



The Planning Inspectorate

Report to Tonbridge and Malling Borough Council

by Louise Crosby and Luke Fleming

Inspectors appointed by the Secretary of State

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Planning and Compulsory Purchase Act 2004
(as amended)
Section 20

Report on the Examination of the Tonbridge and Malling Borough Council Local Plan

The Plan was submitted for examination on 23rd January 2019

The examination hearings were held between 6th and 8th October 2020

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Abbreviations used in this report

DtC	Duty to Co-operate
HMA	Housing Market Area
LPA	Local Planning Authority
MoUs	Memorandums of Understanding
NPPF	National Planning Policy Framework
PPG	Planning Practice Guidance
SDC	Sevenoaks District Council
the Act	Planning and Compulsory Purchase Act 2004 (as amended)
the Plan	Tonbridge and Malling Borough Local Plan

Non-Technical Summary

This report concludes that the Tonbridge and Malling Borough Local Plan (the Plan) is not legally compliant in respect of the Duty to Cooperate (DtC) and, as such, we recommend that the Plan is not adopted.

Introduction

1. This report contains our assessment of the Tonbridge and Malling Borough Local Plan in terms of Section 20(5) of the Planning and Compulsory Purchase Act 2004 (as amended) (the Act). It considers whether the Plan's preparation has complied with the duty to co-operate (DtC).
2. The revised National Planning Policy Framework (NPPF) was published in July 2018 and further revised in February 2019. It includes a transitional arrangement in paragraph 214 which indicates that, for the purpose of examining this Plan, the policies in the 2012 NPPF will apply. Similarly, where the Planning Practice Guidance (PPG) has been updated to reflect the revised NPPF, the previous versions of the PPG apply for the purposes of this examination under the transitional arrangement. Therefore, unless stated otherwise, references in this report are to the 2012 NPPF and the versions of the PPG which were extant prior to the publication of the 2018 NPPF.
3. The starting point for the examination is the assumption that the local planning authority has submitted what it considers to be a sound Plan. The Tonbridge and Malling Borough Local Plan, submitted on 23 January 2019, is the basis for our examination. It is the same document as was published for consultation between 1 October 2018 and 19 November 2018.
4. This report considers whether the Plan's preparation has complied with the DtC. Given our conclusion in relation to the DtC, we do not go on to consider whether the Plan is sound and whether it is compliant with other legal requirements. If a local planning authority cannot demonstrate that it has complied with the DtC at the independent examination of their local plan, then Section 20(7A) of the Act requires that the examiner must recommend non-adoption of the Plan. This is the situation in this case, and it is not, therefore, relevant for us to consider the other matters in this Report. Accordingly, we have not recommended any main modifications.
5. Hearing sessions were held between 6 and 8 October 2020 and they focussed on legal compliance matters including the DtC and Sustainability Appraisal.
6. Further hearing sessions were planned as part of the examination from 3-5 November and on 10 November 2020 to consider other soundness issues. However, following our consideration of the evidence presented by Tonbridge and Malling Borough Council (the Council) and other participants in response to our Matters, Issues and Questions¹ at the hearing session in relation to DtC, and taking into account written representations and discussion at that hearing session we notified the Council in a letter² dated 22 October 2020, that we had

¹ ED56

² ED67

significant concerns in respect of legal compliance. The letter also explained that we had asked the Programme Officer to cancel the hearings planned for November 2020 and that we would be writing to the Council as soon as possible setting out our specific thoughts in more detail. The letter also advised that we would not reach a final conclusion on the way forward for the examination until we had had a chance to consider the Council's response to that letter.

7. Our letter³ to the Council, dated 15 December 2020, set out our concerns with regards to the DtC in some detail. The Council submitted a response dated 29 January 2021⁴, along with a number of appendices. Having fully considered the Council's response and appendices, our final letter⁵, to the Council, dated 2 March 2021, set out our conclusions on this matter and stated that, there were two options before the Council; either to withdraw the Plan from examination or we would write a final report recommending its non-adoption because of a failure to meet the DtC. We gave the Council 21 days to consider which option they wished to pursue. On 11 March 2021 the Council confirmed that it would not be withdrawing the Plan and invited us to prepare a final report at our earliest convenience⁶.

Assessment of Duty to Co-operate

Background

8. Section 20(5)(c) of the Act requires that we determine whether the Council complied with any duty imposed on it by section 33A in respect of the Plan's preparation.
9. Section 33A of the Act imposes a duty on a local planning authority to co-operate with other local planning authorities, the County Council and prescribed bodies or other persons by engaging constructively, actively and on an ongoing basis in relation to the preparation of a development plan document so far as relating to a strategic matter to maximise the effectiveness of the activity of plan preparation. It makes clear that sustainable development or use of land that would have a significant impact on at least two planning areas is such a strategic matter. Account can only be taken of the engagement undertaken by authorities up to the point of submission of the Plan, as the assessment of compliance with the DtC only relates to the preparation of the Plan.
10. Government policy in the 2012 NPPF paragraphs 178 to 181 sets out the importance placed on planning strategically across boundaries. Paragraph 181

³ ED68

⁴ ED69

⁵ ED81

⁶ ED82

states that "local planning authorities will be expected to demonstrate evidence of having effectively cooperated to plan for issues with cross-boundary impacts when their Local Plans are submitted for examination" and that "cooperation should be a continuous process of engagement from initial thinking through to implementation, resulting in a final position where plans are in place to provide the land and infrastructure necessary to support current and projected future levels of development".

11. It is not disputed by the Council that housing is a strategic matter for the purposes of S33A of the Act, which required cooperation as set out above. Whether the DtC has been complied with is a matter of judgement for the examining Inspectors following consideration of the evidence presented by the Council and other participants, both in writing and at the hearing sessions.
12. Sevenoaks District Council (SDC) considers that it is unable to meet all of its own housing needs. It is a neighbouring local authority and forms a large part of the West Kent Housing Market Area (HMA) which also includes a significant part of Tonbridge and Malling Borough, as well as parts of Tunbridge Wells Borough. Our report will focus on the engagement of the Council with SDC, in relation to housing across the HMA. The NPPF (para 47) states that local planning authorities (LPAs) should use their evidence base to ensure that their Local Plan meets the full objectively assessed needs for housing in the HMA, as far as is consistent with the policies set out in this Framework.

Did the Council know that Sevenoaks District Council considered that it would be unable to meet its own housing needs in full, prior to the submission of their plan for examination in January 2019?

13. The Council explained at the hearings that it was not clear until SDC's Regulation 19 (of the Town and Country Planning (Local Plan) (England) Regulations 2012 (the Regulations)) Plan was published in December 2018 what the scale of unmet need was and even then it was not certain as the Plan had not been examined by an Inspector and the housing need and requirement found sound. As set out above, the Tonbridge and Malling Regulation 19 Plan was submitted for examination on 23 January 2019 which was before the transitional deadline of 24 January 2019, set out in paragraph 214 of Annex 1 to the July 2018 and February 2019 versions of the NPPF.
14. At the hearings the Council's view was that until SDC's Plan had been consulted on there was uncertainty about whether there was any unmet need and the basis for that. Furthermore, there had not been a process of examination to demonstrate that there were unmet needs and even if there were unmet needs there was a chance that they could be quite small. However, SDC's Regulation 18 Plan which it consulted on, between July and September 2018, identified a need for 13,960 dwellings and identified sites to

meet between 6,582 and 13,382 dwellings⁷. So, at this stage it was clear there was a likely shortfall of at least around 600 dwellings, and this was the best case scenario. At worst it was closer to approximately 7000. While the level of unmet need and the justification for it could be a matter for debate, there is enough here to demonstrate that this was a strategic matter on which cooperation was required. In the submitted SDC Regulation 19 Plan the unmet need was in the order of 3,392 dwellings⁸. The calculation of housing need is not an academic exercise, it is a question of identifying an actual local need.

15. However, much earlier than this, in October 2017 when SDC were at their 'issues and options' stage of plan preparation, the Council wrote to SDC (ED78B), saying, "At this stage and based on the evidence available it is highly unlikely that there would be supportable reasons or indeed the capacity for meeting any unmet need from Sevenoaks in Tonbridge and Malling".
16. This was at a stage in the process when officers in a report to Tonbridge and Malling Council's Planning and Transportation Advisory Board (ED78A), in December 2017, advised that SDC, unlike Tonbridge and Malling Council, was not planning to release Green Belt land to meet its housing need. It also says that, even with some Green Belt releases, "the conclusion is that Sevenoaks will be a significant way adrift from meeting its identified housing needs". So, in our view, it is clear that the Council knew in 2017 that SDC would be likely to reach the judgement that it would be unable to meet its own housing needs in full, even with Green Belt release.
17. The Council's views on market capacity are informed by a Housing Delivery Study (CD HO3) which was published in September 2017. The purpose of the Study was to consider the market capacity and potential pace of housing delivery within the Borough to inform the development of the emerging Local Plan. However, paragraph 1.7 says that "emerging evidence suggests that a number of neighbouring authorities may not be able to meet in full their objectively assessed housing need. Some authorities may therefore ask TMBC whether it is able to help to address an unmet housing need arising". Paragraph 4.8 advises that "...in addition to Tonbridge and Malling's own housing needs, the Council has a Duty to Cooperate with neighbouring authorities and is likely to need through the plan-making process to consider the potential to contributing to meeting unmet housing needs from beyond the borough boundary. A core role of this study is to consider what additional housing delivery the market could potentially accommodate".

⁷ Page 2 of letter dated 28 October 2019, from the Inspector examining the SDC Plan

⁸ Paragraph 14 of the Report on the Examination of SDC Plan, dated 2 March 2020

18. It is clear then that one of the motivations for the September 2017 Study was to consider the issue of unmet needs arising in a number of neighbouring authorities. Irrespective of a number of technical concerns raised by representors with regard to whether this evidence demonstrates market capacity issues or not, in our view the Housing Delivery Study is further evidence that shows that the Council knew in 2017 that SDC had or was likely to have unmet need and that they may be asked for help with meeting the need.
19. Also, it is well documented that the Council, along with SDC and Tunbridge Wells were involved in a pilot scheme (West Kent Statement of Common Ground Pilot Project), which appears to have started in 2017. This pilot scheme with the Planning Advisory Service (PAS) was set up to look at the use of Statements of Common Ground in plan making. Paragraph 6.6 of the PAS facilitator's notes, dated April 2018, says "Each of the Council's has a clear figure for its housing need, but whilst Tonbridge and Malling BC is confident that it can meet its need, Sevenoaks DC and Tunbridge Wells BC have not yet completed the work needed to determine whether or not they can meet their housing need. Thus the Councils are not yet in a position to reach agreement on the matter of housing supply". However, paragraph 6.3 of the same notes says, "This may increase the housing land supply but it remains unlikely that Sevenoaks DC will be able to meet its housing need in full". This shows that it was known then that there was likely to be some unmet need in SDC, albeit there was no firm figure.
20. In summary, it appears from the evidence before us that the Council knew for a number of years, prior to the submission of their Plan for examination, that it was highly likely that SDC would reach the judgement that it would be unable to meet its housing need in full. While the scale of the unmet need was uncertain, the overall position was clear well in advance of the submission of the Plan for examination in January 2019. It should, therefore, have been obvious to the Council that this was a strategic matter to which the DtC applied.
21. This should have led to the Council engaging constructively, actively and on an ongoing basis with SDC on unmet housing needs, regardless of whether this was a precise figure or a range, or indeed whether the Council felt it may not be able to accommodate the unmet need in full or in part. The requirement of the Act is for authorities to actively engage to maximise the effectiveness of plan preparation.

Did the Council engage constructively, actively and on an ongoing basis with SDC on unmet housing needs?

22. In the Council's Duty to Cooperate Statement (CD SC1), section 8 deals with Cross-Boundary Issues. The table in paragraph 8.1 of this document sets out the strategic cross boundary issues, the key neighbouring authorities/organisations in relation to each issue and the summary of cooperation. Under the housing section of this table the key neighbouring authorities/organisations are listed as Maidstone Borough Council, Ashford Borough Council, Kent County Council and Highways England. It seems that the limited extent of this table is because it only covers authorities where cross boundary issues are specifically covered in the Plan. Nowhere in this document, which is dated January 2019, and therefore postdates the publication of the SDC Regulation 19 Plan on 18 December 2018, is there any mention of unmet housing need in SDC. If there had been any constructive, active and ongoing engagement with SDC ahead of submission on what was clearly a strategic matter, it would be reasonable to expect that this would at least be mentioned in the Council's DtC statement.
23. As set out above, it was apparent from as early as October 2017 there were clear signs that SDC was likely to conclude that it would not be able to meet its housing needs in full. It seems that regular meetings were held between the Council and SDC during the preparation of the Council's Plan, but there is no evidence that unmet housing need in SDC was discussed at these meetings and no meeting minutes have been provided to evidence that housing needs were discussed. The Council say that the discussion was predominantly about 'constraints' to meeting housing needs but no minutes of any of these meetings have been produced as evidence of what was actually discussed. Consequently, there is no evidence before us, that these meetings were used for constructive and active engagement in an attempt to resolve the strategic matter of unmet housing need and maximise the effectiveness of plan preparation.
24. The Council argue that SDC did not formally ask them for help and it was not up to the Council to "make the running", but this is a circular argument with a risk that both parties defer the issue to the other without any meaningful attempt to resolve it. We are obliged to consider whether the Council cooperated and the question of whether or not SDC made any running does not remove the obligation on the Council, particularly as the issue of unmet housing need in Sevenoaks appeared to be well known to both. Moreover, it is clear from the Council's letter sent to SDC in October 2017, where they say "At this stage and based on the evidence available it is highly unlikely that there would be supportable reasons or indeed the capacity for meeting any unmet need from Sevenoaks in Tonbridge and Malling", that such a request would have been likely to be pointless. The letter was therefore a

discouragement to constructive, active and ongoing engagement, because it can reasonably be read as closing the door to cooperation. Indeed, there does not appear to have been much engagement for the next 15 months or so, up to the submission of the Plan for examination. In fact, very little evidence of any meaningful engagement in relation to this particular strategic matter has been submitted for us to take into account.

25. The Council explained at the hearings that, if they had delayed the submission of the Plan to try to accommodate some of the unmet need from SDC, once the SDC Regulation 19 Plan was published in December 2018, they would have had to effectively start plan preparation again. This is because they would have missed the transitional deadline in NPPF paragraph 214 and their housing need would have increased by around 3000 dwellings, due to the introduction of the standard method in the 2018 and 2019 versions of the NPPF⁹ and related PPG. Whilst this may have been so, it is not an adequate or legally compliant reason to not engage. Early engagement in 2017, when there was first evidence that SDC were unlikely to be able to meet their housing need, would not necessarily have caused delays to the overall process and to the Council meeting the transitional deadline¹⁰. Furthermore, the decision to push ahead to submit on or before the 24 January 2019 was entirely a choice made by the Council. Importantly, even if no agreement had been reached on the matter, if constructive, active and ongoing engagement had taken place from the earliest stages of preparation of the Plan, the Plan would have been found legally compliant in relation to the DtC.
26. The conclusion of the SDC Regulation 18 consultation, in September 2018, was some four months prior to the submission of the Plan for examination. At this point the unmet need was still a range and would only be confirmed on conclusion of the Sevenoaks examination. This is something the Council argue is necessary before active and constructive engagement can commence, but we strongly disagree. It should have been clear at this time (i.e. four months prior to submission of the Plan), if not earlier, that there was a strategic matter relating to unmet housing need which required addressing through constructive engagement, regardless of the lack of clarity at the time over the precise volume of unmet need.
27. Whilst it was not clear in 2017, or even later in the process, at the Regulation 18 consultation stage, what the exact level of unmet need was or would be, the fact that SDC considered there was likely to be some unmet need should have led to constructive, active and ongoing engagement between the Council and SDC at that point and subsequently.

⁹ NPPF 2019 Paragraph 60

¹⁰ NPPF 2019 Annex 1, paragraph 214

28. The Council advise that, like SDC, they have large amounts of Green Belt land, which is a constraint to meeting housing needs other than their own. Both authorities have significant areas of Green Belt as well as land in Areas of Outstanding Natural Beauty (AONB). The Council carried out a Green Belt review of land in their own administrative boundary, leading to the release of some Green Belt land in the Plan as well as a proposal to put some land into the Green Belt.
29. 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 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. The Council say the reason for this is that the two LPAs were at different stages of plan making, however the plans were submitted for examination within months of each other. In addition, the fact that the Council disagreed with SDC on the approach they were taking to Green Belt release did not mean the DtC did not apply and could be ignored.
30. In terms of the Council's position about relative timescales, the Council's Regulation 19 Plan was published for consultation on 1 October 2018, around 3 weeks after the conclusion of the SDC Regulation 18 consultation. SDC published their Regulation 19 Plan for consultation on 18 December 2018 and so the fact is the plan-making timescales and processes in Tonbridge and Malling and SDC were actually closely aligned. We can find no credible reason why the Councils could not have engaged constructively and actively during the plan making process in accordance with the duty on them to engage constructively with each other in a meaningful attempt to resolve issues relating to unmet needs.
31. Whilst resolution to the problem of unmet housing needs is not a prerequisite to the Council being able to demonstrate compliance with the DtC, earlier, constructive, active and ongoing engagement, in line with the Act and national policy as articulated in the Framework and PPG, would have been much more likely to result in an effective strategy for meeting SDC's need, whether within the SDC area or elsewhere. Even if in this case the Council considered it unrealistic to contemplate a joint local plan at this point, it might have considered other less formal mechanisms of compliance with the duty, such as aligning plan time-tables and policies and/or joint approaches to plan-making. Any steps of that kind would have demonstrated positive proactive attempts at cooperation.

32. The Council's hearing statement¹¹, submitted to SDC's examination, explains the Council's view that it would be unreasonable to expect it to accommodate any unmet housing need for SDC because it faces similar constraints and challenges, is planning to meet its own need in full, and market and infrastructure capacity mean any such external need could not be accommodated. In the circumstances, these could have all been valid issues for discussion and engagement between both authorities, but there is no evidence to indicate that they were actually the subject of any constructive engagement between the authorities.
33. The Council advise that once the actual SDC unmet need is examined and established, they would potentially seek to deal with it through a future review of the Plan. However, such an approach is not in the spirit of the Act or of national policy. The identified need for housing exists now, and the likely existence of unmet need has been known about for some time and is therefore a strategic matter that should have been considered through the DtC in the current round of local plans, not delayed to some future date. Deferring the issue to subsequent plans does not amount to constructive, active engagement, especially when the plan making processes were, in reality, closely aligned.
34. Memorandums of Understanding (MoU) were signed after the submission of both plans and provide no evidence of constructive and active engagement prior to the submission of the Plan and are therefore of no help in demonstrating the DtC has been met. Indeed, the short final MoU simply states, *'TMBC's evidence of meeting the Duty is set out in the Duty to Cooperate Statement (January 2019). The strategic cross-boundary matters and how the Duty was addressed are summarised in section 8 of the DtC Statement. The details are set out in sections 9 to 16. The record of engagement is documented in Appendix A'*. As set out above, the Statement provides no reference to the unmet housing need in SDC. Appendix A is a list of meetings that took place between April 2012 and January 2019 with various organisations, but no minutes have been provided from any of these meetings to show that unmet housing need in SDC was discussed, and moreover from careful consideration of the verbal evidence given by the Council at the hearing sessions, it would seem that it was not discussed at any of the meetings. The only discussion was about the constraints all of the Council's in the HMA were facing in meeting their housing need. Simply discussing constraints does not in itself amount to cooperation.
35. This shortcoming is surprising given that the Council were involved in the pilot scheme (West Kent Statement of Common Ground Pilot Project) with PAS looking at the use of Statements of Common Ground in plan making. Indeed,

¹¹ Paragraph 13.19 of Tonbridge & Malling Borough Council Position Statement (ED58)

as part of this project, the Council, SDC, and Tunbridge Wells Borough Council all agreed in April 2018 that the need to address the matter of unmet housing need was the most significant issue to be addressed in any Statement of Common Ground¹². This also shows that by April 2018 the Council and SDC had acknowledged that it remained unlikely SDC would be able to meet its housing need in full¹³ and despite this, there is no evidence of cross boundary working with SDC and others as a way of seeking to ensure that housing needs were met in full across the HMA. Moreover, the NPPF at paragraph 181 provides advice to LPAs on how to demonstrate evidence of effective cooperation in relation to cross-boundary impacts. This suggests the use of, among other things, memorandums of understanding. It adds that 'cooperation should be a continuous process of engagement from initial thinking through to implementation...'. There is no evidence that this approach was followed.

36. Despite knowing that, as early as 2017, SDC was indicating it would be likely to have unmet housing need, it is reasonable for us to conclude on the basis of everything that we have considered that the Council failed to engage constructively, actively and on an ongoing basis with SDC on that strategic matter. 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.**

If a plan is found to have failed the DtC, is it possible to proceed with the Examination?

37. In a letter to the Planning Inspectorate, dated 18 June 2019, the Secretary of State stressed to Inspectors the importance of being pragmatic in getting a plan in place that, in line with paragraph 35 of the 2019 NPPF, represents a sound plan for the authority.
38. The Secretary of State's letter refers to a previous letter written in 2015 by the Rt Hon Greg Clark. This 2015 letter also stresses the importance of Inspectors working in a pragmatic way with councils towards achieving a sound local plan, by finding plans sound conditional upon a review in whole or in part within 5 years of adoption, giving councils the option to undertake

¹² Sevenoaks District Council v Secretary of State for Housing Communities and Local Government [2020] EWHC 3054 (Admin)

¹³ ED69A, Appendix D, paragraph 6.3

further work to address shortcomings identified at examination and highlighting significant issues to councils very early on and giving councils the full opportunity to address issues. However, the failure we have identified cannot be remedied during the examination since any failure in DtC cannot be resolved after submission of the Plan because the duty relates to the period of plan preparation which has ended. Once we had considered all of the evidence pertaining to DtC presented in writing and orally at the hearing sessions we immediately notified the Council of our concerns and cancelled the future hearings. We gave the Council opportunities, prior to the hearing sessions, during the hearing sessions and afterwards, to provide additional evidence confirming its approach to complying with the DtC undertaken prior to the submission of the Plan for examination.

39. In examining the Plan we have had this advice in the forefront of our minds and we have worked in a pragmatic way with the Council towards achieving a sound plan as far as practicable. However, we have identified a failure of legal compliance in relation to the DtC.
40. It is reasonable for us to conclude that the DtC, as set out in section 33A of the Act, has not been met.

Overall Conclusion and Recommendation

41. The DtC in Section 33A of the 2004 Act has not been met for the reasons set out above and we, therefore, recommend that the Plan is not adopted.

Louise Crosby and Luke Fleming

Inspectors