

SOUTH OXFORD SCIENCE VILLAGE
SOUTH OXFORDSHIRE LOCAL PLAN PROCESS APRIL/MAY 2018

ADVICE

Introduction

1. The Oxford Science Village Partners, promoters of the South Oxford Science Village (“SOSV”), seek advice in relation to the progression by South Oxfordshire District Council (“SODC”) of the Local Plan for the South Oxfordshire District (“the Local Plan”).
2. The process of making a local plan is governed by the Town and Country Planning (Local Planning)(England) Regulations 2012 (“the regulations”). The Local Plan is in draft and has reached its so-called ‘regulation 19’ stage under the regulations. That is to say, it has been through an extended process of consideration and iterative consultation (including that stage governed by regulation 18, and has reached the form in which SODC intend to submit it for independent examination in public (“EiP”)). At this stage, SODC must make it available for consultation, to allow representations under regulation 20 – any representations should be received before the submission of the plan, and they are to be taken into account by the examining Inspector.
3. Hence the expressions “regulation 18 consultation” and “regulation 19 consultation”. However, there is a significant difference between the two. The former is expressly in relation to the scope of the plan and what it might contain. The latter is the submission draft which contains what the local planning authority *intends* to submit. Whilst both are mandatory, the scope and function of the latter is narrower than the former; one would not expect, for instance, overall housing numbers or the central strategy of the plan to be the subject of the regulation 19 stage.
4. The Local Plan draft:
 - (1) Includes a major development proposal at Chalgrove airfield (“Chalgrove”), amounting to some 3000 units, of which the majority are to be delivered in the Plan Period.

- (2) Does not allocate SOSV, but does seek to allocate strategic allocations at Berinsfield and Culham, both of which currently lie in the Green Belt.
5. On 27 March 2018, the Full Council of SODC resolved to reconsider the draft Local Plan, specifically by reference to two ‘options’:
- (1) Remove Chalgrove and replace it with another site or sites (referred to as “Option 2”); or
 - (2) Retain Chalgrove and supplement it with one or more “reserve sites” (“Option 3”).
6. In so doing, the Full Council rejected the suggestion made by the then Leader of SODC that there be no change to the substance of the Local Plan (“Option 1”).
7. What led to the 27 March 2018 resolution was an accumulation of evidence that the Chalgrove site may not be deliverable in the timescale envisaged by SODC when producing the draft plan. This is principally due to the possibility that Homes England (the Government Agency which intends to deliver the Chalgrove scheme) may not be able secure the ownership of the Chalgrove site without using powers of compulsory acquisition; and funding problems with necessary road infrastructure to serve the strategic scheme at Chalgrove.
8. In resolving to proceed on the basis of either Option 2 or Option 3, SODC Council has, in effect, decided that the Local Plan cannot be submitted to the Secretary of State for EiP without removing, replacing or supplementing Chalgrove, as to rely on it as a strategic allocation would be likely to be found unsound and require a main modification. In considering the matter, SODC apparently received legal advice from leading counsel suggesting that Option 1 would have been lawful, but covering other options as well. That work (“the Opinion”) has not been released, and I am told that SODC are invoking a public interest defence against its disclosure.
9. However, there remain a number of challenges of a legal, procedural and judgemental nature which must be overcome before a re-worked Local Plan can be adopted. These are primarily:
- (1) Ensuring that any revised version of the Local Plan meets the legal requirements of the Strategic Environmental Assessment regime (“SEA”);

- (2) Ensuring that any revised version is considered by SODC to be “sound” by reference to the National Planning Policy Framework (“NPPF”); and
 - (3) That any revised version is the subject of appropriate consultation. This is a key issue which I deal with below.
10. SODC has now published a report to inform a decision by Cabinet on 10 May 2018, at which a decision will be taken as to which Option of Option 2 or 3 to recommend to Full Council. The analysis in the report covers the three Options formerly considered (although it is quite clear that Option 1 is not recommended (see paragraph 59)):
- “Cabinet made a recommendation to Council on the basis of Option 1, but Council did not support this. If Cabinet were minded to consider that Option 1 was the preferred option, then to support this would require further justification to persuade Council of the merits. Officers advise that no new material has been produced that is relevant to our Local Plan since Cabinet/Council last met on this matter.”
11. The report examines the respective implications for timing of the Local Plan process, as well as factoring in the pending changes to the National Planning Policy Framework (“NPPF”) and the deadlines associated with SODC’s involvement in the Oxford Growth Deal.
12. It does not spell out a firm recommendation as between Options 2 and 3, but the implication of the report is that Option 2 (replace Chalgrove) would come at the cost of two further rounds of consultation, (regulation 18 and regulation 19 so-called), and whilst might on the face of it bring in the new Standard Methodology housing numbers for South Oxfordshire, would also potentially lead to the breach of the Oxford Growth deal stipulation that SODC would submit its Local Plan by 1 April 2019.
13. The report also says that Option 3 (supplement Chalgrove) would not require two rounds of consultation, and whilst it might allow the Standard Methodology housing numbers to be used, it would allow the Local Plan to be robustly submitted and meet the Oxford Growth Deal deadline.
14. The relevant paragraphs are important to see as a whole. I highlight points of particular relevance. In relation to Option 2:

“60. Option 2 involves removing Chalgrove from the Plan altogether and finding an alternative site or sites.

61. The work required to support the identification of a replacement site follows a broadly similar approach to that of identifying a reserve site. The work involved is set out later in the report.

62. Option 2 would alter the existing Local Plan strategy to such an extent that Council would likely need to reconsider the Local Plan and undertake a further two rounds of public consultation prior to submission for examination. (A regulation 18 and regulation 19 consultation.) This is because the council must demonstrate that it has undertaken meaningful consultation prior to producing the final version of its Local Plan. At a Regulation 19 stage it is not advisable to alter the plan to such a significant extent. The additional consultation stage provides the safest approach balanced against this option. It also ensures that those who wish to make representations to the Local Plan can have their views taken into account in the formulation of the Local Plan prior to its publication.

63. Officers have reviewed the original timetable and drawn up a more detailed week based project plan, which reflects the current position before a final decision is made by Council. It is considered that this would add at least 18 months to the timetable.

April - May 2018 Information review of alternative sites
April - May 2018 Housing and employment land availability assessment update.
April - May 2018 Objectives Development
May 2018 Round Table Session – Information review of alternative sites
May - June 2018 Site Filtering exercise
June - Oct 2018 Evidence Base updates
October 2018 Round Table Session – outcomes of site filtering and evidence
Oct - Dec 2018 Draft Regulation 18 Local Plan
January 2019 Cabinet/Scrutiny/Council
Feb - March 2019 Regulation 18 Consultation
March - April 2019 Review consultation responses
May - Aug 2019 Update Local Plan and evidence base
September 2019 Cabinet/Scrutiny/Council
Oct - Nov 2019 Regulation 19 Consultation
January 2020 Submission to Secretary of State (Regulation 22)
April 2020 Examination in Public (Regulation 24)
July 2020 Main modifications consultation
September 2020 Inspector's report (Regulation 25)
October 2020 Adoption (Regulation 26)

64. As can be seen, under Option 2 the Local Plan would be submitted for examination after the end of the six month transitional period set out in the new (draft) NPPF. This means that the Plan would be considered against the policies of the new NPPF. The Council's OAN would be assessed against the new standard methodology plus any uplift as required and the Oxfordshire Housing and Growth Deal

65. It would also place the submission of the Local Plan beyond the 1 April 2019 deadline in the Oxfordshire Housing and Growth Deal, which would mean that we had failed to meet this agreed milestone and that we were in breach of the 'Deal'.

66. Option 2 would fundamentally weaken HE's case for CPO as the site would no longer be included as an allocation in an emerging Local Plan.

67. This would not necessarily preclude Chalgrove coming forward at a later date, subject to its availability.”

15. In relation to Option 3:

68. This option assumes that Chalgrove remains in the Local Plan, but that an additional reserve site or sites be included and provides an option for housing delivery in the event that the site at Chalgrove or the other strategic allocations do not come forward in a timely manner or at all.

69. This would involve the council undertaking the necessary work to identify an additional site(s) and ensure the necessary evidence is produced before the Plan is consulted upon again under Regulation 19 and then submitted for examination. Given that this option provides a reserve site(s), it is not considered that an additional regulation 18 stage would be required.

70. The work required to support the identification of an additional site follows a broadly similar approach to that of identifying a replacement site. The work involved is set out later in the next section of this report.

71. The likely timetable for progressing this option is set out below. Officers have reviewed the original timetable and drawn up a more detailed week based project plan, which reflects the current position before a final decision is made by Council. This timetable has been prepared to ensure submission in December 2018, the anticipated deadline for the transitional period under a new NPPF. The timetable provides more detail on the work required to appraise and filter additional sites in the next few weeks. The time required to complete the evidence base has been reviewed as much of this work is reliant on external consultants and their ability to match our timescales. It includes the potential for consultation on main modifications to the Local Plan. If this is not required, then the Local Plan could be adopted in June 2019.

April - May 2018 Information review of alternative sites
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May - June 2018 Site Filtering exercise
May 2018 Round Table Session – Information review of alternative sites
April – Aug 2018 Evidence Base updates
September 2018 Round Table Session – outcomes of site filtering and evidence
Sept – Oct 2018 Draft Local Plan
October 2018 Cabinet/Scrutiny/Council Oct –
Dec 2018 Publication of the Local Plan for consultation (Regulation 19)
December 2018 Submission to Secretary of State (Regulation 22)
March 2019 Examination in Public (Regulation 24)
June 2019 Main modifications consultation
August 2019 Inspector’s report (Regulation 25)
September 2019 Adoption (Regulation 26)

72. The availability of a reserve site in the Local Plan could weaken HE’s case for CPO. The wording regarding the additional ‘reserve’ site or sites will be important in this regard. The status of the site or sites will need to be written in the policy.

73. Further, the promoters of the ‘reserve’ site may well seek to progress their site regardless of their ‘reserve’ status. The triggers for releasing a ‘reserve’ site or sites must therefore be clear in the policy to ensure that this is limited.

74. The implication of this would be that the Local Plan would then likely be submitted under the proposed transitional arrangements for the NPPF and before the 31 March 2019, Housing and Growth Deal deadline.

75. It is considered that this option provides an efficient and proactive route for the Local Plan whilst reducing the risk to the overall soundness of the Local Plan. Councillors may wish to include one or more of these reserve sites within the Local Plan. The identification and selection process of reserve sites is not at this stage in the process, but officers will engage with councillors on the selection process prior to a recommendation to Cabinet/Council for the next stage.

76. As part of considering option 3, councillors could consider a potential sub-option – option 3a. Option 3a would be to delay the submission of the Local Plan beyond the transitional arrangements, but before the 31 March 2019 deadline. This opportunity will depend on the timing of the publication of the final NPPF and could present only a marginal timescale, and in the event that the NPPF is seriously delayed, no opportunity at all. Selecting this approach could enable the council to take advantage of the local calculation of housing need. The further implication of using a lower OAN figure would be to undermine the growth deal commitment to plan for 100,000 homes by 2031.

77. There is a further consideration as to whether we continue to plan to deliver more housing than is required or whether the level of development is then reduced if the new figures indicate a lower requirement.”

Issues

16. Against that summary of the current position as regards the SODC Local Plan, the Science Village Partners have identified three issues for advice:

- (1) The legality of Options 2 and 3;
- (2) Whether under Option 2 the Local Plan could lawfully proceed with the SOSV as a strategic allocation in place of Chalgrove without requiring both regulation 18 and regulation 19 re-consultation; and
- (3) Whether there are grounds to require SODC to make the Opinion publicly available.

The legality of Options 2 and 3

17. In order for a local plan to be lawfully adopted (leaving aside extreme legal errors such as failure properly to advertise it, or some other serious vitiating error extraneous to the content or substantive process that led to it passing the soundness tests), it must satisfy three key tests:

- (1) It must be accompanied by an Sustainability Appraisal that complies with the SEA Regulations, at the very least in setting out the reasonable alternatives that were studied, and an explanation of why the preferred course of action was chosen (see *Heard v Broadland DC* [2012] EWHC (Admin) 344).
- (2) It must have been the subject of a recommendation to adopt by the appointed EiP Inspector, either on the basis of the draft as submitted, or as proposed to be modified in order to achieve soundness, pursuant to section 23 of the Planning and Compulsory Purchase Act 2004 (“the 2004 Act”).
- (3) It must have been the subject of appropriate consultation, at regulation 18 and 19 stages, and (if there are to be later revisions such as main modifications) before any later changes are incorporated into the plan.

18. In my view, Option 2 (substitute a new site or sites instead of Chalgrove) would be lawfully capable of being lawfully progressed as a change to the current draft plan, for the following reasons:

- (1) The Local Plan has not yet been submitted for EiP, and there is no legal bar preventing SODC from materially altering it in response to changing circumstances;
- (2) In particular, there is nothing as far as I can see which would prevent sensible assessment of:
 - (a) The reasonable alternatives now available to meet housing needs and in relation to the overall strategy of the Local Plan – this would in practice require a re-working, re-issue and re-consultation on, the Sustainability Appraisal, leading to the identification of a new preferred option, including an explanation as to why it is preferred.
 - (b) The strategy of the Local Plan – against NPPF policy and other strategic objectives. For instance, whether any key aspects of the strategy would be affected.

- (c) The views of stakeholders. There would need to be an opportunity for meaningful consultation before SODC adopted the Local Plan in such a modified form. However, public consultation, whether styled ‘reg 18’, ‘reg 19’ or indeed consultation on amendments to the plan post-submission, would all in my view satisfy that obligation.
19. I deal with the judgemental or ‘soundness’ issues which might arise were Option 2 to be progressed, under the next issue.
20. Option 3 (retain Chalgrove but supplement it with a reserve site or sites) would, for similar reasons, be capable in my view of being progressed lawfully. The strategy, including how needs would be met, why the strategy is preferred in SEA terms, and public consultation, should all be capable of being undertaken. Again, I deal in the next section of this Advice with points going to the ‘soundness’ of Option 3.
21. I conclude therefore that both Option 1 and Option 2 would in principle be capable of lawful adoption as part of the Local Plan.

Whether Options 2 and 3 require Reg 18 and 19 re-consultation

22. This question turns on the scope, and purpose, of the consultation requirements. One should not forget that the absolute procedural requirements, found in the 2004 Act and in the Local Plan Regulation 2012 (as amended) are relatively simple:
- (1) The 2004 Act simply requires that a Statement of Community Involvement (“SCI”) in the exercise of plan making has been made (section 18); and that the plan must be drafted having regard to certain stipulated matters (section 19) including the requirements of the regulations (section 36) and whether the specific measures for community involvement set out in the local planning authority’s SCI have been satisfactorily dealt with (see *Kendall v Rochford DC* [2014] EWHC 3866 at [56]-[57].
- (2) The 2012 regulations require (a) that stakeholders are notified about the scope of the emerging plan and asked about what it might contain (reg 18), and (b) re-consult on the submission draft proposals (reg 19). There is a background of common law consultation principles, but the statutory provisions are clearly enough drafted to stand on their own up to the reg 19 stage.

- (3) The 2012 regulations are silent as to procedural requirements when main modifications are proposed (either by the local planning authority alone or in response to a finding by the examining Inspector). However, since main modifications will usually require a re-assessment of the SEA, and (by definition) go to the soundness of the plan overall, the guidance from the Planning Inspectorate and practice as it has evolved, both indicate strongly that further consultation should take place at that point. It is therefore inconceivable in practice that changes such as those represented by Options 2 and 3 in this situation would pass through the EiP process without due consultation, and the Inspector taking the fruits of that consultation into account.
23. Bearing those points in mind, together with the accumulated consultation drafts and material from the past three years in South Oxfordshire, it seems clear to me that there would be no need, in Option 2, for SODC to revert to the regulation 18 stage. The basic shape of the Local Plan would not change; whilst the major Chalgrove allocation would be removed, there are several other key allocations which form part of the ‘Heart of the District’ theme; the unmet needs of Oxford City would be met to some extent; and there would be further Green Belt release (but not GB release for the first time). The Cabinet Report for 10 May 2018 gives no reason why the Local Plan would be so changed by a substitution of sites; as I say in more detail below, it appears more of an assertion.
24. In other words, SODC would be well within their discretion to judge that Option 2 did not require the kind of first principles reg 18 re-consultation; critically, the statutory purpose of reg 18 (to identify the “subject of [the] local plan” and invite comment about what it should contain) will already have been undertaken, and the change would not be so radical that the Local Plan re-draft would appear to be a completely different plan aimed at a different subject or subjects.
25. I should also comment that I do not consider that it would necessarily be *legally* required for SODC to revert formally even to a further reg 19 consultation for Option 2. The change thereby represented, and the SEA revision, could in practice be dealt with during the progress of the EiP. The only statutory provisions which might arguably be offended by that course of action lies in the combination of s.20(2)(b) and 20(5)(b) of the 2004 Act, which respectively require (a) SODC to submit a plan for examination when they consider it is ready for examination; and (b) for the examining Inspector thereafter to consider (inter alia) whether it is indeed “sound”. It might be argued that for a local planning authority to submit a plan (ie the current draft) in a form which they had already identified needed at least a main modification, might run counter to the spirit, if not the words, of the section. That section is often paraphrased by Inspectors as

the local planning authority's duty "only to submit if they consider the plan is sound". As I say, that strictly speaking conflates two slightly different responsibilities laid by Parliament on two different bodies, but I think there would at least be a risk of legal challenge if SODC did indeed proceed straight to submission under Option 2.

26. The Cabinet Report for 10 May 2018, contains the view that Option 2 would require both sets of consultation, whilst Option 3 would not. I set out again the key paragraphs alongside each other:

62. Option 2 would alter the existing Local Plan strategy to such an extent that Council would likely need to reconsider the Local Plan and undertake a further two rounds of public consultation prior to submission for examination. (A regulation 18 and regulation 19 consultation.) This is because the council must demonstrate that it has undertaken meaningful consultation prior to producing the final version of its Local Plan.

69. This [Option 3] would involve the council undertaking the necessary work to identify an additional site(s) and ensure the necessary evidence is produced before the Plan is consulted upon again under Regulation 19 and then submitted for examination. Given that this option provides a reserve site(s), it is not considered that an additional regulation 18 stage would be required

27. I remind myself that the key issue is whether it would be legally necessary to revert to the regulation 18 stage for either option, rather than whether there would be more or less 'risk' (as the Cabinet Report puts it). I do not consider that it would be necessary to revert to regulation 18 stage in order for Option 2 (the replacement option) to form part of a lawful plan process, for the following reasons:

(1) Finding (including assessing/appraising) a site, either as a replacement or as a reserve site, involves exactly the same process - as the Report indicates (paragraphs 61 and 70). Therefore the identification of the preferred replacement site itself does not give rise to a need for regulation 18 consultation (since that is not considered necessary in relation to Option 3).

(2) Identifying a "reserve site" is not considered by officers to require regulation 18 consultation. I wonder whether the logic of the position has been fully explored. If it means anything, a "reserve site" is one which is designated with the realistic prospect of being needed, in place of one or more other allocated sites. That is clearly the situation here, given the deliverability concerns over Chalgrove. So Option 3 represents a Local Plan in which the reserve site is in fact developed, rather than Chalgrove. That is a Local Plan which the

officers consider would not require regulation 18 consultation. I entirely agree with that assessment, but it means that, looked at carefully, Option 2 logically does not require regulation 18 consultation either.

- (3) Having looked at the draft Local Plan as currently framed, I find it difficult to see why the substitution of Chalgrove with another site would necessarily “alter the existing Local Plan strategy to such an extent...”. No reasons are given. In my view, that would entirely depend on the site which was chosen to replace Chalgrove. I am not sure whether any of the main strategic ideas in the Local Plan would change, if SOSV was to be chosen to replace it. That option would not involve assessing a site which has not been thoroughly assessed previously and subjected to Sustainability Appraisal; it would not affect the ability of the District to meet any needs (for housing or otherwise); it would not involve a greater infrastructure provision or a change in emphasis in the settlement hierarchy (indeed, it is likely that Chalgrove’s replacement by any other site would involve fewer infrastructure requirements).
 - (4) Therefore in my view SODC could undertake the site appraisal exercise (as both notional timescales suggest could be done within a couple of months), putting it in a perfectly robust position to select a replacement site which did not require the full double consultation – that carries with it a potentially serious downside of missing the Growth Deal submission deadline. At that point it could amend the draft, carry out a regulation 19 consultation and submit the Local Plan.
 - (5) Cabinet members I hope will be informed that the consultations with affected parties do not cease with the regulation 19 phase in any event. That is in part the purpose of the Examination in Public, and even Main Modifications. To take a recent example, the Mid Sussex Plan (adopted March 2018) featured an EiP which contained significant Main Modifications, including the introduction of a strategic housing site; that was assisted by a bespoke day of hearing to enable views to be aired by those affected, as well as written consultation.
28. I have the same views about Option 3. SODC could in my view add a reserve site or sites to the draft Local Plan by simply re-visiting the reg 19 stage, without breaching the statutory provisions. Indeed, there would be a strong argument that they could proceed straight to submission, given that the main modification that Option 2 would entail would not affect the overall strategy even as much as Option 2 would, and would inevitably be subject to full discussion at the EiP and consultation. However, the same point about the ‘spirit’ of the

legislation would also apply and there would be some risk of a legal challenge if SODC were to take that route, albeit a challenge which would be most unlikely to succeed.

29. I have one additional observation about Option 3. I have observed above that the Council officers' reasoning does not fully explore the notion of "reserve sites". Essentially, they are sites which are liable to be needed and therefore should be sound. They are inherently awkward to fit into the language of the NPPF. The policy requirement is to allocate to meet the identified needs. If there is a tangible doubt over the timing or deliverability of the Chalgrove site, then there is a powerful argument that the authority should allocate new sites to ensure a smooth supply of sites throughout the period.
30. I say that particularly given the need to demonstrate a rolling 5 year supply, and ideally 6-10 years (ie when the strategic sites would properly begin to deliver). Allocating a securely deliverable site or sites, rather than only allotting them 'fallback' status would remove the risk that they would not come forward/be allowed to come forward until it became clear that Chalgrove was delayed – by which time it might well be too late to ensure a steady supply, and the effects of failure to show a 5 year supply and meet the delivery test would be felt.
31. For these reasons, I conclude that there would be no need for both reg 18 and reg 19 stages to be revisited for either Option 2 or 3.

Releasing the Opinion

32. SODC has hitherto refused to release the Opinion, which appears to advise that Option 1 would be lawful. I strongly suspect that the reasoning was based on the proposition that, notwithstanding the objections of the County Council and the various pronouncements of Homes England, one might rationally conclude as a matter of judgement that there was some reasonable prospect of the delivery of the Chalgrove scheme; and that as evidence changed through 2018, it would be possible to promote a main modification to the Local Plan (eg Option 2) if it proved necessary. Whatever the reasoning, the Opinion was taken into account by the Full Council and on the face of it should be disclosed.
33. It is notable that the objection to its disclosure is stated to be one of 'public interest'. One would need rather more justification in a situation like this for withholding otherwise relevant material from public scrutiny. There is no legal or other (eg policy making) justification advanced and I consider that it would be very much in the public interest to see what SODC was being advised.

34. I cannot readily see the harm, either to the particular Local Plan process, or to local plan processes in general, of making such advice public. It was commissioned to guide the thinking of the Cabinet and Council at a time when the evidential underpinning of the draft Local Plan seemed to have been eroded to some degree. Given that the Council has decided to review the issues again, and decide (probably) between Option 1 and Option 2, what the Opinion says about Option 1 cannot surely be so sensitive that the public interest would be harmed in releasing it. It presumably says that Options 2 and 3 would also be lawful, which, again, I fail to see as a difficult or unacceptable point to be disclosed.

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