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Your ref:
Our ref: Z2504728/EQC/JD3

15 May 2025

Dear Mid Sussex District Council

Letter of Response, sent pursuant to Annex B Pre-Action Protocol for Judicial Review

Proposed matter of: Mid Sussex District Council v Secretary of State for Housing, Communities and Local Government

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

We act on behalf of the Secretary of State for Housing, Communities and Local Government. We write further to your letter of 17 April 2025 and further to your agreed extension of 1 May 2025.

We set out below the response of the Secretary of State to your proposed claim, in the format required by the Protocol.

1. The Claimant

Mid Sussex District Council, Oaklands Road, Haywards Heath, West Sussex, RH16 1SS ("**the Council**").

2. The Proposed Defendant

Secretary of State for Housing, Communities and Local Government ("**the Secretary of State**").

3. Reference details

The Government Legal Department acts for the Proposed Defendant in this matter. My contact details are set out at the end of this letter. Please quote reference number Z2504728 in any further correspondence.

4. The details of the matter being challenged

You have set out that the decision under challenge is the Report of the Inspector appointed by the Secretary of State to examine the Mid-Sussex District Plan 2021-2039. 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 and issued to the Council on the same date headed "Mid Sussex District Plan 2021-2039: Stage 1 Findings". We have therefore proceeded on the basis that this is the "Decision" under challenge.

5. Details of any Interested Parties

The Secretary of State agrees that it would not be necessary or proportionate to serve the claim on every participant in the examination. However, the Secretary of State considers that it would be proportionate, and in accordance with the Pre-Action Protocol, for the Council to place this pre-action correspondence on the Examination website in order to afford an opportunity for any person who considers they would be an Interested Party within the meaning of CPR 54 to identify themselves to the Council so they may be served with a claim. That approach would best further the overriding objective by saving the expense and court resources of dealing with applications from parties seeking to be joined as an Interested Party after a claim had been issued.

6. The Issue

The Issue is said to be "*the Inspector's conclusion (as set out in the Letter, and which she will confirm in any final Report) that [the Council] has failed to comply with the DtC [duty to co-operate]*."

7. Essential Facts

7.1. The Mid Sussex District Plan 2021-2039 ("**the District Plan**") is a development plan document and, therefore, in accordance with s.20(1) Planning and Compulsory Purchase Act 2004 ("**the 2004 Act**") was submitted to the Secretary of State for independent Examination.

7.2. By s.20(5)(c) of the 2004 Act, one of the purposes of the examination was to determine whether the Council had complied with its duty at s.33A of the 2004 Act.

7.3. On 23 October 2024, the Inspector dedicated a session of the Examination to hear representations on that question.

7.4. By a letter dated 4 April 2025, the Inspector provided her interim findings, concluding that the Council had not discharged its duty s.33A of the 2004 Act and that either could withdraw the District Plan or request that the Inspector issue a Report.

7.5. As is standard practice, the letter was sent to the Ministry for consideration prior to publication. In this instance, the Minister requested and received a briefing (in the form of a written summary) on the Inspector's interim findings.

7.6. The letter was then issued to the Council on 4 April 2025.

8. General Legal Principles

8.1. By s.20(7) of the 2004 Act, the Inspector was under a duty to determine whether "*it was reasonable to conclude that … the local planning authority had complied with any duty imposed on the authority by section 33A in relation to the document's preparation …".*

8.2. As you acknowledge at paragraph 12, the case law has established the question for the Court is whether the Inspector could rationally make the assessment which has been reached, see ***Trustees of the Barker Mill Estates v. Test Valley Borough Council*** [2018] PTSR 408 at [58].

8.3. What is not acknowledged, however, nor seemingly understood in the preparation of the proposed grounds, is that the threshold is a high one ***R v. Secretary of State for the Home Department, ex parte Hindley*** [1998] QB 751, 777A. That is especially the case in the planning sphere, where a claimant faces "*a particularly daunting task*" to establish a rationality argument, and that*"[t]he Court must be astute to ensure that such challenges are not used as a cloak for a rerun of the arguments on the planning merits*" , see ***R(Newsmith Stainless Ltd) v. Secretary of State for the Environment, Transport & the Regions*** [2001] EWHC Admin 74 at [6].

8.4. The standard of reasoning required for a local plan inspector's report is not the *Porter* standard, as Ouseley J held in ***Cooper Estates Strategic Land Ltd v. Royal Tunbridge Wells Borough Council*** [2017] EWHC 224 (Admin) at [28], such that at [29]:

> *"… He is not obliged to go through each participant's principal points and say how he has resolved them, with reasons. That has never been required of such examinations, and it would be a novel and major burden to the process. He has to deal with what he regards as the major issues relevant to soundness, legal compliance and policy consistency."*

8.5. Those dicta are even more apposite when one is considering an interim findings letter, which is not a final report and is addressed, in summary form, to the most knowledgeable party in the process.

9. Response to Proposed Grounds

Ground 1

9.1. The complaint here is that Inspector did not understand the Council's approach to site selection and the implications of that for the effectiveness of the Plan.

9.2. The starting point is that the letter was not directed towards the question of the soundness of the quantum or distribution of housing. The approach to site selection and whether that rendered the plan effective was not the issue the Inspector was addressing. Instead, the letter is squarely focused on the prior question of compliance with the duty at s.33A of the 2004 Act.

9.3. The Inspector made explicit reference to the principal evidence concerning the duty to co-operate part of the examination, including the Statements of Common Ground and the Council's AP-013 document (and appendices). The Council does not point to any positive contrary indications to displace the presumption that the Inspector understood the contents of that evidence.

9.4. On the contrary, the Inspector clearly understood the Council's position to meeting unmet needs. At paragraph 54, the Inspector accurately notes the Council's approach to its neighbours, which was to indicate that any surplus after its own needs had been met would be for the purposes of both *"…resilience and unmet need*".

9.5. However, as the Inspector recorded in paragraphs 42, 53-55 and 63, the issue with that approach was that the Council did not explain to Crawley or Horsham what, if any, of that surplus, it might be able to make available to meet their unmet needs.

9.6. There can be no arguable case that the Inspector failed to supply adequate reasons by those paragraphs, given that she has accurately summarised your Council's position and footnoted the policies of the submission version of the Plan where that approach is spelt out.

9.7. Such an approach would be inappropriate when scrutinising the reasons in a final report, it is all the more so when construing a document which is only intended to be a summary of the key conclusions, pending a final report.

9.8. It was rationally open to the Inspector to hold that the Council's approach was not constructive, active or on-going, contrary to the statutory duty at s.33A(2) of the 2004 Act. In particular, the Inspector was entitled to consider that the Council's rationale for not fixing a quantum (summarised at paragraph 24 of your letter) was unsatisfactory. Whilst there might well be arguments about the level of need or the soundness of given allocations which all might bear on the extent to which, in due course, the Council would be able to accommodate unmet need, the Council had resolved to submit a plan which it considered to be sound, see s.20(2) Planning and Compulsory Purchase Act 2004. It follows that, once that (assumed sound) strategy had been settled upon, the Council was more than able to communicate to its neighbours the extent to which it was able to accommodate their needs, on the assumption that the level of need and distribution strategy of the draft plan would be found to be sound. Indeed, if the Council's approach were to be adopted more widely, no authority would ever be able to explain to its neighbours whether they anticipated being able to meet unmet needs until after the need and distribution strategy of the plan had been found sound at independent examination. That is plainly wrong and illuminates the flaw in the Council's approach, which the Inspector was rationally entitled to find fatal to discharging its duty at s.33A of the 2004 Act.

9.9. Ground 1 is unarguable.

Ground 2

9.10. As is clear from the Inspector's analysis and, particularly, the conclusions on the North West Sussex Housing Market Area ("**NWSHMA**") at paragraphs 42, 53-55 and 63, the Inspector was not critical of the Council for failing to identify a "top down" figure. Instead, as clearly articulated in those paragraphs, the Inspector found the failure to explain what, if anything, of the surplus the Council envisaged being able to make available to its neighbours was the critical issue.

9.11. Your suggestion that such an approach was unlawful at paragraph 27 is unarguable. The Inspector had express regard to Policy DP5. That Policy was adopted against a materially different factual context, as explained in the supporting text:

> "*It is recognised, however, that Crawley's Local Plan finishes a year before the Mid Sussex and Horsham plans. There will therefore be housing need generated in Crawley for 2031, which is within the District Plan Period, but is not being planned for at present as it has yet to be established or tested. The review of the District Plan (commencing in 2021) will seek to address this need, and any further unmet need arising within the Housing Market Area*"

9.12. Accordingly, it was rationally open to the Inspector, in applying the statutory duty upon her, to expect the Council to have engaged co-operatively with its neighbours by identifying the extent to which it was likely to be able to assist in meeting the unmet need in those plan areas. That would have improved the effectiveness with which the preparation of development plan documents by those neighbouring authorities was being undertaken. In particular, those authorities would have been able to devise a spatial strategy knowing the extent to which, if at all, any unmet needs could be accommodated in Mid Sussex District.

9.13. Insofar as you appear to suggest in paragraph 27(e) that the duty at s.33A of the 2004 Act is confined to improving the effectiveness of the Council's Plan, that is wrong. The duty is to co-operate with every other person (including a neighbouring local planning authority) in maximizing the effectiveness with which the preparation of development plan documents is being undertaken. In particular, that required the Council to expressly "*have regard to activities of [*a neighbouring local planning authority*] so far as they are relevant to [*the preparation of development plan documents*]*".

9.14. Ground 2 is unarguable.

Ground 3

9.15. There is no arguable basis on which the Inspector misunderstood Policy DP5.

9.16. First, the supporting text to DP5 explains that:

> *"It is recognised, however, that Crawley's Local Plan finishes a year before the Mid Sussex and Horsham plans. There will therefore be housing need generated in Crawley for 2031 which is within the District Plan period, but is not being planned for at present as it has yet to be established or tested. The review of the District Plan (commencing in 2021) will seek to address this need, and any further unmet need arising within the Housing Market Area."*

9.17. That informs and aids the construction of the wording of the Policy itself which provides as follows:

> *"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 Northern West Sussex HMA as this is established as the 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."*

9.18. The Inspector was therefore correct to identify that the Local Plan was adopted on the basis of a review, commencing in 2021, the purpose of which was to seek to address the unmet need of the Housing Market Area. Paragraphs 21, 35 or 80 do not betray a misunderstanding of the terms of the Policy.

9.19. Second, there is no basis for suggesting the Inspector interpreted Policy DP5 as a requirement to meet the unmet needs of the Housing Market Area in full. There is no evidence relied upon in support of that suggestion. It is totally without merit.

9.20. Third, the Inspector's reasoning at paragraph 59 was not internally inconsistent:

- The Inspector acknowledged the scale of need in the NWSHMA meant that it was unlikely other authorities would ever be able to take advantage of Mid Sussex taking any unmet needs, however that did not excuse a lack of positive engagement with authorities outside the Housing Market Area (see paragraphs 60-61).

- The Inspector's reasoning is clear that the failure to explain to its NWSHMA neighbours, the degree to which Mid Sussex might be able to help (if at all), meant that the effectiveness of plan making authorities in the wider area was also adversely affected. That is because it meant those authorities were unable to plan with the knowledge of Mid Sussex's assumed position. Your Council's case appears to be that, those other authorities could have pieced together the evidence to establish that there would be no capacity left after the surplus had been distributed to Crawley and Horsham, however (i) it was never explained whether any surplus would be available for those authorities (or whether all was required was "resilience" to meet the Council's own needs), (ii) consequentially there was no distribution of the surplus between those authorities and (iii) it is not axiomatic that the entirety of any surplus would be taken up by those two authorities.

- The Inspector expressed no view about which authority, if any, should benefit from any surplus capacity in Mid Sussex. The Inspector's concern, as it should have been, was on the procedural requirements of s.33A of the 2004 Act. The Council's failure to articulate how it saw the surplus being deployed was the critical failure. It was not sustainable for the Council to promote a Plan that it considered to be sound with a surplus beyond its need and, simultaneously, suggest to its neighbours that it was uncertain what, if any, of that surplus would be available to meet each of their unmet needs. That undermined the effectiveness of plan making by neighbouring authorities because they were unable to know the assumptions on which Mid Sussex was working.

9.21. Fourth, the Inspector did not express a view about the judgment to prioritise the North West Sussex Housing Market Area. The Inspector's concern was that the Council failed to articulate the consequences of that decision to authorities, outside that Housing Market Area, who were also actively engaged in plan making.

9.22. Fifth, paragraph 63 of the Inspector's letter needs to be read with the letter as a whole. In particular, it needs to be read with the observations at paragraphs 42, 53 and 55 where the Inspector identified that the failure to identify a definite quantum or range available for each authority was the critical issue. The Inspector is plainly not saying that the provision of capacity to meet unmet needs through surplus is the issue. As the Inspector noted, just telling other DtC partners that "*whatever is left once Mid Sussex's own needs had been provided for*" is meaningless unless they know (i) what that figure is assumed by Mid Sussex to be and (ii) what proportion of that figure they can assume will be available to accommodate unmet their needs.

9.23. Ground 3 is unarguable.

Ground 4

9.24. The criticisms of paragraph 36 are unmerited.

9.25. The Inspector's concern was focused on the failure to articulate the level of capacity available to meet unmet need from Crawley. The criticisms levelled at that conclusion are unmeritorious, in particular:

- It was clearly not the holding of meetings or the sharing of methodology for site selection which the Inspector found to be not "positive". Rather it was the failure to articulate whether the surplus would be available to neighbouring authorities and, if so, what portion of that surplus Mid Sussex was assumed to be available to Crawley.

- The Council was plainly in a position to explain to Crawley at some point before submission, and likely before 13 December 2023 (when the draft plan was approved for consultation), what it considered its surplus to be and what of that surplus it assumed would be available for Crawley. It is not sensible for you to suggest your Council proceeded to vote on a draft plan without itself forming the view that the sites within the plan were deliverable. In any event, as the Inspector noted in paragraph 37, there were no further meetings after May 2023 and no further engagement after the June 2023 letter. Whatever the knowledge of the Council as to the deliverability of sites at the point it sent its June 2023 letter, that is no explanation for the failure to engage after 13 December 2023 (which is the latest date on which the Council must have taken a view on the deliverability of its strategy and thereby known its assumed capacity to meet neighbouring needs).

9.26. The Inspector does not say that further allocations were required, rather the Inspector is noting that nothing appears to have happened between the letter of 2023 and the Regulation 19 Plan by way of further allocations or reconsideration of sites. The thrust of the reasoning in that paragraph is that the Inspector has concluded that, post 2023, Crawley's needs were effectively "ignored".

9.27. At paragraph 5, the Inspector notes that "*no neighbouring authority nor any other prescribed body has suggested that Mid Sussex had not met the legal duty*"; accordingly, it cannot be said that the Inspector failed to understand that Crawley considered that Mid Sussex had met the duty at s.33A of the 2004 Act. Instead, at paragraph 38, the Inspector formed the judgment that Mid Sussex had failed to meet the duty, in part, on the basis of the substance of what Crawley had said, rather than their conclusion. The Inspector was rationally entitled to form that judgment. However, in any event, compliance with the duty was a matter for the Inspector, rather than the subjective opinion of neighbouring authorities. The Inspector formed a rational judgment that the duty had not been discharged, independent of her conclusions at paragraph 38.

9.28. Ground 4 is unarguable.

Ground 5

9.29. The Inspector's reasons for concluding the duty at s.33A of the 2004 Act had not been met in respect of Horsham were two-fold. First, the Council failed to revert to Horsham until after the Regulation 19 consultation had been completed and thereby at a time when there was *"…little opportunity to maximise the effectiveness of plan preparation*" (paragraph 46). Second, and more substantively, the response when it did come, said nothing to Horsham about what, if anything, the Council assumed it could do to accommodate any of Horsham's unmet need. Those reasons were clear, rational and relevant.

9.30. Ground 5 is unarguable.

Ground 6

9.31. The Inspector's conclusions in respect of co-operation with the North West Sussex Housing Market Area authorities are, necessarily, focused on the actions of Mid Sussex. There is no inconsistency with

the Crawley Inspector concluding that Crawley had complied with its duty under s.33A of the 2004 Act and this Inspector concluding Mid Sussex had not. The failure of Mid Sussex to articulate what, if any, of its surplus would be available to meet the needs of Crawley is not a reason for Crawley to fail its duty to co-operate.

9.32. The Inspector records accurately an unmet need for 59 Gypsy and Traveller pitches arising from Horsham but that was plainly not a determinative consideration in the Inspector's overall analysis that the duty had been failed in respect of Horsham.

9.33. You say that "*[n]owhere has the Council stated that it has only looked to sites close to administrative boundaries to meet unmet needs",* however the Council told the Inspector just that at paragraph 3.1.7 of AP-013:

> "*In addition to this, the authorities sought to identify other large-scale sites that had been promoted to them, which could make a strategic contribution to meeting the housing needs of the HMA and were located on or close to administrative boundaries …"*

9.34. In respect of paragraph 62, the minute from 5 January 2023 records the Crawley representative as saying:

> "*EB: need to be very clear why the coastal authorities are not invited to NWS discussions in the absence of the WS&GB officer group meetings. Will need to demonstrate that the NWS authorities are not just looking inwardly at the NWS HMA but are actively pursuing and awaiting engagement from the coastal authorities*."

9.35. The Inspector quotes that final sentence verbatim at paragraph 61 of her letter. It is impossible to understand how that amounts to a "misinterpretation", still less a "clear misinterpretation" of what the minutes show. There was no record of dissention in the minutes to what the Crawley officer had said.

9.36. The Inspector was entitled to note that suggestion had not been undertaken and to have taken that into account as part of her broader evaluation of whether the duty at s.33A of the 2004 Act had been met.

9.37. Ground 6 is unarguable.

Ground 7

9.38. Paragraph 66 is passing factual reference to the National Park as one of the neighbouring authorities. There is no arguable error of law arising from that reference.

Ground 8

9.39. The criticism in relation in respect of the treatment of Brighton and Hove is clearly articulated at paragraphs 71-73. The Inspector found, as she was rationally entitled to do, that the Council did not engage substantively with Brighton and Hove. Instead, the Council updated Brighton and Hove with the plan preparation process and evidence base. The Inspector was entitled to find that did not amount to the necessary engagement to discharge the duty at s.33A of the 2004 Act. There was no evidence that the Council had taken into account the likely unmet needs from Brighton and Hove when preparing its plan, nor communicated to Brighton and Hove whether, and if so at what scale, capacity would be available to accommodate some of their unmet needs. Finally, the Inspector was entitled to find the Council had been unwilling to be open to considering whether prioritising the North West Sussex

Housing Market Area remaining appropriate and that, in approaching the matter in that fixed way, the Council had failed to approach discussions with Brighton and Hove in a sufficiently positive manner.

9.40. In any event, the Inspector's conclusions concerning Brighton and Hove are separate to her conclusions about Horsham and Crawley. Accordingly, even if (which is denied) the Council had established an arguable error in relation to the Inspector's approach to Brighton and Hove, leave for judicial review would be refused to pursue a claim on that basis because the outcome for the Council (i.e. the failure to meet the duty to co-operate) would be high likely to have been the same given the prior conclusions about co-operation with the NWSHMA authorities, see s.31(3C) Senior Courts Act 1981.

9.41. Ground 8 is unarguable.

Overall

9.42. None of the proposed Grounds are remotely arguable. The Inspector's reasons are clear and rational and more than sufficient to demonstrate that the Inspector exercised the wide statutory discretion to demine whether the Council had met its legal duty, had been lawfully exercised in this instance.

10. Details of the Action that the Proposed Defendant is expected to take

10.1. For the foregoing reasons, the Secretary of State does not consider the letter was legally flawed and will resist any judicial review of that letter.

10.2. Having regard to the conclusions of the review of your complaint from Planning Inspectorate dated 15 May 2025 and for the reasons set out above, the Secretary of State does not consider that it is appropriate to revoke the Inspector's appointment.

10.3. Accordingly, the Inspector will remain the appointed Inspector for the Plan.

11. Alternative Dispute Resolution

11.1. The Secretary of State has considered whether an alternative means of resolving the dispute is appropriate. However, given that she remains of the view the Inspector should remain the appointed person to conduct the Examination, the Secretary of State does not consider ADR to be appropriate.

12. Details of Information Sought

12.1. Copies of the correspondence between the Inspector and the Planning Inspectorate and between the Planning Inspectorate and the Ministry will be sent via Egress link with this correspondence, with redactions made to personal data, such as email addresses and contact details.

13. Address for further correspondence and service of court documents

Should proceedings be brought GLD will only accept service of new proceedings via email to the principle email address: newproceedings@governmentlegal.gov.uk. At the same time please copy emily.clapp@governmentlegal.gov.uk into any such email. Please ensure any enclosures are of sufficiently small data size to be sent and are listed in any covering letter or email.

By post:

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Yours faithfully

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