

## IN THE MATTER OF THE EASTLEIGH BOROUGH LOCAL PLAN EXAMINATION

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**RESPONSE OF EASTLEIGH BOROUGH COUNCIL  
TO NOTES SUBMITTED ON BEHALF OF  
ACTION AGAINST DESTRUCTIVE DEVELOPMENT**

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**INTRODUCTION**

1. This is the Response of Eastleigh Borough Council (“the Council”) to matters raised in two Notes by Hereward Phillpot QC (dated 19<sup>th</sup> July 2017 and 8<sup>th</sup> December 2017) which were submitted by Action Against Destructive Development (“ADD”) as Appendices 5 and 6 to its Regulation 20 representations<sup>1</sup> on the proposed submission version 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. The two Phillpot Notes were responses to two Reports to the Council’s Cabinet, dated 20<sup>th</sup> July 2017 and 11<sup>th</sup> December 2017, recommending certain decisions be taken to reflect the changing evidence base for the emerging Local Plan. The content of those two Reports is summarised below, with cross-references given to relevant paragraph numbers.

The 20th July 2017 Cabinet Report

3. In the first Cabinet Report, the Officer set out (inter alia):
  - (a) The purpose of the emerging Local Plan ([12]-[15]);
  - (b) The stages of its preparation so far ([1]-[3] and [35]);

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<sup>1</sup> That is, its representations made under Regulation 20 of the Town and Country Planning (Local Planning) (England) Regulations 2012

- (c) The identified need for new development, including homes and employment ([16]-[37]);
  - (d) The basis for the emerging selection of a Strategic Growth Option (SGO) ([38]-[89]);
  - (e) The key delivery issues for the SGO ([90]-[103]);
  - (f) The basis for the emerging selection of other housing sites ([104]-[112]); and
  - (g) The emerging approach to retail, leisure, gypsy and traveller uses, countryside gaps, urban edges, development management policies, and policies for each Local Area and Parish ([113]-[120]).
4. However, the fact that the evidence base was incomplete was also recognised, as was the desire of the Council to work closely with communities to discuss the emerging evidence. Accordingly, the Local Development Scheme was proposed to be amended to reflect the timescales anticipated to be necessary to gather all of the identified outstanding evidence, with no final view proposed to be taken at this stage – see, for example (with the most important paragraphs emboldened) at: **[4]-[11]**; **[16]**; [25]; [31]; [33]; **[42]**; **[45]**; **[55]**; [60]; [66]; **[67]-[76]**; [78]; **[83]-[84]**; [90]; **[93]-[101]**; [102]; [112]; **[127-128]**.
5. It was in the light of the evidence then available, and outstanding evidence still to be gathered, that the recommendation of the Officer to the Cabinet was to pass a resolution in the following (relevant) terms:
- “(1) Note the Eastleigh Local Plan (2016 – 2036) Emerging Approach ...
  - (2) Note that the Eastleigh Local Plan Emerging Approach is based on the wide range of emerging evidence available at this stage, but that important evidence remains outstanding, and that the Council will need to make a definitive decision on the Local Plan once all the relevant and key evidence is available.
  - (3) Approve the use of the Eastleigh Local Plan Emerging Approach as set out in recommendation 1.
    - (a) ...

(b) as the basis for focussed engagement with local communities, neighbouring Councils and statutory agencies through the 'duty to cooperate, and with developers.

(4) Give delegated authority to the Senior Specialist (Local Plan), in consultation with Managers and the Leader of the Council, to update the Local Development Scheme as needed prior to the submission of the Local Plan."

6. The recommendation was approved by Cabinet and agreed by Full Council<sup>2</sup>.

The 11<sup>th</sup> December 2017 Cabinet Report

7. The second Cabinet Report<sup>3</sup> updated matters following the collection of additional evidence, albeit still insufficient to enable a final decision to be taken on the emerging Local Plan:

(a) As before, the Officer set out the purpose of the emerging Local Plan ([1] and [41]-[43]).

(b) The Officer then set out the "Background" leading up to the July 2017 decision ([2]-[29]), confirming that the decision then taken was to note that the "Eastleigh Local Plan Emerging Approach" was based on the wide range of emerging evidence available at that stage, but that important evidence remained outstanding on range of matters and the Council would only be in a position to make a decision on the Local Plan once all the relevant evidence was available and all the options had been fully considered ([26]).

(c) The Officer then identified that further technical work had been completed since July, but stated that whilst this work afforded sufficient certainty about the direction of travel to enable Council to approve in principle the pre-submission Local Plan, final confirmation of the Local Plan would only take place once all of the technical evidence had been completed, reviewed and

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<sup>2</sup> Certain minor stylistic changes in wording were introduced in the version recommended by Cabinet (and agreed by Full Council), but they were not significant.

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assessed; and if the outstanding technical evidence led to a significantly different approach, the Local Plan would be brought back to Council ([27]).

- (d) Following the decision in July 2017 to approve the use of the Eastleigh Local Plan Emerging Approach as the basis for focused engagement with local communities, the Officer then set out the extent of, and responses to, the “Shaping Your Community” engagement which had been undertaken from July 2017 onwards ([33]-[40]).
- (e) Having identified the “Local Plan Vision and Strategy” ([41]-[43]), the Officer set out, again, the identified need for new development, including “Housing” and “Employment Needs and Sites” ([44]-[56]), in respect of which no new evidence had been gathered.
- (f) So far as “Transport and Accessibility” was concerned, additional evidence had been gathered, and an interim study had identified certain likely mitigations for development impacts at a conceptual level, but additional modelling had been commissioned to enable the relative benefits of the SGOs to be fully assessed ([57]-[64]).
- (g) The Officer then re-stated the approach approved by the Cabinet in June 2017 with regard to “Countryside Gaps and Landscape Sensitivity ([65]-[69]).
- (h) The Officer went on to state, with regard to “Air Quality”, that consideration was being given to a bespoke policy on air quality and to adding air quality as a reference in the Local Plan Objectives and in Strategic Policy S1. The Officer confirmed that, as with the Issues & Options consultation paper and the appraisal of greenfield site options for the Emerging Local Plan, the Local Plan would be subject to a Sustainability Appraisal (SA) before its final form was agreed, including with respect to the cumulative/in-combination effects on air quality ([70]-[74]).

- (i) As for “Biodiversity”, the Officer identified that an initial Habitat Regulations Assessment (HRA) had been undertaken for the Issues & Options consultation paper and confirmed that a final HRA was currently being put together and, when finalised, would inform any final decision to proceed to the Regulation 19 consultation and submission of the Local Plan ([75]-[79]).
- (j) The Officer proceeded to revisit the SGOs (see [80]-140]) in terms of “Transport and Accessibility” ([86]-[87]), “Countryside Gaps” ([88]-[90]), “Landscape” ([91]), Biodiversity ([92]-[108]), and “Other Environmental Issues” ([109]), reaching “Conclusions to date” ([110]-[114]), including, importantly, that:
  - i. SGO B/C was currently preferred ([113]);
  - ii. However, it was important to recognise that there were some specific areas of evidence which were still emerging and/or incomplete, primarily relate to transport modelling, the HRA, and consequent environmental mitigation, and that “the conclusions to date will need to be kept under careful review to identify whether or not they remain valid once the Local Plan evidence is complete” ([111]).
- (k) Having then considered various other matters (including masterplanning; retail and leisure; Gypsies, Travellers and Travelling Showpeople; development management policies; and viability, the Report reached its “Conclusion” ([127]-[132]), including that:
  - i. The Local Plan had been informed by a range of evidence and technical background studies, together with the view of residents, businesses, local councils and a wide range of interested parties who had responded to consultation and engagement as the Local Plan has developed since 2015 ([129]);
  - ii. Although much of this technical work was complete, and the Council was confident that the initial findings supported the approach taken within

the Eastleigh Borough Local Plan (2016 – 2036), some of it was ongoing and if the outstanding evidence did not support the approach taken, the final Plan would be changed to reflect this; and

iii. If this resulted in a major change to the Local Plan, it would be brought back to Council for a decision ([130]).

8. Again reflecting the fact that the evidence base was still emerging, the Report made it clear that there would be ongoing public engagement ([26] and [111]).

9. It was in the light of the evidence then gathered, the outstanding evidence still to be collated, and the Council's intention to engage further with the public, that the recommendation to the Cabinet was to pass a resolution in the following (relevant) terms:

“(1) To approve in principle (subject to the caveats hereafter set out in (a) and (b) below) the ‘pre-submission’ Local Plan and update to the policies map (Appendices 1 and 2) and gives delegated authority to the Chief Executive in consultation with the Leader of the Council to:

(a) finalise the wording and content of the Eastleigh Borough Local Plan 2016 - 2036 (including updating the maps in Appendix 2), following the completion of technical studies (subject to the results of these not significantly changing the content of the Eastleigh Borough Local Plan);

(b) to complete and update the evidence base prior to submission provided this does not lead to a significantly different approach needing to be taken in the Local Plan;

(c) upon completion of (a) undertake a Regulation 19 consultation on the final Eastleigh Borough Local Plan (2016 - 2036); and

(d) following (a), (b) and (c) above, submit the final Eastleigh Borough Local Plan (2016 – 2036) to the Secretary of State in accordance with Regulation 20.

...

(4) To support the ongoing engagement with local communities, neighbouring councils and statutory agencies through the ‘duty to cooperate’ and ‘Shaping Your Community’ and with developers.”

10. Once again, the recommendation was approved Cabinet and agreed by Full Council<sup>4</sup>.

### ASSERTED LEGAL FLAWS

11. By his first Note, dated 19<sup>th</sup> July 2017, Mr Phillpot QC criticises the July 2017 Officer's Report to Cabinet, as follows:

(a) In paragraphs 3-5, he questions why the Report was needed at all and its purpose, concluding as follows at paragraph 6:

"The closest the Report comes to explaining the purpose and intended consequences of recommendation (3) is in paragraph 7, where it is said that the views expressed in the Report are "designed to prompt ... further discussion" of the evidence, "enabling the emerging approach to be further tested, and refined or changed as needed". That needs to be seen in the context of two later paragraphs in the Report:

- a. Paragraph 79, which makes it clear that what is being done is the initial selection of a Strategic Growth Option ("SGO"); and
- b. Paragraph 87, which offers an 'on balance' recommendation "to note that SGO B/C is emerging as the currently preferred option".

(b) He proceeds, in paragraph 7, to identify two reasons why he considered that to be an "inadequate" approach:

- i. The Report did not offer any explanation as to why it was either necessary or desirable to make a decision as to which SGO should be preferred at that stage; and
- ii. The Report identified a wide range of critical issues going to the heart of the decision as to which SGO should be preferred where the evidence base was obviously inadequate to enable any informed view to be reached as to their relative merits or deliverability.

(c) He then summarises his concerns as follows in paragraph 8:

"8. The impression that I was left with was that this is an attempt to seek to accelerate the decision-making ahead of the evidence base, with the clear risk that the subsequent gathering of evidence, comparison of options and

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<sup>4</sup> Again, certain minor stylistic changes in wording were introduced in the version recommended by Cabinet (and agreed by Full Council), but they were not significant.

consultation exercises will be seen as tainted by pre-determination and the legal requirements of soundness and compliance with the requirements of Strategic Environmental Assessment (“SEA”) will not be met.”

12. By his second Note, dated 8<sup>th</sup> December 2017, Mr Phillpot QC criticises the December 2017 Officer’s Report to Cabinet also, principally upon the basis set out in paragraphs 4-11, where it is asserted that that the same issue he identified in paragraph 8 of his first Note (on the July 2017 Report) still arose: the whole purpose of the proposed decision was, it is said, to enable the current timetable for the Council’s decision on the Pre-Submission Local Plan to be met notwithstanding that the evidence base had not yet reached the stage that would enable that to happen on any sound basis.

### **RESPONSE TO ASSERTED LEGAL FLAWS**

13. Mr Phillpot QC’s criticism of the July 2017 Officer Report to Cabinet is simply misguided, based on a false categorisation of the decisions that were actually made pursuant to Officer recommendations which were very carefully worded.
14. So far as Mr Phillpot QC’s concern as to the purpose of, and reason for, the Report (Mr Phillpot QC’s paragraphs 3-5 and 7(a)), that is set out in the Report itself, which made it quite clear that the Council was making its emerging view public, together with its identification of the evidence it was still awaiting, in order to inform the public and other stakeholders with a view to further public engagement ([7], [127] and the second paragraph of the Summary to the report).
15. Further, so far as Mr Phillpot QC’s concern that the Council was making decisions before the evidence had been gathered, consistent with the above the Report was extremely careful to explain the situation, and extremely careful, also, in the recommendations which were made. In particular:
  - (a) The Report made it clear that:
    - i. The Council would not submit any Local Plan for examination until it had a sufficient evidence base to do so ([7], [11], [16], [127]-[128]); and that

- ii. The Council was in no position to do so at this stage because there was considerable, and important, evidence that was outstanding ([7], [11], [16], and [127-128]), including with regard to the competing Strategic Growth Options ([42] and [45]); road traffic ([55]); biodiversity and internationally important designations ([67-76] and [83-84]); SGO deliverability ([93-101]); and small sites ([112]);
- (b) Hence, the Report did not recommend that the Cabinet or Council determine any of the content of the Plan that might in due course be submitted;
- (c) Rather, the recommendation was merely to “note” the emerging approach, and to do so for the specific reasons identified above – in order to ensure that members of the public and other stakeholders were aware of both the Officer’s emerging thoughts, and the direction of travel, and to aid future public engagement.
16. The July 2017 recommendation therefore reflects a spirit of openness and transparency, and was made in circumstances in which the Council had already amassed considerable evidence (so that its mind was not empty), but not enough for submission (and so neither was its mind closed). The resolution was passed on that limited basis and for those reasons; ones which should be applauded rather than criticised.
17. In the second, December 2017, Report an identical approach was adopted, updated to reflect the fact that considerably more additional evidence had since been gathered, albeit still insufficient to permit the Council to come to any final decision on the soundness of the (still) emerging approach so that submission remained impossible.
18. Hence, and having explained (in considerable depth) that sufficient technical work was complete for the Officer to express confidence that the initial findings supported the emerging approach taken, the Report made it expressly clear that:
- (a) The evidence base was still incomplete and some technical work was ongoing;

- (b) If the outstanding evidence did not support the approach taken, the Local Plan would be changed to reflect this;
  - (c) If this resulted in a major change to the Local Plan, it would be brought back to Council for a further decision; and
  - (d) As with the July Report, engagement with the public would continue – and on a far more informed basis than would otherwise be the case.
19. To the extent, therefore, that the common concern underpinning the two Phillpot Notes is that, through the July and December Reports, the Council was pre-determining matters, making decisions to submit the final Local Plan in advance of the evidence base, that concern is simply misplaced. Both resolutions were recommended, and passed, in the knowledge that the evidence base was incomplete; and that if, when completed, that evidence could not support the Plan, then the Plan would not be submitted in that form.
20. There is nothing in that approach which is inconsistent with the requirements of the Directive 2001/42/EC (“the SEA Directive”) or the Environmental Assessment of Plans and Programmes Regulations 2004 (“the SEA Regulations”). Nor is the approach in any way unsound. To the contrary, it was an entirely sensible and commendably transparent approach for the Council to have adopted in response to an emerging evidence base.

### CONCLUSION

21. For the reasons set out above, the Council respectfully considers that Mr Phillpot 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**

**28<sup>th</sup> January 2020**