



OLD OAK NEIGHBOURHOOD FORUM

To: Members of the OPDC Board

November 25th 2021

Board agenda for 30th November – Director of Planning Update and decision on designation of the boundary of the Old Oak neighbourhood area

We appreciate that Board members may be reluctant to read further material on this report on your agenda for November 30th. Decisions on the boundary of the Old Oak neighbourhood area are a minor subject in terms of the Board's overall strategic remit.

But because the Board (rather than the Planning Committee) makes the final decisions on neighbourhood planning designations, we think you need to consider relevant information absent from the officer report and appendices. We recognise that the details of the neighbourhood planning regime may be unfamiliar territory for some Board members. Your decision needs to be a rational and properly informed one, in the event of any subsequent challenge.

The material provided by officers, to the Planning Committee and to the Board, is detailed but suffers from two flaws.

- The lengthy and elaborate justification for refusing the designation application is one that does not reflect over 2,800 previous decisions on neighbourhood area boundaries since the 2011 Localism Act came into force (apart from OPDC's own decision in 2017).
- The report provides no context on implementation of the neighbourhood planning framework over the past decade. Neighbourhood plans are now a well-established layer of the English planning system.

We are asking the Board not to accept the recommendation from the Planning Committee, for the following reasons:

- The main justification put forward by officers for refusal of the application relies on claims of different and distinct 'character areas' within what would be an extended neighbourhood boundary. This rationale for refusal does not hold up under even superficial scrutiny.
- OPDC's approach to what makes for an 'appropriate' neighbourhood area is not supported by the NPPF or National Planning Practice Guidance – despite the claims to this effect made by officers.
- At the local level, rejection of the designation application will cement further the reputations of OPDC and LB Ealing, as bodies where the rhetoric of encouraging community engagement in planning matters is not matched by the reality.
- The consultation results show 95% support for the proposed extended boundary with opposition only from one landowner, the two planning authorities involved (LB Ealing and OPDC), and one local resident.

- The Planning Committee and LB Ealing's dismissal of the Forum's 'Plan B' approach fails to recognise that many planning authorities across England have facilitated and supported neighbourhood plans, in order to fill gaps or to update policies and site allocations in their own local plans. The suggestion from OONF of adding a future 'fallback' plan for Channel Gate/Atlas Road is not as unorthodox as has been made out.

Decisions on neighbourhood planning matters can be challenged on normal public law grounds and are not matters of 'planning judgement' (on which the courts are reluctant to interfere). OPDC officers cite the 2014 decision of the Court of Appeal in *Daws Hall* as the primary legal basis for their recommendations.

We fully accept that this legal case (heard in the High Court and Court of Appeal)ⁱ established that local planning authorities have discretion in deciding on the boundaries of neighbourhood areas. But such discretion needs to be exercised rationally and on sound evidence. The grounds on which the Court of Appeal accepted the decision of Wycombe DC as lawful are not the same as the 'character area' arguments now being deployed by OPDC.

Frustrating a neighbourhood plan at the initial stage of designating a neighbourhood boundary carries legal and reputational risks for OPDC. We ask you as Board members to weigh these in the balance before reaching a decision on this designation application.

The justification of OPDC officers for refusal of the designation application

The reasoning set out in the report to the Board is expressed slightly differently to that in the report to the Planning Committee. It continues to rest very largely on an analysis of 'character areas'. Relevant paragraphs of the Board report read as follows:

7.23 Based on the Context and Character Assessment, officers consider that the difference in character between the designated Old Oak Neighbourhood Area and proposed extension areas results in the proposed extension not according with NPPG paragraph 033 Reference ID:41-033-20140306 bullet points 4, 5, 6, 7 and 8.

7.24 In addition, the assessment confirms that the character of the western corner of Atlas Junction within the designated Old Oak Neighbourhood Area has changed since 2017 due to the clearance of the site for HS2 construction purposes. This results in the character of this location no longer being consistent with the remaining designated Old Oak Neighbourhood Area. It also confirms that the Lords Builders Merchants parking is ancillary to the wider Lords Builders Merchants site and shares the same character which is within the designated Old Oak Neighbourhood Area.

7.25 These conclusions should be considered as part of the factual and policy matrix.

This reliance on the idea that a designated neighbourhood area should include sub areas of similar character (and cannot include areas of different or distinct character) is a novel invention of OPDC.

The dataset of designated areas across England (as at November 4th 2021) shows 2,883 such areas. The vast majority of these are in parished areas, where one or more parish boundaries will normally become the neighbourhood boundary without intervention by the relevant planning authority.

In London, over 70 neighbourhood areas have been designated. LB Camden has designated 13, now covering most of the Borough and has 7 neighbourhood plans in force (including those for Hampstead, Highgate and Kentish Town). City of Westminster has designated 17 areas with neighbourhood plans in force for Knightsbridge, Soho and Fitzrovia.

No rational case could be made out that these neighbourhood boundaries (covering large and small rural areas and parts of major cities) do not include sub-areas of different and 'distinct' character. Neither the NPPF nor National Planning Guidance suggest that neighbourhood areas must be of uniform or consistent character. The 'policy and factual matrix' as presented to the Planning Committee and to the Board would not withstand serious scrutiny.



This image above shows the two sites proposed to be added to an extended neighbourhood boundary. These sites have been largely cleared by HS2 and are in use as construction compounds (until the late 2020s). To argue (as at 8.4 of the Board report) *that the character of the proposed extension area is distinct from the wider character of the designated Old Oak Neighbourhood Area and is isolated by existing barriers and by the functions of the land uses* is not a justifiable argument for refusing/amending a designation application.

The two court judgments on *Daws Hill* were not centred on a principle that a neighbourhood boundary should not include sub-areas of different or distinct character. As shown above, these two sites are in any event largely 'characterless' in terms of townscape or building typologies as normally applied in 'character assessments' used for conservation appraisals or spatial plans. The new 'character' of these two sites, following use by HS2, has yet to emerge.

Officers also rely heavily on the set of 'considerations' at paragraph 033 of National Planning Practice Guidance. Their report at 8.2 states *Officers consider that the proposed amendment to the Old Oak Neighbourhood Area does not fully accord with the guidance set out in NPPG paragraph 033*. As a basis for refusing the application, **this is misleading advice**. The NPPG is clear that these are various 'considerations' which may be helpful in assessing the 'appropriateness' of a proposed neighbourhood area. They are not criteria with which a proposed boundary must 'accord'. The application from OONF addressed all these considerations, at paragraph 2.21. No attempt has been made by officers to take into account or to refute this part of the OONF application.

LB Ealing's position on the designation application

Ealing's negative response to the designation application will be noted locally. It does not match the repeated public commitments from the Leader of the Council to increase meaningful involvement of residents in planning issues. When given a practical opportunity for such involvement, the Council

reveals a set of attitudes to neighbourhood planning common to a number of London's planning departments (but by no means all).

LB Ealing say in their consultation response on the application *Neighbourhood planning has an entirely different role to local planning*.

This assertion from LBE officers is simply not true. The role of neighbourhood planning is set out at paragraphs 18 and 19 of the section of the NPPF on 'Plan Making'. These read as below:

*18. Policies to address non-strategic matters should be included in local plans that contain both strategic and non-strategic policies, **and/or in local or neighbourhood plans that contain just non-strategic policies**.*

*19. The development plan for an area **comprises the combination** of strategic and nonstrategic policies which are in force at a particular time. (our emphasis)*

Neighbourhood plans and local plans **form two levels of the same planning system** (in England) and have done so since 2011. The two levels combine to form the development plan for the area. In the current review of the planning system, with a Planning Bill now delayed until perhaps May 2023, the Secretary of State has expressed enthusiasm for ideas of deeper citizen involvement at an even more devolved levelⁱⁱ.

Potential case for judicial review of a decision as currently recommended to the Board

If the officer recommendations are followed on November 30th, the Board decision vulnerable to challenge would be that yet to be published in the statutory 'decision notice' or 'refusal statement' on the application, as required by the 2012 Neighbourhood Planning Regulationsⁱⁱⁱ.

A draft of such a statement is not included in the Board agenda. Hence the Forum is not yet clear what precise 'reasons' for a decision would be included. Assuming that these are on the lines of various paragraphs of the Board report, we see the following potential grounds for a judicial review.

1. Under [section 61G\(5\) of the Town and Country Planning Act 1990 Act as applied to Neighbourhood plans by section 38A of the Planning and Compulsory Purchase Act 2004](#)) a local planning authority must designate a neighbourhood area if it receives a valid application and some or all of the area has not yet been designated (NPPG 035 . This application from OONF was valid and none of the area proposed for the extended boundary has previously been designated.

2. A local planning authority can refuse to designate the specific area applied for if it considers the area is not appropriate. Where it does so, the local planning authority must give reasons. The authority must use its powers of designation to ensure that some or all of the area applied for forms part of one or more designated neighbourhood areas (Localism Act S61G{5}).

These requirements appears to be the real reason for the officer recommendation to designate the car park of Lords Builders Merchants as a small addition to the current neighbourhood boundary. If so, this has not been explained in the officer reports to the Planning Committee or to the Board. Paragraph 8.4 of the Board report gives different reasoning for this addition to the designated area, than in 7.24 of the Planning Committee report. This landowner (Lords Builders Merchants) did not respond to the consultation and may or not be aware of this proposal from OPDC. The addition of this area alone was **not** a proposal within the designation application. Nor was it one consulted on in OPDC's public consultation on the application.

3. Similarly, the recommendation to remove from the designated area *the western corner of Atlas Junction* (paragraph 8.4 of the Board report) has no valid rationale. This change was not proposed in the designation application, nor was it consulted on. The consultation response from HS2 makes no mention of this specific site.

4. Parliament's intention in the wording of s61(5), and the thrust of this part of the 2011 Act, does not suggest that the neighbourhood area boundary proposed by a 'relevant body' should be adjusted by the planning authority on a whim. Specific adjustments to the boundary applied for should reflect the results of public consultation, or some other sound reasons which are rational, reasonable and can be substantiated.

5. In deciding on a designation application *the local authority should take into account the relevant body's statement explaining why the area applied for is considered appropriate to be designated as such* (NPPG 035). The officer reports to the Planning Committee and to the Board focus instead on the OPDC's own assertions on 'character areas' and on its own novel interpretation of the Paragraph 033 'considerations' on 'appropriateness'.

6. No mention is made of the assessment by OONF of the same set of 'considerations' at paragraph 2.21 of the designation application. The proposed addition and removal by OPDC of small areas are **not** in response to the application. The justifications given for these changes do not reflect consultation responses. The content of the designation application has not been reasonably or fairly taken into account by OPDC in reaching its decisions.

OPDC knows full well that the Old Oak Neighbourhood Forum is a body of volunteers with no funds. The prospects for a legal challenge to OPDC decisions depend on the extent public opposition to its decisions, and the strength of a potential case. It is unlikely (but not inconceivable) that the wider neighbourhood planning community may wish to crowd fund a challenge to a unjustifiable decision by OPDC which sets an obstructive precedent for future neighbourhood area designations.

In many decisions of the courts on neighbourhood planning, the majority of judgments have supported the devolutionary thrust of this part of the 2011 Localism Act. A 2021 Supreme Court judgment re-examined the broader statutory context set by the Act^{iv}. While the case involved a different stage of the neighbourhood planning process, the judgment included a reminder that neighbourhood plans (as compared with Local Plans) *are the product of separate legislation with the promotion of local democracy primarily in mind*.

The 95% of 106 people who took the trouble to respond positively to the consultation on this application will not be impressed with a rejection of the application. **Overall, the courts have proved more willing than have many London planning authorities to look at what Parliament intended in this part of the 2011 Localism Act. This is to enable rather than to block citizen involvement in the planning system.**

We urge the Board to consider carefully its decision on this designation application. If it is to be decided as per the officer recommendations, we urge the Board to be very clear as to the exact proposed content of the statutory decision notice/refusal statement.

Henry Peterson

Adviser to the Old Oak Neighbourhood Forum and DLUHC Neighbourhood Planning Champion

Cc David Lunts CEO OPDC, Emma Williamson Director of Planning OPDC

Mark Walker Chair Old Oak Neighbourhood Forum, Robin Brown GUA, members of the OPDC Planning Committee

ⁱ Daws Hill Neighbourhood Forum v Wycombe District Council, Court of Appeal [2014] EWCA Civ 228 Case No: C1/2013/0861

ⁱⁱ Responses by Michael Gove, DLUHC Secretary of State to the Select Committee 8th November 2021

"We want to have a planning system where people can feel confident that beauty is taken seriously, confident that the environment is benefitting, confident that the money will be there to support infrastructure, and confident that the community has a role ultimately in determining what is right," When asked about the [role of so-called 'street votes'](#) in a future planning bill - an idea first put forward by think tank Policy Exchange that would allow residents to prepare and vote on densification plans for their streets - Gove replied *"I love the idea"*. Planning Resource article November 9th 2021.

ⁱⁱⁱ 7(2) of the Regulations reads *As soon as possible after deciding to refuse to designate a neighbourhood area, a local planning authority must publish the following on their website and in such other manner as they consider is likely to bring the refusal to the attention of people who live, work or carry on business in the neighbourhood area —*

(a) a document setting out the decision and a statement of their reasons for making that decision ("the decision document"); and

(b) details of where and when the decision document may be inspected.

^{iv} *R on the application of Fylde Coast Farms Ltd v Fylde Borough Council* 2021 UKSC 18