
Date: 2 June 2025

Simon Berkeley
Planning Inspectorate
The Square
Temple Quay House
Bristol
BS1 6PN

By email to: SIMON.BERKELEY.2K@planninginspectorate.gov.uk

Dear Mr Berkeley

Mid Sussex District Plan 2021-2039: Inspector's Stage 1 Findings - Complaint

Thank you for your letter dated 15 May, responding to the complaint we raised regarding the conduct of Ms Louise Nurser, the Inspector appointed by the Secretary of State to undertake the Independent Examination of the Mid Sussex District Local Plan 2021-2039.

We were disappointed with your response to our complaint and do not consider that it has fully or appropriately considered and addressed the matters raised. The judgement reached by the Inspector is flawed and a distortion of the requirements for plan making relating to the duty to co-operate (DtC). It is clear that she has exercised pre-determination with regard to this matter. The Inspector had a range of remedies open to her to address the fact that unmet housing need had not been apportioned to neighbouring authorities – which as you suggest is the crux of the matter – which she did not take. Other Inspectors have determined that this is a soundness matter which can be addressed via modification to the plan and not a failure of the DtC. Her response therefore is completely disproportionate. We will be addressing this matter further in our response to the letter from the Government's Legal Services relating to our Pre-Action Protocol letter.

In addition, we have significant concerns relating to the process followed by the Planning Inspectorate in considering our complaint, which we believe has fettered the ability for an impartial and objective review to be undertaken. We turn to this matter first before addressing your response to the issues outlined in our complaint.

Given the multiple concerns the Council has regarding how our complaint has been addressed, we request that it is provided to an alternative, suitably qualified individual within the Planning Inspectorate, who should be tasked with undertaking a full, independent review of our original complaint.

Breach of due process in considering our complaint

We have significant concerns relating to the process followed by the Planning Inspectorate in reviewing our complaint. As you are aware, in parallel with our complaint we sent a letter pursuant to the Pre-Action Protocol for Judicial Review, identifying what the Council believes are serious errors of law in the Inspector's reasoning. The Government Legal Department responded to this letter on 15 May. Its response contained copies of the correspondence between the Inspector and the Planning Inspectorate and between the Planning Inspectorate and the Ministry. Whilst we do not believe the documents provided to be a complete record of all correspondence, they do include emails and documents which relate to the quality assurance of the Inspector's letter undertaken by the Planning Inspectorate. The Council will be submitting a Freedom of Information request to obtain documents not already included in the Pre-Action Protocol letter response.

The correspondence provided to us, extracts of which is included at Appendix A, demonstrates that you took a leading role in the quality assurance of the Inspector's letter. You provided over 40 comments on a draft of the letter as well as making substantial textual amendments. In addition, you supported the Inspector in the conclusions that she was drawing; namely that the Council had failed the DtC. In your email dated 17 February 2025 to the Inspector you say: *"I think you're right to follow the path you have – from what you've said, it does appear to me that they have failed the DtC."* and that *"it's [the letter] all about remaining as safe as possible from challenge"*.

Given your involvement in the quality assurance of the Inspector's letter, the Council is at a loss to understand how it could be deemed appropriate for you to respond to our complaint. It is impossible for you to act objectively and without pre-conceived views since you have already been involved and therefore are essentially 'marking your own homework'. It is clear from your email of 17 February 2025 and comments on the Inspector's draft letter that you support the views reached. You also briefed the Minister on both the Mid Sussex and Horsham Letter. Therefore, to conclude that the Inspector had erred in her approach or understanding of the issues, which is the substance of Issue 1 (pre-determined views of the Plan) of our complaint, would require you to implicate yourself and find that your original views were wrong. The Council considers this unlikely. Furthermore, your prior involvement with our case, means we have no confidence as to the veracity of the conclusions drawn in relation to Issues 2 (the Inspector's behaviour at the examination hearings) and 3 (timescales for the Inspector reaching her decisions) raised in our complaint. We pick this point up again under the Issue 3 heading below.

Issue 1: Pre-determined views of the Plan

Your response provided fails to grapple with substantive points raised in our complaint regarding the Inspector's pre-determined views. We have not provided a line-by-line response and instead wish to focus on what you consider to be the fundamental issue. In your response you say: "the fundamental problem identified in the letter is that there was a failure to explain what amount of housing, if any, the Council envisaged contributing to help address the unmet needs of its neighbours and the effect of that failure in maximising the effectiveness of plan preparation". In her letter, the Inspector fails to explain why the Council's "failure" to attribute its surplus to any particular neighbour constitutes a breach of the DtC. This is particularly in circumstances where:

- in the early stages of preparing its own plan, the Council could not have known what its own surplus would be until it had assessed the number of sites which were available;
- at all stages of the Plan, the Council has kept its DtC neighbours informed of progress on the issue of identifying sites (as evidenced by the material in AP-013 in front of the Inspector);

- at no stage in the preparation of the Plan did any of the Council's neighbours ask the Council to accommodate any particular quantity of need, and still haven't (as confirmed in consultation responses and verbally at the hearings); and
- the Council's approach to the allocation of its surplus was expressly communicated to its DtC partners, none of whom took any issue with it or expressed any concern that it impacted on their own ability to bring forward their own plans (as confirmed in signed Statements of Common Ground).

The Inspector's reasoning is premised on a matter which was patently not of concern to those with whom the Council was required to co-operate. The Council can understand how the Inspector might regard this as a matter going to the soundness of the Plan but struggles to see how failing to do something which the Inspector considers might have assisted the Council's neighbours in circumstances but for which (despite having had ample opportunity to do so) none of those neighbours ever asked, represents a breach of the DtC.

Furthermore, if the Council had, as the Inspector contends it should, specifically identified the authorities to whom the need should be allocated, it is unclear, in the circumstances, how that would have "improved the effectiveness with which the preparation of development plan documents by those neighbouring authorities was being undertaken". Especially as none of the Council's DtC partners has made this complaint.

In addition to this, while the Inspector may consider the Council's rationale for not identifying how it will meet unmet needs to be "unsatisfactory", we contend that this is a matter of soundness (in which case, the solution would be to recommend a modification to the Plan) and not a legitimate basis for concluding that there has been a breach of the DtC. The DtC is a two-way street and - whether or not the Inspector agrees with it - the Council's rationale was communicated to its DtC partners, none of whom took issue with it. It cannot be a breach of the DtC for the Council to fail to anticipate or respond to arguments on substantive issues which were never raised by those with the greatest interest in raising them.

This, in our view, suggests the Inspector had pre-determined views about the way the Plan should have been prepared, which have led her to unreasonably concluding that the DtC has not been met. This is especially the case given that in similar circumstances; other Inspectors have drawn different conclusions. This includes the examination of the adopted Mid Sussex District Plan where the surplus is not specifically attributed to any authority and in respect of the Waverley Local Plan, where the submitted plan made no provision for Woking's unmet need. In both cases, this was not considered to be a breach of the DtC, and for both Plans it was addressed as a matter of soundness by a Main Modification. Given the Inspector had other remedies available to her, the Council cannot understand how you could conclude the Inspector has not demonstrated fixed views regarding plan preparation.

Our complaint also raised broader concerns about the process followed by the Inspector in arriving at her interim findings. These points have not been addressed, and we request that a response is provided on them:

- Para 3 of the Inspector's letter makes it clear she considered there was a need to split the examination hearings in two parts due to "some fundamental issues, including the DtC, that required testing". However, despite the requirements of the PPG and Procedure Guidance these were not shared with the Council prior to the hearings and should have been. See page 6 of our original letter for further details of our complaint.
- We contend in our complaint letter that the Inspector made a number of assumptions in coming to her decision around DtC. Again, no response is provided as to why this is considered appropriate conduct in the circumstances. See pages 6 and 7 of our original letter for further details of the assumptions made by the Inspector.

Issue 2: The Inspector's behaviour at the examination hearings

Thank you for taking the time to look at the recordings of the hearing sessions. Having done that, we are surprised at the conclusions reached in your letter. Overall, you conclude that the conduct of the Inspector is as you would expect, with the fact that no complaints were made to the Programme Officer reinforcing the acceptability of Inspector's behaviour. As we set out in our letter (page 2), the Council wished to maintain a cordial relationship with the Inspector throughout the examination of the Plan. It is reasonable to conclude that if the Council decided it was in its best interests 'not to rock the boat' that other participants would come to this same conclusion. Therefore, the absence of a complaint does not equate to the Inspector's behaviour being acceptable.

We also struggle to understand how you have arrived at some of the conclusions in your letter. For example, the language and tone used by the Inspector did not, in our opinion, create ease at the hearings or bring levity to the proceedings. Indeed, her behaviour had the contrary impact. Following the comments around who should read the Council's opening statement and the Inspector's reference in her opening comments to the need for 'legal eagles' to remember that they were "mere mortals", our own Counsel, and Counsel instructed by other parties were reluctant to take the lead making representations on behalf of their clients because of the Inspector's evident hostility to barristers. We are aware from discussions with participants who had taken the decision to instruct Counsel precisely because they considered this was the most effective way of presenting their case that the Inspector's opening comments led a number to a hasty reorganisation of responsibility within their respective teams for making representations, in order to avoid the Inspector's displeasure. We do not understand how, in those circumstances, you can maintain that no-one was prejudiced by the Inspector's conduct. The Council's officers and advisors have vast experience of appearing at examination hearings and have never experienced a hearing environment where, as a result of the way the Inspector conducted the hearings, they were unable to explain the Council's evidence and rationale clearly. Our original letter pointed to examples whereby officers felt rushed into providing answers, not given the opportunity to explain their rationale without being cut-off and felt pressured when searching for documentation (without reference) when this was taking longer than she expected. Whether this was the Inspector's intention or not she failed to create a participative environment which will have impaired her ability to secure the information required to make informed decisions. This is exemplified by the conclusions reached by the Inspector on DtC including the many assumptions made about the Council's evidence base.

We also note that you did not provide a response relating to our point around the Council's right to reply. We would welcome a response on this point.

Issue 3: Timescales for the Inspector reaching her decisions

Your response to our complaint on the timeliness of the Inspector's activities focuses solely on the overall time taken from the close of the Stage 1 examination hearings to receipt of the Inspector's letter. Whilst the letter was with MHCLG for an extended period of time, this contributes a relatively short period to the overall duration. In our view, you have therefore been selective in addressing the concerns that we raised. In particular, you have not:

- responded to the Council's concerns regarding the lack of and/or slow communication from the Inspector to the Council following the close of the hearings – which are summarised on page 11 of our complaint letter; or

- acknowledged the time taken for the Inspector to write her initial letter prior to it being subject to the MHCLG review process. It took some three and half months for the Inspector to write the letter and for it to go through the Inspectorate's quality assurance process. By any measure this is an extended period of time, particularly in the context of Minister Pennycook's letter of July 2024 relating to 'pragmatism' which explicitly mentions the duration of examinations¹. Indeed, the Inspector drew our attention several times to this letter during the hearings and was clear in the final hearing session that the "onus is on the Council" to progress matters as quickly as possible given "time is of the essence". As a result, the Council responded to the Action Points in a matter of weeks. It cannot be said that the Inspector applied the same sense of urgency. There is tacit acceptance of this point in your email of 17 February 2025 to the Inspector, where you state that "I think issuing the letter expediently is a priority now." This clearly indicates that the time taken by the Inspector to produce a letter that is of a sufficient quality is longer than would normally be expected.


Conclusions

Given the seriousness of our concerns, we urge you to appoint an alternative, suitably qualified individual who can objectively and impartially consider the points raised in this letter, and our complaint letter dated 17 April 2025.

We note that your complaints procedure provides no timescale for a response. Given the time sensitive nature of our complaint, we request that you respond to it within 7 days.

Should you require any further information to progress your investigation into our complaint, please do not hesitate to contact me.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Kathryn Hall', with a horizontal line underneath.

Kathryn Hall
Chief Executive

Appendix A – Extracts from copy of correspondence

¹ <https://assets.publishing.service.gov.uk/media/66aa157b0808eaf43b50dad5/minister-pennycook-to-chief-executive-of-planning-inspectorate.pdf>