

Report for:
ACTION



Contains Confidential or Exempt Information	YES, Appendix 1- Not for publication by virtue of paragraph 5 of Part 1 of schedule 12A of the Local Government Act 1972.
Title	Update on Draft Borough Local Plan
Responsible Officer(s)	Russell O'Keefe, Strategic Director of Corporate and Community Services.
Contact officer, job title and phone number	Russell O'Keefe, Strategic Director of Corporate and Community Services, 01628 796521
Member reporting	Cllr Wilson, Lead Member for Planning
For Consideration By	Cabinet
Date to be Considered	29 September
Implementation Date if Not Called In	Immediately
Affected Wards	All

REPORT SUMMARY

1. This report provides an update on the draft Borough Local Plan.
2. A legal compliance review has been carried out on the draft Plan that has highlighted some significant potential risks. The report, therefore, sets out the proposed approach and timetable to mitigate those risks wherever possible.

If recommendations are adopted, how will residents benefit?

Benefits to residents and reasons why they will benefit	Dates by which residents can expect to notice a difference
Adoption of the Local Plan will give residents certainty about the development strategy and future land uses within the Royal Borough.	December 2017

1. DETAILS OF RECOMMENDATIONS

RECOMMENDATION: That Cabinet:

- i. Endorse the approach and timetable set out in paragraphs 2.17 to 2.19.

2. REASON FOR RECOMMENDATION(S) AND OPTIONS CONSIDERED

Background

- 2.1 The Borough Local Plan is a key corporate priority and over the last few years the Council has been progressing the development of a new Borough Local Plan which would act as the overarching planning policy framework for the Borough.
- 2.2 The Department of Communities and Local Government (CLG) is focused on ensuring all Councils have post 2004 Planning Act plans in place as set out in the Housing and Planning Act 2016. The Council is one of approximately 50 Councils that does not have an up-to-date plan in place due in part to the fact its 2007 draft Local Plan was rejected at Examination by the Planning Inspectorate and no further plan has been produced.
- 2.3 The Government has also set a target for all planning authorities to have submitted new Local Plans to the Planning Inspectorate by early 2017 (no exact date has been published) or face potential intervention in the plan making process. This in practical terms means the Planning Inspectorate producing the Plan on behalf of the Council. Intervention would be likely to be prioritised to those Councils in areas of high housing pressure who have made the least progress on a plan.
- 2.4 The Council's Local Plan has been in full draft format since June. In July a detailed legal compliance review was undertaken. The review sought to test whether the plan complies with all the necessary legislation and the probability of it being found sound at examination by the Planning Inspectorate. The Council has a legal duty to only submit a plan for examination that it believes is legally compliant.
- 2.5 The review was undertaken by Mark Beard at 6 Pump Court Chambers who is a leading planning barrister with significant experience of the plan making process. The completion of the review took longer than usual due to the range of issues identified. A copy of this advice, which is confidential, is attached at Appendix 1.

Main legal issues identified

- 2.6 The legal compliance review has highlighted the following main legal risks:
 - The July 2015 Regulation 18 consultation undertaken by the Council did not include a Sustainability Appraisal to support the strategy being consulted upon. This is a legal requirement.
 - In March 2016, Cabinet took a decision not to undertake further Regulation 18 consultation. The Leader, at the time, was clear that the borough did not need to undertake further Regulation 18 consultation on a draft plan. This decision is not a legal breach in itself. The barrister's opinion is that, as the decision not to further consult at Regulation 18 was not sufficiently supported by the evidence, it undermines the council's decision.
 - The very compressed timetable for plan preparation, where there is a need to jointly produce and/or agree the evidence base with duty to cooperate partner authorities who are moving at different speeds, has not always allowed for the key elements of the evidence base, which required broad consultation, to be completed in the correct sequence.

- As many of the discussions on the emerging local plan were Part 2 items, including the Maidenhead Golf Club non disclosure agreement and negotiations, this has presented risks to the process.
- Incomplete record keeping, historically, in the team has meant the compliance statement for duty to cooperate has had to be prepared retrospectively, which is a risk. There have been significant meetings/workshops with records, with neighbouring authorities – which will continue beyond submission of the Plan.

Options to address the legal issues

- 2.7 The option of continuing to the original timetable, as set by members, was assessed alongside two further options. The detail is set out in points 2.8-2.21.

Option 1 - Continue to the original timetable

- 2.8 If the original timetable was followed the Local Plan would have been taken to Council on 27 September 2016 and then published for Regulation 19 Local Plan Publication consultation in October 2016 and submitted to the Planning Inspectorate at the end of November 2016.
- 2.9 The specialist barrister's advice very strongly indicates if the Council approves the current Local Plan this would mean they would be submitting a plan that is not legally compliant. The legal opinion indicates that this would almost certainly be immediately rejected by the Planning Inspectorate on the grounds of duty to cooperate and legal compliance grounds.
- 2.10 If rejected the Council would need to go right back in the process and be at risk of intervention. In addition the Council under the legislation has a legal duty to only submit a plan that it believes to be legally compliant. As such, the Council would be in breach of the legislation.
- 2.11 Officers are not allowed to recommend a course of action to Council that they believe to be unlawful. If the Council were to agree to submit the current draft BLP without further consultation, because of the legal opinion, the Council's Monitoring Officer would have no choice under the legislation but to issue a section 5¹ report to warn members that officers consider members' proposed course of action to be unlawful.
- 2.12 For the reasons in 2.9 – 2.11, this option of submitting the Borough Local Plan could not be recommended as it is very likely the Council would be acting unlawfully and the plan would almost certainly be immediately rejected by the Planning Inspectorate. The result of this outcome would be a requirement on the Council to go back and carry out full Regulation 18 consultation, starting with issues and options and then Regulation 19 consultation alongside further detailed duty to cooperate work. It could also require preparation of further evidence to avoid the accusation that evidence is out of date. The corrective action would take at least nine months from rejection by the Planning Inspectorate (October 2017). There is also a strong possibility of rejection by the Planning Inspectorate which would lead to intervention in the plan making process by DCLG.

¹ Section 5 report: issued under Section 5 of the Local Government and Housing Act 1989 to every Member of the Council to be considered within 21 days and which stops the implementation of any proposal/action /decision, which is the subject of the Section 5 report until Council have considered it.

Option 2 – Carry out further work and then proceed to Regulation 19 publication consultation

- 2.13 This option would involve significant further detailed work to strengthen the draft Local Plan and supporting documentation to specifically address the legal risks identified. This would include:
- Setting out a very detailed explanation of the process of the development of the Local Plan since 2014 with specialist legal support.
 - Completing the work to prepare, finalise and publish all the key supporting documents including the evidence base, final sustainability appraisal and consultation statement and compliance statement again with legal support. This would also include looking at whether there are any final acceptable options to increase the amount of Objectively Assessed Housing and Employment Need that is to be met.
 - Requesting that the other duty to cooperate Councils sign memorandums of understanding setting out clearly the issues of agreement and difference.
- 2.14 The Council would then undertake Regulation 19 consultation with the attendant risks identified but with an open mind as to the possibility of having to make further changes to the Local Plan in response to the representations received. In practical terms this would mean if there was a significant negative reaction at Regulation 19, the Council would need to change the plan and re-do both Regulation 18 and 19 consultations.
- 2.15 This would mean delaying final submission to the Planning Inspectorate from late November 2016 to end January 2017. If there was a significant negative reaction from the public at Regulation 19, a further full Regulation 18 process starting with Issues and Options and a Regulation 19 Local Plan Publication would be required and this would mean the timescale would be approximately a further nine months from that point (August 2017).
- 2.16 This option could not be recommended as it presents significant risk in proceeding with a Plan that the specialist barrister advises may still not be legally compliant even with all the significant extra work. Councils have a duty within the legislation to submit a plan they believe is legally compliant.

Option 3 – Carry out further work and then proceed to return to Regulation 18 consultation

- 2.17 This option would mean carrying out all the other work set out in 2.13 and also undertaking a Regulation 18 consultation on a full Draft Plan which would explain decision making choices and reasonable alternatives since 2014, informed and supported by a Sustainability Appraisal. We would then proceed to Regulation 19 Local Plan Publication consultation.
- 2.18 This would mean delaying final submission from late November 2016 to early April 2017, see timetable in section 15. The Council would publish an updated Local Development Scheme (LDS) in line with this timetable, a copy of the revised LDS would be provided to CLG which is currently monitoring progress on plan making against LDS. This would be supported by local communications.
- 2.19 This option is strongly recommended as it presents the opportunity to significantly mitigate the risks outlined in the legal advice.

Specialist support and advice

2.20 If option 3 is agreed, the Council will need to bring in additional specialist advice to work alongside the temporary specialist resource already secured.

2.21 The Council has liaised with CLG regularly and through recent discussion they have arranged for the Planning Inspectorate to undertake an informal review and feedback on the Draft Plan prior to Regulation 19 Publication consultation.

3. KEY IMPLICATIONS

Defined Outcomes	Unmet	Met	Exceeded	Significantly Exceeded	Date they should be delivered by
Borough Local Plan published at Regulation 19 by 22 February 2017	Plan published at Regulation 19 after 22 February 2017	Plan published at regulation 19 on 22 February 2017			22 February 2017
Borough Local Plan submitted	Plan submitted after 6 April 2017	Plan submitted by 6 April 2017			6 April 2017
% appeals upheld as a result of an up-to date Borough Local Plan	< 79%	80%	81-89%	90%+	Ongoing

4. FINANCIAL DETAILS

4.1 The significant extra work and specialist help needed to address the legal issues will require additional capital budget.

	2016/17	2017/18	2018/19
	Revenue £'000	Revenue £'000	Revenue £'000
Addition	£0	£'000	£0
Reduction	£0	£0	£0

	2016/17	2017/18	2018/19
	Capital £'000	Capital £'000	Capital £'000
Addition	£94	£'000	£0
Reduction	£0	£0	£0

5. LEGAL IMPLICATIONS

- 5.1 The Borough Local Plan must be compliant with the Town and Country (Local Planning) (England) Regulations 2012 and must take into account the National Planning Policy Framework. The Plan will also need to take into account any changes that are brought about as a result of the Housing and Planning Act 2016 and the enactment of provisions therein.
- 5.2 The Council must cooperate with other local planning authorities and other prescribed bodies in the preparation of development plan documents in accordance with Section 110 of the Localism Act 2011 and Section 33A(3) of the Planning and Compulsory Purchase Act 2004, otherwise known as the Duty to Cooperate.

6. VALUE FOR MONEY

- 6.1 The Borough Local Plan will provide greater certainty as to the future level of development that can be expected and provide a robust basis for refusing planning applications and defending any subsequent planning appeals, including applications for costs.

7. SUSTAINABILITY APPRAISAL, HABITATS REGULATIONS ASSESSMENT AND STRATEGIC ENVIRONMENTAL ASSESSMENT

- 7.1 As part of the Borough Local Plan production process, a Sustainability Appraisal (SA/SEA) needs to be completed at each stage. The Sustainability Appraisal will be submitted with the Plan. A Habitat Regulations Assessment will also be submitted with the plan.

8. RISK MANAGEMENT

- 8.1 A comparison of the risks of the three options is set out in table 1. There are risks of varying degrees with all three options.

Table 1: Risk

	Risk option 1	Risk option 2	Risk option 3
1	The Council would be likely to be knowingly acting unlawfully.	Local plan is rejected prior to Public Examination by the Planning Inspectorate on Duty to Cooperate grounds.	Potential that at Public Examination the Inspector will require further modifications which would mean suspension of the Examination whilst the additional work is done.

2	Local plan is rejected prior to Public Examination by the Planning Inspectorate on Duty to Cooperate grounds.	Local Plan is rejected prior to Public Examination by the Planning Inspectorate on legal compliance grounds.	Local Plan is found unsound at Public Examination by the Planning Inspector.
3	Local Plan is rejected prior to Public Examination by the Planning Inspectorate on legal compliance grounds.		

8.2 An overall summary of the risks and controls is set out in table 2.

Table 2: Risk and Control

Risk	Uncontrolled risk	Control	Controlled risk
The Council acts unlawfully	Very High	Actions set out in the recommended option (3)	Low
Local plan is rejected prior to Public Examination by the Planning Inspectorate on Duty to Cooperate grounds.	Very High	Actions set out in the recommended option (3)	Low
Local Plan is rejected prior to Public Examination by the Planning Inspectorate on legal compliance grounds.	Very High	Actions set out in the recommended option (3)	Low
The government intervenes in the plan making process	High	Actions set out in the recommended option (3)	Low
Local Plan is found unsound at Public Examination by the Planning Inspector.	Medium	Failure to secure a sounds plan	Medium/ Low
Potential that at Public Examination the Inspector will	High	Actions set out in the recommended option (3)	Medium/ Low

Risk	Uncontrolled risk	Control	Controlled risk
require further modifications which would mean suspension of the Examination whilst the additional work is done.			

9. LINKS TO STRATEGIC OBJECTIVES

- 9.1 The plan would help to achieve putting residents first through encouraging healthy people and lifestyles, improvement of the environment, economy and lifestyles and working for safer and stronger communities. It would also support the priority to deliver together by strengthening partnerships and value for money by investing in the future.

10. EQUALITIES, HUMAN RIGHTS AND COMMUNITY COHESION

- 10.1 An Equality Impact Assessment (EQIA) has been carried out and the assessment concludes that it is considered that the draft Borough Local Plan will not unlawfully discriminate against any group or individual, or provide the grounds for such discrimination. This will continue to be updated throughout.

11. STAFFING/WORKFORCE AND ACCOMMODATION IMPLICATIONS

- 11.1 Additional specialist support will be required to effectively and efficiently progress the draft Borough Local Plan towards submission and adoption.

12. PROPERTY AND ASSETS

- 12.1 The draft Borough Local Plan may indirectly affect property values across the borough including property owned by the Council.

13. ANY OTHER IMPLICATIONS

- 13.1 N/A

14. CONSULTATION

- 14.1 In addition to the statutory consultation and duty to cooperate set out in the timetable there would also be consultation with Local Plans Working Group.

15. TIMETABLE FOR IMPLEMENTATION

- 15.1 It should be noted that once the Borough Local Plan has been submitted to the Secretary of State timings are out of the control of the Council and will be determined by the Planning Inspectorate.

Timescale	Details	Target Date
29 September - 10 November 2016	Further work to strengthen the Plan and supporting documents and duty to cooperate	10 November 2016
24 November 2016	Cabinet approve Regulation 18 Consultation Draft of Full Plan	24 November 2016
2 December 2016- 13 January 2018	Regulation 18 Consultation and further duty to cooperate	13 January 2018
3 December - 13 February 2017	Consider and process all representations (as they are received) and then prepare final Regulation 19 Local Plan Publication	13 February 2017
21 February 2017	Council approve Regulation 19 Local Plan Publication	21 February 2017
22 February - 5 April 2017	Regulation 19 Consultation completed	5 April 2017
22 February - 5 April 2017	Collate representations (as they are received) and then Final Submission to Secretary of State	6 April 2017

16. APPENDICES

Appendix 1 – Legal Compliance Review – Part II item. Not for publication by virtue of paragraph 5 of Part 1 of schedule 12A of the Local Government Act 1972.

17. BACKGROUND INFORMATION

18. CONSULTATION (MANDATORY)

Name of consultee	Post held and Department	Date sent	Date received	See comments in paragraph:
Internal				
Cllr Derek Wilson	Lead Member for Planning	14/9/16	20/9/16	Throughout
Alison Alexander	Managing Director/ Strategic Director Adults, Children and Health	14/9/16	20/9/16	Throughout
Simon Fletcher	Strategic Director Operations and Customer Services			
Rob Stubbs	Head of Finance			

Name of consultee	Post held and Department	Date sent	Date received	See comments in paragraph:
Jenifer Jackson	Borough Planning Manager	15.9.16	15.9.16	Throughout the report.

REPORT HISTORY

Decision type:	Urgency item?
Key decision	Yes

Full name of report author	Job title	Full contact no:
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