

TONBRIDGE & MALLING BOROUGH COUNCIL
PLANNING and TRANSPORTATION ADVISORY BOARD

02 March 2021

Report of the Director of Planning, Housing and Environmental Health

Part 1- Public

Matters for Recommendation to Cabinet - Non-Key Decision (Decision may be taken by the Cabinet Member)

1 LOCAL PLAN UPDATE

The purpose of this report is to provide Board Members with an update on the Local Plan process since the last update in July 2020 and set out the next steps. Members are requested to endorse the response sent to the Local Plan Inspectors on 29th January 2021. This report also sets out the latest position with regard to the Council's 5 Year Housing Land Supply, the outcome of the latest Housing Delivery Test results and the implications for decision making.

1.1 Local Plan Progress Since July 2020

1.1.1 Since the last update to this Board in July last year we have prepared for and held the opening three days of the Examination Hearings in October, using virtual technology for the first time; had the remaining sessions put on hold by our Local Plan Inspectors while they considered some concerns that they had with legal compliance; received a detailed Inspector's letter on 15th December setting out those concerns; and prepared a robust response, which was sent on the 29th January. Regular updates on the Local Plan have been sent to all Councillors throughout this period by email.

The Hearing Sessions – 6th to 8th October 2020

1.1.2 After the Inspectors postponed the Hearing sessions scheduled to start in May 2020 due to the restrictions imposed by the Covid-19 pandemic, there was some uncertainty as to whether the sessions would be able to take place with social distancing or held virtually. New dates were subsequently agreed for October and November and for the Hearing to be held virtually using Microsoft Teams and livestreamed on YouTube.

1.1.3 The first three days of the Hearing addressed matters of legal compliance, including the Duty to Cooperate, Sustainability Appraisal and Habitats Regulations Assessment.

- 1.1.4 After the close of proceedings on the third day, statements for the next sessions due to commence on 3rd November were finalised and uploaded to the Examination pages of the website. However on the 22nd October the Inspectors contacted the Council postponing the remaining sessions.

The Inspector's Letter of 15th December 2020

- 1.1.5 The Inspector's letter setting out their concerns with legal compliance was received on the 15th December, 8 weeks after the examination was paused. The letter explained that based on the evidence before them the Inspectors had reached a provisional decision that Local Plan had failed the Duty to Cooperate in respect of meeting unmet housing need in Sevenoaks District and invited the Council to respond before confirming their final decision. No other matters were raised in the letter.
- 1.1.6 The Council response, which challenges the Inspector's initial findings and invites them to reconsider, was prepared during January and sent to the Inspectors on the 29th. A copy of the response was circulated to all Councillors at the time for information. Board Members are requested to endorse the response. At the time of writing we are waiting for the Inspectors to respond and either confirm or amend their provisional decision regarding the Duty to Cooperate.
- 1.1.7 All relevant documentation has been uploaded to the Examination pages of the Council's website and regular updates have been provided to all Councillors by email.

1.2 Local Plan – Next Steps

- 1.2.1 There are a number of different scenarios going forward:

Local Plan Inspectors Final Decision

- 1.2.2 The Inspectors have advised that they are not able at present to give a timescale for responding to the Council as there is a lot of information, which will need to be carefully considered prior to replying. This could take several weeks.
- 1.2.3 If the Inspectors revise their decision to accept that the Duty to Cooperate was satisfied then there is a reasonable expectation that the hearing sessions postponed in November can resume at the earliest practical opportunity and the process continues. In this scenario and assuming Hearing sessions can resume in the Spring, the main consequence will be a 6 month delay to the timetable.
- 1.2.4 However, if they are minded to maintain their provisional decision that there was a failure to meet the Duty, their recommendation will be that the submitted Local Plan is withdrawn since the Duty to Cooperate cannot be rectified retrospectively. This will present further options, to challenge the Inspector's decision or withdraw the Local Plan and resubmit.

Challenging the Inspector's Decision

- 1.2.5 There are two routes for challenging the Inspector's final decision, requesting the Secretary of State to intervene and take an independent review of the Inspector's judgement in interpreting the Duty to Cooperate or a Judicial Review of the process undertaken.
- 1.2.6 Section 21(4) of the Planning and Compulsory Purchase Act 2004 allows the Secretary of State to intervene in the plan making process:
- 'Section 21 - Intervention by Secretary of State
- (4) At any time before a development plan document is adopted by a local planning authority the Secretary of State may direct that the document (or any part of it) is submitted to him for his approval.'
- 1.2.7 Since the Council's response focuses on the Inspector's judgement in interpreting the Duty to Cooperate in respect of the matter of addressing unmet need in Sevenoaks District, it is felt that this is the more appropriate route of challenge. Intervention would be at the Secretary of State's discretion and there is no timescale set out in the Act for when the Secretary would have to decide whether to intervene, but there are examples where intervention in the Local Plan process has been used with some success (e.g. Maldon and Central Beds).
- 1.2.8 In the event that the Inspectors decide not to amend their provisional decision and in order to minimise further potential delays to adopting the Local Plan, the Leader of the Council wrote to the Secretary of State on the 2nd February requesting that he use his powers to intervene should this be the outcome.
- 1.2.9 A joint letter of support for this intervention from Tom Tugendhat MP and Tracey Crouch MP was also sent to the Secretary of State on the same day.
- 1.2.10 The Secretary of State is unlikely to decide whether to intervene until the Inspectors have issued their final decision.
- 1.2.11 Should the Inspector's final decision be unchanged, and the Secretary of State decides not intervene the Council may still consider the Judicial Review route of challenge, which would be more focused on the process that the Inspectors followed to reach their decision rather than their judgement.

Resubmitting the Local Plan

- 1.2.12 Should all of the options described above nevertheless result in a final recommendation from the Planning Inspectorate or Secretary of State to withdraw the Local Plan, the Council will have to effectively start the process again.
- 1.2.13 This would entail adjusting the base date and plan period (this is currently 2011-2031) and planning for a new housing need based on the Standard Methodology of 843 new homes per year (compared to 696 in the submitted Plan). The

development strategy in the submitted Local Plan will be retained on the basis that this is considered to be a deliverable strategy already agreed by Members and that significant work has been undertaken to progress sites within that strategy. Additional sites will have to be considered in order to address the higher housing need. The evidence base would also have to be refreshed and updated accordingly. Some parts of the Local Plan evidence base are already in the process of being updated, for example, the Infrastructure Delivery Plan or IDP, which will assist with the development management process in advance of the Local Plan being adopted. An updated version of the IDP will be brought back to this Board as part of further Local Plan updates in due course.

- 1.2.14 The process would be largely the same as for the current Local Plan, although the latest version of the National Planning Policy Framework (NPPF) would be used instead of the 2012 version. Members would be fully involved as before including approving the Local Plan for the purposes of public consultation and ultimately agreeing a version for submission to the Secretary of State. Public consultations would have to be held as required by Regulation 18 and 19 of the relevant Regulations and officers would seek to utilise a wide range of consultation methods, including those virtual approaches that have become more prevalent during the COVID-19 pandemic.
- 1.2.15 Members may recall that the extraordinary meeting of the Board in September considered the Government's Planning White Paper and other planning reforms that were subject to consultations prior to a major review of the planning system. The fundamental reforms to the planning system proposed by the White Paper will take some time to be finalised and for primary and secondary legislation to be passed. Some commentators have suggested this could take up to 3 years to be fully implemented. Consequently, preparation of a new Local Plan would be based on the current system despite the fact some elements, such as the Duty to Cooperate, are expected to be replaced in due course.
- 1.2.16 The Government in a recent Written Ministerial Statement made clear that it expects up to date Local Plans to be in place by the end of 2023. This would be a challenging timescale particularly as it is uncertain if and when we may be starting the process again.
- 1.2.17 While the Council have to wait for the decision of the Inspectors and whether the Secretary of State will intervene before we know whether we are starting again, officers have begun the task of assessing the process, timescales, key dates and resources that would be required to adopt a new Local Plan at the earliest opportunity. This is a precautionary measure to minimise any further delay.
- 1.2.18 Withdrawal and starting again would be the least desirable outcome and result in the longest delay before a new Local Plan could be adopted.

1.3 Housing Land Supply Position

1.3.1 This part of the report provides an update on the Council's Housing Land Supply (HLS) position. The update reflects the position as at 31 March 2020. This is consistent with previous assessments.

1.3.2 The key factors that measure the Council's HLS performance remain the same from last year, namely the Government's standard method for assessing housing need and the Housing Delivery Test results.

The Standard Methodology

1.3.3 According to the Government's standard method, the assessment of housing need for Tonbridge & Malling is 843 dwellings per annum (dpa). This is based upon the household projections published by the Office for National Statistics (ONS) and takes account of factors such as the median housing affordability ratio for the borough. The figure of 843 dpa is capped at 40% above the annual average growth in households for the 10-year period 2020-2030.

1.3.4 Applying a 'Buffer' to the HLS

1.3.5 In the calculation of the five-year HLS position, the Council is required to apply a 5% buffer to the housing need generated by the standard method. This is to 'ensure choice and competition in the market for land', as made clear in the 'Maintaining supply and delivery' section of the Government's NPPF.

Housing Delivery Test (HDT)

1.3.6 The HDT is an annual measurement of housing delivery. The latest HDT period covers the previous three financial years: 2017/18, 2018/19 and 2019/20. Given that the Council's adopted Local Development Framework is more than five years old, the measure of performance is a combination of the annual average household growth generated by the projections (for 2017/18) and the housing need generated by the standard method (for 2018/19 and 2019/20).

1.3.7 The HDT results for 2020 were published on 19 January 2021. The result for Tonbridge & Malling was 91%. This means that the supply of housing in Tonbridge & Malling across the three-year period of 2017-2020 fell only marginally short of the Government's expectations. It should be noted that the Government did take account of the impact of COVID-19 on the sector at the end of 2019/20 by discounting the housing need figure by one month to reflect the impact of the national lockdown in March last year.

1.3.8 As a consequence of achieving a HDT result that falls below the 95% threshold set by Government the Council needs to prepare a HDT Action Plan. According to the Government's planning practice guidance, the Action Plan needs to identify the reasons for under-delivery, explore ways to reduce the risk of further under-delivery and set out measures the authority intends to take to improve levels of

delivery. This is something that officers are already discussing and researching, and an update will be reported to this Board at the meeting in June.

Deliverability – A Planning Judgement

- 1.3.9 Since the Council published the last HLS position, the Secretary of State (SoS) made an important concession in respect of what can be defined as deliverable housing, i.e., housing that is likely to be developed within the next five years. The concession was made in respect of High Court case known as ‘The Willows’. The concession states (my emphasis in **bold**):
- 1.3.10 He (the SoS) concedes that he erred in his interpretation of the definition of deliverable within the glossary of the National Planning Policy Framework (“NPPF”) as a ‘closed list’. It is not. The proper interpretation of the definition is that any site which can be shown to be **‘available now, offer a suitable location for development now, and be achievable with a realistic prospect that housing will be delivered on the site within five years’ will meet the definition**; and that the examples given in categories (a) and (b) are not exhaustive of all the categories of site which are capable of meeting that definition. **Whether a site does or does not meet the definition is a matter of planning judgment on the evidence available.**
- 1.3.11 This is helpful because prior to this concession a mechanistic approach was taken, as highlighted by recent planning appeals. The mechanistic approach simply looked at whether or not sites enjoyed detail permissions, including full permissions or outline permission with reserved matters. There was no scope to apply a judgement on whether there was a reasonable prospect of housing coming forward in the next five years. The concession has changed this.
- 1.3.12 The Council is now able to apply planning judgement on what is deliverable. This has provided scope to consider and include housing numbers that were previously excluded. For example, officers are confident that the remainder of Kings Hill phase 3 will be delivered within the next five years. This is based upon the existing reserved matters that are being implemented, reserved matters that have been submitted and house builder’s intentions for the submission of further reserved matters to cover the remainder on the outline permission. Previously, those parts of the site not covered by reserved matters permissions were excluded from the calculation.
- 1.3.13 In light of the SoS concession, it is considered that some of the allocations in the Council’s submitted Local Plan can form part of the five-year HLS position. In particular, those sites outside of the Green Belt. These sites have been assessed, sustainability appraised and considered in the context of other evidence as part of the preparation of the Local Plan. The Council has supported these allocations and is confident about the supply during the plan-period. Many of these are expected to deliver some if not all the homes allocated for the site in the Plan within the next five years. Given this available evidence, it is a

reasonable judgement that these sites are deliverable because they are available now, offer a suitable location for development now, and be achievable with a realistic prospect that housing will be delivered on the sites within five years.

- 1.3.14 The Winterfield Lane public inquiry held in December 2020 was the first opportunity to introduce these sites into the five-year housing land supply calculation. At the time of writing this report the Inspector's decision and report is still awaited. As the inclusion of these sites is a matter of planning judgement, the Inspector's conclusions as to whether some or all of the sites can reasonably be included in the HLS will be an important factor before finalising the update to the HLS.

The Latest Five-Year HLS Position

- 1.3.15 The five-year HLS position for the year ending 31.3.20 without including any of the unconstrained sites contained in the Local Plan is 2.93 years, which is slightly higher than the 2.6 years supply in the previous version for the year to 31.3.19. **Annex 1** sets out the calculation in more detail.
- 1.3.16 The final position will not be confirmed until the Winterfield Lane Inspector's decision is received. If the Inspector's report accepts the planning judgement for the inclusion of unconstrained sites from the Local Plan, this could result in a higher level of supply in the published version.
- 1.3.17 In applying the five-year HLS position for decision making purposes, the starting point is the NPPF (2019), in particular para.11. For local planning authorities that are unable to demonstrate a five-year supply of deliverable housing sites – as is the case for Tonbridge & Malling – the presumption in favour of sustainable development applies when taking decisions on planning applications (para.11 d in the NPPF).
- 1.3.18 This means granting permission unless i) the application of policies in the NPPF that protect areas or assets of particular importance provides a clear reason for refusing the development proposed; or ii) any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole. A footnote is provided for i) highlighting the relevant policies in the Framework, e.g. Areas of Outstanding Natural Beauty.
- 1.3.19 The application of the presumption has the effect of limiting the weight that can be given in decision-taking to policies in the Council's adopted Local Development Framework that have a bearing on the supply of land for development, in particular those policies that constrain where and how much development can take place. Examples include the policies relating to the settlements in the borough and development in the countryside, i.e., Policies CP11 – 14 in the Council's adopted Core Strategy.

- 1.3.20 The application of the presumption does not limit the weight that can be given to other policies in the Council's Local Development Framework, although the weight that should be afforded to them in decision-taking is determined by their currency and degree of conformity with the Government's NPPF.
- 1.3.21 It is important to bear in mind that the NPPF, which is a key material consideration in decision-taking, does include a suite of policies including those that protect areas of assets of particular importance, as highlighted above. Furthermore, a recent Court of Appeal judgement involving land promoter Gladman made it clear that when making a complete assessment under paragraph 11d) ii of the NPPF, in which "adverse impacts" and "benefits" are fully weighed and considered, relevant policies in the development plan should be taken into account. This section, as observed by the judge, should be read in the broad context of the NPPF's commitment to the "plan-led" system and its support for "sustainable development".

1.4 Local Plan Progress in Neighbouring Authorities

- 1.4.1 Further to previous Local Plan Update reports to this Board, the following sections provide a review of neighbouring Local Authorities progress with their Local Plans.

Sevenoaks

- 1.4.2 In July 2020 this Board was advised that Sevenoaks District Council had challenged their Inspector's final decision that the Local Plan should be withdrawn on the grounds that it failed the Duty to Cooperate and that the High Court had ruled on 2nd June that there were sufficient grounds for the Judicial Review to be heard. The Judicial Review was subsequently heard by Mr Justice Dove at the High Court on 2 and 3 September 2020. The Court published its decision on Friday 13 November 2020, which found that "there is no substance in any of the grounds upon which this claim is advanced" and therefore SDC's case was dismissed.
- 1.4.3 In early December 2020, SDC lodged an application to appeal against the Judicial Review ruling. The District Council is currently waiting for the High Court to consider their application. The Local Plan is effectively on hold while these enquiries are ongoing.

Tunbridge Wells

- 1.4.4 The Tunbridge Wells Local Plan was approved for the purposes of Regulation 19 consultation and submission to the Secretary of State at an extraordinary meeting of the Full Council on the 3rd February 2021.
- 1.4.5 The consultation is expected to take place for 8 weeks between 26th March and 25th May. As this consultation will take place between meetings of this Board the intention is to prepare an officer level response by the deadline under delegation to the Director of Planning, Housing and Environmental Services in consultation

with the Portfolio Holder. It is anticipated that the Local Plan will then be submitted to the Secretary of State during July 2021.

- 1.4.6 As required by the latest version of the NPPF, Tunbridge Wells Borough Council will be seeking a Statement of Common Ground to accompany their Local Plan when it is submitted to the Secretary of State.
- 1.4.7 The latest Local Development Scheme (LDS) or timetable updated in June 2020 suggests the Local Plan will be at Examination in November 2021 and Adoption in June 2022.

Maidstone

- 1.4.8 The Maidstone Local Plan was subject to a second Regulation 18 consultation between 1st December 2020 and 8th January 2021. Regulation 19 consultations are expected to take place in June. Maidstone Borough Council, like Tunbridge Wells, will also be seeking a Statement of Common Ground to accompany their Local Plan when submitted.
- 1.4.9 The latest LDS updated in September 2020 anticipates submission of the Local Plan to the Secretary of State in December 2021; Examination during May/June 2022; and adoption in October 2022.

The London Plan

- 1.4.10 The Secretary of State wrote to the Mayor confirming that he is content for the Mayor's new London Plan to be formally published, with no further changes on 29th January 2021.
- 1.4.11 The Mayor will now progress to formally publish the new London Plan. This will take a few weeks, in order to allow for statutory notifications to be issued alongside other administrative tasks.

Gravesham

- 1.4.12 Gravesham is preparing a partial review of its Local Plan Core Strategy, Site Allocations and a Development Management Policies Document. A Regulation 18 Stage 2 ran for six weeks from 23 October until 31 December 2020. This followed on from the Stage 1 consultation, which closed on 11 July 2018. Once adopted, these documents will form part of the Development Plan and replace some of the policies in the adopted Local Plan Core Strategy and the remaining saved policies in the Gravesham Local Plan First Review.
- 1.4.13 The latest version of the LDS for the Gravesham Local Plan published in October 2019 suggests submission to the Secretary of State took place in February; Examination in July 2021 and Adoption in December 2021, but this may in the process of being updated.

Medway

- 1.4.14 The latest version of the Medway Local Plan LDS (August 2020) suggests Regulation 19 consultation will take place this Spring; submission to the Secretary of State in December 2021; and Adoption December 2022.

Kent Minerals and Waste Local Plan

- 1.4.15 The early partial review of the Kent Minerals and Waste Local Plan was adopted by KCC in September 2020.

1.5 Summary and Conclusions

- 1.5.1 This information report provides an update on progress with the Local Plan and sets out the various pathways to adoption.
- 1.5.2 The report also provides an update in terms of the Council's Housing Land Supply position as of 31st March 2020, the recent results of the Housing Delivery Test and the implications for decision making. The updated HLS for the year ending 31.3.20 can be found at **Annex 1** to this report. This is not the final version, which will be published following receipt of the Winterfield Lane Inspector's report in due course.
- 1.5.3 The last section of the report provides a brief review of neighbouring authorities Local Plan progress.

1.6 Legal Implications

- 1.6.1 There are no legal implications arising directly from this information report, however the contents summarise the Inspector's concerns regarding the preparation of the Local Plan, specifically in respect of legal compliance with the Duty to Cooperate, which the Council is challenging.

1.7 Financial and Value for Money Considerations

- 1.7.1 The delay in adopting the Local Plan will have financial implications both in terms of the extension to the plan making process and also as a result of the Council not having an up-to-date development plan for the purposes of determining planning applications. This increases the risk of appeals and the associated costs.
- 1.7.2 Recent Government proposals to amend the New Homes Bonus process could potentially have financial implications for the Council in the event of further delays to adopting an up-to-date Plan.

1.8 Risk Assessment

- 1.8.1 Any delay in the Local Plan process carries the risk of the Council's adopted policies becoming more out of date and extends the period of time before the Council can re-establish a 5-year housing land supply.

1.9 Recommendation

- 1.9.1 That the contents of the report be **NOTED** and that the response to the Local Plan Inspectors sent on 29th January 2021, previously circulated to all Council Members and available on the Council's website at [Examination Documents - Tonbridge and Malling Borough Council \(tmbc.gov.uk\)](https://www.tmbc.gov.uk) (ED69) be **ENDORSED**.

The Director of Planning, Housing and Environmental Services confirms that the proposals contained in the recommendation(s), if approved, will fall within the Council's Budget and Policy Framework.

Background papers:

Nil

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