



*Draft following discussion at
OONF/GUA meeting 7th
November 2023*

DRAFT OLD OAK WEST SUPPLEMENTARY PLANNING DOCUMENT: Initial response from the Old Oak Neighbourhood Forum

The Old Oak Neighbourhood Forum was designated by OPDC in 2017. The Forum responded to consultations at all stages of the preparation of the OPDC Local Plan and participated in the Examination hearings held in 2019-2022.

This is an initial response to OPDC's consultation on a Draft Supplementary Planning Document for an area defined as Old Oak West. We will be submitting further detailed comments before the consultation closes on 27th November.

At our Forum meeting on 7th November we had a presentation from OPDC officers and a Q&A session on the Draft SPD for Old Oak West. The main concerns raised by Forum members were that:

- The SPD does not spell out how development at Old Oak West will be phased or how its delivery will be overseen? There is no news as yet on the Government's response to the OPDC Outline Business Case, which is key to infrastructure funding and delivery plans.
- The reaction to date from HS2 and OPDC to the October 4th announcements on the cancellation of the HS2 project north of Birmingham is that 'nothing has changed' and that the 2029-32 opening of Old Oak Common station will have a 'transformational' impact on Old Oak West. Many local people (living and working in the area) do not share this view.
- The timing of consultation on the Draft SPD is now inappropriate, until there is more clarity on both the above major questions on the future planning context for the area. The main TfL/HS2 development sites will not begin to become available until 2028-32. Our Forum members ask how we can sensibly respond to a SPD at this time, and what purpose the document will serve given the level of uncertainty involved.

At this stage our initial response examines one question only, on the status of the SPD document. Our question is:

Does the content of this document as drafted constitute a development plan document (DPD), as defined by the Town and Country Planning (Local Planning) (England) Regulations 2012, and therefore require Examination and potentially a Strategic Environmental Assessment (SEA)?

The legal distinctions between content and subject matter which can be included in a SPD as opposed to a DPD have proved a difficult area of law.

There have been a series of cases where SPDs have 'strayed into the territory' of a DPD and have been quashed by the Courts as a result. In most cases this has happened after adoption. We think it important for OPDC to demonstrate during the consultation period that this risk will not arise in the case of the Old Oak West SPD.

The legal cases which we have examined on this issue are as below:

Wakil and Others v London Borough of Hammersmith & Fulham Neutral Citation Number: [2012] EWHC 1411 (QB) Case No: CQ/735/2011

Skipton Properties Ltd n Craven District Council Neutral Citation Number: [2017] EWHC 534 (Admin) Case No: CO/5521/2016

William Davis Ltd & Ors v Charnwood Borough Council [2017] EWHC 3006 (Admin) (23 November 2017)

We fully accept that each of these cases involved different sets of circumstances, with each being judged on their merits. But some general principles emerged from the judgments in each case. We consider that these beg serious questions on whether the current Draft Old Oak West SPD would survive a legal challenge, if adopted in its present form.

Context of the Old Oak West SPD

We see this as a very unusual example of a SPD. This alone does not make it unlawful. Below are some of the attributes of the OPDC draft document which we feel are questionable for a purported SPD as opposed to a DPD.

- a) The Draft refers to development sites in the area defined (for the first time in a OPDC Local Plan document) as a 'Place' labelled Old Oak West. Paragraph 1.3 states *The sites are located in six different 'Places' in the Local Plan and subject to different Place policies. This SPD amalgamates the relevant place policies in the Local Plan to provide clearer spatial planning guidance for Old Oak West and to support a comprehensive and coordinated approach to development in Old Oak West.*

It is well established that SPDs are intended to provide 'policy guidance' and as such are allowed to contain what can be deemed 'policy'. But this must be justified and must not conflict with the adopted development plan (Reg 8(3)). SPD policy cannot supersede development plan policy.

The concept of 'amalgamating' the wording of a series of adopted local plan policies without creating 'new' policy seems to us to be both novel and questionable. Paragraph 1.5 of the Draft states *This SPD focuses on coordinating existing relevant spatial policies.* We are not clear what this means? Local Plan policies are specific and their interpretation important in development management decisions. In what way can 'policies' be 'co-ordinated' and re-badged as 'principles'? Precise terminology has proved to be significant in the legal cases referred to above. What weight will the Planning Inspectorate give to 'original policies' as opposed to 'amalgamated principles' in the event of appeals against refusals?

- b) Paragraph 1.7 of the introduction to the Draft SPD states:

The sections will set out guidance and information in the form of:

- *Principles – Proposals will be required to comply with Principles.*

As questioned above, it is not explained why the term 'Principles' is used. OPDC has previously made use of this term in publishing a series of documents for specific areas titled *Development Framework Principles*. Although overtaken by events in some cases, these publications continue to feature as 'supporting document' for the Local Plan. The Bing AI system says *I cannot find any reference to "Development Framework Principles" in the NPPF or any other official UK government document related to planning.* We have not come across the term in relation to other local plans. It does not feature in the Government's Plain English Guide to the Planning System or on the Planning Portal. Explanation is needed of why this term is used.

It appears that the term Principles is being used in the Old Oak West SPD to lessen the risk of challenge that ‘amalgamated’ wording constitutes ‘new policy’.

- c) More importantly, the second part of this sentence in the Draft states *Proposals will be required to comply with Principles*. This elevates the status of ‘Principles’ to development management requirements.

Our understanding of the judgments in the Charnwood and Skipton cases is that the offending and quashed SPD documents were deemed to contain ‘policies’ which clearly related to forms of development to be encouraged, and imposed development management requirements against which applications could be refused. **Hence (we argue) these amalgamated statements (whether termed ‘policies’ or ‘principles’) can only be adopted as a Local Plan (DPD), following examination.**

- d) In the Charnwood case the District Council promoted the SPD as an ‘interim approach’ or a necessary ‘stopgap’ prior to preparation of an updated local plan. OPDC is to an extent in the same position. After the Inspector’s intervention in 2019, the OPDC Local Plan required over 460 major modifications as a result of which the spatial context was substantially altered, with Old Oak West a new creation as compared with the submission version of the Plan. Hence the need to relabel six original ‘places’, and in doing so set aside the logic of their earlier boundaries. The case for justifying an ‘interim approach’ was rejected by Mr Justice Jay on the basis that the content of the Charnwood SPD was ‘clearly policy’.
- e) The Old Oak West Draft SPD contains a section 10 on Design. This includes Principle DP2 on Building Heights. This ‘Principle’ starts by saying *Proposals should deliver a range of building heights comprising..* and then continues to specify height ranges at specified locations at Old Oak West. These height ranges were introduced in January 2022 as ‘supporting text’ as part of the final modifications to the Post Submission Draft Local Plan. The Inspector chose to accept these very late modifications despite the fact that they were not consulted on at PSMDLP stage in late 2021.

OPDC now seeks to give these height ranges the status of ‘Principles’ in a SPD rather than supporting text. As noted above, the concept of ‘Principles’ adding any weight to a material consideration is questionable. But it seems clear that these height ranges are not currently ‘Policy’ in the adopted OPDC Local Plan and as such are now proposed to be included in a document as an attempt to introduce ‘new policy’ in a manner which we consider to be incompatible with SPD categorisation.

Our understanding of the construction of the 2012 Regulations is that documents that have the characteristics listed in regulation 5 of the 2012 Regulations must (under reg 6) be prepared as local development documents (DPDs). SPDs are defined negatively (under Regulation 2) as anything that is not a Local Plan or LDD.

Our understanding is that SPDs cannot contain policy identifying development and use of land which the authority wishes to encourage, making site allocations or site allocation policies or setting development management requirements which have to be met to secure consent or which would constitute sufficient grounds for refusal.

Regulation 5 reads as below

5.—(1) For the purposes of section 17(7)(za)(1) of the Act the documents which are to be prepared as local development documents are—

(a) any document prepared by a local planning authority individually or in cooperation with one or more other local planning authorities, which contains statements regarding one or more of the following—

(i) the development and use of land which the local planning authority wish to encourage during any specified period;

(ii) the allocation of sites for a particular type of development or use;

(iii) any environmental, social, design and economic objectives which are relevant to the attainment of the development and use of land mentioned in paragraph (i); and

(iv) development management and site allocation policies, which are intended to guide the determination of applications for planning permission;

(b) where a document mentioned in sub-paragraph (a) contains policies applying to sites or areas by reference to an Ordnance Survey map, any map which accompanies that document and which shows how the adopted policies map would be amended by the document, if it were adopted.

(2) For the purposes of section 17(7)(za) of the Act the documents which, if prepared, are to be prepared as local development documents are—

(a) any document which—

(i) relates only to part of the area of the local planning authority;

(ii) identifies that area as an area of significant change or special conservation; and

(iii) contains the local planning authority's policies in relation to the area; and

(b) any other document which includes a site allocation policy.

SPDs are defined negatively (under Regulation 2) as anything that is not a Local Plan document.

Assessing the SPD as a whole, it would seem to fall under Regulation 5 in these key respects:

- It identifies a specific area 'of significant change' while relating to only part of the area of the local planning authority
- It contains the local planning authority's policies in relation to the area in a newly 'amalgamated' form.
- It contains development management and site allocation policies, which are intended to guide the determination of applications for planning permission.
- It contains many *environmental, social, design and economic objectives which are relevant to the attainment of the development and use of land*

The first of the Court judgments cited above on the legitimate scope of a supplementary planning document involved a development brief prepared and adopted by LB Hammersmith & Fulham in relation to potential development at Shepherds Bush Market. To quote relevant paragraphs 87-90 from the judgment:

87. Whilst that is an important conceptual difference between the two categories of document, it does not replace the provisions of the statute which require me to consider whether, looking at the document as a whole and as a matter of substance, it satisfies all of the requirements of an area action plan so as to be a DPD not an SPD.

88. In considering whether this document does amount to a DPD I have had particular regard to those passages in the introduction concerning: background, vision and objectives to which I have referred above. I have also had regard to the range of policy statements set out in the remainder of the document under the various headings to which I have referred.

89. In my judgment, Mr Jones is right when he says that the whole point of the document is to identify the Shepherd's Bush Market area as an area of significant change. In my judgment, the whole thrust, tenor

and organisation of the document is about the fact that the area is to be transformed and identifies it as an area of significant change.

90. Accordingly, and conscious of the fact that in making this judgment I am disagreeing with the view taken by the local planning authority, in my judgment they have, erroneously, failed to characterise this document as an area action plan. That being so the statutory scheme requires that it should have been subject to the procedure required for a DPD. It is not in dispute that it was not subject to that procedure. **It follows that, for that reason, the adoption of the document by the Council on the 27th October was procedurally flawed and, on that ground, the decision was unlawful** (our emphasis).

The OPDC Local Plan, in the form adopted in June 2022, does not demarcate and identify Old Oak West as an 'area to be transformed and of significant change'. It identifies 6 other 'Places' to which policies specific to each were drafted for the submission version, consulted on, and heavily modified at stages up to and subsequent to the final consultation on modifications.

As of October 2023 the Draft SPD now carries out a different role. While OPDC members and officers may have become familiar with the concept of 'Old Oak West' **this concept does not feature in the adopted Local Plan**. This is a planning concept newly introduced to the local plan process. We therefore argue that the *tenor, thrust and organisation* of the Draft SPD requires it to be consulted on and progressed under the procedures required for a DPD, and not as a SPD

We therefore believe that the current consultation should be restarted. Either the current draft SPD should be substantially redrafted in a form which would meet the (negative) SPD characteristics under the Regulations. Or the present draft should be consulted on as a DPD and subject to Examination and any SEA requirements deemed to apply.

The officer report to the OPDC Board on October 12th included a brief paragraph of legal comments, stating *Part 5 of the Town and Country Planning (Local Planning) (England) Regulations 2012 sets out the procedure for the production of SPDs. This draft Old Oak West SPD constitutes the consultation version required to be carried out under Regulation 12 of Part 5 of those Regulations.*

Part 5 of the Act concerns the process for preparing and adopting a SPD. The legal comments in the OPDC report do not address the question of the distinction between a DPD and a SPD.

We would expect (at the least) that the OPDC's response to the current SPD consultation will include authoritative legal advice that adoption as a SPD of a finalised draft is lawful. This is not a straightforward legal issue and other planning authorities have seen decisions quashed, as in the three cases cited above. We see a safer course for OPDC as that of accepting that this Draft SPD is a development plan document.

Strategic Environmental Assessment Screening and Determination Statement

We note that the concluding section of this October 2023 document reads as below:

4.11 OPDC's Old Oak West SPD will provide additional information on the policies set out in OPDC's adopted Local Plan. It will not create additional planning policies or amend current planning policies. As such, the screening of this document, and the comments received from consulted bodies listed in paragraph 4.6 above, has led to the conclusion that the SPD is unlikely to have any significant environmental impacts, and therefore, an SEA is not required.

4.12 This section therefore constitutes the OPDC's Determination Statement outlining the process that has led to the conclusion that a SEA is not required.

We consider this a disingenuous statement. Is ‘amalgamating’ not ‘amending’? Earlier sections of the Screening Assessment set out the ‘Proposed Structure’ of the SPD and use this terminology below:

Guidance - Sets out SPD guidance in the form of Principles and Ambitions:

- *Principles provide guidance on things that must be considered in developing proposals.*

‘*Guidance on things which must be considered*’ is not the same language as used in the draft SPD itself, where (as noted above) the language used at 1.7 is *Principles – Proposals will be required to comply with Principles*. This latter wording imports a swathe of development management requirements, to be interpreted by applicants and the public and using new amalgamated wording, into the SPD. **This was not made clear to those invited to comment on the Screening Assessment.**

It is notable that none of the three Boroughs nor the GLA submitted any comments on this Screening and Determination Statement and hence were deemed by OPDC to have gone along with the conclusion reached on the screening process, as below:

it is concluded that as the OPDC Old Oak West SPD will not change or introduce new planning policy, proposals or allocations and that those on which it will rely are within the Local Plan which are subject to an Integrated Impact Assessment (IIA) (including a SA/SEA), it is considered that a SEA is not required for the Old Oak West SPD.

We do not see how this complies with the Act and Regulations. Or how the consultation on SEA Screening and the consequent Determination can be deemed to have been a valid exercise.

Conclusions

For all the above reasons, we argue that that the current consultation on the Draft SPD should be restarted. Either the current document should be substantially redrafted in a form which would meet the (negative) SPD characteristics under the Regulations and thereby avoid being categorised as a DPD under Regulation 5. Or the present draft should be consulted on as a DPD and subject to Examination and any SEA requirements deemed to apply.

Given the wide scope and content of the Draft SPD, and its introduction of new policies, we consider that the better course would be for the proposals in the Draft SPD should be progressed as a Partial Review of the Local Plan. There are precedents such as the [Local Plan Partial Review for North Kensington](#), undertaken by RBKC in 2017.

As a result of events external to OPDC since the 2018 submission of the Draft Local Plan (the cancellation of the HS2 project north of Birmingham, increased construction costs, shrinking residential values) there has been much change impacting on the Draft Plan as prepared for Examination. Five years have passed since submission. Not only has the focus of the Plan shifted from old Oak North to Old Oak West, but many other assumptions built into the adopted Local Plan are seriously outdated.

A Partial Review, we suggest, would be a way forward that allows for an Examination in Public and reconsideration of key assumptions on which the adopted Local Plan is based.