

Ms. Louise Crosby MA MRTPI &
Mr. Luke Fleming BSc (Hons) MRTPI

(By email only via Mrs Louise St John-
Howe (Programme Officer))

Contact Ian Bailey
Email Ian.bailey@tmbc.gov.uk
Your ref.
Our ref.
Date 29 January 2021

Dear Ms Crosby and Mr Fleming,

Re: Council's Response to Letter of 15th December 2020 (ED68)

1. Thank you for your letter dated 15 December 2020. In light of the implications of that letter for the Plan, and consequently the significant impact that your preliminary conclusions would have for forward planning in Tonbridge and Malling more generally, the Council has sought to address your concerns in some detail. The Council is therefore grateful for the time and opportunity given for its response.
2. In the next section of this letter the Council outlines its views about the Overarching Picture, before explaining the remaining structure of this letter and giving its detailed response to your letter.

1. Overarching Picture

3. TMBC has a plan which is capable of meeting its objectively assessed needs, both housing and employment, to 2031. It will provide for at least 6,834 dwellings. The plan will provide for substantial amounts of affordable housing. It will do within an authority which is c.70% Green Belt and also subject to other national constraints. That is

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because, in part, the Council has faced up to the hard choices that are required to be made in relation to Green Belt land.

4. The Secretary of State wishes to see complete local plan coverage by 2023. The Government's target is to get housebuilding to 300,000 homes a year. The Plan will play its role in meeting that aspiration. The Secretary of State is encouraging LPAs to continue with plan making despite the substantial changes that are currently mooted to the plan making system. He endorses a pragmatic approach to the examination of local plans, such as this one, which plans to meet the needs of the Council. This critical importance of actively continuing with plan making in the current environment has been reaffirmed in the WMS of 19 January 2021 made by Mr Pincher MP.
5. Whilst, for reasons set out in detail below, the Council strongly disagrees with the contents of your letter, it is acutely conscious that whether or not the DtC has been met is primarily a matter of planning judgment. However, that judgment still requires to be exercised within a proper framework and, critically, in furtherance of the statutory purpose for which the power was made. The purpose of the power, self-evidently, is not to frustrate plans coming forward which meet their identified needs in full. It must therefore require an unusual case before the DtC could require failure of such a plan.
6. Within that context, the Council would make a number of overarching points concerning the preliminary conclusions expressed in the letter:
 - i. The Council considers that the provisional judgment formed on this issue is not a legally reasonable one for the reasons set out below. Certainly, there could be absolutely no legal criticism of a finding that the DtC had been met, whether that finding is made by the Inspectors or the Secretary of State.
 - ii. No DtC partner objected on the issue which the inspectors have formed their provisional conclusions upon. Critically, SDC did not object to the Plan, and indeed offered observations "welcoming" the approach taken by the Plan in their latest representations to the Plan dated 20 December 2019. They did not feel it necessary to take up the inspectors' invitation to appear at the DtC session, nor to make any criticism whatsoever of the DtC process which led to the Plan. TWBC did not object, nor did any LPAs in the wider area. This should be given great weight in the overall decision of whether the DtC has been met, in the

context of a plan led system.

- iii. As is amply set out in the documentation provided by the Council, unmet housing need in SDC is only one of a wide range of strategic cross boundary issues which engaged the DtC. Apart from unmet need, no apparent issue has been raised with the Council's approach to such matters, which began many years ago and which demonstrates a constructive, active and ongoing approach to the DtC in cases where it could be realistically actioned. Even if it was considered that more could have been done in relation to the issue of unmet need in SDC (a position which, for the reasons we set out below, we disagree with), a judgment on overall compliance with the DtC would necessarily have to weigh the Council's approach in respect of all strategic cross boundary issues. The provisional findings fail to do this.
- iv. The issue of unmet housing need in SDC is treated as though there is a demonstrable, identified need (*"the identified need for housing is now and the existence of unmet need has been known about for some time"* - §15). This is not the case now, and it certainly was not the case in January 2019 when the Plan was submitted. At the very highest, there is (and as at January 2019 was) the *potential* for unmet housing arising from SDC. However, crucially, at no point prior to submission of the Plan did SDC: (i) request, formally or otherwise, that TMBC consider meeting any unmet housing need; (ii) seek agreement from its neighbouring authorities that it had a level of need which it could not reasonably address, or seek an agreed approach for accommodating the any unmet need; or (iii) even seek to quantify the potential unmet need beyond the very broad range set identified Regulation 18 Plan, which of itself was necessarily a provisional figure.
- v. Furthermore, and crucially, as was recognised by Inspector Bore in his advisory visit of 6 February 2019, the *potential* for unmet need arose because SDC had not treated meeting housing need as being capable of amounting to exceptional circumstances for amendments to the Green Belt, which he rightly described as a *"Council-imposed impediment"*. As Inspector Bore would have been aware, that *"Council-imposed impediment"* had been baked- in to the evolution of the SDC

eLP. It was established in the 2017 Issues and Options, and taken through both the Reg 18 and Reg 19 plans, thus at each stage influencing and restricting potential site allocations. The significance of this appears directly from his note where he confirms that at Reg 19 stage, the approach “eliminated 10 of the site allocations, leaving only two in the published Reg 19 plan”, neither of which were strategic sites. SDC made clear to Inspector Bore that other than changing the base date of the plan they were not prepared to make any further changes.

- vi. In contrast to its treatment of SDC’s potential unmet need, the letter makes no mention of the undeniable fact that, until and unless this Plan is adopted, there is no realistic prospect of TMBC meeting its *own* housing needs (given the constraints in the Borough, in particular the extent of Green Belt). The Plan will be scuppered because of an alleged failure to consider addressing *potential* unmet housing need in SDC, with the result that identified housing need now in TMBC will not be met. This is a perverse outcome. This outcome should be avoided, unless the only reasonable conclusion is that the DtC had not been met.
- vii. The Sevenoaks judgment of Mr Justice Dove and the inspector examining the SDC Plan demonstrates the criticism made of SDC. Put simply, SDC had concluded that it was not possible to meet their housing needs in full, without first having asked their neighbouring authorities, including TMBC to meet some of their needs. It was not for TMBC to “make the running” in relation to a level of alleged unmet need in SDC. Such an approach is flatly contrary to other examples elsewhere.
- viii. The approach of Inspector Bore, in his advisory visit of 6 February 2019 to SDC (as set out in more detail below), indicates (a) the correct approach; or (b) at the very least, a reasonable approach which TMBC could properly have followed in its approach to the DtC; especially when the necessary “margin of appreciation” that the Council is entitled to, is applied.
- ix. In the absence of any criticism by SDC of the TMBC Plan making process, before any substantial failure under the DtC could be found, it requires a proper articulated approach by a proposed “exporter” of housing need. There are various key indicators as to whether such an approach might be sufficient to

cause a DtC failure. They include (a) whether objections were made to the relevant Plan (at any stage); (b) whether the “exported need” has been quantified (both quantitatively and qualitatively); (c) whether the request for assistance has been made formally; (d) whether the approach of the exporting authority has obvious flaws attached to it from a DtC perspective (which therefore would receive an obvious answer). There is also a practical need to consider how firmly over time a request for such assistance is made, because a failure to press such a case may be reflective of an authority which understands that, for good reason, a request would not be supported by the receiving authority. It is the combination of these factors to which the Inspectors should then apply the “margin of appreciation” in forming an overall judgment about whether it is “reasonable to conclude” that the Council complied with the DtC.

- x. The inspectors’ observations in relation to the failure to undertake a Green Belt study give insufficient weight to a number of factors as follows: (a) the fact TMBC was proposing to meet its need; (b) the absence of any articulated case from SDC as set out above; (c) the absence of any request by SDC for such consideration; (d) the different stages of plan making that the two authorities were at prior to TMBC submission; (e) the absence of any obvious identified benefit (in terms of Green Belt release) to such an approach; (f) the absence of any suggestion in the SDC litigation that consideration of such an approach was required; (g) the guidance in *Barker Mills Estates*, *Zurich Assurance*, and *Sevenoaks* itself notes that such questions are for the LPA’s judgment and highly sensitive to the facts and circumstances of the case, and that a substantial margin of appreciation or discretion should be allowed in such matters. It was, in those circumstances, well within the DtC obligations for TMBC to submit its plan without a joint Green Belt study. Moreover, it is clear, in light of SDC’s baked-in “*self-imposed impediment*” that a joint Green Belt study would not have been (a) productive or (b) even possible.

- 7. The Inspectors’ provisional conclusions have the effect of requiring TMBC not simply to have engaged constructively, actively and on an ongoing basis, but to take responsibility for the plan-making functions of their neighbouring authority (while their own plan-making

was, presumably, to be put on hold). To require such an approach betrays a misunderstanding of the statutory test: it elevates and transmutes the DtC into a duty to cajole an apparently unwilling neighbour.

Structure of this letter

8. The balance of this letter discusses (2) the Nature of Potential Unmet Need of SDC; (3) the Sevenoaks Judgment and Decision Letter; (4) Compliance with the DtC – general; (5) Detailed points in response to your letter; (6) Intervention by the Secretary of State; and (7) Conclusions.

2. Nature of Potential Unmet Need of SDC

9. For a proper analysis of the application of the DtC it is critical to understand the position of SDC throughout this process. Put shortly, there was, at no material time, an articulated request for quantified assistance in relation to an agreed, demonstrated or proven “unmet need”. No such request was made informally, still less formally. Neither, importantly, was it made at any stage through the plan making process. It follows from the above, but should also be recorded, that SDC did not therefore pursue through any of those mechanisms an (a) agreed; (b) demonstrated or (c) proven level of actual unmet need.
10. In the earlier communications which the Inspectors have relied heavily upon, all that was under discussion was the prospect, in the broadest terms, of the potential for unmet need to arise through the plan making process. To give a clear example of how that changed over time, in the initial version of the PAS note of 3 April 2018 the views being expressed by SDC and TWBC were that SDC and TWBC would meet their respective OAN figures, but that they would not be able to assist TMBC with any unmet needs arising (see below).
11. The importance of a clearly articulated formal request is reflected in the approach taken by Mr Justice Dove in the Sevenoaks judgment.

3. The Sevenoaks Judgment and Decision Letter

The Judgment

12. The Council is aware that SDC are seeking permission to appeal to the Court of Appeal from the judgment of Mr Justice Dove [2020] EWHC 3054 (Admin), delivered on 13 November 2020. The Council will, of course, let you know of any developments it hears of in that respect.
13. In paragraphs 2-28 of the judgment the factual background is set out. In paragraph 2 the judge notes without adverse comment SDC's position that the extent of its unmet need was unknown until after the Call for Sites process which remained open until October 2018. In reality, of course, SDC could only have come to a firm view of their own (which would not had an approach been made, have been shared by neighbours due to the "self-imposed impediment") after a further time for analysis of those responses and (on a proper basis) any further opportunities for development they provided. SDC Planning Advisory Committee considered the results of the consultation on 22 November 2018, and SDC Cabinet on 6 December 2018. The TMBC Plan was submitted on 23 January 2019, less than 2 months later.
14. In paragraph 10 the judge set out passages from TMBC's hearing statement to the SDC examination. Paras 13.6 – 13.8 set out clearly TMBC's continuing view – with reasons - that in light of the different approach SDC took to using Green Belt land, it would be unreasonable to expect TMBC to accommodate "unmet" housing need from SDC. The stark contrast between the release of 160 ha of Green Belt land by TMBC, and the approach of SDC, is noted in that hearing statement. Accordingly, the Council's approach on this issue has been consistent, and it is clear what the Council's response would have been had an earlier formal request been made: It would undoubtedly have substantively echoed the points made and approach articulated by Inspector Bore (below).
15. In paragraph 12 the judge set out the PAS material, recording the acknowledgment that "the matter of unmet housing need was acknowledged on all sides as the most significant issue that needed to be addressed in any statement of common ground" (emphasis supplied). As the judge also observed, this note represented the culmination of that PAS process – and the "outcome of the project": paragraph 12. However, as

paragraph 13 goes on to note, recording paragraph 6.6 that SDC and TWBC “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”.

16. In paragraphs 29-37 the judge set out the applicable law and main parts of the guidance. For present purposes the Council relies in particular upon paragraphs 35 and 36 confirming the *Zurich Assurance* approach. A key part of this approach is (1) recognising that DtC compliance requires evaluative judgments to be made by the body subject to the duty regarding planning issues and the limited resources available to them; (2) as a consequence a substantial margin of appreciation should be allowed when assessing those positions.
17. In paragraphs 38-48 the judge summarises the parties competing submissions. It is clear from that summary and the following conclusions that neither the Secretary of State or the judge considered those points were limited to a legal challenge under s.113: They also apply to the inspector’s approach as to whether or not it is “*reasonable to conclude*” that the DtC has been met: see paragraphs 38, 41 and 42 where the Secretary of State refers to “*the undoubted existence of the margin of appreciation*”. The basis upon which the Secretary of State defended the inspector’s decision is set out at the end of paragraph 41 “*The Inspector concluded that [SDC] could reasonably have been expected to do something in the circumstances which arose when the extent of the unmet need emerged, but in fact did nothing*” (emphasis added). Of course, at that stage the unmet need was still not agreed, demonstrated or proven; but it was the fact that it was SDC’s case that there was unmet need, which meant the onus was upon it to seek assistance from its neighbours.
18. Further, the Secretary of State defended and supported the Inspector’s emphasis on the importance of formal requests for assistance and *pursuing* those requests: see paragraphs 46, 47 and 48.
19. In paragraph 51 the judge adopted the *Zurich Assurance* approach. In paragraph 57 he dealt with the margin of appreciation point, necessarily on the basis that an inspector is required to provide such a margin to the LPA. In paragraphs 52 - 54 the judge set out his conclusions “*as to the nature of the decision the Inspector reached*”. Those

paragraphs include the following passages, which the Council submits were central to the judge's reasoning and conclusion:

"[53] . . . The claimant did not request assistance from Tunbridge and Malling Borough Council during the course of Regulation 19 consultation on the Tonbridge and Malling Local Plan between 1 October and 19 November 2018 to assist with unmet housing need in the claimant's area (see paragraph 27), and only made formal request to ask whether or not Tonbridge and Malling Borough Council and Tunbridge Wells Borough Council would assist in meeting the claimant's unmet housing need after the Regulation 19 consultation had been completed and just prior to submitting the plan for examination (see paragraphs 27 and 28) .

20. "[54] Thus, the Inspector concluded in paragraph 37 of her report that it was reasonable to expect that the claimant would, after the extent of the unmet housing need emerging following the Regulation 18 consultation, have undertaken constructive engagement in an attempt to resolve the issue prior to the publication of the Regulation 19 version of the plan . . . The visiting Inspector raised issues which were not adequately resolved before the plan was submitted (see paragraph 44)." (Emphasis supplied).
21. In paragraph 58 the judge referred to the conclusion of the SDC Regulation 18 consultation as being "*the critical point of time when the extent of nature of the unmet housing need emerged*".
22. Accordingly, the judgment is supportive of the Council's position on the DtC as set out in this letter and at the hearing sessions.

The SDC Inspector's Report

23. The Council does not rehearse the detail of its points on the SDC Inspector's Report at length, because they were made during the hearing sessions. However, the Council does rely on the following main points:
 1. The tenor of the Inspector's Report is fully supportive of the Council's point that it was not for TMBC to "make the running" on this issue. See IR/24 – 28. At IR/37 the Inspector said "*Under the DtC, it is reasonable to expect [SDC] to have contacted its neighbours as soon as it became clear that it would not be able to accommodate its own needs. This would have allowed the authorities to engage constructively . . .*"

2. The Inspector properly placed emphasis on whether or not formal requests for assistance had been made (and this emphasis was endorsed in the High Court by the submissions of the Secretary of State and the findings of the judge (above)).
 3. Related to that, the Inspector properly focussed on what SDC had (or had not) requested through its ability to consult on the Council's Local Plan. In particular at the "crucial" regulation 19 stage: See IR/27.
 4. At IR/45 the Inspector summarised, without any adverse comment, the approach Inspector Bore had advised SDC to take during his Advisory Visit.
24. Therefore, taking the substance of the Inspector's Letter and approach, together with the observations made upon that approach in the judgment, the letter does not undermine the approach the Council took to DtC compliance.

4. Compliance with DtC - general

25. Given the published evidence in the Examination Library and Examination Documents, the chronology of engagement with Sevenoaks District Council (SDC) during plan-making (see Appendix A to this letter) and the signed Memorandum of Understanding (MoU), the only reasonable planning judgement that can be made is that TMBC complied with the DtC during plan preparation.
26. The Duty to Cooperate Statement **[SC1]** highlights that TMBC engaged constructively, actively and on an ongoing basis with SDC during the preparation of the Local Plan.. The signed MoU from SDC is affirmation that the process of the DtC was met during the making of the Tonbridge & Malling Borough Local Plan. The MoU does not highlight unmet housing need because this was not raised by SDC, in any sufficient way to engage the DtC, during the making of the Plan.
27. This engagement took place from the earliest stages. TMBC approached other authorities to see the extent to which they were willing to co-operate in relation to evidence base studies. Some authorities took up those offers as shown by The Council's Strategic Housing Market Assessment (SHMA). Others did not. But it is clear that TMBC sought to work proactively through the overall process. The Council's SHMA was prepared as part of a joint commission with the consultants GL Hearn and Partners with Maidstone Borough Council and Ashford Borough Council to ensure a consistency of approach and methodology across all three authorities. Other neighbouring authorities to the west (Sevenoaks and Tunbridge Wells) were invited to join the commission at the time, but this proved to be too early in their own plan cycles. However, both authorities subsequently appointed GL Hearn and Partners so a consistent approach has been applied.
28. A similar approach was taken with planning for employment and economic growth. The Council was open to conducting a joint employment land review with neighbouring authorities, but this was not taken up. Subsequently the Council commissioned the same consultants (Turley) as neighbouring authorities Sevenoaks District Council and Tunbridge Wells Borough Council to ensure consistency and reference is made, as necessary, to separate studies produced for the Sevenoaks and Tunbridge Wells areas.
29. During this engagement, and including responses to consultations on the TMBC Reg.18

and Reg.19 Plans, SDC did not identify to the Council that it had a quantified amount of unmet housing need nor did they seek TMBC's assistance to help address this. SDC did not object to the TMBC Reg.19 Local Plan on the grounds that the Duty had not been complied with. You invited SDC to attend and participate during the Hearing Sessions on the DtC, despite them not making an objection to the Plan on this matter, and they declined the offer. There is no clear evidence to support the judgement that TMBC had failed to meet the DtC in respect of engagement with SDC on cross-boundary matters.

30. The chronology of this case (as set out in more detail below and in Appendix A) demonstrates that it is the opposite of a case where DtC failings could be found. For the DtC to have any proper meaning in law, it needs to be identified what request for co-operation was not met. Yet, in this case, during the making of the Local Plan, through the DtC meetings, responses to consultations and requests to attend the Hearing sessions, SDC simply do not complain (or raise as a point) that the DtC was not being met on the basis that TMBC was not addressing unmet housing need. That was not the case, the issue was never raised in that way. At best (see below) the evidence suggests that only SDC had indicated a likelihood that they *might not* meet their needs without their own boundaries; this was never expressed in any quantified way during plan preparation such that TMBC might have been able to engage constructively with SDC on the matter.
31. It is entirely reasonable for a DtC authority to rely upon written and verbal communication from a neighbouring authority during meetings and in responses to Plan consultations to determine whether the duty has and is being complied with. A Plan led system and the DtC do not require anything more than this. The TMBC consultation forms clearly provided the opportunity for people, including neighbouring authorities, to comment on whether the Duty had been complied with. The Council did not receive any objections from SDC on the grounds that the DtC had not been complied with during plan-making. It is entirely reasonable to assume on that basis that SDC were satisfied that the duty, as between SDC and TMBC, had been met.
32. It is quite clear from the chronology of engagement with SDC (see Appendix A) that the first time SDC formally informed neighbouring authorities, including TMBC, of their position regarding its unmet housing need was in an e-mail dated 11 April 2019 (see Appendix A: table appendix K, pp.COE081-COE082).. This is confirmed by the

Examination Inspector's letter to SDC dated 28 October 2019 [**SDC ED40** – see Appendix A: table appendix F, pp.COE049-COE054], which states:

“...In fact, the Council did not formally inform neighbouring authorities of the position regarding its unmet housing need until it wrote to them on 11 April 2019, after the PINS’ Advisory Visit and following the Regulation 19 consultation...”

33. The High Court judgement in respect of the Sevenoaks Local Plan (discussed above and set out in Appendix B) highlights that it was only in March 2019 that SDC first referred to addressing unmet housing need, in a broad sense, and even then SDC did not seek assistance to address it. Furthermore, the judgement makes it very clear that no requests were made by SDC to TMBC to assist them in addressing unmet need prior to this date.
34. It is evident from this clear timeline that the issue of unmet housing need was not raised until many weeks after TMBC had submitted its Local Plan for examination. The DtC only applies during the preparation of a plan. Plan preparation ceases at the point of submission. Given the chronology of events we have outlined, as confirmed by the Sevenoaks Examination Inspector and Mr Justice Dove in his judgement on the High Court case, it is not sustainable to reach the conclusion that TMBC has not complied with the Duty, so far as it relates to the strategic matter of housing, because the issue of unmet need was not raised during the preparation of the TMBC Local Plan in any meaningful way with which TMBC could have constructively engaged.

5. Detailed points in response

35. In light of the critical importance of this matter to the progress of the Local Plan, the Council has sought below to address in some detail the aspects of your letter that the Council disagrees with. We have endeavoured to deal with the points in turn, whilst seeking to avoid unnecessary repetition.
36. ***Para.3: Sevenoaks District Council (SDC) considers that it is unable to meet all of its own housing needs*** – Insofar as the implication from this statement is that it engaged the DtC, it is wrong. Unmet housing need arising from plan-making in Sevenoaks has not been agreed, demonstrated or proven. This is a point the Council made during the Hearing sessions. The position was not agreed between the

authorities. The Council turns to consider whether it was demonstrated or proven.

Not demonstrated

37. It has not been demonstrated because during the making of the TMBC Local Plan the issue was not raised – please see ‘Compliance with the DtC’ section of this letter. SDC did not object to the TMBC Reg.19 Plan on the grounds of failing to meet the Duty, so far as it relates to the strategic matter of housing, and they also declined your invitation to attend the Hearing session on the matter.
38. In analysing the application of the DtC to this situation, it is critical to bear in mind how any such request (had it been made) would inevitably have unfolded from the perspective of TMBC. The correct approach has already been set out by Inspector Bore in his advisory visit to SDC. The Council would emphasise two key matters: First, it is for the LPA which considers it cannot meet its own OAN to first review whether or not that is truly the position or whether (for example) more Green Belt release is required. Second, and sequentially, if that cannot be done, it must then robustly approach neighbours to see if they can assist. This approach is not only a reasonable one, but the Council submits, the only reasonable one in circumstances such as the present. Of course, by that time, the Local Plan had already been submitted for examination, and the DtC ceased so far as testing it for the Council’s plan is concerned. It follows, applying the persuasive logic of the inspector, that SDC were simply in no proper position to make a DtC request prior to the submission of the Council’s Local Plan. Doubtless, SDC realised that position and that informed their approach. It was not, in those circumstances, for TMBC to attempt to tell SDC how to approach their own plan making process when TMBC was not seeking co-operation in relation to its needs (having decided to make the difficult choices necessary to meet them). This approach is consistent with NPPF 2012 para 179 and PPG ID: 9-003-20140306 advising that authorities should work together *“to meet development requirements which cannot wholly be met within their own areas . . .”* (emphasis supplied) and *“explore all available options for delivering the planning strategy in their own area”*. Whilst the 2019 PPG is not before the examination, that version of the PPG also supports the advice given by Inspector Bore (see paragraph 34 of the *Sevenoaks* judgment).
39. It is also consistent with the PAS document: ‘Ten key principles for owning your housing

number - finding your objectively assessed needs' (April 2013) which was referred to during the Hearing sessions, which advises that:

"It is entirely inappropriate to ask your neighbours to accommodate housing on land with the same capacity constraints or environmental designations that you have dismissed."

40. Here, one of the obvious (and in reality insuperable) difficulties facing SDC in any DtC discussions was precisely the one Inspector Bore identified: They were *choosing* to place additional restrictions on the operation of the Exceptional Circumstances test. In particular they imposed an additional restriction that such release *could not occur* without there being demonstrable and significant infrastructure benefits from the release. As Inspector Bore noted, that was not justifiable. It is obvious it would have been given short shrift by any neighbouring authority asked to meet an "unmet" need arising as a result; nor would such an approach have been likely to be found sound applying the NPPF 2019 §35. Moreover, that is what actually happened at the SDC hearing sessions, where TMBC made clear observations on the SDC approach, as highlighted by the sections of the TMBC hearing statement Mr Justice Dove set out in his judgment (above).

41. It is evident from the notes of the PINS Advisory Visit to Sevenoaks on 6 February 2019 **[SDC ED42C]** that SDC's concept of exceptional circumstances – which has generated unmet housing need – is narrowly drawn to circumstances where development would only enable significant infrastructure to be delivered that would benefit the existing community, such as a hospital or a school. Delivering housing on its own, in SDC's view, would not count as an exceptional circumstance. Jonathan Bore, the Planning Inspector who visited SDC stated in his notes:

"The Council's position, which reflects a local political promise, has been a significant factor in limiting the number of sites that could be brought forward for housing. Other sites do exist but they don't meet this self-imposed requirement."
(Emphasis supplied)

42. As we have highlighted above, this approach to exceptional circumstance has not been examined and found sound. It should be noted, as restated in the **[Keep Bourne End Green]** High Court judgement (see Appendix C), that general planning needs, for

example general housing, are not excluded from amounting to exceptional circumstances. It is not the approach the Plan adopts. The Council considers that approach is probably not sound. In that context, it is worth noting that Sevenoaks has the highest housing affordability ratio of all of the Kent districts (2019: 13.12, source: Office for National Statistics).

43. Inspector Bore, in his notes of the visit, highlights the consequence of this self-imposed requirement (which was imposed by SDC at the strategic, not site specific, level):

“I pointed out that meeting housing need and improving housing affordability are key national planning policies. Other Green Belt authorities such as Guildford and East Herts have got to grips with this by making strategic allocations on land removed from the Green Belt. They regarded meeting significant levels of housing need and other development need per se as a strategic-level exceptional circumstance, and did not make the definition of exceptional circumstances contingent on delivering infrastructure for the existing community. I said that if this Council-imposed impediment were taken away, and housing need on its own was recognised as potentially being an exceptional circumstance, there might be a more positive approach to housing delivery without harming the overall purposes of the Green Belt.”

44. It is evident from the notes of the PINS Advisory Visit in February 2019 and recent legal judgements, that had the SDC approach to exceptional circumstances been tested, there would have been robust points made against it. Accordingly, it is not possible to simply accept that unmet housing need from Sevenoaks exists either now, or during the preparation of the TMBC Local Plan. There is no sound foundation for this assumption.

Not proven

45. The “unmet need” has not been proven because the Sevenoaks Local Plan has not been found sound and adopted. Accordingly, there is a clear contrast between this situation and the situations at (for example) Luton/Central Bedfordshire and Woking/Waverley/Guildford. The examination has stopped, and the Inspector has recommended that the Plan cannot be adopted. On this basis, it is not reasonable to conclude that unmet housing need has been generated from the plan-making process in Sevenoaks because the process is far from complete. Significant weight cannot be

afforded to the content and outcomes of the Local Plan process in Sevenoaks. It is premature and unjust to simply accept that SDC is unable to meet all any of its own housing need, especially when taking into account the SDC approach and decisions that have led to this position.

46. ***Para.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.*** – This statement is not supported by the evidence, as highlighted by the chronology of engagement with SDC set out in Appendix A. The first time TMBC was formally notified of a quantified amount of unmet housing need and asked for assistance in addressing it was in April 2019, which post-dated the submission of the Plan – the point at which compliance with the Duty ceases – by more than two months. This is confirmed by the Inspector examining the SDC Local Plan **[SDC ED40 & ED44]**. Mr Justice Dove, in his judgement on the legal challenge, highlighted that the first time unmet housing need, in its broadest sense, was flagged up by SDC during DtC meetings with its neighbouring authorities was in March 2019, and even then SDC did not seek assistance to address it. Again, this post-dated the submission of the Plan.
47. There is no evidence from the published notes of the Planning Advisory Service (PAS) West Kent Statement of Common Ground Pilot Project meetings to support the statement that *‘the Council knew for a number of years.....that it was highly unlikely that SDC would be able to meet its housing requirement in full’*. The draft notes of the Pilot Project **[SDC SUP006a: DtC Appendix 1 – Neighbouring authorities]** (see Appendix A: table appendix C, pp.COE015-COE020) states at para.6.1:
- “Sevenoaks and Tunbridge Wells are both planning to meet their OAN as determined by the joint SHMA which was updated in 2017.”*
48. The Inspector examining the SDC Local Plan highlights this in her letter to the Council dated 28 October 2019 **[SDC ED40]**.
49. Mr Justice Dove, in his judgement, highlights that these draft notes were superseded in a subsequent note dated 10 April 2018 **[SDC ED42C]** (see Appendix A: table appendix D, pp.COE023-COE029). On the issue of housing the updated note from the PAS facilitator provides a summary at para.6.6:

“Each of the Councils 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.”

50. Based on this evidence, which represents the finalised view of the independent facilitator having taken into account the position of all the contributors, it is not correct or reasonable to state that the Council knew for a number of years that it was highly unlikely that SDC would be able to meet its housing requirement in full. Even in April 2018, as highlighted by the PAS facilitator’s final notes of the Pilot Project, it was still too early in their plan-making process for SDC to determine whether they could meet their housing need – any issue of “unmet need” was simply a potential one. Although only summarised at para 6.3 of the note, the “self-imposed impediment” that Inspector Bore later referred to is mentioned in describing the position of SDC.
51. ***Para.6: 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*** – There is no evidence that the Council engaged in any meaningful discussions with SDC to consider how the strategic matter of unmet housing need could be resolved because that matter was never raised by SDC with TMBC during the preparation of the TMBC Local Plan. This is highlighted by the chronology of engagement with SDC (see Appendix A) and is confirmed by the Inspector who examined the SDC Local Plan and by Mr Justice Dove in his legal judgement (see earlier paragraphs of this letter for further details).
52. As set out above, it is entirely reasonable to rely on the fact that SDC did not formally ask TMBC for help in addressing a quantified amount of unmet need during the preparation of our Plan. That is the accepted normal way of communicating matters of significant concern during plan-making. It is the first particular matter the Sevenoaks inspector identified as a criticism in her letter of 14 October 2019 (para 3). It remained a point of emphasis throughout, and, as set out above, was defended as such by the Secretary of State and accepted by Mr Justice Dove. It mirrors the importance Inspector

Bore gave to formal requests (recorded on p.3 of the SDC Inspector's letter of 28 October 2019). The DtC does not require anything more than this and the approach in your letter indicates an elevation of the DtC beyond what it legally requires. Whilst the DtC is a two-way process, it was the responsibility of SDC to raise the issue of unmet housing need arising through their plan-making with TMBC during the preparation of our Local Plan. It is not the responsibility of TMBC to tell SDC what they should be asking of us. SDC is a competent local planning authority. To impose such a requirement as a condition of compliance with the DtC goes above and beyond what is expected by the legal requirements imposed by the duty.

53. ***Para.6: 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'. We consider Tonbridge and Malling were complicit with this for having said no without any active, ongoing and constructive engagement.*** – The Council is concerned about the use of the word 'complicit' in the above. It is unfortunate and not reasonably justified by the available evidence of engagement between the neighbouring authorities during the preparation of the TMBC Local Plan (as set out above). TMBC was not involved in something morally or legally wrong, because the Council was not asked by SDC to help address a quantified amount of unmet housing need until April 2019, as confirmed by the Inspector examining the SDC Local Plan, which post- dated the preparation of our Plan by nearly three months. An independent observer, in the shape of the PAS facilitator for the West Kent Statement of Common Ground Pilot Project, concluded that as recently as April 2018 SDC was not in a position to determine whether they could meet their housing need because they had yet to complete the necessary work to make that determination. At that point in time TMBC was in the process of preparing its own Regulation 19 Plan. TMBC did not say "no" because the question was never asked during plan preparation. There was no request to actively or constructively respond to. This has been confirmed by the Inspector examining the SDC Local Plan and Mr Justice Dove in his judgement on the High Court case. Inspector Bore, in providing his advice to SDC, did not identify any shortcoming in the approach taken by TMBC or TWBC. He was clear that it was for SDC to seek to address this issue in the first instance. That approach is consistent with guidance in both the 2012 PPG (ID:9-003-20140306). (The 2019 PPG, quoted in

Sevenoaks, is to materially similar effect)

54. ***Para.7 - 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 dwellings. So, at this stage it was clear there was a likely shortfall of around 600 dwellings, and this was the best case scenario.*** – It is unreasonable to state that in the summer of 2018 it was clear there was a likely shortfall of around 600 dwellings as a best case scenario. This approach is not supported by the judgment of Mr Justice Dove (above). It would have been premature to make such an assumption at that time because it would have completely disregarded the consultation that needed to be undertaken on the Regulation 18 Plan and the possible outcomes that might have shaped the Plan as it progressed to the Reg.19 stage of preparation. The statement assumes that the consultation would not present any solutions to address what was a relatively modest shortfall of around 600 dwellings (at best). It is quite possible that the outcome of the consultation could have prompted SDC to revisit certain assumptions, such as the selection of sites and densities and views on exceptional circumstances, which could have meant that the shortfall no longer existed. New sites might have been promoted. In those circumstances it would have been inappropriate to make any assumptions on a likely shortfall or otherwise in the summer of 2018 prior to the consultation on the SDC Reg.18 Plan. In any event, this observation does not overcome the issues raised above in relation to the lack of an adequately framed formal request for assistance, the importance of which is clear from the judgment of Mr Justice Dove.
55. ***Para.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*** – This statement is wrong for the reasons already set out.
56. ***Para.8: The Council's hearing statement 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. – The reason why there is no evidence to indicate that these valid issues were actually subject to any constructive engagement is because SDC did not ask the question to prompt their consideration until after the Plan had been submitted for examination, by which point the duty had ceased to apply. The acknowledgement in your letter that, had SDC sought to make a request for assistance, these factors would have been presented to them, simply serves to underline what would have been well known to SDC and doubtless informed why they chose not to make or pursue – through senior officers, members, the Chief Executive or SDC, or otherwise – a request for assistance. That is especially true given that SDC would have recognised the “self-imposed [political] impediment” they were operating under at material times.

57. ***Para.9: - The whole paragraph*** – The Housing Delivery Study (HDS) [CD HO3] and its broad purpose has not been fairly presented in your letter. The first para. of the HDS is very clear about its overall purpose:

“The purpose of the Study is to consider the market capacity and potential pace of housing delivery within the Borough to inform the development of the emerging Local Plan.”

58. It is simply wrong and unfair to state that TMBC commissioned the Study ‘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’. This statement overlooks the broader purpose set out at the beginning of the document.
59. It is unreasonable to take the view that the HDS is further evidence that shows that the Council knew in 2017 that SDC had established unmet housing need and that they may need to seek help with it. For the reasons already set out, no-one at that point in time could state, with any confidence, that SDC had unmet housing need. At the time the HDS was being prepared SDC had yet to consult on their first Reg.18 Plan (Issues & Options - consulted upon between the 3 August and 5 October 2017) let alone the second Reg.18 Plan.
60. ***Para.11: [The whole paragraph]*** – The Council’s DtC Statement [CD SC1] is an accurate record of cross-boundary issues raised during the preparation of the Local Plan. There is no mention of unmet housing need in SDC because that issue was not

raised by SDC until after the TMBC Plan had been submitted for examination, as highlighted by the chronology of engagement with SDC (see Appendix A) and confirmed by the Inspector examining the SDC Local Plan and Mr Justice Dove in his judgement on the legal challenge (above)

61. TMBC and SDC did engage constructively, actively and on an ongoing basis during the preparation of the TMBC Plan as documented in **[CD SC1]**, the West Kent Statement of Common Ground Pilot Project and the record of engagement produced by SDC **[SDC ED42C]**. For the reasons already set out it is and was the responsibility of SDC to raise the issue of unmet housing need in Sevenoaks during the preparation of the TMBC Plan, not the Council. That is not our failing. The Council acted reasonably, well within the substantial margin of appreciation, and responsibly to cross-boundary matters that were raised during the preparation of the Plan.
62. ***Para.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.*** – This observation is predicated on an agreed, demonstrated or proven unmet need. In light of the points made above, and in particular what the response of the Council would have been had SDC continued to rely upon a political imperative to secure infrastructure before releasing any Green Belt sites, it is clear not only that SDC did not approach the Council seeking any such joint review, but that there would have been no justification for requiring the same as part of the DtC. During the hearing sessions the Council highlighted that there is no expectation or requirement in national policy that a joint Green Belt review be undertaken to demonstrate compliance with the DtC. Furthermore, evidence gathering and plan-making in Tonbridge & Malling did not trigger a need to consider a cross-boundary review. Despite the constraints in the borough, which are not too dissimilar to those in Sevenoaks, especially in the relevant HMA, the Council took

the responsible decision to propose the removal of several parcels of land from the Green Belt to help address in full the assessed need for housing and support a sustainable pattern of development. No unmet need was generated by this process so there was no need for TMBC to engage with SDC on the prospect of a joint review. The Council adopted a proportionate approach to this matter, as advocated by paragraph 158 in the NPPF (2012).

63. During plan preparation, SDC did not raise the issue of a joint review of the Green Belt with TMBC. It is their responsibility to raise that issue with TMBC if their plan-making generated a need for such an approach. That is not our failing. In fact, turning to Sevenoaks's formal responses to the Council's Regulation 18 and Regulation 19 consultations, SDC was generally supportive of the approach TMBC were taking:

"This approach is largely consistent with the national planning policy and guidance, as it applies a sequential method by using existing brownfield land within settlement confines before looking further afield. It is recognised that there is potential for TMBC to look at releasing small areas of Green Belt to accommodate further growth to meet the OAN. SDC is generally supportive of TMBC's approach to meeting the OAN of the Borough over the plan period". (SDC Regulation 18 and 19 responses dated 24.11.2016 and 19.11.2018).

64. In respect of a review of the Green Belt, the one thing that SDC has shared are the exceptional circumstances for removing land from the designation. These are clearly summarised by Inspector Bore, in his notes of the PINS Advisory Visit in February 2019 as set out above. SDC's self-imposed bar for exceptional circumstances is the principal reason why unmet housing need has been generated in Sevenoaks. The Council's approach to exceptional circumstances is not the same, as highlighted by the Green Belt Exceptional Circumstances Topic Paper **[ED10]** and our response to Examination Matter 3 questions. The Council's approach responds to national policy requiring a review to take account of the need to promote sustainable patterns of development **[NPPF 2012, para.84]** and recognises that general planning needs, for example general housing, are not excluded from amounting to exceptional circumstances, as restated by the **[Keep Bourne End Green]** High Court judgement (see Appendix C).

65. It should be noted that if the Council had applied the same narrowly focussed approach

to exceptional circumstance less, not more, land would be proposed for removal from the Green Belt in Tonbridge & Malling during plan preparation. It would have resulted in a greater amount of unmet housing need. That would be unhelpful and irresponsible given that West Kent is an expensive housing market area. It is difficult to see how, in light of those divergent approaches, consideration of a Green Belt study would have led to an agreed approach acceptable to either authority.

66. Further guidance about the better approach to requests for “unmet need” is contained in the excerpt from the PAS document: ‘Ten key principles for owning your housing number - finding your objectively assessed needs’ (April 2013) set out above. That guidance reflects national policy set out in para.182 of the **[NPFF 2012]** in respect of positively prepared plans (the Council’s emphasis):

“Positively prepared – the plan should be prepared based on a strategy which seeks to meet objectively assessed development and infrastructure requirements, including unmet requirements from neighbouring authorities where it is reasonable to do so and consistent with achieving sustainable development.”

67. The Council stands by the statement that plan-making by the two LPAs did not align closely. This is borne out by the facts. The Council published its Reg.18 Plan in September 2016, whereas SDC did not consult on its first Reg.18 Plan until August 2017. At the time SDC published its second Reg.18 Plan in July 2018, the Council was in the stages of finalising its Reg.19 Pre-Submission Plan. Furthermore, it should be noted that the short period of time between the second SDC Reg 18 plan (July 2018) and its Reg 19 plan (December 2018) facilitated the submission of the SDC plan in April 2019. For comparison the equivalent gap at TMBC was 2 years which was considered necessary to take into account feedback on the Reg 18 plan and to prepare and analyse additional evidence to address outstanding issues and inform the refinement of the Plan.
68. Lastly, but importantly, it should be noted that the Inspector examining the SDC Plan in her final report (2 March 2020) did not cite the absence of a joint Green Belt review as a reason for Sevenoaks failure to comply with the DtC. On that basis, bearing in mind that it would have been for SDC to take the necessary DtC steps to seek to secure co-operation to meet any true unmet need, consistency in decision making indicates that factor cannot reasonably be held against the Council.

69. ***Para.14: 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.***
– There is a credible reason why the issue of unmet housing need in Sevenoaks was not addressed and that is SDC did not raise the issue during plan preparation, when the DtC applies. This is borne out by the chronology of engagement between the two authorities (see Appendix A), the letters from the Inspector examining the Sevenoaks Plan and Mr Justice Dove in his judgement on the High Court challenge. If unmet housing need is being generated by a neighbouring LPA through their plan-making, it is the responsibility of that neighbouring LPA to raise the issue with the Council during plan preparation. That is not a failing of the Council. The Council can only respond to issues constructively and actively if they are clearly communicated and reasonably justified during the plan-making process.
70. ***Para.14: 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.*** – There is no reasonable basis for this conclusion on the evidence before the inspectors, as supplemented by this letter and Appendices. The Council was unable to undertake 'earlier, fuller and proactive' engagement on the issue of unmet housing need because during the preparation of the TMBC Local Plan the issue was not raised by SDC. Further, given the significant differences of approach to exceptional circumstances for making changes to the Green Belt – which has given rise to the unmet need in Sevenoaks – it is not possible to say with any confidence that 'earlier, fuller and proactive' engagement would have been much more likely to result in an effective strategy for meeting SDC's need.
71. Taking account of recent High Court judgements including **[Compton]** and **[Keep Bourne End Green]** and being mindful of the comments of Inspector Bore following the PINS Advisory Visit to SDC in February 2019, the only reasonable and fair way an effective strategy for meeting SDC's need could be achieved would be for SDC to review

and remove its self-imposed impediment related to the strategic justification for making changes to the Green Belt, in line with the approach adopted by TMBC. The Council recognises that this is a matter for the SDC Plan and not the TMBC Plan.

72. ***Para.15: 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.*** – For the reasons set out above the existence of agreed, demonstrated or proven unmet housing need (in any degree) has not been known for some time. It was only communicated to the Council in April 2019, as highlighted by the chronology of engagement with SDC (see Appendix A) and confirmed by the Inspector examining the SDC Local Plan. Unmet need would have been considered if it had been clearly communicated by SDC to the Council during the preparation of the TMBC Plan. It was not, as highlighted by Mr Justice Dove in his judgement on the High Court challenge in respect of the SDC Plan.
73. Had the issue been formally raised, then in the first instance, the Council would have looked at the reasons that had generated the level of unmet need, in particular the exceptional circumstances for making changes to the Green Belt boundaries. As highlighted earlier in this letter, the narrowly drawn circumstances imposed by SDC, which discounted addressing general planning needs such as housing, are simply not consistent with national policy and recent High Court judgements including **[Compton]** and **[Keep Bourne End Green]**. They are certainly not consistent with the approach taken by TMBC which has allowed the submitted Plan to address in full the assessed need for housing in a way that will deliver a sustainable pattern of development. In any event, the exceptional circumstances imposed by SDC have not been proven and found sound, which means it is unreasonable to give significant weight to them and the resultant outcomes.
74. ***Para 16: Turning to the matter of the Memorandums of Understanding (MoU's) that have been submitted. 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.*** – The Council disagrees with this approach. The relevance to the DtC of these MoU in their positive form can be tested by considering whether they (or similar documents) would have been taken

into account by the Inspector's had they raised adverse DtC issues. The purpose of the Memorandums of Understanding (MoUs) is to complement the Duty to Cooperate Statement [CD SC1], to demonstrate clear and unequivocal evidence of whether neighbouring authorities and Kent County Council (KCC) considered the Council had sufficiently engaged with them to meet the Duty during plan preparation. They are consistent with the representations SDC made to the Local Plan.

75. The positive approach the Council took to meeting the DtC is demonstrated by signed MoUs with all neighbouring authorities as well as KCC. They provide the untainted views of each neighbouring authority and were purposefully drafted to be short and precise documents that go straight to the heart of the matter, avoiding unnecessary text. They do not contain detailed information about engagement with SDC (or other authorities) because this is not their intention. Such detail is set out in the Council's DtC Statement and Hearing submissions.
76. The MOUs were drafted in accordance with the NPPF 2012, in particular para. 181 which expects LPAs to demonstrate evidence of effective cooperation. Para. 181 directly recommends the use of MOU's which are presented as evidence of an agreed position. In this instance, the agreed positions between the Council and all neighbouring authorities and KCC is that the Council had indeed, engaged constructively, actively and on an ongoing basis to meet the Duty during plan preparation. This simply serves to underscore why any remaining issue about "unmet need" – the Council says there is none – is simply a matter of soundness rather than a DtC issue.
77. The fact that they were signed and published after the submission date of the Local Plan is not material. The MoUs are a record of conformity with a process (the DtC) during plan preparation. National policy does not state that such evidence must be finalised and signed prior to submission.
78. The Council therefore considers the MOUs to be helpful, effective evidence that clearly and succinctly demonstrates compliance with the Duty during plan preparation.
79. ***Para.17: 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 ground. 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. – It is unreasonable to conclude from the PAS facilitator’s note of the West Kent Statement of Common Ground Pilot Project that unmet housing need in SDC had been clearly and reasonably identified and that point in time (April 2018) and that the Council had been asked to help address it. This is evident from para. 6.1 in the facilitator’s notes dated 10 April 2018 **[SDC ED42C - the Council’s emphasis]**:

“6.1 During the short lifespan of this pilot project there have been several changes both to the policy background, for example the revised draft of the NPPF issued for consultation on 5 March 2018 and to the emerging evidence base which will support the three Local Plans. Consequently the three Councils have not been in a position to identify firm figures for unmet need or to have any meaningful discussion on this cross boundary issue.”

80. The PAS facilitator quite rightly observed that at that point in time (April 2018) it would have been premature to state whether SDC’s plan-making process would generate unmet housing need because additional work pertinent to that decision still needed to be completed (the Council’s emphasis):

“6.6 Each of the Councils 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.

81. The Inspector examining the SDC Plan referenced these extracts in her letter to SDC dated 13 December 2019 **[SDC ED44 – see para.21]** – see Appendix D. The Inspector concluded:

“21...As such, it is apparent that, at that time, the three Councils were not aware of the extent of any unmet need.”

82. It was not until April 2019 that SDC identified the amount of unmet housing need and asked TMBC for assistance in addressing it, as highlighted by the chronology of engagement with SDC (see Appendix A) and confirmed by the Inspector examining the Sevenoaks Plan. This post-dated the submission of the TMBC Plan – the point in time

when plan preparation ends, and the Duty ceases to apply – by nearly three months.

SoS Intervention

83. In light of the issues raised in the Overarching Points section of this letter, and the view expressed in your letter that it is highly likely your final view will be that the Plan fails the DtC, the Council will be inviting the Secretary of State to use his powers of intervention to review and assess whether the DtC has, in fact, been complied with in this case. We will forward a copy of this letter for your information in due course.

Conclusions

84. At the heart of planning is a plan-led system. This is the first of the core planning principles in the [NPPF 2012, para.17]. Whilst the Government is currently considering many reforms to the planning system, as set out in the Planning White Paper, a plan-led approach remains. The importance of proceeding with the adoption of emerging local plans has been underscored by the WMS of 19 January 2021. The Council has always been mindful of this, which is why the Plan was prepared in a timely fashion and submitted for examination in January 2019, to ensure this approach can be maintained in the borough.
85. The Council therefore considers it imperative to have an up-to-date Local Plan in place and pursue a plan-led process as quickly as possible, giving certainty for residents and businesses.
86. This is why the Council has invested considerable resources into the preparation of this Plan over many years, to ensure a timely process to adoption, so that Tonbridge & Malling can embrace and benefit from a plan-led system and effectively manage development once again. The Council's current adopted Plan (Local Development Framework) has a time horizon of 2021 and therefore we are acutely aware that, in the event of this Plan not being found sound and adopted, there would, in the short to medium term, be a local policy vacuum which the Council naturally wants to avoid. Unfortunately, this would mean that many important planning decisions affecting local communities risk not being plan-led in their determination.
87. A plan-led system can deliver the right homes in the right places across the borough as

well as creating employment opportunities and delivering much needed infrastructure, a key element of the Plan. Without an up-to-date Plan, including changes to the Green Belt boundaries, a balanced strategy of housing delivery across the two Housing Market Areas, providing homes where the needs are generated, will not be achieved. That is not a desirable outcome.

88. The Council considers the Plan is realistically deliverable over its period, that positively addresses assessed needs in full in a sustainable pattern whilst safeguarding important assets. This is what we have done, despite the many constraints in the borough.
89. This is not just a positive, effective Plan but one that is succinct, clear, accessible and customer focussed, aligning with the tenor of the White Paper proposals in that regard.
90. The Council is deeply concerned that in the event the Plan is withdrawn it will mean that Tonbridge & Malling will have to endure a lengthy period without a plan-led system locally, and the uncertainties this presents, but will also find it challenging to achieve the Government's repeatedly stated and clear expectation of complete coverage of up-to-date Local Plans across England by December 2023.
91. The Council considers that it is unreasonable to conclude that it has failed to comply with the DtC for the reasons set out above. Not only has the issue of unmet housing need in SDC not been agreed, demonstrated or proven, but the timeline of engagement clearly demonstrates that SDC did not communicate the quantity of unmet need and ask for assistance from TMBC to address it until several weeks after the TMBC Plan had been submitted for examination; nor did they seek to agree a mechanism for doing so. This is not just the view of the Council but the view of the Inspector examining the SDC Plan and Mr Justice Dove, in his judgement on the High Court challenge. The Council's approach to this issue is wholly consistent with the PINS advice given to SDC by Inspector Bore. The responsibility for communicating an issue of unmet housing need in a timely fashion during plan preparation lies with the authority where that issue arises. That is not a failing of the Council, who prepared a positive Plan that met in full the assessed need for housing, despite facing quite similar constraints to SDC.
92. Given this position, the Council respectfully asks you to review your provisional conclusions on compliance with the DtC and reconvene the examination so that there is a reasonable prospect of TMBC enjoying an up-to-date plan-led system again in the

near future and certainly before the Government's deadline of December 2023.

Yours sincerely,

A handwritten signature in black ink that reads "Ian Bailey". The signature is written in a cursive style with a long, sweeping underline.

Ian Bailey
Planning Policy Manager
Tonbridge and Malling Borough Council

Direct line: 01732 876061