

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

FURTHER OPINION

(1) Introduction

1. Leading Counsel previously provided an initial written opinion on behalf of Old Oak Park Limited in this matter dated 1 April 2019 ("**the First Opinion**")¹. We are now instructed to provide a further written opinion in response to that produced by Paul Brown Q.C. and Richard Moules for OPDC dated 26 April 2019 ("**the OPDC Opinion**"). Although this is dated 26 April it was only provided to us on 23 May 2019. Similarly, significant additional information attached to an email from Pinsent Masons dated 8 May (including a revised version of the IIA) [**OPDC-024**] was only sent on 23 May. No satisfactory explanation has been given for these delays.
2. This further opinion should be read in conjunction with the First Opinion. We do not repeat the points already made in the latter but instead focus on those raised in the OPDC Opinion which argues that the requirements of the SEAR have been complied with. Despite this, it is noted that a further version of the IIA was produced following the Opinion dated May 2019 which suggests that OPDC was not confident in the advice in the OPDC Opinion.
3. In support of the view that the sustainability appraisal of the draft plan complies with the SEAR, three primary contentions are advanced in the OPDC Opinion:
 - (1) The spatial strategy and quantum of housing and employment land for inclusion in the draft plan were "*decided*" in the Further Alterations to the London Plan (2015) ("**FALP**") and the OAPF. Since IIAs were produced in respect of both the FALP and the OAPF, the IIAs in relation to the draft plan were not required to

¹ Abbreviations etc. are those used in the First Opinion.

"duplicate the consideration of reasonable alternatives that had occurred at a higher tier of the plan-making process";

- (2) As a matter of OPDC's reasonable plan-making judgement, there were no reasonable alternatives to the spatial strategy and quantum of housing and employment that would have been consistent with the FALP and the OAPF; and
 - (3) OPDC has complied with the requirement to give reasons, albeit it appears only in the IIA Addendum dated May 2019 ("**2019 IIAA**") (which implies acceptance of the failure to give reasons at earlier stages in the plan process). Similar points are now lately made in the latest viability material received on 3 June 2019, e.g. at para. 2.7.
4. In our view the first two of those contentions do not withstand scrutiny, for the reasons that follow. As to the third (adequacy of reasons), Old Oak Park Limited wishes to reserve its position given the volume of OPDC documentation that has belatedly been provided to it. This Opinion should therefore be regarded as provisional on this last point.
5. However, as important preliminary points in respect of point (3):
- (1) The OPDC Opinion does not clearly identify the source in any IIA to demonstrate points (1) and (2) nor any document which identified it during consultations on the iterations of the draft plan. Indeed, at paras. 22 and 28 it is suggested that the IIA did not need to duplicate the work of the SEA for the FALP and OAPF which suggests it was considered unnecessary (wrongly, as we explain) to set out the reasoning in the IIA. The key contentions at para. 29 and 30 that there were, in any event, no reasonable alternatives do not refer to any document or statement and certainly reference no consultation document which would have explained what appears to be said for the first time in the OPDC Opinion. Doubtless any such previous documentation would have been provided given the seriousness of the failure if, as we contend, such it is;
 - (2) The following month after the date of the OPDC Opinion, OPDC produced the addendum to the 2019 IIAA (though the final version in the *Version Control* states 25.4.19) which contains for the first time at e.g. pp. 4-7 and 11-15 reasoning which mirrors what is set out in the OPDC Opinion. The Opinion makes no reference to it and we do not know whether it was available to counsel in draft when writing that Opinion;
 - (3) We have as yet seen no revised non-technical summary incorporating the

additions made by the IIAA; and

- (4) There has been no consultation on the IIAA or other additional information or on any revised NTS (assuming one is to be produced). It follows that contrary to the SEAR and to the *Seaport* judgment, there was no consultation in parallel with this explanation for the two reg. 18 and the reg. 19 drafts of the plan. This has underlined a further defect in compliance with SEA, namely the failure to consult at the appropriate time on the reasons now advanced (several years after the plan process began) for the failure to address reasonable alternatives except in the limited manner described in the First Opinion and in the 2017 IIA and 2018 IIA.

(2) Neither the FALP nor the OAPF decided the spatial strategy and quantum of housing and employment land for inclusion in the draft plan

6. We do not consider that it is correct to state that "the FALP and the OAPF provide detailed requirements on the quantity of development that the Draft Plan should deliver, as well as the spatial distribution of that development and the other planning policy requirements it should conform to" (para. 18 of the OPDC Opinion and pp. 11-15 2019 IIAA) thus, it is said, rendering it unnecessary to undertake further SEA at the lower tier of the development plan hierarchy represented by the draft plan.
7. Moreover, we note that whilst the OPDC Opinion relies heavily on the IIAs produced in respect of the FALP and the OAPF, the IIA Addendum in relation to the draft plan appears to rely much less extensively on those documents (referring in the SEA Checklist at 4.1 only to the FALP IIA - and only then in response to the requirement to assess the "do minimum" scenario). The narrative that has now been put forward by OPDC in response to criticisms made of its assessment of reasonable alternatives thus lacks coherence and is, in any event, novel. We deal with the failure to consult following this.
8. We consider (i) the effect of the FALP; (ii) the FALP IIA; (iii) the effect of the OAPF; and (iv) the OAPF IIA in turn.

The effect of the FALP

9. Policy 2.13A of the FALP states that:

"Within the opportunity and intensification areas shown in Map 2.4, the Mayor will:

- a) provide proactive encouragement, support and leadership for partnerships preparing and implementing opportunity area planning frameworks to realize these areas' growth potential in the terms of Annex 1...

[...]

d) encourage boroughs to progress and implement planning frameworks to realise the potential of intensification areas in the terms of Annex 1..."

10. Policy 2.13B of the FALP provides that:

"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

[...]

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 through opportunity area planning frameworks and/or local development frameworks..." (emphases added).

11. Policy 2.13C of the FALP then states in respect of local development framework ("LDF") preparation that "[w]ithin LDFs boroughs should develop more detailed policies and proposals for opportunity areas and intensification areas".

12. Annex 1 to the FALP is expressly stated to be "*subject to phasing*" (para. A1.1). It reiterates that the estimates and guidelines provided "***will be tested through the preparation of planning frameworks and/or local development frameworks***" (para. A1.2). It identifies an "*Indicative employment capacity*" for Park Royal of 10,000 and for Old Oak Common of 55,000 and a "*Minimum new homes*" figure of 1,500 for Park Royal and 24,000 for Old Oak Common.

13. It is in our view thus plain that the FALP did not decide the spatial strategy and the quantum of housing and employment land for inclusion in the draft plan. FALP Policy 2.13B(a) expressly acknowledges that both the FALP and OAPFs do no more than set "*strategic policy directions*" (our emphasis) for opportunity areas. Para. 13 of the OPDC Opinion omits any reference to this. Policy 2.13C then provides that more detailed policies and proposals fall to be brought forward in LDFs. The reference in Policy 2.13B(a) is no error since the use of "directions" is repeated in para. 2.60:

"2.60 The broad locations of London's opportunity areas and intensification areas are set out in Map 2.4. The strategic policy directions for London's opportunity areas and intensification areas, and minimum guidelines for housing and indicative estimates for employment capacity, are set out in Annex 1."

14. Para. 2.61 further underlines that the OA guidance is not intended to be prescriptive:

"To ensure that housing output is optimised, employment capacities should, if necessary, be reviewed in the light of strategic and local employment projections. In addition, the scope for larger areas to determine their own character should be fully realised in terms of housing densities, including those towards the top of the relevant density scale where appropriate."

15. It is notable that both the OPDC Opinion and 2019 IIAA omit detailed references to key aspects of the FALP which is a matter of some concern since they consequently describe a policy version which misstates what the FALP actually provides and what is required by the passages quoted at length in the OPDC Opinion at para. 12.
16. Importantly, Policy 2.13B also expressly recognises that Annex 1 to the FALP only sets out "*minimum guidelines*" for housing and "*indicative estimates*" for employment capacity - and expressly contemplates that these will be exceeded where appropriate. The policy stipulates that the minimum guidelines and indicative estimates that are given are to be tested through OAPFs and LDFs.

The FALP IIA

17. We consider that the content of the FALP IIA supports the view that the FALP did not decide the spatial strategy and the quantum of housing and employment land for inclusion in the draft plan. The FALP IIA spatial development options that are referred to at paras. 16 and 17 of the OPDC Opinion are all pan-London options. Indeed, this is acknowledged at p. 5 of OPDC's response to the JAM Consult Ltd review of the IIA for the draft plan ("**the Response to JAM**").²
18. Whilst the Response to JAM notes that "*Old Oak and Park Royal Opportunity areas are referenced [...] in the supporting text*", the sole such reference states simply that "[i]n addition a review of the housing potential within the Opportunity Areas shows significant potential for additional housing capacity. For example, the potential investment and alterations resulting from Crossrail and HS2 has resulted in the number of homes projected for Park Royal / Old Oak Common / Willesden Junction increasing from 1,500 to 19,000".
19. The real issue in the FALP was the enlargement of the existing policy for OAs to place greater reliance on them for generation of housing and employment as an option to other strategic approaches to such provision rather than examining the detail of the extent of the provision as opposed to alternative provision within any specific OA: see FALP IIA at para. 3.5.1 and at pp. 29-33 and 37-40 (which included specific issues around the Olympic Legacy). The two alternatives considered were of a strategic nature and concern the use of OAs as opposed to the specifics of their development mix (p. 29):

"Policy Change: Increase the focus on housing provision (and densities), especially in town centres and opportunity areas.

The proposed change would place additional focus for housing development in town centres and opportunity areas (preferred option) and encourage the co-location of

² The IIA Addendum is identically worded at 2.4.2.

schools and housing developments to maximise land use. The alternative option A would not put additional focus on the development of housing in town centres and opportunity areas (the do-nothing option), whilst option B would include reference to either town centres or opportunities areas.”

See also Appendix H, SEA Objective 3

20. That falls very far short of being a consideration of the reasonable alternatives and options for the detailed provisions of the draft plan. The FALP IIA considered the enlarged use of OAs, contrasted with its strategic alternatives, not the details within the OAs or any alternatives to them.
21. Indeed, the scoping report for the FALP IIA³ and the FALP IIA itself⁴ made it clear it was only considering “broad options” for the OAs which is consistent with the details referred to above.
22. It follows that the suggestion made by OPDC that the FALP IIA undertook the assessment of reasonable alternatives that would otherwise have been necessary in relation to the draft plan is flawed and does not support the statements made in the OPDC Opinion or the 2019 IIA e.g. at pp. 4-5. Since the FALP does not contain any policies setting the spatial strategy and the quantum of housing and employment land for inclusion in the draft plan, its IIA (unsurprisingly) does not assess reasonable alternatives to such policies.
23. OPDC is therefore wrong to suggest that if it had assessed reasonable alternatives in the IIA for the draft plan in the manner contended for by Old Oak Park Limited, there would have been duplication of the analysis carried out in the FALP IIA. Given the limited effect of the FALP, this is not a case where there is potential to -

“duplicate the consideration of reasonable alternatives that had occurred at a higher tier of the plan-making process”

24. In this context, the Commission Guidance on SEA⁵ says this about the duplication issue (article 4(3) of the SEA Directive):

“4.7. It is clear that the decision to reuse material from one assessment in carrying out another will depend on the structure of the planning process, the contents of the plan or programme, and the appropriateness of the information in the environmental report, and that decisions will have to be taken case by case. They will have to ensure that comprehensive assessments of each element of the planning process are not impaired, and that a previous assessment used at a subsequent stage is placed in the

³ Para. 2.1.4 p. 10

⁴ Para. 2.13 pp. 4-5

⁵⁵ http://ec.europa.eu/environment/archives/eia/pdf/030923_sea_guidance.pdf

context of the current assessment and taken into account in the same way. In order to form an identifiable report, the relevant information must be brought together: it should not be necessary to embark on a paper-chase in order to understand the environmental effects of a proposal. Depending on the case, it might be appropriate to summarise earlier material, refer to it, or repeat it. But there is no need to repeat large amounts of data in a new context in which it is not appropriate.”

25. Not only has the IIA process failed to understand the differences between the FALP and the draft plan, it has not taken the relevant information and placed it in the context of the IIA for this plan. It has not even mentioned it until some 4 years after the scoping report for the draft plan was produced.
26. The fact is that the FALP IIA did not do what the 2019 IIAA asserts was the case and this can easily be seen from reading that document.

The effect of the OAPF

27. The above analysis extends to the OAPF. In any event, as the OAPF SEA Screening Report (Dec 2015) makes clear at para. 1.1.14 the role of the OAPF (which has not been adopted yet) is limited:

“The OAPF contains sections which set out the guidance/strategies to deliver these objectives. As an SPG to the London Plan, the OAPF does not propose new policy. The OAPF guidance provides clarity on how existing policy will be applied in the Old Oak and Park Royal area. The OAPF does not seek to unnecessarily duplicate the policies of the London Plan or guidance set out in other SPG documents. As such the document only sets out guidance necessary to achieve the OAPF vision and objectives.”

28. As to the content of the OAPF, we note the following:
 - (1) **Principle L1: Old Oak** refers to "in conformity with the London Plan [...] a minimum of 24,000 new homes, and 55,000 jobs" and then states that "OPDC will, though [sic] its Local Plan, carry out work to further consider the deliverable quantum of development" (our emphasis).
 - (2) **Principle L2: Park Royal** contemplates that the OPDC Local Plan will "develo[p] planning and design policies that encourage development that makes more efficient use of land and that works to attract different sectors to the area".
 - (3) In respect of the Old Oak illustrative masterplan, para. 5.5 of the OAPF states that
"[i]t is recognised more than ever in this time of economic uncertainty, that flexibility will be needed to achieve the comprehensive redevelopment of the Old Oak area. The illustrative masterplan is not intended to eliminate or constrain other acceptable development and/or strategies for achieving sustainable comprehensive regeneration in accordance with relevant London Plan policies" (our emphasis).

- (4) Para. 5.8 then refers to a 3D illustrative masterplan that will be developed during the production of the OPDC Local Plan, which work -

"will allow further testing on development capacity, development densities and building heights to inform policy preparation".

- (5) In respect of housing, para. 5.9 of the OAPF (like the FALP) states that

"OPDC will, though [sic] it's Local Plan, carry out work to further consider the deliverable quantum of development".

- (6) Para. 5.13 explains that

"OPDC's Local Plan will set an annual housing target for the OPDC area, which will be informed through further work on housing capacity and phasing across the Old Oak area".

- (7) On employment, para. 5.19 explains that OPDC

"is currently undertaking a Future Growth Sectors Study for Old Oak and Park Royal that is analysing potential growth sectors that could be suited to Old Oak and Park Royal. This work will inform the preparation of the OPDC Local Plan".

29. Again, therefore, we consider it plain that (like the FALP) the OAPF did not decide the spatial strategy and the quantum of housing and employment land for inclusion in the draft plan.

30. Indeed, the OAPF SEA Screening Report for the draft Plan (Dec 2015) at paras. 1.1.16 and 1.1.17 did not rule out SEA despite the FALP IIA:

"1.1.16 An IIA was carried out for the FALP. The Old Oak & Park Royal OAPF is a "daughter" document of the "parent" FALP.

1.1.7 Although the OAPF is not proposing additional policies and/or additional levels of growth to the London Plan, consideration has been given to the criteria specified in Schedule 1 of the SEA Regulations and the potential for likely significant effects as a result of the OAPF. As required under Regulation 9, it has been concluded that an SEA is required as significant effects are likely. It is also considered that the unique scale and intensity of transformative redevelopment within Old Oak alongside the future production of a Local Plan by the Old Oak & Park Royal Development Corporation warrants that a SEA, as part of an IIA, is undertaken. This approach will ensure that a consistent assessment process is undertaken at the strategic and local spatial scales to understand any significant effects and identify mitigation measures to inform plan making processes."

The OAPF IIA

31. As explained in the First Opinion at para. 12, the requirements of the SEAR and guidance in respect of reasonable alternatives cannot be satisfied in relation to the draft plan by reliance on the IIA that was undertaken for the OAPF. That is because whilst the OAPF IIA tested two scenarios, it did not assess them against the IIA framework and so did

not undertake the requisite analysis of the social, economic and environmental implications of the scenarios against the baseline: Section 5 of the OAPF IIA at pp. 91-94.

32. We do not consider that OPDC has provided any satisfactory answer to this point. The Response to JAM purports to address it at p. 4 (ES.9) but fails actually to provide an answer to the specific point made in the JAM review (and at para. 12 of the First Opinion) in respect of the limited scope of the scenario testing that was undertaken for the OAPF IIA.

The IIA Scoping Report for the draft plan (December 2015)

33. This IIASR 2015 does not mention the points now made for the exclusion of reasonable alternatives either in the general discussion of the process and the FLAP/OPAF at §2.2.1 p. 7 or in the scoping of alternatives at pp. 7-8. Indeed, there is no suggestion that a decision was made to scope out reasonable alternatives because of (a) reliance on the higher level assessments (and the reasons for this) or (b) since there are no reasonable alternatives in any event (with the reasons for that). This is concerning since no contemporaneous documents supporting the recent explanation were referenced in the OPDC Opinion nor are they in the 2019 IIAA.
34. We have therefore considered the IIASR 2015 to see if it provides support for the 2019 IIAA. It does not.
35. The latter part of §2.2.1 states at pp. 6-7:

“Assessment of Alternatives

It is a requirement of the SEA Directive that ‘reasonable alternatives’ are assessed and, therefore, alternative options will be assessed using the IIA Framework. In accordance with NPPG:

‘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.’

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 UK, 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.

The draft IIA Framework for consultation is presented in Section 6 of this report. The purpose of the assessment will be to determine the sustainability strengths and weaknesses of each option, such that this information can be used by the plan-makers to inform their decision to select the preferred options. It is proposed that for the

strategic elements a matrix will be used for this assessment that enables the options to be easily compared.

The types of alternative options to be reviewed are currently anticipated to include:

- Strategic Spatial Strategy Options;
- Possible strategic policy directions; and
- Possible site allocations.

This report documents Stage A of the SEA process. The assessment of alternatives will be undertaken as part of Stage B of the SEA process, and therefore documented in subsequent IIA reports. This will include the Initial IIA Report, to be published with the Regulation 18 version of the draft Local Plan.”

36. Indeed, at Table 3.1 pp. 12-13 the second row in the matrix refers to “Generating options for the strategy” and includes “B1/B2 Developing, refining and appraising strategic alternatives” without any suggestion of their exclusion because of FALP and/or OAPF or for any other reason.
37. This casts doubt on the reasons now advanced in the 2019 IIAA.

Summary of the position following the FALP, OPAF and their IIAs

38. For the above reasons, in our view neither the FALP nor the OAPF decided the spatial strategy and quantum of housing and employment land to be included in the draft plan. Nor do we consider that the IIAs produced for the FALP and the OAPF have assessed reasonable alternatives in a manner that means that Old Oak Park Limited erroneously seeks a duplication of consideration that has already occurred at a higher tier of the plan-making process. To the contrary, in our opinion the assessment of reasonable alternatives contained in the IIAs for the FALP and the OAPF cannot satisfy the requirements of the SEAR and guidance in relation to the draft plan.
39. Contrary to the OPDC Opinion and the 2019 IIAA, the IIAs for the FALP and the OAPF did not undertake a consideration of reasonable alternatives of the housing and employment requirements or of the spatial options open to the draft plan but specifically left those decisions to the plan itself.
40. Merely because the draft plan might in broad terms be compliant with the FALP (which would be a requirement in any event) and OAPF does not mean that it has not had to make detailed spatial choices or that reasonable alternatives should not be considered. The detail and complexity of the draft plan is self-evident particularly when compared to the FALP and OAPF. The fact that plan has not adopted precisely the numbers set out in the FALP and propose phasing outside the plan period show that they are not options dictated by the FALP or OAPF.

41. It follows that:

- (1) The reasons given in the 2019 IIAA are seriously flawed and cannot be proper reasons for screening out any further reasonable alternatives option;
- (2) The primary basis on which it is said that there is no need to undertake reasonable alternatives assessment is therefore incorrect and such an assessment was wrongly and unlawfully ruled out;
- (3) The ex post facto suggestion that it would not have made a difference since there were no alternatives in any event is very doubtful and requires further consideration in the light of the information supplied since –
 - (a) It has only been raised in the last 2 months as a result of the submissions made on SEA;
 - (b) The latest contentions and the 2019 IIAA are not consistent with the IIASR 2105 nor the SEA Screening Report for the OAPF;
 - (c) There is no evidence of such an assessment having been undertaken before this time;
 - (d) To make such an assertion some 4 years into the IIA process at short notice risks being labelled as rushed and lacking in proper reasons, or evidence, and additionally highlights a serious failure to consult in breach of the SEAR.

Consultation

42. The requirements for consultation are found in reg. 13 of the SEAR and are mandatory:

“13.— Consultation procedures

(1) Every draft plan or programme for which an environmental report has been prepared in accordance with regulation 12 and its accompanying environmental report (“the relevant documents”) shall be made available for the purposes of consultation in accordance with the following provisions of this regulation.

(2) As soon as reasonably practicable after the preparation of the relevant documents, the responsible authority shall–

- (a) send a copy of those documents to each consultation body;
- (b) take such steps as it considers appropriate to bring the preparation of the relevant documents to the attention of the persons who, in the authority's opinion, are affected or likely to be affected by, or have an interest in the decisions involved in the assessment and adoption of the plan or programme concerned, required under the Environmental Assessment of Plans and Programmes Directive (“the public consultees”);

(c) inform the public consultees of the address (which may include a website) at which a copy of the relevant documents may be viewed, or from which a copy may be obtained; and

(d) invite the consultation bodies and the public consultees to express their opinion on the relevant documents, specifying the address to which, and the period within which, opinions must be sent.

(3) The period referred to in paragraph (2)(d) must be of such length as will ensure that the consultation bodies and the public consultees are given an effective opportunity to express their opinion on the relevant documents.

(4) The responsible authority shall keep a copy of the relevant documents available at its principal office for inspection by the public at all reasonable times and free of charge. ...”

43. It is notable that there is no suggestion of the matters now appearing in the 2019 IIAA (reliance on the FALP and OAPF IIAs, no reasonable alternatives generally) in either the 2017 IIA or the 2018 IIA. This underlines the further failure of consultation apparent from the generation of the new SEA material.

44. In any event, as explained above, the reasoning has only been set out in the last month and has not been the subject of consultation and testing. It has therefore been advanced once the OPDC had reached a settled view on the draft plan and therefore deprives consultation of any genuine ability to influence, again contrary to law. See the reference to **Seaport** at para. 41 of the First Opinion and, in particular -

“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.”

45. So far as we are aware no proposals have been advanced to undertake a sufficient open and wide ranging consultation which would now allow it to serve its purpose and comply with the requirements of the SEAR. There is an enormous risk that any consultation now would simply pay lip-service to the requirement and not offer a genuine opportunity to influence the final form of the draft plan.

46. It would be fair and in the interests of transparency that OPDC should provide contemporaneous documentation that supports what is now set out in the 2019 IIAA and which shows when, precisely, the decision was made that there (a) needed to be no further SEA of reasonable alternatives due to the provision in the FALP and OAPF and (b) there were in any event no reasonable alternatives. This is particularly important given the lack of any reference from the earlier IIAs, when considering reasonable alternatives or otherwise, to even mention what is now set out in the 2019 IIAA.

47. As Ouseley J. held in **Heard** at [70] (see First Opinion para. 38) there is a need in any event to give reasons for the selection of a single option –

“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.”

It is noted that the reasons now advanced take up many pages of the 2019 IIAA which emphasises their absence from earlier iterations of the IIA.

48. The purpose of the consideration of reasonable alternatives is not “merely to demonstrate how the chosen plan has been arrived at when compared to the reasonable alternatives” (2019 IIAA §2.1.4 p. 11) but to allow parallel consultation on those alternatives so that the preferred option is properly examined in the light of the effect of alternatives, so that the best result is achieved, and so that those concerned with the process can express views which can genuinely be taken into account and not simply considered at a stage when, following 3 consultation drafts, the plan maker is unlikely to be of a genuinely open mind. Indeed, the statement quoted above seriously overlooks the consultation aspect and that quoted in the **Seaport** case, above. It treats the requirement as no more than an explanation of how the preferred option was reached.
49. Indeed, as Hickinbottom J. pointed out in **R. (Friends of the Earth England, Wales and Northern Ireland Ltd) v Welsh Ministers** [2016] Env LR 1⁶ at para. 88(vii) consultation is important since:

“vii) However, as a result of the consultation which forms part of that process, new information may be forthcoming that might transform an option that was previously judged as meeting the objectives into one that is judged not to do so, and vice versa. In respect of a complex plan, after SEA consultation, it is likely that the authority will need to reassess, not only whether the preferred option is still preferred as best meeting the objectives, but whether any options that were reasonable alternatives have ceased to be such and (more importantly in practice) whether any option previously regarded as not meeting the objectives might be regarded as doing so now. That may be especially important where the process is iterative, i.e. a process whereby options are reduced in number following repeated appraisals of increased rigour. As time passes, a review of the objectives might also be necessary, which also might result in a reassessment of the “reasonable alternatives”. But, once an option is discarded as not being a reasonable alternative, the authority does not have to

⁶ The case reference in the OPDC Opinion at [31] is incorrect.

consider it further, unless there is a material change in circumstances such as those I have described.”

50. The PPG on Plan Making also emphasises the continuing role of the IIA throughout the process, and not merely at a late stage in it:

“What roles do Sustainability Appraisal and Habitats Assessment play?

Every Local Plan must be informed and accompanied by a Sustainability Appraisal. This allows the potential environmental, economic and social impacts of the proposals to be systematically taken into account, and should play a key role throughout the plan-making process. The Sustainability Appraisal plays an important part in demonstrating that the Local Plan reflects sustainability objectives and has considered reasonable alternatives. The Sustainability Appraisal should incorporate a Strategic Environmental Assessment to meet the statutory requirement for certain plans and programmes to be subject to a process of ‘environmental assessment’.

....

Paragraph: 037 Reference ID: 61-037-20190315

Revision date: 15 03 2019”

51. The difficulty here is that the decision to undertake no alternative assessment other than the limited affordable housing issue referred to in the First Opinion, was undertaken for reasons which are mistaken and which do not stand scrutiny. There has therefore been no consultation on the reasonable alternatives to the main options in terms of numbers, infrastructure, spatial options etc within the plan, or to reassess them as the plan has proceeded, so that the plan process has not been informed as it ought to have been.
52. New and untested reasons have now been advanced for saying that there are no reasonable alternatives (see further below):
- (1) It needs to be examined further given the limited time available to date;
 - (2) In any event these new reasons are questionable given their late origin and the lack of explanation and references e.g. in the IIA SEA Screening Report (Dec 2015);
 - (3) There needs to be proper consultation on them and on any addendum to the 2018 IIA, though it may be unwise to rely on the 2019 IIAA given the defects highlighted above. This has unfortunate consequences for the plan process, but the alternative may be to revert to the reg. 18 stage given the extent of the error explained above.

(3) OPDC's judgement that there were no reasonable alternatives that would have been consistent with the FALP and the OAPF

53. The OPDC Opinion asserts at para. 29 that

“OPDC has reasonably concluded that there are in fact no reasonable alternatives to the spatial strategy and quantum of housing and employment land for inclusion in the Draft Plan given the requirement that the Draft Plan be consistent with the FALP and OAPF”.

54. The assertion is repeated at paras. 32 and followed by the assertion that -

“[a]n alternative that did not involve redevelopment of OOPL's Cargiant site as envisaged by draft Policy P2 would not meet the objectives of the Draft Plan or the strategic objectives set by the higher level FALP and OAPF” (para. 33)

and that

“[i]f OPDC were not to allocate the Cargiant site for redevelopment [the allocated] 5,300 new homes (plus the new job creation target) would not be achieved” (para. 34).

55. The OPDC Opinion does not explain where in the evidence base OPDC itself reasons as described above. The 2019 IIAA similarly baldly asserts at p. 13 (para. 2.4.2) that

“[t]he OPDC Local Plan therefore proposes the only approach available in terms of quantity and spatial distribution of development”

and then refers at p. 14 to

“[t]he fact that no reasonable alternatives to the quantity of development or spatial strategy proposed in the OPDC Local Plan were available”.

56. We assume that both the OPDC Opinion and the IIA Addendum are in this respect drawing on section 3.4 of the May 2018 IIA for the draft plan, which refers to the FALP and to the OAPF and then states that

“[i]n 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”.

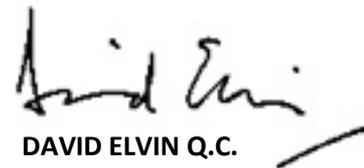
57. The JAM review of the IIA provides a detailed explanation of why OPDC's approach fails to satisfy the requirements of the SEAR and guidance in relation to reasonable alternatives: this includes section 3.4 of the 2018 IIA for the draft plan (as to which see paras. 2.2.3 and 3.1.4 of the JAM review). The JAM review is considered in the First Opinion.

58. We make the following additional observations:

- (1) Section 3.4 of the May 2018 IIA states only that alternative development capacities are not considered to be reasonable alternatives and have not been assessed. It does not address the additional assertion made in the OPDC Opinion, namely that the desired development capacity can only be achieved with the

Cargiant allocation.

- (2) Whilst it is not clear to us in what respect precisely the Development Capacity Studies are said to be relevant at pp. 2-4 of the Response to JAM, reliance on the DCS is in our view ultimately misplaced for the same reason as is reliance on the OAPF IIA (above). The DCS do not test scenarios against the IIA framework and so do not undertake the requisite analysis of their social, economic and environmental effects against the baseline.
 - (3) Having regard to p. 9 of the Response to JAM in relation to ES.16, it appears that OPDC had to decide what proportion of the London Plan target it would seek to meet during the Local Plan period. That surely gave rise to reasonable alternatives in terms at least of the phasing of development.
 - (4) Finally, if (as appears to us to be the case) OPDC has misunderstood the effect of both the FALP and the OAPF then in our view, even if it were in all other respects reasonable,⁷ its exercise of its plan-making judgement as to whether or not there were reasonable alternatives will have been vitiated by that misunderstanding.
59. We will consider our advice further in the light of a further opportunity to review the material and in the light of any additional information provided by OPDC, or future consultation responses, given the points noted above.



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4 June 2019

⁷ Which for the avoidance of doubt is not accepted, having regard to the analysis in the JAM review.