

**IN THE MATTER OF THE OXFORDSHIRE MINERALS AND WASTE PLAN  
CORE STRATEGY**

**AND**

**IN THE MATTER OF REPRESENTATIONS MADE BY COMMUNITIES  
AGAINST GRAVEL EXTRACTION (CAGE)**

**FURTHER ADVICE.**

**Introduction.**

1. I have been asked by CAGE to consider the situation in the light of recent events and more particularly the suspension of the consideration of the examination of the Minerals and Waste Strategy (the Strategy) by the Inspector appointed to hold the examination. The Inspector made it known by email dated the 26<sup>th</sup> February 2013 that he “has suspended the examination until 31<sup>st</sup> May 2013” for reasons that can be identified from an exchange of correspondence between himself and Oxfordshire County Council, “the Council”.
2. The advice which is sought from me is in respect of the various options available to CAGE following the suspension of the examination and in particular whether any further representations should be made at this time to the Inspector.
3. I set out a brief chronology of events starting with the representations made by CAGE, as they appear from the papers before me, to assist with this advice and I would be grateful for confirmation that what I set out is correct. In compiling the chronology I have drawn from all the papers before me and clearly some of the

matters would not have been known by CAGE at the time but only became clear later.

### **The Brief Chronology.**

4. CAGE responded to the publication of the Strategy by completing and submitting the Representation Form on the 16<sup>th</sup> July 2012. The Representation made set out in detail the concerns of CAGE and was presented to the Council on the basis that if matters contained within it could be addressed and dealt with they could, therefore be withdrawn from consideration at the examination itself. I do not repeat the contents of Representation made at this time as they can be read in the form submitted.
5. That implicit invitation to the Council to address any points it was able to was not taken up and accordingly the Representation as made was sent forward for consideration as presented. I am not aware of any attempt by the Council to respond to any of the points made by CAGE.
6. It would appear, as set in the Inspectors letter dated the 9<sup>th</sup> January 2013 that an Inspector undertook an Advisory Visit to the Council during July 2012. Although the detail of that visit is not available it would appear that there were “a number of items which the inspector ... identified as being necessary”; which do not appear to have been supplied; which were still outstanding when the Inspector sent his letter in January 2013. No criticism is to be made of the use of an advisory Inspector whose function is to try to assist with the smooth consideration of the documents but a failure to follow the guidance issued by that inspector is a ground for concern.
7. It would appear that the next date in the chronology that CAGE would have been aware of was the receipt of the email dated 23<sup>rd</sup> November 2012 indicating the Councils next action.

8. In that email, which was sent to all Consultees to the Strategy, the Council set out the future programme for consideration of the Strategy. In particular the Council indicated the following three matters:-

(i). that by that date the Council had submitted the Strategy for independent consideration;

(ii). that the Strategy remained unchanged from the proposed submission document and therefore none of the 400 representations received had caused the Council to change any part of the Strategy;

(iii). that the independent examination will now be carried out by the Planning Inspector and subject to his findings that the Strategy would be adopted later in 2013.

9. The contents of that email indicate that the Council was of the view that the matter could proceed to be considered at the examination and that all the relevant material could be made available to the Inspector.

10. In sending the Strategy forward for consideration at the examination the Council must have satisfied itself that the provisions of Section 20(2) of the Planning and Compulsory Purchase Act 2004 had been complied with. That Act requires that “the authority (here being the Council) must not submit such a document unless- (a) they have complied with any relevant requirements of the regulations and (b) they think the document is ready for independent examination.”; I note the Inspector has also referred to that fact.

11. Accordingly as of the 23<sup>rd</sup> November 2012 the Council must have been of the view that the Strategy was complete and ready for examination by the Independent Inspector on the basis of the documentation and evidence then

available. I am also aware that a timetable was thereafter put in place which was intended to be followed leading to the examination, which would also suggest that the Council was ready to proceed.

12. The importance of that cannot be overstated. It means that the basis on which the Council had developed its proposals and presented its approach, as set out in the Strategy was known. The evidence supporting that approach was identifiable and the potential arguments that could be raised and relied on by the Council in opposing the representations being made were in the public domain. As such CAGE, as well as any other person or body making a representation would have been aware of the case that was being put forward by the Council. That situation would have complied with the relevant statutory provisions and would have permitted the examination to take place with the relevant information being available to all. The position now or at least the possible position given that the information is not yet available, is no longer so clear. If the examination is to proceed therefore every opportunity will need to be given to those objecting to the Councils proposals to be able to deal with them fully.
13. I recall that part of the objections raised by CAGE, did rely on the paucity of the evidential base supporting the Strategy and that would have been a point taken at the examination itself. The Council's submission of the Strategy would suggest however that it was satisfied with the evidence it had and would be able to defeat the objection raised.
14. The next step in the chronology is revealed by the exchange in correspondence between the Inspector and the Council in January and February 2013. That correspondence indicates several important matters, which I will summarise rather than attempt to set out in full.
15. First it indicates that the Council acknowledged that further work was necessary to support the Strategy in terms of providing the evidential basis for it, and that it

had by the time the document was submitted put in place additional work. The papers reveal that a draft Local Aggregates Assessment for Oxfordshire was published in October 2012. That document is so incomplete as to be virtually worthless in the context of the consideration of the Strategy and it was acknowledged by SEEAWP to be deficient. The fact that it was commissioned and published indicates the need for it to support the Strategy. Without that, as well as in respect of other aspects, the evidential base to support the Strategy is lacking. The Inspector points out correctly in his letter of the 9<sup>th</sup> January that the evidential base should have been available at the time that the Plan was submitted for examination. Accordingly, the evidence available at that time and which was considered by those making representations is the evidential base that should apply. If the Council's approach is found to be lacking against that base then the Strategy should be rejected.

16. Secondly, the correspondence raises the question whether the Plan was actually submitted prematurely and the question of withdrawing it is presented as an option for the Council to take. The Council rejected that option and chose instead to seek a suspension of the examination. As such the Council must be satisfied with that as an approach and it must be prepared to have the Strategy considered on the basis of the current evidential base supported by additional matters that the Inspector decides can be accepted in the context of this Strategy, provided the opportunity is given for any interested party to consider what is being presented. The one point worthy of mention is that although the Inspector is clearly aware of the statutory provision he addresses it by saying that the Council "should not" submit the plan unless the Council thinks that it is ready. In my view the test is more strict than that with the requirement being "must not" submit it. On that basis if the view is taken that the Council was manifestly not ready, as appears to be the case from the correspondence then the submission came too early and the application itself may be susceptible to judicial review and quashing.

17. The third element to note is the clear desire on the part of the Inspector to ensure that all parties are treated fairly. In the case of Representors he has made it clear that they will need the evidence in order to prepare their statements on a proper basis. CAGE should welcome that recognition that they will not be disadvantaged by the Council's late production of evidence and there can be no doubt that if matters change to such a degree that additional information needs to be presented by CAGE, then the opportunity will be offered through the production of statements to present it. The one point to note however is that if the evidential base as eventually put together indicates a change to the Strategy beyond that which would normally be considered as falling within a modification process it may mean the Strategy itself is not found to be lawful or sound. We will therefore need time and opportunity to consider all such changes as they emerge.
18. The fourth factor is that there appears to be a recognition that additional work, as opposed to adding to the evidential base, is also required; compliance with the NPPF being one such element. I do not believe a comprehensive list of all such items has yet been compiled but the fact that such items still need to be looked at indicates the Plan has been submitted prematurely and care will be needed in dealing with the way that the updated information comes forward.
19. There is one particular aspect that has emerged that appears to be insurmountable. One of the objections raised by CAGE in its representations related to the NPPF requirement of cross border cooperation. I note that the Inspector has picked up the same point in the correspondence and has specified that in his view such a problem is potentially incapable of remedy as it is an action that is required prior to submission.
20. The Council towards the end of that exchange of correspondence sought to challenge the Inspector on that issue and it has suggested that the NPPF requirements are not required to be applied retrospectively to the Strategy. The Council appears to be saying that it does not have to comply with the NPPF in the

preparation of the Strategy as the work started before the NPPF came into existence.

21. In my view the Council is fundamentally incorrect on that approach. Case law suggests, at least in so far as dealing with the consideration of a planning application that the policy position as it applies at the time the decision is made is the correct policy to follow and what precedes it is no longer relevant; see for example R v Secretary of State for the Environment exp. Bickenhall Parish Council [1987] JPL 773. To suggest that the Council can ignore the current and applicable policy requirements because the process was started under the previous policy regime is, in my view, wrong and without any support.

#### **The Options Available.**

22. These can be stated shortly but ultimately the final choice will remain with the Council. That is because the Strategy as developed and brought forward is the Council's approach to matters within its area but there are steps that have to be complied with in order for the independent inspector to be able to support it.
23. The Strategy will either proceed to the examination for it to be considered, it will be withdrawn by the Council or it may remain as at present in a state of suspension; although that cannot exist indefinitely. The Council has clearly indicated a desire to continue to the examination irrespective of the views being expressed by either those making representations or the Inspector himself.
24. I believe we can assume therefore that the Council wishes to proceed.
25. In respect of CAGE, therefore I can only see two options being available. There is nothing to be gained by a continued period of suspension and so I do not include that as an option at all.

26. The first option is to support the Councils desire to see the matter progress and for the examination to get under way to consider the Strategy as drafted or as drafted with appropriate modifications.
27. The second option is to support the call for the Council to withdraw the Strategy as presented so far. Withdrawal would mean, however a continuing period of uncertainty whilst the Council reconsider the position and which may result in the same suggestions being made which would therefore have to be considered at a later stage.
28. In my view the only sensible solution is to seek to proceed and to have the examination proceed at which time CAGE will be able to present all the many reasons why the Strategy is currently defective including as it does the site at Cholsey. The Council clearly wishes to proceed and provided CAGE are given the opportunity to consider any new or additional information, which the Inspector has indicated will happen, then the position should be protected. I would suggest that CAGE communicate with the Inspector along the lines set out in this advice and urge him to recommence consideration of the Strategy at the earliest possible moment consistent of course with the need to allow sufficient time for CAGE and its advisors time to consider the available information.
29. In the context of the examination proceeding I would wish to make one other matter clear. The Inspector has indicated that if it proceeds then he would wish to hold a preliminary session into the duty to cooperate point. CAGE should support that approach because not only is it an argument they have raised it would appear to be an insurmountable problem for the Council to overcome. The Inspectors preliminary view is very supportive of the CAGE position and it may be the case that the Councils failure to comply with the NPPF on this issue is fatal. The Councils current answer to that issue is in my view legally flawed and given that the duty needs to be complied with prior to submission of the Strategy I do not see how the Plan can proceed.



30. If that issue is considered and the Inspector finds against the Council then the Strategy will be rendered unlawful and unsound and it will have to go back for reconsideration. I accept that the Council may thereafter choose to bring forward a replacement Strategy and that Strategy may still include the Cholsey site, given that it will not have been ruled out by the Inspector, but that is an inevitable consequence of the Inspector considering a preliminary issue rather than considering the full case. It would mean, however that any reconsideration of the Cholsey site would be carried out on the basis of the information then known including any additional housing sites coming forward or any new historical information.
31. On a final matter I would simply raise the question of the additional historical information. In the representations that were made by CAGE reference was made to some additional work being carried out on the archaeological value of the area. I was wondering if that work had been completed and whether the information had been presented as was suggested in the Representation Form.
32. If I can be of any further assistance then those instructing me should not hesitate to call me.

Simon Randle  
4-5 Gray's Inn Square,  
Gray's Inn,  
London  
WC1R 5AH.