

Central  
Bedfordshire  
Council  
Priory House  
Monks Walk  
Chicksands,  
Shefford SG17 5TQ



## TO EACH MEMBER OF THE COUNCIL

26 February 2015

Dear Councillor

### **COUNCIL - Thursday 26 February 2015**

Further to the Agenda and papers for the above meeting, previously circulated, please find attached the report for Item 8 – Development Strategy – Consideration of Judicial Review Proceedings. Items 9 and 10 are not required as the report is wholly in the public domain.

**8. Development Strategy - Consideration of Judicial Review Proceedings**

To consider Judicial Review proceedings with regard to the Development Strategy.

The report and Appendix A and Appendix B are attached.

Should you have any queries regarding the above please contact Committee Services on Tel: 0300 300 4040.

Yours sincerely

Helen Bell,  
Committee Services Officer  
email: [helen.bell@centralbedfordshire.gov.uk](mailto:helen.bell@centralbedfordshire.gov.uk)

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**Central Bedfordshire Council**

**FULL COUNCIL**

26<sup>th</sup> February 2015

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**Development Strategy - Consideration of Judicial Review Proceedings**

Report of Nigel Young, Executive Member for Regeneration  
([Nigel.young@centralbedfordshire.gov.uk](mailto:Nigel.young@centralbedfordshire.gov.uk))

Advising Officers: Jason Longhurst, Director of Regeneration and Business  
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Development Planning and Housing Strategy,  
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**Purpose of this report**

1. **This report relates to the Planning Inspectorate's decision that Central Bedfordshire Council have not met the legal Duty to Co-operate in respect of the Development Strategy. Council is asked to consider whether a Judicial Challenge should be lodged against the Secretary of State for Communities and Local Government in respect of this decision.**

**RECOMMENDATIONS**

**That Council:**

1. **Notify the Planning Inspectorate that Central Bedfordshire Council does not intend to withdraw its Development Strategy and that the Planning Inspector should not issue his final report as the Council intends to challenge his decision.**
2. **Instigates Judicial Review proceedings against the Secretary of State for Communities and Local Government against the Inspector's decision.**

**Overview and Scrutiny Comments/Recommendations**

1. N/A

## Issues

2. The Council submitted its Development Strategy for Examination by the Planning Inspectorate in October 2014. The appointed Planning Inspector wrote to the Council on the 3<sup>rd</sup> December 2014 describing significant issues with the submitted Plan. He subsequently notified the Council in January 2015 that he intended to hold the Examination Hearings into the Development Strategy in two parts.
3. It was agreed that he would examine only two issues at the first session of Hearings: whether the Duty to Co-operate had been met and matters relating to objectively assessed need, including the proper Housing Market Area. The Duty to Co-operate is set out in section 33A of the Planning and Compulsory Purchase Act 2004 (Appendix A) and is a legal requirement that Local Authorities need to comply with. It is distinct from the test of “soundness” i.e. whether the Plan is fit for purpose.
4. The first set of Hearings commenced on the 3<sup>rd</sup> February 2015 and lasted two days. The first day of the Hearings considered legal matters, including the Duty to Co-operate.
5. On the 16<sup>th</sup> February 2015 the Planning Inspector, Brian Cook wrote to the Council (Appendix B) explaining his view that the Council had not met the Duty to Co-operate and that the Council should withdraw the Plan or await his final Report, (the latter being somewhat academic as the final Report would essentially repeat the findings in the letter).

## Options for consideration

6. The Council could agree with the Inspector’s request and withdraw the Plan or await his final Report.
7. The Council could challenge the Inspector’s findings. This would entail a Judicial challenge against the conclusions in the letter of 16<sup>th</sup> February 2015. Proceedings would need to be instigated against the Secretary of State as the Planning Inspectorate is an Agency of DCLG.

## Reasons for decision

8. The Inspector’s letter of 16<sup>th</sup> February 2015 has been carefully examined and Counsel’s advice has been taken.
9. In the present case, the Inspector has emphasised that he is exercising his judgement on several occasions. However, the judgement must be exercised in a lawful manner. The Inspector sets out the tests he considers that the Council needs to meet in his decision letter. The Planning and Compulsory Purchase Act 2004 provides that the Duty is to engage constructively, actively and on an ongoing basis in any process by means of which activities within subsection (3) are undertaken.

10. The Inspector's approach to the matter is arguably flawed in law. Reading the decision letter as a whole he is clearly focussed on "outcomes" and gives little regard to the engagement and circumstances of the issues with Luton. He does mention it, but does not deal with how this needs to be fed into his assessment of compliance with the Duty.
11. Furthermore, he seems to believe that the desired outcome must be to meet all Luton's needs in the Council's area. That seems to be a soundness point rather than one that should have gone into the Duty considerations. The remainder of his letter is predicated on his conviction that this was the central point of any co-operation and his final comments in paragraph 56 of his letter confirm this.
12. He states the following: "The necessary steps to secure effective policy delivery on cross boundary strategic matters have not been taken in respect of housing. I acknowledge that in considering this issue the distinction between a failure to comply with the Duty and a failure to agree with others (and LBC in particular) is a matter of judgement that is not always clear. In making that judgement however I consider it reasonable to conclude on the evidence that the Council has failed to comply with the Duty in that regard."
13. Based on what goes earlier, it seems that he has decided that the failure to agree in this case proves the failure to meet the duty to cooperate. This is not the proper approach.
14. Furthermore, he seems unduly influenced by Luton's refusal to sign the MOU. He considers that it is "inevitable" that Luton's need will have to be met in the Council's area. It is difficult to see how he can conclude this given that other plans have not yet been examined and the capacity or growth study is yet to be completed. This is part of resolving where the need will in due course go. He has no regard or understanding of the role of the Allocations Plan in meeting further need. Significantly he seems to ignore that the Council has secured an outcome in that it is taking over 5000 dwellings of Luton's need and that this figure itself was a consequence of an increase during the process by over 1000.
15. Moreover, it appears that the Inspector may have taken into account a failure to meet the Duty to Co-operate before this duty was enacted.

### **Reason for urgency**

16. A Judicial Review has to be lodged within six weeks of the relevant decision being taken.

### **Council Priorities**

17. Enhancing your local community – creating jobs, managing growth, protecting our countryside and enabling businesses to grow.

18. Improved educational attainment, promote health and well being and protect the vulnerable.
19. Better infrastructure – improved roads, broadband reach and transport.

### **Corporate Implications**

### **Legal Implications**

20. As set out above.

### **Financial Implications**

21. An Earmarked Reserve was created in 2013/14 and carried over in 2014/15 to cover any costs, including legal costs that might be associated with the Development Framework. The likely costs incurred will not therefore impact on current year or 2015/16 General Fund budgets.

### **Equalities Implications**

22. No specific issues related to the Equality Duty have been identified.

### **Conclusion and next Steps**

23. It is considered that the Inspector's conclusions following his initial Examination of the Development Strategy are flawed and capable of challenge. If the Council withdrew the Plan there would be a policy vacuum, hostile planning applications and investment uncertainty.
24. Should Council agree the recommendation, the Secretary of State could contest the challenge and legal proceedings commence, in which case the matter would go to a hearing in the High Court.

### **Appendices**

The following Appendix is attached:

25. Appendix A - Section 33A of the Planning and Compulsory Purchase Act 2004

The following Appendix is provided through an electronic link:

26. Appendix B - Inspector's letter of 16<sup>th</sup> February 2015

[http://www.centralbedfordshire.gov.uk/Images/ED42%20Inspector's%20Letter%20to%20Council\\_tcm6-63000.pdf](http://www.centralbedfordshire.gov.uk/Images/ED42%20Inspector's%20Letter%20to%20Council_tcm6-63000.pdf)



# Localism Act 2011

## 2011 CHAPTER 20

### PART 6

#### PLANNING

### CHAPTER 1

#### PLANS AND STRATEGIES

#### **110 Duty to co-operate in relation to planning of sustainable development**

- (1) In Part 2 of the Planning and Compulsory Purchase Act 2004 (local development) after section 33 insert—

#### **“33A Duty to co-operate in relation to planning of sustainable development**

- (1) Each person who is—
- a local planning authority,
  - a county council in England that is not a local planning authority, or
  - a body, or other person, that is prescribed or of a prescribed description,

must co-operate with every other person who is within paragraph (a), (b) or (c) or subsection (9) 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—
- to engage constructively, actively and on an ongoing basis in any process by means of which activities within subsection (3) are undertaken, and
  - to have regard to activities of a person within subsection (9) so far as they are relevant to activities within subsection (3).

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- (3) The activities within this subsection are—
- (a) the preparation of development plan documents,
  - (b) the preparation of other local development documents,
  - (c) the preparation of marine plans under the Marine and Coastal Access Act 2009 for the English inshore region, the English offshore region or any part of either of those regions,
  - (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) to (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, and
  - (b) sustainable development or use of land in a two-tier area if the development or use—
    - (i) is a county matter, or
    - (ii) has or would have a significant impact on a county matter.
- (5) In subsection (4)—
- “county matter” has the meaning given by paragraph 1 of Schedule 1 to the principal Act (ignoring sub-paragraph 1(1)(i)),
- “planning area” means—
- (a) the area of—
    - (i) a district council (including a metropolitan district council),
    - (ii) a London borough council, or
    - (iii) a county council in England for an area for which there is no district council,
 but only so far as that area is neither in a National Park nor in the Broads,
  - (b) a National Park,
  - (c) the Broads,
  - (d) the English inshore region, or
  - (e) the English offshore region, and
- “two-tier area” means an area—
- (a) for which there is a county council and a district council, but
  - (b) which is not in a National Park.
- (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



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- (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.
- (8) A person, or description of persons, may be prescribed for the purposes of subsection (1)(c) only if the person, or persons of that description, exercise functions for the purposes of an enactment.
- (9) A person is within this subsection if the person is a body, or other person, that is prescribed or of a prescribed description.
- (10) In this section—
  - “the English inshore region” and “the English offshore region” have the same meaning as in the Marine and Coastal Access Act 2009, and
  - “land” includes the waters within those regions and the bed and subsoil of those waters.”
- (2) In section 16 of the Planning and Compulsory Purchase Act 2004 (applying Part 2 for purposes of a county council’s minerals and waste development scheme) after subsection (4) insert—
  - “(5) Also, subsection (3)(b) does not apply to section 33A(1)(a) and (b).”
- (3) In section 20(5) of the Planning and Compulsory Purchase Act 2004 (development plan documents: purpose of independent examination) after paragraph (b) insert “; and
  - (c) whether the local planning authority complied with any duty imposed on the authority by section 33A in relation to its preparation.”

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**Central Bedfordshire Development PLAN Examination**  
**Inspector: Mr. Brian Cook BA (Hons) Dip TP MRTPI**

**Programme Officer:**  
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Mr. Richard Fox,  
Head of Development Planning and Housing Strategy,  
Central Bedfordshire Council,  
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Shefford SG17 5TQ

16th February, 2015

Dear Mr Fox

**CENTRAL BEDFORDSHIRE DEVELOPMENT STRATEGY**

*Introduction*

1. I was appointed to examine the above Plan following its submission on 24 October 2014 pursuant to s20(1) of the 2004 Act and Regulation 22 of the Town and Country Planning (Local Planning) (England) Regulations 2012, as amended, (the 2012 Regulations). After an initial review of the submission documents I wrote to the Council on 3 December 2014 (document ED09 on the Examination web site) expressing a number of serious concerns that would need to be addressed before or during the hearing sessions. Included among these was the Council's compliance with s33A of the 2004 Act which sets out the Duty to Co-operate (the Duty) requirements.
2. Given the effect for the Examination and the Plan of a finding that the requirements of s33A have not, as a matter of judgement, been complied with the Council supported my decision to conduct the hearing sessions of the Examination in two stages (ED13). The stage 1 hearing sessions, which I opened on 3 February, dealt therefore with Legal Compliance and the Duty (Matter 1) and Housing, Employment and Retailing Scale (Matter 2). I undertook to write to the Council with my conclusions on these matters not later than 27 February.

3. During discussion of Matter 1 the Council indicated that, since there was now a very clear indication from DCLG that the 2012-based household forecasts would be published on 27 February, it would not be a sensible use of Examination time to discuss the objectively assessed housing need now and then discuss it again when that data had been assessed by the Council and others. I agreed and Issues 2 and 3 under Matter 2 were therefore deferred. This letter therefore makes no comment on that aspect of Matter 2.
4. Unfortunately, I have concluded that the Council has not complied with the Duty. This is not a conclusion that I have come to lightly since I recognise the effect for the progress of the Plan. However, I consider that it is the correct judgement to make in all the circumstances and on the evidence before me having regard to the purpose of the Duty. The reasons for my conclusion are set out below.

*The Duty – The Statute*

5. With respect to planning, one of the coalition Government's very early announcements was an intention to abolish regional strategies. However, this did not mean that individual planning authorities could plan for their areas in total isolation from the planning strategies and requirements of the adjoining areas. This was given statutory effect through s110 of the Localism Act 2011 which in November 2011 introduced s33A into the 2004 Act with immediate effect. Importantly, there were no transitional arrangements for plans already in preparation but not yet submitted for examination emphasising the importance of the Duty for plan-making.
6. Under s33A a plan-making body must co-operate with every prescribed body in maximising the effectiveness with which the preparation of development plans is undertaken. Activities that can reasonably be considered to prepare the way for or support the preparation of development plans fall within the purview of s33A(1). In particular, the Duty requires the local planning authority to '...engage constructively, actively and on an ongoing basis in any process...' by which those activities are undertaken.
7. The role of the person appointed to carry out the independent examination of the submitted plan is set out in s20(5)(c) and s20(7)(b)(ii) of the 2004 Act. Respectively, these say that it must be determined

whether the local planning authority has complied with s33A and whether, in all the circumstances, it would be reasonable to conclude that the local planning authority has complied with the Duty. The court has held that the conclusion drawn by the independent examiner is a matter for his or her judgement.

### *The Duty - Guidance*

8. The Duty is a new statutory concept. Published in March 2012, the National Planning Policy Framework (the Framework) established some high level principles in paragraphs 178 to 181 inclusive. Framework paragraph 156 gave guidance about the strategic priorities that would give rise to cross administrative boundary planning issues to be subject to the Duty process. Among those listed are the homes and jobs needed in the area, the provision of retail, leisure and other commercial development and the provision of infrastructure for such as transport and flood risk.
9. Greater detail on how local planning authorities might discharge the Duty and show at Examination that they had was not published in final form by Government until April 2014 through the Planning Practice Guidance (PPG). However, the beta version of this was available in the autumn of 2013 and emerging good practice and advice was made available before that by Planning Advisory Service and the Planning Inspectorate among others.
10. There are some 23 paragraphs under the ID: 9-20140306 reference making it one of the more detailed sections in the PPG. Key points are as follows
  - a. It is not a duty to agree but every effort must be made to secure co-operation on strategic cross boundary matters before submission of the plan.
  - b. Co-operation should produce effective and deliverable policies on strategic cross boundary matters.
  - c. Comprehensive and robust evidence of the efforts made to co-operate and the outcomes achieved must be submitted.
  - d. Members and officers are responsible for leading the discussion, negotiation and actions required to ensure effective planning for strategic matters.

- e. Effective working is necessary with all the authorities within wider functional areas such as housing market and travel to work areas when planning land uses such as housing.
- f. The Duty is unlikely to be satisfied by an exchange of correspondence, conversations or consultations between authorities alone. Outcomes are important, not just whether others have been approached. Evidence should be produced to show who has been co-operated with, the nature and timing of the co-operation and how it has influenced the plan.
- g. Planning for infrastructure is a critical element of strategic planning.
- h. Effective co-operation where plans are being brought forward on different time scales but joint working is essential for effective delivery of key planning strategies could be shown through formal agreements signed by elected members. These should be as specific as possible and should show, for example, the quantity, location and timing of unmet housing need that one authority is prepared to accept from another to help deliver its planning strategy.
- i. Authorities are not obliged to accept the unmet needs of other planning authorities if they have robust evidence that this would be inconsistent with the policies set out in the Framework, for example those on Green Belt.
- j. Details of the actions that an authority has taken in respect of the Duty (both proactive in respect of its own plans and reactive in respect of the plans prepared by others) should be set out in the Annual Monitoring report required by Regulation 34(6) of the 2012 Regulations.

*The regional and local context*

11. This is set out briefly but in clear detail in section 4 of submission document DPD10 which addresses the Duty to Co-operate. The key points are:
  - a. Central Bedfordshire fell within the East of England Regional Strategy area and specifically within the Milton Keynes and South Midlands Growth Area (MKSM).
  - b. The MKSM Sub-regional strategy (MKSMSS) of 2003 identified the Luton/Dunstable/Houghton Regis area and Leighton Linlade as suitable locations for growth.
  - c. The unitary authority came into being on 1 April 2009.

- d. The north of the Council area (previously Mid Beds DC) is covered for planning purposes by an adopted core strategy (2009) and an adopted site allocations plan (2011). In the south (formerly South Beds DC) it is the South Bedfordshire Local Plan of 2004.
- e. Joint working between southern Central Bedfordshire and Luton began in 2005 responding to the growth strategy and the MKSMSS. This was formalised through a joint committee and a seconded officers' joint technical unit in 2007.
- f. A Joint Core Strategy (JCS) was submitted for examination in March 2011 but withdrawn in July.

*The evidence supplied by the Council*

- 12. I raised in my first letter (ED01) a concern that some of the submission documents could not have been those made available at pre-submission consultation (Regulation 19 of the 2012 Regulations) since they are dated October 2014. The Council explained in ED02 that this was because they addressed issues and outcomes still taking place up to the point of submission. DPD10 therefore includes details of the continuing co-operation up to that point and could be seen as addressing some of the concerns raised in the Regulation 20 representations.
- 13. DPD10 addresses six strategic issues and follows a similar format for each. This comprises a short narrative setting out the key issues; actions; governance and working arrangements; outcomes; and managing the issue on an ongoing basis. Not all of these steps are set out for every issue. This is supported by a number of Appendices. Appendix 3 is titled 'Audit trail of key decisions and processes by Local Authority Area' and lists a series of events, the attendees where appropriate and the date. Appendix 5 is a Memorandum of Understanding (MoU) on housing need in the Luton Housing Market Area.
- 14. In paragraph 7 of ED09 I expressed the view that it was inappropriate to characterise Appendix 3 as an audit trail and gave my view of what that might actually include. I noted too that the MoU supplied related only to housing need. At paragraph 58 I suggested that the Council would wish to reflect on all the comments I had made on the submitted Plan and other submission documents, which were intended to be of assistance, and respond to them as necessary and appropriate through the further papers that would be prepared for the hearing sessions.

15. The Matter 1 hearing statement must therefore be viewed as the Council's response to both those initial comments and my Matter 1, Issue (ii) set out in ED11 and thus the further written evidence in respect of the Duty. It sets out what the Council considers to be the main issues in contention in relation to the Duty, namely, shortfall in housing need, Luton's unmet housing need and employment issues.
16. It also includes five appendices. Appendix 1 is a development of Appendix 3 in DPD10. This sets out in six columns the date; the event; the attendees; the issues discussed; the outcomes/actions; and the documents available. The first date is 7 January 2014 and none of the documents has been produced in evidence although I have no doubt they would have been if required.
17. Having read all the statements submitted in response to my Matters and Issues I prepared a detailed agenda (ED28) to guide the discussion at the hearing session. The Council gave further oral evidence at the hearing session in answer to both my questions and points raised by other participants. In doing so the Council was represented by Saira Kabir Sheikh QC and a number of officers.

*The evidence given – introduction to the appraisal*

18. As a first preliminary point, I agree with the Council's assessment of the main issues in contention; there are however others including Green Belt and infrastructure. As a second preliminary point, participants were unanimous that preparation of the Plan ended on 24 October 2014 when it was submitted for Examination. Therefore nothing that happened thereafter can be taken as evidence of compliance with the Duty.
19. I was provided with evidence from the examinations of the Milton Keynes Core Strategy (MKCS) and the Vale of Aylesbury Plan Strategy (AVP). The MKCS was submitted for examination before the Duty came into effect while the AVP was submitted after. The MKCS Inspector's report was issued in May 2013, the AVP Inspector's letter on 7 January 2014. It is clear from these that Central Bedfordshire and Luton fall within the sphere of influence of both plans; the reverse must also be true as confirmed by the housing market area (HMA) analysis undertaken by the Council.
20. At paragraph 37 of the MKCS Inspector's report the challenges of cross-boundary issues and that Borough's position at the centre of the South



East Midlands Local Enterprise Partnership area are noted as issues needing to be addressed positively and effectively applying the Duty which, by then, had come into effect. Early review of the MKCS through Plan:MK was recommended to provide greater clarity about the role that Milton Keynes and its hinterland would play in the longer term. I understand that Plan:MK is only now in preparation.

21. In the AVP Inspector's letter to the Council advising that the Duty had not been complied with the Inspector draws attention to the significant issues relating to the ability of Luton Borough to accommodate its own growth and the need for the AVP to at least consider this.

*The evidence given - housing*

22. The introductory remarks above reinforce a consistent theme of the evidence, namely the complexity of the wider area within which Central Bedfordshire sits and the interaction between the various administrative areas in plan-making. While the regional and sub-regional plans no longer exist, the fact that the MKSMSS identified the area as a focus for growth must now be viewed in the context of the Framework. Framework paragraph 14 is explicit that there is a presumption in favour of sustainable development with development proposals that accord with the development plan being approved without delay. The message in Framework paragraph 47 in relation to housing is even clearer; the aim is to significantly boost the supply of housing.
23. It is in this context that the evidence of engagement and co-operation between the Council and Luton Borough Council (LBC) must be viewed. Luton is tightly constrained by Green Belt and is surrounded in large part by Central Bedfordshire. The bulk of what the two authorities agree is the Luton HMA is in these two administrative areas. Planning in Central Bedfordshire is therefore of key importance to LBC although the reverse link may be weaker. I believe an understanding of the chronology of events that can be gleaned from the evidence is important and I turn to this now.
24. Prior to local government reorganisation in the area the former county and district councils of Bedfordshire and LBC commissioned a Bedfordshire and Luton Strategic Housing Market Assessment (SHMA) in 2008. The report (Document TR2) was published in March 2010.

25. As recorded above [11.e] the two Councils worked together and submitted the JCS for examination. The Council included as Appendix 4 to its Matter 1 hearing statement the Minutes of a Luton and South Beds Joint Committee meeting held on 22 October 2010. The intended abolition of the regional tier of planning would therefore have been known by that date but the Duty would not then have been part of the statute.
26. Although not the reason for their submission in evidence, what the Minutes show is that, even then, the main issue now between the two authorities was live. Before voting on the substantive motion to proceed to the submission of the JCS an amendment was proposed that said *'to recognise that no completely effective solution to the housing problems in the area can be delivered without some additional sustainable development to the west of Luton.'* Voting for the amendment was split 6:6 on authority lines. No casting vote by the Chair was allowed by the terms of reference so the amendment was lost and the JCS proceeded with that matter still of concern to LBC members. The failure to include a strategic allocation to the west of Luton was, on the Council's evidence, the reason for LBC withdrawing support for the submitted JCS.
27. Early in 2012 the Council published an Issues and Options Discussion Paper (ED41). This sets out a number of housing growth options. This is phrased in terms of meeting the needs of Central Bedfordshire. It notes that since 2001 about 40% of the population growth of the Council area has been the result of migration from elsewhere, particularly Luton, north London and Hertfordshire. The options reflect the accommodation of different levels of inward migration continuing.
28. Through 2012 work continued on the draft Development Strategy prior to Regulation 19 publication in January 2013. From DPD10, Appendix 3 it is clear that throughout this period there were meetings, correspondence and conversations between the Council and the surrounding authorities<sup>1</sup>. Some of these engagements included elected members but no further detail is given about the nature of those engagements or the outcomes for the Plan.

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<sup>1</sup> Bedford BC (BBC); Milton Keynes Council (MK); Aylesbury Vale DC (AV); Luton BC (LBC); Dacorum BC (DBC); St Albans City and District Council (StA); North Herts DC (NHDC); and Stevenage BC (SBC).

29. Following publication of updated demographic information by the Office for National Statistics in April 2013 the Council decided to delay the submission of the Plan to allow further work. On 22 August 2013 an inception meeting took place which established a steering group comprising all nine authorities and commissioned Opinion Research Services (ORS) to prepare what became the SHMA Refresh dated June 2014 (TR1).
30. On 10 September 2013 an Inspector and a DCLG officer held an advisory meeting with officers from both LBC and the Council. This looked at the progress both authorities were making with their separate plans. The note of this meeting (ED36) contains some key messages given by DCLG. These included that all local planning authorities had to contribute to growth; everyone was part of the story and should all plan for growth; and local planning authorities should get together and not isolate themselves. LBC officers noted that there had been good member level discussions with NHDC but it was unclear what level of commitment there was to meeting part of Luton's unmet need. The Council's officers' recorded view was that in fairness NHDC needed to be seen as taking its small share of Luton's unmet need as local people in Central Bedfordshire would need to be clear that it was not the Council that was meeting the entirety of the unmet need. That the Duty was a change in the culture of working and that councils must work together was recorded as a final thought from DCLG.
31. It is clear from Appendix 1 of the Council's Matter 1 hearing statement that during the period from January to 21 May 2014 the focus of the work (or at least that which is evidenced) was the preparation of the SHMA Refresh. There were two 'Duty' member engagement meetings during this period. That on 17 April 2014 appears from the issues discussed and those giving presentations to have been the first time that members from the nine authorities were advised of the implications for them of the Duty in addressing Luton's unmet need and its potential distribution. The next meeting was on 21 May 2014. This appears to be in effect a 'sign-off' meeting for TR1 and the agreement of the MoU [13].
32. During this period the Council must have been undertaking a sustainability appraisal of the Plan since the document (DPD7) is dated June 2014. It does not include an assessment of an option that would address the whole of the unmet need arising from Luton. As a number of

participants pointed out, this would have been the case had all the options at Issues and Options stage been assessed.

33. Publication under Regulation 19 of the Plan that has been submitted for Examination was on 30 June 2014 with representations invited by 26 August.
34. Letters dated 11 June 2014 and 27 August 2014 from Cllr Sian Timoney (Portfolio Holder for Regeneration at LBC) and 23 June 2014 from Cllr Nigel Young (Executive Member for Regeneration at the Council) were exchanged.
35. From mid-June onwards Council officers and, on occasion, elected members were involved in mostly bi-lateral meetings with other authorities including SBC, MK, NHDC, AV and BBC regarding the housing issues in their emerging plans. The final recorded meeting is on 21 October, three days before submission of the Plan.

*Appraisal - housing*

36. Having regard to the Guidance set out above [10] I believe the following questions need to be considered in this appraisal:
  - a. What are the outcomes of the Duty process?
  - b. How have they influenced the Plan?
  - c. What has been the role of members in leading the process?
  - d. What steps have been taken to secure effective policy delivery on cross boundary strategic matters?
37. Dealing first with question (a), the required outcome is the delivery of the full objectively assessed needs for market and affordable housing in the housing market area (Framework paragraph 47) including the unmet needs of neighbouring authorities where it is reasonable to do so and consistent with sustainable development (Framework paragraph 182).
38. Although I deal with HMAs later, that Central Bedfordshire is not a HMA in its own right is not in dispute. The matter in issue on that point is whether it should be considered as being made up of parts of four other HMAs (which is the Council's evidence) or whether it is part of a much

larger HMA as argued by some participants. Whichever is to be preferred, for the purposes of the housing appraisal it would appear that, to be consistent with national planning guidance, the Plan should proceed on an understanding of the objectively assessed housing needs of the relevant HMAs and the contribution that it can and should make towards that. This should be determined through the Duty process with the relevant authorities.

39. There is, in my judgement, emerging evidence that the Council is fulfilling its part of the Duty process in response to the contacts from others preparing their plans [35]. I am concerned that this should also have informed the contribution that the Council should make in the Plan towards the needs of those HMAs; this is not how the assumed contributions shown in TR1 have been derived. However, I accept that in reality, as some participants argued, this could lead to inertia in the plan-making process given that the plans are at different stages towards adoption.

40. Assessing and addressing the objectively assessed housing needs of the Luton HMA is however of central importance for the Plan. The Council and LBC have jointly commissioned the SHMA and are agreed about the objectively assessed need; this is 30,000 dwellings up to 2031. They are agreed too that 17,800 of this need arises within Luton. It also appears to be agreed that the whole of this need cannot be met within Luton. That too is evidence of the positive and ongoing engagement required by the Duty process.

41. However, how much can be met where does not appear to be agreed by the two authorities. In that respect they seem no further forward now than they were in 2011 when the JCS was withdrawn.

42. The MoU is the mechanism by which this should be resolved. It sets out some broad principles to guide the way forward and contains eight clauses. Only clauses 1 and 2 are definitive statements with clause 1 stating the objectively assessed need for Luton (17,800) and clause 2 stating that for Central Bedfordshire (25,600).

43. Clauses 3 and 4 relate to LBC's estimate of its urban capacity (6,000) and thus its unmet housing need (11,800). It is implicit in the wording of clause 4 that the other authorities do not necessarily accept that estimate

since LBC undertakes to share its evidence base and expresses a willingness to examine this further in conjunction with the others. The Council commits to provide for at least 4,400 of the unmet need (clause 5) although this appears to have been raised to 5,400 in practice in the Plan.

44. Clauses 6 and 7 clearly steer the whole of the unmet need to areas within the Luton HMA. It is worth therefore looking at the approaches of the other authorities with parts of their administrative areas within the Luton HMA in order to form a judgement about the likely effectiveness of the MoU in delivering Luton's unmet housing need.
45. At the date of Plan submission, NHDC had not signed the MoU. It eventually did so on 11 December 2014. On any fair reading of the Matter 2 hearing statement from DBC it is clear that it does not envisage any of the unmet need being met in the part of the Borough that lies within the Luton HMA. In its Matter 1 hearing statement AV says that it does not understand how the Council can consider 5,400 to be a reasonable contribution to LBC's unmet need. It goes on to say, in effect, that its position will be clarified following the further work required by clauses 6 and 7 of the MoU.
46. Beyond the Luton HMA that is also the gist of the position put by BBC at the hearing sessions. SBC confirmed at the hearing session that it did not envisage making any notable contribution given the poor geographical linkages with Luton.
47. It should also be noted that LBC has not signed the MoU. That is important since it brings into doubt whether or when the work required under clause 3 will take place.
48. The MoU therefore fails to meet the guidelines for such a document [10.h]. In particular, it does not establish clearly the scale of the unmet need nor does it set out how and where this will be met. Moreover, it has not been signed by all of the authorities, most notably LBC. To that extent it cannot be relied upon by the Council as a mechanism for demonstrating that through the Duty process the need of the Luton HMA will be delivered, even in the future.

49. Turning now to question (b), my conclusion must be 'hardly at all' simply from the timing of events. LBC's evidence, which the Council has not disputed, is that the report to the meeting of the Executive held on 27 May 2014 was published on 19 May. This report seeks authority to publish the Plan for the purposes of Regulation 19. The report was prepared therefore before the 'sign off' meeting of the SHMA steering group on 21 May. I accept that the draft findings would have been available before that date but from the events listed in Appendix 1 of the Council's Matter 1 hearing statement this would not seem to have been any earlier than the 8 May officer steering group meeting.
50. Furthermore, there is no evidence that the Council has considered the implications of meeting the unmet need of Luton in full. As many participants pointed out, a reasonable alternative for assessment through the sustainability appraisal process would have been an additional option with a housing figure somewhere between those of options 3 and 4. Ultimately this is a soundness point given the drafting of Framework paragraph 182. However, this also goes to the Duty since this has been an issue in contention between the two authorities since October 2010 at the latest and is thus indicative of a failure of the Duty process to influence the Plan since no accommodation on this important cross-boundary issue has been reached.
51. I now move on to the third question. The Duty came into effect in November 2011. The advisory visit in 2013 emphasised the importance of the two authorities working together [30]. Shortly after that meeting, early guidance was available stressing the role of members in the Duty process [10.d]. There is a history of difficult working relationships between the two authorities evidenced by, for example, the robust exchanges of correspondence [34] and LBC's legal challenges to planning permissions granted by the Council on land allocated in the Plan. It seems somewhat surprising in all these circumstances that, on the available evidence, the first meeting outlining members' role in the Duty process did not take place until 17 April 2014; barely a month before the publication of the report to the Executive meeting on 27 May.
52. On the evidence provided to me it would be reasonable to conclude that the answer to the question I have posed is 'limited'.

53. I turn now to the final question. I have considerable sympathy with the views expressed by BBC and others that (paraphrasing), at some point, a local planning authority has to climb off the carousel of ever updated demographic data and publish a plan. I acknowledge too the Council's many references to the need to address the Duty in a pragmatic manner. It was clear also from Cllr Young's opening statement to the Examination hearings that the Council sees the Plan as a first step on the road to other plans, including the Allocations Local Plan that it will bring forward, meeting the needs of the area.
54. However, there is a clear view among many of those making representations, including LBC in particular, that in following this path the Council has simply taken forward the withdrawn JCS and the adopted plan for the northern part of the Borough without giving proper consideration to the current 'need' position.
55. Stage 1 of the Examination was not intended for me to form a view on those contentions. However, simply from the timing of the Duty activities in relation to the publication of the Plan it would be reasonable to conclude that the link between the two was tenuous. Moreover, from the wording of the MoU and the way the signatories see it working in practice it seems reasonable to conclude that making provision for Luton's unmet housing need in an adopted plan or plans is some way off. Furthermore, it seems to me inevitable that the outcome of the MoU process will be that the requirement to provide for the whole of that unmet need will fall back on the Council in the first instance.
56. In effect therefore the Council has deferred to later plans that either it or others will prepare an issue that it could and should have addressed now under the Duty. The necessary steps to secure effective policy delivery on cross boundary strategic matters have not been taken in respect of housing. I acknowledge that in considering this issue the distinction between a failure to comply with the Duty and a failure to agree with others (and LBC in particular) is a matter of judgement that is not always clear. In making that judgement however I consider it reasonable to conclude on the evidence that the Council has failed to comply with the Duty in that regard.

*Employment*



57. I shall deal with this matter far more briefly since I consider the failure to comply with the Duty in this regard is clearer.
58. The Plan identifies land to support the delivery of an additional 27,000 jobs over the Plan period. This is stated to be an aspirational figure and, as far as I can tell from the limited discussion held during the Examination to date, is only tenuously linked to any assessment of future employment growth.
59. There is no evidence that the Council has undertaken the identification of the functional economic market area(s) (FEMA) affecting Central Bedfordshire as advocated in the PPG. It took part in an inception meeting on 13 October 2014 to establish the extent of one with NHDC and SBC. Although that appears to be primarily for the preparation of those two authorities' plans paragraph 6.7 of the Council's Matter 1 hearing statement implies that there may be land-use implications for the Council.
60. LBC contends in its hearing statement that it only became aware of this study by chance. It is seeking to agree with the Council a study brief to determine the FEMA as it relates to the two authorities but as a separate study to that commissioned by the Council, SBC and NHDC.
61. The Council appears to derive its objectively assessed employment need from the East of England Forecasting Model (EEFM). However, the outputs from this appear to fluctuate wildly on an annual basis. For example, the Council's Matter 2 hearing statement confirms that the 2013 model output for Central Bedfordshire was 15,000 jobs while the interim 2014 figure was 23,900. This had increased to 26,700 by the time of the hearing session (ED32). The headroom that can be regarded as aspirational within the 27,000 proposed therefore varies from year-to-year.
62. In the Plan the Council says in paragraphs 6.16 and 6.17 that, in summary, provision is being made to accommodate some of Luton's job growth that cannot be met within the LBC administrative area. In his letter to Cllr Timoney dated 23 June 2014, Cllr Young defends the Plan's approach to employment provision suggesting that LBC's emerging homes:jobs provision is not balanced and that a more flexible approach to employment land could boost housing supply in Luton where it is most

needed. This reinforces my observation about the lack of acceptance of LBC's urban capacity estimate. It also appears to be prejudging the outcome of the further work envisaged in the MoU and the response of LBC in its emerging local plan.

63. Put simply, LBC says that this approach had never been discussed and contends that it is not necessary in any event since there is no unmet employment need arising within the Borough. LBC argues that in the absence of such a study on an important cross-boundary issue the Council's assertion that the Plan should provide for any unmet need is not justified.
64. In its Matter 2 hearing statement the Council developed its position in the light of the October 2014 EEFM forecast. This, it argued, would enable a better balance between jobs and homes to be achieved within Luton, possibly alluding to the observations of Cllr Young. Thus it was no longer necessary for the Plan to make provision for any unmet employment need in Luton. Instead, there would now be an opportunity to contribute to meeting part of Stevenage's unmet employment needs. SBC sees some advantage in this approach.
65. Both MK and BBC expressed concerns about the effect of the Plan on commuting patterns between their respective areas and Central Bedfordshire. Although at the hearing sessions both authorities were keen to stress that this was not a Duty issue for them but one of soundness, that is not the message conveyed in the MK Matter 1 and 2 hearing statements.
66. Asked specifically about the extent of the Duty process in respect of this at the hearing session, the Council identified from Appendix 1 of the Matter 1 hearing statement the officer meetings on 31 January, 28 March and 28 April as being those where employment issues were discussed. That is certainly not clear from the 'Issues discussed' column while the outcome in each case is simply stated to be a note of the meeting.
67. In summary, there is almost no evidence of any active, constructive and ongoing engagement on this important cross-boundary issue. The differences between the Council and LBC seem to be part of their wider failure to reach an accommodation on housing provision. The uncertainty of other neighbouring authorities over the nature and effects of the

employment approach pursued in the Plan simply could not have arisen in my judgement had the Duty been complied with on this matter.

*Other matters relating to the Duty*

68. In the light of my conclusions on housing and employment matters I shall deal with these shortly. On Green Belt it seems to me that the difference between the Council and LBC is one of perception. The Council feels it has engaged with LBC when it consulted over the sites that would be proposed (most of which were in the Green Belt) whereas LBC was expecting a more extensive engagement over methodology. However, as with aspects of the employment issue, the very fact that a difference of perception still exists is, in my view, itself indicative of a failure to engage fully.

69. In my letter (ED09) I referred to the various issues that had been raised in the representations and in paragraph 10 invited the Council to present evidence to allow me to reasonably conclude that engagement has been active, constructive and ongoing. In its Matter 1 hearing statement the Council concentrates on housing and employment matters. I therefore have no further evidence in respect of others such as infrastructure.

70. It is a requirement to report on the steps taken to comply with the Duty in the Annual Monitoring Report [10.j]. The Council has not given any evidence about this and I could not find any relevant information in Document TR25.

*Conclusion on the Duty*

71. For the reasons set out above it would not be reasonable for me to conclude that the Council has complied with the Duty.

*Other Issues*

72. Given my conclusion on the Duty, I shall deal with certain other matters discussed during the hearing sessions only briefly. These comments are intended to assist the Council when it next publishes the Plan under Regulation 19 and deals subsequently with the representations received under Regulation 20.

73. First, is the definition of the appropriate HMA for the purposes of this Plan. It seems to me that the approach taken by ORS is broadly in accord with the PPG with the levels of self-containment identified being of the

order set out therein. In my view, none of the alternative methods for assessing the HMA submitted in evidence and discussed would be demonstrably preferable in the particular circumstances of the wider area.

74. I note that ORS has been commissioned by several of the surrounding authorities to prepare or review the SHMA to assist with the preparation of their plans. This is likely to lead to a series of interlocking HMAs across the wider area developed taking essentially the same approach in each case. However, it is unlikely that any of the HMAs defined will be coincident with the administrative boundaries of any one authority or group of authorities.
75. Translating the objectively assessed housing need for the HMA into a housing requirement figure for the Plan area is a matter for discussion under the Duty. This is explicitly acknowledged in TR1 at paragraph 8.23. With the publication of the 2012-based household projections imminent and several local plans in the wider area at points in their preparation where this data will be vital, there would appear to be an opportunity for meaningful activity through the Duty process. In my view therefore, in the particular circumstances of this area at this time the way that the authorities engage through the Duty is more important than the manner in which the boundaries of any particular HMA are drawn.
76. Second, is the matter of the objectively assessed retailing need. In short, there was no evidence that the approach taken and set out in TR9 was flawed and I see no reason to disagree. Taking this forward however, it will be appropriate to align the population figures used in the various studies that rely upon them for forecasting purposes.
77. Finally I turn to two matters relating to compliance with the legal requirements. The first is the availability of submission documents under Regulation 22 of the 2012 Regulations with the second being compliance with Regulation 24.
78. Dealing with the first of these, this has been a matter of considerable concern to both those making representations and to me. In simple terms, the Council has not complied with Regulation 22(1)(d) because at the date of submission, it did not make available copies of the representations made under Regulation 20. Since the Examination

started (and largely at my request), various corrections and additions have been made to documents DPD4 and DPD4A with guidance on how to access and view the representations given to those looking at the Examination web site. The latest of these guidance documents was not published until 5 February.

79. Notwithstanding that latest advice, nowhere can all the representations made be read in whole. Instead, representations have been split into Plan order on the judgement of the Council about the part of the Plan being addressed. Many of those contacting the Programme Officer objected to this arguing that the sense of their representation as a whole was thus lost. Additionally, for the purposes of the Examination hearings, it is impossible for the Programme Officer and me to be clear from DPD4 whether a representor wishes to appear and be heard or understand the nature of the change proposed to address any claimed soundness issue. That has significant implications for the management of the Examination.

80. I appreciate the difficulty created for the Council by the voluminous representations made by some. I understand that the document management software used cannot deal with certain material. However, this appears to include tables. Given the obvious focus of parts of the Examination that is not, in my view, acceptable.

81. Turning briefly to compliance with Regulation 24, it seems to me that the Council is in fact relying on documents generated by me and placed on the web site by the Programme Officer. The required information is in my Guidance Notes (ED12) which was placed on the Examination Documents tab of the web site on 5 December. The only place on the web site where all the specified information is transparently set out and easily accessible is the Examination Information tab. Despite being asked, the Council did not give the date when this tab was created.

#### *Overall conclusions*

82. I recognise that my conclusion with regard to the Duty is not one that the Council will welcome. However, I believe it to be the only conclusion that I could reasonably draw on the evidence that was presented both at submission and in response to both my initial letter (ED09) and my agendas for the Matters 1 and 2 hearing sessions. In simple terms there should be much clearer evidence of the co-operation required for the effective delivery of the homes and jobs needed in the Luton and Central Bedfordshire area.

83. I fully appreciate that the Duty is not a duty to agree. However, even in that context, I do not consider that there is sufficient evidence that the various authorities have taken the necessary steps through the Duty process to secure the delivery of the homes and jobs needed by authorities such as LBC that are constrained in their ability to meet their own needs. I do not underestimate the challenge that achieving the necessary co-operation presents in this particular area. However, all reasonable steps must be shown to have been taken to secure that co-operation before it would be reasonable to conclude that the Duty had been complied with. As I have explained, I consider the co-operation between the Council and LBC in particular has fallen short of the required level.

84. Having come to that conclusion, under s20(7)(A) of the 2004 Act I must recommend non-adoption of the Plan. There are two options now open to the Council. First, the Council could chose to receive my report. In substance, that would be the same as this letter and must reach the same conclusion. Second, the Council could chose to withdraw the Plan under s22 of the 2004 Act. That would seem to me to be the most appropriate course of action but that is clearly a matter that you will wish to consider.

85. I shall ask the Programme Officer to notify everyone that the stage 2 hearing sessions will not now take place as programmed and that no further statements should be submitted. She will also arrange for this letter and an explanatory piece to be placed on the Examination web site as soon as possible.

Yours sincerely,

*Brian Cook*

Appointed Inspector