

Examination of the Tonbridge and Malling Local Plan

Inspectors: Ms. Louise Crosby MA MRTPI

Mr. Luke Fleming BSc (Hons) MRTPI

Programme Officer: Mrs Louise St John Howe

louise@poservices.co.uk Mobile: 07789 486419

2 March 2021

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

By email only

Dear Mr Bailey

Examination of Tonbridge and Malling Local Plan

1. Thank you for your letter dated 29 January 2021 and the attached appendices. We have carefully considered your detailed response to our earlier letter and seek to cover the main points raised, but we do not intend to reiterate all the points made in our previous letter, which we stand by.
2. The starting point for our consideration of whether there has been compliance with the duty to co-operate, as set out in s20 and s33A of the Planning and Compulsory Purchase Act 2004 (the Act). Our relevant duties as examining Inspectors are set out in particular at s20(5)(c), (7) and (7A) of the Act and they require us to consider whether there has been adequate compliance with s33A of the Act. S33A (2) requires the Local Planning Authority "to engage constructively, actively and on an ongoing basis" in relation to the preparation of Local Plan documents so far as relating to a strategic matter, which includes "the development or use of land that has or would have a significant impact on at least two planning areas...". It is important to note that s 33A (7) of the Act requires a person seeking to comply with the duty to cooperate to have regard to guidance issued by Ministry for Housing Communities and Local Government on how that duty is to be complied with. Material in that regard is contained both within the National Planning Policy Framework (the Framework), at paragraphs 178 to 181, as well as within Planning Practice Guidance (PPG).
3. We agree that it is important that all local planning authorities have an up to date adopted local plan in place and that there is a need for pragmatism in examinations to ensure that wherever possible plans can be found sound, usually subject to Main Modifications, where this is necessary to achieve a sound plan. However, you will appreciate that a failure of the Duty to

Cooperate (DtC) cannot be rectified via a Main Modification because it is a matter of legal compliance which relates to the period of plan preparation which ends on submission for examination. By virtue of the provisions contained within s20(7), (7B) and (7C) of the Act, where we determine it would not be reasonable to conclude that an LPA has complied with the s33A duty, then we can neither recommend modifications nor adoption of the plan.

4. Whilst no DtC partner objected to the plan on the matter of the DtC, some representors did object in relation to DtC and indeed they appeared at the hearings. Moreover, the fact that no DtC partner has objected is not part of the test for legal compliance in relation to the DtC, as set out in Section 33A of the Act nor in the Framework or PPG.
5. We agree that housing is the only strategic matter about which we have significant concerns. This relates to unmet housing need in the Housing Market Area (HMA) and specifically Sevenoaks district. Your letter suggests that the degree of engagement in one strategic matter can be balanced against that in another to reach an overall conclusion on the DtC. We can see nothing that supports your suggested interpretation of the DtC in legislation or in the Framework or PPG.
6. Whilst meetings have clearly taken place between the LPAs within the HMA (Tonbridge and Malling, Tunbridge Wells and Sevenoaks Councils), it seems the stance taken by Tonbridge and Malling Council (the Council) as early in 2017, does not support a contention that a process of constructive engagement was underway or would take place. Indeed, in a letter sent to Sevenoaks District Council (SDC), in October 2017 (ED78B), when they were at their issues and options stage, the Council 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".
7. 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 and even with some Green Belt releases, "the conclusion is that Sevenoaks will be a significant way adrift from meeting its identified housing needs". So, it is clear that the Council knew in 2017 that SDC would be unlikely to be able to meet their housing needs in full, even with Green Belt release. In our view, despite this position being clear, the overall evidence appears to indicate that the Council chose to not actively engage at this stage. In particular, there is no evidence of active engagement in an attempt to resolve this matter.

8. This letter and report, have recently been added to the examination website, as has another report on Duty to Cooperate (ED77A). ED77A states, "This report provides an update in respect of current and ongoing cross boundary working in accordance with the Duty to Cooperate, which in due course will form part of the evidence base for the Local Plan to show compliance".
9. Whilst it was not clear then, or even later in the process, what the exact level of unmet need was or would be, as we set out in our previous letter, the fact that there was likely to be some unmet need should have led to constructive, active and ongoing engagement between the Council and SDC.
10. The conclusion of the SDC regulation 18 consultation, in September 2018, was some 4 months prior to the submission of your 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 (ie 4 months prior to submission of your plan) that there was a strategic matter relating to unmet housing need. An active process of ongoing constructive engagement might or might not have led to a more positive outcome. 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.
11. In addition, your letter of October 2017 to SDC seems to indicate that the Council had already reached an in-principle decision not to assist SDC with its likely unmet housing need. 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.
12. 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 were seemingly deferring the issue to the other. However, it is clear from the Council's letter sent to SDC in October 2017, at a time when it should have been obvious to neighbouring authorities that SDC, even with some Green Belt releases, was not intending to meet its housing target in full, that such a request would have been likely to be pointless. The letter was a discouragement to constructive, active and ongoing engagement and indeed there does not appear to have been much engagement for the next 15 months or so, up to the submission of your plan for examination. Indeed, there is very little evidence of any such engagement for us to take into account.

13. Our view remains unchanged, notwithstanding the additional points you have made in your letter of 29 January 2021, that on the basis of the evidence before us, for the reasons set out above and in our previous letter, we consider it reasonable to conclude 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. As such, the DtC in Section 33A of the 2004 Act has not been complied with. This cannot be remedied during the examination of the plan.
14. We have sought to be pragmatic in our approach to the examination, but this cannot extend to ignoring a failure to comply with the DtC 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 following a great deal of thought and after hearing relevant evidence from both the Council, including the attachments to your latest letter, and representors.
15. This is now our final position on the matter. Consequently, there are two options before the Council; either the plan is withdrawn from examination or we will write a final report recommending its non-adoption because of a failure to meet the DtC. Can the Council please indicate in writing within 21 days of the date of this letter which option they wish to pursue.

Yours sincerely

Louise Crosby and Luke Fleming

Examining Inspectors