Neutral Citation Number: [2020] EWHC 3054 (Admin)

Case No: CO/1417/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/11/2020

Before :

MR JUSTICE DOVE

- -

Between :

Sevenoaks District Court	**Claimant**
- and -	
Secretary of State for Housing Communities and Local Government	**Defendant**

- -
- -

Ms Saira Kabir Sheikh QC and Charles Merrett (instructed by **Sharpe Pritchard**) for the **Claimant**
Richard Moules (instructed by **GLD**) for the **Defendant**

Hearing dates: Thursday 3rd September 2020

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Approved Judgment

Judgment Approved by the court for handing down.

Mr Justice Dove :

Introduction

1. The claimant is a local planning authority who prepared the Sevenoaks District Local Plan ("the SDLP") for its administrative area. The claimant challenges the decision of the Inspector appointed by the defendant to undertake the examination of the SDLP who concluded that the claimant had failed to comply with the duty to cooperate set out in section 33A of the Planning and Compulsory Purchase Act 2004. The claim is advanced by the claimant on four grounds. The first ground is that the Inspector erred in law in failing to apply a margin of appreciation when considering the test under section 33A of the 2004 Act. Ground 2 is the contention that the Inspector failed to correctly interpret and apply the duty to cooperate, and in reality conflated that duty with the requirement that a plan be sound. Ground 3 is that the Inspector failed to have regard to material considerations and in particular to consider the material evidence that was placed before her. Finally, Ground 4 is a challenge based on the contention that the Inspector's reasons were inadequate.

2. This judgment will firstly set out the facts in relation to the case, secondly, rehearse the relevant legal framework and, thirdly, deal with the submissions advanced and the conclusions reached in relation to the four grounds on which this application is advanced.

The facts

3. The claimant's administrative area contains a significant element of Green Belt as well as areas which are designated as an Area of Outstanding Natural Beauty. Its district forms part of the West Kent Housing Market Area (the "HMA") and has further functional and economic relationships with London boroughs to the north of its administrative area.

4. The claimant began the preparation of its proposed SDLP in 2015 and at that time the evidence for it started to be collected. In September 2015 a Joint Strategic Housing Market Assessment ("SHMA") was published, having been prepared jointly for the HMA by the claimant together with the other local planning authorities in the HMA: Tunbridge Wells and Tonbridge and Malling Borough Councils. Other technical work in relation to the assessment of the Green Belt and provision for gypsies and travellers was prepared by the claimant. The claimant undertook two rounds of consultation under the provisions of Regulation 18 of the Town and Country Planning (Local Planning) (England) Regulations 2012, the first in relation to issues and options in August 2017, and then a further consultation on the draft SDLP from July through to September 2018. In a witness statement before the court to explain the factual background to the preparation of the SDLP, James Gleave, who is the Strategic Planning Manager for the claimant, explains that at the Regulation 18 stage of plan preparation the extent of any unmet housing need as a result of the SDLP's proposals was unknown "because views were still being gathered on what the Plan ought to contain and the council's 'call for sites' process remained open until October 2018". Thus, Mr Gleave observes, that it was not clear what proportion of unmet housing need might arise in the claimant's district.

5. Between 8 December 2018 and 3 February 2019 the claimant undertook the consultation required by Regulation 19 of the 2012 Regulations on the SDLP in its proposed submission version. The proposed submission version identified that based upon the defendant's standard methodology the annualised housing need for the claimant's district was 698 dwellings, giving rise to a total of 13,960 dwellings over the 20-year plan period from 2015 to 2035. The housing land supply which was proposed in the SDLP was 10,568 dwellings or approximately 75% of the total housing need derived pursuant to the standard methodology. The plan was submitted for examination on the 30 April 2019.

6. For the purposes of the examination the claimant prepared a Duty to Cooperate Statement ("the Statement") setting out its case and the evidence in support of the conclusion that the duty to cooperate had been satisfied in the preparation of the SDLP. The Statement presents the evidence in a number of themes. Firstly, it alludes to the preparation of a joint evidence base, referring to the SHMA set out above and other studies and plans which were jointly prepared with relevant authorities. Secondly, the Statement refers to discussions which had occurred with a wide variety of statutory bodies ranging from Natural England and the Environment Agency to Highways England and Network Rail. The Statement then turns to discussions with neighbouring authorities. Reference is made to the Kent Planning Officer's Group as a forum (complemented by the Kent Planning Policy Forum) which meet regularly to discuss common issues in relation to plan making and allied concerns. Annexed to the statement are the notes of meetings with other public bodies, and in particular neighbouring authorities, which had occurred since the outset of preparation of the SDLP in 2015. The statement then records the statements of common ground which had been signed with a wide variety of local authorities and public bodies in respect of the various cross-boundary strategic issues which were engaged with the SDLP process. Alongside this documentation the Statement also set out discussions which had taken place at an elected member level with adjoining local authorities and briefings which had occurred with local MPs. Finally, the Statement also sets out the elements of peer review to which the SDLP process had been subject since the Regulation 18 draft consultation.

7. Whilst it is clear that the duty to cooperate, so far as it was relevant to the SDLP process, engaged a number of strategic issues, for the purposes of this judgment it is necessary to focus upon the strategic issue of housing need since, as will be seen, that was the issue which was principally of concern to the Inspector. In that connection it is necessary to set out the contents of the statements of common ground with, in particular, the neighbouring authorities of Tunbridge Wells Borough Council and Tonbridge and Malling Borough Council, along with the conclusions of the peer review which was undertaken and relied upon in relation to the housing issue.

8. A statement of common ground was agreed between the claimant and Tonbridge Wells Borough Council on the 21 May 2019. Having set out the issue in relation to unmet housing need within the SDLP the statement of common ground records as follows:

> "2.1.5 Discussions have taken place with neighbouring authorities in the HMA to discuss assistance with any unmet need, but no authority has been in a position to assist SDC with its unmet need.

> 2.1.6 TWBC is currently preparing its second Regulation 18 version of the Draft Local Plan for consultation, which includes the vision, objectives and growth strategy, overarching strategic policies, place shaping policies and detailed Development Management Policies.
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> 2.1.7 TWBC is also constrained by the Green Belt (22%) and the Area of Outstanding Natural Beauty (70%) as well as areas of flood risk and traffic congestion. The Regulation 18 Draft Local Plan identifies the need for 13,560 dwellings in accordance with the Standard Methodology. Taking into account homes already built since 2013 and sites benefiting from planning permission and allocations within the existing Site Allocations Local Plan, TWBC is aiming to allocate land to meet the remaining balance of 8,914 (Note: this is still subject to change following ongoing work) dwellings. TWBC is seeking to meet its full objectively assessed need across the borough through development at a number of settlements, strategic release of Green Belt at Paddock Wood/Capel to allow expansion of the settlement and a new garden settlement within the Green Belt at Tudeley also within Capel Parish.
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> 2.1.8 It is understood that, at present, TWBC is unable to assist SDC with unmet housing need, due to the constraints on both local authorities, and their inability to meet housing needs beyond their own, irrespective of unmet needs elsewhere.
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> 2.1.9 Consequently, both councils will continue to work together and identify the position as both TWBC and SDC prepare to review their Local Plan every 5 years.
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> Actions
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> TWBC and SDC will engage through the wider Duty to Cooperate forum with other neighbouring authorities outside the West Kent housing market area in relation to housing related matters, including unmet need, five year housing land supply, best fit HMAs, affordability, London growth, large scale developments and opportunities for meeting any unmet need.
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> TWBC and SDC to each undertake a 5 year review of their respective Local Plans."

9. The position in the statement of common ground is supported by the material contained within Tunbridge Wells Borough Council's Hearing Position Statement for the purposes of the examination. The Hearing Position Statement observes that up until 11 April 2019 there had been discussions in relation to matters, including the meeting of housing need, and that those discussions were reflected in the observations made by Tunbridge Wells Borough Council during the Regulation 19 consultation, where they stated that there should be no presumption that there was any capacity within the Tunbridge Wells Borough Council area to accommodate unmet need from another

authority area. The Hearing Position Statement records that on the 11 April 2019 Tunbridge Wells Borough Council received a communication from the claimant formally asking whether or not they were in a position to meet any of the claimant's unmet housing need. At the duty to cooperate workshop on the 24 April 2019 (which is addressed further below) Tunbridge Wells Borough Council made clear that they would not be able to meet any of the claimant's unmet housing need. The Hearing Position Statement does however record as follows:

> "1.06 It is considered pertinent to note that if the request from SDC to meet its unmet need had been made at any point prior to the submission of TWBC's comments on Sevenoaks regulation 19 representations then those representations would have addressed this issue more fully."

The Hearing Position Statement goes on to record the observations made within the Statement of Common Ground and set out above and to indicate that the position from their perspective remained the same.

10. Tonbridge and Malling Borough Council also provided a hearing statement for the purposes of the examination. In their hearing statement they explain that during the consultations on both the Regulation 18 and Regulation 19 versions of their own Local Plan they had not received any request from the claimant to address unmet housing need. In the hearing statement they set out that there had been regular meetings between Tonbridge and Malling Borough Council and the claimant to address cross-boundaries strategic matters engaging the duty to cooperate. The essence of the position which they placed before the Inspector is set out in the following paragraphs of their hearing statement:

> "13.5. It is evident that TMCB faces similar constraints and challenges to Sevenoaks District Council for that part of the Borough covered by the West Kent HMA. However, TMBC's response during plan-making has and continues to be significantly different to that of Sevenoaks District Council.
>
> 13.6. TMCB has responded positively to the Government's policy for plan-making by addressing in full its assessed need for housing plus some flexibility to adapt to rapid change. This is summarised in the TMBC Spatial Topic Paper. This has been challenging but TMBC understands that if suitable patterns of development are to be delivered and if the Local Plan is to positively address the acute need for housing, as demonstrated by the median housing affordability ratio, then sufficient sites need to be allocated for development to ensure there is no unmet need. This includes the removal of approximately 160 hectares of land from the Green Belt in the West Kent HMA to provide for residential development, as explained in the TMBC Green Belt Exceptional Circumstance Topic Paper.
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> 13.7 Before addressing the matter of whether or not the unmet housing need could be accommodated in Tonbridge & Malling Borough it is important to first question whether it is reasonable

> for Sevenoaks District Council to expect TMBC to address it. Given the similarities between the two authorities (see above), TMBC considers that it is entirely inappropriate to as the Borough Council to accommodate unmet housing need in an area with the same constraints that have been dismissed by Sevenoaks District Council. It is important to bear in mind that the part of Tonbridge & Malling Borough falling within the West Kent HMA is wholly within the Green Belt (with the exception of the settlements not washed over by the designation).
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> 13.8 If Sevenoaks District Council had adopted a similar positive approach to meeting the housing development needs of their area in full, it is possible that there would be significantly less or no unmet need to consider. It is unreasonable to expect TMBC to not only meet their assessed need for housing in full but to accommodate unmet housing need from Sevenoaks District Council who are facing similar constraints.
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> …
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> 13.19 To conclude, it would be unreasonable to expect Tonbridge & Malling Borough Council to accommodate unmet housing need from Sevenoaks District Council given that TMBC is facing very similar constraints and challenges and is planning to address in full its own assessed housing need. Not only would it be unreasonable but factors including Housing Market Areas, market capacity and infrastructure mean that TMBC could not accommodate the identified unmet housing need."

11. In addition to the contributions made by the local authorities directly concerned in the duty to cooperate, representations were also made, in particular to the examination process, by other parties who were interested in the issue. Representations were made both for and against the conclusion that the duty to cooperate had been satisfied in the present case. Whilst some reliance was placed upon this material by both parties at the hearing of this case, it suffices to record that there were a number of participants in the examination who maintained that the claimant had not complied with the duty to cooperate and that this was a fundamental flaw in the preparation of the SDLP.

12. As set out above the claimant placed reliance in support of its contention that the duty to cooperate had been satisfied upon the peer review of the plan process which had been commissioned as a cross-check in relation to the process. The first element of this work was the invitation extended by the Planning Advisory Service ("PAS") to the claimant to participate in a pilot project in relation to the preparation of statements of common ground. This invitation was extended to and accepted by both the claimant and also Tonbridge Wells Borough Council and Tonbridge and Malling Borough Council. The programme led to a sequence of meetings, culminating in the preparation of notes reflecting the outcome of the project, dated the 3 April 2018. Paragraph 5.2 of the note of the discussions indicates that the need to address 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 between the parties. The note then considers the question of housing need in the three districts in the HMA, and from paragraph 6.1

onwards sets out the position in each of the authorities, and thereafter at paragraphs 8.4-8.5 notes the risks in the current position. The note provides as follows:

> "6.1 Sevenoaks and Tunbridge Wells are both planning to meet their OAN as determined by the joint SHMA which was updated in 2017. In Sevenoaks the OAN of 11,740 (578 dpa) compares with an indicative figure of 13,960 (698 dpa) based on the government's standardised methodology. In Tunbridge Wells the SHMA gives an OAN of 696dpa, which is consistent with the government's indicative figure of 692 dpa using the proposed standard methodology.
>
> 6.2 The situation in Tonbridge and Malling is more complex. The evidence base, which includes an up to date SHMA covering 2 housing market areas, gives an OAN of 696 dpa. This is significantly lower than the indicative figure of 859 dpa using the proposed standardised methodology. Members have agreed to continue with 696 dpa figure. The Council accepts the standardised methodology and will reflect this as national policy in its Local Plan. However it proposes to demonstrate that the higher figure is undeliverable based on past trends and capacity issues. This position will be supported by evidence including the housing deliverability study prepared by G L Hearn in September 2017. The Council's concerns are clarified in more detail in its consultation response to Planning for the Right Homes in the Right Places.
>
> 6.3 The emerging Tonbridge and Malling Local Plan, if it continues to propose a housing supply which is lower than the standardised OAN, clearly presents a risk to finalising an agreed SoCG. Whilst at present neither Sevenoaks or Tunbridge Wells will require Tonbridge and Malling to accept unmet need, it is possible that the reverse may apply. Even if all three Councils sign up to a SoCG which includes a lower housing figure for Tonbridge and Malling than the standard methodology indicates, this could be undermined when its Local Plan is examined.
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> …
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> 8.4 The greatest risk to this SoCG is the decision by Tonbridge and Malling to continue plan for a level of housing supply which is below the OAN identified by the government's standard methodology. As Tonbridge and Malling takes its Local Plan forwards it will be relying on evidence which states that capacity and delivery issues prevent it from states that capacity and delivery issues prevent it from meeting the higher OAN.
>
> 8.5 Whilst both Sevenoaks and Tunbridge Wells are aiming to meet their standard methodology OANs, both are heavily

> constrained by green belt and infrastructure issues and are unlikely to be capable of accommodating unmet need from Tonbridge and Malling. This pilot project is not the appropriate place to address this matter in detail. However if the final SoCG is to have any real meaning and to be robust in supporting the three Local Plans there will need to be some hard talking within the group on this matter. This is a potential showstopper in terms of the utility of the SoCG and its capability of serving its desired purpose"

13. At a later stage it emerged that the note of the 3 April 2018 (which the claimant had included within the appendixes to the statement) had in fact been superseded in a subsequent note dated 10 April 2018. It seems that the representative of Tonbridge and Malling Borough Council had, in response to receipt of the 3 April 2018 draft, made suggestions in relation to amendments to the draft, including the observation that the claimant would have elements of unmet housing need. Thus, paragraphs 6.1 and following of the note were redrafted as follows:

> "6.1 During the short lifespan of this pilot project there have been several changes to both 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. The current situation, at the end of the pilot project, is as follows.
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> Sevenoaks DC
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> 6.2 In Sevenoaks the OAN of 12,400 compares with an indicative figure of 13,960 based on the government's standardised methodology. With Regulation 19 submission planned to take place in early 2019 it likely to fall outside the NPPF transition period, therefore the higher figure will apply. However the district is highly constrained, with 93% of the district lying within the Green Belt and 60% within AONBs.
>
> 6.3 The Council is currently examining the potential of releasing some Green Belt land where a convincing exceptional circumstances case is made. This would mean that any proposed development would need to deliver evidenced social and community benefits as well as housing. Sites where this might be the case will be the subject of Regulation 18 consultation. This may increase the housing land supply but it remains unlikely that Sevenoaks DC Tonbridge and Malling DC will be able to meet its housing need in full.
>
> Tonbridge and Malling BC
>
> 6.4 The evidence base for the Tonbridge and Malling Local Plan, which includes an up to date SHMA covering two housing

> market areas, gives an OAN of 696 dpa. This is significantly lower than the indicative figure of 859 dpa using the proposed standardised methodology. However the position has changed since the pilot project began with the revised NPPF draft proposing a transitional period for introducing the standardised methodology of assessing housing need. Provided the Regulation 19 submission can be made within the transition period, as proposed by the Council, then the lower locally derived OAN can be used. This level of housing growth is considered deliverable.
>
> Tunbridge Wells BC
>
> 6.5 When the pilot project commenced Tunbridge Wells BC was planning to meet its locally derived OAN as determined by the joint SHMA which was updated in 2017. The SHMA sets an OAN of 696 dpa for Tunbridge Wells, which is consistent with the government's indicative figure of 692 dpa using the proposed standard methodology. Recently updated evidence on strategic flood risk suggests that some re appraisal may be necessary, but the Council is still endeavouring to ensure that it can meet its own housing need.
>
> Summary
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> 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 their housing needs. The councils are not yet in a position to reach agreement on the matter of housing supply."

14. In autumn 2018 the claimant commissioned Intelligent Plans and Examinations (IPe) to undertake a review of the Regulation 18 draft of the SDLP, with a particular focus on the Green Belt and the question of exceptional circumstances. A meeting was held on 1 November 2018, and on the 4 December 2018 Ms Laura Graham, who had undertaken the review, produced a report of her advice. Within that advice she noted that there was "no absolute requirement in the NPPF to meet housing need", but that if development needs could not be met outside the Green Belt it would be necessary to demonstrate through the sustainability appraisal process that the consequences of not meeting that need had been fully and properly addressed.

15. On the 17 December 2018 the claimant contacted the Planning Inspectorate ("PINS") with a view to arranging an advisory visit in order to assess the plan which was at that stage in the midst of the Regulation 19 consultation (the Regulation 19 consultation closed on the 4 February 2019). On the 6 February 2019 the advisory visit from PINS was undertaken by an experienced Inspector, Mr Jonathan Bore. One of the important topics for discussion at that meeting was the change that the claimant was considering to altering the base date of the SDLP to 2019-35. The note of the advisory visit identifies

that the plan fell seriously short of meeting its housing need in full, based upon the standard method. In relation to the duty to cooperate the note of the meeting records as follows:

> "The Duty to Cooperate
>
> Sevenoaks haven't sent formal letters asking other authorities to accommodate unmet need. They say they don't want to, because no authorities are willing to help with unmet need and asking the question would sour relations with them. Some neighbouring authorities such as Tandridge may also have unmet need. There is a SoCG with other authorities and a MOU with Maidstone, but the Council did not say that there is constructive engagement among the neighbouring authorities to resolve the issue, nor could they point to any ongoing strategic level cross boundary planning to look at how identified needs could be accommodated."

16. The note goes on to record the comments on the issues made by Mr Bore at the meeting. In particular, within the comments on the issues he noted as follows:

> "If the OAN really could not be accommodated within the District, I said that there should be clear evidence of positive engagement among the group of neighbouring authorities in order to resolve the issue on a cross boundary basis. Currently, despite the MoU and SoCGs, this did not appear to exist in a positive form. I said that any Inspector would look closely at this in regard to whether the Duty to Cooperate had been fulfilled."

17. The advisory visit by Mr Bore on behalf of PINS was followed by correspondence from the defendant seeking to understand how the visit had gone, and offering assistance from PAS in relation to guiding the future progress of the plan. This correspondence led to a meeting on the 6 March 2019 between Mr Gleave and a colleague from the claimant and representatives of the defendants. The notice of the meeting of the 6 March observes as follows:

> "Sevenoaks asked whether MHCLG meets with LPAs on a regular basis following an Advisory Visit or whether there were particular concerns with the emerging Sevenoaks plan. MHCLG explained that following the AV the Department had been made aware that there were some potentially significant issues with housing numbers and Duty to Co-operate, and constraints including Green Belt. Given these could be potential 'showstoppers' MHCLG wanted to talk through the issues, find out what further work Sevenoaks may be doing in respect of these and to discuss whether there is any assistance MHCLG could provide as the authority prepares its plan for submission.
>
> In terms of the Duty to Co-operate, Sevenoaks explained they had met regularly with neighbouring authorities at Officer and Member level to discuss x-boundary issues, of which housing

> need was a standing item on the agenda. In addition, a regular Kent-Planning Officers Group was held at Kent County Council. This operates along similar lines to the ALBPO forum in London and serves to update colleagues on Local Plan preparation. Statements of Common Ground are currently being prepared with neighbours on strategic cross-boundary matters, including housing need.
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> …
>
> DR advised that the balance between protecting the environment and meeting housing needs was a planning judgement that had to be made locally. SH set out that the approach the LPA took would need to be justified, both in terms of why the authority was unable to meet its own needs and the reasons behind neighbouring authorities not being asked to accommodate some of Sevenoaks needs."

18. On the 11 April 2019 Mr Gleave, on behalf of the claimant, wrote to neighbouring planning authorities in relation to the progress that was being made in respect of the plan. They were also invited to an event which was being facilitated by PAS to be held later in the month. The correspondence contains the following in relation to the duty to cooperate:

> "The Council is of the view that all authorities bordering Sevenoaks, and Kent County Council, have engaged actively and on an on-going basis to meet the provisions of the Duty to Co-operate. In particular, Statements of Common Ground (SoCGs) are in the process of being agreed to formally clarify if it is possible to meet unmet housing needs from adjoining areas. Notwithstanding the provisions of the SoCG and for the sake of completeness, I write to formally ask if is in a position to meet any of Sevenoaks' unmet housing need as outlined above. In the event that this is not possible, I would also be grateful for your views on the preparation of a joint sub-regional strategy to address future housing requirements."

19. The duty to cooperate workshop took place on the 14 April 2019 and a note was prepared minuting the meeting. An experienced former Inspector, Mr Keith Holland, facilitated the workshop. Updates were provided by the local planning authorities who attended and, in particular, the update from the claimant identified that the SDLP housing supply left a shortfall measured against the standard methodology requirement of approximately 1,900 dwellings across the plan period, equating to about 17%. The claimant provided a summary of the activities which they had undertaken in order to address the duty to cooperate. Following discussion of the issues a note records Mr Holland advising that in his view "SDC has done all it can and is able to demonstrate that it has satisfied the duty to cooperate requirement". This note of the workshop then records further discussions in relation to the potential to a sub-regional strategy to address unmet housing needs across the area.

20. A note of these meetings held with PAS was also provided by IPe who undertook the work for PAS. Their note covers both the meeting which was held on the 17 April 2019 and a first meeting between Mr Gleave and his colleagues on behalf of the claimant and Mr Holland. The claimant's position as expressed in the SDLP was explained to Mr Holland in the meeting on the 17 April 2019 and noted as follows:

> "2.2 The discussion focussed on the implications of the DtC for the soundness assessment of the SLP. At the time of the meeting, the Council's intention was to submit the SLP for examination at the end of the month (it was subsequently submitted on 30 April 2019). The discussion included a review of advice provided by Laura Graham of IPe and Jonathan Bore from the Planning Inspectorate (PINS). SDC feels that there is a degree of inconsistency between the PINS advice and that provided by IPe. SDC believe that the advice from PINS is based on a misunderstanding of the approach being adopted by the SDC. In the view of the SDC, PINS failed to fully appreciate that the council attempts unmet housing need as an exceptional circumstance justifying consideration of Green Belt (GB) land release. What PINS calls a "Council imposed impediment" (the provision of infrastructure for the existing community) is not the defining exceptional circumstance consideration – it is simply the logical requirement that any development in the GB needs to be accompanied by adequate infrastructure. In other words, SDC believes that PINS has placed too much emphasis on the infrastructure point and not enough on the unmet need consideration."

21. The note prepared by IPe in relation to the workshop on the 14 of April 2019 provides as follows in relation to the views expressed in respect of the duty to cooperate:

> "3.3 The message regarding the importance of the DtC and the way it is dealt with at local plan examinations was repeated. All parties present appreciate how important the local duty is and how it has the potential to derail examinations. Each of the councils present outlined the position they are in at present regarding their development plans. From the discussion, it is clear that none of the authorities present are in a position to help meet any unmet housing need generated by SDC. In fact, most of the authorities believe that they are unlikely to be able to meet their own needs. The discussion thus confirmed and reinforced the contention made in the Submission version of the SLP that the Council is unable to meet its own needs and cannot rely on the DtC to resolve the problem. The importance of preparing a clear and convincing narrative for the forthcoming SDC local plan examination was again stressed.
>
> 3.4 The importance of continuing to seek to meet development needs in West Kent through cooperative strategic working was discussed. In this regard, the need for a strategic approach to infrastructure was emphasised. KH explained the importance of

> getting member involvement and buy-in to any strategic work and that the more formal the process, the more likely it was to convince a local plan examiner that the councils are doing all they can to use the DtC effectively. Cllr Piper expressed severe reservations about the likelihood of effective strategic planning because of what he described as an inconsistency between the political message provided by the government regarding the GB and the guidance in the NPPF. KH pointed out that under the DtC there is nothing to stop local authorities undertaking joint strategic planning of the sort that previously happened in the South East through SERPLAN (London and South East Regional Planning Conference). KH also explained that the policy in the NPPF makes it clear that where there are exceptional circumstances local authorities ca revise GB boundaries, but that this must be done through their local plans and not through the development management process."

22. On the 30 April 2019 the plan was submitted for examination. As set out above Statements of Common Ground with neighbouring authorities were produced as part of the examination process. The examination hearing sessions commenced on the 24 September 2019, and issues in relation to the duty to cooperate were canvased on the first day of the hearing. On the 14 October 2019 correspondence was received by the claimant from the Inspector raising concerns that she had in relation to whether or not the claimant's approach to the SDLP had met the requirements of the duty to cooperate. There then followed further correspondence between the claimant and the Inspector which it is unnecessary to rehearse in detail for the purposes of this judgment. Suffice to say, that during the course of that exchange of correspondence the claimant provided detailed responses and further documentation including, for instance, the corrected note of the 10 April 2018. By the 13 December 2019 the Inspector had confirmed her view that the claimant had not discharged the duty to cooperate and therefore indicated that unless the claimant intended to withdraw the plan from examination the only course available was for her to produce a report concluding that the plan was not legally compliant. On the 3 January 2020 the claimant requested that the Inspector issue her report as soon as possible. This led to the production of the Inspector's final report issued to the claimant on the 2 March 2020 and comprising the decision which is the subject of this challenge.

23. The Inspector's final conclusions in relation to the issues with respect to the duty to cooperate are set out in the decision which is under challenge. In order to provide the full context for the Inspector's decision it is necessary to set out her conclusions at some length. At the outset of her decision the Inspector set out that the starting point for the examination was the assumption that the local authority had submitted what it considered to be a legally compliant and sound plan. She confirmed that this was the basis for her examination. She further set out by way of introduction that having reached conclusions in relation to the duty to cooperate she did not go on to consider whether the plan was sound or was compliant with other legal requirements. She points out that if the local planning authority cannot demonstrate that the duty to cooperate has been complied with then, under section 20(7A) of the 2004 Act, the examiner is bound to recommend non-adoption of the local plan. In her decision the Inspector addresses the evidence in relation to the duty to cooperate in the following paragraphs:

"17. I acknowledge that the Council has prepared a joint evidence base with other local planning authorities which underpins many of the policies in the Plan, including a Strategic Housing Market Assessment (SHMA) with Tunbridge Wells Borough Council. The SHMA examines the overall housing need in the West Kent Housing Market Area (HMA), need from different sizes of homes (both market and affordable) and needs for particular types of homes, particularly from the growing older population. The assessment of housing need does not include any specific provision for meeting unmet needs of adjoining areas, which the SHMA says will need to be considered through the DtC. In respect of compliance with the DtC, my concern relates to the lack of ongoing, active and constructive engagement with neighbouring authorities in an attempt to resolve the issue of unmet housing need and the inadequacy of strategic cross boundary planning to examine how the identified needs could be accommodated. The joint evidence base produced by the Council in co-operation with others is not, therefore, of direct relevance to this matter as it does not address unmet housing needs.

18.The Council sets out the nature and timing of the engagement and cross boundary planning that was undertaken in its DtC Statement and Appendices and in Appendix 1: Schedule A attached to its letter, dated 18 November 2019, with the minutes of most of these meetings provided in the DtC Statement. This indicates that a number of meetings took place between the Council and its neighbouring authorities, along with other prescribed bodies, during the preparation of the Plan. These include meetings of the West Kent DtC group and the West Kent Statement of Common Ground (SoCG) Pilot Programme group.

19. The minutes of the West Kent DtC meeting, on 2 August 2017, which was held the day before consultation began on the Sevenoaks Local Plan Issues and Options (Regulation 18), do not mention the unmet housing need in Sevenoaks District, nor do they make reference to any discussion relating to how those unmet needs could be accommodated. The DtC Forum notes, on 23 August 2017, do not make any reference to the position at that time in Sevenoaks District Council. The summary of the initial meeting of the West Kent SoCG group with planning consultants, Intelligent Plans and Examinations (IPE), held on 22 January 2018, set out in the Facilitator's Note, dated 3 April 2018, does not mention the unmet housing need in Sevenoaks District, nor does it make reference to any discussion relating to how those unmet needs could be accommodated.

20. The notes of the SoCG Pilot Programme: West Kent Group, on 12 February 2018, indicate that the difficulties faced by Sevenoaks were briefly discussed in respect of Objectively Assessed Need [OAN], but state that Sevenoaks 'is testing options to assess the way forward'. The summary of the meeting, held on 14 March 2018, set out in the Facilitator's Note, dated 3 April 2018, does not mention the unmet housing need in Sevenoaks District, nor does it make reference to any discussion relating to how those unmet needs could be accommodated.

The Facilitator's Note does, however, refer to a 'table of draft key strategic cross boundary issues' which had emerged through discussions, including the 'need to address the matter of unmet need in the HMA', which was acknowledged to be the most significant issue. It goes on to say that 'Sevenoaks and Tunbridge Wells are both planning to meet their OAN as determined by the joint SHMA which was updated in 2017'.

21.The Council has since stated, in Appendix 1: Schedule A to its letter, dated 18 November 2019, that the Facilitator's Note from the meeting of the West Kent SoCG Pilot Project on 3 April 2018 was incorrect, as it referred to Sevenoaks District Council planning to meet its OAN in full. The Council refers to all three HMA authorities commenting in April 2018 that this statement was incorrect, but that a final version of this note was not sent through by the Planning Advisory Service [PAS] in 2018. The Council contacted the Facilitator on 27 September 2019, during the Hearing sessions, and a finalised note, dated 10 April 2018, was duly issued. The Council submitted the original Facilitator's Note twice in its DtC Statement, however, no mention was made in that document about the inaccuracy of those minutes. Nor was any amended version sought from the Facilitator until the matter was raised during the Hearing session. Not only have changes been made to paragraph 6.3 of that document, which now says that 'it remains unlikely that Sevenoaks District Council will be able to meet its housing need in full', but there are additional paragraphs inserted, as well as changes/additions made to other paragraphs.

22. Significantly, paragraph 6.1 of the amended version of the Facilitator's Note now says that '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'. Paragraph 6.6 concludes that, 'each of the Councils has a clear figure for its housing need, but whilst Tonbridge and Malling is confident that it can meet its own need, Sevenoaks and Tunbridge Wells 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'. As such, it is apparent that, in April 2018, the three Councils were not aware of the extent of any unmet need. Consequently, while the evidence, up to this point, indicates that the Council was engaging in discussion, it does not demonstrate that constructive engagement was taking place on the strategic matter of unmet housing needs.

23. The minutes of the West Kent DtC meeting on 11 September 2018, the day after the consultation period had ended on the Regulation 18 Plan, do not mention the unmet housing need in Sevenoaks District, nor do they make reference to any discussion relating to how those unmet needs could be accommodated. The first time that the minutes of the DtC meetings refer to addressing the unmet need in Sevenoaks is at the DtC meeting between Sevenoaks District Council and Tonbridge and Malling Borough Council on 13 March 2019, when it is noted that 'officers discussed the potential requirement for a follow up letter to

request that neighbouring authorities assist with Sevenoaks' unmet need, where it is practical to do so'. This was at a very late stage in the Plan preparation process, following the Regulation 19 consultation on the Plan and only around 7 weeks prior to the submission of the Local Plan for Examination on 30 April 2019.

24. Although the DtC statement indicates that Officer and Member level meetings were held with neighbouring authorities, and a joint evidence base with neighbouring authorities in the West Kent HMA was produced, the minutes of the meetings provide no substantial evidence that the Council sought assistance from its neighbours in meeting its unmet housing need or in devising an agreed approach for accommodating this unmet need, before the publication of the Regulation 19 Plan. Indeed, it is unclear from the notes of these meetings when unmet need was first discussed. Housing was appropriately identified as a key strategic cross boundary issue, but the evidence from the notes of these meetings does not indicate that there has been ongoing, active and constructive engagement with neighbouring authorities with regard to Sevenoaks' unmet housing need.

25. At the Hearing sessions, concerns were expressed by participants about the lack of co-operation between the Council and neighbouring authorities to address the issue of unmet housing need. However, I note that, neighbouring authorities have made positive comments about engagement overall and have not said that the Council has failed the DtC. Other parties have advanced similar comments. Nevertheless, the Hearing Position Statements (HPSs) submitted by both Tonbridge and Malling Borough Council and Tunbridge Wells Borough Council do raise matters of concern about unmet housing need in the District and the engagement between the authorities in this respect, particularly that the Council did not formally raise this as an issue with its neighbours until after the public consultation on the Regulation 19 Plan was completed. This is confirmed in the Hearing Position Statements provided by the other two Councils[1] within the HMA.

26. In paragraph 13.2 of its HPS, Tonbridge and Malling Borough Council confirms that during the consultation on the Regulation 18 and Regulation 19 versions of the Tonbridge and Malling Borough Local Plan, Sevenoaks District Council did not make a formal request for Tonbridge and Malling to address the unmet need in Sevenoaks. Furthermore, it goes on to say that despite Officers from Tonbridge and Malling Borough Council and Sevenoaks District Council engaging on a regular basis to discuss cross-boundary strategic matters, Tonbridge and Malling Borough Council Officers 'did not receive any formal requests to address unmet housing need' from Sevenoaks District Council.

27. The Regulation 19 Tonbridge and Malling Local Plan was subject to public consultation between 1 October and 19 November 2018. The Council says that it became aware of the extent of its unmet need

following the consideration of the representations to the Regulation 18 version of the Sevenoaks District Local Plan, which ended on 10 September 2018. However, the Council did not request that Tonbridge and Malling Borough Council considered the possibility of accommodating unmet housing need from Sevenoaks during the Regulation 19 consultation on the Tonbridge and Malling Local Plan. This highlights the lack of engagement with this neighbouring authority on this issue at a crucial stage in the Plan preparation process.

28. In paragraph 1.04 of its HPS, Tunbridge Wells Borough Council confirms that it received communication from Sevenoaks District Council on 11 April 2019 formally asking if it would be in a position to meet any of its unmet housing need. This was after the Regulation 19 consultation and just before the Plan was submitted for Examination, leaving no time for a proper consideration of the issues by either Council and for Sevenoaks to consider whether or not its Plan remained appropriate in the knowledge that its unmet housing needs would not be provided for in neighbouring authority areas. Indeed, at paragraph 1.06, Tunbridge Wells Borough Council states that if this request had been made at any point prior to the submission of its comments on the Regulation 19 version of the Plan, then its response would have addressed this issue more fully.

29. I appreciate that these neighbouring authorities say that there has been regular, constructive and cooperative liaison between the three West Kent authorities, including the preparation of joint evidence base studies. However, the evidence before me, including the minutes of meetings and the HPSs, does not demonstrate that there has not been active, constructive or on-going engagement in respect of unmet housing need."

24. The Inspector went on to address the statements of common ground which had been prepared in order to deal with cross-boundary issues. Her conclusion in relation to those statements of common ground is set out as follows:

"32. These SoCGs were prepared too late to influence the preparation of the Plan. Indeed, in an email to MHCLG, dated 15 March 2019, the Council says that it 'is in the process of preparing SoCGs to address, amongst other things, the issue of unmet need.' However, these SoCGs were completed following the submission of the Plan for Examination. As a result, the SoCGs set out the issues to be addressed following the submission of the Plan rather than the progress made to address them prior to submission. They imply that these matters will be dealt with in any review of the Plan. However, the Duty required by the Act applies specifically to plan preparation, and plan preparation ends when the plan is submitted for Examination.

33. For these reasons, the SoCGs do not demonstrate that effective and joint working has been undertaken, particularly in respect of unmet housing need, nor do they document the progress made in co-operating to address this.

> 34. I acknowledge that discussions have taken place as part of the West Kent Leaders' Forum with regards to the preparation of a sub-regional strategy, but this represents engagement in relation to a solution in the future, not the submitted Plan. At the DtC Workshop, on 24 April 2019, the group discussed the potential for a sub-regional strategy to address any unmet needs across the area, with this approach having been discussed through Kent Leaders' meetings. However, this approach is at a very early stage and this, along with the agreed actions in the SoCGs, relate to proposed joint working in the future, which is not something that is relevant to the consideration of the DtC in relation to the preparation of this Plan."

25. The Inspector then proceeded to consider the question of the timing of the engagement in relation to, in particular, the extent of unmet housing need which was the strategic issue at the heart of her concerns in relation to the duty to cooperate. She sets out her conclusions in relation to this issue in the following paragraphs:

> "35. The Council refers to the extent of unmet housing need becoming apparent once a full assessment of the comments received on the Regulation 18 consultation was undertaken, which would have been after 10 September 2018. The Regulation 19 version of the Local Plan was considered by the Council's Planning Advisory Committee on 22 November 2018 and by Cabinet on 6 December 2018. The Council says, in its letter dated 18 November 2019, that it 'could have gone back to neighbours at this point', but decided not to, as it was felt that, as discussions had already indicated that an unmet need of 600 dwellings could not be accommodated, 'it was therefore extremely unlikely that a higher unmet need would be met elsewhere'. Nevertheless, the minutes of meetings with neighbouring authorities prior to this, which I refer to in paragraphs 19 to 22 above, either do not mention the unmet housing need or the extent of any unmet housing need in Sevenoaks District. There is no evidence, therefore, to support the Council's statement that discussions had already indicated that an unmet need of 600 dwellings could not be accommodated in the neighbouring authorities.
>
> 36. I note the comments of Tonbridge and Malling Borough Council, made in a letter, dated 1 February 2019, in response to the Regulation 19 consultation on the Plan that 'all three West Kent Authorities confirmed that they were seeking to meet as much of their needs as possible and acknowledged the practical difficulties of taking any unmet need from each other' at the DtC meeting on 11 September 2018, despite the minutes not recording this. Tonbridge and Malling Borough Council's response to the Regulation 19 consultation goes on to say that 'at that time the draft Sevenoaks Local Plan included options that could have met the vast majority of its need for housing. The

best case scenario resulting in approximately 600 dwellings of unmet need across the Plan period.' However, there is no evidence from the minutes of the DtC meetings that even this level of unmet need had been discussed in a meaningful way.

37, The full extent of unmet need only became apparent to the Council following the consideration to the responses of the Regulation 18 consultation, after the DtC meeting on 11 September 2018, and during the preparation of the Regulation 19 Plan. Under the DtC, it is reasonable to expect the Council 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 in an attempt to resolve this issue prior to the publication of the Plan at the Regulation 19 stage. However, there is no evidence to show that this occurred. Indeed, if the engagement had occurred between the Regulation 18 and Regulation 19 versions of the Plan, once the Council was aware of the level of unmet need, it might have resulted in a more positive outcome. Given earlier notice and more time for in-depth engagement, discussion and consideration, neighbouring authorities may have been able to accommodate some of Sevenoaks' unmet need. Alternatively, if the neighbouring authorities had not been able or willing to meet these needs, the Council would have had the time to formally reconsider its own constraints to reach a final view on whether or not it could appropriately fully meet its own housing needs in the knowledge that they would not be met outside the District. This could have included a reconsideration of the balance to be struck between planning policies that might constrain development and the merits of providing sufficient housing to meet identified needs. Ultimately, this process may, or may not, have led to the same outcome. However, it is not possible for me to know whether this would have been the case because effective and constructive engagement on this issue did not take place.

38. From the evidence before me, therefore, it is apparent that the Council did not engage with its neighbouring authorities on this matter at the appropriate time.

39. It is noted that neighbouring authorities have not indicated any willingness to take unmet need from Sevenoaks, in part due to the extent of Green Belt, but proper engagement at the right time would have enabled all three authorities and others in the wider area to properly grapple with the issues arising from unmet housing need. There is, of course, no guarantee that such an approach would have resulted in arrangements being made for Sevenoaks' housing needs to be met in full. However, in my view, earlier and fuller proactive engagement on this crucial issue, in accordance with national policy, would have been

> significantly more likely to result in an effective strategy for meeting Sevenoaks' unmet need."

26. The Inspector then proceeded to consider the peer review processes which had been undertaken by the claimant, in terms of external advice from IPe in November 2018, the PINS advisory visit in February 2019, the advice which had been received from the defendant and the review of the plan and the PAS workshop which had occurred on the 24 April 2019. Dwelling initially on the PAS workshop, and subsequently focusing on the other elements of peer review, the Inspector's conclusions are set out as follows:

> "42. At this Workshop, the Council set out what it considered to be the unmet need of around 1,900 dwellings in its Plan to be submitted for Examination. The Note on the DtC and the Local Plan, prepared by IPE, dated 7 May 2019, following the PAS Workshop, was not submitted as part of the Council's DtC Statement. This note concludes that 'none of the authorities present is in a position to help meet any unmet housing need generated by Sevenoaks District and it stresses the importance of continuing to meet development needs in West Kent through cooperative strategic working'.
>
> 43. The Council suggests that the PAS Note provides evidence that a solution to address unmet need now does not exist through the DtC. However, the PAS Note does not set out a detailed assessment of how the DtC has been complied with. Furthermore, the PAS Workshop was undertaken at a very late stage in the Local Plan preparation process and if the engagement had occurred as soon as the Council was aware of the broad level of unmet need and, in any event, in advance of the Regulation 19 version of the Local Plan, it might have resulted in a more positive outcome. Alternatively, it may have been that the Council's conclusions were correct and that the unmet need could not be addressed by neighbouring authorities. However, on the evidence before me, I am unable to conclude that the issue of addressing unmet need had been given adequate consideration. Whether or not there is a cross boundary solution to unmet need is not a requirement of the DtC. The Duty is to engage constructively, actively and on an on-going basis and, on the evidence before me, I am unable to conclude that this has taken place.
>
> 44. The Council says that had the peer review process, which was set up to run alongside the Regulation 19 consultation, raised significant concerns, the Council would not have submitted the Plan. Nevertheless, significant concerns were raised in relation to the DtC at the Advisory Visit carried out by the Planning Inspectorate in February 2019, as set out in the note of this meeting.
>
> 44. The visiting Inspector noted that the Council had not sent formal letters asking other authorities to accommodate unmet

> need and that it could not point to any ongoing strategic level cross boundary planning to look at how identified needs could be accommodated. He went on to advise that, if the OAN really could not be accommodated within the District, then there should be clear evidence of positive engagement among the group of neighbouring authorities in order to resolve the issue on a cross boundary basis and that, despite the Memorandum of Understanding and SoCGs, this did not appear to exist in a positive form. These issues were not adequately resolved before submission.
>
> 45. I understand the Council's reasons for seeking the advice from PAS and its hope that this would have identified potential 'showstoppers' in advance of submission. However, it is apparent that the PAS Workshop would not have benefitted from the full extent of evidence that is before me, particularly given that the DtC Statement was not submitted until May 2019. Nor would it have had the benefit of the time available to an Inspector for the examination of that detailed and complex evidence or the discussion at the Hearing sessions.
>
> 46. The Council submitted its note of the DtC Workshop in Appendix 4 of its DtC Statement in which it states that 'KH advised that, in his view, Sevenoaks District Council has done all it can and is able to demonstrate that it has satisfied the DtC requirement.' However, the Note of the same meeting prepared by IPE, does not state that the DtC has been met or that KH advised that this was the case.
>
> 47. Moreover, although it is reasonable for any authority preparing a local plan to seek advice from outside bodies in the way that the Council did, doing so cannot ever provide a guarantee that the Plan will, at its formal Examination, be found to be legally compliant. In any event, given the timing of the peer review, I consider that it was held far too late in the preparation process for it to be effective."

27. The final point addressed by the Inspector was whether it would be possible to proceed with the examination, applying the defendant's indication in correspondence with PINS that Inspectors should be pragmatic in getting plans into place. Her conclusions in relation to this point, and indeed the position overall, are set out in the following paragraphs of her decision.

> "49. The Secretary of State wrote to the Planning Inspectorate, on 18 June 2019, in which he stressed to Inspectors the importance of being pragmatic in getting plans in place that, in line with paragraph 35 of the NPPF, represent a sound plan for the authority.
>
> 50. The Secretary of State's letter refers to a previous letter written in 2015 by the Rt Hon Greg Clark. This earlier letter also

> stresses the importance of Inspectors working in a pragmatic way with Councils towards achieving a sound local plan, by finding plans sound conditional upon a review in whole or in part within five years of adoption, giving Councils the option to undertake further work to address shortcomings identified at Examination and highlighting significant issues to Councils very early on and giving Councils the full opportunity to address issues.
>
> 51. In accordance with this advice, I have worked in a pragmatic way with the Council towards achieving a sound Plan as far as practicable. However, given that it is a failure in the legal DtC that I have identified, this could not be resolved by finding the Plan sound conditional upon a review, nor does the Council have the option to undertake further work, as any failure in the DtC cannot be rectified following submission. Once I had considered all of the evidence presented to me in writing and at the Hearing sessions in relation to the DtC, I immediately notified the Council and cancelled future Hearings. I also gave the Council the opportunity to provide any additional evidence relating to the DtC undertaken prior to the submission of the Plan for Examination. Furthermore, had it been possible for the Examination to proceed, if, for example, the DtC had been complied with, I would have been pragmatic in considering any Main Modifications required to make the Plan sound. However, there is no scope within the Examination process to correct a failure to comply with the DtC following submission of the Plan.
>
> 52. The DtC Appendices that the Council has submitted in response to my letters include several statements and letters from neighbouring authorities and Parish Councils, as well as from Representors with an interest in the Plan. I have considered their comments carefully, however, none provides any substantial evidence which would lead me to a different view.
>
> 53. For the reasons set out above the DtC set out in Section 33A has not been complied with."

28. In the light of these conclusions the Inspector reached the overall decision that the duty to cooperate had not been complied with and therefore she was bound to recommend that the plan not be adopted.

The law

29. The SDLP, as a development plan document, has to be prepared in accordance with the provisions contained within Part 2 of the Planning and Compulsory Purchase Act 2004. Section 19 of the 2004 Act sets out certain requirements in relation to the contents of a development plan document. The relevant provisions of section 20 of the 2004 Act in relation to independent examination are as follows:

> "20. Independent examination

(1) The local planning authority must submit every development plan document to the Secretary of State for independent examination.

(2) But the authority must not submit such a document unless-

(a) they have complied with any relevant requirements contained in the regulations under this Part, and

(b) they think the document is ready for independent examination.

…

(4) The examination must be carried out by a person appointed by the Secretary of State.

(5) The purpose of an independent examination is to determine in respect of the development plan document-

(a) whether it satisfies the requirements of sections 19 and 24(1), regulations under section 17(7) and any regulations under section 36 relating to the preparation of development plan documents;

(b) whether it is sound and

(c) whether the local planning authority complied with any duty imposed on the authority by section 33A in relation to its preparation.

…

(7) Where the person appointed to carry out the examination-

(a) has carried it out, and

(b) considers that, in all circumstances, it would be reasonable to conclude-

(i) that the document satisfies the requirements mentioned in subsection (5)(a) and is sound, and

(ii) that the local planning authority complied with any duty imposed on the authority by section 33A in relation to the document's preparation, the person must recommend that the document is adopted and given reasons for the recommendation.

(7A) Where the person appointed to carry out the examination –
(a) has carried it out, and

> (b) is not required by subsection (7) to recommend that the document is adopted, the person must recommend non-adoption of the document and give reasons for the recommendation.
>
> (7B) Subsection (7C) applies where the person appointed to carry out the examination-
>
> (a) does not consider that, in all circumstances, it would be reasonable to conclude that the document satisfies the requirements mentioned in subsection (5)(a) and is sound, but
>
> (b) does consider that, in all circumstances, it would be reasonable to conclude that the local planning authority complied with any duty imposed on the authority by section 33A in relation to the document's preparation.
>
> (7C) If asked to do so by the local planning authority, the person appointed to carry out the examination must recommend modifications of the document that would make it one that-
>
> (a) satisfies the requirements mentioned in subsection (5)(a), and
>
> (b) is sound."

30. As can be seen from the provisions of section 20, of particular note for present purposes is the provision contained in section 20(5) that the purpose of the independent examination includes an examination of whether the plan is sound, and also whether the local planning authority has submitted a document that has been prepared in compliance with the duty under section 33A of the 2004 Act in relation to its preparation. By virtue of the provisions contained within section 20(7), (7B) and (7C), where the Inspector determines that it would not be reasonable to conclude that the local planning authority had complied with the section 33A duty then the Inspector can neither recommend modifications nor adoption of the document. This is in effect what happened in the present case.

31. It is not disputed that the duty under section 33A of the 2004 Act applied to the preparation of the local plan by virtue of section 33A(3) of the 2004 Act. The nature and content of the duty is described in the following provisions of section 33A:

> "33A Duty to co-operate in relation to planning of sustainable development
>
> (1) Each person who is—
>
> (a) a local planning authority,
>
> (b) a county council in England that is not a local planning authority, or
>
> (c) a body, or other person, that is prescribed or of a prescribed description, must co-operate with every other person who is within paragraph (a), (b) or (c) or subsection (9) in maximising

> the effectiveness with which activities within subsection (3) are undertaken.
>
> (2) In particular, the duty imposed on a person by subsection (1) requires the person—
>
> (a) to engage constructively, actively and on an ongoing basis in any process by means of which activities within subsection (3) are undertaken, and
>
> (b) to have regard to activities of a person within subsection (9) so far as they are relevant to activities within subsection (3).
>
> (3) The activities within this subsection are—
>
> (a) the preparation of development plan documents,
>
> (b) the preparation of other local development documents,
>
> (c) the preparation of marine plans under the Marine and Coastal Access Act 2009 for the English inshore region, the English offshore region or any part of either of those regions,
>
> (d) activities that can reasonably be considered to prepare the way for activities within any of paragraphs
>
> (a) to (c) that are, or could be, contemplated, and
>
> (e) activities that support activities within any of paragraphs (a) to (c), so far as relating to a strategic matter.
>
> (4) For the purposes of subsection (3), each of the following is a "strategic matter"—
>
> (a) sustainable development or use of land that has or would have a significant impact on at least two planning areas, including (in particular) sustainable development or use of land for or in connection with infrastructure that is strategic and has or would have a significant impact on at least two planning areas, and
>
> (b) sustainable development or use of land in a two-tier area if the development or use—
>
> (i) is a county matter, or
>
> (ii) has or would have a significant impact on a county matter."

32. It will be noted from section 33A(7) that a person who is seeking to comply with the duty to cooperate must have regard to guidance issued by the defendant on how that duty is to be complied with. Material in that regard is contained both within the National Planning Policy Framework ("the Framework") and in the Planning Practice Guidance

("the PPG"). The relevant provisions of the Framework dealing with the duty to cooperate are set out in paragraphs 24-27 of the Framework as follows:

> "Maintaining effective cooperation
>
> 24. Local planning authorities and county councils (in two-tier areas) are under a duty to cooperate with each other, and with other prescribed bodies, on strategic matters that cross administrative boundaries.
>
> 25. Strategic policy-making authorities should collaborate to identify the relevant strategic matters which they need to address in their plans. They should also engage with their local communities and relevant bodies including Local Enterprise Partnerships, Local Nature Partnerships, the Marine Management Organisation, county councils, infrastructure providers, elected Mayors and combined authorities (in cases where Mayors or combined authorities do not have plan-making powers).
>
> 26. Effective and on-going joint working between strategic policy-making authorities and relevant bodies is integral to the production of a positively prepared and justified strategy. In particular, joint working should help to determine where additional infrastructure is necessary, and whether development needs that cannot be met wholly within a particular plan area could be met elsewhere.
>
> 27. In order to demonstrate effective and on-going joint working, strategic policy making authorities should prepare and maintain one or more statements of common ground, documenting the cross-boundary matters being addressed and progress in cooperating to address these. These should be produced using the approach set out in national planning guidance, and be made publicly available throughout the plan-making process to provide transparency."

33. Whilst addressing the provisions of the Framework it is worthwhile at this stage to note that the claimant's argument includes the contention that the Inspector confused the requirements of the duty to cooperate with the examination of soundness required pursuant to the provisions of section 20(5). The policy in relation to whether or not a plan is sound is to be found in paragraph 35 of the framework in the following terms:

> "35. Local plans and spatial development strategies are examined to assess whether they have been prepared in accordance with legal and procedural requirements, and whether they are sound. Plans are 'sound' if they are:
>
> a) Positively prepared – providing a strategy which, as a minimum, seeks to meet the area's objectively assessed needs and is informed by agreements with other authorities, so that

> unmet need from neighbouring areas is accommodated where it is practical to do so and is consistent with achieving sustainable development;
>
> b) Justified – an appropriate strategy, taking into account the reasonable alternatives, and based on proportionate evidence;
>
> c) Effective – deliverable over the plan period, and based on effective joint working on cross-boundary strategic matters that have been dealt with rather than deferred, as evidenced by the statement of common ground; and
>
> d) Consistent with national policy – enabling the delivery of sustainable development in accordance with the policies in this Framework."

34. Turning to the PPG, it contains a considerable amount of guidance relating to the preparation of statements of common ground including their contents, subject matter and format. Of particular relevance to the issues in the present case are the provisions of the PPG dealing with the question of whether or not local planning authorities are required to reach agreement on strategic matters, and what should be done if they are unable to secure such agreements. The parts of the PPG dealing with this point are as follows:

> "Are strategic policy-making authorities required to reach agreement on strategic matters, and what should an authority do if they are unable to secure these agreements?
>
> Strategic policy-making authorities should explore all available options for addressing strategic matters within their own planning area, unless they can demonstrate to do so would contradict policies set out in the National Planning Policy Framework. If there they are unable to do so they should make every effort to secure the necessary cooperation on strategic cross boundary matters before they submit their plans for examination. Authorities are not obliged to accept needs from other areas where it can be demonstrated it would have an adverse impact when assessed against policies in the National Planning Policy Framework.
>
> Inspectors will expect to see that strategic policy making authorities have addressed key strategic matters through effective joint working, and not deferred them to subsequent plan updates or are not relying on the inspector to direct them. Where a strategic policy-making authority claims it has reasonably done all that it can to deal with matters but has been unable to secure the cooperation necessary, for example if another authority will not cooperate, or agreements cannot be reached, this should not prevent the authority from submitting a plan for examination. However, the authority will need to submit comprehensive and robust evidence of the efforts it has made to cooperate and any

> outcomes achieved; this will be thoroughly tested at the plan examination."

35. In *Zurich Assurance Limited v Winchester City Council* [2014] EWHC 758 Sales J (as he then was) explained both the substance of the obligation imposed by section 33A and the role of the court in a challenge of the kind presently under consideration in the following terms:

> "109. The duty to co-operate imposed by section 33A applies (so far as relevant in this case) in respect of the preparation of development plan documents "so far as relating to a strategic matter" (subsection (3)), as defined in subsection (4) ("sustainable development or use of land that has or would have a significant impact on at least two planning areas, [etc]"). The question of whether development or use of land would have a significant impact on two planning areas is a matter of planning judgment.
>
> 110. The obligation (see subsection (1)) is to co-operate in "maximising the effectiveness" with which plan documents can be prepared, including an obligation "to engage constructively [etc]" (subsection (2)). Deciding what ought to be done to maximise effectiveness and what measures of constructive engagement should be taken requires evaluative judgments to be made by the person subject to the duty regarding planning issues and use of limited resources available to them. The nature of the decisions to be taken indicates that a substantial margin of appreciation or discretion should be allowed by a court when reviewing those decisions.
>
> 111. The engagement required under subsection (2) includes, in particular, "considering" adoption of joint planning approaches (subsection (6)). Again, the nature of the issue and the statutory language indicate that this is a matter for the judgment of the relevant planning authority, with a substantial margin of appreciation or discretion for the authority.
>
> 112. WCC was required to have regard to the guidance about co-operative working given in the NPPF: subsection (7).
>
> 113. The limited nature of the role for the court in a case like the present is reinforced by the structure of the legislation in relation to review of compliance with the duty to co-operate under section 33A . The Inspector is charged with responsibility for making a judgment whether there has been compliance with the duty: section 20(5)(c) of the 2004 Act. His task is to consider whether "it would be reasonable to conclude" that there has been compliance with the duty: section 20(7)(b)(ii) and (7B)(b). A court dealing with a challenge under section 113 of the Act to the judgment of an inspector that there has been such compliance is therefore limited to review of whether the inspector could

> rationally make the assessment that it would be reasonable to conclude that there had been compliance by a planning authority with this duty. It would undermine the review procedures in the Act, and the important function of an inspector on an independent examination, if on a challenge to a plan brought under section 113 the court sought to circumvent this structure by applying any more intrusive form of review in its own assessment of the underlying lawfulness of the conduct of the planning authority itself. A rationality standard is to be applied in relation to the decision made by the Inspector and in relation to the underlying decision made by WCC."

36. In the subsequent case of *Trustees of the Barker Mill Estates v Test Valley Borough Council* [2017] PTSR 408 Holgate J endorsed and adopted the analysis of Sales J in *Zurich Assurance* (see paragraphs 55-57). Since the claimant places some reliance upon the conclusions of Holgate J in relation to the particular facts of that case it is necessary to set out Holgate J's agreement in summary with Sales J, and then his analysis of the issues which arose in that case and how he resolved them. These points are dealt with in the following paragraphs of his judgment:

> "58. In agreement with Sales J I consider that:—
>
> (i) The question posed by section 20(7B)(b) of PCPA 2004 is a matter for the judgment of the Inspector;
>
> (ii) The Court's role is limited to reviewing whether the Inspector could rationally make the assessment that
>
> (ii) The Court's role is limited to reviewing whether the Inspector could rationally make the assessment that it would be "reasonable to conclude" that the LPA had complied with section 33A ;
>
> (iii) It would undermine the structure of PCPA 2004 and the procedure it provides for review by an independent Inspector if, on a challenge made under section 113 , the Court sought to apply a more intrusive form of review in its assessment of the underlying lawfulness of the LPA's conduct or performance; form of review in its assessment of the underlying lawfulness of the LPA's conduct or performance;
>
> 59. The challenge under ground 2 is therefore directed to the Inspector's report, in particular paragraphs 10 to 14 where he stated:—
>
> "10. On the first day of the Hearing a submission was made by a representor to the effect that the Council had failed in relation to the DtC [the duty to co-operate]. This was discussed in some detail at the Hearing, and in public correspondence between the representor, the Council and myself. The most important element of this submission was that the Council's identified affordable

housing need figure is 292 dwellings per annum (d.p.a.) (clarified by MM/5/1), with certain caveats, whereas the expected provision is 206 d.p.a. The Council put forward reasons for this position, but the DtC issue relates to the fact that the Council had not asked neighbouring authorities whether they could accommodate some or all of the identified shortfall.

11. There is nothing to suggest the extent to which any shortfall in affordable housing provision within Test Valley would lead to displaced demand affecting some or all of the eight adjoining authorities.

12. The objective of the DtC is to maximise the effectiveness of the plan making process. In this case the overall manner in which the Council has worked with other authorities, particularly but not exclusively in the southern part of the Borough, is impressive. In the light of their considerable experience, Council officers presented me with a very clear picture of the position of adjoining authorities in relation to affordable housing. To have made a formal request to adjoining authorities for assistance with affordable housing, when the Council knew full well what the answer would be, would not have been effective or productive.

13. In subsequent correspondence the representor also stated that there would be a shortfall in market housing, and that the DtC would additionally be triggered in this respect. However, as I conclude (below) that the RLP will meet the full OAN for market housing, this matter does not trigger the DtC.

14. The Council has clearly taken into account the wider strategic context and the interrelationships with neighbouring areas, particularly in terms of housing markets and employment patterns. I am satisfied that the Council has engaged constructively, actively and on an ongoing basis with relevant local authorities and organisations, and I conclude that the DtC has been met.

…

60. The Claimants submit that where an LPA cannot meet its own FOAN for affordable housing then it must "explore under the ambit of the duty to co-operate whether any unmet needs can be met within adjacent LPAs" (paragraph 68 of skeleton). The proposition is said to be based upon paragraphs 104 and 106 of the judgment of Hickinbottom J in *Gallagher* . But in fact the Judge did not determine any issue in relation to section 33A nor did he lay down the proposition for which the Claimants contend.

61. It is to be noted that the Claimants' proposition is limited in scope. This is not a case where non-compliance with section 33A is said to have occurred because the Defendant failed to address

the inclusion of a policy in its plan for meeting needs arising outside its area. The Claimants simply argue that TVBC should have "explored" with other LPAs the issue of whether the shortfall in meeting the FOAN for affordable housing in its area could be dealt with in their areas. In essence, this is the same complaint as that raised at the Examination, namely that TVBC failed to put this question to the other authorities.

62. The Claimants were not at all precise as to what the use of the term "explore" should be taken to mean, although it lies at the heart of the ground of complaint. By implication the Claimants recognise that TVBC was not in a position to complete other authorities to provide for TVBC's shortfall and that they might legitimately say that they were unable to assist. Here the word "explore" suggests obtaining sufficient information about affordable housing needs in the areas of other LPAs and their ability to satisfy their own needs and any additional needs from other areas. In the light of that information a plan-making authority could decide, as a matter of judgment, whether it would be worthwhile to pursue negotiations with one or more other authorities to assist with its shortfall.

63. In this case the Claimants made no attempt to show the Court that TVBC either lacked this information or that, in the light of the information it had, TVBC's judgment that there was no point in pursuing negotiations with other authorities on this point was irrational. In his reply, Mr Cahill QC confirmed that the only criticism of the Inspector's report is one of irrationality and is limited to the last sentence of paragraph 12, in which he had said that there had been no need for TVBC to make a " formal request" to adjoining authorities when it knew full well what the answer would be. He also stated that no legal criticism is made of the penultimate sentence of paragraph 12 in which the Inspector said that TVBC's officers had given him a very clear picture of the position of adjoining authorities in relation to affordable housing.

64. In fact, paragraph 12 is a summary of what the Inspector had been told during the Examination. In inquiry document IN009 (dated 19 December 2014) the Inspector explained that the extent of cross-boundary working had been explained by TVBC not only in its "Duty to Co-operate Statement" but also in the Hearing sessions, including one devoted to affordable housing. TVBC had been actively engaged in the production of a number of informal strategies and evidence based studies with other authorities and stakeholders. The extent of the working with other authorities was described by the Inspector as "impressive". It was from this information that he reached the judgment that TVBC's officers were "fully aware that other authorities would not be in a position to assist with any shortfall". Plainly the

> Inspector relied upon this information when writing paragraph 12 of his Report on the Examination.
>
> 65. When paragraph 12 of the Report is read properly in the context of the material which was before the Examination, the Inspector, in his review of TVBC's performance, was entitled to reach the conclusions that (i) they had obtained sufficient information from the cross-boundary work which had in fact taken place on whether adjoining authorities would be able to provide affordable housing to meet any part of needs arising within TVBC's area and that (ii) it would have been pointless to make a "formal request" for assistance in meeting TVBC's shortfall. It is impossible for the Court to treat to Inspector's conclusions as irrational and so ground 2 must be rejected."

37. In *R(on the application of St Albans City and District Council) v SSCLG and others* [2017] EWHC 1751 Sir Ross Cranston dealt with an application for judicial review in which it was contended that an Inspector's conclusion that the duty to cooperate had not been satisfied was unlawful. The factual circumstances of that case involved the claimant's argument that the Inspector had failed to properly take into account the polarised position or impasse which had emerged in relation to contentions between the claimant and the adjoining local planning authorities with respect to the housing market. Having accepted and endorsed the approach taken in *Zurich Assurance* and *Trustees of Barker Mills*, Sir Ross Cranston concluded that the reasons provided by the Inspector demonstrated that he was fully aware of the disagreement between the council and adjoining local planning authorities in relation to the definition of the housing market area and appreciated the issue. The judge was satisfied that the decision adequately reasoned the conclusions that the Inspector had reached. In paragraph 51 of the judgment Sir Ross Cranston went on to accept the defendant's submission "that once there is disagreement, I would add even fundamental disagreement, that is not an end of the duty to cooperate". He concluded that the duty to cooperate remained active and ongoing "even when discussions seemed to have hit the buffers". Whilst in reaching this conclusion he placed some reliance on a decision of Patterson J in *R(on the application of Central Bedfordshire Council) v SSCLG* [2015] EWHC 2167 (Admin), which the parties in the present case accepted could not be authoritative as it was a permission decision which did not contain a statement that it could be cited in accordance with the Practice Direction on the Citation of Authorities, 9 April 2001 and, furthermore, was overturned by the Court of Appeal in granting permission to appeal.. Nonetheless the observations of Sir Ross Cranston are in my judgment properly capable of being considered as free standing, relevant and reliable, bearing in mind the fact-sensitive nature of the judgment which has to be reached in each individual case in which the duty to cooperate is being examined, and taken in the context of the particular facts of the case he was considering.

Submissions and conclusions

38. On behalf of the claimant Ms Saira Kabir Sheikh QC advances the case on four grounds. The first ground is that the Inspector failed when reaching her conclusions to apply the margin of appreciation which ought to be afforded to the claimant pursuant to section 33A of the 2004 Act. It is Ms Sheikh's submission, based upon both the wording of the statute and also the decisions in *Zurich Insurance* and *Barker Mills*, that when

considering whether or not the claimant had discharged the duty to cooperate in preparing the plan the Inspector was required to afford a margin of appreciation to the claimant and she failed to do so. In particular Ms Sheikh relies upon the contention that the Inspector sought to substitute her own judgment for that of the claimant and adjoining authorities where, for instance, in paragraph 29 of her report she concludes that, notwithstanding the fact that the adjoining authorities indicated that there had been regular constructive and cooperative liaison, she was not satisfied that that had in fact taken place. The discarding of the opinions of adjoining authorities demonstrated that the Inspector had failed to afford the claimant the margin of appreciation to which it was entitled.

39. Moreover, Ms Sheikh disputes the contention that the Inspector applied the correct test in reaching her conclusions: whilst the Inspector made assertions about unmet housing need being met elsewhere outside the claimant's administrative area, in reality the claimant was fully aware from its engagement with neighbouring authorities that there was no possibility of unmet housing need being met elsewhere. The Inspector's approach, for instance in paragraph 37 of her report, demonstrates that the Inspector's focus was upon what a local planning authority might do in the event of unmet housing need arising and was not focused on the particular circumstances of the claimant and its own knowledge and judgment as to what might be expected from any dialogue with adjoining authorities. Effectively, the whole tenor of the Inspector's report reflects the substitution of her own judgment for that of the claimant, without affording the claimant the margin of appreciation to which they were entitled.

40. Ms Sheikh also contends that her approach to the statements of common ground illustrated a similar error. The statements of common ground illustrated the depth and extent of the claimant's engagement with adjoining authorities, and her assertion that these had been drafted too late to influence the plan misunderstood both her role and the proper approach to be taken to the duty to cooperate.

41. In response to these submissions Mr Richard Moules, on behalf of the defendant, submits that when the Inspector's report is read as a whole it is clear that she has applied the correct approach. She started from the proposition that the plan had been submitted by the claimant in what it considered to be a legally compliant and sound form. In paragraph 37 of her report she clearly applied the test of what it was "reasonable to expect" the claimant to have done in the circumstances which arose. Fundamentally, Mr Moules submits that the present case had little to do with the margin of appreciation, on the basis that the Inspector's judgment as to what the claimant had done demonstrated that in fact they had done nothing constructive to explore addressing unmet housing need at the appropriate time during the plan's preparation. The Inspector concluded that the claimant could reasonably have been expected to do something in the circumstances which arose when the extent of unmet need emerged, but in fact did nothing.

42. Moreover, Mr Moules maintains that the Inspector was entitled to scrutinise the assertions of the adjoining authorities and if she concluded that, having evaluated all of the available evidence, it was not "reasonable to conclude" that the duty to cooperate had been satisfied then she was entitled to reach the conclusion which she did. Further, in applying the statutory tests at paragraph 26 of the Framework, the Inspector needed to examine whether the claimant had taken reasonable steps to explore meeting its unmet housing need. In doing so the Inspector was not effectively adopting the

approach of asking what a hypothetical authority would have done but was rather discharging the statutory tests on the facts of this particular case. The undoubted existence of the margin of appreciation should not stand in the way or act as a dis-incentive to local planning authorities working together to help to solve difficult and controversial problems of, for instance, unmet housing needs where the authority areas are the subject of environmental constraints.

43. Turning to Ground 2, Ms Sheikh contends that in reaching her conclusions the Inspector failed to correctly interpret and apply the duty to cooperate and conflated it with the statutory requirement that the plan should be sound. Central to her submission is that the Inspector misdirected herself by working backwards from evidence which might go to the soundness of the plan to reach conclusions on whether or not the duty to cooperate had been discharged. She worked backwards from the existence of unmet need to reach a conclusion that there had been a failure to comply with the duty to cooperate. This confused and conflated the two issues of the duty to cooperate and soundness. The evidence of this error exists, for instance, in paragraphs 17 and 24 of the Inspector's report in which she focusses on the existence of unmet need and the failure to resolve that issue. Ms Sheikh submits that the reality was that at the stage that unmet need was clearly identified it was well known that it could not realistically be met elsewhere. In effect, the Inspector erroneously considered the duty to cooperate in the light of the unmet housing need, rather than examining the requirements of the duty to cooperate itself in order to understand whether it had been discharged. The issue of unmet need and whether the housing figures and delivery proposed by the SDLP were justified was an issue connected with soundness and not the duty to cooperate.

44. In response to these submissions Mr Moules contends, firstly, that the Inspector was careful to distinguish between the duty to cooperate and the requirements of soundness in the substance of her report. Secondly, Mr Moules submits that when the Inspector's decision is properly understood, it correctly distinguished between the duty to cooperate and soundness. The problem, as identified by the Inspector, did not lie in the existence of unmet housing need in and of itself but rather in the claimant's failure to engage with adjoining authorities constructively, actively and on an ongoing basis in order to consider an attempt to find a solution that that unmet housing need at the time when it emerged. The Inspector recognised, in particular in paragraph 39 of her report, that it may not be possible for the claimant's housing need to be met in full, but concluded that earlier and fuller proactive engagement might have made it "significantly more likely to result in an effective strategy for meeting Sevenoaks' unmet need". In truth, Mr Moules contends that the claimant highlights two paragraphs (paragraphs 17 and 24) which in fact exemplify the Inspector addressing and setting out the essence of the claimant's failure to engage in ongoing active and constructive engagement with the neighbouring authorities in relation to the strategic issue of unmet housing need, rather than confusing the questions arising under the duty to cooperate with those which arose in respect of soundness.

45. Turning to Ground 3, Ms Sheikh on behalf of the claimant submits that the Inspector failed to have regard to the available material evidence furnished by the claimant. The evidence demonstrated that the claimant was both aware that there would be an unmet need, but also as a result of its duty to cooperate discussions with adjoining authorities was aware that regardless of the scope of the unmet need neighbouring authorities would not be able to assist. This point is not grappled with, she submits, by the

Inspector, and, in particular, the Inspector fails to grapple with the extensive environmental constraints that each of the authorities have to work with. In addition, Ms Sheikh submits that the statements of common ground ought not to have been disregarded in the way the Inspector did by treating them as too late to influence the SDLP. In fact, that documentation reflected years of discussions between the authorities and was highly relevant to demonstrate that the duty to cooperate had been discharged. Further, the lack of a formal request for assistance from the claimant did not demonstrate non-compliance with the duty to cooperate: the reason that no formal request was made was because as a result of the exercise of the duty to cooperate the claimant was well aware that unmet need could not be met elsewhere.

46. In response to these submissions Mr Moules submits that, firstly, the Inspector addressed whether or not there had been discussion of meeting unmet need for a considerable time and concluded on the evidence, as she was entitled to, that there was no evidence to support the claimant's statement that discussions had already indicated that an unmet need of 600 dwellings could not be accommodated in the neighbouring authorities (see paragraph 35). Secondly, Mr Moules submits that the Inspector was clearly aware of the constraints under which both the claimant and the adjoining authorities operated: these were referred to at several points during the course of her report. Thirdly, the Inspector explained clearly her conclusion that the claimant had neither demonstrated that it had constructively and actively pursued solutions to the unmet housing need it had identified with its neighbours at the appropriate time during preparation of the plan, nor that cooperation with its neighbours was an impossibility in respect of meeting any of the unmet housing need arising. Fourthly, Mr Moules submits that, again, the Inspector clearly explained for good reason that the statements of common ground had arrived too late in the process to support the conclusion that the duty to cooperate had been complied with. Fifthly, the claimant's complaint in relation to the Inspector's view on the lack of the formal request to neighbouring authorities is submitted by Mr Moules to be simply another disagreement on behalf of the claimant with the Inspector's planning judgment that it was unreasonable for the claimant to do nothing by way of meaningful exploration of solutions to meet the identified housing need shortfall.

47. Finally, by way of Ground 4, Ms Sheikh submits that the Inspector failed to give adequate reasons for the claimant's failure to comply with the duty to cooperate or, alternatively, the Inspector's conclusion was irrational. In particular it is submitted that the Inspector failed to provide adequate reasons as to why weight was placed upon the claimant's failure to make a formal request for assistance earlier and further failed to adequately reason why she disregarded the evidence of neighbouring authorities in relation to the duty to cooperate, or why she suggested that the statements of common ground did not provide evidence of compliance to cooperate. In the light of the evidence the Inspector's conclusions were irrational.

48. In response to these submissions Mr Moules submits that the Inspector's conclusions on each of the issues relied upon were clear and entirely rational. As the Inspector explained, had formal requests for the adjoining authorities been made as soon as the full extent of the claimant's unmet housing need became apparent then it may have been possible through constructive engagement to achieve a more positive outcome and maximise the effectiveness of the plan (see paragraphs 37-39 of the Inspector's report). The Inspector's reasoning showed that the neighbouring authorities' views were taken

into account, but as the Inspector explains they could not allay the concerns that she had clearly identified. The statements of common ground were, for the reasons the Inspector gave, provided too late to furnish evidence of compliance with the duty to cooperate in relation to the unmet housing need identified. Finally, Mr Moules submits that it is unarguable that the Inspector's conclusion was irrational.

49. In forming conclusions in relation to these competing submissions it is necessary, in my view, firstly to analyse the substance of the legal issues which arise in relation to the duty to cooperate under section 33A of the 2004 Act. Thereafter, secondly, it is important in my view to be clear as to the nature of the decision which the Inspector reached and the specific basis for her conclusions.

50. As described in paragraph 33A(2)(a) the duty to cooperate, when it arises, requires the person who is under the duty "to engage constructively, actively and on an ongoing basis" in relation to the preparation of a development plan document (see paragraph 33(A)(3)(a)) "so far as relating to a strategic matter" (see paragraph 33A(3)(e)) to "maximise the effectiveness" of the activity of plan preparation. Whilst during the course of her submissions Ms Sheikh points out that activities were undertaken by the claimant in relation to a broad range of strategic issues concerned with infrastructure and wider environmental designations, and she relied upon the numerous strategic matters with which the claimants were concerned in preparing the SDLP, it is in my view clear that the duty to cooperate arises in relation to each and every strategic matter individually. There was, therefore, no error involved by the Inspector in the present case focussing upon one of those strategic matters in reaching her conclusions in respect of the duty to cooperate.

51. I accept the submission made by Ms Sheikh that discharging the duty to cooperate is not contingent upon securing a particular substantive outcome from the cooperation. That was a proposition which was not disputed by Mr Moules. I accept, however, his submission that the duty to cooperate is not simply a duty to have a dialogue or discussion. In order to be satisfied it requires the statutory qualities set out in section 33A(2)(a) to be demonstrated by the activities comprising the cooperation. As Sales J observed in paragraph 110 of *Zurich Assurance*, deciding what ought to be done to meet the qualities required by section 33a(1)(c)(2)(a) "requires evaluative judgments to be made by the person subject to the duty regarding the planning issues and use of limited resources available to them." As Sales J also observed, bearing in mind the nature of the decisions being taken a court reviewing the decision of an Inspector making a judgment in respect of whether there has been compliance with the duty will be limited to examining whether or not the Inspector reached a rational decision, and will afford the decision of the Inspector a substantial margin of appreciation or discretion. It is against the background of these principles that the submissions of the claimant fall to be evaluated.

52. The second issue is, as set out above, to be clear as to the nature of the decision which the Inspector reached. In that connection, in my judgment the submissions made by Mr Moules in relation to Ground 4 are plainly to be preferred. Having carefully examined the Inspector's conclusions they were, in my judgment, clearly expressed and set out in detail the reasons for the conclusions that she reached. I am unable to identify any defect in the reasoning of her report which sets out clearly and in full detail her conclusions and the reasons for them.

53. It is clear from the report that the conclusions of the Inspector were that the claimant became aware of the detailed extent of its unmet housing need after the Regulation 18 consultation which ceased on the 10 September 2018 (see paragraph 27 and paragraph 35). The first minutes of a duty to cooperate meeting referring to addressing unmet housing need in the claimant's area was on 13 March 2019, after the Regulation 19 consultation on the SDLP, and seven weeks prior to submission of the SDLP for examination (see paragraph 23). The minutes of the duty to cooperate meetings provided "no substantial evidence that the council sought assistance from its neighbours in meeting its unmet housing need" prior to the publication of the Regulation 19 version of the SDLP (see paragraph 24). 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). The statements of common ground were completed after the submission of the plan for examination and prepared too late to influence the content of the plans preparation (see paragraphs 32 and 33). Whilst the claimant contended that discussions had already indicated prior to the extent of unmet housing need emerging following the Regulation 18 consultation and further engagement was not undertaken because it had already been indicated that an unmet need of 600 dwellings could not be accommodated, the Inspector concluded that there was no evidence to support the assertion that discussions had already indicated an unmet need of 600 dwellings could not be accommodated (see paragraph 35).

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. Whilst that process may or may not have been fruitful, the Inspector observed that "it is not possible for me to know whether this would have been the case because effective and constructive engagement on this issue did not take place". The peer review process did not assist: the PAS workshop was undertaken at a very late stage the plan process and "if the engagement had occurred as soon as the council was aware of the broad level of unmet need and, in any event, in advance of the Regulation 19 version of the Local Plan, it might have resulted in a more positive outcome" (see paragraph 43). The visiting Inspector raised issues which were not adequately resolved before the plan was submitted (see paragraph 44).

55. From this distillation of the Inspector's conclusions and reasoning it is clear to see that there is no substance in the claimant's grounds. In my view it perhaps makes most sense to start with the claimant's Ground 2, the contention that the Inspector failed to properly interpret and apply the duty to cooperate and conflated it with the requirement for soundness. In my view there is no basis for this contention when the Inspector's conclusions and reasons are properly understood. Firstly, as to the application of the test it is clear from paragraph 37 that the Inspector directed herself to whether, in accordance with the requirements of section 20(7)(a)(ii), it was reasonable for her to conclude that the duty to cooperate had been complied with. She found that once the

extent of the unmet need emerged after completion of the Regulation 18 consultation on the SDLP, the claimant should have contacted its neighbouring authorities and engaged constructively in an attempt to resolve the issues arising from its unmet housing needs. Her conclusion that there was no communication, let alone engagement, in between the emergence of this issue and embarking upon a Regulation 19 consultation underpinned her conclusion that there had not been constructive, active and ongoing engagement in relation to that issue. It is clear from paragraphs 37 and 43, and indeed from the totality of her reasoning, that what she was scrutinising and assessing was not the identification of a particular solution for the strategic issue of unmet housing need, but rather the quality of the manner in which it had been addressed. Her conclusions were, based on her factual findings as to what in fact happened after the Regulation 18 consultation disclosed the extent of the unmet housing need, that no constructive and active engagement was undertaken at the time when it was required in advance of the Regulation 19 version of the SDLP being settled. These conclusions properly reflected the statutory requirements and the evidence which was before the Inspector and do not disclose any misdirection on her part, or confusion between the requirements of the duty to cooperate and the requirements of the soundness with respect to this strategic issue.

56. Turning to Ground 1 there is force in the submission made by Mr Moules that, in truth, this is a clear-cut case based on the findings that the Inspector reached. As set out above, the Inspector concluded (as she was entitled to on the evidence before her) that at the time when the strategic issue in relation to unmet housing need crystallised, there was no constructive, active or ongoing engagement and, indeed, the matter was not raised with neighbouring authorities until after the Regulation 19 consultation on the SDLP and at a very late stage in plan preparation. Requests made of neighbouring authorities on the 11 April 2019 post-dated the Regulation 19 consultation and were shortly prior to the plan being submitted. In those circumstances the Inspector was entitled to conclude that these discussions were not taking place at a time when they could properly inform and influence plan preparation and maximise the effectiveness of that activity. As the Inspector recorded in paragraph 37, she found, as she was entitled to, that had engagement occurred after the Regulation 18 consultation and prior to the Regulation 19 consultation "it might have resulted in a more positive outcome". Further, as the Inspector recorded, the possibility that it may have led to the same outcome was nothing to the point. Effective, constructive and active engagement had not taken place at the time when it was required. By the time there was communication in respect of the issue it was too late.

57. Although the claimant stressed its belief that whenever called upon to do so neighbouring authorities would have refused to provide assistance, I am not satisfied that this provides any basis for concluding that the Inspector's conclusions were irrational. Indeed, as she notes, Tunbridge Wells Borough Council noted in its written material that if the request to address the claimant's unmet housing need had been made at any point prior to the submission of its comments on the Regulation 19 version of the plan then their response would have addressed the issue more fully. There was, therefore, evidence before the Inspector to support her judgment in this respect. In the light of these matters I am unable to accept that there is any substance in the claimant's Ground 1. There is no justification for the suggestion that the Inspector failed to afford a margin of appreciation to the claimant in reaching her conclusions; the clear-cut nature of the conclusions which the Inspector reached were fully set out and ultimately

the Inspector was required by section 20 of the 2004 Act to reach conclusions in relation to the statutory test which she did.

58. Turning to the submissions in relation to Ground 3, I am unable to accept that the Inspector failed to have regard to the material which was available to her in reaching her conclusions. It is clear to me from the detail of the report that the Inspector had regard to all of the evidence that had been placed before her. The Inspector clearly addressed the detailed material in relation to the duty to cooperate meetings and the preparation of joint evidence. She also engaged with the existence of statements of common ground and the views of the neighbouring local authorities. She gave careful consideration to the peer review which had been undertaken and reflected on the responses from adjoining authorities to request they meet unmet housing need from the claimant and the environmental constraints under which the claimant had to operate. In my view the submissions advanced in respect of Ground 3 effectively amount to a disagreement with the Inspector on the conclusions which she ought to have forged based upon the material which was before her. Ultimately, the availability of this evidence did not dissuade the Inspector from reaching the conclusions which she did in respect of quality and timing of the engagement in the present case: the generality of the position presented by the claimant does not gainsay the detailed conclusions reached by the Inspector as to the nature of the duty to cooperate activities, or lack of them, at the critical point of time when the extent of nature of the unmet housing need emerged at the conclusion of the Regulation 18 consultation. In my view it is clear that the Inspector had careful regard to all of the material which was placed before her and reached conclusions which, I have already set out in respect of my views on Grounds 1 and 2, were lawful and appropriate.

59. I have already expressed my view as to the quality and nature of the reasons provided by the Inspector in respect of the examination. In my view her reasons were clear, full, detailed and justified. In addition, under Ground 4 it is contended that the conclusion which she reached was irrational. In my judgment there is no substance whatever in that contention. For the reasons which I have already given the Inspector's conclusions were clearly open to her and based upon a proper appreciation and application of the relevant statutory tests.

60. It follows that for all of the reasons set out above I am satisfied that there is no substance in any of the grounds upon which this claim is advanced and the claimant's case must be dismissed.