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# **MATTER 1: LEGAL COMPLIANCE (INC. DUTY TO CO-OPERATE)**

## **TUNBRIDGE WELLS LOCAL PLAN**

Prepared by Pro Vision on behalf of Cooper Estates Strategic Land Limited

February 2022

Representor number  
PSLP\_2048 to PSLP\_2052

**TUNBRIDGE WELLS LOCAL PLAN**

MATTER 1: LEGAL COMPLIANCE (INC. DUTY TO CO-OPERATE)  
PROJECT NO. 2133

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## 1.0 Introduction

- 1.1 As the Inspectors will be aware through correspondence<sup>1</sup> on behalf of Cooper Estates Strategic Land (“CESL”) Limited, Pro Vision has been concerned for some time that the plan making process by Tunbridge Wells Borough Council (“the Council”) has been carried in breach of its legal duties. Therefore, the Local Plan examination should not proceed; the Plan is not legally compliant.
- 1.2 We do not seek to repeat these concerns in detail here, but in order to assist the Inspector by providing cross-references to the CESL representations and additional communications previously made where they relate to the specific Examination Questions.
- 1.3 For context to these comments, CESL is promoting land at Sandown Park<sup>2</sup> for development to contribute to specialist housing needs<sup>3</sup> in the borough and beyond.
- 1.4 This hearing statement has been prepared in consultation with Gregory Jones QC, Francis Taylor Building, Temple. The structure of the document reflects that in the Stage 1 Matters, Issues and Questions document<sup>4</sup>.

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<sup>1</sup> Representation [PSLP\\_2048](#), full document at [SI\\_140](#)

<sup>2</sup> Regulation 22 version of the SHELAA (Jan 2021) – [Core Document 3.77n - Site 114](#)

<sup>3</sup> Specifically “Extra Care accommodation” as a category of specialist housing for older people, as defined by the [Planning Practice Guide at Paragraph: 010 Reference ID: 63-010-20190626](#)

<sup>4</sup> Examination document [ID03](#)

## 2.0 Matter 1: Issue 1 – Duty to Cooperate

- Q1. **The Duty to Cooperate Statement – Part 1 (Revised November 2021)**<sup>1</sup> states that the Council has identified sufficient sites to meet its local housing need in full. Whilst this involves the removal of land from the Green Belt and some major development in the High Weald AONB, paragraph 4.14 states that neighbouring authorities were approached to help in meeting housing needs but were unable to assist.

**What did this process entail and how did the Council explore the possibility of meeting housing needs in areas outside the Green Belt and High Weald AONB? Can the Council point to evidence of effective and on-going joint working with neighbouring authorities beyond Green Belt and AONB boundaries?**

- 2.1 As we have set out in our Pre-submission (Regulation 19) stage representations<sup>5</sup>, a joint study of the Green Belt and the AONB with Sevenoaks DC and Tonbridge and Malling BC are conspicuous by their absence. This is especially surprising i) given the extent of constraint in the West Kent Market Area, with Sevenoaks having over 90% of its area included in the Green Belt and significant areas of the three districts covered by the High Weald AONB, and ii) the criticisms of the Inspectors examining the Local Plans of these neighbouring authorities.<sup>6</sup>
- 2.2 Noting the explicit requirement in the NPPF for joint working over strategic cross-boundary issues<sup>7</sup>, it is surprising that these key issues have not been considered beyond the Council's boundary, other than to acknowledge in general terms that these designations constrain development opportunities across the three areas.
- 2.3 To elaborate, the Inspectors examining the Tonbridge and Malling Plan state:

*“However, there is no evidence that at any time the Council cooperated or even considered cooperating with SDC on a joint review of the Green Belt across both of their boundaries to understand the comparative quality across the two authority areas and any potential to amend Green Belt boundaries to fully or more fully meet needs. Nor was there any joint work*

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<sup>5</sup> Representation [PSLP\\_2048](#), full document at [SI\\_140](#); Section 2: paragraphs 2.5 to 2.8.

<sup>6</sup> TMBC Inspectors Report – Appendix A to this Statement A

<sup>7</sup> NPPF 2021, Paragraph 26.

*to assess and reach an agreement on the housing capacity on non Green Belt areas across both authorities or on how that capacity might reasonably be maximised”<sup>8</sup>.*

and

*“An active process of ongoing, active and constructive engagement might or might not have led to a more positive outcome despite the constraints of market capacity, infrastructure capacity, Green Belt and AONB designations. However, what is certain is that, if parties choose not to engage with each other, there will be little prospect of difficult but important cross-border issues being resolved in relevant strategic matters. If there is no cooperation on such matters, then the effectiveness of plan preparation is unlikely to be maximised”<sup>9</sup>.*

- 2.4 It is clear from the Council’s request to participate in the Sevenoaks Examination in 2019, that it recognised that the Green Belt issue beyond its own boundary was relevant to its own plan making<sup>10</sup>.
- 2.5 We also note from the Duty to Cooperate statement, November 2021, that the Council made a specific request to Sevenoaks DC for assistance with meeting development need given the extent of the Green Belt and AONB constraint in the borough (Appendix SDC 15)<sup>11</sup>.
- 2.6 Following the failure of the Sevenoaks Plan under the Duty to Cooperate, as upheld by the Courts, we note that that neighbouring authority is now undertaking a refresh of its Green Belt evidence. This is further indication that the issue has not been addressed adequately to date. Given it is clearly a cross-boundary issue (as recognised in the Council’s DtC), there is compelling reason for this issue to be addressed jointly, for example, through an independent cross-boundary review, as has been done in several other areas (see paragraph 2.8 of our Pre-submission representations).
- 2.7 Without this evidence, the plan is certain to be ineffective, given the extent of the constraint in this HMA and development needs.

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<sup>8</sup> TMBC Inspectors Report – Appendix A to this Statement, para 29

<sup>9</sup> TMBC Inspectors Report – Appendix A to this Statement, para 36

<sup>10</sup> 3.132ciii: Appendix B. SDC10 – Email Exchanges with SDC Programme Officer about appearance at SDC Examination. Email to Programme Officer Date 16 August 2019 (12:10): Stephen Baughen to Ms St John Howe.

<sup>11</sup> Core Document [3.132c\(iii\) Appendix B - Sevenoaks District Council](#)

2.8 The strategic nature of the Green Belt and designated landscape constraints has once again been highlighted in a recent S78 appeal. The ‘Broke Hill’ appeal in Sevenoaks<sup>12</sup>, dismissed last month, makes explicit reference:

*“There is little doubt that the Council’s difficulties in identifying housing allocations largely stem from the high percentage of protected land in the District with around 93% designated s Green Belt and 60% AONB”<sup>13</sup>.*

2.9 The Inspector goes on to note that:

*“the Council acknowledges that a route to addressing undersupply is through the release of sites from the Green Belt”<sup>14</sup>.*

2.10 It is self-evident that these constraints are a challenge, and that there is and has been necessity to explore the exceptional circumstances for some releases from the Green Belt and /or justification for major development in the AONB (a matter in which the Council is in dispute with Natural England and others over, and which we address further under Question 12). There has, therefore, been a failing of each of the authorities to cooperate more closely and effectively on this issue, including joint, cross-boundary evidence.

2.11 The Council’s approach is to “forge a way forward”<sup>15</sup> while Tunbridge and Malling BC and Sevenoaks DC revisit their strategies and evidence. While the Council is left in an awkward situation, this approach builds on the same unsafe ground that led to the other failures, and is therefore, not effective and stems from failures or all three authorities in their efforts to cooperate in recent years.

2.12 Finally, we note that neither the Inspectors report for the Tonbridge and Malling examination, nor the Inspector’s report on the Sevenoaks examination are included in the list of Core Documents for this examination, and we consider they must do to inform this Matter. We append the reports for information (Appendices A and B).

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<sup>12</sup> Broke Hill appeal W/21/3273188 (A copy of the decision is provided in Appendix D)

<sup>13</sup> Broke Hill S78 appeal W/21/3273188 – Appendix D to this Statement, paragraph 89.

<sup>14</sup> Broke Hill S78 appeal W/21/3273188 – Appendix D to this Statement, paragraph 90.

<sup>15</sup> Examination Core Document [3.132a Nov 2021, para SDC 9.03](#)

2.13 This issue clearly overlaps with Matter 2 (Green Belt). The Council's discharge of its duty to cooperate is inextricably linked with how it has, or has not, approached this strategic, cross-boundary issue with its neighbours. We therefore intend to participate in Matter 2.

**Q2. Likewise, how did the Council approach strategic decisions about meeting employment needs? Were options explored with duty to cooperate partners which sought to meet needs without releasing Green Belt land or requiring major development in an AONB? If so, where is this set out?**

2.14 We consider that this question should be extended to consider whether or not the three neighbouring authorities in the West Kent HMA (and also sharing the same/similar functional economic areas) considered the Green Belt and AONB beyond their individual boundaries.

2.15 It is evident from the Duty to Cooperate evidence, and the outcomes of the Sevenoaks and Tonbridge and Malling examinations, that the authorities have not looked beyond their boundaries through a joint review, but have approached these matters individually.

2.16 This individual, rather than joint, approach, for which Sevenoaks and Tonbridge and Malling have already been correctly criticised by the examining inspectors. It inevitably means that the Council's plan making is not effective.

**Q3. Paragraph 27 of the National Planning Policy Framework ('the Framework') states that in order to demonstrate effective and on-going joint working, strategic policy-making authorities should prepare and maintain one or more statements of common ground, documenting the cross-boundary matters being addressed and progress in cooperating to address these. Has a signed statement of common ground been prepared with Sevenoaks District Council, as required by the Framework?**

2.17 There is not a signed SOCG, only a working draft.

2.18 The absence of a signed SoCG with a neighbour in the same HMA, at submission of the Plan, is a clear indication of a failure of the Duty to Cooperate.



2.19 It may not be a 'duty to agree', but the absence of an agreement to identify the common ground (and any uncommon ground), documenting the progress that has been to address cross-boundary issues, is a major gap at submission stage.

2.20 We have noted, for example, that there is a signed SoCG with Natural England, despite there being significant uncommon ground between the parties. As part of the duty to cooperate it is equally important to identify those areas where the parties do not agree as well as relevant matters where they do.

**Q4. In the absence of a statement of common ground with Sevenoaks District Council, what evidence can the Council point to in order to demonstrate effective and on-going joint working on strategic cross-boundary matters?**

2.21 As already highlighted under Question 1, it is evident that the Council cannot provide any record of joint evidence on the key strategic cross-boundary issues of the Green Belt and nationally designated landscape.

**Q5. The Duty to Cooperate Statement – Part 1 (Revised November 2021) confirms that Sevenoaks District Council informed Tunbridge Wells Borough Council that it was unable to meet its own housing needs in April 2019. What steps has the Council taken since April 2019 in response to this request? Has the Council engaged constructively, actively and on an on-going basis insofar as the preparation of the Tunbridge Wells Borough Local Plan is concerned?**

2.22 No, it has not. The Council is assuming that the request from Sevenoaks DC is effectively withdrawn following the failure of its local plan. That there is still no SoCG with Sevenoaks at the point of submission of the Council's Plan (or indeed in the preceding period since) indicates that there are ongoing problems of engagement between the two authorities.

2.23 Further indication of these problems is evident in the Council's phrase of "forging a way forward<sup>16</sup>" to reach submission stage. The use of the phrase is meaningless.

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<sup>16</sup> Examination Core Document [3.132a Nov 2021, para SDC 9.03](#)

**Q6. Planning Practice Guidance advises that local planning authorities are not obliged to accept needs from other areas where it can be demonstrated that it would have an adverse impact when assessed against policies in the Framework. How has the Council considered the likely possible impacts of accommodating unmet housing needs from elsewhere as part of the Plan's preparation? What does this show and how have the results been shared and/or discussed with duty to cooperate partners?**

2.24 The Council's Sustainability Appraisal (SA) has considered the possibility of taking some unmet needs by testing of Growth Option 11 (Uncapped and Unmet Need).

2.25 However, it is entirely unclear in the SA why that option was not taken forward, in favour of a hybrid option – Growth Option 13.

2.26 Option 13 does not include any element of planning for unmet need from neighbours (see the objectives for Option 13 in paragraph 6.2.16), simply the objective to meet the standard method need (for Tunbridge and Wells).

2.27 In the absence of any joint studies on strategic cross-boundary issues, it is only the assessment of Growth Option 11 in the SA that has tested the impact of planning for some unmet need in the Borough. This is high-level, unilateral assessment rather than a detailed consideration of the impacts (please see our comments on the robustness of the appraisal under Issue 3).

**Q7. Has the Council been approached by other strategic policy-making authorities to accommodate any unmet needs in the Tunbridge Wells Borough Local Plan? What were the outcomes of these discussions?**

2.28 Yes, the Council has plainly been approached by Sevenoaks DC to assist with its unmet needs, including potential for unmet need for specialised accommodation.

2.29 However, the outcome is a plan that explicitly does not plan to meet such unmet needs.

2.30 While the Council may well have no formal request to assist with unmet need, we point to the Inspectors' report on the Tonbridge and Malling Local Plan examination, where the absence of such requests between that Council and Sevenoaks DC was described as a

“circular argument with a risk that both parties defer the issue to the other without any meaningful attempt to resolve it”<sup>17</sup>.

- 2.31 The Council has acknowledged that its discussions with Sevenoaks in recent *years* “*were not as effective as they could have been*”<sup>18</sup> and that even now they are having to “*forge a way forward*”<sup>19</sup>.
- 2.32 However, the Council’s position with Sevenoaks (set out in its Final Duty to Cooperate statement<sup>20</sup>) is now to deny that there is any unmet need until the neighbouring authority has advanced its evidence base having effectively had to re-set following the failed plan (See for example paragraph SDC 7.05<sup>21</sup>, which describes the “significant uncertainty” about whether or not there is unmet need; and paragraph 4.24).
- 2.33 Paragraph SDC 8.09 is especially troubling as on the one hand the Council acknowledges that “The view of SDC throughout this period of time was that there remained unmet housing need”, it goes on to conclude that SDC would not know “until it completed its evidence base work and site assessments, whether there was going to be any unmet need”. And this is despite the communications reported at SDC 9.05 from the ‘working draft SoCG’ that Sevenoaks DC “considers it is highly unlikely that it will be able to accommodate its housing need on land that is not covered by the constraints listed in footnote 7 of the NPPF” (which includes Green Belt and AONBs constraints).
- 2.34 It is apparent that that the Council has misinterpreted the communication from Sevenoaks DC (reported at paragraph SDC 9.04) that the unmet need of 1,800 homes “cannot be relied upon” while the evidence base is being reviewed as that this might mean there could be no unmet need. However, it is evident that it is only the scale of the unmet need from Sevenoaks that is likely to be in question. Indeed it is obviously implausible that Sevenoaks could have been seriously suggesting that a review would be likely to demonstrate no unmet need. Accordingly, the other two authorities in the HMA should anticipate being asked to, or offering to, assist in assessing how this need could be met, for example by undertaking joint assessment of the Green Belt and identifying exceptional circumstances and the most

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<sup>17</sup> TMBC Inspectors Report – Appendix A to this Statement, para 24

<sup>18</sup> Examination Core Document [3.132a Nov 2021, para SDC 10.02](#)

<sup>19</sup> Examination Core Document [3.132a Nov 2021, para SDC 9.03](#)

<sup>20</sup> Core Document 3.132a Final Duty to Cooperate for Submission Local Plan (Part 1 and 2) (Supersedes the Duty to Cooperate statement issued for submission October 2021), November 2021.

sustainable locations for releases. The following observations on the records of engagement between the Council and Sevenoaks DC confirm this point.

2.35 In its representations on the Regulation 18 Plan in 2019<sup>22</sup>, Sevenoaks DC clearly set out that a) there is unmet need arising from the district and b) this unmet need “is due to the high level of Green Belt (93%) and AONB (60%)” within their area. Further, that representation noted that the PPG had recently been amended to require that C2 (residential institutions) will need to be included in Housing Land Supply from now on, and therefore “this will result in a higher level of land supply s set out through the Examination hearings”.

2.36 The letter went on to state:

*“As the submitted [Sevenoaks] Plan does not meet housing needs in full in the District, SDC will continue to engage with its neighbouring authorities, including TWBC, under the Duty to Cooperate for further discussions on how this issue can be resolved”.*

2.37 The prime causes of the unmet need in 2019, the Green Belt and AONB constraints, and the need to include C2 demand, have not evaporated since the Sevenoaks plan failed. The housing need figures have been adjusted through the revised Standard Method, but nonetheless there is significant need for housing and the constraints to delivery remain.

2.38 Notwithstanding the supportive comments about the Duty to Cooperate in the Sevenoaks DC representations on the Regulation 19 plan, the representation does little more than defer to a draft Statement of Common Ground which had been sent to the Council for consideration<sup>23</sup>

2.39 With reference to the record of meetings between the Council and Sevenoaks DC<sup>24</sup>, a meeting was held on 4 February 2016 involving the three West Kent HMA authorities, with updates discussed on matters including “Green Belt studies”. But there is no mention of considering a joint review and no mention of a joint assessment, or any assessment of the AONB to assist with exploring options to meet unmet needs between them.

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<sup>22</sup> [TWBC Exam Core Document 3.132c3 Appendix B5](#) – SDC Response to TWBC Regulation 18 Draft Local Plan Consultation 15 November 2019.

<sup>23</sup> [Core Document 3.132c3 Appendix B6](#) – SDC Response to TWBC Regulation 19 Pre-Submission Plan Consultation 3 June 2021 (Page 3 of 14).

<sup>24</sup> [Core Document 3.132c3 Appendix B7](#) – DtC engagement record between TWBC and SDC.

- 2.40 There was a meeting on 30 August 2016 to discuss the methodology for the assessment of Green Belt in Sevenoaks. There was, however, no indication in the summary that a cross-boundary review was considered.
- 2.41 In 2020, after the West Kent HMA authorities had signed-up to be a Duty to Cooperate Pilot Programme, a meeting on 15 June is reported to have included discussion on lessons learned from other LPAs and housing need, including scope for neighbours to take housing and employment in the Green Belt and AONB. This was followed a formal request from the Council for Sevenoaks DC to help with meeting its housing and employment needs in the Green Belt. Despite this request, there is at no point any record of consideration of a joint assessment of these cross-boundary constraints.
- 2.42 In the draft SoCG between the Council and Sevenoaks DC, it is clear that there are areas of uncommon ground. These areas include the status of the Sevenoaks Plan and its assessment of the Green Belt, noting that had the Sevenoaks Examination continued it was anticipated that the approach to the Green Belt would have been carefully scrutinised.
- 2.43 The fact that there is uncertainty over unmet need is not a reason not to plan positively for it, even if the scale of the need is unclear. The Inspectors examining the Tonbridge and Malling plan were explicit in their criticism of that Council for not responding to the clear signals that there would be at least some unmet need arising from Sevenoaks<sup>25</sup>. There are very clear parallels with the TWBC examination. The Council has explicitly chosen not to plan for unmet need, and sought to justify that position by the uncertainty of that need, despite the clear signals from its neighbour (Sevenoaks) and the obvious constraints that make meeting housing need in the West Kent HMA so challenging, namely the Green Belt and AONB.
- 2.44 The signals about unmet need in the HMA persist with housing delivery test results and recent appeal decisions.
- 2.45 Housing Delivery Test results for the three authorities are summarised in Appendix C.
- 2.46 These results show that since the first test results were published in 2018, each of the West Kent HMA authorities at some point has been under some form of intervention to address under-delivery. Both the Council and Sevenoaks DC have consistently had interventions over

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<sup>25</sup> See TMBC Inspectors Report – Appendix A to this Statement, para 27

this period. These results are a clear indication of housing delivery problems in the HMA and signals that there is likely to be unmet needs arising.

- 2.47 In the 'Broke Hill' S78 appeal decision issued last month, the Inspector acknowledged the "chronic under provision in the District [Sevenoaks]; a situation that continues to decline"<sup>26</sup>. The Inspector also notes that housing delivery in the district is the lowest of the Kent authorities, and that "The HDT figures indicate that this has been a matter of concern for the last years"<sup>27</sup> (echoing our point above). Housing land supply is also highlighted as a major problem, with a range of between 1.9 and 2.8 years quoted, which is described by the Inspector as indication of a "serious and chronic undersupply which undermines the Government's objective of securing 300,000 dwellings per annum", with serious consequences for affordability<sup>28</sup>.
- 2.48 Given these constraints persist across the HMA (and FEMA) areas (Green Belt and AONB), notwithstanding the fate of the recent examinations which means evidence is being reviewed, it is plainly ineffective and not robust to avoid planning for the likelihood of unmet needs arising from one of both of these neighbours.
- 2.49 The Council claims there is a "platform for ongoing effective joint working", despite no tangible evidence of this 'platform', for example, in signed and effective SoCGs with each of its neighbours or joint evidence on key cross-border issues. This falls far short of the positive planning through duty to cooperate expected by the NPPF.
- 2.50 It is therefore plainly evident that the process to prepare the submitted plan fails to meet the Duty to Cooperate as set out in Section 33A of the Planning and Compulsory Purchase Act 2004

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<sup>26</sup> Broke Hill S78 appeal W/21/3273188 – Appendix D to this Statement, paragraph 84.

<sup>27</sup> Broke Hill S78 appeal W/21/3273188 – Appendix D to this Statement, paragraph 85

<sup>28</sup> Broke Hill S78 appeal W/21/3273188 – Appendix D to this Statement, paragraph 86.

**Q8. Does the Plan seek to meet any unmet housing needs from elsewhere? If not, what are the reasons for this and is it justified?**

2.51 It is clear from the Duty to Cooperate evidence that the Council is not planning positively to assist with unmet needs. With reference to paragraph SDC 7.03<sup>29</sup>, the Council is including a buffer to help ensure deliver of its own needs over the plan period. The Council explains that “there may be scope for any excess buffer to be considered as part of any excess buffer to be considered as part of the wider delivery of housing in the Strategic Housing Market Area”. The Council is applying a buffer to its own need, which *may* allow for some of apparently as yet unidentified need be accommodated

2.52 For the reasons set out under Question 7, the Council evidently does not provide justification for avoiding this unmet need from the wider HMA.

**Q9. The submitted Local Plan proposes two strategic developments (at Tudeley Village and Paddock Wood, including land at east Capel) which are situated reasonably close to the boundary with Tonbridge & Malling Borough. The Statement of Common Ground with Tonbridge & Malling Borough Council includes details of a ‘Strategic Sites Working Group’ which meets monthly and includes examples of some policy outcomes as a result of this joint working.**

The Statement of Common Ground also clarifies that Tonbridge & Malling Borough Council has raised ‘serious concerns’ relating to the transport evidence base, transport impacts, flooding and infrastructure provision. In response, paragraph 5.12 concludes that both authorities will continue working to address these concerns, including where necessary with key infrastructure providers and statutory consultees.

**How have these strategic cross-boundary matters been considered throughout the plan-making process and has the Council engaged constructively, actively and on an on-going basis in addressing them?**

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<sup>29</sup> Core Document 3.132a Final Duty to Cooperate for Submission Local Plan (Part 1 and 2) (Supersedes the Duty to Cooperate statement issued for submission October 2021), November 2021.

**In answering this question, has the Council's approach been consistent with advice contained in the Planning Practice Guidance? It states that Inspectors will expect to see that strategic policy making authorities have addressed key strategic matters through effective joint working, and not deferred them to subsequent plan updates or are not relying on the Inspector to direct them. If agreements cannot be reached, Planning Practice Guidance advises that plans may still be submitted for examination, but, states that comprehensive and robust evidence of the efforts made to cooperate, and any outcomes achieved, will be required.**

- 2.53 In addition to the unexplained absence of joint evidence on Green Belt and AONB matters, it is evident that there are further strategic cross-boundary issues that are unresolved.
- 2.54 Similarly to the serious, in principle, concerns that Natural England has expressed in its 'Statement of Common Ground' over the Council's approach to the AONB, as is highlighted by this question, there are evidently serious issues with cross-boundary traffic matters which are unresolved at the point of submission of the plan.
- 2.55 In the absence of joint evidence on these strategic matters, there is significant doubt that the Council has met the test set out in the Planning Practice Guidance and will be relying on these issues to be resolved through the Examination stage<sup>30</sup>.

**Q10. The Statement of Common Ground with Kent County Council (Highways) refers to the preparation of a Transport Assessment Addendum (dated September 2021) and a second Addendum dated October 2021. It then concludes that the Council and Kent County Council agree to continue working together over the coming weeks and months and will seek to update their positions through a further statement of common ground 'prior to the examination'.**

**What is the latest position regarding 1) the completion, publication and consultation on this evidence and 2) the statement of common ground?**

- 2.56 This question is directed to issues that are in the gift of the Council to answer, but we reserve the right to respond to any reply from the Council as we have been unable to ascertain the Council's position on this from the published evidence. Therefore, we are unable to assist the

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<sup>30</sup> Planning Practice Guidance: [Paragraph 022 Reference ID: 61-022-21090315](#).



Inspector at this stage but reserve the right to respond to the Council's answer either orally or in writing if necessary.

**Q11. How does the preparation of additional highways evidence and further dialogue with the County Council demonstrate compliance with the duty to cooperate, which relates to the preparation of the Plan and thus cannot be rectified post-submission?**

2.57 It does not. It is evident that there are on-going discussions between the Council and KCC on key strategic matters. In which case, the submission of the Local Plan was premature, and the Council is relying on remedying key issues through the Examination, which contravenes Government guidance<sup>31</sup>.

**Q12. Has the Council engaged with all relevant local planning authorities, county councils and other prescribed bodies in the preparation of the Plan?**

2.58 It would be appropriate to expand this question to ask, if all relevant consultees, including the Prescribed Bodies, have been engaged, has that engagement "maximised the effectiveness" of preparing the Plan? If not, the Plan must be at risk of failing the legal test imposed by Section 33A of the Planning and Compulsory Planning Act 2004.

2.59 We have highlighted the specific issues around the Council's engagement with Sevenoaks DC in response to Question 7.

2.60 It is apparent that there are also significant issues with at least two of the Prescribed Bodies: Natural England and the High Weald AONB Unit, which cast doubt on the effectiveness of the plan making.

2.61 Natural England has agreed a statement of common ground with the Council<sup>32</sup>. However, it is clear that there remain significant areas of uncommon ground at point of submission of the Plan (SoCG paragraph 1.4). Natural England is concerned that the Council has not given "proper regard to" protecting the AONB.

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<sup>31</sup> [Procedure Guide for Local Plan Examinations](#), Updated 25 October 2021. Paragraphs 1.2 and 3.5.

<sup>32</sup> [3.132c\(v\) Appendix H](#) – Appendices for DtC prescribed bodies (Engagement Logs and SoCGs): Appendices for Appendix H10: SoCG signed between TWBC and Natural England 26 October 2021.

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- 2.62 There is a clear dispute between the Council and Natural England over whether or not major development can or cannot contribute to the landscape and special qualities of the AONB (SoCG paragraph 8.6).
- 2.63 Natural England’s conclusion is that major development allocations within the AONB “should not be pursued and that alternative approaches should be further explored to avoid negative impacts on the AONB by reducing the size and scale of these allocations” (SoCG paragraph 8.19).
- 2.64 The Council’s Plan is, therefore, submitted in the context of a very serious disagreement around the impacts on the designated landscape. The Council has a special duty under the National Parks and Access to the Countryside Act 1949 and the Countryside and Rights of Way Act 2000 to have regard to the purpose of the AONB. Given this duty, we have seen no rational reason why it is justified to depart from the advice of the statutory body on this matter.
- 2.65 Turning to the High Weald AONB Unit, it is clear from the representations made at Regulation 19 (Pre-submission) Stage that, notwithstanding the additional landscape assessment undertaken for the proposed allocation sites, there are “significant issues with the assumptions and outcomes of these studies” and that the submitted spatial strategy “would have a severe detrimental impact on the purposes for which the AONB was designated”<sup>33</sup>.
- 2.66 In respect on both Natural England and the AONB Unit, these are not matters of detail, but fundamental matters of principle about the approach to proper planning to respect the nationally designated landscape.

**Q13. Has the Duty to Cooperate under sections 22(5)(c) and 33A of the 2004 Act and Regulation 4 of the 2012 Regulations been complied with, having regard to advice contained in the National Planning Policy Framework (the ‘Framework’) and the National Planning Practice Guidance (the ‘PPG’)?**

- 2.67 No, the Duty has not been met. In summary of the points made above:

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<sup>33</sup> Core Document ref CD 3.125a-ii PSLP Reps in Representor Order D to J. Representor Numbers 1434 & 1438 and Supporting Information Files Ref No: [SI 75a](#) and [SI 75b](#).

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- The issue of unmet need within the West Kent HMA is still unresolved, albeit there are strong signals that there is and will be unmet need, including for specialised accommodation, even if the full scale is as yet not confirmed;
- There is no signed and effective SoCG with Sevenoaks DC, one of the three authorities in the West Kent HMA;
- There is an absence of effective joint evidence on strategic cross-boundary issues, including in respect of the Green Belt, the AONB and traffic arising from proposed allocations so the submission of the plan was premature;
- There are serious objections over the Council's spatial strategy and its impact on the AONB;
- The plans of the two neighbouring authorities in the HMA have failed the Duty to Cooperate;
- The Council's position that it has "forged ahead" to get to this stage emphasises the failings of the Duty to Cooperate process.

### **3.0 Matter 1: Issue 2 – Habitats Regulations Assessment ('HRA')**

**Q1. What is the justification for the 7km 'zone of influence' used in the HRA and Local Plan Policy EN11? Does it continue to represent an appropriate distance for considering recreational pressure?**

- 3.1 In short, the 7km 'zone of influence' is not justified. The Regulation 19 HRA and the Regulation 18 HRA are very similar. Both HRAs assess only Ashdown Forest (which includes a SAC and a SPA). The SAC is designated for two types of heathland and the great crested newt. The SPA is designated for the European nightjar and the Dartford Warbler.
- 3.2 The only difference of note between the regulation 19 HRA and the regulation 18 HRA is that in the regulation 19 HRA policy EN 11 requires more mitigation for housing within 7km of Ashdown Forest. As a result, the conclusion under the appropriate assessment that there would not be an adverse impact on the integrity of the site is strengthened.
- 3.3 It has not been demonstrated that the HRA has followed the law as set out in *Holohan v An Bord Plenála (C-471/17)*. The case is cited on page 10 of the Regulation 19 HRA (and page 11 of the Regulation 18 HRA). The HRA quotes paragraph 39 of the judgment, in particular emphasizing the sentence "typical habitats or species must be included in the appropriate assessment, if they are necessary to the conservation of the habitat types and species listed for the protected area." Both HRAs use this quotation to justify the fact that the impacts of the local plan on deciduous woodland have not been assessed because the woodland is not "necessary to the conservation of the habitat types and species listed for the protected area".
- 3.4 The HRA does not, however, assess the local plan's potential effects on non-listed species within the site that could affect listed species. The European nightjar and the Dartford warbler both rely on the heath as a habitat, and the potential impact of air pollution on the heath is considered in the HRA. There is, however, no consideration of the species which the great crested newt, nightjars or Dartford warblers feed on. The HRA briefly mentions that the insects which the birds feed on rely on the heath as well (so implicitly a lack of impact on the heath could be taken as meaning a lack of impact on the insect species as well), but this is the only consideration of the local plan's potential impact on species that the listed species

rely on<sup>34</sup>. Further, there is no consideration given at all to species or habitats that lie outside the boundaries of Ashdown Forest. The HRA has not addressed whether there is any heath outside the Forest, and whether the birds venture outside the Forest

3.5 The regulation 19 HRA only assesses Ashdown Forest (which is both a SAC and a SPA) and the potential impacts of recreational pressure and atmospheric pollution. The regulation 19 HRA states that only Ashdown Forest is assessed 'given the findings of the regulation 18 HRA' (page 8). The regulation 18 HRA states that only Ashdown Forest is assessed 'given the findings of the Issues and Options Consultation HRA' (page 8). The Issues and Options Consultation HRA explains that 'In June 2010 the Council adopted its Core Strategy Development Plan Document and in July 2016 it adopted the Tunbridge Wells Borough Council Site Allocations Local Plan. The HRA of both these documents identified potential linking pathways that could result in adverse effects upon the Ashdown Forest SAC and SPA. Key impact pathways investigated included recreational pressure and atmospheric pollution derived from traffic flows. As such this report focusses on those two impact pathways' (page 5).

3.6 It therefore apparent that ultimately the decision to assess only Ashdown Forest and the potential impacts of recreational pressure and atmospheric pollution was based on two HRAs that predate the *People Over Wind & Sweetman v Coilte Teoranta (C-323/17)* and *Holohan (supra)* cases. The Regulation 19 HRA<sup>35</sup> and the Regulation 18 HRA<sup>36</sup> do briefly mention that the decision to assess Ashdown Forest was based on a 20km search zone around the boundaries of the Borough. There is no particular explanation for why the buffer zone is 20km as opposed to any other distance, and in any case on Magic Map other European sites (such as Peter's Pit SAC, Hastings Cliff SAC and Dungeness, Romney Marsh and Rye Bay Ramsar) are within 20km of the Tunbridge Wells Borough boundaries. There is no explanation for why these other sites were screened out of the HRA assessment.

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<sup>34</sup> Regulation 19 HRA (TWBC Exam Core Document 3.92), page 12 and Regulation 18 HRA (TWBC Exam Core Document 3.36), page 13.

<sup>35</sup> TWBC Exam Core Document [3.92](#), pg10

<sup>36</sup> TWBC Exam Core Document [3.36](#), pg11

**Q2. Policy EN11 suggests that the 7km figure may be subject to revision. Why and when is that likely to occur?**

3.7 We are unable to assist the Inspector at this stage but reserve the right to respond to the Council's answer either orally or in writing if necessary.

**Q3. As it stands, what is required of development proposals within 7km of the Ashdown Forest Special Protection Area ('SPA') and Special Area of Conservation ('SAC')? Are the necessary requirements sufficiently clear to developers, decision-makers and local communities?**

3.8 We are unable to assist the Inspector at this stage but reserve the right to respond to the Council's answer either orally or in writing if necessary.

**Q4. Where contributions to Strategic Access Management and Monitoring ('SAMM') and Suitable Alternative Natural Greenspace ('SANG's) are required, how will the Council ensure that the necessary mitigation is provided?**

3.9 We are unable to assist the Inspector at this stage but reserve the right to respond to the Council's answer either orally or in writing if necessary.

**Q5. The HRA concludes that there will be no adverse effects upon the integrity of the Ashdown Forest SPA/SAC as a result of increased atmospheric pollution or recreational pressure resulting from the submitted Plan. Is this conclusion reasonable and justified by appropriate evidence?**

3.10 It is evident from above that the conclusion has not been justified.

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#### **4.0 Matter 1: Issue 3 - Sustainability Appraisal**

**Q1. Option 11 in the Sustainability Appraisal of the Local Plan (Version for Submission) tests a growth strategy which includes an additional 1,900 dwellings (equivalent to the need identified by Sevenoaks District Council in April 2019). What were the outcomes of this assessment and how did they inform the preparation of the Plan?**

4.1 Option 11 has not been taken forward. We are not clear from the SA Report why this was, other than that the general assertion in the SA Report at paragraph 6.2.18 that Option 13, is considered to be the most preferable option.

4.2 Given the lack of detail in the SA Report comparing the options, unlike the Council, we do not accept that Option 13 is the preferable option, noting for example, that it is not planning to meeting any unmet needs, which may therefore also fail to take the opportunity to plan for unmet need for specialised accommodation.

**Q2. Does Option 11 test the minimum housing requirement plus 1,900 dwellings to help meet unmet needs from elsewhere, or an alternative, higher figure? What is the justification for this?**

4.3 Option 11 purports to test for some unmet need, but this option is discounted, for reasons which are unclear from the evidence. If the Council's position is that it is because it is uncertain if there is unmet need, we have explained in Matter 1 Issue 1 why we, in common with the Inspectors for the Tonbridge and Malling plan, consider this is not effective planning.

...

**Q3. Does the Sustainability Appraisal adequately and robustly test a strategy that would contribute towards meeting previously identified unmet housing needs from Sevenoaks?**

4.4 Please refer to our answer to Q2 to assist with this question.

**Q4. Has the Council, through the Sustainability Appraisal, considered alternative strategies which avoid major development in the High Weald AONB altogether?**

- 4.5 Growth Strategy 2 considers 'No AONB Majors' . It has not been demonstrated that this has been tested effectively or has led to logical conclusions.
- 4.6 As we have noted under Matter 1 Issue 1, Natural England has serious outstanding objections to the proposed approach to development in the AONB, as does the AONB Unit.
- 4.7 We have also pointed out that there has been no cross-boundary assessment of the AONB, therefore, only an inward-looking approach to this alternative strategy.
- 4.8 A more specific example is the comparison of the inclusion of the Woodsgate Corner site (Site 395) allocated for extra care accommodation (Use Class C2), a site entirely in the AONB, but rejection of our client's site at Sandown (site 114), also proposed for C2 use, which is entirely outside of the designated landscape. While there are a number of SA objectives other than landscape to consider, comparison of the two SA appraisals indicates that the landscape impact is equal (both have a neutral/negative 'score' despite the fundamental benefit that the Sandown site is not in the designated landscape).
- 4.9 We have addressed these inconsistencies in our Regulation 19 representation (section 4).

**Q5. Has the Council, through the Sustainability Appraisal, considered alternative strategies which avoid releasing land from the Green Belt?**

- 4.10 We note that Growth Strategy 1 considered a 'no development in the Green Belt' option.
- 4.11 What is missing, in common with the no development in the AONB option, is an outward looking option that tests potential for exceptional circumstances for Green Belt releases on a cross-boundary basis.
- 4.12 Collectively, the three authorities in the West Kent HMA have failed to assess, lawfully, alternative strategies (as we have commented on under Issue 1).



**Q6. Does the Sustainability Appraisal adequately and robustly consider alternative distributions of development, such as focusing growth towards existing settlements such as Royal Tunbridge Wells, rather than relying on a new settlement?**

4.13 We note that options have been tested through the SA including a focus of growth on the main towns (Option 4), or a combination of the main towns and villages (Option 5). However, please refer to our response to Matter 3 Question 11 below about the robustness of the SA.

**Q7. Having established the strategy, what reasonable alternatives has the Council considered through the Sustainability Appraisal to the new settlement proposed at Tudeley?**

4.14 We respectfully reserve the right to respond to the Council's answer to this Question either orally or in writing if necessary.

**Q8. What was the justification for ruling out alternative options in locations such as Frittenden and Horsmonden on transport grounds, but not Tudeley Village?**

4.15 We respectfully reserve the right to respond to the Council's answer to this Question either orally or in writing if necessary.

**Q9. Does the Sustainability Appraisal adequately and robustly consider reasonable alternative strategies for the size and scale of development proposed at Tudeley Village and Paddock Wood, including land at East Capel? For example, does it consider smaller and/or larger forms of development as a way of meeting housing needs?**

4.16 We respectfully reserve the right to respond to the Council's answer to this Question either orally or in writing if necessary.

**Q10. Where individual sites are concerned, how did the Sustainability Appraisal determine what were reasonable alternatives?**

4.17 We note that alternative site options were identified through the Strategic Housing and Economic Land Availability Assessment (SHLAA). We have raised our concern over the robustness of the Council's comparison of the alternatives (please refer to our concerns expressed under Issue 3 Question 4).

**Q11. Are the scores and conclusions reached in the Sustainability Appraisal reasonable, sufficiently accurate and robust to inform the submission version of the Local Plan?**

4.18 We do not agree that with the conclusion of the SA that "it is clear from this exercise that the Pre-submission Local Plan is preferable to the alternatives identified"<sup>37</sup>.

4.19 The commentary in the SA on how the Council arrived at the preferred option of the hybrid approach (Option 13), is not clear.

4.20 It is not transparent, for example, about how the weighting of issues identified in Appendix B translates into the results.

4.21 What is not clear from the appraisal is why all of the original 12 growth options were discounted. There is no clear conclusion following the assessment or the proper comparison of options (Table 26). Rather there is a very general, high-level commentary on the various options tested between paragraphs 6.2.4 and 6.2.16 before presenting a 13<sup>th</sup> option. The Council describes this Option 13 as being "being successful in maximising the beneficial effects and minimising the negative effects"<sup>38</sup>. This is very crude comparison of the performance of the various options.

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<sup>37</sup> [TWBC Exam Core Document 3.130a](#) - Sustainability Appraisal of the Local Plan: Version for Submission, October 2021 (Paragraph 6.2.18).

<sup>38</sup> [TWBC Exam Core Document 3.130a](#) - Sustainability Appraisal of the Local Plan: Version for Submission, October 2021 (Paragraph 6.2.18).

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- 4.22 For example, the objective summarised as ‘Noise’ in Table 26 appears to have exactly the same weight in the assessment as ‘Housing’. If different weights have been given to these various SA objectives, that it is not clear.
- 4.23 We consider that the Council’s own warning in regard to the appraisal of individual sites that “Caution is also given in respect of simply adding up respective scores”<sup>39</sup> equally applies to the appraisal of strategic growth options, and arguably, even more so. In which case, the Council’s justification for pursuing Option 13 is not robust.

**Q12. What alternative strategies and/or site allocations does the Sustainability Appraisal consider for the provision of new employment land and buildings?**

- 4.24 We respectfully reserve the right to respond to the Council’s answer to this Question either orally or in writing if necessary.

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<sup>39</sup> [TWBC Exam Core Document 3.130a](#) - Sustainability Appraisal of the Local Plan: Version for Submission, October 2021 (Paragraph 8.2.2)

## **5.0 Matter 1: Issue 4 – Other Aspects of Legal Compliance**

### **Q1. Has public consultation been carried out in accordance with the Council’s Statement of Community Involvement?**

5.1 The adopted SCI<sup>40</sup> gives a clear commitment to address strategic issues that cross local authority boundaries as part of the duty to cooperate.

5.2 While the Council gives some evidence of considering cross-boundary issues, as we have highlighted in response to Matter 1 Issue 1, there has been an absence of effective joint assessment of the strategic issues of Green Belt and the AONB, with a conspicuous absence of joint, cross-boundary evidence.

5.3 The plan therefore falls short of the commitments made in the SCI.

### **Q2. Were adequate opportunities made available for participants to access and make comments on the Local Plan, and other relevant documents, in different locations and different formats – i.e. electronically and in person?**

5.4 We respectfully reserve the right to respond to the Council’s answer to this Question either orally or in writing if necessary.

### **Q3. Were representations adequately taken into account?**

5.5 Given the absence of a signed SoCG with Sevenoaks DC, and significant, outstanding objections to the Plan with at least two of the Prescribed Bodies – Natural England and the High Weald AONB Unit – the answer must be no. Please also refer to our response under Matter 1, Issue Question 12.

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<sup>40</sup> Tunbridge and Wells Borough Council Statement of Community Involvement (2016); [TWBC Exam Doc 3.150](#) paragraph 2.16.

**Q4. Has the Local Plan been prepared in accordance with the Local Development Scheme ('LDS')?**

5.6 We respectfully reserve the right to respond to the Council's answer to this Question either orally or in writing if necessary.

**Q5. In what way does the Plan seek to ensure that due regard is had to the aims expressed in s149 of the Equality Act 2010 in relation to those who have a relevant protected characteristic?**

5.7 Age is one of the protected characteristics of the Equality Act.

5.8 We note that there is limited and inadequate assessment of planning for the needs for older people in the evidence base and specifically the Duty to Cooperate documents. For example, several of the evidence sources suggested in the PPG for this important issue appear to have been overlooked by the Council<sup>41</sup>.

5.9 The SoCG between Kent County Council and the Council makes cursory reference to "specialist care accommodation" and "Housing for Older people and people with disabilities" and notes policy H6 of the submitted Plan.

5.10 We also note that KCC's appreciation of the actual demand for specialised accommodation for older people has recently been questioned in the 'Broke Hill' appeal<sup>42</sup>.

5.11 Having recognised the issue (an obvious issue which the PPG regards as "critical"<sup>43</sup>), it is apparent that there has been very limited engagement over the scale of need, the range of need, for example dementia care and extra care, and how those need can be met with the borough.

5.12 The SoCG with KCC concludes on this point by saying "Both parties will continue to work together with other partners to ensure that such specialist housing is provide for over the Plan period".

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<sup>41</sup> Planning Practice Guidance. [Paragraph: 004 Reference ID: 63-004-20190626](#)

<sup>42</sup> Broke Hill S78 appeal W/21/3273188 – Appendix D to this Statement, paragraph 105.

<sup>43</sup> Planning Practice Guidance. Paragraph: 001 Reference ID: 63-001-20190626

- 5.13 This is an entirely unsatisfactory approach. It indicates that while the importance of planning for the needs for older people (and other specialist needs) has been nominally recognised, the scale of that need and options for meeting that need, and indeed if there is unmet need from any of the neighbouring authorities in the West Kent Housing Market Area, has not been grappled with.
- 5.14 We have already noted that Sevenoaks DC had flagged to the Council that there may be unmet need for C2 accommodation (Issue 1 Question 7).
- 5.15 In which case, the resulting policy H6 and the proposed allocations for specialist accommodation have not been based on effective engagement with the issue or those with those organisations with a duty to plan for these needs.
- 5.16 It is also somewhat surprising that there appears to have been no engagement on this matter of specialist accommodation with other key stakeholders beyond the County Council. For example, the engagement record with Kent and Medway Clinical Commissioning Group and NHS Trust appears to make no reference to the specific health care needs of older people and those people in the community with specialist care needs such as dementia. Even if this Prescribed Body is not directly a supplier of specialist accommodation, it is surely a significant consideration as it the availability (or lack of) this accommodation can have a direct impact on the demand for care in the community. Provision of specialist accommodation for older people is widely recognised as reducing pressure on the health services.
- 5.17 The record of engagement with this Prescribed Body is notably vague, consisting of largely of a series of 'phone discussions' and, towards the latter stages (the four months before submission), about Duty to Cooperate and agreement of an SoCG.
- 5.18 This does not equate to effective engagement, and that the policy response in the Plan to providing specialist accommodation is not well founded and cannot be relied upon to meet needs over the plan period, including failing to clarify if there is unmet need from neighbouring authorities, or where the most effective locations for this specialised accommodation are.

**Q6. In what ways does the Plan include policies designed to secure that the development and use of land in the area contributes to the mitigation of, and adaptation to, climate change.**

5.19 We respectfully reserve the right to respond to the Council's answer to this Question either orally or in writing if necessary.

**Q7. Did the Council make available copies of all the submission policies maps, showing any changes that would result from the adoption of the Local Plan?**

5.20 We respectfully reserve the right to respond to the Council's answer to this Question either orally or in writing if necessary.