MID SUSSEX DISTRICT COUNCIL

Oaklands Road
Haywards Heath
West Sussex
RH16 1SS

01444 458166
www.midsussex.gov.uk

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Your ref: Z2504728/EQC/JD3

Government Legal Department
102 Petty France
Westminster
London
SW1H 9GL

By email to: newproceedings@governmentlegal.gov.uk

Dear Sir / Madam

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

Introduction

1. Thank you for your letter of 15 May 2025, setting out the Secretary of State's response to our Pre-Action Protocol Letter of 17 April 2025 ("your Letter").

2. The Council is disappointed that the Secretary of State does not agree that the reasoning set out in the Inspector's letter of 4 April 2025 ("the Inspector's Letter") is flawed. For the reasons set out below, your Letter fails to grapple with a number of key points which we urge the Secretary of State to consider before the Council decides how to respond to the Inspector's Letter.

3. Unless otherwise stated, paragraph references below are to paragraphs in your Letter.

The Details of the Matter Being Challenged

4. Para 4 states:

> "You have set out that the decision under challenge is the Report of the Inspector … However, no such Report has been issued and therefore that is not a decision amenable to judicial review. It is impossible to comment on the legality of a decision yet to be taken.
>
> However, the body of your letter challenges the details of the letter from the Inspector, dated 4 April 2025 … We have therefore proceeded on the basis that this is the 'Decision' under challenge."

Julie Galvin
Assistant Director Governance
Solicitor to the Council

5. It may be that nothing turns on this, but you will readily appreciate that one of the purposes of the Pre-Action Protocol is to avoid the need for claimants to have to make an application for judicial review in order to remedy legal errors. However, the Protocol can only do this if the pre-action correspondence takes place before there is a final decision which renders the proposed defendant *functus officio*. Once that point has passed, an application for judicial review is unavoidable, even if it is known that the defendant's response will be to concede to judgment. It is for that reason that, in planning matters, it is standard practice to write to a local planning authority in advance of a committee meeting, in circumstances where the proposed grounds of challenge are based on alleged errors in the officer's report.

6. That is the approach the Council has taken in this case. As its letter of 17 April 2025 made clear, the proposed challenge is to any final Report issued by the Inspector, on the assumption that the Inspector "concludes that the Council has failed the DtC for the reasons given in the letter of 4 April 2025". The assumption that any final Report would be for substantially the same reasons as the Inspector's Letter is entirely reasonable, given than the Inspector has expressly said that the contents of her final Report "would likely be very similar to this letter", and that she was not inviting a response from the Council (or any other examination participant). It is clear from this that, outside the Pre-Action protocol process, there is little or no opportunity for the Council to convey concerns which might lead the Inspector to word her final Report differently.

7. In keeping with the purposes of the Pre-Action Protocol, the whole point of the Council's decision to write at this stage is to avoid a situation where the Inspector is *functus officio*, and where the unlawfulness of her approach can only be remedied by a court order. The Council recognises that any challenge it brings will ultimately need to be to the reasons set out in any final Report (assuming the Council requests this), and that whether there are grounds for such a challenge will only be fully apparent once that final Report is issued. However, in circumstances (such as this) where the decision-maker has specifically indicated what the basis for a future decision is likely to be, it is perfectly possible to comment on the legality of that future decision.

8. This remains the Council's position. The Council considers that the Inspector's Letter is an interim decision which, while it has no formal legal status, is the best indication of the likely basis for any final Report, assuming the Council requests the Inspector to proceed to this stage. For the record, the Council considers that the time for seeking judicial review will not begin to run unless and until there is a final Report to challenge.

Relevant Law

9. At para 8.1, you suggest that the Council has "not acknowledged, nor seemingly understood" the threshold for a claimant seeking to challenge the decision of an Inspector on grounds of irrationality. With respect, your Letter does not acknowledge or seemingly understand paragraphs 12 and 13 of the Council's letter, which expressly refer to the margin of appreciation which the court will afford when reviewing the decision of an Inspector when making a judgment on whether there has been compliance with s.33A. The Council is well aware of the standard applied by the Courts: the difference between us is not whether the Council understands the test, but whether the proposed grounds clear that hurdle.

10. In this regard, you will be aware that the legal concept of "irrationality" or "unreasonableness" is not limited to the ***Wednesbury*** notion of a decision which is so unreasonable that no reasonable decision maker could come to it, but includes cases where there is a demonstrable flaw in the reasoning, such as a serious logical or methodological error: see e.g. ***R (Law Society) v. Lord Chancellor* [2019] 1 WLR 1649 at [98]**; approved in ***R (Finch) v. Surrey County Council* [2024] UKSC 20 at [56]**

Details of any Interested Parties

11. The Council notes and agrees with your suggestion that the Inspector's Letter and the Pre-Action correspondence should be placed on the Examination website. This has now been done.

Your Substantive Response to the Council's Proposed Grounds

12. Your Letter deals with each of the Council's proposed grounds in turn. While there is much there with which the Council disagrees, we do not propose to conduct a line-by-line response, not least because there is a more fundamental issue, which we address in the conclusions sub-section. Failure to respond to any more detailed point should not be taken as acceptance of it.

13. As a preliminary point, we note that your Letter now expressly disavows any reliance on arguments that:

    a. The Inspector was relying on the quantum or distribution of housing, or the Council's approach to site selection (para 9.2);

    b. The Council failed to identify a "top-down" figure (para 9.10);

    c. The holding of meetings and the sharing of the Council's methodology for site selection was not positive (para 9.25);

    d. The unmet need for gypsy and traveller sites in Horsham was determinative (para 9.32);

    e. The position with regard to the National Park was anything more than a "passing reference" (para 9.38);

14. The Council does not necessarily agree that these statements are consistent with the Inspector's Letter and reserves the right to return to these arguments if the Inspector's final report is reasoned in the same way. However, for the purposes of this response, we proceed on the basis that these concessions make it easier to concentrate on what you describe as the "critical issue".

15. In particular, it is a notable feature of your Letter that the Secretary of State's response to almost all of the Council's proposed grounds is that the Council has misunderstood the Inspector's central concern, which was that – having identified a surplus – the Council did not explain to any of its DtC partners what, if any, of that surplus it might be able to make available to meet their unmet needs: see paras 9.5, 9.8, 9.12, 9.20, 9.25, 9.29, 9.31. As noted above, you describe this as the "critical issue": para 9.22

16. In the Council's view, this focus fails to grapple with the following points.

17. First, the Inspector was not dealing with the soundness of the plan, but with the DtC. Co-operation is a process, in which parties may begin with different (but legitimate) positions, and part of the process is to see whether they can reach agreement. In those circumstances, the Inspector completely fails to explain why the Council's "failure" to attribute its surplus to any particular neighbour constitutes a breach of the DtC in circumstances where:

    a. 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;

    b. At all stages of the Plan, the Council has kept its DtC neighbours informed of progress on the issue of identifying sites;

c. 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;

d. 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 plans.

18. In short, 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, but for which (despite having had ample opportunity to do so) none of those neighbours ever asked, represents a breach of the DtC.

19. Second, the point above is amplified by para 9.8, where you state that "the Inspector was entitled to consider that the Council's rationale for not fixing a quantum … was unsatisfactory" (emphasis added). The DtC is not a duty to agree. Its immediate focus is on a process which (it is hoped) will lead to better substantive outcomes, but which recognises that there will often be occasions where parties disagree. The fact that there is disagreement is not, and cannot, of itself be breach of the duty. As such, while the fact that the Inspector considers the Council's rationale to be "unsatisfactory" may go to the soundness of the Plan (in which case, the solution would be to recommend a modification to the Plan) that disagreement on a substantive argument is 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.

20. This point is reflected in the approach taken by the Inspector examining the Waverley Local Plan, where the submitted plan made no provision for Woking's unmet need. However, this was not considered to be a breach of the DtC, but rather a matter of soundness which could be addressed by a Main Modification. It would be inconsistent with that decision if the Inspector's final Report in this case concluded that a similar approach was not possible.

21. Third, neither the Inspector's Letter nor your Letter grapples with the point that the approach taken by the Council is precisely the same as in the current District Plan, where the reasoned justification for Policy DP4 simply states that the housing provision figure will:

"meet the OAN as well as contributing towards the unmet need of neighbouring authorities, primarily the unmet need arising in the North West Sussex Housing Market Area from Crawley."

22. Although this indicates that most of the surplus will be attributed to Crawley, it quite clearly does not state that Crawley could rely on all of it. Neither Crawley, nor any other authority, was given a specific figure, or even a range, which it could use in its own local plan. Nor did that position change in the Council's Site Allocations DPD, which included an over-supply of 907 dwellings. This is notwithstanding the fact that – even at that time – there were unmet needs in more than one of the Council's neighbouring areas.

23. Critically, that approach was tested through the local plan process, and found to be consistent with both the DtC and the requirements of soundness. Even if, as a matter of soundness, the current Inspector disagrees with this, it is impossible to understand how or why the Council could not legitimately have regarded the same approach as an appropriate starting point for its new Plan, subject to discussion with or push-back from its DtC partners. Consistency is important in planning, and if the Inspector wished to disagree with the approach taken by her predecessors, she was required to address the fact that this is what she was doing, and provide reasons for her decision. However, in the context of the DtC, she needed to go on to explain why that disagreement was a basis for concluding that the Council has failed the DtC, when the approach has been endorsed by previous Inspectors on whose decisions it was perfectly reasonable for the Council to rely. Neither her Letter nor yours does this.

24. Fourth, at para 9.12 you suggest that, if the Council had specifically identified the authorities to whom the need should be allocated, it would have "improved the effectiveness with which the preparation of development plan documents by those neighbouring authorities was being undertaken". If that is the case, it is astonishing that none of the Council's DtC partners has made this complaint. Moreover, if and so far as this is part of the Inspector's reasoning (which is not apparent from her Letter), it does not explain how this would have been possible in circumstances where:

    a. The Crawley Local Plan was being prepared significantly in advance of the Council's own Plan, at a time when the Council simply did not know whether there would be a surplus at all. At the Regulation 18 stage of Mid Sussex's Plan, Crawley was also expecting a contribution from Horsham, and it was not until the issue of water neutrality arose that Horsham decided this would no longer be possible.

    b. Until the issue of water neutrality was identified, Horsham was proposing to meet the entirety of its own need, such that there would have been no shortfall for the Council to meet. Even once the water neutrality issue had been identified, there was considerable uncertainty as to the timescales for a solution to this and the implications for Horsham's ability to meet its own needs which (in terms of Horsham's Plan) continued until November 2023. By this point, the Council's Regulation 19 Plan was subject to its own governance procedures and therefore at a very advanced stage of plan making. Neither you nor the Inspector explain why, prior to this stage, the Council would or should have proposed to contribute to meeting Horsham's needs when Horsham had not yet determined whether it could meet its own need in full itself. Nor does the Inspector explain how attributing a particular number to Horsham's needs could have changed this, or assisted Horsham in the preparation of its own plan, where the primary issue was whether or not Horsham was able to find a solution to the problem of water neutrality.

25. Point (b) above is compounded by the fact that (as the documents you have disclosed demonstrate) both the Inspector's Letter and that of the Inspector examining the Horsham Plan were being vetted by the Planning Inspectorate at the same time, and were sent to the Secretary of State for consideration at the same time. Indeed, the Secretary of State received a briefing on both Letters from the same officer in the Inspectorate who also QAed the Mid Sussex letter. As you will be aware, the Horsham Inspector concluded that Horsham failed the DtC because it had not given sufficient consideration to the question whether, despite the issues of water neutrality, it could meet its own needs. The Council recognises that its Inspector might not have been aware of what her Horsham colleague was about to recommend, but both Inspectors are appointed by the Secretary of State who had oversight of both letters at the same time. There is an obvious inconsistency between the Horsham Inspector's conclusion, and the suggestion that MSDC should have identified a specific quantity of its surplus to meet Horsham's needs.

c. As far as Brighton & Hove is concerned, the Plan has always made it clear that the NWSHMA will take priority which (as the Inspector notes) has meant that there is unlikely to be a surplus available to meet Brighton & Hove's needs. Brighton & Hove might be unhappy with that outcome, but it has been able to bring its plan forward on that basis. In any event, it has always been clear that there would be a far more significant shortfall in Brighton & Hove than any one neighbour was able to meet, in which case the Brighton & Hove Plan has always needed to maximise what Brighton & Hove itself can deliver. On either analysis, it is impossible to see how allocating a specific part of Brighton & Hove's needs to any authority could have improved the effectiveness of Brighton & Hove's own plan preparation. It certainly would not have affected the number of houses being delivered in either authority's area.

d. While the Inspector was not satisfied with the Council's rationale, as set out at para 24 of the Council's letter of 17 April 2025, it is self-evident that anyone of those factors could have led to significant changes to the actual contribution which the Council was able to make to meeting the needs of any of its neighbours. Neither the Inspector nor you explain how it would have assisted neighbouring authorities to rely on a figure which might change as a result of the examination of the Council's Plan.

26. We would also note that, if this was the Inspector's concern, then finding the Council to be in breach of the DtC is an entirely counterproductive solution, as it would require the Council to go back to the beginning of the Local Plan preparation process. This would result in a very significant delay (likely to be of the order of at least 3 years) before the Council is once again in a position to advise its neighbours how much of their need it can accommodate (assuming, in the light of the December 2024 revisions to the standard methodology, it will be able to accommodate anything). In contrast, if the Inspector regarded this as a matter of soundness, she could simply have recommended a modification of the Plan, in which case neighbouring authorities would know the position very shortly.

27. Fifth, to the extent that the Inspector had criticisms of the Plan's approach to Brighton & Hove:

28. The Council repeats paras 67-74 of its letter of 17 April 2025. The DtC is not a duty to agree. The Council had a limited surplus, which was patently never going to be able to meet the needs of all of its neighbours. In those circumstances, it is inevitable that someone would miss out. In deciding to prioritise the NSWHMA, the Council was following the approach which had been at the previous Local Plan, and endorsed by the Inspector examining that Plan. It did not dismiss Brighton & Hove's representations out of hand, but concluded that there was no good reason to depart from the established approach. The fact that the current Inspector might not agree is something which might go to soundness, but it cannot be a breach of the DtC. Indeed, had the Council decided to assist Brighton & Hove, it would simply have been "robbing Peter to pay Paul", and would almost certainly have received objections from Crawley and Horsham that this went against the established position. On the Inspector's approach, the failure to resolve those objections would doubtless have been regarded as a breach of the DtC as well.

29. Despite your contention that there is no inconsistency in the Inspector's Letter, there is a clear tension between your contention that the breach of the DtC lies in the failure to help improve the effectiveness of adjoining plans by making the Council's position clear, and the Inspector's complaint that the Council's Plan makes it clear that Brighton & Hove was unlikely to be able to take advantage of the surplus. Her decision and your Letter put the Council in the impossible position of being in breach of the DtC because it has not made its position sufficiently clear to its neighbours, while at the same time being in breach of the DtC because it has made it clear that it is unable to help. The Secretary of State cannot have that argument both ways.

Details of Information Sought

30. Your response to the Council's Pre-Action Protocol Letter on 15 May 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.

Conclusions

31. For the reasons set out in the introduction to its letter of 17 April 2025, the Council is astonished that the Inspector's conclusions are one which the Secretary of State would even want to defend. The December 2024 NPPF repeats the government's commitment to the plan led system. Indeed, in March 2025 – at precisely the same time as the Secretary of State was considering the Inspector's Letter – she directed South Tyneside Council to submit its Regulation 19 Plan precisely because the Government is "committed to making progress toward the universal coverage of Local Plans".[1] It is against that backdrop that the Secretary of State has also, on numerous occasions, committed herself and her government to delivering 1.5 million new homes in the next 5 years.

32. That is a challenging target, and without the support of up-to-date and positive plans, there is little prospect of meeting it. The contrast between the Secretary of State's direction to South Tyneside and her endorsement of the Inspector's decision on the Mid Sussex Plan is, at its best, very mixed messaging from the Government. Whether or not any of the sites which would be allocated in the MSDC Plan are specifically ear-marked as contributing to the needs of any of its neighbours, the Plan will bring forward sufficient sites not only to meet MSDC's own need, but also to contribute more than 1000 new homes over and above that need. On any analysis, this is a plan which has been positively prepared, and your letter expressly disavows any suggestion that it is being criticised for not delivering enough housing: the complaint is essentially a paper exercise in deciding who should receive credit for them.

33. In short, if the Secretary of State agrees with the Inspector that it is necessary for the Plan to identify the beneficiaries of the surplus, there is a far simpler solution which would both address that concern and enable the Plan to contribute to the "universal coverage" which the Government desires. That solution is for the Inspector to recommend a main modification, in precisely the same way was the Waverley Inspector. Subject to that, and to passing through Stage 2 of the examination, the Plan is "ready to go" in assisting the Government to meet its target. Significantly, it would do this in a way which was "plan-led" and provided developers, infrastructure providers and the local community with the certainty they need to ensure that development occurs in the most sustainable way, in the right locations and with the right infrastructure provided at the right time.

[1] See South Tyneside Local Plan intervention letter

34. In contrast, if the Plan cannot proceed because of the Inspector's conclusions on DtC, it is likely to take a minimum of 3 years before this position can be reached again, in circumstances where – as your Letter indicates – there is no suggestion that this would deliver any more housing. In the meantime, the Council will inevitably have to deal with piecemeal applications on a range of sites, many of which were ruled out during the local plan process because they were unsuitable, and others of which are brought forward without the benefit of a local plan policy to identify the constraints which need to be respected or the infrastructure which is needed in order to make the development of those sites sustainable. That will certainly lead to delay, and an increase in the number of appeals. To require that, without any conceivable advantage, when the "problem" identified by the Inspector is so easily fixed, would be to throw the baby out with the bathwater.

35. For the reasons set out above, the Council remains of the view that the Inspector's reasoning is legally flawed, and that if it requests her to issue a final report which (as she has said is likely to be the case) is similarly reasoned, it would have good grounds for seeking judicial review. However, it is possible to avoid that, and to the keep the Plan "on track" so as to help the Government meet its commitments. Consequently, in order to inform its decision on how it should respond to the Inspector's letter, the Council seeks your response within 14 days.

Yours faithfully,

Julie Galvin
Assistant Director Governance and Solicitor to the Council

cc: emily.clapp@governmentlegal.gov.uk