INSPECTOR'S RULING ON S33A DUTY TO COOPERATE

INTRODUCTION

1 This ruling addresses the submissions made during the April 2012 hearings that Selby District Council (SDC) has failed to comply with S33A of the Planning and Compulsory Purchase Act 2004, which imposes a duty on local planning authorities to cooperate with Councils and other bodies to address strategic cross-boundary issues when preparing Local Plans. S33A is a new provision which was introduced by S110 of the Localism Act 2011 and came into force on 15 November 2011.

2 This ruling deals only with the *legal* duty to cooperate in terms of compliance with S33A of the 2004 Act. It does not address the policies of the National Planning Policy Framework which relate to the duty to cooperate.

SUMMARY OF SUBMISSIONS BY REPRESENTORS

3 Some representors contend that because SDC is proposing changes to the Submission Draft Core Strategy (CS) after S33A came into force in November 2011, the provisions of S33A apply at least to the changes proposed after that date. It is argued that the work carried out by SDC since the suspension in September 2011, which included further consultation and updating of the Regulation 30 statement and Sustainability Assessment (SA), amounts to further plan preparation. S33A(2)(a) states that authorities should "engage constructively, actively and on an ongoing basis…." in the process of plan preparation relating to a strategic matter. The requirement for ongoing engagement means that if Councils are required to consult at any stage of the process, then the consultation should conform to the new provision.

4 This is particularly the case in the context of a suspension and subsequent changes to the CS which are intended to save a plan which contained serious errors from an inevitable finding of unsoundness. It is inconceivable that the legislature could have contemplated a duty to cooperate in respect of obviously flawed plans, but no such duty in respect of the changes necessary to overcome such flaws, especially if they have an impact on surrounding authorities. The post November 2011 changes are all part of plan preparation under S33A. Even if they are not, they fall within S33A(3)(e), which relates to activities (including plan preparation) that fall within parts (a), (b) or (c).

SUMMARY OF SUBMISSIONS BY SELBY DC

5 The Council does not accept that the duty to cooperate applies to the post November 2011 changes. The independent assessment of a plan by an Inspector is for its policies to be tested and challenged and possibly modified through the process. The reconvening of the examination in this case is part of this testing and modifying process

and not plan preparation. This is supported by the wording within the 2004 Act – S19 being concerned with plan preparation and S20 with submission and examination. All matters relating to the suspension have arisen through the testing and challenging of the Submission Draft CS rather than through any formal plan preparation process, which ceased when the CS was submitted. The duty to cooperate does not apply retrospectively.

6 The matter was tested at the Bath and North East Somerset Core Strategy examination, when the submissions by Mr Forsdick of Counsel were accepted by that Inspector. SDC agrees with those submissions. As to the point about S33A(3)(e), that clause specifically relates to activities which support plan preparation. This is not a catch-all clause, but relates to the preparation stage – by definition, activities which support plan preparation cannot take place once one gets beyond the S19 stage.

7 In the event that the Inspector determines that there has been plan preparation and, therefore, the duty to cooperate arises in principle, the "Duty to Cooperate Compliance Statement" sets out the Council's position. Firstly it is submitted that because the three topics subject to the suspension, and the related proposed changes, would not have a significant impact on at least two planning areas, they do not fall within the definition of 'strategic matters' set out in S33A(4). Furthermore, no significant cross-boundary impacts have been identified by adjoining Councils. For this reason there is no duty to cooperate in respect of the three topics.

8 If this argument is not accepted, the Council contends that it has done sufficient to comply with the duty to cooperate. The CS is in general conformity to the Regional Spatial Strategy, which was the mechanism for tackling strategic, cross boundary issues before the introduction of S33A. The post-suspension proposed changes remain within the overall CS strategy, which itself remains in conformity with the emerging strategic spatial planning priorities of the region through the Leeds City Region Interim Spatial Strategy. Moreover, the proposed changes have been assessed for their cross boundary impacts through liaison and cooperation with other public bodies on capacity and infrastructure planning, as well as adjoining Councils on commonality of approach to assessing housing requirements and impacts of CS policies. While it has to be recognised that it is simply not possible to achieve a fully cooperative approach on specific numbers, it would be imprudent to wait for regional agreement on numbers in the light of the imperative to progress Local Plans to adoption.

INSPECTOR'S RULING

9 The 2004 Act clearly distinguishes between plan preparation (S19) and independent examination (S20), the latter starting with submission of a plan to the Secretary of State. The S33A duty to cooperate relates specifically to the *preparation* of development plan documents (so far as relating to a strategic matter). The test in S20(5)(c) requires the examining Inspector to determine whether the local planning authority *complied* with S33A in relation to the plan's preparation; the use of the

past tense supports the view that the duty to cooperate relates to the plan preparation stage. I agree with the Council that the S33A(3)(e) clause relating to activities which *support* plan preparation could only reasonably occur at the plan preparation stage, not later.

10 S20(7B) establishes that the duty to cooperate is not capable of remedy at examination stage. The phrasing of S20(5), which refers to *satisfies* (present tense) in S20(5)(a) and *complied* (past tense) in S20(5)(c), affirms that a failure to comply with S19 and other procedural requirements may be capable of remedy, whereas a failure to comply with the S33A duty to cooperate is not. Thus the point that any changes necessary to make a seriously flawed plan sound should not be exempt from the duty to cooperate is not reflected in the legislation. There is no provision for revisiting the duty to cooperate at examination stage even if a plan is seriously flawed – the duty to cooperate is part of the plan preparation process and, at examination, the test is whether or not it has been complied with.

11 The remedy available for a failure to comply with the plan preparation requirements, or a finding of unsoundness, is a recommendation of modifications by the examining Inspector (S20(7C)). The scope of any such modifications is not prescribed. Under the plan adoption provisions of S23, any modifications recommended by an Inspector under S20(7C) are referred to as "main modifications" at S23(2A)(b). S23(3)(b) allows an authority to adopt a plan with main modifications and additional modifications, but only if the additional modifications do not materially affect the policies (as modified by the main modifications). This distinction between "main" and "additional" modifications suggests that main modifications (those recommended by an Inspector) are modifications which <u>do</u> materially affect the policies of the plan.

12 S20(2) requires a local planning authority not to submit a plan for independent examination unless it has complied with the relevant requirements and it thinks the document is ready for examination. At the commencement of the CS examination hearings in September 2011 the Council confirmed that it complied with this provision – in effect, the Council submitted what it believed to be a sound and legally compliant plan. From this point on the Council's power to make further material changes is limited, because such changes can only be adopted if recommended by me as the examining Inspector.

13 I suspended the examination in September 2011 because I was concerned that there was a serious risk of the CS being found unsound. The additional work carried out by the Council and the proposed changes which have resulted from this process are the direct result of my intervention at the examination stage. If ultimately I determine that the plan can be found sound with these (and/or other) proposed changes, they will comprise main modifications which I will recommend under S20(7C).

14 Consequently, there is little merit to the argument that changes cannot be made at examination to save a plan which contains serious errors and is unsound. S21 gives the Secretary of State the ultimate power to direct that an unsatisfactory plan be modified or withdrawn, but that

has not been exercised in this case. At examination, S20(7C) enables an Inspector to recommend modifications relating both to procedural matters and soundness. The fact that the Council has carried out further consultation and SA in respect of the proposed changes following suspension means that, potentially, the required procedural steps have already been undertaken. However, because the need to undertake these steps is within the remit of an Inspector under S20(7)(c), securing procedural compliance at this stage forms part of the testing process at examination rather than plan preparation under S19.

Conclusion

15 The legislation requires local planning authorities to ensure, to their satisfaction, that a prepared plan is legally compliant and sound before being submitted for examination. S33A imposes a new duty to cooperate upon bodies who undertake plan preparation; this applies to plans submitted after 15 November 2011. S33A is not retrospective, however, and cannot impose an obligation which did not exist prior to plan submission. Because the Submission CS was submitted for examination in May 2011, it is not subject to the S33A requirements.

16 The changes proposed by the Council following suspension of the examination are a response to concerns about unsoundness. They fall squarely within the ambit of S20, the examination stage, which provides a mechanism for rectifying a plan which has procedural shortcomings and/or is unsound. The Council's role in this process is limited, for the proposed changes can only be adopted if recommended as modifications by me. Although these modifications are subject to the same procedural requirements (such as consultation and SA) as were carried out at plan preparation stage, they are clearly part of the examination process. As S33A applies only to plan preparation, the duty to cooperate does not apply to modifications arising at examination stage.

17 **I conclude that the S33A duty to cooperate does not apply to the Submission Draft CS or to the changes proposed by the Council which post-date the coming into force of this provision**.

18 In light of this conclusion, it is not necessary for me to consider

(a) whether the three topics subject to the suspension, and the related proposed changes, fall within the definition of 'strategic matters' at S33A(4), or

(b) whether the Council has complied with the S33A duty to cooperate in any event.

Martin Pike

Inspector

27 April 2012