EPPING FOREST DISTRICT COUNCIL: Examination of the District Local Plan 2011-33

Town and Country Planning (Local Planning) (England) Regulations 2012 (as amended)

PRE-HEARING STATEMENT
ON BEHALF OF THE MARDEN ASH ACTION GROUP
FOR WEEK 3

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1. This statement has been prepared on behalf of the members of the Marden Ash Residents Group ("MAAG") (both individually and collectively) in connection with Matter 5 Issue 1 Questions 1 and 3. MAAG has not been invited to participate in the session scheduled for Tuesday 19 March 2019 but nevertheless would respectfully request the inspector to take into account these submissions when determining this Matter.

2. At the time of writing, no hearing statement by EFDC in relation to Matters 5 and 6 has been made available on-line. It is understood that no hearing statement will be produced until the deadline for submission of this statement has passed. As a consequence, this has restricted the scope of these submissions. This is a regrettable state of affairs and calls into question the efficacy of the Regulation 19 consultation process and means that it is impossible to know whether or not EFDC has complied with its legal requirements in relation to the Sustainability Appraisal, and, additionally, there are the wider public administrative law issues to consider. This also needs to be viewed in the context of the failure by EFDC to release the relevant Appendix B (Report of Site Selection until March 2018 after the Regulation 19 consultation period had closed.

3. The courts have held on numerous occasions that there is an overriding need for fairness in any consultation process – see the decisions of the Court of Appeal in *R (on the application of Edwards) v Environment Agency* [2006] EWCA Civ 877 and in *R v North and East Devon Health Authority ex parte Coughlan* [2001] QB 213 per Lord Woolf M.R. at para 108: "It is common ground that, whether or not

consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken": *R v Brent London Borough Council, Ex p Gunning (1985) 84 LGR 168*."

4. Whilst a duty to consult may fall short of a duty to comply with the consultees' wishes, it nevertheless imposes flexible but demanding procedural requirements: to communicate fully, to allow proper time to respond and to consider carefully any responses received – see *R (on the application of Compton) v Wiltshire Primary Care Trust* [2009] EWHC 1824 (Admin). Furthermore, as Donaldson J held in *Agricultural, Horticultural and Forestry Industry Training Board v Aylesbury Mushrooms* [1972] 1 WLR 190: "The essence of consultation is the communication of a genuine invitation, extended with a receptive mind, to give advice…without communication and the consequent opportunity of responding, there can be no consultation." I would also draw attention to Lord Reed's judgment in the Supreme Court decision in *R (on the application of Moseley) v Haringey LBC* [2014] UKSC 54 to the effect that: "that whether or not there is a statutory obligation to consult, consultation must take place when proposals are still at a formative stage; it must include sufficient reasons for the proposals to enable consultees to consider them, and respond to them intelligently; enough time must be given for that; and the consultation responses must be taken conscientiously into account when the decision is taken. Lord Reed pointed out that statutory obligations to consult vary widely in content (at paragraph 36). The obligation to consult in that case was imposed, he said, not to ensure procedural fairness, but to 'ensure public participation in the local authority's decision-making process' (at paragraph 38). However, he went on to say, "in order for consultation to achieve that objective, it must fulfil basic minimum requirements." For a searching analysis of what amounts to satisfactory consultation as a matter of public administrative law in the context

of modern government see the decision of Sullivan J (as he then was) in *R (on the application of Greenpeace Limited) v Secretary of State for Trade and Industry* [2007] EWHC 311 (Admin) where a decision of the government was declared unlawful as a result of it being based on a "procedurally unfair" consultation.

5. It is significant to this Plan that one of the purposes behind both SA and the SCI is to enable "community involvement" in public participation in the plan making process. The SEA Directive (2001/42/EC) (at article 5) requires that the likely significant environmental effects of a plan or programme "and reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme are identified, described and evaluated." Those options must be subject to public consultation in the form of a report with the draft plan (article 6) and, before the adoption of the plan, the results of that consultation must be taken into account by the relevant authority (article 8) – see Hickinbottom J (as he then was) in *R (on the application of Friends of the Earth) v Welsh Ministers* [2015] EWHC 776 (Admin) at para. 12.

6. Question 1 of Issue 1 requires EFDC to provide "a summary of the process by which the Plan's housing allocations were selected." No such summary has been produced. It is therefore impossible to engage with the examination on these issues. This is a fundamental failing on the part of EFDC, made all the more unacceptable by virtue of the fact that sites ONG.R6 and R7 were NOT included in the draft local plan that was put out for consultation under Regulation 18 and were only included, without any prior notification, in the Submitted Plan when released for the more limited consultation process under Regulation 19.

MARTIN EDWARDS
Cornerstone Barristers
2-3 Gray's Inn Square
London WC1R 5JH
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