

The duty to co-operate is not to be taken lightly

Craig Howell Williams QC considers the statutory duty of local planning authorities to work jointly, in light of the Housing and Planning Act



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Section 33A of the Planning and Compulsory Purchase Act 2004 (as amended by section 110 of the Localism Act 2011) imposed on local planning authorities a 'duty to co-operate'. Local planning authorities (LPAs) must look carefully at the statute itself, case law, policy, and experience elsewhere. And there are changes afoot...

The statute defines the duty in broad terms: it applies to LPAs, county councils, and 'prescribed bodies' (e.g. the Environment Agency and Historic England). The duty applies to various activities, including the preparation of development plan documents and other local development documents; activities that support those activities, insofar as it relates to a 'strategic matter' – a development that has a 'significant impact on at least two planning areas'; and activities that can reasonably be considered to prepare the way for those activities.

The duty requires LPAs to 'co-operate... in maximising

the effectiveness' with which the defined activities are undertaken, in particular, to 'engage constructively, actively and on an ongoing basis,' including consideration of whether to agree to prepare joint local development documents.

The duty is very important for local plans. The examination inspector must determine whether or not it is reasonable to conclude that the duty has been complied with (sub-section 20(7)-(7C)) and a legally non-compliant plan will fail the independent examination process.

The courts have provided some guidance. In the case of *Zurich Assurance Ltd v Winchester CC* [2014] EWHC 758 (Admin), the High Court advised: 'Deciding what ought to be done to maximise effectiveness and what measures of constructive engagement should be taken requires evaluative judgments'. The inspector's task is to consider whether 'it would be reasonable to conclude' that there has been compliance with the duty. A court dealing with a challenge to an inspector's conclusion 'is therefore limited to review of whether the inspector could rationally make the assessment that it would be reasonable to conclude that there had been compliance'.

In *Samuel Smith Old Brewery (Tadcaster) v Selby DC* [2015] EWCA Civ 1107, the Court of Appeal confirmed that the duty applies to the pre-submission stage of plan making. 'The duty does not subsist during the examination stage, nor does it

revive if the examination is adjourned or suspended for main modifications.' Importantly, however, the Court of Appeal made it clear that even after plan submission, co-operation between LPAs would still be relevant, having regard to the policies in the National Planning Policy Framework (NPPF) and public law obligations.

The government's policy in the NPPF and its guidance in the Planning Policy Guidance (PPG) is also relevant. In the former, the government says that it 'expects joint working on areas of common interest to be diligently undertaken' and that LPAs 'will be expected to demonstrate evidence of having effectively co-operated to plan for issues with cross-boundary impacts'. In the latter, the government says that 'the duty to co-operate is not a duty to agree', and that it 'is separate from but related to the Local Plan test of soundness'. It advises that the necessary co-operation should produce 'effective policies', and that an LPA 'will need to submit comprehensive and robust evidence of the efforts that it has made to cooperate and any outcomes achieved'. It is clear that the government requires more than just consultation: LPAs must make every effort to reach agreement and be ready to demonstrate this by reference to outcomes.

Experience has shown that some LPAs have not met the standard expected of them. For example, the Local Plan inspector criticised the submitted Coventry

Core Strategy in part because, while there was a statement of common ground agreed with neighbouring authorities, there was no joint strategic housing market assessment. The Hart Core Strategy failed in part because discussion with neighbouring authorities on meeting housing needs took place shortly before submission of the draft plan. The submitted Aylesbury Vale Strategy failed in part because other authorities had not been properly involved in the council's housing needs assessment.

The Housing and Planning Act 2016 was given royal assent on 12 May 2016. It includes changes to local planning, with some that are relevant to the duty to co-operate. Section 15 of the 2004 Act is amended to allow the secretary of state (SoS) greater power to direct amendment of local development schemes. Section 20 contains a new sub-section to permit the SoS to give directions to a local plan examiner, including a requirement that the examiner consider a specified matter. Section 27 is amended so that the SoS's powers of intervention are widened to include directions to LPAs relating to the preparation or revision of development plan documents.

There may be changes to policy too. The Local Plan Expert Group recently advised the government that it should make the NPPF policy on soundness more stringent so that joint working is expected to reach agreement on the distribution of full objectively assessed housing needs. Watch this space. **SJ**