

IN THE MATTER OF THE EASTLEIGH BOROUGH LOCAL PLAN EXAMINATION

**RESPONSE OF EASTLEIGH BOROUGH COUNCIL
TO OPINIONS SUBMITTED ON BEHALF OF
PERSIMMON HOMES SOUTH COAST**

INTRODUCTION

1. This is the Response of Eastleigh Borough Council (“the Council”) to matters raised in three Opinions of Christopher Boyle QC (dated 8th December 2017, 27th July 2018, and 17th October 2019) which have been submitted as Appendix 1 to each of the Matter 1, 2 and 3 Statements submitted on behalf of Persimmon Homes South Coast (“Persimmon”) in connection with the examination of the Eastleigh Borough Local Plan 2016-2036 (“the Local Plan”). This Response is made pursuant to a request from the Inspector on the first day of the examination.

BACKGROUND

2. In his three Opinions, Mr Boyle QC asserts that the Council acted unlawfully when preparing and consulting on the emerging Local Plan through failing to follow the procedures required of it by the Town & Country Planning (Local Planning) (England) Regulations 2012 (“the 2012 Regulations”), the legal principles for Sustainability Appraisal (“SA”) “as enunciated in *Save Historic Newmarket*”, and a Cabinet Resolution of July 2017, and that the Plan is, as a consequence, not ‘justified’. The allegations may be summarised as follows:

- (a) The Council failed to undertake a Regulation 18 consultation exercise pursuant to the 2012 Regulations – in particular, the “Issues and Options” consultation document, December 2015 [ORD004], did not appear to be, and did not purport to be, a Regulation 18 document.

- (b) Even if the Issues and Options exercise was taken to be the Regulation 18 consultation, the Council failed to undertake any Regulation 18 consultation on either:
- i. The appropriateness or otherwise of smaller sites (below 200 units) or where they might be found; or
 - ii. The “Development Principles”¹, which post-dated the Issues & Options consultation and guided the exclusion of certain sites - including Hamble Airfield².
- (c) In failing to consult on smaller sites and the Development Principles, the Council’s Sustainability Appraisal does not adequately fulfil its legal requirements as enunciated in the *Save Historic Newmarket* case³.
- (d) The resulting Plan (at least as regards its treatment of small sites and the Hamble peninsula) is not ‘justified’ on the evidence base, as required by paragraph 182 of the NPPF 2012.
- (e) The endorsement of the approach to arrive at the 16 proposed allocated sites, as resolved upon by Cabinet in July 2017, was expressly on the understanding that the process and evidence base would be consulted upon prior to the publication of the Regulation 19 pre-submission version. However, no such consultation took place and officers did not, therefore, have authority to proceed to the Regulation 19 exercise.

¹ The “Development Distribution Strategy and Principles Report” [ORD012], December 2016.

² Viz: “There should be no significant additional development in the Hamble peninsula because of transport constraints, minerals safeguarding and the vulnerability of the open and undeveloped countryside gaps between settlements in this area and Southampton, the outer borders of which are clearly visible from many parts of the peninsula”.

³ *Save Historic Newmarket & Ors Forest Heath DC & Anr* [2011] EWHC 606 (Admin)

- (f) Insofar as the Council excluded a site at Mallards Road from further consideration because it was the subject of appeal, the Council took into account an immaterial consideration.

RESPONSE TO ASSERTED LEGAL FLAWS

(a) No Regulation 18 Exercise

3. Regulation 18 of the 2012 Regulations provides as follows:

“(1) A local planning authority must—

(a) notify each of the bodies or persons specified in paragraph (2) of the subject of a local plan which the local planning authority propose to prepare, and

(b) invite each of them to make representations to the local planning authority about what a local plan with that subject ought to contain.

(2) The bodies or persons referred to in paragraph (1) are—

(a) such of the specific consultation bodies as the local planning authority consider may have an interest in the subject of the proposed local plan;

(b) such of the general consultation bodies as the local planning authority consider appropriate; and

(c) such residents or other persons carrying on business in the local planning authority’s area from which the local planning authority consider it appropriate to invite representations.

(3) In preparing the local plan, the local planning authority must take into account any representation made to them in response to invitations under paragraph (1).”

4. It is to be noted, therefore, that the Regulation 18 requirements regarding consultation are limited and flexible. The Local Planning Authority is required only:

(a) To notify those bodies, residents and persons specified in Regulation 18(2) that it proposes to prepare a Local Plan; and

(b) To invite representations from those notified as to “what a local plan with that subject ought to contain.”

5. That is precisely what the Council did through publishing for consultation its Issues and Options consultation document in December 2015: the Council notified each of the bodies and persons specified in Regulation 18(2) of the Local Plan which the Council was proposing to prepare; and the Council invited them to make representations to the Council, as Local Planning Authority, about what that Local Plan ought to contain.

6. Indeed, this was made absolutely clear in the Foreword to the consultation document, which identified its purpose at the outset, as follows:

“The Borough Council needs to bring forward a new local plan to take account of these needs⁴.

...

The Council intends to bring its new local plan forward as quickly as possible, to help give certainty to communities for the future.

This “Issues and Options” document gives residents, businesses and other organisations a real opportunity to help get the Plan right. We urge everyone to read the consultation document and take part.”

7. To these ends, the Issues and Options consultation document explained, in paragraphs 1.8-1.20 of its “Introduction”, that:

(a) The purpose of the consultation was to give people the opportunity to comment formally on how the Borough should develop through to 2036, thus informing the future planning of the Borough and the preparation of the Local Plan next year;

(b) The Consultation document set out what the Council believed were the key issues facing the Borough and how to address them, and had been prepared to focus on the key strategic issues facing the Borough, where there are genuine choices to be made;

⁴ Specified as: new homes; land for jobs; community facilities such as schools, healthcare and leisure facilities; open space for sport, recreation and nature conservation; support for town and local centres; and keeping vital green gaps between our towns and villages.

- (c) Views were invited in order to help the Council “choose the best planning strategy, policies and allocations for the Borough in the period up to 2036”; and
 - (d) There would be an eight-week consultation, from 23 December 2015 to 17 February 2016, in which representations could be made (giving details as to how they could be submitted).
8. Further, and in order to solicit representations as to what the proposed Local Plan “ought to contain”, subsequent chapters of the Issues and Options consultation document dealt with the following matters, and each chapter contained consultation questions to be addressed⁵:
- (a) Chapter 2 provided a brief overview of the characteristics of the Borough, key policies and the development of the evidence base;
 - (b) Chapter 3 identified a number of key strategic issues and constraints for the Borough that needed to be taken into account in considering how and where the Borough should grow;
 - (c) Chapter 4 identified a vision for the Borough and made a number of suggestions for objectives that would help to achieve this;
 - (d) Chapter 5 identified that the Local Plan would need to accommodate significant levels of additional development needs, including new homes and employment space, discussed what these needs could be, and sought views on the right level of new development in the Borough;
 - (e) Chapter 6 identified, and summarised, 8 “spatial strategy options”⁶, based on 23 strategic locations, as to how, potentially, to accommodate future development needs, along with the key early findings on their sustainability credentials;

⁵ The Introduction explained that consultees could on respond on “every issue and option or just one or two”.

⁶ Potential locations for major strategic locations (i.e. over 200 units) listed as Options A-H.

- (f) Chapter 7 identified a number of “policy options” which might be included within the Local Plan, covering a range of factors that would affect how development was delivered; and
- (g) Chapter 8 summarised the next steps in preparing a detailed Local Plan for further consultation.
9. The Questions posed in the Issues and Options consultation document were phrased in broad terms so that consultees were not constrained in their responses: see, for example, the final questions in Chapters 6 and 7 (Questions 18⁷ and 38⁸) which expressly invited consultees to comment on any issues they wished.
10. The Issues and Options consultation document was, therefore, plainly an adequate Regulation 18 consultation document. The mere fact that it did not expressly refer to Regulation 18 is neither here nor there. There is no requirement for a Regulation 18 consultation document expressly to so identify itself. What matters is whether the substance of the Regulation 18 requirements were fulfilled, and here they were.
11. Moreover, the Issues and Options consultation document was only part of a wider process which included:
- (a) The call for sites exercises in 2015 and 2016 (noting that the call for sites in 2016, to update the SLAA, invited people to submit sites for 5 dwellings or more); and
- (b) Ongoing public engagement including through the ‘Shaping Your Community’ exercise in 2017 (noting that the selection of small and medium sites [HOU11] was first published on the Council’s website in September 2017,

⁷ “Have we identified all the main spatial options and locations of development? What options should we also consider? What are their potential benefits and impacts?”

⁸ “Are there any other issues that you would like to comment on?”

enabling people to see the direction of travel well before the Regulation 19 consultation).

12. Furthermore, as the Issues and Options consultation document itself recognised at paragraph 1.4, the Council was in any event not starting from scratch since the 2011-29 Local Plan had itself gone through four wide-ranging public consultations.
13. In the circumstances, therefore, there is no reasonable basis for suggesting that the requirements of Regulation 18 were not met, or for suggesting that there was any failure in seeking views on what the Local Plan ought to contain. To the contrary, there had been very substantial consultation and engagement indeed.

(b) No Consultation on Smaller Sites or Development Principles

14. Whilst in force, Regulation 26 of the Town and Country Planning (Local Development) (England) Regulations 2004 had required a further “public participation” (in other words, “consultation”) on “pre-submission proposals documents” and “the proposals matters”⁹. However, that requirement was removed by the Town and Country Planning (Local Development) (England) (Amendment) Regulations 2008 in a bid to speed the process up. As explained in paragraph 7.9 of the accompanying Explanatory Memorandum, this had the effect of removing “one of the formal stages of consultation ... - the preferred options stage”.
15. There is, therefore, no longer any requirement, under the Regulations, to consult on preferred options and it suffices simply to invite representations, very broadly, as to “what the Local Plan ought to contain”. Nor was a separate consultation on preferred options required by the Council’s Statement of Community Involvement (“SCI”) [SUB014]. Paragraph 5.2 of the SCI (which stated that a Regulation 18 consultation document “will indicate the options considered and the Council’s preferred option(s)”) enabled the Council to consult on a preferred option at Regulation 18 stage if it wished, but it did not *require* the Council to do so if it had not at that stage identified a preferred option, as opposed to options (as was the case, for example, in

⁹ In effect, an additional “preferred options” stage of consultation.

relation to the Policy Options identified in Chapter 7 of the Issues and Options consultation document¹⁰).

16. Hence, it was completely lawful for the Council to proceed from a Regulation 18 exercise (as undertaken in Eastleigh by the Issues and Options consultation document and through the call for sites exercises), directly to a Regulation 19 consultation on its pre-submission Local Plan, without consulting on any intervening stage by which the Council developed its submitted Local Plan – including both the treatment of smaller sites and the Development Principles by which the Council had been guided (and which had, of course, been devised in the light of the responses to the Issues and Options consultation).

(c) Failure to Fulfil SA Legal Requirements

17. As set out in the Council’s Matter 1 and 2 Statements, the Sustainability Appraisal has been carried out in full conformity with the requirements of Directive 2001/42/EC (“the SEA Directive”) and the Environmental Assessment of Plans and Programmes Regulations 2004 (“the SEA Regulations”).
18. In particular:
- (a) The Council was fully entitled to decide that strategic development on the Hamble peninsula¹¹ and certain of the sites identified in the SLAA were not “reasonable alternatives”, that being a matter of evaluative judgment for the Council, which could only be challenged on conventional public law grounds¹²;

¹⁰ As the “Note” at the beginning of the Chapter 7 text on each Option makes clear.

¹¹ In the case of the Hamble peninsula, development on Hamble airfield was one of the options (Option G) at issues and options stage and so did undergo SA at that stage (see ORD007 and ORD008, and also SUB003b at Table 5.2 and pages 99-105). Option G was not carried forward for the reasons set out in paragraph 5.248 and Table 5.11 of the June 2018 SA (SUB003b), namely that the Option “is no longer considered appropriate for housing-led development as it is allocated by the County Council for sand and gravel extraction and then restoration to grazing, nature conservation, open space, public access and woodland. In addition, EBC has agreed that there should be no significant development in the Hamble peninsula due to transport and countryside gap issues.” The decision not to carry Option G forward in the June 2018 SA was therefore fully reasoned and entirely lawful.

¹² See *R (Friends of the Earth) v Welsh Ministers* [2016] Env LR 1 at [88].

(b) The consideration of reasonable alternatives has been full, with entirely adequate reasons provided in the SA; and

(c) The SA process has been an iterative one which has informed the plan-making process.

19. There is, therefore, no basis for suggesting breach of the legal requirements for SA as enunciated in the *Save Historic Newmarket* case or otherwise.

(d) Plan not 'Justified' on the Evidence Base

20. The allegation that the Plan is not 'justified' on the evidence base is entirely parasitic on the allegations of errors in failing to consult on smaller sites and the Development Principles and failing to fulfil the SA legal requirements. For the reason set out above, therefore, the allegation that the Plan is not 'justified' is without merit.

(e) No Authority to Proceed to the Regulation 19 Exercise

21. The assertion that the July 2017 Cabinet decision (which was agreed by Full Council) endorsed the approach to arrive at the 16 proposed allocated sites on the express understanding that the process and evidence base would be further consulted upon prior to the publication of the Regulation 19 pre-submission version is simply wrong as a matter of fact.

22. Whilst paragraphs 104 and 111 of the Officer's Report (relied upon in the Opinions to which this is a response) did state, respectively, that the process being followed would enable "all interested parties to review and comment on the evidence, to enable Council officers to refine or change the initial recommendations as needed", and that "once the full initial assessment is published this will enable any interested party to make comments, enabling officers to consider whether or not their initial recommendations are 'sound'", these statements did not propose, promise, or even anticipate, a further, formal, consultation exercise prior to publication of the proposed submission Plan; rather, they anticipated a far more informal process of "public engagement", as paragraphs 10 and 127-128 of the same Report describe.

23. In particular, paragraph 10 of the Report makes it clear that the timetable for Plan-making would entail the following stages (in order) prior to submission of the proposed Local Plan for examination:

(a) Completion of the final evidence;

(b) "Further public engagement";

(c) The Cabinet/Council decision on the definitive 'proposed submission' Plan;

(d) "Formal consultation on the 'proposed submission' Local Plan"; followed by

(e) Submission, independent examination, and finally adoption.

24. Hence, the only "formal consultation" which was proposed was to be "on the 'proposed submission' Local Plan" (in other words Regulation 19 consultation). The reference in paragraph 10(b) of the Report to "further public engagement" plainly did not extend to a "formal consultation" exercise: completely different phraseology was used, and deliberately so.

25. Moreover, and consistent with this, paragraphs 127-128 of the Report, which also refer to "further engagement", likewise speak to an informal type of public engagement, followed by a formal Regulation 19 consultation once the Council had published its pre-submission Local Plan:

"127. The Council will submit for independent public examination a Local Plan that it considers to be 'sound'. A range of evidence has been published to enable further testing and engagement; and further evidence is being collected. Therefore at this stage the recommendation is to approve an emerging Local Plan, which gives an initial direction of travel to facilitate this further testing and engagement.
...

128. Once the testing and engagement on the emerging plan, current and further evidence is complete the Council will make a decision on a 'pre-submission' Local Plan. At that stage any interested party will have the opportunity to make written representations regarding that Plan. ..."

26. The Resolutions of Cabinet and Full Council were entirely consistent with this. The emerging approach to the Local Plan was “noted” and its use “as the basis for focused engagement with local communities, neighbouring Councils and statutory agencies through the ‘duty to co-operate’, and with developers” was “approved”. But the resolutions emphatically did not make provision for (still less require) further consultation prior to Regulation 19 publication stage.
27. Furthermore, as explained in section 8 of the “Revised Consultation Statement” [SUB006], “Shaping your Community” [DTC002], and paragraph 55 of the Council’s “Matters Statement” response to Q 2.3, the Council did precisely what it said it would do in the July 2017 Report and Resolutions, and conducted extensive, non-statutory, public engagement (through digital and other surveys, questionnaires, and meetings).
28. Finally, it should be noted that the 11th December 2017 Resolutions of Cabinet and Full Council provided specific authorisation to proceed to Regulation 19 publication without any further consultation. That authority was lawfully exercised by the Chief Executive in his decision of 20th June 2018 to proceed to Regulation 19 publication [ED54].
29. For those reasons, Mr Boyle QC is, with respect, wrong to assert that there was no authority to proceed to Regulation 19 publication in the absence of consultation on proposed allocated sites.

(f) Mallards Road

30. As for the exclusion of Mallards Road pending determination of a planning appeal, it was plainly open to the Council to await the view of an independent Inspector as to the site’s suitability for development before considering whether to allocate it for the same in its emerging Local Plan. As it happens, the Inspector dismissed the appeal by a decision letter, dated 2nd August 2017¹³, noting its location beyond an urban edge and in a local gap, and the adverse impact which would be occasioned on the character and appearance of the area.

¹³ Appeal Ref: W1715/W/16/3156702.

31. In any event, the Mallards Road site was put forward as an omission site at Regulation 19 stage and was assessed in the June 2019 SA Addendum [SUB016 at page 46]. Mr Boyle QC rightly makes no criticism of that assessment in his final Opinion of 17th October 2019.

CONCLUSION

32. For the reasons set out above, the Council respectfully considers that Mr Boyle QC is wrong in his suggestions that the Council's approach has been unlawful and unsound.

PAUL STINCHCOMBE QC and NED HELME
39 Essex Chambers
81 Chancery Lane, London, WC2A 1DD

28th January 2020