

RESPONSE TO SUBMISSIONS MADE
ON BEHALF OF THE BRISTOL ALLIANCE

1. The submissions made on behalf of the Bristol Alliance are as follows:
 - a. The Council's proposed post submission changes, dated December 2011, to policies CS14 and CS26 constitute either plan preparation or are activities that support plan preparation and are therefore subject to the duty to co-operate;
 - b. The examination into the plan on policies CS14 and CS 26 is either plan preparation or an activity that supports plan preparation and is therefore subject to the duty to co-operate;
 - c. If the duty to co-operate does not apply to the proposed post submission changes or the examination stage then the legislative purpose is undermined;
 - d. The plan cannot be sound because it is not compliant with paragraph 181 of the NPPF.

These four points are addressed below.

The post submission changes

2. South Gloucestershire Council's position on the duty to co-operate is contained in documents TP1 (The duty to co-operate Topic Paper – section 2) and SG17 produced at the Pre Examination Hearing. The submissions contained in those documents are relied upon but not repeated in this document. In essence, for the reasons set out in those documents, plan preparation, which is stage one of the core strategy process, was completed by the Council on the date of the submission of its core strategy to the Secretary of State on 31 March 2011. The duty to co-operate did not come into effect until 15 November 2011 and therefore could not apply to the Council's preparation of this core strategy. The post submission changes whilst described as such are not in reality changes made by the Council to the core strategy. Once the core strategy has been submitted to the Secretary of State, as is the case here, the Council no longer controls the core strategy and can no longer continue to prepare it, it can merely only make suggestions to the Inspector for him to consider whether or not to recommend those suggested changes as main modifications to the Council's core strategy.
3. Furthermore, the Council's proposed post submission changes cannot constitute activities that support plan preparation. It is not possible to support an action, in this case one of plan preparation, once it has finished. Section 33A 3(d) states that activities that "prepare the way" for plan preparation are

also subject to the duty to co-operate. This the Council suggests can only involve an activity that occurred **before** the plan was prepared as otherwise it cannot “prepare the way” for plan preparation. Section 33 A(3)(e) also states that activities that “support” plan preparation are subject to the duty to co-operate. This the Council suggests relates to the activities of a local authority that occur during, not before, plan preparation which are not in fact plan preparation but activities that support that preparation. However it is not possible to support a process that has finished. Therefore if the Council is correct and plan preparation was complete on its submission of the core strategy to the Secretary of State it is not possible thereafter to “prepare the way for” or to “support” an activity that has finished. In short the references in section 33 A (3) (d) and (e) are all activities that are ancillary to or subordinate to the preparation of the plan. When that process is complete it is not possible for those ancillary activities to continue.

The examination process constitutes plan preparation or is an activity that supports plan preparation

4. It is not accepted that the examination process itself can constitute plan preparation. The examination process is to ascertain whether or not the submitted plan prepared by the Council is compliant with the relevant legislation or is sound. If not, and if requested to do so by the Council, the Inspector must recommend main modifications to the plan that would make it sound. If the Council wish to adopt the plan then it must do so with the recommended main modifications contained within it. The examination stage is quite different to the plan preparation stage. The Inspector is in charge of the plan and the Council is a mere participant in the Inspector’s examination of its prepared plan. The Inspector is not preparing the plan but considering the plan that has been prepared. If he thinks it is not sound then he must recommend main modifications to it. He is the only person at this stage who can recommend main modifications to the plan which must be incorporated into the plan by the Council if it is to be adopted.
5. However the Inspector is not subject to the duty to co-operate in either examining the plan or in recommending main modifications to it. It would be wholly impracticable for him to be subject to such a duty. Any participant in the examination process, including the Council, cannot at this stage make any amendments to the plan – they can only make suggestions to the Inspector that he should recommend main modifications to the plan. The Council’s plan preparation by this stage is finished.
6. Furthermore to suggest that the examination process is somehow an activity that supports plan preparation cannot be correct. The examination does not

support plan preparation as it takes place after the Council's preparation has finished. It is not possible to support a process that has finished. To suggest that the examination supports plan preparation misunderstands the examination process which is to scrutinise and where necessary recommend main modifications to the prepared plan.

7. Additionally it is critical that there exists a clear demarcation between plan preparation and plan examination so it can be readily ascertained when the duty to co-operate is engaged to enable the Inspector to assess whether or not it has been complied with in the Council's preparation of the plan. Otherwise if plan preparation or activities that support plan preparation can continue into the examination stage it would become an impossible task for the Inspector to try and ascertain when in carrying out his examination of the plan, the duty to co-operate was and was not engaged as only one participant in the examination process would be subject to it, namely the Council. Whilst clearly not directing their minds to this particular point - that there are different stages of plan preparation and plan examination within the legislative regime established under the 2004 Act - is clearly recognised in Cala Homes (South) Ltd [2011] EWCA Civ 639 [RE 22] by Lord Justice Sullivan at paragraph 24.

Legislative process undermined

8. It is incorrect to suggest that that the Council's approach undermines legislative objectives. The point is merely one of timing and when the duty to co-operate was enacted.
9. Because of the timing of the enactment of the new section 33 A the duty to co-operate does not bite on South Gloucestershire Council's core strategy because its preparation was complete before the duty to co-operate came into effect. If the Council had included the proposed changes that the Bristol Alliance complains about in its submission core strategy, (which was submitted before 31 March 2011 and therefore before the enactment of the duty to co-operate) the duty would not have been engaged as the duty had not been enacted. The fact that the Council now suggests that the Inspector recommends main modifications on this matter does not undermine the legislative regime as even if the proposals had been incorporated into the plan by the Council prior to submission of the Core Strategy they would not have been subject to the duty.
10. Furthermore, the contention that an authority could, if the Council's contentions are right, subvert the duty to co-operate is incorrect. It is

suggested by the Bristol Alliance that a Council could prepare a plan to which the duty to co-operate applied at the time of preparation which deliberately (or accidentally) left out a strategic matter. The Council could then propose policies in respect of that strategic matter by suggesting changes to the Inspector after the plan was submitted. Whilst theoretically a Council could do this there, is no guarantee that those changes would be recommended as main modifications to the plan by the Inspector examining it. The preparation stage would be over and the Council would be wholly dependent upon the inspector agreeing with those suggested changes and recommending main modifications to include them. Furthermore, if a plan making authority had deliberately or indeed accidentally during plan preparation, left out of the plan reference to, or consideration of, a strategic matter at a time when the duty to co-operate was engaged and subsequently produced suggested changes in respect of that strategic matter, an Inspector examining the plan is likely to conclude that the omission by the Council to consider that strategic matter at the time it prepared the plan is a breach of the duty to co-operate.

11. The different outcomes between that of the South Gloucestershire Core Strategy and the example given by the Bristol Alliance do not demonstrate that the legislative objective is undermined by South Gloucestershire Council's approach. They merely demonstrates that a different result will occur depending on whether or not at the time of plan preparation and submission of a core strategy the duty to co-operate was engaged or not. When new legislation is enacted, which is not retrospective in effect, there will always be examples of when that enactment does not have effect because the relevant events took place before the enactment. This does not undermine legislative objectives it is merely the effect of the date of the enactment.
12. Furthermore in the example given by the Bristol Alliance the policies in the NPPF relating to the duty to co-operate would also not have been complied with and the plan would not be in conformity with that document and is likely to fail on that basis also.

Failure to comply with the NPPF

13. It is incorrect for the Bristol Alliance to suggest that the plan is not sound because the Council has not demonstrated effective co-operation in accordance with paragraph 181 of the NPPF. Under the section of the NPPF called "PLAN MAKING" and immediately before paragraphs 178-181 there is a section entitled "Planning Strategically across local boundaries". This part of the NPPF is specifically addressing the duty to co-operate and paragraph 178

starts by stating “Public bodies have a duty to co-operate on planning issues that cross administrative boundaries.” This paragraph and those following are clearly guidance on the duty to co-operate. This duty to co-operate came into effect on 15 November 2011 and the NPPF was not produced until March 2012. Where, as here, the duty to co-operate does not apply a Council can not be expected to have fulfilled guidance recently produced that relates to a duty to which it is not subject.

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