MID SUSSEX DISTRICT COUNCIL

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Government Legal Department
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Dear Sir / Madam

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

Introduction

1. This letter is sent pursuant to the Pre-Action Protocol for Judicial Review. It relates to the letter dated 4 April 2025 ("the Letter") from Ms Louise Nurser, the Inspector appointed by the Secretary of State to examine the Mid-Sussex District Plan 2012-2039 ("the Plan"), in which the Inspector sets out her findings following the conclusion Stage 1 of the Examination. In particular, the Letter sets out the Inspector's provisional reasons for concluding that the Council has not complied with the Duty to Co-operate ("the DtC") under section 33A of the Planning and Compulsory Purchase Act 2004 ("PCPA 2004"), and advises the Council that it has two choices: either to withdraw the Plan, or to ask that the Inspector write a report of her conclusions, the contents of which she explains "would likely be very similar to this letter" [para 84]. The Letter is clear that it is not an invitation to the Council (or any other examination participant) to comment on its contents. As such, the Letter is not the Inspector's Report for the purposes of section 20(7A), but is apparent that, if the Council does not withdraw the Plan, the Inspector is likely to write a final Report concluding that the Council has failed to meet the DtC, for reasons which are similar to those set out in the Letter.

2. The Council considers that there are numerous legal errors in the Inspector's reasoning, with the result that it is not minded to withdraw the Plan and will, if the Inspector writes a Report which concludes that the Council has failed the DtC for the reasons given in the Letter, seek statutory judicial review of her decision under s.113 PCPA 2004. The purpose of this letter is to seek to avoid the unnecessary expense and delay to which such action would give rise by asking the Secretary of State (a) to agree that the Inspector's reasoning is legally erroneous, (b) to remove her from the role of examining the Plan and (c) to appoint a new Inspector to re-start the examination of the Plan in her stead.

Julie Galvin
Assistant Director Governance
Solicitor to the Council

3. Full details of the respects in which the Council considers the Inspector has erred in law are set out in the main body of this letter. In simple terms, however, the Inspector has concluded that, in relation to housing need,[1] the Council's co-operation with DtC partners was not sufficiently "positive" or effective when it came to meeting the unmet needs of adjoining areas, despite the fact that:

    a. In the Letter, the Inspector recognised that "authorities are not obliged to accept needs from other areas where it can be demonstrated that it would have an adverse impact when assessed against policies in the Framework" [para 14]. This is clearly correct, given the terms of para 11(b) of the National Planning Policy Framework ("the NPPF"). It is also the approach taken by the Council in deciding which sites to bring forward which in turn has determined the overall quantum of homes the Council is able to plan for: see (c)-(f) below.

    b. Throughout the preparation of the Plan, the Council has been fully aware of the fact that there were significant unmet needs in adjoining authorities para 35]. However, it was not until November 2023 (*after* consultation on the Council's Regulation 18 draft had closed, and at a point when the Inspector recognised that the scope to influence the shape of the Plan was more limited) that any adjoining authority *quantified* their level of unmet need [para 45] and to date none have quantified the precise amount with which it was asking the Council to assist, even when asked directly by the Inspector during the hearings.

    c. In deciding which sites to allocate for housing, the Council carried out an assessment of *all* available sites within its area, and allocated *all* sites which it considered could be brought forward for development without an unacceptable adverse impact when assessed against the policies in the the NPPF.

    d. By definition, this approach meant that sites which were rejected fell into the category where, in the Council's view, either individually or cumulatively development would have an adverse impact when assessed against policies in the NPPF and where, as the Inspector acknowledged [para 14], the DtC did not oblige the Council to accept needs from other areas.

    e. Before carrying out the assessment of sites, the Council shared with all its relevant DtC partners the methodology which it proposed to use and invited comments on that methodology. No DtC partner took issue with the approach which the Council was planning to take.

    f. Having carried out that assessment, the Council shared with all the relevant DtC partners the results, and invited comment on them. No DtC partner argued that the methodology had been incorrectly applied, or quarrelled with the results.

    g. Neither before the Examination nor at it did any of the Council's DtC partners complain that the Council had not complied with the DtC, or suggest that the Council should have been doing more to meet the overall unmet need. Indeed, by the time of the hearings all relevant DtC partners had signed SoCG confirming that the Council had engaged with them and met the DtC, and this position was confirmed by each of them verbally at the hearings.

[1] The Letter accepts that the DtC has been satisfied in relation to all other strategic matters such as transport and habitats considerations: para 19

h. At no point in the Letter does the Inspector take issue with either the methodology adopted by the Council when assessing sites, or the results of the Council's assessment. Nor does she explain what additional steps the Council might have taken to identify additional sites, so as to make the Plan more effective.

i. The result of the above is a plan which not only meets Mid-Sussex's own needs in full, but also provides a surplus of 1042 homes which would be available to meet the needs of adjoining areas.

j. The significance of (i) should not be underestimated: Mid-Sussex is the only authority in the area which has been able to meet its own needs, let alone assist in meeting the needs of any adjoining authority.

4. In short, the Letter entirely fails to grapple with the Council's case that the approach it has taken has in fact maximised the amount of housing which can be delivered without an "adverse impact when assessed against policies in the Framework", and fails to explain what the Council could possibly have done to make the Plan more effective in addressing the unmet needs of adjoining areas. At its heart, there is a fundamental contradiction between:

a. on the one hand, the Inspector's acceptance at para 14 that the DtC does not require authorities to accept needs from other areas where there would be unacceptable adverse impacts, and the absence of any finding by her that this is not the approach the Council has taken; and

b. on the other, her conclusion that the co-operation between the Council and its DtC partners has not been "effective" in maximising the extent to which the Plan meets the needs of adjoining areas.

5. In connection with the above, the Council points out that:

a. When (in March 2018) the Council adopted the Mid-Sussex District Plan 2014-2031 ("MSDP"), that plan provided an additional 1498 dwellings to meet the unmet needs of neighbouring authorities;[2]

b. When the Council brought forward its Site Allocations DPD (adopted in 2022) it allocated significantly more sites than were needed in order to meet its own need – Policy SA10: Housing included an over-supply of 907 dwellings.

c. Since the adoption of the MSDP, and up to the amendment of the NPPF in 2024, the Council has consistently maintained a 5 year housing land supply;

d. Throughout the whole of this period, the Council also has consistently delivered more than 1000 new homes a year, which is significantly in excess of its Housing Delivery Target;

e. On the one occasion on which, prior the 2024 amendments to the NPPF, the Council's 5 year housing land supply was challenged on appeal, that challenge was rejected, with the Inspector observing that:

> "95. … it is clear that Mid Sussex has a history of housing delivery and it is not an area with a record of persistent under delivery... I am confident that the Council understands and acknowledges its obligations under the HLS and HDT. The Site Allocations DPD has allocated more land for housing than the DP required, and the Council approaches the issue of housing in a positive and proactive manner.

[2] See MSDP paras 3.17, 3.42, Policy DP4

> 96. Overall, I find that the Council has taken and continues to take a proactive approach to housing delivery at both plan making and decision making. From the evidence to this Inquiry … the Council is effectively using a variety of tools and mechanisms to ensure housing can be delivered in a timely manner. Plan making progress as acknowledged by the Appellant is commendable and is positive and continuing to progress."

6. In the Council's view, this track record (of both taking the issue of meeting housing needs seriously and demonstrable over-delivery in meeting that need) has been exemplary. Critically, it is a record which is reflected in, and would be continued under the Plan, which (as stated above) would not only meet *all* of Mid-Sussex's own needs, but would also providing an *additional* 1042 homes to meet the needs of surrounding areas. If, as the Inspector has indicated she will do, she goes on to write a report in the same terms as the Letter, the result will be that a development plan which is otherwise effectively "ready to go" and would allocate more than 8,000 new homes would have to be set aside. The consequent waste of tax-payer's money would be considerable. Preparation of new plan would need to start afresh, and it would take several years before the development plan was again in a position to start delivering housing to meet the Government's targets.

7. As an authority with a proven record in housing delivery, which has brought forward two successive development plan documents which go significantly further in meeting housing need than the plans of any of its neighbours, and was proposing to add to that a new Local Plan which exceeded the Mid-Sussex's own need by over 1000 homes, the Council finds it impossible to understand how that outcome is consistent either with the plan-led system, or the Government's commitment to delivering 1.5 million new homes over the next five years. In every possible way, it would be a backward step.

8. The remainder of this Letter sets out the matters required of a Pre-Action Protocol Letter pursuant to the Pre-action Protocol for Judicial Review. It concentrates on what the Council regards as the principal defects in the Inspector's reasoning. Failure to comment on any other passage should not be taken as acceptance of what the Inspector has said: there are numerous other factual errors which we would be happy to identify. However, we draw attention to the fact that, independently of this letter, the Council has written to the Planning Inspectorate about the Inspector's overall conduct of the Examination. A copy of that letter is appended. The complaints set out in that letter are not repeated here because (having taken legal advice) the Council has concluded that the conduct there described falls short (albeit only just) of what would be necessary to allege bias as a further ground of legal challenge. Nonetheless, the Council considers that the matters set out in that letter, and the accompanying evidence, clearly demonstrate that the Inspector's conduct was inappropriate, unprofessional and falls far below the standards expected. It therefore constitutes further reasons why she should be replaced.

Proposed Claim for Judicial Review

To/The Proposed Defendant:

The Secretary of State for Housing, Communities and Local Government

The Proposed Claimant

Mid-Sussex District Council
Oaklands
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Details of the Claimant's Legal Advisers

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Details of the Matter Being Challenged

The Report of the Inspector appointed by the Defendant to examine the Mid-Sussex District Plan 2021-2039. This Report has not yet been issued, but the Inspector's letter of 4 April 2025 indicates that, if the Council does not withdraw the Plan, her Report will conclude that the Council has failed to comply with the Duty to Co-operate, with the result that the Plan cannot proceed to adoption.

Details of Any Interested Parties

Unless it is considered that every single party who has made representations on the Plan and/or every single party who attended the Examination is an Interested Party (which the Council does not consider a necessary or proportionate approach at this stage) the Council does not consider there are any other Interested Parties. However, a copy of this letter has been sent to the Planning Inspectorate.

The Issue

9. The Council challenges the Inspector's conclusion (as set out in the Letter, and which she has indicated she will confirm in any final Report) that it has failed to comply with the DtC.

Relevant Law

10. Section 33A PCPA 2004 provides that:

> "(1) Each person who is—
> (a) a local planning authority
> (b) …
> (c) …
> 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) … "

11. One of the purposes of the independent examination of a development plan is to determine whether the local planning authority has complied with ss.33A: s. 20(5)(c). Where the independent examiner concludes that the DtC has not been met, (s)he must recommend non-adoption and give reasons for that recommendation: s. 20(7A). Critically, in these circumstances there is no power under s.20(7C) to recommend modifications which would remedy that defect: s. 20(7B)(b).

12. Case-law on the application of these provisions establishes the following:

a. The DtC is not a duty to agree, and discharging the DtC to cooperate is not contingent upon securing a particular substantive outcome from the cooperation: ***R (Sevenoaks District Council) v. Secretary of state for Housing, Communities and Local Government*** per Dove J @ [51].

b. Deciding what ought to be done to meet the qualities required by s.33A "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. 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": ***Zurich Assurance Limited v. Winchester City Council*** **[2014] EWHC 758** per Sales J @ [110]. A similar "margin of appreciation" applies when a court is reviewing the decision of an inspector making a judgment on whether there has been compliance with s. 33A: ***Sevenoaks*** per Dove J @ [51].

c. In reviewing an Inspector's decision regarding a local planning authority's performance of its s.33A duty, the court's role is limited to considering whether he or she acted rationally and lawfully; it is a matter of judgment for an inspector and a more intensive review would undermine the Parliamentary intention behind the provision: see ***Zurich Assurance*** per Sales J @ [114]; ***Trustees of the Marker Mill Estates v. Test Valley Borough Council*** **[2017] PTSR 408** pe Holgate J @ [58]; ***R (o.a.o. St Albans City and District Council) v. Secretary of State for Communities and Local Government*** **[2017] EWHC 1751 (Admin)** per Cranston J @ [39].

13. Notwithstanding the "margin of appreciation" to be applied when reviewing the inspector's reasons, it is the Council's view that she acted unlawfully and/or irrationally in the following respects.

Ground 1: Failure to Grapple with the Council's Evidence on its Approach to Site Selection and the Implications of that for the Effectiveness of the Plan

14. The core of Ground 1 is set out in paras 3-4 above. In simple terms, the Inspector has concluded that the Council has failed the DtC because its discussions with DtC partners were not sufficiently "positive" or "effective" in meeting the unmet needs of adjoining areas, notwithstanding the fact that:

    a. The Inspector herself recognised (rightly) that the DtC did not require Mid-Sussex to accept the needs of adjoining areas where it could be demonstrated that this would have an adverse impact when assessed against the policies in the NPPF [para 14].

    b. That is precisely the approach which the Council took to the selection of sites for allocation in the Plan. As explained in the Site Selection: Conclusions paper (SSP3) and hearing statements MSDC-01b (p11) and MSDC-01c (p7-8) the only sites which were excluded were excluded because (either individually or cumulatively when considered against the evidence base as a whole) they would have unacceptable adverse impacts. All sites which did not have such impacts were allocated.

    c. That approach, and the methodology to be used in applying it, were discussed in full with the Council's DtC partners, none of whom took any issue with what the Council was proposing.

    d. The results of that assessment process were also shared with the DtC partners, none of whom took any issue with the findings.

    e. Para 31 of the Letter recognises that the process of sharing its approach to Site Selection was "at face value" consistent with the PPG.

    f. The Inspector herself has not criticised the methodology or the outputs from it.

15. Despite this, the Inspector criticises the Council for "relying on what is left once Mid-Sussex's needs have been provided for" (para 42) and only providing for unmet needs "through any housing which is surplus to Mid-Sussex's needs" (para 63). This reasoning is frankly bizarre, and directly contrary to the NPPF, in so far as it suggests that the Council's first priority should not have been to meet its own needs. More importantly, the Inspector's reasoning completely fails to grapple with the fact that, because the only constraint employed by the Council in identifying sites to meet need was the question whether sites could be released without unacceptable environmental harm, the surplus which has been identified is not simply what is left over after the Council's own needs have been met, but is the maximum contribution the Council can make to meeting the needs of adjoining areas. It is not clear that the Inspector has taken into account or properly understood the implications of the Council's approach to site selection, but if she has, she has completely failed to explain why that approach is deficient, or what else the Council could or should have done to improve the effectiveness of the Plan in meeting unmet needs, or how any of her criticisms could have resulted in the Plan being more effective.

16. The Council is severely prejudiced by this, because (a) if carried through into a final Report, the Inspector's conclusion will mean that the Council will not be able to adopt the plan, when there is no good reason for that outcome and (b) the Council would have no way of knowing what more it is supposed to do when bringing forward any replacement plan.

Ground 2: Unlawful Insistence on a "Top-Down" Approach

17. Throughout the preparation of the Plan, the Council has been aware of the fact that there were, or were likely to be, significant unmet needs in adjoining areas. The Council's previous Local Plan had already allocated sites for over 1400 homes to meet the needs of adjoining areas, and the Council's awareness that this was a continuing issue can be seen from the reports to Council at Regulation 18 (document P9, p23) and Regulation 19 stage (document ref P7, p26 - p27), , pp. 23 and 139 of the Plan, and Housing Need and Requirement Topic Paper (H5, p.6 - 9), and confirmed in Statements of Common Ground with all neighbours (particularly DC4, DC5, DC6, DC8 with respect to Northern West Sussex, Brighton & Hove, Crawley and Horsham respectively). =

18. However, while the Council was aware of that wider unmet need, it has always been clear that the general scale of that need was far more than Mid-Sussex could ever accommodate. In particular, the Letter refers to an unmet need for 7,505 homes in Crawley [para 34], 2,275 in Horsham [para 45], and 17,000 in Brighton & Hove [para 68]. Although these precise figures have not always been known, it has always been apparent that Mid-Sussex would never be able to accommodate the entirety of the unmet need, nor has it ever been suggested that Mid-Sussex alone (as opposed to any of the DtC partners' *other* neighbours) should do so. It would therefore have been absurd for the Council to take this level of need as a figure which it was required to meet. .

19. However, if the overall unmet need of surrounding areas was not a sensible figure to be used when preparing the Plan then - although Crawley, Horsham and Brighton & Hove had all indicated that they had unmet needs, and had asked for the Council's help in meeting those needs – it was equally the case that none of the Council's neighbours had identified a particular figure which they were asking Mid-Sussex to meet.[3]

20. Against that backdrop, the approach taken by the Council was that, in the absence of an assessment of the availability of suitable sites within its own area, any figure which it arrived at as a "top-down" statement of the number of homes it should seek to provide in order to assist its neighbours would have been entirely arbitrary, and ultimately meaningless. In particular:

    a. If, following an appropriate site search, the Council concluded that it was unable to provide sufficient sites to meet that "top-down" figure without unacceptable environmental harm, para 11(b) of the NPPF clearly indicated that it would not have been expected to meet that figure, and it would have been entitled to reduce the figure accordingly.

    b. Conversely, if the Council identified a "top-down" figure but then concluded that it could provide sites to meet an even higher level of need, it would have been perverse not to bring those sites forward given that the "top-down" figure did not reflect the full extent of need in the wider area.

21. Accordingly, the approach taken by the Council was to address the issue of unmet needs "from the bottom up", by identifying *and then allocating* all those sites which it considered could be brought forward without unacceptable harm. In that way, it ensured that it would be making the maximum contribution possible to meeting the needs of its neighbours, without unacceptable environmental harm.

[3] Para 45 of the Letter refers to the request from Horsham (in November 2023, after publication of the Regulation 18 draft of the Plan) for help in an unmet need of 2,275 homes, but this was not a request to Mid-Sussex to provide the entirety of that number: it was a request for *help* in meeting it.

22. This approach was clearly set out to the Inspector in the Site Selection Methodology (SSP1, para 63) and the Council's response to a post-hearing action point (MSDC-AP018, para 3). It was also the subject of discussion at the Examination where Leading Counsel for the Council (Mr Paul Brown KC) said this:

> "The identification of specific sites for allocation has not been constrained by any artificial 'ceiling' on the number required. Rather, the Council has undertaken a capacity-led assessment, and identified all those sites which it considers can be developed without significant conflict with national policy. The site selection process used is one which has been confirmed as robust and fit for purpose in two previous examinations."

23. This point was also addressed in an exchange between the Inspector and Mr Christopher Boyle KC on day 2 of the Examination, where Mr Boyle explained the Council's approach very simply. The video recording of that exchange shows the Inspector as being confused, reluctant to listen to the answer given, and failing to take any notes of the submission being made.

24. In this context, as Mr Brown KC also explained, although the draft Plan did not specifically allocate the surplus (or any quantified part of it) to any particular authority, this was because the figure available for allocation in this manner was a residual figure, in circumstances where:

    a. At the date of submission, the Council could not be certain that there would not be arguments about the figure for its own need;

    b. There were representations from some objectors that, as part of Mid-Sussex's own need, the Plan should make provision for a buffer. While the Council did not agree with that, it was aware that this was a matter on which different Local Plan Inspectors had taken different views;

    c. There were as yet unresolved objections to some of the Council's proposed allocations. The extent of the surplus was therefore dependent on whether the Inspector agreed with any of those objections and recommended deletion of those sites.

    d. The level of the surplus believed to be available had already fluctuated during preparation of the Plan,[4] and the final extent of the surplus available to meet the needs of adjoining areas would only be known once the Inspector's views on all these issues were known. Even then, there were differing views among the neighbouring authorities as to which of them should be able to claim any part of the surplus towards their own needs, which the inspector would also need to resolve. At the end of that process, however, the Council was perfectly content for the surplus to be allocated amongst the Council's neighbours as the Inspector saw fit and this could be achieved by modification.

25. Despite these explanations, a key criticism by the Inspector is that, throughout its discussions with its neighbours and in its preparation of the Plan, the Council has failed to identify a figure representing the number of dwellings it would provide in order to meet each of their needs. The centrality of this to the Inspector's reasoning can be seen from:

    a. Para 42, where she complains that:

[4] As reflected in para 55 of the Letter

"the LPA has not committed to providing a definitive quantum of housing for Crawley's needs, instead relying on whatever is left once Mid Sussex's own needs have been provided for. This is the antithesis to the approach of the Framework which would require a planned, strategic approach to be taken to wider housing needs, which reflects the legislation underpinning the DtC, and is advocated in Policy DP5 of the adopted Plan."

b. Para 53, where the Inspector says of the SoCG with Crawley and Horsham:

"However, it does not set out in a convincing manner how their engagement increased the effectiveness of plan making, such as setting a definitive figure for, or even a range of, the quantum of housing which Mid Sussex should provide to contribute towards unmet needs."

c. Para 54, where the Inspector comments that:

"There is no consideration of how this surplus would be distributed between the two LPAs. Nor has a fixed quantum of development which could be relied upon been set and an explanation of how it would relate to any annual requirement and subsequent monitoring. This is particularly important, given that the oversupply figure is also expected to contribute to the resilience of MSDC's own housing supply, to be drawn on by MSDC in the event that some of the sites within the Plan do not to come forward."

26. The Inspector's conclusion that the Council has not been sufficiently positive in seeking to meet the needs of adjoining areas because it has not either started with or identified a "top down" figure is unlawful because:

a. For the reasons set out in paras 18-20 above, it would have been impossible and/or pointless to begin with a "top down" figure, the environmental acceptability or deliverability of which had not been tested. If that is what the Inspector was suggesting the Council should have done, her conclusion is irrational. Alternatively, she has failed to provide reasons for disagreeing with the submissions made to her on this point;

b. If and so far as the Inspector considered the Council should have identified such a figure, she fails to explain how it should have arrived at that figure in circumstances where (i) the overall level of need was significantly in excess of anything which the Council could reasonably provide (ii) none of the Council's DtC partners had themselves quantified the extent of the need which they were asking the Council to meet, nor does she indicate what the figure should have been.

c. The Inspector fails to explain how her approach could have resulted in any greater contribution to meeting the needs of adjoining areas than the "bottom up" approach adopted by the Council, when the Council was under no obligation to meet the "top-down" level of need if this resulted in unacceptable environmental impacts.

27. If and so far as the Inspector's concern is not that the Council failed to identify a "top down" figure but that, having adopted a "bottom up" approach, it should have specifically allocated any surplus to one or more of its neighbours, her reasoning is unlawful because:

a. It fails to recognise that, although Policy DP4 of the MSDP identified a surplus of 1,498 dwellings, it also did not specifically allocate them to any one authority, but simply stated that they were "to ensure unmet need is addressed in the North West Sussex Housing Market Area", and that Policy DP5 advocated a similar approach to meeting future housing needs. That approach had been accepted by the previous Local Plan Inspector and was agreed by Crawley and Horsham as an appropriate basis for the Plan.

b. Alternatively, if and so far as the Inspector had regard to this, she fails to give any reasons for disagreeing with her predecessor, or for concluding that following his conclusions was a breach of the DtC.

c. It fails to have regard to the fact that the supporting text to Policy DPH1 of the Plan specifically stated that:

> "Any provision over and above meeting Mid Sussex housing need serves as a contribution toward unmet need arising in the Northern West Sussex Housing Market Area, in accordance with the agreed priority order, as set out in Chapter 2 of this Plan"

and that this was entirely consistent with MSDP Policies DP4 and DP5. The Inspector fails to explain why an approach specifically mandated in the adopted Local Plan should now be regarded as breaching the DtC.

d. It fails to grapple with the reasons explained by Mr Brown KC at the Examination as to why the Plan had not gone further, and specifically allocated the surplus to any particular authority.

e. It fails to explain how allocating that number to any particular authority would have improved the effectiveness of the plan by increasing the number of dwellings being provided.

f. It fails to explain why this alleged "failure" was a matter which went to the heart of the DtC, rather than being a matter of soundness which the inspector herself could have corrected by recommending a modification to the Plan which identified how the surplus was to be distributed. If, for example, the Inspector's view was that there was no need for a "buffer" for resilience, it would have been a simple matter to modify the supporting text to Policy DPH1 so as to to allocate the entirety of the surplus to adjoining authorities. Indeed, this is precisely what Mr Brown KC invited the Inspector to do, but she has given no reason why that was not an appropriate solution.

<u>Ground 3: Error in the Inspector's Understanding of Policy DP5 and the Previous Local Plan Inspector's Recommendations</u>

28. As part of the Inspector's recitation of the "Background and Context", the Letter refers to Policy DP5 of the Mid Sussex District Plan and the previous Local Plan Inspector as follows [paras20-21]:

> "20. … the extensive unmet housing needs of neighbouring authorities has historically been a strategic issue in the sub-region that has required active, on-going and constructive engagement, and remains relevant to plan preparation.

> 21. This is clearly articulated in Policy DP5 of the adopted Mid Sussex District Plan 2014-20316. The examining Inspector for that plan required the Council to undertake a prompt review of the Plan and to work under the 'Duty-to-Cooperate' with all other neighbouring local authorities on an ongoing basis to address the objectively assessed need for housing across the Housing Market Areas."

29. The importance which the Inspector thereafter attached to Policy DP5 can be seen from:

    a. Para 35, which describes meeting the unmet needs of Crawley as "central to the review of the Plan required by Policy DP5 of the adopted Plan";

    b. Para 38, where the Inspector comments that "Crawley did not consider that Mid Sussex was doing the maximum reasonable to meet the unmet housing needs which Policy DP5 envisaged and the DtC requires."

    c. Para 42, cited above;

    d. Para 59, where the Inspector refers to the agreement between the Council, Crawley and Horsham that any surplus should firstly be applied to unmet needs within the Northern West Sussex HMA and goes on to say:

> "I note that this approach has previously been tested at examination in relation to Horsham and Mid Sussex's adopted Plan. However, Policy DP5 of the adopted Plan, makes explicit the importance of working to address unmet need in the wider sub-region.
>
> This policy includes working with all neighbouring authorities: an approach consistent with the legislation which requires a LPA to cooperate with every other person, in maximising the effectiveness of plan preparation, in relation to the planning of sustainable development."

    e. Para 63, where the Inspector comments that the housing SOCG:

> "suggests that it has not been possible to provide for unmet needs other than through any housing which is surplus to Mid Sussex's needs. This position is vague and is neither consistent with the objectives of the Framework nor those of Policy DP5 of the adopted Plan."

    f. Para 80, where the Inspector says:

> "The review of the adopted Plan envisaged under Policy DP5 was to ensure that additional sites could come forward in sufficient time to contribute to the sub-region's unmet housing need."

30. As explained below, the Inspector's reliance on DP5 betrays a demonstrable and fundamental misunderstanding of that policy, of the reasons why the previous Local Plan Inspector recommended it, and of its implications for the need for the Plan to be specific in the distribution of the surplus amongst its neighbours.

31. MSDP Policy DP5 states:

> **"Policy DP5: Planning to Meet Future Housing Need**
>
> The Council will continue to work under the 'Duty-to-Cooperate' with all other neighbouring local authorities on an ongoing basis to address the objectively assessed need for housing across the Housing Market Areas, prioritising the North West Sussex HMA as this is the established primary HMA.
> …
> The Council's approach will ensure that sites are considered and planned for in a timely manner and will be tested through a robust plan-making process, as part of a review of the Plan starting in 2021, with submission to the Secretary of State in 2023"

32. It will be noted that the Policy itself thus expressly enjoins the prioritisation of the North West Sussex HMA ("NWSHMA").

33. Policy DP5 was included in the MSDP at the recommendation of Mr Jonathan Bore, the Inspector examining that plan. At that time, it was referred to as Policy DP5a. Mr Bore explained his recommendation as follows (para 28, emphasis added):

> "**MM05** introduces Policy DP5a. this indicates that the Council will work with all other neighbouring local authorities on an ongoing basis, under the DtC, to address the objectively assessed needs for housing across the HMAs. It prioritises the Northern West Sussex HMA, as this is established as the primary HMA, but also indicates that the Council will work with the Gatwick Diamond and the West Sussex and Greater Brighton Strategic Planning Board to address unmet housing need in the sub-region".

34. Commenting on needs arising in Brighton & Hove, Mr Bore also said (para 25), emphasis added:

> "developing a multi-authority spatial strategy based in an understanding of environmental, infrastructure and demographic factors is a complex process. … whilst acknowledging the work that has been carried out by landowners and developers, there is not enough evidence at the present time to enable conclusions to be reached about the apportionment of housing provision within the sub-region to meet this need, or to support any particular strategy, whether that be a new settlement or some other approach. Progress needs to be made on the LSS3 work to bring an end to the uncertainty."

35. Against this backdrop, the Inspector's approach to Policy DP5 is legally defective for the following reasons.

36. **First**, she repeatedly states that, in recommending the insertion of Policy DP5, Mr Bore had "required the Council to undertake a prompt review of the Plan" (para 21, see also paras 35 and 80). That is simply wrong: Policy DP5 says nothing about early review.[5] What Mr Bore *did* require (in addition to DP5) was the inclusion in DP4 of a commitment to bring forward a Site Allocations DPD in order to meet Mid-Sussex's own residual housing need for the plan period. That obligation has been discharged. As noted above, the SADPD allocated 907 houses more than was required in order to meet Mid-Sussex's own need.

[5] Under Policy DP4 of the Plan, the Council committed itself to preparation of a review, starting in 2021, but this was not inserted by Mr Bore, nor would it have amounted to an early review.

37. **Second**, the Inspector appears to have interpreted DP5 as a commitment or instruction that Mid-Sussex would address the unmet needs of the wider area *in full*. It says nothing of the sort.

38. **Third**, the Inspector's reasoning in para 59 is internally inconsistent, in so far as:

    a. she recognises that the approach of giving priority to meeting the needs of the NWSHMA was "previously tested at examination in relation to Horsham and Mid-Sussex's adopted plan", but nonetheless goes on to suggest that this priority is somehow watered down or trumped by references to the "importance of working to address unmet need in the wider sub-region". Had that been the case, the MSDP could not logically have given preference to the NWSHMA;

    b. As para 59 recognises, given the level of unmet need within the NWSHMA, if priority is given to meeting those needs, it is "highly unlikely that any other local authorities would ever be able to benefit from MSDC taking on any of their unmet needs". However, that cannot logically be a fair criticism of the Plan: it is a simply the logical consequence of the fact Mid-Sussex does not have unlimited capacity to meet surrounding needs. The Inspector does not explain how or why that should be regarded as a breach of the DtC.

    c. If (as the Inspector appears to suggest it should have done) the Council had decided that it should no longer give priority to the NWSHMA, and had allocated some or all of its surplus to meeting the needs of Brighton & Hove, the result would simply have been that the amount of surplus which was available to meet the needs of the NWSHMA would have been reduced. The Inspector fails to explain how simply reallocating the shortfall from one neighbouring authority to another would have improved the effectiveness of plan preparation.

39. **Fourth,** para 59 fails to grapple with the reasons advanced to the Inspector by the Council in the course of discussion at the Examination as to why the priority in favour of the NWSHMA continued to make sense, and in particular the fact that in the south of the District, Mid-Sussex was separated from Brighton & Hove by the South Downs National Park, which was an area which enjoys one of the highest levels of protection in national planning policy.

40. **Fifth**, as to the Inspector's suggestion (at para 63) that the fact that it has not been possible to provide for unmet needs other than through any housing which is surplus to Mid Sussex's needs is contrary to the NPPF, Policy DP5 and is therefore evidence of a failure to comply with the DtC:

    a. As noted in para 15 above, in so far as it suggests that the Council's first priority should *not* have been to meet its own needs, this reasoning is frankly bizarre, and directly contrary to the NPPF, which specifically directs that consideration of the minimum number of homes required should start with a local housing need assessment of the Council's own need, following which needs which cannot be met within neighbouring areas should "also be taken into account".

    b. The Inspector fails to explain how the Council was supposed to go about identifying a contribution to meeting the needs of adjoining areas other than by first deducting its own needs from the supply of sites which could be developed without unacceptably adverse environmental consequences. What was left at the end of that process was always going to be a "surplus".

    c. The Inspector fails to explain how her approach would have led to a greater contribution to meeting the needs of Brighton & Hove without detracting from the contribution made to the needs of the NWSHMA.

d. The Inspector fails to explain how contributing 1042 dwellings to the needs of adjoining areas is contrary to the requirement in Policy DP5 to continue to work under the DtC with all other neighbouring authorities to address the housing need across the Housing Market Areas. This is particularly the case, given the absence in the Letter of any criticism of the Council's site selection process, or the Council's conclusions in relation to the appropriateness and availability of strategic sites which might contribute to meeting the need in a sustainable manner.

Ground 4: Errors in Relation to Crawley

41. At para 35, the Letter notes that the "principle of [Crawley] having substantial unmet needs has been known prior to and throughout the preparation of Mid-Sussex's Plan" and that "This situation is unlikely to change in the future". As a matter of fact, the latter observation is simply wrong: prior to the identification of the water neutrality issue (as to which, see below) Horsham had been proposing to contribute some 2500 dwellings towards Crawley's needs, and it is only water neutrality which now prevents it from doing this. Even if the date by which a solution will be identified is not certain, water neutrality is not an insoluble problem. Horsham's emerging plan is currently still at examination, and the impact of water neutrality on its ability to meet its own needs and the needs of its neighbours is one of the issues being examined.

42. At para 36, the Inspector comments:

> "36. Your Council's response to both formal requests has been to state that it is committed to working with Crawley in a positive manner. However, the first letter stated that any consideration of unmet needs would have to be in the context of Mid Sussex reviewing its own plan and querying whether Crawley had exhausted all opportunities to increase capacity. The second set out how Mid Sussex had shared its Site Selection Methodology (SSM), held briefings to share the initial outcomes of the Site Selection Process, and commissioned an Urban Capacity Study. It also set out the extent of any surplus in capacity. However, it did not take a positive approach to addressing unmet needs, as it was '*not in a position to confirm the total deliverable housing in the District and therefore the amount of housing it may be able to provide to meet unmet need*'."

43. It is not clear from this whether the comment that "the first letter stated that any consideration of unmet needs would have to be in the context of Mid Sussex reviewing its own plan and querying whether Crawley had exhausted all opportunities to increase capacity" is intended as a criticism or part of the Inspector's conclusion that the Council has not complied with the DtC. If that is what the Inspector intended, the reasoning is irrational:

a. The whole point of the DtC is that it operates in the sphere of development plan preparation. It is self-evident that the Council's ability to assist Crawley in meeting unmet needs would – and, indeed, should – be through the review of the MSDP. It is implicit in the Council's letter that this is not only how the matter would need to be addressed, but how the Council would address it. That is fully consistent with the DtC, and it would be irrational to conclude otherwise.

b. The letter from Crawley to which the Inspector refers was received in 2020, but para 17 of the Letter concludes that July2021 should be taken as the date on which the Council commenced plan making activities to which the DtC applies. She cannot logically criticise the Council for failing the DtC at a point when, on her analysis that duty did not apply, or for recording that it would address Crawley's request at the point when the DtC became relevant.

c. The DtC is a two-way process. In circumstances where the Council was being asked for help by Crawley, it was entirely reasonable for the Council to query whether Crawley had exhausted all opportunities within its own area. The Council would have expected no less if the position had been reversed. The Inspector cannot rationally have expected the Council to blindly accept what adjoining areas asserted to be the extent of their need.

44. The Inspector's comment that the Council's second letter "did not take a positive approach to addressing unmet needs, as it was 'not in a position to confirm the total deliverable housing in the District and therefore the amount of housing it may be able to provide to meet unmet need'" is clearly a criticism which is relevant to her overall conclusion. It is an irrational *non sequitur*:

a. As the Inspector records, that letter set out how Mid Sussex had shared its Site Selection Methodology, held briefings to share the initial outcomes of the Site Selection process and commissioned an Urban Capacity Study; and set out the extent of the surplus in capacity. As set out in its response to MIQ 25 (MSDC01 para 25.2) this information informed the discussion around the Council's ability to accommodate unmet housing need. On any analysis, those briefings were positive and important steps in the DtC, without which the Council would undoubtedly have been open to criticism. It is irrational to state that providing neighbouring authorities with the material they need to evaluate and (if necessary) challenge the Council's site selection was not part of a positive approach. It is even more irrational to state that identifying the surplus in capacity is not positive.

b. The only basis provided by the Inspector for concluding that the approach was not positive was the fact that the Council was still not yet in a position to confirm the total deliverable housing and therefore the amount of housing it may be able to provide to meet unmet need. However:

(i) One of the key tests of soundness of a development plan is the deliverability of its policies. It would have been entirely wrong (and, indeed, pointless) for the Council to identify the contribution it could make to meeting the unmet needs of adjoining areas unless and until it had determined whether the sites in question were deliverable.

(ii) The assessment of deliverability can only follow from the initial selection of sites, not least because issues such as cumulative impact on the local highway network of sites which are individually deliverable must also be taken into account. The fact that this work was still to be done did not mean that the Council was not moving in the right direction.

In the circumstances, the Inspector's conclusion that this was not part of a "positive approach" is perverse to the point of incoherence, and completely fails to have regard to the fact that the production of a plan is a *process*. It is almost as if the Inspector's view was that the only way in which the Council could evidence a "positive approach" was by identifying a number which it could contribute, before it had carried out the work required to determine whether that was environmentally acceptable. For the reasons set out in relation to Ground 2 above, that approach is simply unworkable, contrary to policy and plainly wrong.

45. Para 37 of the Letter goes on to say:

> "there were no further individual meetings between the two Councils after May 2023 and submission in July 2024. In the context of Crawley's demonstrable substantial unmet needs, and that no further allocations were brought forward after the Regulation 18 consultation in late 2022, it appears that Crawley's needs were, in effect, ignored in the absence of ongoing and constructive engagement."

46. In so far as this conclusion is based on the fact that no further allocations were brought forward after the Regulation 18 consultation, it is irrational, given the Inspector's acceptance that the Council was not required to bring forward sites which could not be developed without unacceptable environmental impact. Para 37 completely fails to have regard to, or grapple with, the fact that the reason why no further sites were allocated was because the Council had already brought forward all the sites which could be developed without such adverse effects. The fact that the Council was unable to assist does not mean that Crawley's request was "ignored". This was not a failing in the DtC, but the logical consequence of the limits of what the duty requires. Again, the Inspector's reasoning completely fails to recognise or engage with the necessary implications of the Council's approach to site selection.

47. Para 38 of the Letter refers to the SoCG between the Council and Crawley, and notes the agreement between the two authorities that a "robust and appropriate SHMA has been completed for each local authority" before going on, in para 39, to say:

> *"*Nonetheless, I have interpreted the phrase '*that **each** considers that they are doing the maximum reasonable to meet the housing needs',* in the context of Crawley's Regulation 19 response to DPH1: Housing. Here Crawley set out a number of concerns relating to the submission Plan, including a recommendation that, *'all potential sources of housing supply which might contribute to meeting identified needs are proactively explored…'*[18]. This clearly suggests that Crawley did not consider that Mid Sussex was doing the maximum reasonable to meet the unmet housing needs which Policy DP5 envisaged and the DtC requires."

48. The Inspector's interpretation of the Statement of Common Ground was unlawful:

    a. The words "a robust and appropriate SHMA has been completed for each local authority" are clear and unequivocal. The Inspector's conclusion that they should be "interpreted" as meaning Crawley did not consider the Council was doing the maximum reasonable to meet the unmet housing involves giving them a meaning which they are plainly incapable of bearing.

    b. The Inspector's reason for her interpretation (Crawley's recommendation that "all potential sources of housing supply might contribute to meeting identified needs are proactively explored") does not and cannot bear the meaning attributed to it, namely that Crawley did not consider such sources were not being explored. It is certainly not a basis for displacing the clear meaning of the SoCG.

    c. In any event, Crawley's recommendation was made at the Reg 19 stage. Even if it could bear the meaning attributed to it by the Inspector, it is perfectly consistent with Crawley subsequently reaching the conclusion (reflected in the SoCG) that all such sources had been explored.

d. The Inspector's "interpretation" of Crawley's Reg 19 response was clearly a highly material factor in her conclusion. However, representatives of Crawley Borough Councilwere present at the hearing sessions. . Had the Inspector wanted to know whether her interpretation was correct, she could (and should) simply have asked them. She did not do so. In the circumstances, her conclusion was:

(i) Procedurally unfair, in as much as neither Crawley nor the Council was given the opportunity to comment on it; and/or

(ii) In breach of the *Tameside* duty to make reasonable inquiries. It would have been a very simple matter to ask Crawley what that sentence meant. Had the Inspector done this, she would not have needed to indulge in speculation.

e. It was (and is) in direct conflict with the recognition, at para 5 of the Letter, that "no neighbouring authority … has suggested that Mid Sussex had not met the legal duty".

49. Para 38 also complains that the Inspector was not provided with earlier iterations of the SoCG, but these are not something she had ever requested. Copies (including the SoCG submitted to the examination of the Crawley Local Plan) could have been provided if requested. It is procedurally unfair to criticise the Council for not providing something for which the Inspector had never asked.

50. In relation to para 42 of the Letter, the Council repeats its observations in paras 15 and 39(a) above.

Ground 5: Errors in Relation to Horsham

51. Historically, Horsham has not only been able to meet its own needs, but has also contributed to meeting the needs of Crawley. The only reason why that position has changed is because, in late 2021, Natural England identified issues relating to water neutrality which have imposed a practical limit on the number of homes which can be provided in the parts of the Horsham area . It will be noted that these issues are not associated with any fixed or immutable environmental constraint such as a landscape designation or Green Belt: Natural England, Horsham and other affected authorities have all been working on identifying a solution to resolve the issue. Throughout the preparation of the Plan, there has been no certainty as to what that solution is, or at what point it may become available, but it has always been expected that a solution will be forthcoming. Further, the extent to which Horsham is unable to meet its own needs is currently being tested at the examination of Horsham's Plan. The Horsham Inspector's holding letter pausing that plan was issued on 16th December 2024 and will have been known to the Inspector.

52. Against this backdrop, paras 43-47 of the Letter state as follows:

> " … Horsham is extensively affected, and its position is that it cannot meet its own housing needs in full or help meet Crawley's unmet needs.
>
> 44. This position would have been evident early in Mid Sussex's plan preparation and there may have been an opportunity for Mid Sussex to work constructively to address some of those needs. Indeed, in August 2022 Horsham wrote to your Council suggesting that if the needs of the HMA could not be met that a further call for sites should be made and the methodology be reappraised. I am aware whilst any site taken forward as a result of the Regulation 18 and Regulation 19 consultations were considered, no further sites were allocated throughout the plan preparation process.

> 45. Following a meeting in August 2023, it was not until November 2023 that Horsham formally requested the help of Mid Sussex to cater for the excess 2,275 homes for which it considers that it cannot identify sites without falling foul of the Habitat Regulations. However, by this time the strategy of the Plan had been set, albeit the Regulation 19 consultation had not begun.
>
> 46. I note that Mid Sussex did not formally respond to Horsham's request, sent in late November 2023 until early March 2024. This was over three months later and after your Regulation 19 consultation had been completed. By this time there was little opportunity to maximise the effectiveness of plan preparation.
>
> 47. Moreover, whilst the letter was full of goodwill and commitment to continuing engagement, citing Mid Sussex's sharing of its SSM and its maximisation of its housing supply, it did not provide any meaningful evidence of what, if anything, Mid Sussex could do to help Horsham. Rather it relied on the imprecise and vague approach to meeting unmet needs within the NWSHMA set out within the Housing SoCG which I consider below. As such, I do not consider that MSDC engaged in the active, constructive and ongoing way, as required by the legislation, so as to maximise the effectiveness of plan preparation."

53. It is far from clear which parts of paras 44-46 are intended as a criticism or as evidence for the Inspector's conclusion that the Council has not engaged positively with Horsham's unmet need. However, in so far as any criticism is intended, it is perverse to the point of irrationality:

    a. With regard to the observation at para 44 that, whilst all sites taken forward as a result of the Regulation 18 and Regulation 19 consultations were considered "no further sites were allocated throughout the plan preparation process, the Council repeats para 45 above.

    b. With regard to the observation at para 45 of the Letter that "by this time the strategy of the Plan had been set": leaving aside the fact that the issue of water neutrality is complicated, and that it is not surprising that Horsham was not able to identify the precise implications for its ability to meet its own housing need until November 2023, the question for the Inspector was whether *the Council* had complied with the DtC. The fact that a neighbouring authority had not made representations until too late in the day is not a matter for which Mid-Sussex was responsible, and it would be entirely wrong to hold this against it.

    c. With regard to the observation at para 46 that "by this time [i.e. early March 2024] there was little opportunity to maximise the effectiveness of plan is preparation", if this is a criticism it fails to have regard to the fact that the Council's response formed part of its response to Horsham's Regulation 19 consultation, once it had an opportunity to review the evidence and content of the Horsham Plan which was subject to consultation the same time as ours. It is absurd to suggest that this letter was not the product of a period of consideration and contemplation.

54. Whatever the status of paras 44-46, the statements at para 47 that, whilst the Council's letter of March 2024 was "full of goodwill and commitment to continuing engagement, citing Mid Sussex's sharing of its SSM and its maximisation of its housing supply" this "did not provide any meaningful evidence of what, if anything, Mid Sussex could do to help Horsham. Rather it relied on the imprecise and vague approach to meeting unmet needs within the NWSHMA set out within the Housing SoCG which I consider below" were clearly a criticism and part of the Inspector's reasoning. For the reasons set out in 43 above, that conclusion is perverse.

Ground 6: Errors in Relation to the NWSHMA

55. At para 52, the Inspector refers to the SoCG between the Council, Crawley and Horsham concerning housing, before (at para 53, emphasis added) criticising this on the basis that it:

> "does not set out in a convincing manner how their engagement increased the effectiveness of plan making, such as setting a definitive figure for, or even a range of, the quantum of housing which Mid Sussex should provide to contribute towards unmet needs."

56. This is in stark contrast to, and inconsistent with the findings of the Inspector examining the Crawley Plan, who concluded that:

> "wider growth around Crawley has been considered as part of regular engagement between the Borough and its neighbouring Planning Authorities'
>
> and
>
> "The NWSHMA SoCG provides a constructive approach but ultimately the DtC does not extend as far as a duty to agree that some or all of Crawley's unmet housing need must be accommodated"

57. The Inspector provides no reasons for this inconsistency.

58. Paras 54-55 criticise the Council for failing to indicate how its surplus should be distributed between Crawley and Horsham. The Council repeats para 26 above.

59. Para 55 also refers to an unmet need for 59 pitches for gypsy and traveller accommodation from Horsham. However, that position was only clarified by Horsham in late 2024. The Inspector's criticism of the Council for not having considered it is inconsistent with her own reasoning at paras 75 and 76, where she dismisses requests from Lewes and Wealden (which were made in February and April 2024, i.e. significantly before the date on which Horsham's position was clarified) on the basis of their lateness.

60. Para 56 notes that:

> "Much effort has been put to setting out why the unmet pressures cannot be managed, such as the agreement that the authorities have 'worked to explain and understand each other's housing supply position' and that there were no further suitable sites close to the administrative borders. However, the ability to provide homes to meet the needs of neighbouring authorities should not be restricted to sites close to the boundary given the extent of the reach of the HMA within Mid Sussex."

61. Nowhere has the Council stated that it has only looked to sites close to administrative boundaries to meet unmet needs. The Inspector's criticism is unsupported by evidence and unfounded.

62. Para 61 of the Letter states:

> "I note concerns were raised in early 2023 by Crawley that, in the absence of an active WGSB, other authorities should be invited to the NWSHMA to, '*demonstrate that the NWS authorities are not just looking inwardly at the NWSHMA but are actively pursuing and awaiting engagement from the Coastal Authorities.*' As far as I am aware this has not been done."

63. This is a clear misinterpretation of the minutes, which simply state that "we will need to be clear why coastal authorities are not invited to NWS discussions" and that the NWS authorities had actively pursued further engagement which had not been reciprocated by the coastal authorities. Nowhere in the minutes does it suggest that this was an action. Moreover, even if that was a tenable interpretation, the Inspector does not explain why responsibility for it lay at the Council's door.

64. In relation to para 63 of the Letter, the Council refers to para 39 above.

Ground 7: Ground 7: Errors in Relation to South Downs National Park

65. Para 66 of the Letter states:

> "MSDC officers met with officers in the South Downs National Park (SDNPA) in August 2022. Given its status as a National Park it is severely constrained and lies immediately to the south of the plan area for Mid- Sussex."

66. It is not entirely clear whether this is a criticism by the Inspector which forms part of her reasoning, but if it is it fails to have regard to the fact that the Council agreed early on with the SDNPA that it would meet the SDNPA need falling within Mid Sussex in full. Therefore, there is no unmet need issue to be resolved. This point is not even acknowledged by the Inspector, nor is the fact that there has been engagement with SDNPA on the site assessment/site selection work considering the impact development may have a on the setting of the National Park.

Ground 8: Errors in Relation to Brighton & Hove

67. As para 68 of the Letter records, the fact that Brighton & Hove had a "considerable quantum of unmet need" had been known since before the adoption of the MSDP. Notwithstanding the scale of that need, MSDP Policy DP5 indicated that the Council's efforts under the DtC to address the need for housing "across the Housing Market Areas" should prioritise the NWSHMA.

68. Against this backdrop, it is startling (if not incomprehensible) that para 69 of the Letter criticises the Council in the following terms:

> "Notwithstanding the extensive needs of B & H, as set out above the NWSA SoCG prioritises the unmet needs of Horsham and Crawley. This means the unmet needs of B & H, have to all intents and purposes been discounted. As such, irrespective of the acute need experienced by B & H, there has been no meaningful attempt to maximise the effectiveness of plan preparation in relation to such an important strategic cross boundary issue."

69. On this issue, the Council repeats paras 37-38 above: the Inspector's reasoning fails to have regard to or give reasons for disagreeing with Policy DP5 (and her predecessor's endorsement of it); is inconsistent with her own reliance on DP5; fails to have regard to the fact that the overall level of need is such that it is impossible for the Council to meet everyone's needs, with the result that some neighbouring authorities will fare better than others; and fails to explain how a different approach to Brighton & Hove would have made any difference whatsoever in terms of the total number of houses provided for in the Plan.

70. Para 72 of the Letter criticises the Council on the basis that:

> "during the meeting [in mid-2022] B & H set out its concerns, regarding the NWSHMA's hierarchical approach to unmet needs. B & H also expressed concerns as to whether all options were being explored to optimise the potential for housing. As far as I can gather these points were dismissed without constructive dialogue or any otherwise meaningful exploration of the issues."

71. Contrary to the Inspector's (unnecessarily contemptuous) suggestion, Brighton & Hove's concerns were not "dismissed": they were responded to both during the meeting and in writing afterwards, by highlighting the findings of the evidence base. The DtC is not a duty to agree, and it is plainly wrong to conclude that a representation has been "dismissed" simply because the Council does not agree with it. The Inspector has failed to recognise that, as set out in the December 2022 meeting minutes between the two authorities, Brighton & Hove subsequently agreed that they had reviewed the evidence base and considered it to be extensive and had no specific questions arising. Brighton & Hove thereafter raised no concern about these points in (a) their Regulation 19 response (b) the SoCG or (c) at the hearing itself.

72. At para 73, the Letter states:

> "A further meeting took place in December 2022 in relation to the Regulation 18 consultation. However, it is clear that it was a means to ensure B & H could question and understand the Plan, rather than to engage in its preparation. Similarly, the meeting immediately prior to the Regulation 19 consultation gave little opportunity to shape plan preparation, with the Council making explicit that the strategy had not changed since Regulation 18, and that once MSDC had met its own needs it would prioritise those of the NWSHMA."

73. This criticism is utterly perverse. The Council simply does not understand how giving a DtC partner the opportunity to understand and question the Plan is not giving them an opportunity to engage in its preparation.

74. Finally, the Inspector's conclusion in relation to Brighton & Hove is inconsistent with her own reasoning in disregarding the position of Lewes on the ground that Lewes made their request too late in the day: para 75. At the hearing, the representative from Brighton & Hove confirmed to the Inspector that they were not in a position to quantify the informal request which was made in February 2021. Even as at today, Brighton & Hove has still not quantified the informal request, and has only just commenced its own Local Plan Review.

Details of the Action that the Defendant is Expected to Take

75. For the reasons set out above, the Council considers it clear that, if the Inspector were to proceed to issue a final Report which concluded that the Council had failed to comply with the DtC, that conclusion would be legally flawed and would be susceptible to challenge by statutory judicial review under s. 113 PCPA 2004. However, the Inspector has not yet reached that point and is therefore not yet *functus officio*. It follows that there is still time for the Secretary of State to avoid the need for the Council to issue proceedings.

76. However, the Council is equally clear that, if the arguments above are accepted, it would be inappropriate for the Inspector to continue in her role. She has clearly reached a view on an issue which is fundamental to the progress of the Plan, and her conclusions on this would taint any subsequent reconsideration by her. Moreover, for the reasons explained in the Council's letter relating to the Inspector's overall conduct, there has been a fundamental break down in the Council's trust and confidence in her ability to conduct the examination of the Plan. The position here would be no different to that on the redetermination of any planning appeal.

77. In the circumstances, the Council considers that the only appropriate course would be for the Secretary of State to revoke the Inspector's appointment, and appoint a new Inspector to take over the examination of the Plan. While this would result in some delay while a new Examination (including a repeat of Stage 1) is arranged, this would be considerably less than the delays which would occur if the Inspector is allowed to write her final report, the Council is then forced to challenge that decision, and the future of the Plan is placed on hold pending the outcome of those proceedings.

78. Pending the Secretary of State's consideration of these matters, and in order to ensure that the option of resolving this matter without the need for litigation, the Secretary of State is requested to make a direction under s.20(6A) PCPA 2004, directing the Inspector not to issue her final Report until a decision has been made on the question whether her appointment should continue.

ADR Proposals

79. It is not obvious to the Council that this is a matter which can be resolved by ADR, but the Council remains open to the possibility, if the Secretary of State thinks otherwise.

Details of Information Sought and any Documents that Are Considered \Relevant or Necessary

80. The Council understands that, in line with the procedure set out in the letter from the (then) Secretary of State for Housing, Communities and Local Government, the Rt Hon James Brokenshire MP, to the Chief Executive of PINS, dated 18 June 2019, the Inspector's Letter was sent to the Secretary of State at some point before 7 March 2025. Despite this, it was not until 4 April 2025 that the Letter was sent to the Council. The Council does not understand why it has taken a month (and possibly more) for the Letter to be sent to it. The Secretary of State is asked to produce copies of all communications between the Inspector/PINS and her/her department in relation to the Letter.

Address for Reply and Service of Court Documents

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Proposed Reply Date

The Secretary of State is requested to respond to this within 14 days. However, as time for the commencement of proceedings will not begin to run until the Inspector has issued her final Report, the Council would consider a longer period if this is considered insufficient, as long as the Secretary of State has made the direction referred to in para 78 above.

Yours faithfully,

Julie Galvin
Assistant Director Governance and Solicitor to the Council