Old Oak Park Limited
Re: Old Oak & Park Royal Development Corporation
Local Plan Examination and compliance with the requirements of strategic environmental assessment

O P I N I O N

(1) Introduction

1. I am instructed to advise Old Oak Park Limited, a partnership between Cargiant Limited and London & Regional Properties. I have been asked to consider whether the Old Oak & Park Royal Development Corporation ("**OPDC**") has complied with the requirements of strategic environmental assessment ("**SEA**") in undertaking its sustainability appraisal ("**SA**") of the draft OPDC local plan ("**the draft plan**") pursuant to the Environmental Assessment of Plans and Programmes Regulations 2004 ("**the SEAR**").

2. In considering whether there has been a lawful SEA of the draft plan I have had regard to the *Review of Integrated Impact Assessment (IIA) (February 2019)* by Jam Consult Ltd. (February 2019) ("**the Review Report**") which has been submitted to the plan examination together with other written material on behalf of Old Oak Park Ltd.

3. The SEAR transposed into English law the requirements of Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment ("**the SEAD**"). In respect of the obligations in the SEAD, and therefore also with regard to the SEAR, the EU Commission issued guidance as to the approach to be taken in the *Guidance on SEA Implementation of Directive 2001/42 on the Assessment of the effects of certain plans and programmes on the environment*[1] ("**Commission Guidance**"). This is not legally binding but is nonetheless authoritative.

4. There is also up-to-date national guidance in the PPG chapter 11, *Strategic environmental assessment and sustainability appraisal*. This includes (my emphasis):

[1] http://ec.europa.eu/environment/archives/eia/pdf/030923_sea_guidance.pdf

"**How should the sustainability appraisal assess alternatives and identify likely significant effects?**

The sustainability appraisal needs to compare all reasonable alternatives including the preferred approach and assess these against the baseline environmental, economic and social characteristics of the area and the likely situation if the Local Plan were not to be adopted.

The sustainability appraisal should predict and evaluate the effects of the preferred approach and reasonable alternatives and should clearly identify the significant positive and negative effects of each alternative.

The sustainability appraisal should identify, describe and evaluate the likely significant effects on environmental, economic and social factors using the evidence base. Criteria for determining the likely significance of effects on the environment are set out in schedule 1 to the Environmental Assessment of Plans and Programmes Regulations 2004.

The sustainability appraisal should identify any likely significant adverse effects and measures envisaged to prevent, reduce and, as fully as possible, offset them. The sustainability appraisal must consider all reasonable alternatives and assess them in the same level of detail as the option the plan-maker proposes to take forward in the Local Plan (the preferred approach).

Reasonable alternatives are the different realistic options considered by the plan-maker in developing the policies in its plan. They must be sufficiently distinct to highlight the different sustainability implications of each so that meaningful comparisons can be made. The alternatives must be realistic and deliverable.

The sustainability appraisal should outline the reasons the alternatives were selected, the reasons the rejected options were not taken forward and the reasons for selecting the preferred approach in light of the alternatives. It should provide conclusions on the overall sustainability of the different alternatives, including those selected as the preferred approach in the Local Plan. Any assumptions used in assessing the significance of effects of the Local Plan should be documented.

The development and appraisal of proposals in Local Plan documents should be an iterative process, with the proposals being revised to take account of the appraisal findings. This should inform the selection, refinement and publication of proposals (when preparing a Local Plan, paragraph 16 of the National Planning Policy Framework should be considered).

Paragraph: 018 Reference ID: 11-018-20140306"

5. For the reasons set out in detail in the Review Report, I do not consider that the above guidance (which reflects the law) has been complied with.

6. The SA and SEA are comprised in the Integrated Impact Assessment ("**IIA**") dated July 2018 that accompanies the current version of the submission draft of the plan. It supersedes the IIA provided to accompany the first version of the submission draft published in June 2017 which was replaced by the current version now subject to examination.

7. The consultations to date prior to the current IIA comprise:

(1) Scoping Report, 2015

(2) Regulation 18, IIA February 2016

(3) Regulation 19, first version, IIA June 2017.

8. The context for the draft plan lies in the Old Oak Common OA designated in the current London Plan ("**LP**") and further detailed in the OAPF.

9. The LP (consolidated version, 2016) sets out the Policy for the Opportunity Areas in Policy 2.13, pp. 76-77. Part B ("Planning Decisions") (my emphasis) which makes it clear that a significant amount of consideration needs to be given to selection of options and their testing:

> "Development proposals within opportunity areas and intensification areas should:
>
> a support the strategic policy directions for the opportunity areas and intensification areas set out in Annex 1, and where relevant, in adopted opportunity area planning frameworks
>
> b seek to optimise residential and non-residential output and densities, provide necessary social and other infrastructure to sustain growth, and, where appropriate, contain a mix of uses
>
> c contribute towards meeting (or where appropriate, exceeding) the minimum guidelines for housing and/or indicative estimates for employment capacity set out in Annex 1, tested as appropriate."

10. LP Annex One states the following with regard to Old Oak Common OA:

> "**27 Old Oak Common**
>
> Area (Ha): 155
>
> Indicative employment capacity: 55,000
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> Minimum new homes: 24,000
>
> OAPF progress: 2
>
> Old Oak Common has significant regeneration potential for new housing and jobs and could make a major contribution to London's position as a world business centre. Regeneration would centre on a new strategic public transport infrastructure hub at Old Oak Common on the HS2 line between London, and Birmingham and beyond with an interchange with Crossrail 1, other national main lines and the London Overground. This should include a new branch of Crossrail 1 linking from Old Oak to the West Coast Main Line and extending via Wembley to Watford and potentially beyond. Provision of public transport infrastructure on this scale would drive substantial development which could yield 24,000 new homes and, subject to capacity and demand, up to 55,000 jobs and a variety of complementary and supporting uses in a commercial hub around the station and in the wider area. The potential for a network of new open spaces and green links connecting Old Oak Common station to North Acton, Willesden Junction, Wormwood Scrubs and the Grand Union Canal should be investigated. Public transport accessibility and availability of amenity space should support high density development which could include a cluster of tall buildings around the interchange.

> Wormwood Scrubs would provide a major amenity to support this scale of development and improved access to the Scrubs is essential to deliver sustainable residential communities. Planning for Old Oak Common should be integrated with the wider Park Royal Opportunity Area, including scope for business relocations. Linkages with Kensal Canalside and White City Opportunity Areas should also be considered, including the Imperial College campus expansion and associated potential for business creation and development at Old Oak/Park Royal. A vision document for Old Oak was published in June 2013 setting out a direction of travel for the future development of the area."

11. The OAPF also states at para 1.23:

> "Initial assessments undertaken by OPDC suggest that Old Oak and Park Royal combined could accommodate the delivery of 25,500 homes and 65,000 jobs. OPDC will, through its Local Plan, carry out work to further consider the deliverable quantum of development."

12. An IIA of the OAPF was carried out in November 2015 but did not carry out any formal testing of alternatives as required by the SEAR and guidance. Two possible options for the quantum of residential and commercial space were considered (see Section 5) but they were not assessed against the IIA framework and therefore did not assess the necessary social, economic and environmental implications of the different options against the baseline: OAPF IIA, Section 5, pp. 91-94.

13. A Transport Strategy for the OAPF was also prepared in 2015, but it stated Appendix B, B.13.1 (p151 PDF):

> "The study didn't consider the impacts of the number of homes being proposed nor the number of jobs. <u>As such this needs careful consideration in the Local Plan</u>"

14. The contention in the reg. 18 draft at para 1.20 that "Local Plan policy options, including the alternative policy options, have been appraised in OPDC's IIA" is therefore incorrect. Indeed, the draft plan (as revised) states differently that:

> "A1.30 The Local Plan is supported by an Integrated Impact Assessment (IIA). The IIA fulfils the statutory requirements for a Sustainability Appraisal (SA) and Strategic Environmental Assessment (SEA) (in a manner that incorporates the requirements of the European Union's SEA Directive (2001/42/EU) and the transposing UK Regulations, the Environmental Assessment of Plans and Programmes Regulations 2004)."

15. The scope and detail of the draft plan can be seen

16. Indeed, the IIA notes in its Non-Technical Summary

> "**Developing and Refining Options and Assessing Effects**
>
> **Spatial Vision and narratives**
>
> Government guidance advises that only reasonable alternatives should be considered and they should be sufficiently distinct to enable a meaningful comparison of their

different environmental effects.

Good practice guidance recommends that the key aims and principles of the plan should be assessed against the IIA Objectives, in order to test their compatibility and to determine whether they accord with broad sustainability principles.

The Spatial vision for OPDC has been reviewed against the IIA Objectives, and a summary of the key strengths, weaknesses and recommendations are presented in Chapter 6 of the IIA Report. The assessment of the Spatial Vision narratives against the IIA Objectives has been undertaken during the IIA using a simple matrix based approach. Chapter 6 of the IIA Report presents the complete compatibility of the Spatial Vision narratives against the IIA Objectives."

17. I have considered the various iterations of the IIA but this does not consider alternatives to the options for the draft local plan except in a very limited area. IIA section 3.4 asserts as did the reg. 18 draft at 1.20 that there has been compliance at an earlier stage:

"Alternatives must be realistic and are likely to emerge from the plan-making process. However, the SEA can encourage further thinking around alternatives, and highlight where environmentally preferable options exist.

Alternatives have been a focus for several legal challenges within the UK5, and so it is important to ensure reasonable alternatives are meaningfully considered. If there are genuinely no reasonable alternatives to a plan, alternatives should not be artificially generated. OPDC's Local Plan operates in a hierarchy of strategic planning policy documents that have been subject to their own IIAs.

The Further Alterations to the London Plan (FALP) (2015) IIA tested four pan-London options for London's growth (para. 2.3.1) and this identified that the preferred option was to accommodate growth within London's boundaries and as part of this, to consider flexibility for enhanced growth in town centres and Opportunity

Areas with good public transport accessibility. Old Oak and Park Royal Opportunity areas are referenced as an example of this in the supporting text. The published FALP (2015) identified a target for the Old Oak and Park Royal area to deliver a minimum 25,500 homes and 65,000 new jobs. Following the publication of the FALP in 2015, the GLA developed the Old Oak and Park Royal Opportunity Area Planning Framework (OAPF) covering the entirety of the OPDC area. This was published in November 2015 and subject to an IIA.

The current London Plan (2016) and the Draft New London Plan (2017) also continue to set out these homes and jobs targets. In light of these strategic planning documents defining the housing and jobs targets for the Old Oak and Park Royal, alternative development capacities are not considered to be reasonable alternatives and have therefore not been assessed.

Overarching strategic options were assessed ahead of the drafting of the Regulation 18 Local Plan. The purpose of the assessment was to determine the sustainability strengths and weaknesses of each option, such that this information would be used by the plan-makers to develop the plan's policy options and preferred policies (section 6.3). The preferred policies and policy options were then assessed alongside one another in detail, which enabled a comparison of their predicted sustainability effects, to inform the development of the preferred policies. A matrix was used for this assessment enabling the policies and options to be easily compared.

Following the Regulation 18 19(1) consultation of the Draft Local Plan, the Plan for the

Regulation 19(1) consultation has been amended and restructured. The Regulation 19(2) Second Revised Draft Local Plan takes into consideration the draft IIA findings, evidence outputs and review by the OPDC Place Group to reflect a more coherent structure between evidence outputs and the strategic direction that the Local Plan wants to take the area in throughout its plan cycle.

This report documents the second part of Stage B of the SEA process and represents Stage C and D of the SA Process. This IIA Report, is being published alongside the Regulation 19(2) Second Revised version of the Draft Local Plan."

18. This appears to me to be incorrect. If the assertion underlined above is correct, then there has been a significant failure to give reasons and to set out how the alternatives were selected and tested.

19. The failure can be simply demonstrated. Section 4 of the reg. 18 IIA (Feburary 2016) states:

"**4.1 Alternatives**

As identified in Box 3, the SEA Directive requires that the assessment process considers alternatives:

Box 3: Consideration of Alternatives

Government guidance advises that only realistic and relevant alternatives should be considered and they should be sufficiently distinct to enable a meaningful comparison of their different environmental effects. This Draft IIA Report presents the assessment of the strategic plan options as well as the policy options developed as part of the Regulation 18 Local Plan.

4.2 Appraisal of the Strategic Options

As part of the assessment of alternatives, the key strategic options with regards to affordable housing were assessed at the outset. The results of this assessment are presented in Chapter 5 of this report.."

20. Chapter 5, however, deals only with affordable housing options.

21. Chapter 7 states:

"**7 Appraisal of Regulation 18 Local Plan Policies and Options**

This Chapter provides a summary of the results of the IIA of the Regulation 18 Local Plan, dated 15th December 2015. The detailed results of the assessments of the Policies and options, are presented in Appendix G."

22. Appendix G contains limited, but unexplained references to options, and does not explain clearly what they were or why they were selected. As the Review Report states:

"ES.17 An assessment of some policy options was carried out in the Regulation 1 version of the IIA. However, there is no explanation within the IIA of what those policy options were or the reasons for their selection. There is also no explanation of the reason alternatives were rejected.

…

2.2.5 There is no explanation of what the 'overarching strategic options', which were considered included. Such options are not provided in the Regulation 18 IIA Report and no assessment of such options has been found.

2.2.6 The above approach also clearly differs from that set out in the Scoping Report and does not comply with either the SA regulations and guidance or the policy of the London Plan."

23. The 2018 IIA for the draft plan does not remedy these failures:

(1) Appendix F contains an "SEA Checklist" which cross-refers to

"Chapter 2, Section 8.1, 8.2 – origins of the alternatives dealt with

Chapter 3 – approach and method, including difficulties

Appendix F"

(2) Section 5 appraises only affordable housing options;

(3) Chapter 2 refers back to the reg. 18 process, as to which see above. It is unclear what "Section 8.1-8.2" mean – Chapter 8 is dealing with monitoring;

(4) Chapter 3 does not provide any more assistance and refers at para. 3.4 back to the earlier parts of the process (above) in terms I have quoted above;

(5) Appendix F is the checklist itself.

See also Annex 1 to the Review Report.

24. If anything, Chapter 3 underlines the scale of the failure by setting out the wide scope of the draft plan and those many aspects where there has been a failure to comply with SEA:

"**3.3 Aspects of the Local Plan to be assessed and how**

The framework of policies and proposals contained within the Local Plan will seek to regulate and control the development and use of land and to provide the basis for consistent and transparent decision making on individual planning applications. As options emerge, each of its components will be assessed to determine sustainability performance and to provide recommendations for sustainability improvements. The Local Plan includes policies and proposals, grouped under the following headings, per the Regulation 19(2) Second Revised Draft Local Plan:

1. Spatial vision and narratives

2. Strategic Policies (including site allocations)

3. Places and, Clusters and Site Allocations

4. Design

5. Environment and Utilities

6. Transport

7. Housing

8. Employment

9. Town Centre and Community Uses

10. Delivery and Implementation

The intention has been, throughout the Regulation 18 and Regulation 19various stages of assessments, to ensure that the process is iterative while maintaining an independent assessment with regular feedback occurring between the plan-makers and the IIA team, as options are developed."

Legal requirements of SEA

25. There is a legal duty to comply with the requirements of the SEAR which as far as possible should be interpreted consistently with the SEAD: ***Marleasing SA v. La Commercial Internacional de Alimentacion SA*** Case 10/89 [1992] 2 C.M.L.R. 305

26. See the Commission's *Report on the Effectiveness of the Directive on Strategic Environmental Assessment* (2009) [**BA/6**] which observed at section 4.1 (in recognition of the legal structure of the SEA Directive):

> "The two Directives are to a large extent complementary: the SEA is "up-stream" and identifies the best options at an early planning stage, and the EIA is "down-stream" and refers to the projects that are coming through at a later stage."

27. These considerations are reflected in para. 4 to the preamble to the SEA Directive:

> "Environmental assessment is an important tool for integrating environmental considerations into the preparation and adoption of certain plans and programmes which are likely to have significant effects on the environment in the Member States, because it ensures that such effects of implementing plans and programmes are taken into account during their preparation and before their adoption."

28. Article 1 of the SEA Directive further provides:

> "The objective of this Directive is to provide for a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation and adoption of plans and programmes with a view to promoting sustainable development, by ensuring that, in accordance with this Directive, an environmental assessment is carried out of certain plans and programmes which are likely to have significant effects on the environment"

29. Reg. 5(2)-(3) of the SEAR (Article 3(2) of the SEAD) provides, insofar as is relevant (emphasis added):

> "**5.— Environmental assessment for plans and programmes: first formal preparatory act on or after 21st July 2004**
>
> (1) Subject to paragraphs (5) and (6) and regulation 7, where–
>
> (a) the first formal preparatory act of a plan or programme is on or after 21st July 2004; and

(b) the plan or programme is of the description set out in either paragraph (2) or paragraph (3),

the responsible authority shall carry out, or secure the carrying out of, an environmental assessment, in accordance with Part 3 of these Regulations, during the preparation of that plan or programme and before its adoption or submission to the legislative procedure.

(2) The description is a plan or programme which–

(a) is prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use, and

(b) sets the framework for future development consent of projects listed in Annex I or II to Directive 2011/92/EU of the European Parliament and of the Council on the assessment of the effects of certain public and private projects on the environment."

30. The concept of *"plans and programmes"* is defined by reg. 2(1) of the SEAR (Article 2(a) of the SEAD) as follows (emphasis added):

> ""plans and programmes" means plans and programmes, including those co-financed by the European Union, as well as any modifications to them, which–
>
> (a) are subject to preparation or adoption by an authority at national, regional or local level; or
>
> (b) are prepared by an authority for adoption, through a legislative procedure by Parliament or Government; and, in either case,
>
> (c) are required by legislative, regulatory or administrative provisions;…"

31. It is established that a DPD such as the draft plan is caught by these provisions and engages the requirements of the SEAS and SEAR: see e.g. ***Save Historic Newmarket Ltd v. Forest Heath District Council*** [2011] J.P.L. 1233, ***Heard v. Broadland District Council*** [2012] Env. L.R. 23 and ***Ashdown Forest Economic Development LLP v. Secretary of State*** [2016] P.T.S.R. 78 at [5]-[10] (Richards LJ). As the authorities demonstrate, failure to comply with the duties in the SEAR renders the plan unlawful and may lead to the quashing of the relevant aspects of the plan or the plan itself.

32. OPDC in the present case has acknowledged that the SEAD applies to the draft plan and has purported to comply with it. See e.g. IIA Non-Technical Summary which states:

> "This approach has been adopted by the Mayor of London, who has taken an integrated approach to assessing the impacts of his strategies, incorporating the requirements of Strategic Environmental Assessment (SEA), Sustainability Appraisal (SA), Health Impact Assessment (HIA), and Equalities Impact Assessment (EqIA). This IIA draws together the following impact assessments:
>
> • SA and Strategic Environmental Assessment …"

33. OPDC is the "responsible authority" for the purposes of carrying out SEA: reg 2(1). By

reg.12(2), an environmental report shall be prepared in which the likely significant effects on the environment of implementing the 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 (emphasis added):

> "(1) Where an environmental assessment is required by any provision of Part 2 of these Regulations, the responsible authority shall prepare, or secure the preparation of, an environmental report in accordance with paragraphs (2) and (3) of this regulation.
>
> (2) The report shall identify, describe and evaluate the likely significant effects on the environment of–
>
> (a) implementing the plan or programme; and
>
> (b) reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme.
>
> (3) The report shall include such of the information referred to in Schedule 2 to these Regulations as may reasonably be required, taking account of–
>
> (a) current knowledge and methods of assessment;
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> (b) the contents and level of detail in the plan or programme;
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> (c) the stage of the plan or programme in the decision-making process; and
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> (d) the extent to which certain matters are more appropriately assessed at different levels
>
> in that process in order to avoid duplication of the assessment."

34. It is not in dispute that the environmental report may be incorporated in a SA and in the IIA. The question here is not incorporation of the SEA but compliance with its legal requirements.

35. The information to be given for the purpose of reasonable alternatives is such of the information referred to in schedule 2 "as may reasonably be required": reg. 12(3), above. What is reasonably required is to be determined taking into account (a) current knowledge and methods of assessment; (b) the contents and level of detail in the plan or programme; (c) the stage of the plan or programme in the decision-making process; (d) the extent to which certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment. (See arts 4(3) and 5(2), (3) and (4) SEAD). Given the detailed nature of the draft plan, this is plainly relevant to the duty to assess reasonable alternatives.

36. Further, the requirement is not merely to assess generic alternatives to the draft plan/programme (such as not adopting a plan/programme at all) but to assess the reasonable alternatives to the specific policies contained in it. See for example:

    (1) ***City & District Council of St Albans v. SSCLG*** [2010] J.P.L. 10, especially at [21],

where the failure to subject policies within the East of England Plan relating to greenfield urban extensions to Hemel Hempstead, Welwyn Garden City and Hatfield to SEA of reasonable alternatives was held to be unlawful;

(2) In ***Save Historic Newmarket***, Collins J quashed the housing policies in the Forest Heath Core Strategy on the basis that there had not been SEA of the reasonable alternatives to the allocation of a particular site for residential development. That plan still awaits the plan examiners' report on its replacements some 7 years after quashing;

(3) ***Heard***, where Ouseley J held that the Broadland Joint Core Strategy was unlawful because the reasonable alternatives to a proposed urban extension north-east of Norwich had not been assessed in accordance with the SEA Directive;

(4) ***R (Buckinghamshire County Council & Others) v. Secretary of State for Transport*** [2013] EWHC 481 (Admin) (part of the HS2 litigation) where Ouseley J held that, had the SEA Directive applied to the Government's January 2012 White Paper setting out its decisions and next steps in relation to the HS2 railway, the accompanying appraisal of sustainability would not have met the requirements of the Directive due to the failure to consider reasonable alternatives to the "Y" network" [165] and the provision of spurs to and from Heathrow Airport [169]. This aspect of Ouseley J's judgment was upheld by the Court of Appeal at [2013] P.T.S.R. 1194 and was not the subject of the further appeal to the Supreme Court [2014] 1 W.L.R. 324;

(5) In ***Ashdown Forest***, the Wealden District Core Strategy Local Plan was quashed by the Court of Appeal in part in respect of the policy introduced at a late stage to limit development within certain distances of the Ashdown Forest SPA and SAC and which had not been the subject of assessment including reasonable alternatives.

37. See the Commission Guidance at [5.13]:

> "The first consideration in deciding on possible reasonable alternatives should be to take into account the objectives and the geographical scope of the plan or programme. The text does not specify whether alternative plans or programmes are meant, or different alternatives within a plan or programme. In practice, different alternatives within a plan will usually be assessed (e.g. different means of waste disposal within a waste management plan, or different ways of developing an area within a land use plan). An alternative can thus be a different way of fulfilling the objectives of the plan or programme. For land use plans, or town and country planning plans, obvious alternatives are different uses of areas designated for specific activities or purposes, and alternative areas for such activities. For plans or programmes

> covering long time frames, especially those covering the very distant future, alternative scenario development is a way of exploring alternatives and their effects."

38. Art 5(1) of the SEA Directive makes no distinction between the assessment requirements for the drafted plan or programme and for the alternatives. Accordingly, as noted in the Commission Guidance at [5.12] the likely significant environmental effects of both the plan and of the reasonable alternatives must be *"identified, described, and evaluated in a comparable way"* and *"the information referred to in Annex I should thus be provided for the alternatives chosen"*. In ***Heard*** at [68]-[70], Ouseley J. held that while the SEAD did not expressly provide for the giving of reasons for the choice of reasonable alternatives, it was nonetheless required:

> "68 The reasons for the selection of the preferred option, as distinct from the reasons for the selection of the alternatives to be considered, have not been addressed as such either in the SA, although some comparative material is available. The parties dispute the need for these reasons. It was very surprising to me that the reason for the selection of the preferred option was not available as part of the pre-submission JCS or the accompanying September SA, nor readily available in a public document to which the public could readily be cross-referred, with a summary.
>
> 69 This is not an express requirement of the directive or regulations, and I do not regard European Commission guidance as a source of law. However, an outline of reasons for the selection of alternatives for examination is required, and alternatives have to be assessed, whether or not to the same degree as the preferred option, all for the purpose of carrying out, with public participation, a reasoned evaluative process of the environmental impact of plans or proposals. A teleological interpretation of the directive, to my mind, requires an outline of the reasons for the selection of a preferred option, if any, even where a number of alternatives are also still being considered. Indeed, it would normally require a sophisticated and artificial form of reasoning which explained why alternatives had been selected for examination but not why one of those at the same time had been preferred.
>
> 70 Even more so, where a series of stages leads to a preferred option for which alone an SA is being done, the reasons for the selection of this sole option for assessment at the final SA stage are not sensibly distinguishable from reasons for not selecting any other alternative for further examination at that final stage. The failure to give reasons for the selection of the preferred option is in reality a failure to give reasons why no other alternatives were selected for assessment or comparable assessment at that stage. This is what happened here. So this represents a breach of the directive on its express terms."

39. It is clear from reg. 12 that it is for the responsible authority to select "reasonable alternatives in the exercise of its (strategic) planning judgment and to give reasons for the selection of the choice of alternatives for assessment. However, as Richards LJ held in the ***Ashdown Forest*** case at [42]:

> "42 I accept … that the identification of reasonable alternatives is a matter of evaluative assessment for the local planning authority, subject to review by the court on normal public law principles, including Wednesbury unreasonableness: see *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223. In order

to make a lawful assessment, however, the authority does at least have to apply its mind to the question."

40. Reg. 8(1) provides that "(1) A plan, programme or modification in respect of which a determination under regulation 9(1) is required shall not be adopted" unless a number of requirements are met, including –

> "(3) The requirements of this paragraph are that account shall be taken of–
>
> (a) the environmental report for the plan or programme;
>
> (b) opinions expressed in response to the invitation referred to in regulation 13(2)(d);
>
> (c) opinions expressed in response to action taken by the responsible authority in accordance with regulation 13(4); and
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> (d) the outcome of any consultations under regulation 14(4)."

41. The consultation process is important as was considered by Weatherup J. (as he then was) in ***Re Seaport Investments Ltd's Application for Judicial Review*** [2018] Env. L.R. held (my emphasis):

> "48 Then there is the public consultation period. Article 4.1 continues to apply. Article 6.2 provides that consultees shall be given an early and effective opportunity within appropriate timeframes to express their opinion "on the draft plan or programme and the accompanying environmental report before the adoption of the plan." Regulation 12(1) refers to the draft plan and its "accompanying" environmental report as "the relevant documents". Regulation 12(2) provides that as soon as reasonably practical after their preparation the responsible authority shall send a copy of "the relevant documents" to the consultation body. Regulation 12(3) provides that the responsible authority shall publish a notice that includes inviting expressions of opinion on the relevant documents.
>
> 49 Once again the environmental report and the draft plan operate together and the consultees consider each in the light of the other. This must occur at a stage that is sufficiently "early" to avoid in effect a settled outcome having been reached and to enable the responses to be capable of influencing the final form. Further this must also be "effective" in that it does in the event actually influence the final form. While the scheme of the Directive and the Regulations does not demand simultaneous publication of the draft plan and the environmental report it clearly contemplates the opportunity for concurrent consultation on both documents."

42. It follows that if the environmental report does not comply with the legal requirements (e.g. in respect of reasonable alternatives) then the consultation that resulted was also flawed and the plan may not lawfully be adopted. As in cases such as ***Save Historic Newmarket***, ***Heard*** and ***Ashdown Forest*** appropriate orders will be made by the Court to quash so much of the plan as may be affected which may extend from a single issue, as is ***Ashdown***, a suite of policies on housing as in the ***Newmarket*** case, or the plan as in ***Heard***.

Brexit and the legal requirements for SEA

43. The law with regard to SEA will not change significantly as a result of Brexit. The SEA Regulations The SEAR will continue to have effect in English law. S. 2(1) of the European Union (Withdrawal) Act 2018 ("**the Withdrawal Act"**) provides:

> "EU-derived domestic legislation, as it has effect in domestic law immediately before exit day, continues to have effect in domestic law on and after exit day."

44. The SEAR are "EU-derived domestic legislation". S. 2(2) of the Withdrawal Act defines "EU-derived domestic legislation" as including

> "(2) … any enactment so far as—
>
> (a) made under section 2(2) of, or paragraph 1A of Schedule 2 to, the European Communities Act 1972,
>
> (b) passed or made, or operating, for a purpose mentioned in section 2(2)(a) or (b) of that Act,
>
> (c) relating to anything—
>
> (i) which falls within paragraph (a) or (b), or
>
> (ii) to which section 3(1) or 4(1) applies, or
>
> (d) relating otherwise to the EU or the EEA,
>
> but does not include any enactment contained in the European Communities Act 1972."

45. The SEAR were made pursuant to those provisions. The Preamble to the SEAR states

> "The Secretary of State, being a designated 1 Minister for the purposes of section 2(2) of the European Communities Act 1972 in relation to matters relating to the assessment of the effects of certain plans and programmes on the environment, in exercise of the powers conferred by that section 2, and of all other powers enabling him in that behalf, hereby makes the following Regulations."

46. S. 7(1) provides:

> "(1) Anything which—
>
> (a) was, immediately before exit day, primary legislation of a particular kind, subordinate legislation of a particular kind or another enactment of a particular kind, and
>
> (b) continues to be domestic law on and after exit day by virtue of section 2,
>
> continues to be domestic law as an enactment of the same kind."

47. As the SEAR came into effect prior to Exit Day, the Principle of Supremacy will continue to apply to them. S 5(1) of the Withdrawal Act provides that the Principle of Supremacy will not apply to any enactment or rule of law passed after exit day, but ss. 5(2) and (3) provide:

"(2) Accordingly, the principle of the supremacy of EU law continues to apply on or after exit day so far as relevant to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before exit day.

(3) Subsection (1) does not prevent the principle of the supremacy of EU law from applying to a modification made on or after exit day of any enactment or rule of law passed or made before exit day if the application of the principle is consistent with the intention of the modification."

48. This has the following implications:

(1) The SEAR must continue to be interpreted in light of the SEAD even after exit day; and

(2) If there is a conflict between the SEAR and other domestic law, the SEAR have priority.

49. The Explanatory Notes to the Withdrawal Act state:

"103. Where, however, a conflict arises between pre-exit domestic legislation and retained EU law, subsection (2) provides that the principle of the supremacy of EU law will, where relevant, continue to apply as it did before exit. So, for example, a retained EU regulation would take precedence over pre-exit domestic legislation that is inconsistent with it. The principle would not, however, be relevant to provisions made by or under this Act or to other legislation which is made in preparation for the UK's exit from the EU.

104. The principle of supremacy also means that domestic law must be interpreted, as far as possible, in accordance with EU law. So, for example, domestic law must be interpreted, as far as possible, in light of the wording and purpose of relevant directives. Whilst this duty will not apply to domestic legislation passed or made on or after exit day, subsection (2) preserves this duty in relation to domestic legislation passed or made before exit.

105. Finally, subsection (3) sets out that the principle of supremacy can continue to apply to pre-exit law which is amended on or after exit day where that accords with the intention of the modifications."

50. Various amendments preparatory to Brexit have been made to the SEAR by Environmental Assessments and Miscellaneous Planning (Amendment) (EU Exit) Regulations 2018/1232. This does not materially change the substance of the regulations or the legal obligations.

The IIA

51. In my opinion, for the reasons set out in more detail in the Review Report, OPDC has failed in its legal duties:

(1) It has failed to consider and identify in a transparent manner reasonable alternatives to the main strategic policies in its plan (if not others also). Such

reference to options as there is (principally in the reg. 18 IIA) is wholly lacking in transparency and would leave consultees wholly unclear as to what was being considered still less how it was assessed. The process has therefore failed to be informed by those considerations required by law to be considered;

(2) It has failed to give reasons not only for the identification of the reasonable alternatives and the ruling out of others, but what reasonable alternatives were actually considered;

(3) It has failed to meet the requirements of the SEAR and SEAD (and the PPG) to consult on the environmental report detailing the assessment of the reasonable alternatives at the same time as the draft local plan, having regard to the fact that the report (i.e. the IIA) is intended not only to be subject to public consultation per se but to inform consultation and assessment of the draft plan.

52. As the Review Report states:

> "2.2.15 Yet, despite the significant challenges identified in delivering the Local Plan, the only spatial issue to be considered at all within the IIA has been affordable housing provision. The Spatial Options should have included the following suggested alternatives or combinations of options:
>
> • Extent of SIL re-designation and industrial intensification
> • Quantum/mix of development
> • Location of development
> • Variation in densities/locations for tall buildings
> • Infrastructure requirements – transport, open space
> • Phasing and deliverability"

53. Indeed, It is clear from the LP and OAPF that the selection of the appropriate spatial options was to be undertaken in the draft plan and they therefore required to be assessed and tested to ensure the selection of the most appropriate strategy for the regeneration of the plan area. It is clear that a SEA and SA of the spatial options has not been undertaken.

54. The Review Report concludes, in terms with which I agree:

> "3.1.17 Different scenarios should have been tested within the IIA to understand the social, economic and environmental impacts of alternative policies and proposals, in order for the SA to demonstrate how it has informed the development of the Plan. Paragraph 018 of the National Planning Practice Guidance sets out how the SA should assess alternatives and identify likely significant effects. The SA has failed to carry out the assessment according to the regulations and guidance above, particularly in respect of the following:
>
> • No consideration of key 'challenges' to inform the selection of options

> • Failure to assess all reasonable alternatives, in particular the Spatial Strategy Options, Policy Options and Site Options for the Plan
>
> • Failure to provide an outline of the reasons the alternatives were selected, the reasons the rejected options were not taken forward and the reasons for selecting the preferred approach in the light of the alternatives
>
> • Failure to provide conclusions on the overall sustainability of the different alternatives
>
> • Inadequate prediction and evaluation of the effects
>
> • Failure to link to the appropriate evidence to support the decisions taken
>
> • Inadequate assessment of cumulative effects
>
> • Failure to suitably identify potential mitigation measures
>
> • Failure to show how the SA has informed the Local Plan
>
> • Failure to demonstrate a transparent process.
>
> 3.1.18 It is clear from the London Plan policy, OAPF and the SA regulations and guidance that different Spatial Options needed to be tested to ensure the selection of the most appropriate strategy for the regeneration of the area. It is evident from the findings above that a sustainability assessment of the spatial options has not been undertaken (see Annex 1 to this report) and the IIA cannot have informed the development of the Plan. The SA is therefore totally deficient."

55. Since the options were left to selection by the draft plan, this is not a case where the assessment was undertaken by a tier of the development plan standing above the draft plan – contrast ***West Kensington Estate Tenants and Residents Association v Hammersmith and Fulham LBC*** [2013] EWHC 2834 (Admin) where the options and their assessment in the SPD, since they had to emerge from development plan policy, had been tested in the local plans. This is not such a case since the development plan has left the selection of the options and their testing to the draft plan and it SA.

56. Compliance with the SEAR cannot now be achieved without returning to the pre-submission stage of the draft plan, reconsidering the issues without prejudging the decision as to the final draft policy and, following assessment, if necessary issuing a further revision to the submission draft and consulting in tandem with a lawful environmental report/IIA.

57. Whilst some defects may be capable of resolution at a later stage in the plan it does not appear to me to be the case where a plan has failed from an early stage to consider reasonable alternatives to major spatial options and to consult on it in parallel with the drafts of the plan. The importance of the iterative and consultative process in policy formulation would otherwise be wholly undermined by a late attempt to correct major defects in the SEA which is possible in principle, but the cases concern alleged defects of a relatively minor nature: see e.g. ***No Adastral New Town Ltd v Suffolk Coastal DC***

[2015] Env. L.R. 28 at [47]-[59].

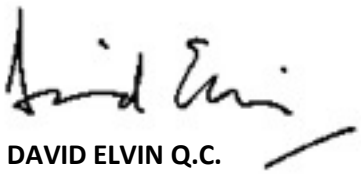
58. The purpose of the early consultation, as underlined in the ***Seaport*** case, would not be met and, whilst it may be possible to correct smaller defects, if there has been a widespread failure to consider reasonable alternatives in respect of the draft plan it is difficult to see what alternative there is to either going back several stages in the process and restarting it or to quashing the plan following adoption. In ***No Adastral***, for example, an addendum to the environmental report was produced part way through the process and the argument focussed on whether it was properly consulted upon. If that were to be done here, at the least the examination would have to be adjourned and the process put back to allow further work to be done and a new consultation process initiated which allowed the reasonable alternatives to be selected, reasons given for their selection, assessment and testing through consultation and a further process allowing further representations/objections.

Conclusions

59. For the reasons given above, I consider that the draft plan is unlawful due to the failure to comply with the requirements of the SEAR, has also failed to comply with the guidance in the PPG, and cannot therefore lawfully proceed in its current form.

60. For the reasons given above, these conclusions are unaffected by Brexit.

61. If I can be of further assistance do not hesitate to contact me in Chambers.



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1 April 2019