

Matter 1: Legal Compliance, including the Duty to Co-operate

Issue 1: Overall, has the Local Plan been prepared in accordance with the relevant legal requirements?

Redrow are members of the Sevenoaks Developer Forum and agree with and support the representations made by Lichfields on behalf of the Forum on issue 1 – questions 3, 8 and 9.

Issue 2: Is the Local Plan's preparation compliant with the Duty to Cooperate [DtC] imposed by Section 33A of the Planning and Compulsory Purchase Act 2004 (as amended) [PCPA]?

Q10. What has been the nature and timing of the co-operation and on which issues?

Q11. Who did the Council co-operate with?

Q12. Are there any failures in the DtC?

Q13. Could the identified unmet housing need be accommodated in neighbouring authorities under the DtC?

Q14. Were any standing arrangements/protocols/memorandums of understanding in place?

Q15. How has the co-operation influenced the preparation of the Local Plan?

Whilst Redrow are members of the Sevenoaks Developer Forum and agree with and support the representations made by Lichfields on behalf of the Forum on issue 2 – questions 10 to 15, they have additional comments they wish to make – as set out below.

- 2.1 In our reps of the Reg 19 Consultation in February 2019 we highlighted the fact that Paragraph 3.67 of the 2015 SHMA (HOU001) states:
'As the CURDS analysis sets out there is a close set of interactions between the towns of Sevenoaks, Tonbridge and Tunbridge Wells which reflect their geographical proximity. There is also a relationship into the northern part of Wealden. There are cross-boundary interactions between Swanley and Dartford and a stronger commuting relationship to London. Links from Tandridge are stronger to other authorities in Surrey and West Sussex. Flows between Dartford and Swanley are relatively localised'
- 2.2 Paragraph 3.19 of the 2015 SHMA also indicates that Sevenoaks falls within the London Framework HMA.
- 2.3 It is evident from the 2015 SHMA and 2017 Local Housing Needs Study (HOU15) that Sevenoaks is not a standalone housing market area. It has strong links with Tunbridge Wells, Tonbridge and Malling, and London (including Bromley and Bexley), Dartford and Tandridge. This is acknowledged in the DTC Statement of May 2019 (SUP006 -paras 2.1 and 2.2).

- 2.4 Having regard to the above we note that Paragraph 1.9 of the submission plan states:

'We have not been able to meet the 'Local Housing Need 'figure provided by central government purely by focusing within our existing settlements. Therefore, we have been consulting with our neighbouring authorities, to understand whether they can help to meet some of our need, through a process known as the Duty to Co-operate. We have fully considered capacity within the West Kent housing market area (HMA) and adjacent housing market areas. Officers and members have been regularly meeting with neighbouring counterparts to establish a robust process of co-operation, in some instances supported by the Planning Advisory Service (PAS). We have produced a number of Statements of Common Ground with these authorities. We also have a Memorandum of Understanding with Maidstone, to explore Duty to Cooperate issues which might not be able to be met within the HMA. To date, none of these discussions or processes have led to any authorities being able to assist Sevenoaks with unmet need. Clearly there needs to be a balance between how much can be achieved within the highly constrained Sevenoaks District and what might be achieved elsewhere, and discussions will continue as the Local Plan progresses to examination'

- 2.5 Policy ST1 (A Balanced Strategy for Growth in a Constrained District), goes on to explain that:

'We will continue to work with neighbouring authorities under the Duty to Co-operate asset out in the Statements of Common Ground'

- 2.6 The DTC Statement of May 2019 (SUP006) is high level and general in its comments. It is appendix 1 (SUP006a - Neighbouring Authorities), appendix 2 (SUP006b - Statutory Consultees), and appendix 3 (SUP006c - Statements of Common Ground) that provide the detail. SUP006a sets out the meetings there have been with neighbouring authorities, and associated outcomes. We note that SUP006a refers specifically to the following:

London Borough of Bexley (LBBx)
London Borough of Bromley (LBBr)
Dartford Borough Council (DBC)
Gravesham Borough Council (GBC)
Tandridge District Council (TDC)
Tonbridge and Malling Borough Council (TMBC)
Tunbridge Wells Borough Council (TWBC)
Wealden District Council (WDC)

- 2.7 There is no mention of meetings/ discussions with Surrey County Council and no engagement with the South East Local Enterprise Partnership.

- 2.8 In terms of the Summary of actions / outcomes from DTC meetings with TDC we note that page 6 of SUP006a states:

'Both authorities are heavily constrained by Green Belt (94% in TDC and 93% in SDC).

Both authorities have prepared Plans which do not fully meet housing need. TDC and SDC will engage through the wider Duty to cooperate forum with other neighbouring authorities in relation to housing related matters, including unmet need,

five year housing trajectory, best fit HMAs, affordability, London's growth, large scale developments and opportunities for meeting unmet need.'

- 2.9 Likewise we note that whilst SDC's unmet housing is acknowledged as a Key Cross Boundary Issue, in terms of SDC's relationship with TMBC and TWBC, the Summary of actions / outcomes from DTC meetings does not comment upon how this issue is to be addressed.
- 2.10 Having reviewed the more detailed information as to the meetings etc with adjacent authorities as set out in SUP006a, we consider that whilst SUP006a provides evidence of a number of meetings with various authorities, such that it could be argued that engagement was active and ongoing, there is nothing to show that it was constructive.
- 2.11 Section 33A(2)(a) PCPA 2004 imposes a duty on the Council "(a) to engage **constructively**, actively and on an ongoing basis in any process by means of which activities within subsection (3) are undertaken".
- 2.12 In *Zurich Assurance v. Winchester City Council*¹ Sales J held that deciding what ought to be done to maximise effectiveness and what **measures of constructive engagement** should be undertaken requires evaluative judgments:
'110 The obligation (see subsection (1)) is to co-operate in "maximising the effectiveness" with which plan documents can be prepared, including an obligation "to engage constructively [etc]" (subsection (2)). Deciding what ought to be done to maximise effectiveness and what measures of constructive engagement should be taken requires evaluative judgments to be made by the person subject to the duty regarding planning issues and use of limited resources available to them. The nature of the decisions to be taken indicates that a substantial margin of appreciation or discretion should be allowed by a court when reviewing those decisions.
111 The engagement required under subsection (2) includes, in particular, "considering" adoption of joint planning approaches (subsection (6)). Again, the nature of the issue and the statutory language indicate that this is a matter for the judgment of the relevant planning authority, with a substantial margin of appreciation or discretion for the authority'.
- 2.13 The extent of the duty was considered in *St Albans DC v. SSCLG*².
 a. At paragraph 38 Sir Ross Cranston followed the approach taken by Paterson J in *R (Central Bedfordshire Council) v. SSCLG*³
'38 What is required of a planning inspector in examining whether a local planning authority has performed its section 33A duty was spelt out by Paterson J in R (on the application of Central Bedfordshire Council) v Secretary of State for Communities and Local Government [2015] EWHC 2167 (Admin):
"[50] To come to a planning judgement on a duty to co-operate involves not a mechanistic acceptance of all documents submitted by the plan-making authority but a rigorous examination of those documents and the evidence received so as to

¹ [2014] EWHC 758 (Admin) at paragraph 110-111

² [2014] [2017] EWHC 1751 (Admin)

³ [2015] EWHC 2167 (Admin)

enable an Inspector to reach a planning judgment on whether there has been an active and ongoing process of cooperation.

The key phrase in my judgment is "active and ongoing". By reason of finding there were gaps as the Inspector has set out, he was not satisfied that the process had been either active or ongoing."

b. The duty to cooperate is not a duty to agree (paragraph 47).

c. At paragraph 51 Sir Ross Cranston made plain that once there is disagreement that is not the end of the matter:

"51 Further, I accept the Secretary of State's submission that once there is disagreement, I would add even fundamental disagreement, that is not an end of the duty to cooperate, especially in an area such as housing markets and housing need which involve as much art as science, and in which no two experts seem to agree. As Paterson J underlined in R (on the application of Central Bedfordshire Council) v Secretary of State for Communities and Local Government [2015] EWHC 2167 (Admin) , the duty to cooperate is active and on-going, and that to my mind means active and on-going even when discussions seem to have hit the buffers. In all the circumstances, my conclusion is that the Inspector did not reach an illogical or irrational conclusion as regards the duty to cooperate over housing.'

- 2.14 Having regard to the above, in considering whether engagement has been constructive and collaborative it is necessary to ask whether every effort has been made to secure the necessary cooperation⁴.
- 2.15 In reviewing the meeting notes of the discussions with TDC, it appears to us that whilst SUP006a shows that discussions have taken place over the years, there is little or no evidence of constructive engagement. For example, it does not appear that either TDC or SDC sought to engage with each other as to whether the other could accommodate their unmet need. As with its discussions with other local authorities it appears that SDC merely accepted TDC's statements that it could not accommodate unmet need from Sevenoaks. That said the timing of the SoCG with TDC is telling – its Dec 2018, just after Sevenoaks Planning Advisory Committee of 22 November 2018, when SDC chose to revise its approach and reduce its housing supply, thus leaving it with an unmet need. Which suggests this point was never actually discussed with TDC. In that respect engagement was not constructive.
- 2.16 We have come to the same view when it comes to discussions between SDC and TMBC and TWBC. The discussions with TMBC and TWBC are however even more interesting in as much as, together with SDC the three authorities were clearly looking to enter into a 'West Kent SoCG' to address the key strategic cross boundary matters affecting all three authorities, but initially could not do so as TMBC were not in a position to meet their unmet need⁵. Not only does this support our view that SDC were originally able to meet their OAHN and only after the decision to reduce the housing supply in November 2018 did they have an unmet need, but that there was no constructive discussion taking place about what the authorities could do jointly to address this issue. Likewise it is clear from the notes of a DTC Meeting with TMBC in March 2019 that just weeks before formal submission of the LP, SDC were discussing the potential for a follow up letter to request that neighbouring authorities

⁴ St Albans at paragraph 29

⁵ see p 178, 187/188 of SUP006a re meeting in April 2018

assist with SDC's unmet need, where it is practical to do so.⁶ Whilst the DTC Workshop that took place on 24 April 2019 at SDC's offices and referred to in a number of places in SUP006a is of interest in as much as it highlights the fact that SDC acknowledge that they have a recognised 'shortfall of approximately 1,900, equating to 17% of its OAHN', and that TWBC are proposing strategic Green Belt release including 14ha for business and 2 garden settlements to meet their OAHN⁷.

- 2.16 The above is reiterated in the SoCG signed with TWBC on 21.5.2019, wherein the scale of SDC's unmet need is clear at 2.1.4, the fact no one can assist in meeting the unmet need is clear at 2.1.5, that TWBC are looking to meet their needs in full (para 2.1.7 and that they can not assist SDC with their unmet need (para 2.1.8). Whilst the action arising from this is that TWBC and SDC will engage through the wider DTC forum with other authorities outside the West Kent HMA in relation to housing related matters, including unmet need, and opportunities for meeting any unmet need⁸, this is all post submission – not pre submission and does not suggest constructive engagement. Furthermore para 3.1 of SUP007h makes it clear that work on the West Kent SoCG remains ongoing.
- 2.17 The SoCG signed between TDC and SDC in Dec 2018 (SUP007(c)) acknowledges at para 2.1.7 that TDC's unmet need will be circa 1,904 dwellings based against the 2018 OAN. At para 2.1.10 it is acknowledged that SDC will also have an unmet need. The SoCG goes on to state:
*'Discussions have taken place with neighbouring authorities in the HMA to discuss assistance with unmet need, but no authority to date has been in a position to assist SDC with unmet need.
Consequently both councils will continue to work together and identify the position as both TDC and SDC prepare to review their local plans every 5 years*
- 2.18 Again this is not constructive engagement – it is merely putting off what needs to be done. PPG is clear in 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". My emphasis⁹.*
- 2.19 The SoCG signed between TMBC and SDC in May 2019 (SUP007(h)) confirms that TMBCs emerging LP looks to meet its full OAHN and that during consultation on its Reg 18 and Reg 19 LP TMBC did not receive any requests to address unmet need arising elsewhere in neighbouring authorities covered by the same HMA's – including SDC; and that providing housing above the levels set out in the submitted local plan would be unrealistically achievable and inconstant with achieving sustainable development across the HMA. Thus, it has been left that SDC and TMBC will continue to engage with each other on the matter of housing during the preparation of

⁶ p1934 of SUP006a

⁷ TWBC are 22% GB. In their Reg 18 plan they are looking to release 5.35% of their GB to meet their OAHN - see para 2.40 and 4.49 of draft plan as reported to cabinet on 5th Aug 2019

⁸ See para 2.1.9 of the TWBC SoCG – SUP007h

⁹ Paragraph: 022 Reference ID: 61-022-20190315

their LP reviews. Again, this does not comply with the advice at 61-022 in the PPG, is not constructive engagement, and is merely putting off what needs to be done.

- 2.20 Para 35 of the NPPF (2019) is clear that in order to be effective, and thus sound, a plan must be *'based on effective joint working on cross-boundary strategic matters that have been dealt with rather than deferred, as evidenced by the statement of common ground'*
- 2.21 Para 27 of the NPPF (2019) also makes it clear 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. These should be produced using the approach set out in national planning guidance, and be made publicly available throughout the plan-making process to provide transparency'
- 2.22 Whilst there appears to have been some discussions between SDC and neighbouring authorities, there appears to be no concrete actions arising out of these discussions that would demonstrate how the unmet housing needs are to be addressed i.e. there are no clear statements in the Plan / or the evidence base as to how unmet needs will be addressed. No joint housing needs assessment has been undertaken and there are no formal agreements with regard to how housing needs will be met across the area. As SDC have stated that they cannot meet the identified need for housing in Sevenoaks it is important that the authorities in the HMA work together to address these needs. It would appear that not only is SDC not able to meet its need but that it has not actively sought assistance from its neighbours. Perhaps because as recently as April 2018 it had the full intention of meeting its needs. But has since the Planning Advisory Committee of 22 November 2018, has revised its approach and been left in a position where there is nowhere to go.
- 2.23 PPG in setting out the information to be included in a statement of common ground about the distribution of identified development needs makes it clear that:
'When authorities are in a position to detail the distribution of identified needs in the defined area, the statement will be expected to set out information on:
a. the capacity within the strategic policy-making authority area(s) covered by the statement to meet their own identified needs;
*b. the **extent of any unmet need** within the strategic policy-making authority area(s);*
and
*c. **agreements (or disagreements) between strategic policy-making authorities about the extent to which these unmet needs are capable of being redistributed within the wider area covered by the statement.**'*¹⁰ My emphasis.
- 2.24 PPG in addressing the issue of whether strategic policy-making authorities are required to reach agreement on strategic matters, and what an authority should do if they are unable to secure these agreements advises:
*'Strategic policy-making authorities should **explore all available options** for addressing strategic matters within their own planning area, unless they can demonstrate to do so would contradict policies set out in the National Planning Policy*

¹⁰ Paragraph: 012 Reference ID: 61-012-20190315 refers

*Framework. If there they are unable to do so they should **make every effort to secure the necessary cooperation on strategic cross boundary matters before they submit their plans for examination.** Authorities are not obliged to accept needs from other areas where it can be demonstrated it would have an adverse impact when assessed against policies in the National Planning Policy Framework'.¹¹ My emphasis.*

- 2.25 Having regard to the above and to para 35 of the NPPF (2019) we fail to see how the Plan can be said to be based on effective joint working on cross-boundary strategic priorities. There has been a clear failure to cooperate effectively, actively and on an ongoing basis and as a result the Plan is unsound. Furthermore failure to comply with the DTC means the plan has failed to accord with the requirements of the Part 2 (33a) of the Planning and Compulsory Purchase Act 2004 i.e. it is not Legally Compliant. This cannot be fixed post submission¹². Either the plan as submitted complied or it did not.
- 2.26 In the context of the above we note that if one looks at the level of housing provision proposed in neighbouring authorities and compares this with the Governments Standard Methodology¹³, there is a considerable level of undersupply. Not only does this highlight the fact that given the status of plans in adjacent authorities SDC are unlikely to be able to look to their neighbours to help meet their unmet need, but that their neighbours may well be looking to others to assist them.¹⁴

¹¹ Paragraph: 022 Reference ID: 61-022-20190315

¹² PPG Paragraph: 031 Reference ID: 61-031-20190315

¹³ See table 1 in Forums reps on issue 6 – policy ST1 – que 35- 44

¹⁴ In this regard we note that SDC wrote to TDC on 06/09/18 in response to TDC's Reg 19 consultation expressing concerns about the fact TDC were not looking to meet their full OAHN and the implications of this on SDC.