear gaps in otherwise built up frontages" on Greenfield land and conversion of farmsteads...." This was approved for consultation, together with a statement on IHPs, which was yet to be approved. The TFG, at a meeting in September, accepted the recommendations of an officer report on the content of this statement, and in turn recommended it to the PRC for approval. The PRC accepted that TFG recommendation.

54. On 30 November 2010, the TFG considered the results of the consultation. An officer report proposed amendments in the light of the responses. This would now read: "In Secondary Villages [to be listed] –conversions, replacement dwellings, redevelopment of previously developed land, "filling of small linear gaps in otherwise built up residential frontages and conversion/redevelopment of farmsteads."" There were further changes to the policy on the development of farmsteads, which are not material. The TFG decided to recommend the adoption of this policy in the draft Core Strategy, as CP1A as it appears to have become, and as a revised IHP, but subject to further amendments, including the removal of "residential" qualifying "frontages". The PRC was to meet to consider this on 14 December 2010.

55. On 11 December 2010, Councillor Percival told the Council's Monitoring Officer that he wished to declare an interest, and at the PRC meeting on 14 December he did so. He declared a personal and prejudicial interest because his wife had property, a single plot with potential for housing, in a Secondary Village which could be affected by the proposed IHP and draft policy CP1A. She had submitted a planning application on it in October 2010. He left the meeting while the TFG recommendations were discussed. The PRC approved the new policies, for inclusion in the SDCS.

56. This declaration of a personal and prejudicial led the Chief Executive to set up what became a two member review panel, none of whom had been on the TFG, to "carry out an independent examination of the development of Policy CP1A...[and] to consider whether or not any actions or decisions of the [TFG] had any inappropriate impact on the development and consequent soundness of the final policy." The panel heard from the senior officers who attended the TFG meetings, and considered

various documents. Its report of April 2011, concluded that "a thorough and methodical process had been followed" and "that the development of the policy was well documented". One of the key drivers for the development of CP1A had been the change in government policy towards the development of garden land. CP1A was a sound policy: the TFG had had the benefit of expert officer advice; the TFG had not influenced its development unduly; and the only significant change to the text of CP1A by Councillors had been proposed and agreed at the PRC on 27 July 2010. CP1A was not entirely in accord with national policy, but the difference was thought to be acceptable in the light of its policy of "localism". There had then been a "minor amendment" in response to consultation. The Panel put forward three options for consideration by the Executive: no change to CP1A, or amendment to remove the words above set out in internal quotes, followed either by further consultation or by presentation of the policy to the Inspector. Officers recommended to the PRC in April 2011 that Policy CP1A, without further amendment, be retained in the SDCS for submission to the Inspector.

57. Councillor Percival was not re-elected to the Council after the May 2011 elections. In July 2011, the Executive considered the panel report, and decided that CP1A, without further amendment, should stay in the SDCS to be submitted for examination. This was in line with the officer's recommendation. His report pointed out that there were risks associated with each option put forward by the panel. The first option, which was adopted, carried the risk of legal challenge at the examination on the grounds that the development of Policy CP1A had been "inappropriately influenced through Councillor and Officer interaction." There would also be financial costs and delay associated with a successful challenge. Option 2 (reconsultation) created a significant risk of delay increasing the risk of challenge to the SDCS on the grounds that its evidence base was out of date, which could require expensive updating, and further consultation. Option 3 (presentation of the revised policy to the Inspector) risked the Inspector deciding that the change required further consultation, with costs similar to those in Option 1. In the light of the risks and likely financial consequences, the officer recommended that Option 1 be pursued, the panel having concluded that the policy in question was sound in the way it had been formulated.

58. Before the election, two Councillors had complained to the Monitoring Officer about Councillor Percival; the Council referred the matter to Standards for England, which, in January 2012 concluded that he had breached the Code of Conduct by failing to ensure that his register of interests was up to date, but had not failed to declare an interest, since he had not been required to do so before the PRC meeting of 14 December 2010, when he had indeed done so.

59. The Inspector heard submissions about the evolution of CP1A; he said this in paragraph 9 of his report:

> "Public consultation on the Submission Draft CS, which included policy CP1A, was undertaken immediately prior to its submission in May 2011 and modifications to the policy were consulted upon during the examination. These representations were taken into account at the various hearing sessions when the purpose and detailed wording of policy CP1A was discussed. Consequently the planning merits of policy CP1A have been subject to detailed scrutiny during the examination

> and I have been able to reach a properly informed conclusion on its soundness. Because the tests in section 20(5) of the 2004 Act have been satisfied in respect of policy CP1A, it is not necessary for me to determine whether or not the corrective action taken by the Council removed the acknowledged bias in the formulation of policy CP1A."

60. The Inspector considered the soundness of the policy in the context of the overall spatial development strategy, in which growth was centred on Selby town, then on two smaller local service centres, followed by Designated Service Villages, DSVs. No growth was planned in the "Secondary" or smaller villages where growth would be less sustainable, and where development was controlled to their development limits, while beyond them in the Green Belt and open countryside, there were yet stricter controls on development. This overall strategy, he accepted as sound.

61. His comment on Policy CP1A, and non-allocated sites, was in paragraph 55:

> "Clear guidance on the types of windfall residential development which will be accepted in settlements is provided in policy CP1A, which aims to balance the overall strategy of focusing on urban regeneration with the need to maintain the viability of smaller communities. The policy includes a restriction on the development of residential garden land in the less sustainable SVs, but no such restriction in the larger settlements. This approach is an appropriate response to the overall strategy and is consistent with paragraph 53 of the Framework, which enables authorities to devise policies to resist inappropriate development of residential gardens."

The policy was adopted with the recommended modification. In secondary villages, SP4 formerly CPIA, now provides that the following would be "acceptable in principle within Development Limits": "conversions, replacement dwellings, redevelopment of previously developed land, filling of small linear gaps in otherwise built up residential frontages, and conversion/redevelopment of farmsteads".

62. Mr Evans accepted that Councillor Percival had had a direct financial and prejudicial interest in CP1A, which the TFG was considering for the purposes of making recommendations to the PRC for decision. He also accepted that the fair minded observer would consider that there was a real possibility that Councillor Percival was biased in favour of adopting CP1A. He contended however that the mere fact of apparent bias on the part of Councillor Percival did not create a real possibility that the fair minded and fully informed observer would conclude that the recommendations of the TFG or decisions of the PRC were biased. This depended on the circumstances, including the number of members, the stage in the decision-making, and the level of participation of the tainted member; *Gardner v Harrogate Borough Council* [2008] EWHC 2942 (Admin). The role of the TFG was to make recommendations to the PRC of which its members were also members. This was why Standards for England had concluded that he did not have to declare an interest at the proceedings of the TFG. The suggested relaxation of the Secondary Villages policy originated with officers, for the reasons which they gave, and their recommendation was accepted. The review panel found that the policy was not

unduly influenced by TFG members, and that the only significant amendment was proposed at a meeting of the PRC on 27 July 2010 at which Councillor Percival was not present. The factors considered by the review panel were relevant to whether the whether Councillor Percival's views contaminated the work of the TFG.

63. The question of whether any real possibility of bias travelled from the TFG to the decision-making body was also to be tested by asking whether the fair - minded observer, in possession of all relevant facts, would conclude that there was a real possibility that the decision to adopt the SDCS, including what had become SP4, was also tainted. The TFG in effect had a recommending role rather than a decision-making role. Where a decision was taken on advice tainted by bias, the question was whether the observer "knowing the composition and remit of both the advisory body and the deciding body, would perceive a real possibility both of bias in the advice and of its infecting the decision"; *R (Royal Brompton and Harefield NHS Foundation Trust) v Joint Committee of Primary Care Trusts* [2012] EWCA Civ 472 at paragraphs 125-126.

64. The PRC was not a rubber stamp for the TFG: it amended what became CP1A on 27 July, when Councillor Percival was not present and he left the meeting on 14 December 2010 when the PRC decided whether to approve CP1A for inclusion in the SDCS. The SDCS had then proceeded through the public examination process before an independent Planning Inspector who had produced a reasoned report on the policies and their soundness. Any person seeking a change to a policy was entitled to be heard by the Inspector on that point.

65. Mr Village pointed out that Councillor Percival had been the Chairman of a small group, with all the added influence which that could bring; he had only declared his interest at a late stage in the TFG process. The PRC did not itself, so far as the minutes go, consider the implications of his declaration of interest for the reliance which it placed on the TFG recommendations, which appeared, he submitted, to be adopted routinely with little debate. The report of the review panel, concluding that the TFG had had no inappropriate impact on the development and soundness of the policy, was legally irrelevant since once apparent bias was established, there was no need to prove that the apparent bias had an effect on the decision taken; that would be to blur the important difference between actual and apparent bias; *Competition Commission v BAA Ltd* [2010] EWCA Civ 1097. The Council had also failed to recognise the difference between whether a policy was "sound", and whether it was the best policy on its merits. The policy might be sound, but the apparent bias could have prevented a different but also sound policy emerging from the deliberations of the TFG. The adoption of the panel's recommendation was not independent since it was influenced by the considerations of cost and delay, factors irrelevant to the soundness of the policy, which the Executive did not reconsider, nor its merits.

66. The Inspector's report could not cure the taint either. He did not decide whether the corrective action taken by the Council through the review panel had "removed the acknowledged bias in the formulation of policy CP1A." Although he concluded that the policy was sound, a policy included as a result of a process tainted by apparent bias could not be sound; *R(Al-Hassan) v SSHD* [2005] UKHL 13: a fair minded and informed observer having considered all the relevant facts would have concluded that there was a real possibility that a prison governor who assented to a search order was

biased when he came to adjudicate on its lawfulness. The reasonable observer also had to consider the whole procedure which the body followed. .

67. I accept Mr Evans's submissions. I do not accept that Councillor Percival's apparent bias would have caused the reasonable observer, in possession of all the facts, to believe that the TFG itself was biased. Granted he was the chairman of a small group to which he had not vouchsafed any interest through his wife's ownership of property, but the proposals were recommended to the TFG by an officer of the Council. There is no suggestion that the officer was influenced in his recommendation by Councillor Percival. Apart from the fact of his chairmanship of the TFG, there is no evidence of any other particular influence or conversation he had. It was another TFG member who put forward the further relaxation. The TFG then considered a further report from an officer after the consultation, and accepted his recommendations. There is no suggestion that that recommendation was influenced by Councillor Percival or that his views were at odds with the general tenor of public responses. The consideration given by the TFG in those reports was also accepted by the PRC, subject to a relaxation he did not propose. The consideration given to the TFG's role by the Council's Review Panel and then its Executive itself would be part of the reasonable observer's thinking; it showed that the development of policy had followed a thorough, methodical process. That is relevant factual material. There was a proper paper trail for the development of policy. The minor departure from Government policy was justified; the general conformity of the TFG's recommendation with Government policy would be part of the reasonable observer's thinking.

68. Even if the reasonable observer would have concluded that there was a realistic possibility that the TFG had been biased, I do not consider that that can lead to the conclusion, crucial to any challenge, that the PRC was apparently biased.

69. The PRC cannot be taken simply as a rubber stamp for the TFG. The latter made recommendations. Clearly there were some discussions there, not initiated by Councillor Percival who was not present for the 27 July 2010 PRC meeting. After December 2010, when the PRC met to consider the adoption, post-consultation, of the draft policy for the SDCS, it was aware of Councillor Percival's declaration of interest and he had departed the meeting at that point. The examination of the issue and the conclusion of the review panel, although it could not undo any apparent bias in the TFG, support my view that the PRC was not tainted by apparent bias.

70. The Executive's consideration as part of a risk assessment of the consequences of the various possible courses of action, shows no more than a sensible consideration of risks. It chose the course which risked litigation. But it accepted the review panel's report, and the risk did not deter it from the course of action which that acceptance indicated. There were risks whatever it did. But I do not draw evidential support from what it did for my conclusions about how a reasonable observer would have perceived matters.

71. Although I accept Mr Village's point that the Inspector considered soundness, and not the competing merits of different sound policies, I consider that the Inspector's consideration and acceptance of the policy reinforces my conclusion that neither TFG nor PRC was apparently biased, or "tainted" by Councillor Percival's acts. The Inspector's consideration of this policy is quite detailed, although his conclusion

concerns soundness. There is no evidence of an alternative sound policy, which he refused to consider because it went to merits not soundness in his report or ruling.

72. The assertion of a continued apparent bias affecting the lawfulness of the adoption of the plan cannot survive the Inspector's conclusions, the difference between soundness and merit notwithstanding. Indeed, as Mr Evans submitted, it would require a strong case to show that a prejudicial interest affected two officer recommendations, including one after public consultation, two reports of the TFG, and two PRC decisions, the final one of which was taken after the declaration of interest, and notwithstanding that the independent Inspector had concluded that the outcome was sound, aware of the argument over bias.

Ground 5: Windfall sites, sustainability appraisal, and reasons

73. The Inspector ruled in April 2013 on representations made by SSOBT and another that the Council had not undertaken the required Sustainability Appraisal, SA, on proposed modifications to the SDCS. These modifications added the anticipated level of windfall housing development to the "housing trajectory", the likely number of houses to be built, but not to the housing "target", the number of houses needed. In other words, windfalls were part of the expected total of houses to be built during the plan period but not part of the supply to meet the housing need. Only the latter had been subject to SA. Nonetheless this meant, according to SSOBT, that there was a reasonable prospect of more houses being built over the plan period than proposed and assessed; that higher number was said to be a proposal or reasonable alternative which should have been assessed for its sustainability.

74. This obligation arose from s19(5) and regulation 12(2) of the Environmental Assessment of Plans and Programmes Regulation 2004 SI No 1633. S19(5) required an appraisal of the sustainability of "the proposals" in the SDCS.

75. Regulation 12 requires an environmental report to be prepared where an environmental assessment is required. Sub-regulation (2) requires that report to identify, describe and evaluate the likely significant effects on the environment of (a) implementing the plan, and "(b) reasonable alternatives taking into account the objectives and geographical scope of the plan or programme". The level of information may vary according to a judgment as to whether certain matters are more appropriately assessed at different levels of the decision-making process to avoid duplication.

76. The SA of the SDCS of 2010 appraised Policy CP1A, which was the policy which would apply to housing development on non-allocated sites. Many of the relevant issues are marked in it as not applicable to that policy for reasons given; others are accompanied by general comments to the effect that specific possible issues such as the protection of the historic environment are dealt with under other policies. Overall, it makes the point that uncertainties arise largely because CP1A is a strategic policy, but its effects would be specific to locations which are presently unknown; these effects are controlled by policies other than CP1A itself.

77. There was no quantification of windfalls beyond the comment that the present high level was expected to continue. The SDCS 6th and 7th Proposed Changes, put forward during the examination, quantified anticipated windfalls at 105 dwellings per annum,

dpa. A second SA concluded that the small changes to the policy wording would not result in any change to the earlier SA.

78. The Inspector rejected SSOBT's contention that the greater clarity about the scale of windfall development now available and the consequences for the SA process should have been addressed in the two SA addenda. In his separate April 2013 ruling in this issue, the Inspector said that it had always been recognised that windfalls would be part of the housing totals, but additional to those required to meet plan requirements. The SA for the SDCS recognised that windfalls would continue; the likely yield from windfalls as a result of its policies would not be significantly different from those considered already, although there was greater certainty and precision about the numbers.

79. Paragraph 18 of the ruling is important:

> "In policy terms, windfalls have always been part of the expected delivery. Although minor adjustments have been made during the examination to the policy that aims to manage windfall development (CP1A), the submission CS acknowledged that an unspecified amount of windfall development would be additional to the housing requirement. The 2nd SA Addendum refers to the small changes to policy CP1A which clarify how windfall development will be managed, concluding that the changes do not alter the findings of the original (2010) SA on this policy. As the plan recognises, the location of windfall development is inherently unpredictable so its effects on infrastructure, travel patterns and so on cannot be assessed in detail or with any precision. Thus the quantification that has emerged during the examination does not change the overall spatial strategy, which establishes principles to direct and control housing development that includes both allocations and windfalls."

80. The Inspector in paragraph 22 of this ruling concluded that if the need figure were 550/555 dpa, that was the figure which should have been appraised, but if the need figure were 450 dpa no further SA was required, because in those circumstances, 550/555 dpa would not be a reasonable alternative assessment of the quantum of need.

81. He returned to this issue in paragraphs 19-23 of his report to the Council. He rejected the argument that the correct need figure was 555 dpa, as a result of his detailed examination of the issue later in the report, where the windfalls were seen as part of the cushion against the possibility that need might exceed 450 dpa after the first ten years of the plan. In paragraph 20, he continued:

> "This matter is examined in detail under Issue 2 below, where it is concluded that the Council's housing need figure of 450 dpa is an appropriate minimum figure (at least for the first 10 years of the plan period). The suggestion that 555 dpa represents an alternative quantum of need which should have been subject to

> SA is not correct. The housing need is established through evidence and then the strategy considers alternative ways of delivering it; SA does not require alternative objectives or alternative need figures to be assessed. The idea that the objectively assessed need effectively rises to 555 dpa as a result of windfalls being quantified confuses need with anticipated delivery. The CS does not plan on windfalls to meet the need."

82. He then dealt with the second strand to the argument which was that the supply of windfall housing was now a significant part of the proposed strategy; windfalls, together with allocations; would have an effect on the environment, and the greater clarity about it should have been specifically addressed in the two SA Addenda. His conclusions are in paragraphs 22-23 of his report:

> "22. In practice the likely stated yield from windfalls has not significantly changed. The Submitted CS indicates that windfalls have been a substantial source of housing land supply in recent years (over 150 windfalls in 2009/10, nearly 50% of the total annual requirement, is given as an example). The 2010 SA considers the policy options for windfall development, refers to past "high levels of windfall" and acknowledges that the CS policies will enable windfalls to continue to come forward. Whilst the latest evidence has given greater certainty to, and quantified more precisely, the likely future yield, the end result is not significantly different to that which appears to have been considered by the SA at the time of CS submission.
>
> 23. In policy terms, windfalls have always been part of the expected delivery. Although minor adjustments have been made during the examination to the policy that aims to manage windfall development (CP1A), the Submission CS acknowledged that an unspecified amount of windfall development would be additional to the housing requirement (which at that time was 440 dpa). As the plan recognises, the location of windfall development is inherently unpredictable so its effects on infrastructure, travel patterns and so on cannot be assessed in detail or with any precision. Thus the quantification that has emerged during the examination does not change the overall spatial strategy, which establishes principles to direct and control housing development that includes both allocations and windfalls. Taking all these factors into account, I conclude that the SA carried out prior to and during the examination satisfies the requirements of regulation 12(2) of the Environmental Assessment of Plans and Programmes Regulations 2004."

83. Mr Village contended that this conclusion involved an error of law. The Council's anticipation that 105 dpa would be supplied from windfall sites, in addition to

allocated sites, and in excess of the objectively assessed housing need, meant that more housing would be developed than the allocation polices provided for. The windfall policies, such as those for the secondary villages, were significant contributors of housing development, over and above the target. The windfall sites were expected to come forward. Policy SP5 provided for a minimum of 450 dpa, and the Core Strategy Housing Trajectory, the forecast housing completions, included expected windfall completions. This "significant boost" to housing completions, as the notes to SP5 described it, reflected the policy in paragraphs 47 and 48 of the NPPF, which sought to "boost significantly the supply of housing". But the various methods which it commended did not include reliance on windfall sites to meet the five year supply unless there were compelling evidence of consistent availability, and that that would continue. The fact that windfalls might not be necessary to meet the housing need did not mean that they fell out of account for the purposes of SA, especially as they were an important part of the strategy and were part of the policy. The Inspector gave no adequate reasons for his conclusion on that, nor for the significance he attached to the recognition in the SA of high levels of windfalls in the past in the light of the absence of any appraisal of future effects of that level continuing. The adoption of the plan was accordingly unlawful.

84. Mr Evans supported the distinction drawn by the Inspector between the need for an SA of the housing allocations to meet housing requirements, and an SA of windfalls, since the latter could not be assessed in any detail or with any precision; their multiple locations were inherently unpredictable, and so too would be any effects which their development might have on, for example, travel patterns. The now more precise quantification of windfalls could not change the overall spatial strategy. But a requirement for a further 105 dpa would be a significant change in that strategy. The Inspector was also right in saying that the likely yield of windfalls, although now more certain and precise, was not significantly different from the past levels which the 2010 SA, for the SDCS, expected to continue under its policies for windfalls. There was in the Inspector's view therefore no significant change requiring further SA work. That was a lawful planning judgment.

85. In my judgment, Mr Evans is correct. The policy for windfalls, CP1A, was the subject of SA in the SDCS. The later changes were ones of precision and quantification. The Inspector was entitled to take the view that those changes were not significantly different from the policy as previously appraised. The Inspector was also entitled to take the view, again as a matter for his expert planning judgment, that by the very nature of a policy for windfalls, that is development on unallocated, unidentified sites, SA could not usefully be taken further. There simply was not enough relevant information for that to be realistic. That is a perfectly rational, indeed obvious, judgment. There would be no value in a speculative, theoretical appraisal. The Inspector was also aware that the SA had taken account of the various environmental policies which would apply to control windfall sites. He also took the view that the overall spatial strategy had been the subject of SA and the quantification of anticipated windfalls did not change that strategy so as to require it to be further appraised for its sustainability. These considerations support the sense of the planning judgment he reached.

86. It is not to the point that windfalls would continue to play a significant part in the housing trajectory, in the total delivery of housing. SA could not realistically be taken

further in the reasonable planning judgment of the Inspector, and of the Council for that matter. I appreciate that the Inspector would have required further SA if the housing need figure had been increased by 105 dpa. But he is not saying that it was then the windfall sites which would be the subject of a SA which he has said could not sensibly be undertaken. Windfall sites, as Mr Village's citation from the NPPF showed, do not usually form part of the supply to meet the need. The further 105 dpa would have had to be identified in the same way as the 450 dpa were. That would have had to be appraised. There is no substance in this point; it is a challenge to a rational planning judgment. As a "proposal", it had been the subject of an adequate SA; it was not a " reasonable alternative" to the supply figure to meet the need, which had been appraised.

Ground 6: the classification of Appleton Roebuck as a Designated Service Village, DSV

87. Mr Village challenged the Inspector's acceptance of Appleton Roebuck as a DSV within policy SP2. Appleton Roebuck had not been included as a DSV in the consultation draft of the Core Strategy, because it lacked the services and capacity to take the growth that entailed. The Appleton Roebuck and Acaster Selby Parish Council urged that it should be a DSV, and the publication draft showed it as a DSV; SSOBT responded saying that it should revert to being a secondary village. The issue was debated at the examination before the Inspector. He concluded that the DSV designation was suitable for the two reasons put forward by the Council: it was the largest and most central village in a relatively extensive but isolated area without other DSVs so it performed as a minor service centre for a wider area. "Secondly, and notwithstanding the objection from a major landowner, there is strong support for this designation from the Parish Council." This was also broadly consistent with the NPPF.

88. On 20 March 2013, the Parish Council had held a neighbourhood planning meeting, at which the public who attended voted overwhelmingly against DSV status for the village. The Parish Council clerk emailed the Council with this news the next day, asking whether the status could be stalled or revoked. The Council supplied the clerk with the contact details of the Inspector's Programme Officer so that it could approach the Inspector with a view to the consideration of a late submission. There is no evidence as to whether it took that step or not. SSOBT, through its planning consultant, drew the Council's attention to the views of that public meeting, asserting that the Parish Council no longer supported the DSV designation, which had been important to the Inspector's reasoning.

89. On those facts, Mr Village contended that by the time of adoption one of the reasons for the Inspector's reasoning had been overtaken by events; the Parish Council had changed its mind. Indeed, the Council ought to have told the Inspector of this anyway before he reported, whether or not the issue had been pursued by the Parish Council through an attempted late submission. The adoption decision was inadequately reasoned and a material consideration ignored.

90. This is misconceived. The Parish Council's meetings and procedures are governed by the Local Government Act 1972, Schedule 12 Part II in particular. The position which it adopted in support of Appleton Roebuck being a DSV was resolved upon at a

properly constituted meeting of the Council members; its resolution was duly minuted. There has been no revision to its position at all. There was no more than a public meeting, at which the public, which I will assume were all on the electoral roll, voted against the Parish Council's position. SSOBT's claim that this was a meeting of the Parish Council is simply wrong, and with that the basis for this ground disappears. The views of elected members are not to be overborne by such a meeting, and the meeting turned into a substitute for a properly called meeting of the Parish Council, under the 1972 Act.

Ground 7: Escrick, DSV status and the Green Belt review

91. Escrick was not included in the list of DSVs in the SDCS, but the Inspector recommended that it be included as a main modification; and the Core Strategy was accordingly adopted by the Council with Escrick as a DSV. Its initial exclusion was because housing growth would be tightly constrained by Green Belt and landscape designations, and housing growth would make it more of a commuter settlement for York. The Inspector commented on this in paragraph 42 of his report:

> "But that approach predetermines decisions which would more properly be taken at the Site Allocations DPD stage, when the relative merits of limited expansion could be judged in the round against the policies of the CS and potential locations in other DSVs. Nevertheless, in recognition of the particular importance of Green Belt policy, it is appropriate to highlight that at Escrick (and certain other DSVs), any land releases from the Green Belt would be part of a wider Green Belt review and would have to comply with policy CPXX."

92. Mr Village submitted that this approach was perverse. Land could not be released until after the Green Belt review, and until then it could not be known whether it would be suitable for the sort of growth expected of a DSV. So it should be a secondary village until that review. Mr Evans pointed out that the status of Escrick would be established by this Core Strategy; that would feed into how the Site Allocations DPD considered sites in Escrick, and how the Green Belt review considered Escrick and its possible sites.

93. There is nothing in this point. Of course, planners could argue about which policy came first: should its status be determined, with the possible sites then being considered in the light of that and their Green Belt status, as the Inspector concluded; or should the current position be that it is a secondary village, and the status adjusted after the constraints are considered in the Site Allocations DPD and Green Belt review. But this chicken/egg or cart/horse debate is a matter of planning judgment, and reveals no point or error of law.

94. Indeed, that is to put it more generously to Mr Village than his argument merits. The status of the village was a matter for this plan, and not for a later plan, nor for later adjustment. The uncertainty over what housing growth it could and should take would be skewed by the secondary village designation at this stage. The Inspector was aware however of the risk that the DSV status could lead the unthinking to treat the Green Belt as fair game for development; so to avoid the debate being skewed by DSV status, which kept the door open for the future rather than shutting it by secondary

village status, he pointed out that any review of Green Belt boundaries would still have to satisfy policy for such a review, and if it remained Green Belt, development would have to fit that policy as well. So the DSV designation did not sell the pass for development in the way in which secondary village status would sell the pass against development.

Ground 8: breach of the duty to engage with SSOBT

95. SSOBT had devised a strategy for the regeneration of Tadcaster, its "Vision" as it called it, and for which in less ethereal form, it had been granted planning consent. S19(2)(a) of the 2004 Act required the local planning authority to have regard to national policies and advice during the preparation of a development plan document such as the SDCS. Paragraph 155 of the NPPF, operative after 27 March 2012, contained this:

> "Early and meaningful engagement and collaboration with neighbourhoods, local organisations and businesses is essential. A wide section of the community should be proactively engaged, so that Local Plans, as far as possible, reflect a collective vision and a set of agreed priorities for the sustainable development of the area, including those contained in any neighbourhood plans that have been made."

96. Its predecessor, PPS 12 paragraphs 4.27-4.29, had said that local authorities should discuss with key stakeholders what options for the core strategy were deliverable. Those stakeholders who were key to its delivery should be "engaged early" in the production of the core strategy to avoid options which could not be delivered, or representations emerging late which would make the plan unsound; a plan would be unsound if it were not deliverable.

97. Mr Village submitted that the Council had not complied with its duty in s19(2)(a) since it had not had regard to the policy obligations in PPS12 and later in the NPPF. He identified three particular ways in which this failure manifested itself: the Council had not engaged with SSOBT at an early stage in the preparation of the SDCS, it had not considered whether SSOBT's regeneration proposals for Tadcaster should be part of the spatial strategy for Tadcaster, and it had failed to ascertain whether SSOBT would be willing to release land which it owned at Tadcaster, for housing in particular, before the start of the examination in public of the SDCS. This last was one of the issues which had led to the suspension of the examination. He submitted then that the Inspector had failed to consider and reach a conclusion on whether the Council had breached its s19 duty in those respects.

98. SSOBT produced to the Inspector, shortly before he considered the arguments on whether to suspend the examination, a document entitled "A Summary of the Background and History of [SSOBT's] Action to Implement the "Vision of Tadcaster" ". The original Vision required land from the Council which it transferred to SSOBT but subject to a buy back provision which it exercised, against SSOBT's wishes. Various planning permissions were sought; SSOBT criticised the Council for the way in which it dealt with them, though planning permission was eventually granted in 2003. Two judicial review claims were brought by SSOBT against the Council in respect of its grant of permission to itself for the resurfacing of the car park

which had been the subject of the buy-back; one was successful. In the second, permission was granted but the substantive hearing was adjourned to allow for negotiations, Harrison J expressing the hope in 2005 that the parties would resolve their litigation differences to enable a comprehensive scheme to proceed. The Inspector who reported on the earlier Local Plan Inquiry in 2002 had expressed similar sentiments about the effects of litigation and differences of approach on the progress of schemes for the regeneration of Tadcaster. Eventually, a draft planning agreement reached an advanced state of consideration, in 2006, but SSOBT regards the Council as responsible for changing position without discussion. The local highway authority produced proposals for a 20 mph zone to which SSOBT objected, leading to further successful judicial review proceedings. There have been new highway proposals with the highway authority and SSOBT continuing to take different views about what is right for Tadcaster. The third proposal by the Council to refurbish the car park had led to a third application for permission to apply for judicial review, unresolved as at September 2011. The document concluded with a complaint that the Council and highway authority were unwilling to work with SSOBT, and that the Core Strategy made no mention of SSOBT's scheme for the regeneration of Tadcaster, especially in the "light of the emphasis placed on engagement with key stakeholders" set out in PPS 12.

99. Whatever this document's merits, it is not and does not set out to be an analysis of the failings of the Council in respect of s19 and the PPS. That is more a by-product of the history.

100. The Inspector commented on the relationship between SSOBT and the Council in two places: his ruling on the suspension of the examination, and in the report itself. The Inspector said in the ruling that he had not been aware that there was no non-Green Belt land available for development in Tadcaster until he was told at the hearing by SSOBT that no landowner would be releasing such land, save for one site to meet one–third of the housing requirement. He had at an earlier meeting flagged up a concern that the Council had marked the intentions of the landowners as unknown, but concluded that whatever SSOBT had known about its own intentions, there was no definitive statement from it to that effect until the hearings. As I have said, this was partly why the Inspector agreed to the Council's application for a suspension.

101. He thought, paragraph 4 of the ruling, that it was "highly unusual" for the substantial amount of non-Green Belt land, suitable for development, around the perimeter of the town, not to be released for development by the landowners, save for the one site. He continued:

> "Whilst it might be argued that the Council should have been more cautious in its approach to land deliverability in Tadcaster, the problem appears to stem from the inability and/or unwillingness of local authorities and major stakeholders to engage meaningfully with each other. The SDCS examination is not the appropriate forum for me to explore this long-standing antipathy."

102. The Inspector considered the proposals for Tadcaster in his report. For this he had the benefit of further written representations on behalf of SSOBT, from its planning

consultant. These dealt with paragraph 155 of the NPPF, among other NPPF matters, and had been sought by Inspector as the NPPF came into effect.

103. The written representations to the Inspector from SSOBT on this issue are short. It is said that the Council has simply failed in its duties under that paragraph. The SSOBT strategy for Tadcaster was deliverable; but the Council had ignored or overlooked it; the Core Strategy was in consequence unsound. Securing appropriate levels of housing and employment development for Tadcaster were key components of SSOBT's vision, with which the Council had failed to engage meaningfully.

104. The Council produced to the Inspector its statement on consultation at various stages, including with key stakeholders such as SSOBT. SSOBT had made representations at some of these stages. Ms Gregory's evidence to me was that SSOBT had also written letters to the Council asking that the contents be drawn to the attention of relevant Council meetings. There had also been non-statutory meetings with SSOBT concerning Tadcaster and the "Vision". Mr Cunnane, the Claimant's planning consultant, described what occurred between the Council and SSOBT as no more than normal consultation, as with the public in general, not the "co-operative consensus building exercise" imported by the requirement to "engage".

105. The Inspector concluded that all legal requirements had been met, and that the Core Strategy was sound, but did not specifically deal with s19, and such arguments as there were, based on the policy duty to "engage" with "key stakeholders". The report considers the spatial strategy, the relationship between Selby and Tadcaster in relation to the distribution of housing, notably in paragraphs 80-82. The distribution of housing to Tadcaster represented "a reasonable balance between the urgent need to regenerate the town and protection of the Green Belt."

106. When it came to the delivery of housing in Tadcaster, in paragraphs 85-88, he referred to the "highly unusual" situation for land supply. The town centre needed regeneration, in which new housing would play a part. But large sites allocated in past plans had not been developed because landowners were unwilling to release land. There was very considerable doubt over the developability of any peripheral land at Tadcaster in the light of the landowners' attitude and past practice, even in relation to allocated and permitted sites. Sites not owned by unwilling landowners might be acquired by them to prevent their development. There was therefore potentially a "strong case for the Council…attempting to acquire suitable land by compulsory purchase." He asked the Council to devise a contingency plan, because these long-standing land supply issues could thwart "a small but important part of the overall strategy". He approved this contingent strategy as "proactive and positive", which should ensure that, if land availability difficulties prevailed, the required dwellings would be built albeit not in the preferred location.

107. The Inspector considered the scale of employment land required at Tadcaster, and how it might be delivered; there was no case for a reduction in its proposed scale in the SDCS, but an up to date land availability study would enable the allocation to be better informed at the Site Allocation Local Plan stage; paragraphs 113-115.

108. For Tadcaster town centre, the Inspector required a main modification which briefly referred to "the implementation difficulties that have beset Tadcaster town centre….The reference …to strengthening the role of Tadcaster is appropriate in the

context of diversifying the range of town centre uses; the inclusion of more detail is not necessary given the strategic nature of the CS." The footnote to that sentence reads:

> "Various publicly and privately promoted proposals to regenerate Tadcaster town centre have been mooted for more than 20 years but have failed to materialise, due in part to a long-running dispute between the Councils involved and a major landowner, Samuel Smith Old Brewery (Tadcaster). Other than to repeat the exhortation of the previous Inspector examining the Selby District Local Plan, who in 2002 urged the parties to agree and progress a comprehensive scheme for the town centre, it is not the role of the Core Strategy or this report to attempt to resolve these complex issues."

109. Main Modification (MM) 26 refers to the unfortunate failure of any of the regeneration schemes for the town centre to come to fruition, but notes that "the Council remains committed to its regeneration and is willing to collaborate with other parties to support delivery of the Core Strategy objective in this respect."

110. Mr Village submitted that s19(2) meant that the Inspector had to resolve whether or not the Council had sought to engage SSOBT in effective discussions, and could not just leave the issue as he did in the report, however rancorous and time-consuming its resolution might be. My sympathies are all with the Inspector.

111. The Inspector does not say in so many words that the plan satisfied s19, or that it would be reasonable to conclude that it did, to use the statutory language, or that the Council had complied with the duty in s19 to have regard to the policies on engagement with stake holders. In paragraph 136, he comes to the general conclusion that, with main modifications, the plan is sound and compliant with legal duties. However, the language of his ruling on the suspension, and the footnote to his discussion of MM26, lead me to conclude that the Inspector did not sweep up a conclusion on this s19 issue, however he interpreted the relevant provisions, into the general conclusions. Rather he took the view that, so far as the points raised by SSOBT were concerned, they were issues which did not arise for this SDCS, and so he did not need to consider s19 in relation to them.

112. Mr Evans submitted that the issues were not strategic issues, and that is why the Inspector was able, and entitled, to take the line he did. That is in principle a sound answer, since if an issue does not arise for consideration in the SDCS as a strategic planning matter, for resolution within that Plan, which is a matter for the judgment of the Council in the first place and then of the Inspector, there is no need to engage with stakeholders about it. That argument appears to me to be applicable to one issue which was of crucial interest to SSOBT, the regeneration of Tadcaster town centre. The Inspector did not have to deal with the interaction between Council and SSOBT over that issue because it was not for this plan in his view. The Council clearly considered the point and had reached the same view. The very way in which the town centre policy was dealt with shows that conclusion. That was a planning judgment he was entitled to reach.

113. The next point to be considered further is the way housing land supply at Tadcaster was dealt with by the Council, and this has some relationship to Tadcaster's regeneration. The Inspector appears in paragraph 13 of his ruling on the suspension to conclude that, whatever SSOBT knew of its own intention "there was no definitive statement to that effect until the hearings". He did not conclude that the Council had been fully aware of SSOBT's position. He had been concerned at the extent of the Council's reliance on sites where the landowners' intentions were unknown.

114. Ms Gregory in evidence to me said that the Council had asked SSOBT in 2008, for the purpose of the Strategic Housing Land Availability Assessment, what its intentions were in relation to its landholdings, but SSOBT did not tell the Council either what its intentions were or what the extent of its landholdings was. Mr Cunnane, the Claimant's planning consultant, said in evidence to me that the Council was "fully aware" that SSOBT's land would not be included, yet went ahead anyway. But his second statement, not shy of argument, did not take specific issue with what Ms Gregory said, rather characterising it as falling short of "engagement".

115. I do not think this is a factual issue for me to resolve but on the Inspector's conclusions, the obvious inference from his thinking is that the Council did not pursue the question of intention adequately and SSOBT did not tell it clearly enough.

116. The statutory issue for the Inspector was whether it was reasonable to conclude that the plan satisfied the requirements of s19. There is a marked contrast between the language of s20(7)(b)(i) and (ii), to be found elsewhere in s20 as well. The Inspector has to consider whether the Council has complied with any s33A duty, but not with any s19 duty. It is the *plan* which the Inspector has reasonably to conclude satisfies s19. This may be a distinction without a difference, but I regard it as significant, as I shall come to. Mr Village certainly treated the issue for the Inspector as being whether the Council had complied with a duty to "engage". But the Inspector did not have to ask whether the Council did engage with SSOBT; if he had to inquire whether the *Council* had fulfilled a s19 duty, he only had to consider whether it had regard to the duty. Evidence, if such there be, of a failure to engage cannot, certainly in these circumstances, show a failure to have regard to the duty. There was no basis for the Inspector to draw an adverse conclusion to the Council, if it was the performance of its duty to have regard to the NPPF about which the Inspector had to reach a conclusion.

117. If the late discovery of the housing land availability problem at Tadcaster did involve a breach of the Council's duty to have regard to the relevant provisions of the PPS and NPPF on engagement with key stakeholders, upon which the Inspector was required to reach a conclusion, the outcome in terms of the Inspector's powers is quite remarkable. There is no suggestion that the SDCS modified as recommended by the Inspector was unsound. No modification could be made by the SDCS in relation to the requirement in s19 to have regard to national policy on engagement with key stakeholders. None was suggested to the Inspector. No modification could overcome any past absence of engagement, though the modification in relation to the town centre strategy would do so for the future. What this would mean is that s20(7) could not apply. (It did not apply anyway because, without modification, the plan was undeniably unsound.) It would mean that s20(7b) and (7c) could not apply because no modification could satisfy the want of regard to the duty of engagement. The Inspector would have to recommend that the Council did not adopt the plan, and

under s23 it would be unable to do so. It would have to start again, none of its policies would be adopted: it is difficult to see how a plan shorn of housing policies could be sound, and adopted without them. All this because of a want of engagement which did not in the end lead to an unsound plan after modification, where the Council had complied with the statutory requirement on consultation, and the modifications to which had been the subject of informal consultation.

118. Whether or not the distinction to which I have referred does have a purpose, which I think it does, it is clear that the primary purpose of s19(2) is to focus the Inspector's attention on the way in which the policies in the plan have been considered against the substantive national policies, and whether any procedural omissions affect the soundness of the plan. That was clearly considered and ruled on. This point is supported by the now redundant reference in s20(5) to s24 (the duty of general conformity to regional strategy). That primary purpose, is, I think, the probable sole but important purpose of the distinction in the statutory language, particularly in the light of the impact on the Inspector's powers of Mr Village's approach.

119. If the Inspector should have concluded that the Council failed to have regard to the duty to engage with SSOBT over housing policy in Tadcaster, the impact on the public interest in the planning of Selby District Council's area of returning to the pre-submission stage to no real or legitimate advantage whatsoever to SSOBT, which was lawfully consulted, and put its case to the Inspector, would lead me to exercise my discretion to refuse relief. I would also take the same view of any failure of engagement over employment land, to the extent it was a strategic matter. SSOBT put forward its case. The Inspector concluded that SDCS was sound if modified.

Ground 9: breach of the Environmental Assessment of Plans and Programmes Regulations 2004 SI No.1633

120. Mr Village relied on the same provisions as he did for his windfalls argument. He submitted that neither the Council nor the Inspector had considered the reasonable alternative embodied in the Claimant's "Vision of Tadcaster". This was also the consequence of the failure of the Council to engage with the Claimant.

121. Ms Gregory, in her witness statement on behalf of the Council, said that the Council had considered the Claimant's "Summary of the Background and History of [SSOBT's] action to Implement the "Vision of Tadcaster"" when it was submitted at the EiP. But this document is not the "Vision" itself; it is what it says: a chronology with reasons as to why SSOBT's "Vision" has not been implemented, in part due to an unco-operative Council. Nonetheless, Ms Gregory said that the Council felt that the "Vision" was site specific "relating to proposed sites in the Town and for retail development and regeneration works". On that basis, it did not amount to a reasonable alternative to the Core Strategy. It related to site specific issues which were for "lower order plans." The Core Strategy should not commit the Council to one particular and site specific scheme, rather than another.

122. There was a debate between the Council and Claimant about the level of housing for Tadcaster, with the Council taking the view that Tadcaster should accept a higher level of housing than did SSOBT. The Inspector dealt with the level of housing appropriate for Tadcaster, referring to the unusual land supply situation, and consequently to the need for a contingency plan. The Claimant put forward its

detailed scheme at the EiP, with proposals for further housing on the Council-owned car park. Ms Gregory says that the scheme was not debated at the hearing session in April 2012 at which SSOBT sought to promote it because the Council and Inspector took the view that it was not a strategic matter and therefore not a matter for the Core Strategy. The Inspector made no mention of the "Vision" in his report.

123. Mr Cunnane saw Ms Gregory's evidence as proof of a misunderstanding of the relevance of SSOBT's plans to the regeneration of central Tadcaster. The "Vision" was an alternative approach which required the SDCS to be flexible enough to accommodate it, rather than being a scheme to be adopted wholesale into the SDCS; paragraph 41 of his second witness statement.

124. I was far from clear as to what it was that had been put before the inspector by way of alternative strategy in order to show an alternative reasonable strategy which ought to have been considered in the environmental report. The "Background" document could not possibly have served in that capacity, though that is what I was first referred to. Nor was I shown a document called the "Vision". I was referred to the planning permission which had been granted, which the Council would have been fully aware of. I was told that the way in which the topic based EiP, and the representation process, worked meant that there was no single document pulling together the threads of the "Vision" which had been placed before the Inspector.

125. Mr Village produced for me a Note on the references in SSOBT's representations to its Alternative Strategy: this referred to a conservation led approach to town regeneration; housing at Tadcaster should be limited to Tadcaster's own needs, to be met within the town's boundaries in order to reverse its dormitory status; the spatial strategy should include support for SSOBT's "comprehensive regeneration proposals" to avoid Tadcaster continuing as a dormitory town; instead of an over-optimistic view about the supply of employment land, new employment opportunities should come from the reuse of existing premises. Representations were made at, it seems, every opportunity, to urge the Council to adopt or to engage with SSOBT over its "Vision" for Tadcaster.

126. The judgment by the Council and by the Inspector that specific proposals for regeneration of the town centre were not appropriate for consideration at the Core Strategy stage was a planning judgment which they were entitled to reach. There was no scope for it to be included in any environmental report as an alternative, since it was not a strategic alternative. That was a view to which they were entitled to come.

127. It was not suggested that the parts of the Vision which related to housing and employment land at Tadcaster, issues which the Inspector did consider, should separately have been the subject of the environmental report as reasonable alternatives. They were nonetheless considered by the Inspector to the extent appropriate for this level of plan, and ruled on.

Conclusion

128. This application is dismissed.