

SUBMISSIONS ON BEHALF OF SAMUEL SMITH OLD BREWERY (TADCASTER) TO SELBY CORE STRATEGY INSPECTOR

Introduction

1. These submissions are written on behalf of Samuel Smith Old Brewery (Tadcaster) in response to the request from the Inspector for written submissions on the proper interpretation of section 20(7) of the Planning and Compulsory Purchase Act 2004 (“the 2004 Act”), as amended by the Localism Act 2011 (“the 2011 Act”), following oral submissions that were made on the morning of 5th September 2012.
2. Subsequent to the session in September 2012, the Inspector wrote a note to the Selby District Council (“the Council”) in the following terms:

“Duty to cooperate

21. I gave my ruling on the legal aspect of the duty to cooperate in April 2012, concluding that it does not apply in this case (INSP/12). The argument that this finding does not allow me to recommend main modifications seems, on the face of it, to have little merit because s20(7) of the 2004 Act consistently refers to any duty imposed by s33A – I interpret this as allowing for situations in which (for whatever reason) the duty to cooperate does not bite. Clearly I cannot reach a firm conclusion on this point until I have considered the full legal submissions to be put to me early next year, but my initial view is that s20(7C) does apply and that I have the power to recommend main modifications.”

3. These submissions therefore do not rehearse any of the previous submissions made on behalf of the objector in writing and orally on other issues, including the duty to co-operate. They are made without prejudice to all those submissions and do not represent any change of stance by the objector on those issues. In accordance with the request, they only deal with the consequences if the ruling of the Inspector in April 2012 is (contrary to the objector’s understanding) correct in law that the duty to co-operate does not apply to the Council in respect of this Core Strategy.

Section 20(7) of the 2004 Act

4. Section 20 of the 2004 Act deals with independent examination of any development plan document (“DPD”) by the Secretary of State, a function performed by the Inspector pursuant to section 20(4).
5. The purpose of such independent examination is specified in section 20(5) of the 2004 Act, as now amended by section 110(3) of the 2011 Act which came into force on 15 November 2011. It is to determine whether the DPD satisfies the requirements of sections 19 and 24(1) of the 2004 Act and regulations made under section 17(7) and section 36 of the 2004 Act, whether it is sound, and whether the local planning authority complied with any duty imposed on the authority by section 33A of the 2004 Act in relation to its preparation. Thus section 20(5) of the 2004 Act states:

- “ (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; and
 - (c) whether the local planning authority complied with any duty imposed on the authority by section 33A in relation to its preparation.”

6. Before turning to section 20(7) of the 2004 Act, it is convenient to deal with the duty under section 33A of the 2004 Act referred to in section 20(5)(c) of the 2004 Act.

The Duty to Cooperate under section 33A of the 2004 Act

7. Section 33A of the 2004 Act, as amended by section 110 of the 2011 Act, introduced a new and important duty on local planning authorities to co-operate in respect of (amongst other things), the preparation of development plan documents in relation to the planning of sustainable development.
8. It is evident from the nature of the duty and its location within the 2011 Act that it forms part of the overall package of reforms to the planning system introduced by the 2011 Act which are intended to give local planning authorities greater say in planning matters. It is part of the localism agenda contained in the 2011 Act.
9. The duty to co-operate is an integral part of that package and part of the intended purposes and objectives of the 2011 Act, and therefore the relevant amended provisions of the 2004 Act, against which the provisions have to be interpreted: see *R v Minister of Agriculture and Fisheries ex parte Padfield* [1968] UKHL 1, as applied by Sales J in *R(Cala Homes) v Secretary of State for Communities and Local Government* [2010] EWHC 2866 Admin at [52].
10. From the overall spirit and purpose of these provisions, it can be seen that greater power granted to local planning authorities in respect of planning decisions (such as in the framing of DPDs) is intended to be balanced by corresponding new duties in reaching those decisions.
11. One of those corresponding new duties is the duty to co-operate under section 33A of the 2004 Act. Whilst local planning authorities are now granted greater say in planning for development in their area (for example in respect of housing provision etc), that power is tempered by (amongst other things), the requirement to fulfil the duty to cooperate to ensure that planning for sustainable development in a local authority area only proceeds where there has been full compliance with the duty to cooperate with other neighbouring authorities.
12. As will be seen below, one of the provisions that grants the local planning authority greater power in these circumstances (balanced by the duty to cooperate), is the change to the powers of an examining Inspector considering

a DPD. The Inspector's reduced powers to require changes limited to "main modifications" is part of the overall package of localism measures: see sections 20 and 23 of the 2004 Act (considered below). But this change is plainly intended to be subject to the new corresponding duties on the local planning authority.

13. Put shortly, it is obvious from the provisions that the 2011 Act did not and cannot sensibly be interpreted as introducing greater power to the local authorities (including the reduced scope for intervention on examination of a DPD) without compliance with the corresponding responsibilities, such as the duty to co-operate. Such a result is neither intended nor logical, nor does it naturally flow from the provisions.
14. By ruling dated 27 April 2012, the Inspector concluded that the new duty to co-operate brought in by the 2011 Act does not apply to the submission draft CS, or to the changes proposed by the Council which post-dated the coming into force of section 33A of the 2004 Act (including those proposed after the examination was suspended to require changes in light of potential unsoundness).
15. As noted above, the objector respectfully disagrees with the Inspector's interpretation of the law in this regard. It has reserved its position. It does not repeat its submissions, but it can be seen that this restrictive approach means that even though the draft CS should only have been submitted for examination as a sound document, and it has had to be modified by the Council after submission and after the duty to co-operate came into force in an effort to make it sound, the new regime under the 2011 Act is not being applied by the Inspector in respect of the duty to co-operate. However that new regime is part of an overall package (as identified above). It was obviously never intended that parts of the overall package of the new regime should apply and other parts should not. That would be contrary to the intentions and objectives of the Act.

Section 20(7) of the 2004 Act

16. Section 20(7) of the 2004 Act deals with the powers of the Inspector appointed to examine a DPD. Section 20(7) of the 2004 Act has been amended by the 2011 Act. These amendments came into force after the commencement of this examination. For the reasons outlined above, the objector submits that these changes are part of the overall package of changes in the 2011 Act directed at localism, where greater power is vested in local planning authorities in the determination of DPDs, but subject to corresponding duties, including the duty to cooperate.
17. Section 20(7) of the 2004 Act provides, so far as material:
 - “(7) Where the person appointed to carry out the examination—
 - (a) has carried it out, and
 - (b) considers that, in all the circumstances, 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 satisfies 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—

- (a) satisfies the requirements mentioned in subsection (5)(a), and
- (b) is sound.

(8) The local planning authority must publish the recommendations and the reasons.”

18. It will be immediately obvious from the terms of section 20(7) as amended that the provisions are generally predicated on the assumption that these provisions are read alongside section 33A where the duty to cooperate is expressed and forms a fundamental part of any DPD that is being examined under section 20(7). Under these provisions:

- (1) An Inspector must recommend adoption of a DPD if it is sound and where the duty to cooperate has been fulfilled.
- (2) An Inspector must recommend non-adoption of the DPD if these two criteria are not fulfilled.
- (3) Where the criterion that is not fulfilled is that of soundness (rather than a failure in the duty to cooperate), an Inspector can be required to recommend modifications that would make the plan sound.

- (4) Where the criterion not fulfilled is the duty to co-operate, the Inspector must recommend non-adoption.
19. The power to be required to identify modifications must be seen in light of section 23 in its amended form. Section 23(2)-(4) of the 2004 Act provides:
- “(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.
 - (4) The authority must not adopt a development plan document unless they do so in accordance with subsection (2) or (3).
20. The new powers granted to local authorities to adopt DPDs in circumstances where an Inspector is required to identify main modifications to make it sound, but in circumstances where the duty to cooperate has been fulfilled, are part of the overall package of the localism agenda in the 2011 Act. In those circumstances, it is unsurprising that section 20 of the 2004 Act is articulated in a way which presupposes that the DPD will be tested against the duty to cooperate under section 33A on the basis that the duty is applicable. It is not contemplated under the 2004 Act (as amended) that a local authority could benefit from the greater powers granted under the 2011 Act, such as the latitude allowed in preparing a DPD, without otherwise having complied with the duty to cooperate under section 33A, yet this is precisely the situation that the Inspector is countenancing on his interpretation.
21. Logically, the better interpretation is that the duty under section 33A is applicable to the submission draft CS, and that the Council should have complied with the new duty in seeking to progress the draft CS further, either by ensuring that its proposed modifications to achieve soundness were arrived at after fulfilling the duty under section 33A, or restarting the process to comply with section 33A (it being a matter of law as to which was required).
22. However, if (contrary to this interpretation) the Inspector were to be correct that section 33A does not apply at all (notwithstanding the modifications made

by the Council after the duty came into force), then section 20 of the 2004 Act still needs to be interpreted faithfully in accordance with its terms.

23. The objector submits that section 20(7) is clear on its face in these circumstances. The Inspector is unable to recommend that the DPD be adopted, or to recommend that modifications be made to make it sound, as both of these powers are only available where the Inspector considers that in all the circumstances that it would be reasonable to conclude that the second of the two criteria in section 20(7)(b) has been met, namely that the local planning authority complied with any duty imposed on the authority by section 33A in relation to the document's preparation.
24. The Inspector clearly has not concluded that the local authority complied with the duty to cooperate under section 33A, having reached a view that the duty did not apply. In those circumstances, the criterion in section 20(7)(b) cannot be fulfilled. This is unsurprising given that the duty to cooperate is now a fundamental part of the law in respect of any DPD being adopted after the duty came into force.
25. The objector notes as a post-script that it has done everything it can in providing detailed submissions on this and other points to ensure that the Core Strategy process proceeds lawfully and that it does not result in an unlawful adoption in due course. However, this is without prejudice to the objector's position in any subsequent proceedings as to other legal errors that may have occurred.

PETER VILLAGE QC

JAMES STRACHAN

39 Essex Street

London

18 January 2013