
BRIEF TO COUNSEL

**IN THE MATTER OF HARBOROUGH DISTRICT COUNCIL AGREEING TO THE
LEICESTER AND LEICESTERSHIRE STATEMENT OF COMMON GROUND
RELATING TO HOUSING AND EMPLOYMENT LAND NEEDS**

HARBOROUGH DISTRICT COUNCIL

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1. Counsel has herewith the following documents:

- Leicester and Leicestershire Authorities - Statement of Common Ground relating to housing and employment land needs (June 2022) (Document 1).
- Advisory notice dated 31 August 2023 prepared for Harborough District Council (“HDC”) by Intelligent Plans and Examinations (IPE) in relation to the Duty to Co-operate and the Statement of Common Ground between Leicester City Council, the seven Leicestershire Local Planning Authorities and Leicestershire County Council relating to Housing and Employment Needs (Document 2).
- Advisory notice dated 15 September 2023 prepared for Harborough District Council by Intelligent Plans and Examinations in relation to further advice following letter from the Minister of State for Housing and Planning (Document 3).
- Draft Report to Harborough District Council’s Council meeting on 6 November 2023 in respect of the Harborough Local Plan - Leicester and Leicestershire Statement of Common Ground relating to housing and employment land needs (Document 4) (excluding appendices)

Counsel has not been provided with the appendices to the report (other than Document 2 and 3) as advice on the supporting documents is not required. However, the documents are in the public domain and published on the Council’s website – www.harborough.gov.uk

2. Counsel’s instructing solicitor is Julie Young, Head of Legal Services (& Deputy Monitoring Officer) for Harborough District Council, The Symington Building, Adam and Eve Street, Market Harborough, LE16 7AG.

3. Counsel will note from Document 4 that HDC’s existing local plan was adopted in April 2019 and contains implementation, monitoring and review provisions which have been triggered. Failing to update the existing local plan will put the Council in breach of its own planning policy (IMR1). HDC has reviewed the existing local

plan and concluded that a new plan is also desirable to allocate development in sustainable locations and protect important natural spaces and built heritage in the district. Accordingly, work has commenced on the development of a new local plan.

4. Counsel will be familiar with the current legislative requirements on local planning authorities when preparing local development plans, and the need to demonstrate that the tests of soundness have been met. The Council therefore needs to ensure its plan makes adequate provision for local housing and employment needs and helps to ensure that any unmet needs from neighbouring areas are also met.
5. HDC is considering becoming a signatory to the Leicester and Leicestershire Statement of Common Ground relating to housing and employment land needs, June 2022 (“SoCG HEN”) (Document 1). The SoCG HEN has been signed by 7 of the 9 authorities in Leicester and Leicestershire and is considered by HDC to be the best evidence by which it can demonstrate that it has discharged its duty to cooperate with other authorities in the Housing Market Area and the Functional Economic Market Area.
6. At the next meeting of HDC’s full Council on 6 November 2023, Councillors will receive a report from officers with a recommendation that HDC continues to progress the preparation of the new local plan by signing the SoCG HEN. Officers have sought agreement of the signing of the SoCG HEN in accordance with the Local Development Scheme adopted by HDC in June 2022. However, for a variety of reasons, largely connected with local political issues rather than planning principles, a decision on whether to accept the SoCG HEN has not been forthcoming to date – it is anticipated at the meeting on 6 November 2023.
7. The situation for the Council was further complicated by the local government elections in May 2023, which saw the long term administration ousted by the former opposition, by the formation of a coalition. The current opposition is of the same political party as the 3 members of parliament for the district and the new coalition administration is understandably inexperienced in making contentious

decisions. The opposition are exploiting public resentment at the thought of the district being 'required' to accept unmet housing need from the district of Leicester City. This has been exacerbated by the Government's confirmation of the proposed abolition of the Duty to Cooperate, both in respect of the impact this may have upon the need to meet unmet needs arising from neighbouring authority areas, and the potential costs of accelerating plan submission under the current regime to meet the Government's 30 June 2025 deadline in connection with the proposed implementation of the Levelling Up and Regeneration Bill.

8. To assist Councillors and provide them with independent assurance on the proposal recommended by officers, independent advice was sought from specialist advisors at Intelligent Plans and Examinations (Documents 2 and 3). In summary, the advice confirms HDC's ongoing responsibilities in relation to both demonstrating compliance with the Duty to Cooperate and meeting the tests of soundness. Further, the Minister of State for Levelling Up, Communities and Housing ("MLUCH") was contacted for clarification as to the impact of the Levelling Up and Regeneration Bill upon the duty to co-operate. Further advice was provided by IPE once the response was received from MLUCH (see Document 3).
9. Officers of HDC consider, and have advised, that:
 - a. Signing the SoCG is the best evidence that the Council has met its duty to co-operate;
 - b. There is no realistic prospect of successfully challenging the basis upon which the calculations for the unmet housing have been conducted;
 - c. It is not necessary for the council to consider the strategic transport assessment and strategic growth options reports before determining whether to endorse the SoCG
 - d. The local plan examination process will ultimately determine the soundness of HDCs plan;
 - e. Although the duty to co-operate will be removed by the LURB, there will still be an as yet unknown obligation to work with regional and sub-

regional colleagues to address issues in the Housing Market Area, and evidence the same, such as through a Statement of Common Ground;

- f. Accelerating the development of the new local plan to ensure submission for examination by the government deadline of 25 June 2025 ensures the work done on the plan to date is not abortive and that the Council can maximise its influence on the development of the local plan for the benefit of the district as a whole without delay.

10. The Council now seeks Counsel's opinion in respect of the Council's legal position regarding the acceptance of the SoCG HEN and particularly:

- 10.1 whether the advice provided by IPE to the Council is correct, and if not why not;
- 10.2 the merits of the Council signing / not signing the SoCG HEN.

11. The Council wishes to publicise the advice received from Counsel and therefore requests either that the advice is suitable for public dissemination in its entirety, or alternatively, that a summary of the advice is provided which can be shared with Councillors and at public meetings.

If Counsel requires any further information then please contact Julie Young on 01858 821371 or email j.young@harborough.gov.uk.

Julie Young
Head of Legal Services (& Deputy Monitoring Officer)
Harborough District Council

HARBOROUGH DISTRICT COUNCIL
THE LEICESTER & LEICESTERSHIRE AUTHORITIES
STATEMENT OF COMMON GROUND RELATING TO HOUSING AND
EMPLOYMENT LAND NEEDS

A D V I C E

1. At its meeting on 6 November 2023 Harborough District Council (“the Council”) is to consider a report from the Head of Strategic and Local Planning which recommends that the Council signs the Leicester and Leicestershire Authorities Statement of Common Ground (“the SOCG”) relation to Housing and Employment Needs as a formal step in the preparation of the Council’s next local plan.

2. The Council has received advice in the form of Advisory Notes dated 31 August 2023 and 15 September 2023 prepared by Derek Stebbing BA (Hons) (DipEP) MRTPI of Intelligent Plans and Examination (“the Advisory Notes”). These provide advice on the benefits of entering into the SOCG and the potential consequences and risks to the Council in declining to do so and conclude that the benefits of signing the SOCG at this time very significantly outweigh the potential risks would arise from a decision not to sign the SoCG. In summary, the advice received is that signing:

“...will provide the Council with much greater certainty in the short-term for the ongoing preparation of its new Local Plan. A decision not to sign the SOCG will likely make the Council’s position increasingly fragile, with regard to its new Local Plan and the threat of speculative applications”.

3. My advice is sought on whether the advice provided by Intelligent Plans and Examination (“IPE”) is correct and on the merits of the Council signing and not signing the SOCG.

Summary of Advice

4. I have reviewed the IPE Advisory Notes and I am satisfied that they accurately summarise both the current statutory requirements under which the Council must prepare its new local plan and the arrangements under the recently enacted Levelling Up and Regeneration Act the relevant provisions of which have yet to be brought into force. It also correctly identifies the principal advantages of entering into the SOCG and the disadvantages of not doing so, both in relation to the preparation of the Council’s new local plan and within the development management context. I can see no legal error in the advice which the Council has received from IPE. In particular, the conclusion reached is a reasoned and balanced one.
5. Having reviewed the advantages and disadvantages of the Council entering into the SOCG, I would also advise the Council that, having regard to the terms of the SOCG, there are no obvious disadvantages of entering into the SOCG at this point of time and considerable advantages in doing so. Indeed, given that the wording of the SOCG, on the basis of the material before me, the

balance of advantage is so great that it would at least be arguably irrational to refuse to do so.

The Planning Issue – Leicester’s unmet Needs

6. The eight local planning authorities responsible for plan making in Leicestershire have cooperated on the preparation of a joint evidence base to support their plan making. The work undertaken to date includes, importantly, the Housing & Economic Needs Assessment 2022 (“the HENA”). This is a critical part of the evidence base for any local plan. Its purpose is to identify the Housing Market Area and the Functional Economic Area for the purposes of assessing both the extent of the need for housing and employment land and where additional provision should be made within the defined areas.
7. The HENA concludes that Leicestershire is a largely self-contained Housing Market Area and, applying the Government’s Standard Methodology for the setting of a housing requirement figure for local plans, for the 8 plan areas, there is presently a requirement for 91,408 dwellings for the period 2020-2036 (5,713 dpa). This is the Local Housing Need within the Housing Market Area. For the Council’s administrative area, the housing requirement for this period is 8,544 dwellings (53 dpa).
8. Whilst it is correct as a matter of policy that the National Planning Policy Framework (“NPPF”) neither dictates use of the Standard Methodology nor that the identified housing need for a given administrative area must be met, it makes it very clear that recourse to an alternative methodology will rarely be justified:

“To determine the minimum number of homes needed, strategic policies should be informed by a local housing need assessment, conducted using the standard method in national planning guidance – unless exceptional circumstances justify an alternative approach which also reflects current and future demographic trends and market signals.”

(para.61)

9. The NPPF also addresses the issue of unmet needs from other local planning authorities' areas:

“In addition to the local housing need figure, any needs that cannot be met within neighbouring areas should also be taken into account in establishing the amount of housing to be planned for”.

(para.61)

10. The requirement extends beyond simply considering the amount of unmet need that there may be. There is a specific policy requirement that:

“Strategic policy-making authorities should establish a housing requirement figure for their whole area, which shows the extent to which their identified housing need (and any needs that cannot be met within the neighbouring areas) can be met over the plan period”.

(para.66)

11. This requirement is reinforced by paragraph 11(b) of the NPPF which contains the presumption in favour of sustainable development which, for plan-making means that:

“strategic policies should, as a minimum provide for objectively assessed housing need for housing and other uses, as well as any needs that cannot be met within neighbouring areas, unless:

- i. the application of policies in this Framework that protect areas or assets of particular importance provides a strong reason for restricting the overall scale, type or distribution of development in the plan area; or*
- ii. any adverse impacts of doing so would significantly and demonstrably outweigh the benefits when assessed against the policies in this Framework as a whole”*

12. The areas or assets of “*particular importance*” referred to in paragraphs 11(b)(i) are ecological sites the subject of the highest level of legal and policy protection (existing and candidate Special Protection Areas, Special Areas of Conservation, Ramsar Sites or SSSIs), land designated as Green Belt, Local Green Space, an Areas of Outstanding Natural Beauty, a National Park, a Heritage Coast, irreplaceable habitats (e.g. Ancient Woodland and Veteran Trees), designated heritage assets and areas at risk of flooding. (see footnote 7 to the NPPF). The approach of the NPPF is therefore, unless there is a strong planning reason to the contrary, housing and other needs arising within a given plan area, *together with any unmet needs from those areas unable to fully meet their own objectively assessed needs*, should be met in full.
13. Other than in cases involving the a shortage of developable land and/or a significant effect of housing and other growth on one or more of the nationally important assets referred to in footnote 7 to the NPPF, I am not aware of any Inspector examining a Local Plan concluding that a local plan which failed to meet the full objectively assessed need and any relevant unmet need, would be sound and could be adopted.
14. Whilst therefore there are some who seek to contend that the NPPF is purely advisory and leaves it to local planning authorities to decide whether to plan for

growth and, if so, how much growth to be provided in the plan area, when the NPPF is read as a whole, the reality is very different. In the absence of a clearly evidenced and very weighty land use planning reason why the identified needs should be met, any plan which fails to make adequate provision for housing and other needs, will almost inevitably be found unsound unless it is modified to allocate additional land.

Harborough District

15. None of the available evidence would support the Council seeking to argue that the planning constraints in its area are such that it should plan both to meet all its own objectively identified need together with an appropriate amount of unmet need from elsewhere if it is asked to do so. For example, the Council's own assessment of the availability of housing land in its plan area, shows housing completions since 2020 and commitments at 1st April 2023 total 10,427 dwellings and the Strategic Housing Land Availability Assessment identifies theoretical capacity within the District for an additional 12,246 dwellings over the next 10 years or so. This may be compared with the assessed Local Housing Need using the Standard Methodology of 8,544. Whilst not all of this capacity will prove to be realisable in practice, the evidence shows that the planning constraints in the District do not justify an attempt not to meet the Local Housing Need and any unmet need from elsewhere.
16. This conclusion is reinforced by the record of actual delivery being achieved within the District. The annualised LHN requirement for the District is 534 dwellings per annum over the period 2020 to 2036. That number of new homes delivered in the District has exceeded 534 in each of the last five years, with an

average of 850 dpa. This is not indicative of a district with overriding constraints to new housing delivery.

17. In contrast to Harborough District, the evidence shows that Leicester City Council is unable to meet all of its Local Housing Need within its administrative boundaries. Its Standard Methodology requirement is 39,424 dwellings for the period 2020-2036 which equates to an average of 2,464 dpa. Leicester City Council's work in the preparation of its emerging Local Plan has identified that it has capacity for just 20,721 dwellings of the 39,424 required i.e. there is an unmet need of 18,703 dwellings.
18. There is nothing unusual in cities such as Leicester which are tightly constrained by administrative boundaries not being able to meet their Local Housing Need within their areas and requesting assistance from neighbouring and nearby authorities to help it to do so. As I understand the position, the Council sought clarification from the City Council as to the rigour to which it had explored the potential to make greater provision within the City and this elicited a response dated 12 September 2023 from the City's Mayor which outlined that its average delivery over the last 10 years had been just 1,168 dpa and that the majority of proposed allocations in its emerging Local Plan are on Council owned land due to the lack of available third party owned land being put forward, despite repeated Calls for Sites.
19. It is perfectly reasonable for those authorities asked to make provision for the City's unmet needs to require a robust demonstration that no greater provision can be made within the City's boundaries and to ensure that the balance being struck between the delivery of homes and jobs and protecting important

heritage, biodiversity and greenspaces is a sound one. However, there is no evidence which I have seen which would support any contention that the City Council is materially underestimating its available capacity to meet the required needs and I understand that no objections to its merging Local Plan have been made on this basis. The identified level of unmet need is very significant and meeting the Local Housing Need would require the annual rate of delivery to more than double from the existing rate which is a good indication of the problems which the City Council faces.

20. In these circumstances, Leicester City Council's request for assistance to meet its Local Housing Need is both evidenced and reasonable.

The Duty to Cooperate and Unmet Need

21. Under the present statutory arrangements for the preparation of Local Plans, for a Local Plan to be submitted for examination it must be sound and its preparation must have complied with all relevant legal requirements (section 20 of the Planning and Compulsory Purchase Act 2004). The NPPF advises (paragraph 35) that local plans are sound where they are:
 - (a) Positively prepared – providing a strategy which, as a minimum, seeks to meet the area's objectively assessed need; and is informed by agreements with other authorities, so that unmet need from neighbouring areas is accommodated where it is practical to do so and is consistent with sustainable development;
 - (b) Justified – an appropriate strategy, taking into account the reasonable alternatives, and based on proportionate evidence;

- (c) Effective – deliverable over the plan period, and based on effective joint working on cross-boundary strategic matters that have been dealt with rather than deferred, as evidenced by the statement of common ground; and
 - (d) Consistent with national policy -enabling the delivery of sustainable development in accordance with the policies in this Framework and other statements of national policy, where relevant.
22. Both the “positively prepared “ and “effective” soundness tests require effective engagement, evidenced by agreements and a statement of common ground, so that it is clear that identified needs are met. That expressly includes the meeting of unmet needs from neighbouring areas. The aim is that strategic issues such as the provision of housing across administrative boundaries should be grappled with at an early stage of plan making, rather than being deferred or not addressed at all.
23. To ensure that strategic issues such as unmet need are properly grappled with, the Duty to Cooperate was introduced into the Planning and Compulsory Purchase Act 2004 (“the 2004 Act” by means of section 33A. Section 33A(2) requires that a local planning authority which is preparing a local plan must engage constructively, actively and on an ongoing basis on strategic matters including the sustainable development or use of land that has or would have a significant impact on at least two planning areas. This includes constructive, active and ongoing cooperation with neighbouring authorities on meeting the unmet needs of another authority. The statutory object of the duty to cooperate is to “maximise effectiveness” and whilst it is not a duty to agree, the expectation

is that the discharge of the duty to cooperate will lead to outcomes such as appropriate provision being made by one planning authority to meet the unmet needs of a neighbouring authority.

24. The Duty to Cooperate must be discharged during the preparation of the relevant local plan i.e. there must be evidence that it has been met at the point of submission of the local plan for examination. Any breach of the Duty is irremediable and will inevitably lead to the Inspector conducting the examination into the plan to conclude that it must be withdrawn with the consequent reputational damage and waste of resources. Compliance with the Duty to Cooperate is therefore an important statutory obligation and the earlier compliance with it can be evidenced, the less risk to the subsequent plan making process.
25. Because a failure to show that the Duty to Cooperate has been discharged is a “show stopper” in terms of the examination of a local plan, it is the first matter which the appointed Inspector will consider. There will need to be sufficient evidence of the discharge of the Duty for the examination to progress and the Statement of Common Ground expressly referred to by the NPPF, is a key component of the evidence required. It is not unusual for a Statement of Common Ground to be a “living document” which revised and updated as a local plan progresses through its various stages of preparation in order to reflect the most recent evidence and any changes of circumstance. It is, therefore, important for a draft Statement of Common Ground to be expressed in terms which allow for appropriate flexibility.

26. I note in this context that the SOCG here expressly recognises that the apportionment figures in relation to the unmet housing and employment need for Leicester set out in Tables 3 and 4 respectively, are “*subject to testing through each individual Local Planning Authority’s plan making*” (see SOCG paras.3.23 and 3.25). In addition paragraphs 5.4 and 5.5 of the SOCG provide that:

“5.4 The authorities agree the Duty to Cooperate is an ongoing process, and should the amount of unmet need change significantly, the apportionment of unmet need will be jointly reviewed to assess whether it needs updating. The process for updating and maintaining this statement will be managed through ongoing joint work between the authorities.

5.5 The above apportionment (Table 3 and 4 above) is intended to be implemented through individual local plans. These figures will therefore need to be tested through each authority’s Local Plan process. The authorities agree that if an authority’s local plan process identifies that it is not able to provide for their own objectively assessed needs as well as any unmet need apportioned in this statement (as set out in paragraph 11b of the NPPF), the apportionment of unmet need will need to be jointly reviewed and updated as necessary. The process used for this review will be proportionate to the scale of the issue and should not cause undue deal to the preparation of Local Plans.”

27. There is, therefore, appropriate flexibility built into the SOCG which provides for reconsideration of the extent to which any of the neighbouring authorities are required to meet the needs of the City of Leicester, in the event that there are any material changes of circumstance.

The SOCG and Leicester’s unmet need

28. Furthermore, the SOCG complies with the requirements for a Statement of Common Ground as set out in the Planning Practice Guidance (“PPG”):

“A statement of common ground is expected to contain the following:

- a) a short written description and map showing the location and administrative areas covered by the statement, and a brief justification for these area(s);*
- b) the key strategic matters being addressed by the statement, for example meeting the housing need for the area, air quality etc.;*
- c) the plan-making authorities responsible for joint working detailed in the statement, and list of any additional signatories (including cross-referencing the matters to which each is a signatory);*
- d) governance arrangements for the cooperation process, including how the statement will be maintained and kept up to date;*
- e) if applicable, the housing requirements in any adopted and (if known) emerging strategic policies relevant to housing within the area covered by the statement;*
- f) distribution of needs in the area as agreed through the plan-making process, or the process for agreeing the distribution of need (including unmet need) across the area”.*

(PPG ID: 61-011-20190315)

29. The SOCG does all of these things and therefore is fully compliant with the PPG. In particular, it addresses the apportionment of the unmet City of Leicester housing and employment need across the administrative areas of the seven other authorities. For the Council there is no apportioned employment land requirement, but the SOCG sets an apportioned figure for Harborough District to plan for of 123 dpa over the period 2020 to 2036 which equates to an overall requirement of 1968 dwellings. The overall annual delivery requirement for Harborough District would therefore be increased from 534 dpa to 657 dpa and the overall requirement to 10,512. The resultant annual delivery rate of 657 dpa should be seen in the context of the recently achieved annual delivery rates in the District of in excess of 800 dpa. The overall requirement sits within the

context of the SHLAA's assessment that there is potential capacity within the District for in excess of 20,000 dwellings.

30. There is no statutory or planning formula for the apportionment of unmet housing need across a Housing Market Area, however, the apportionment must be undertaken on a sound basis and be applied consistently. The approach here, as explained by the SOCG, is logical and has been consistently applied:

“The work considers housing provision across the HMA as a whole having regard to a range of factors including, the functional relationship of each District/Borough with Leicester City, the balance of jobs and homes in each district/borough, and deliverability of the distribution of development. When all of these factors are brought together, they address the unmet need and result in a redistributed housing provision that differs from the standard method starting point”

31. I see nothing unreasonable or erroneous in the approach taken to apportionment. Whilst no doubt other approaches might have been taken, I have seen nothing to suggest that they would have resulted in a materially different or a reduced apportionment for Harborough.
32. On the basis of the information before me, were the Council not to sign the SOCG and to progress a local plan under the current statutory plan making requirements which did not make the appropriate provision for meeting the identified unmet needs of the City of Leicester it will be found to have failed the duty to cooperate and be required to withdraw the submitted plan from examination. For the purposes of its proposed new local plan, if it is to be progressed under the existing statutory arrangements, it is therefore essential that the Council commits to both the principle of meeting a share of the unmet

need and to the level of that need albeit on the basis that the level of need may change as its plan making process and those of its neighbour's progress.

The Implications of the Levelling Up and Regeneration Act 2023

33. I understand that those opposed to the Council signing the SOCG at this time and in its current form argue that the Duty to Cooperate has been or is due to be repealed and replaced and that it is premature to commit to meet any of the City of Leicester's unmet needs now. It is implicit in this argument that the replacement of the Duty to Cooperate with the proposed new Duty of Alignment contained in policy either will or might obviate the need for the Council to make any provision in its area for the unmet needs of Leicester.
34. There a number of weaknesses in this line of argument. Firstly, whilst the Levelling Up and Regeneration Act 2023 (LURA 2023) received Royal Assent on 26 October 2023 and will in due course replace the plan making part of the Planning and Compulsory Purchase Act 2004 with new provisions and the Duty to Cooperate is not part of the new provisions, the relevant provisions will come into force only when commenced and the Government has only very recently (18 October 2023) finished consulting on the proposed implementation and transitional provisions. Whilst the Government's intention as stated in the recently closed consultation was that it intends the regulations, policy and guidance to support the new plan making system to be in place by Autumn 2024, that is subject to approval of the regulations by Parliament. The precise timetable is unknown.

35. Irrespective of the precise timetable, there is no intention that the process of local plan making should cease pending the implementation of the new provisions. It is intended that the existing plan making provisions under the 2004 Act, including the requirement to discharge the Duty to Cooperate will remain in place for those local planning authorities who either are progressing or see the benefit of progressing local plan preparation under the existing statutory provisions, rather than wait for the new arrangements to be put in place and be available to them.
36. I say “be available to them” as the Government’s proposal is that the preparation of local plans under the new arrangements should be phased in tranches. This phasing is intended to regulate the burden on the Planning Inspectorate and the examination system by avoiding the submission of too many plans at the same time. So even when the new provisions are in force, the ability to rely on them will initially be rationed. The current suggestion is that, other than for a handful of selected front runners, local planning authorities will be ranked by reference to the date they most recently adopted a local plan. Once ranked, they will then grouped together in cohorts of 25 for the purpose of being allowed to proceed through the new shortened plan preparation process. It is therefore not possible to predict with any certainty when Harborough is likely to be permitted to prepare a new local plan under the new arrangements, but the initial focus is proposed to be on local planning authorities with older plans, and therefore it may not be until 2026 or 2027. I will return to the development management implications of this potential delay below.

37. The alternative approach is for the Council to make use of the intended transitional arrangements and to proceed with the preparation of a new local plan now. The Government has stated that the intention is that any plan being prepared under the existing arrangements will need to be submitted by 30 June 2025 with subsequent adoption by 2026. However, as with the other timescales these are presently not certain dates. It is intended that this option will cease to be available to a local planning authority when the new provisions are commenced where it has a plan which is more than five years old and it is not proactively working to the submission of a new plan by 30 June 2025. The Council therefore only has a short window to begin making progress on a local plan to avoid the risk of being made to wait for some period of time before being allowed to prepare a new plan under LURA 2023.
38. The principal weakness in the argument that there would be some advantage in the Council surrendering control of the timetable for the progress of its local plan, this avoiding the need to comply with the Duty to Cooperate, is that it misunderstands the effect of the Government's reforms. Whilst the statutory duty will be replaced in due course, there has been no change to the statutory requirement that local plans may be adopted only where they are found sound. Whilst the Government consulted in December 2022 on a change to the tests of soundness by the removal of the "justified" test and removal of the express reference to meeting unmet needs from neighbouring areas from the "positively prepared" test, no change was proposed to the "effective" test, in so far as it requires effective joint working on cross boundary strategic matters. These are required to be dealt with and not deferred. In its recent consultation on the implementation arrangements for LURA 2023, the Government has indicated

that it may change the wording of the “effective” test to make it less demanding in relation to the deliverability of longer term developments, but there are *no* proposals that the “effective” test should otherwise be changed. There will therefore remain a national policy requirement that to be sound, a local plan must deal appropriately with strategic cross border issues, such as unmet housing need from neighbouring areas.

39. Rather than this requirement being secured through the requiring discharge of the *statutory* Duty to Cooperate, it will instead be addressed through a new “Alignment Policy”. The Government has yet to consult on the wording proposed for this as part of future changes to the NPPF required to support the new local plan arrangements, but there is nothing which has been published by the Government which indicates that its commitment to meeting Local Housing Need as calculated by the Standard Methodology has lessened or that it intends to absolve local planning authorities from contributing towards meeting the identified needs of their neighbours where it is shown that there are sound planning reasons to require that.
40. The suggestion therefore that it would be advantageous to the Council to delay committing to the preparation of a local plan including provision for meeting the unmet needs of Leicester until after the new plan making arrangements are in place and the Duty to Cooperate removed, finds little support in the changes to the NPPF which the Government has to date consulted upon. The removal the statutory duty to cooperate simply means that one of the *legal* tests which a local plan must satisfy before it is found sound has been replaced instead by a *policy* test. There is nothing to indicate that the substantive requirements of

that policy test in terms of meeting housing needs will be materially different to those of the statutory test.

Letter of 27 October 2023 from the Minister of State for Housing and Planning

41. I have been provided with a copy of a letter dated 27 October 2023 from the Minister of State for Housing and Planning to Mr Neil O'Brien MP which it is claimed "demolishes the council's argument" in terms of signing the SOCG. However, the letter in fact confirms what I have set out in my advice above. There is not a statutory requirement that the Council submit a local plan before summer 2025. Rather, it is a matter of discretion for the Council. In exercising that discretion it must have regard to the balance of advantage and disadvantage of submitting a new plan for examination under the current statutory arrangements when compared to making use of the new provisions when they are in force. That balance must be based on a correct identification of law and policy both as it exists and as it is likely to exist in the future.
42. The Minister's letter confirms that there is no certainty as to which authorities might be allowed to make use of the proposed "front runner" status, even if that option is progressed. It therefore confirms my view that there is a risk that, if the Council does not make use of the current statutory provisions, it may be 2026 or 2027 before it is allowed to do so.
43. I note that the Minister's letter is silent on the practical implications of the replacement of the statutory Duty to Cooperate with the policy of the Duty of Alignment, and therefore, it does not materially assist the Council in actually

undertaking the balance it is required to undertake in deciding whether to progress a new plan under the existing or the proposed new arrangements.

Balance of Advantage and Disadvantage

44. Within the context that I have outlined above, I turn to consider the balance of advantage and disadvantage in relation to a decision not to enter into the SOCG.
45. I can see no obvious advantage in not signing the SOCG. As I have said, the claimed advantage which might be gained by relying on the replacement of the Duty to Cooperate with the Policy of Alignment is likely to be more illusory than real. The continued direction of Government policy is that local housing needs should continue to be met, if necessary, through effective joint working and assistance from neighbouring authorities.
46. It also follows from this that there is no relevant advantage in delaying signing the SOCG or in delaying preparation of the new Local Plan in order to rely on the LURA 2023 plan making provisions.
47. There are, however, significant disadvantages in not signing the SOCG at this point of time. Failing to do so will mean that an invaluable baseline for the preparation of the Local Plan (an agreed apportionment of unmet housing need) is not set at the outset of plan preparation. That will make the preparation process harder and, unless the draft plan when submitted makes adequate provision for Leicester's unmet need, it is very likely that the Council will be unable to demonstrate compliance with the Duty to Cooperate.

48. In consequence, the logical step to take if the SOCG is not signed is to defer preparation of the new Local Plan until after the Autumn of 2024 in order to rely on the new LURA 2023 plan making arrangements. However, there is a strong prospect that, by adopting this course, the Council would not have a new local plan in place until potentially 2029 or 2030. However, this timescale would not be consistent with the requirement of policy IMR 1 of the Local Plan which, following the consultation by Leicester City Council on its draft plan showing it has unmet housing needs (which has now been submitted for examination) requires the Council to commence a full or partial review by 16 July 2024. Furthermore, the Council's housing land supply trajectory shows that, without a new local plan being put in place before 2026, its ability to demonstrate a five year land supply will materially weaken.
49. These factors increase the prospect of the Council's existing local plan becoming "out of date" for the purposes of paragraph 11 of the NPPF with the result that speculative planning applications will be encouraged and the Council will find it harder to control how much development occurs within the District and where. Whilst the Government is proposing transitional arrangements which would have the effect of deeming up to date plans which become more than five years old *during* the first 30 months of the new system, those will not protect the Council's local plan which was adopted on 30 April 2019 and will become five years old before it is anticipated the new arrangements will be put in place. It will therefore remain out of date until replaced by a new local plan potentially as late as 2029/30. That is likely to be seriously disadvantageous to the Council's interest.

50. In contrast, signing the SOCG now which will facilitate the submission of the new local plan by the deadline of 30 June 2025 avoids this very obvious disadvantage. As a step, it also has no obvious disadvantage. The terms of the SOCG are sufficiently flexible for any changes of circumstances which might bear on the level and apportionment of the City of Leicester's unmet need to be reconsidered as the local plan goes through preparation prior to 2025. This enables the balance of advantage and disadvantage to be kept under review.
51. I therefore agree with the advice which the Council has received both from IPE and its officers that the balance of advantage and disadvantage having regard to the interests of the Council as local planning authority are overwhelmingly in favour of signing the SOCG.

Conclusion

52. I have reviewed the IPE Advisory Notes and I am satisfied that they accurately summarise both the current statutory requirements under which the Council must prepare its new local plan and the arrangements under the Levelling Up and Regeneration Act 2023 as now enacted. It also correctly identifies the principal advantages of entering into the SOCG and the disadvantages of not doing so both in relation to the preparation of the Council's new local plan and within the development management context. I can see no legal error in the advice which the Council has received from IPE. In particular, the conclusion reached is a reasoned and balanced one.

53. Having reviewed the advantages and disadvantages of the Council entering into the SOCG, I would also advise the Council that, having regard to the terms of the SOCG, there are no obvious disadvantages of entering into the SOCG at this point of time and considerable advantages in doing so. Indeed, given that the wording of the SOCG, on the basis of the material before me, the balance of advantage is so great that it would at least be arguably irrational to refuse to do so.

SIMON BIRD KC
1 November 2023

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**HARBOROUGH DISTRICT COUNCIL
THE LEICESTER &
LEICESTERSHIRE AUTHORITIES
STATEMENT OF COMMON GROUND
RELATING TO HOUSING AND
EMPLOYMENT LAND NEEDS**

ADVICE

Copy of email to Counsel's clerk dated 06.11.2023



Pack of documents
provided at public meeting



Letter from
Secretary of State



231103 Minister
MMaclean to Neil OBr

Dear Harry,

I refer to the above. Further to our conversation, please see attached the pack of documents which was provided at a public meeting in Market Harborough on Friday 3rd November 2023 and hosted by the three MP's for this area.

In summary, the pack of documents contain the following:

- Pages 1 and 2 – letters dated 8 September 2023 and 27 October 2023 from the Minister of State for Housing and Planning. These are not new letters, and have been reviewed as part of the advice provided.
- Pages 3, 4 and 5 of the pack contain an excerpt of a letter from Michael Gove. We have since obtained the complete letter so that we have the full context. The letter in full is attached as a separate attachment, the letter is 5th December 2022.
- Pages 6 and 7 – letter dated 3rd November 2023 from the Minister of State for Housing and Planning. The letter in full is attached as a separate document, as the document in the pack at pages 6 and 7 contains handwritten text at the bottom of page 1.

The Council now seeks Counsel's opinion in respect of the attached documents regarding its legal position and particularly:

1. whether the attached documents, in particular the letter dated 3rd November 2023, impact and / or change any of the advice Counsel provided in his advice dated 1st November 2023, and if not why not;
2. could Counsel expand on his advice in relation to the risks of challenge in relation to irrationality.

I would be grateful if you could kindly confirm timescales.

Kind regards

Julie Young (she / her / hers)

Head of Legal Services and Deputy Monitoring Officer

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FURTHER A D V I C E

1. I have been provided with a pack of documents which I understand was circulated at a public meeting relating to the proposed signing of the SOCG and which contains the following documents:
 - (i) Letter dated 5 December 2022 from the Secretary of State for Levelling Up, Housing and Communities explaining the changes to the planning system proposed in the then Levelling Up and Regeneration Bill and through changes to the NPPF;
 - (ii) Letter dated 8 September 2023 from the Minister for Housing and Planning to Neil O'Brien MP setting out the proposals to remove the Duty to Cooperate but also stressing that plan makers are expected to meet objectively assessed housing needs;
 - (iii) Letter dated 27 October 2023 from the Minister of State for Housing and Planning to Neil O'Brien MP stating that there is no requirement on local planning authorities to submit a new local plan before the summer of 2025; and

- (iv) Letter dated 3 November 2023 from the Minister of State for Housing and Planning to Neil O'Brien MP which summaries the recently consulted upon proposals for implementing the new plan making arrangements under the now enacted, but not yet commenced provisions of LURA.
2. I am asked whether any of these documents affect the content of my advice. I can confirm that they do not.
 3. The Secretary of State's letter of 5 December 2022 sets out the proposals for legislative and positive change proposed at that time, and my advice has taken into account the provisions of LURA and also the proposed changes to the NPPF (see paras.38 & 39).
 4. My advice accurately reflects the substance of the letters from the Minister of State for Housing and Planning dated 8 September and 27 October 2023 (see paras.33 to 43).
 5. The letter of Minister of State's letter of 3 November 2023 simply rehearses the content of the recent consultation paper on the proposals for implementation of the new plan making arrangements which, to the extent relevant here, I have faithfully reflected in my advice. As the Minister has done, I have pointed out in my advice that these remain proposals and the final decision on the arrangements will be a matter to be dealt with through the required Regulations (para.34).

6. None of the content of these letters affect the substance or conclusions of my advice, their content already being reflected in it. In particular, none of the letters bears on the essential problem facing the Council that, whatever the precise arrangements for the implementation of the new plan making arrangements under LURA, it will, unless it makes progress on a new local plan now, face the prospect of its existing local plan being found out of date, which will expose the District to the pressure of speculative housing proposals.

SIMON BIRD KC

6 November 2023

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ADVICE

Supplementary Advice from Intelligent Plans and Examinations received 6th November 2023

I have reviewed all the documents that you have supplied and have discussed this reply to you with Lee Armitage of Intelligent Plans and Examinations.

Most importantly, there is nothing in any of the documents that changes the nature of the advice previously given to you and your members.

We have seen the letters dated 8 September and 27 October from Rachel Maclean MP, Minister of State for Housing and Planning before, and they do not add anything more.

The letter from Michael Gove, Secretary of State dated December 2022 is an update to MPs on the Government's intentions at that time and does not add anything new.

The only letter that adds any further information is that of 3 November. It does add rather more information about the nature of the transition arrangements that will come into force for authorities wishing to wait for the new plan-making system to come into force. However, you will note that none of the transitional arrangements are yet confirmed and remain as Government intentions. That includes the "*protections from speculative development*" that are mentioned, which some Councillors may find attractive. In my judgement, how such "protections" could be applied (in some authorities and not in others) is likely to be difficult, as there is presently nothing in law to stop a planning application being submitted at any time, with a right of appeal against its non-determination.

The upshot of the letter (3 November) is that the Council has a choice to make tonight – whether or not to proceed with a Local Plan and seek to meet the deadline of 30 June 2025 under the current system, or await the details of the new system (much of which still remains unknown, including the 'Alignment Policy', and will be dependent upon secondary legislation and regulations that are yet to be published in any form).

My advice to the Council remains unchanged, which is that it is in best interests of Harborough DC to sign the Leicester & Leicestershire SoCG and proceed as quickly as possible to a Reg. 19 Draft Plan.

May I say that this advice is entirely consistent with that being given to other authorities facing similar issues, as part of our work with the Planning Advisory Service (PAS).

I trust that this assists you.

Derek Stebbing
IPE