

Examination of the Tonbridge and Malling Local Plan

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Mr. Ian Bailey,
Planning Policy Manager
Tonbridge & Malling Borough Council

By email only

Dear Mr Bailey

Tonbridge and Malling Borough Council Local Plan Examination

1. Further to our letter of 22 October 2020, we are now writing to you to explain, in detail, our primary concern in relation to legal compliance and in particular the Duty to Cooperate (DtC) in connection with our consideration of the Tonbridge and Malling Borough Council Local Plan.
2. Section 33A of the Planning and Compulsory Purchase Act 2004 (as amended) (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. As you will be aware, we can only take account of the engagement done 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.
3. 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 which also includes a significant part of Tonbridge and Malling Borough. Our letter will focus on the engagement of Tonbridge and Malling Borough Council (the Council) with SDC, in relation to housing and how any unmet needs might be met. This is a strategic matter for the purposes of S33A which required cooperation as set out above.
4. The Council explained at the hearings that it was not clear until SDC's Regulation 19 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

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been examined by an Inspector and the housing requirement found sound. The Tonbridge and Malling Regulation 19 plan was submitted for examination in January 2019 to meet the transitional deadline set out in paragraph 214 of annex 1 to the July 2018 and February 2019 versions of the National Planning Policy Framework (the Framework).

5. The Council said at the hearings that if they had delayed the submission of their plan to try to accommodate some of the unmet need from SDC they would have had to effectively start again. Consequently, they would have missed the transitional deadline and their housing requirement would have increased by around 3000 dwellings, due to the introduction of the standard method in the 2018 and 2019 versions of the Framework and planning practice guidance (PPG).
6. However, 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 unlikely that SDC would be able to meet its housing requirement in full. Despite this there is no evidence that the Council engaged in any meaningful discussions with SDC to consider how the strategic matter of unmet need could be resolved. Instead the Council has relied on the fact that SDC did not formally ask them for help. However, from the evidence it seems that SDC chose not to make any formal request for help because they knew that the answer from Tonbridge and Malling would be 'no' due to 'constraints'¹. We consider Tonbridge and Malling were complicit with this for having said no without any active, ongoing and constructive engagement. This is not indicative of an attempt by Tonbridge and Malling Council to engage constructively or actively to resolve this issue.
7. Indeed, the Council accepted at the hearings that they knew of the unmet need much earlier than December 2018, but say that they could not do anything as the unmet need was a large range and there was an expectation that it would have been met by SDC through increased densities on allocated sites. 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 dwellings². So, at this stage it was clear there was a likely shortfall of around 600 dwellings, and this was the best case scenario. At worst it was closer to approximately 7000. In the submitted Regulation 19 plan the unmet need was in the order of 3,392 dwellings³.

¹Report of the Examination of SDC Plan, dated 2 March 2020

² Page 2 of letter from Karen Baker (examining Inspector) to SDC on 28 October 2019

³ Paragraph 14 of the Report on the Examination of SDC Plan, dated 2 March 2020

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8. Whilst this is a significant range it was clear when SDC consulted on their Regulation 18 plan that there was going to be some unmet need which should have led to constructive, active and ongoing engagement between the Council and SDC at that point and subsequently. The Council's hearing statement⁴ 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 need could not be accommodated. In the circumstances, these could have all been valid issues for discussion and engagement, but there is no evidence to indicate that they were actually subject to any constructive engagement.
9. The Council's views on market capacity are informed by a Housing Delivery Study (CD HO3) which was published in September 2017. This seeks to demonstrate that the housing market in Tonbridge and Malling at that time could not accept any more housing than their own objectively assessed housing need and it is clear from paragraphs 1.7 and 4.8 that a motivation for the study was the 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 unmet need and that they may need to seek help with it.
10. It seems that all of the Local Planning Authorities (LPAs) in the HMA, containing both SDC and Tonbridge and Malling, had regular meetings, but there is no evidence that unmet housing need in SDC was discussed. The Council say that the only discussion was about 'constraints', but no minutes of any of these meetings have been produced as evidence of what was actually discussed. Consequently, there is no evidence these meetings were used for constructive and active engagement in an attempt to resolve the strategic matter and maximise the effectiveness of plan preparation.
11. Moreover, in the Council's Duty to Cooperate Statement (CD SC1), section 8 deals with Cross-Boundary Issues. The table in para 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

⁴ Paragraph 13.19 of Tonbridge & Malling Borough Council Position Statement (ED58)

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covers authorities where cross boundary issues are covered in the plan. Nowhere in this document, which is dated January 2019, and therefore postdates the publication of SDC Regulation 19 plan on 18 December 2018, can we find any mention of the unmet housing need in SDC. If there had been any constructive, active and ongoing engagement 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 DtC statement.

12. 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 an Area of Outstanding Natural Beauty, albeit SDC has more Green Belt as a percentage of its total administrative area (around 93%), compared to Tonbridge and Malling (around 70%). 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.
13. 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 to understand the comparative quality across the two districts and any potential to amend Green Belt boundaries to fully or more fully meet needs. 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. Without cooperation, we do not know whether the LPAs might realistically have been able to provide for all or some of the unmet housing need. Whilst the DtC is not a duty to agree and nor does it require a solution to be found to unmet housing needs, it does require constructive, active and ongoing engagement to maximise effectiveness of plan preparation.
14. We appreciate the Council's position about relative timescales, however the fact is that the plan making timescales and processes in Tonbridge and Malling and SDC were very 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 such as how identified needs could be accommodated. 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, fuller and proactive engagement, in line with 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.

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15. 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, the identified need for housing is now and the existence of unmet need has been known about for some time and so should have been considered through the DtC in the current round of local plans, not delayed to some future date. Delaying the issue to subsequent plans does not amount to constructive, active engagement, especially when the plan making processes were, in reality, closely aligned.
16. Turning to the matter of the Memorandums of Understanding (MoUs) that have been submitted⁵. They were composed and 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 Duty 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 in paragraph 11 above the document 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 from the verbal evidence given by the Council at the hearing sessions it would seem that it was not discussed at any of the meetings.
17. This shortcoming is surprising given that the Council were involved in the pilot scheme (West of Kent Statement of Common Ground Pilot Project) with the Planning Advisory Service looking at the use of Statements of Common Ground in plan making. Indeed, as part of this project, the Council, SDC, and Tunbridge Wells 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 ground⁶. This shows that by April 2018 the Council and SDC had acknowledged that there was unmet housing need in SDC 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 Framework at paragraph 181 provides advice to LPA's on how to demonstrate evidence of effective cooperation in relation to cross-boundary impacts. This suggests the use of, among other things,

⁵ Appended to the Council's Hearing Statement for Matter 1

⁶ *Sevenoaks District Council v Secretary of State for Housing Communities and Local Government* [2020] EWHC 3054 (Admin)

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memorandums of understanding. It adds that 'cooperation should be a continuous process of engagement from initial thinking through to implementation...'

18. On the basis of the evidence currently before us, for the reasons set out above, it is reasonable for us to conclude, having carefully considered all the evidence, that the Council has failed to engage constructively, actively and on an ongoing basis in the preparation of the plan, so far as it relates to the strategic matter of housing, and that the DtC in Section 33A of the 2004 Act has not been complied with. This cannot be remedied during the examination of the plan.
19. We will not reach a final decision until you have had chance to consider and respond to this letter. However, in light of our serious concerns regarding the DtC, as set out above, we consider it a very strong likelihood that there will be no other option other than to invite you to withdraw the plan from examination, or, failing that, for us to issue a final report recommending that the plan is not adopted because of a failure to meet the DtC in accordance with our duties under Sections 20 (5) (c) and (7) of the Act.
20. We have sought to be pragmatic in our approach to the examination, but this cannot extend to ignoring a legal compliance failure with the plan which cannot be rectified during the examination. We also appreciate how disappointed you will be with our findings but confirm that we have only come to this view after having careful regard to all of the evidence and material before us.
21. We appreciate the Council will need some time to consider the contents of this letter and to decide on a response. We are also happy to provide any necessary clarification to the Council via the Programme Officer. Can the Council please provide an early indication of when they are likely to be able to respond fully to this letter. Responses from other parties to this letter are not invited and we do not envisage accepting them.

Yours sincerely,

Louise Crosby and Luke Fleming

Examining Inspectors