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 (No. 3)

(1) Introduction

1. Opinions have been provided on behalf of Old Oak Park Limited ("**OOP**") in this matter dated 1 April 2019 ("**Opinion 1**")[1] and 4 June 2019 ("**Opinion 2**"), which were both submitted to the Inspector examining OPDC's draft plan. We are now instructed to provide a further opinion in response both to Richard Moules' note dated 4 July 2019 ("**the Note**") and to the further information provided since 5 July 2019 by OPDC in the form of two schedules dated 20 and 27 June 2019.

2. Substantial additional information has also been provided less than two weeks before the next hearing on issues relating to Phase 1A, viability of the plan proposals, potential for relocation and related matters. Consistently with its earlier conduct, OPDC has provided late in the day substantial additional information that appears to exceed what was discussed at the last hearing whilst it appears protesting, somewhat inconsistently, at the need for proportionality at plan examinations and a need for pragmatism. The reality appears to amount to a (too) late effort by OPDC to correct the errors of process it had not identified, or sought to deal with, until raised by OOP.

3. This further opinion should be read in conjunction with Opinions 1 and 2 and we do not repeat the points already made but instead focus on those raised in the Note and arising from the additional information, which is not mentioned in the Note but which concerns the objection of non-compliance with the SEAR.

4. As noted, it appears clear from what OPDC has done, and done recently in response to OOP's objections, it is a very late attempt to repair the serious defects in process and

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

assessment that have occurred over the years since the first draft of the plan was published. The overwhelming impression we have had from the flow of additional material, and the schedules, is that of an authority seeking to redress its previous errors by the production of a still greater paper chase of documentation than was apparent at the previous hearing and, even then, doing so without achieving a solution. We explain below why we consider OPDC still fails to meet the legal requirements of the SEAR (and SEA Directive).

5. It is our view that the point has been reached where these defects are of sufficient significance that they cannot be repaired by a late and additional iteration of the IIA since they would come following three drafts of the plan and the award of HIF funding for the first phase of implementation of the draft plan proposals and the prospect of consultation on a revised or additional environmental report in the IIA having any significant effect on the plan proposals, or being approached with an open mind, is negligible.

6. The Note focuses on 2 matters:

   (1) soundness and compliance with FALP;

   (2) the Secretary of State's recent letter to PINS regarding pragmatism in local plan examinations.

7. We will address the Note (including its omissions) first then deal with the schedules of additional information allegedly providing the answer to the objection of a failure to consider reasonable alternatives.

Note (1): soundness and compliance with FALP

8. On soundness, the Note simply sets out para. 182 of the 2012 NPPF and asserts that "[m]*any of the issues raised by Old Oak Park Limited are not directly relevant to the question of soundness*". That assertion is not developed in any further detail in the Note and is incorrect. It is also plainly wrong. The issue of reasonable alternatives (with which Opinions 1 and 2 are concerned) is directly relevant to the "*Justified*" limb of soundness and the issue of viability is directly relevant both to that limb and also to the requirement of effectiveness.

9. The Note then contends that because it is a statutory requirement that the plan be both

"*in general conformity*"[2] and "*consistent*"[3] with the London Plan, it was unnecessary for OPDC to test levels of development below the housing figure stated in the FALP for the opportunity area (because "[a] *Local Plan which retained the Strategic Industrial Location designation of Old Oak North, and thus failed to deliver the housing targets set out in the London Plan, would not be in conformity with the London Plan, would not be consistent with the London Plan and could not be found sound*"[4]).

10. The summary of the proper approach to the interpretation of planning policy that is set out at para. 11 of the Note (with reference to ***Tesco v Dundee***) is accepted. However, adopting the proper approach to the interpretation of Policy 2.13 of the FALP, OPDC is wrong to contend that it necessarily requires testing of development levels through the local plan process "*to be subject to a minimum level*".[5] Mr Moules' Note passes over the language of FALP which is plainly at odds with OPDC's position and does not acknowledge the weakness of OPDC's position.

11. As we noted in Opinion 2, 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..." (emphases added).

12. 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).

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[2] S. 24(1)(b) PCPA 2004.

[3] Reg. 8(4) of the Town and Country Planning (Local Planning) (England) Regulations 2012.

[4] Para. 13 of the Note.

[5] Para. 12 of the Note.

13. The Note fails to acknowledge the significance of the use of “contribute towards meeting” and “tested as appropriate” (etc) and the fact that it would be have been very simple for FALP to state in the Policy at 2.13B that the figures were minima or had required to be met if not exceeded. The language used is simply inconsistent with OPDC’s approach and the advice in the Note.

14. 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*".

15. Para. A1.1 of Annex 1 to the FALP then provides as follows:

> "This Annex (which for the avoidance of doubt, forms part of the London Plan and therefore of the statutory development plan) is integral to policy 2.13 in Chapter 2, outlining how its broad principles should be applied to specific Opportunity and Intensification Areas including indicative estimates of employment capacity and minimum guidelines for new homes to 2031, subject to phasing".

16. Importantly, para. A1.2 of Annex 1 confirms that

> “[t]hese estimates and guidelines [...] will be tested through the preparation of planning frameworks”.

17. Annex 1 goes on to identify 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.

18. Having regard to the London Plan as a whole and reading Policy 2.13Bc in context, it is thus entirely clear that properly interpreted, that policy does not require that the minimum housing figure for the opportunity area that is identified in Annex 1 is met. It is plainly stated that both the London Plan and OAPFs merely set "*strategic policy directions*" and that in relation to housing, this is done by providing minimum guidelines, which are to be tested through the local plan process.

19. In particular, there is no support in the wording of the London Plan's policies or their supporting text for the suggestion made by OPDC to the effect that testing through the local plan process is permitted in one direction only (i.e. of levels of development that exceed the guideline stated in the London Plan). Indeed, OPDC’s own draft plan does not meet the OAPF figures in any event, which underlines the above points.

20. In any event, OPDC's failure to satisfy the requirements of the SEAR in relation to reasonable alternatives is not confined to its failure to assess levels of development below the guideline/estimate levels that are set out in Annex 1 to the FALP. As is explained in the JAM review of the IIA (at ES.13) and as confirmed by OOP at the 6 June

2019 hearing session, the spatial options that should have been considered by OPDC include the following:

- "Business as usual" or "do nothing" approach;
- 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.

21. Overall, therefore, the statutory requirement that the plan be both "*in general conformity*" and "*consistent*" with the London Plan did not, on a proper interpretation of Policy 2.13, excuse OPDC from considering (as reasonable alternatives) levels of development lower than the guideline/estimate levels set out in Annex 1 to the FALP: such lower levels would not have been inconsistent or lacking in general conformity with the London Plan. In any event, even if (which is disputed) OPDC was not required to consider such lower levels of development, there remained additional reasonable alternatives that OPDC was required to consider. OPDC's failure to consider alternative options in terms of phasing and deliverability is particularly striking in this regard, given that para. A1.1 of Annex 1 to the FALP is expressly stated to be "*subject to phasing*" (above).

22. It follows that on OPDC's own erroneous approach to FALP, it has provided a sole reason for not assessing reasonable alternatives which is legally flawed and which classically ignores reading the OAPF text in the context of the policy, especially 2.13B. In any event, its approach fails to consider other aspects of reasonable alternatives as noted above.

23. It follows that OPDC, despite several efforts to do so, has failed to provide a proper legal justification for its failures to consider reasonable alternatives.

24. Moreover, for the reasons set out below, the schedules provided to attempt to pull together the "paper chase", fail in their apparent purpose to demonstrate compliance with SEA requirements.

Note (2): pragmatism and local plan examinations

25. The reliance placed by OPDC at para. 14 of the Note upon the letters sent by the

Secretary of State to PINS that highlight the importance of pragmatism is misplaced. If the legal requirements of the SEAR have not been satisfied (which they have not, for the reasons explained by OOP), that failure cannot be resolved by "pragmatism". If those requirements have not been met (which they have not), the draft plan simply cannot lawfully be adopted. References such as those in the 2015 letter to the merits of early review as a way of avoiding "unnecessary" delay are thus irrelevant.

Note (3): omissions

26. As highlighted above, the Note seeks only to establish that OPDC was not required to test spatial options involving lower levels of development than the guideline/estimate levels that are set out in Annex 1 to the FALP. In OOP's submission, not only is it unsuccessful in doing so but the narrow focus of the Note serves only to emphasise OPDC's failure to address the other reasonable alternatives that have been identified by OOP (in the JAM review of the IIA, at ES.13: see above) and which the SEAR required OPDC to deal with. OPDC simply has not responded on these issues.

27. Moreover OPDC continues baldly to assert (in the Note) that "*the housing targets set out in the London Plan*" could not be delivered if the Strategic Industrial Location designation of Old Oak North were retained. It remains the case that, as explained in Opinion 2 at paras. 53 to 58, that assertion is nowhere explained or evidenced by OPDC. There are no reasons despite the clear duty to give reasons for selection of even a single preferred option. The Note fails to provide the requisite explanation or evidence, notwithstanding the observations made in Opinion 2. In any event, as highlighted in Opinion 2 at para. 58(4)), if OPDC has misunderstood the effect of the FALP and the OAPF (as we consider it has done) then the exercise of its plan-making judgement as to whether or not there were reasonable alternatives will have been vitiated by that misunderstanding[6]. The content of the Note confirms that the effect of the FALP has been misunderstood by OPDC (above).

28. Finally with regard to the Note, as we observed in Opinion 2 at para. 40, the fact that the draft plan has not adopted precisely the numbers that are set out in the FALP and proposes phasing outside of the plan period shows that the FALP did not decide the spatial strategy and quantum of housing and employment land to be included in the draft plan. The Note provides no response to this point, with which it entirely fails to engage. It is an inconvenient truth to OPDC.

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[6] Even if it were in all other respects reasonable, which for the avoidance of doubt is not accepted by OOP.

The June 2019 Schedules

29. The two schedules dated 20 and 27 June 2019 ("**Schedule 1**" and "**Schedule 2**", respectively; together, "**the Schedules**") that have been produced by OPDC are considered in detail by JAM Consult Ltd in its July 2019 "*Response to OPDC additional information Integrated Impact Assessment*". Further to the analysis set out in Opinions 1 and 2, we make the following points in respect of the Schedules.

30. ODPC said at the 6 June 2019 hearing session that the Schedules would fulfil two purposes: (i) they would show that the content of the May 2019 IIA Addendum ("**2019 IIAA**") was not new but rather represented the contemporaneous reasoning of OPDC; and (ii) they would answer OOP's criticism that there was an impermissible "paper-chase", by providing a schedule of OPDC's reasons in respect of reasonable alternatives.

31. Neither purpose has been fulfilled. Indeed, the Schedules have provided strong evidence that in fact a paper-chase is being advanced as a proxy for compliance.

Contemporaneous reasoning

32. As to the first, as is explained in Opinion 2,[7] neither the OPDC Opinion dated 26 April 2019 nor the 2019 IIAA provided any references to contemporaneous documentation supporting the recent explanation by OPDC that a decision was made to scope out reasonable alternatives because (i) the FALP and the OAPF meant that "duplication" of assessment was unnecessary and/or (i) there were no reasonable alternatives in any event. This leads to the inevitable conclusions that:

    (1) There is no lawful basis for the choice or decision in the absence of clear documentation and relevant reasons;

    (2) There was no consultation to inform the plan preparation given the above.

33. Schedule 1 does not succeed in remedying that absence of references to contemporaneous documentation. We will deal with (i) the FALP/OAPF point and (ii) reliance on an absence of reasonable alternatives in any event, in turn.

34. On the FALP/OAPF point, the only contemporaneous (i.e. pre-2019 IIAA) document that is actually identified in Schedule 1 as addressing that point is Section 3.4 of the May 2018 IIA (see Table 1 within Schedule 1). That section states that "[i]*n light of these strategic planning documents* [i.e. the FALP and the OAPF] *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*". That

[7] See e.g. paras. 33 to 37 and 41.

reasoning is flawed as already explained by OOP. It was also provided by OPDC at a late stage in the local plan process: the May 2018 IIA was produced to accompany the second consultation on the Reg. 19 revised draft plan.

35. Schedule 1 also refers to Section 5 of the 6 January 2016 Planning Committee Report (see Table 2 within Schedule 1). That however simply states at para. 5.3 that

> "[a]s a result of the need to be consistent and in general conformity with the NPPF and London Plan respectively, coupled with the emerging evidence base from OPDC's supporting studies, the majority of policies in the draft Local Plan are expressed as 'preferred policy options'. Alternative policy options are presented where relevant".

There is no suggestion that the London Plan means that alternative development capacities are not reasonable alternatives.

36. As to the second element of OPDC's recent explanation of why reasonable alternatives were scoped out (i.e. an absence of reasonable alternatives in any event), the only contemporaneous (pre-2019 IIAA) documents that are identified in Schedule 1 as addressing that point are (i) certain chapters within the Reg. 18 Local Plan (see Table 2 within Schedule 1) and (ii) Section 3.4 of the May 2018 IIA (see Table 1 within Schedule 1).

37. Those references are not, however, an answer to OOP's contention that reasonable alternatives existed that should have been (but were not) assessed by OPDC. For example (as explained at para. 58(1) of Opinion 2), whilst Section 3.4 of the May 2018 IIA states that alternative development capacities are not considered to be reasonable alternatives and have therefore not been assessed, it does not address the additional assertion subsequently made in the OPDC Opinion, namely that the desired development capacity can only be achieved with the Cargiant allocation.

38. Schedule 2 does not assist OPDC in establishing that its recent explanation that a decision was made to scope out reasonable alternatives because (i) the FALP and the OAPF meant that "duplication" of assessment was unnecessary and/or (i) there were no reasonable alternatives in any event is supported by the contemporaneous documentation. It does not contain any references to the FALP or to the OAPF. Whilst it purports to explain why numerous alternative options were not assessed as "reasonable alternatives" (for the purposes of SEA), once again that explanation is proffered without any reference to the contemporaneous documentation. As JAM Consult Ltd observes in its July 2019 report at. 4.2.3 –

> "[t]he explanation provided for the selection and rejection of alternatives is not provided in the IIA or supporting documents and appears to be post-rationalisation for decisions taken without assessment or due consideration".

The paper-chase

39. Notwithstanding the production of the Schedules, the Inspector, the EiP participants and the public more generally remain faced with an impermissible paper-chase. We quoted the relevant guidance in Opinion 2.

40. In particular, Schedule 2 has, if anything, muddied the waters still further:

    (1) It includes, for no good reason, many documents that do not even include any analysis of options;

    (2) Those documents that are identified as having analysed options are all tightly focused on a specific, narrow issue such as utilities, waste, options for improving the A40, car parking, affordable housing. It is clearer than ever that the reasonable alternatives identified by OOP (above) have not been assessed;

    (3) It purports to explain why numerous alternative options were not assessed as "reasonable alternatives" (for the purposes of SEA) but that explanation is once again proffered without any reference to the contemporaneous documentation or reasoning on which consultation was undertaken;

    (4) In certain respects it contradicts what has previously been said by OPDC. For example, SD56 (Development Capacity Study) is identified as not having included an options analysis, whereas OPDC has previously relied on the Development Capacity Study as part of its case on reasonable alternatives (see the Response to JAM at ES.7); and

    (5) There is no evidence of compliance with the SEAR requirement for early (or any) consultation.

Consultation

41. The legal requirements in relation to consultation are set out in Opinions 1 and 2 (see in particular paras. 42 to 52 of the latter). The key principle is as described in ***Seaport*** at [49]:[8]

> "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".

[8] ***Re Seaport Investments Ltd's Application for Judicial Review*** [2008] Env LR 23.

42. Here, the factual position is now as follows:

(1) The 2019 IIAA and the Schedules have not been consulted upon, still less any reasoning (which has not been produced to support them);

(2) OPDC's position is that a decision was made to scope out reasonable alternatives because (i) the FALP and the OAPF meant that "duplication" of assessment was unnecessary and/or (ii) there were no reasonable alternatives in any event;

(3) As to (i) above (reliance on the FALP and the OAPF), there is only one brief relevant reference in the contemporaneous (i.e. pre-2019 IIAA) documentation (being the documentation that was consulted upon), at section 3.4 of the May 2018 IIA. There are no references to reliance on the FALP and the OAPF in the December 2015 IIA Scoping Report for the draft plan, the Reg. 18 IIA or the first Reg. 19 IIA. Furthermore, subsequent to consultation on the draft plan, OPDC's reliance on the FALP and the OAPF has been elaborated in not one but two legal opinions. What consultation there was on this aspect of OPDC's recent explanation occurred at too late a stage in the process (the May 2018 IIA) and was in any event inadequate given the elaboration that has since been provided;

(4) As to (ii) above (no reasonable alternatives in any event), OPDC has belatedly explained in Schedule 2 why numerous alternative options were not considered to be reasonable alternatives for the purposes of SEA. Schedule 2 has not, however, been the subject of consultation and it contains no references to the contemporaneous documentation that <u>was</u> consulted upon.

43. Having regard to the above it is plain that the consultation requirements in relation to reasonable alternatives in SEA have not been satisfied.

Defects cannot now be cured

44. It is now too late for the defects in SEA of the draft plan that have been identified by OOP to be cured (by producing a late and additional iteration of the IIA and consulting upon the same). As noted above, any such iteration would come following three drafts of the plan and the award of HIF funding for the first phase of implementation of the draft plan proposals. In those circumstances the prospect of consultation on an additional iteration of the IIA being approached with an open mind or having any material influence on the plan proposals is genuinely negligible.

45. Whilst as a matter of law some defects in the SEA process can in principle be cured at a later stage of the process (***Cogent Land LLP v Rochford DC*** [2013] 1 P&CR 2), it is clear

from ***Cogent Land*** that whether that is appropriate will turn on the particular facts of the case. This is not a case where further assessment and consultation is required to support a late amendment to a draft plan. The legal error here is a failure adequately to assess reasonable alternatives and/or to provide proper reasons for discounting alternative options as reasonable alternatives at a sufficiently early stage of the plan-making process, as is required. That error necessarily does not admit of remedy by belated additional assessment and consultation.

46. As noted above, consultation must take place at a sufficiently early stage where it can fairly be said to be at a time when it can influence the plan process and provide a basis on which environmental choices can be made. It is far too late in the process for consultation to have the required effect since the plan is at a late stage in its process and HIF funding has been provided, presumably on the basis of proposals rooted in the plan - though it is not possible to tell since OPDC will not reveal the terms of the funding offer. It should therefore be assumed, contrary to OPDC's interests (unless it releases the basis of the offer), that the HIF funding is tied to the current version of the plan and would itself provide a huge disincentive to change as the result of late consultation.

47. After all, for consultation to be genuine, it should meet the requirements of the well-known ***Gunning*** criteria as explained by the Court of Appeal in ***R v North and East Devon HA, ex p. Coughlan*** [2001] QB 213 (Lord Woolf MR at [108], giving the judgment of the Court):

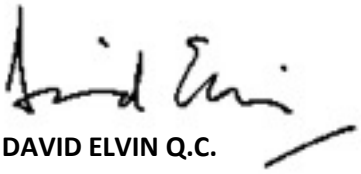
> "108. It is common ground that, whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for D this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken: *R v Brent London Borough Council, Ex p Gunning* (1985) 84 LGR 168."

Conclusion

48. There is now overwhelming evidence, strengthened by OPDC's latest information, that there has been no proper consideration of reasonable alternatives, nor have the reasons for selection of reasonable alternatives (including discounting alternative options that were not considered to be reasonable alternatives) been compiled in a systematic manner so as to allow for the requisite fair and informed consultation process at an early stage in the formulation of the various drafts of the plan.

49. OPDC has produced, instead, a classic paper-chase, which fails to meet the requirements of the SEAR and which moreover fails in its purpose of demonstrating

that reasonable alternatives have been dealt with properly. It is clear that OPDC and its consultants simply failed to grapple with the requirements of SEA until it was too late. To correct the defects through a further iteration of the IIA at this very late stage would be to require a futile exercise to be undertaken, since the relevant policy choices have already been made. SEA is not an exercise in verification after the event.



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