Planning for a better London: the legal framework for promoting a new London Plan

Neil Cameron QC

1. In July 2008, the Mayor of London published a report entitled *Planning for a better London*.[1] That report described itself as "the first stage in reviewing the London Plan". It set out a timescale for making a number of alterations to the London Plan in the short term, and for starting work on a complete review of the London Plan to be completed by 2012.[2] *Planning for a better London* acknowledged that the process of altering the London Plan "can be quite lengthy". In *Planning for a better London- Response* the Mayor stated that he intended to produce an entirely new London Plan before the next Mayoral election in 2012. The purpose of this paper is to examine what that process is, and to identify the opportunities which exist to influence the emerging policy.

The statutory and policy framework

2. The London Plan – or, more accurately, the Mayor's spatial development strategy – finds its statutory basis in the Greater London Authority Act 1999. Section 334(1) imposes a statutory duty on the Mayor to prepare and publish a spatial development strategy, which must include his "general policies in respect of the development and use of land in Greater London" (s 334(3)). The Mayor is limited to dealing only with matters which are of "strategic importance to Greater London" (s 334(5)) and must comply with a number of requirements as to form and content prescribed in the Town and Country Planning (London Spatial Development Strategy) Regulations 2000/1491.

3. Guidance on the scope and format of the SDS and on the arrangements for the review, alteration and replacement of the SDS are set out in GOL Circular 01/2008. The circular indicates that there is no simple definition of 'strategic importance'[3]. The distinction between strategic issues and issues of local importance was considered in a different context in R (Mayor of London) v. First Secretary of State[4] . That case concerned a challenge to the Secretary of State's decision to award costs against the Mayor following a planning inquiry. The Court held that in determining the costs application the Secretary of State was entitled

[1] http://www.london.gov.uk/mayor/publications/2008/docs/plan-better-london.pdf

[2] See pp 34-35.

[3] GOL Circular 01/2008 paragraph 2.11

[4] [2008] EWHC 631 (Admin)

to conclude that design matters of purely local (i.e. not strategic) significance were not within the Mayor's remit to direct refusal, because the powers of direction were solely concerned with strategic planning[5].

4. The initial stage of policy formulation – the preparation of a draft of his proposals – is a matter for the Mayor himself. Whilst there may be non-statutory consultation processes as part of the drafting process (such as that in *Planning for a better London*), the formal consultation only commences after the Mayor has prepared his draft.

5. In formulating the strategy for spatial development the Mayor must have regard to[6]:

    a. The general duties of the Mayor[7]
    b. The European context
    c. National policy, in particular PPG's and PPS's
    d. The regional context[8]

6. The reasoned justification is required to contain a statement of the regard that the Mayor has had in formulating the strategy for spatial development in Greater London to the matters specified in sections 41 and 342(1)(a) of the Greater London Authority Act 1999 and the matters prescribed in regulation 6(1) of the Town and Country Planning (London Spatial Development Strategy) Regulations 2000[9].

7. GOL Circular 01/2008 indicates that "Whilst the SDS should establish the broad locations for specific types of development of strategic importance, it should not be site specific."[10]

(i) Consultation of the Assembly and "functional bodies"

[5] [2008] EWHC 631 (Admin) at paragraph 43

[6] Paragraph 2.5 of GOL Circular 01/2008

[7] Sections 342(2) and 41 of the Greater London Authority Act 1999

[8] Section 342(1)(a) Greater London Authority Act 1999

[9] Regulation 6(3) of the Town and Country Planning (London Spatial Development Strategy) Regulations 2000

[10] GOL Circular 01/2008 paragraph 2.15

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8. The first phase of consultation in the London Plan process is limited to the Assembly and "functional bodies", namely Transport for London, the London Development Agency, the Metropolitan Police Authority and the London Fire and Emergency Planning Authority[11]. A draft of the Plan is to be made available, and the Assembly and functional bodies must be consulted (s 335(1)(c) GLA Act 1999).

9. Following amendments to the 1999 Act which came into force in 2008,[12] there is now a duty on the Mayor to "have regard to" comments made by the Assembly or functional bodies at this first consultation stage (s 335(1A)). This is coupled with a new duty to prepare a written statement for submission to the Assembly identifying which of the Assembly's comments in response to the consultation are accepted, and "setting out the reasons why any comments so submitted are not so accepted" (s 335(1B)).

10. This is a notable strengthening of the role of the Assembly in the London Plan process. The Mayor must carefully consider the Assembly's comments, and give reasoned justification for not accepting any comments. It is therefore likely that the Assembly will have more influence over the Plan which goes out to general consultation than was previously the case. It follows that those with an interest in the plan process may now focus more attention on lobbying Assembly members and seeking to influence policy at this early stage.

(ii) General consultation

11. Following the consultation of the Assembly and functional bodies and the submission of the Mayor's statement on the Assembly's comments, the Mayor is then required to prepare a draft of his proposed Plan for general consultation. That Plan must be made available at the GLA's principal office and at other places which the Mayor considers appropriate.[13] The draft Plan must be sent to the Secretary of State and each London borough council, and each

[11] Section 424(1) Greater London Authority Act 1999

[12] Amendments introduced by s 29 Greater London Authority Act 2007. The amendments came into force on 21 January 2008.

[13] Reg 7(1) Town and Country Planning (London Spatial Development Strategy) Regulations 2000 (SI 2000/1491).

council must in turn make the Plan available at its principal office.[14] The Mayor must also send the draft Plan to those councils adjoining Greater London which are affected by the proposed Plan,[15] and to Natural England, the Environment Agency and English Heritage.[16] Finally, he must send copies to any other bodies which he considers appropriate, which must include voluntary bodies whose activities benefit Greater London, bodies representing different racial, ethnic and religious groups, and bodies representing persons carrying on business in Greater London.[17]

12. Following the distribution of the draft Plan, and the publication of a notice of the availability the Plan, there is a consultation period of at least twelve weeks.[18] The Mayor is required to consider any representations made to him in that consultation period,[19] and must make available copies of all representation made during the period until the Plan is published or withdrawn.[20] This twelve week consultation is the critical consultation period before the submission of the Plan for examination in public, where the right to make further representations is limited.

(iii) Examination in public

13. Prior to publication of the Plan the Mayor must, unless directed otherwise by the Secretary of State, cause an examination in public to be held. The examination in public offers limited opportunities for participation:

[14] Section 335(3) GLA Act 1999 and Reg 7(3) Town and Country Planning (London Spatial Development Strategy) Regulations 2000

[15] Section 335(3)(c)

[16] Reg 7(5)

[17] Section 335(4) and s 32(3) GLA Act 1999

[18] Reg 7(6)

[19] Section 335(2)(e)

[20] Reg 7(10)

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a. There is no general right to be heard at the examination (s 338(6) GLA Act 1999);

b. Aside from the Mayor, it is for the Panel to decide who else may be invited to take part in the process (s 338(7)(b)); and

c. Written submissions need only be taken into account if they are shorter than 2,000 words in length and have been sent to the Panel no later than 3 weeks before the opening of the examination (Reg 8(6) Town and Country Planning (London Spatial Development Strategy) Regulations 2000).

14. That said, there is no restriction imposed on the Panel preventing them from hearing further representations from third parties at the time of the examination in public. The 2007 examination in public of alterations to the London Plan heard from many different organisations and landowners.[21]

15. GOL Circular 01/2008 (paragraph 3.14) indicates that the guidance on EIP's set out in PPS11 ".. should be reflected, where applicable, in arrangements for conducting the EIP into the SDS." Annex C to PPS11 gives guidance on the procedures to be followed.

The Secretary of State's Powers of Direction

16. The Secretary of State has a power to direct that that the Mayor may not publish the SDS except in a form which includes modifications to the proposed SDS[22].

17. In contrast to the Secretary of State's power in relation to other plans, this power is limited. The power can only be used to avoid inconsistency with national and regional policy or detriment to an area outside Greater London[23].

Publication and challenge

18. The Mayor must publish a Plan which is in the same form as the proposed plan originally put out to consultation, or as modified to take account of representations made on consultation,

[21] See Annex A to the Report at http://www.london.gov.uk/mayor/strategies/sds/eip-report07/panel-report-further-alts-eip.pdf

[22] Section 337(6) and (7) of the Greater London Authority Act 1999

[23] Section 337(6) of the Greater London Authority Act 1999. Paragraph 3.17 of GOL Circular 01/08

the report from the examination in public and "any other material considerations". Where there is an examination in public, the Mayor may not publish until after the panel has reported.

19. Once the Plan has been published, the only means of challenging the Plan is by an application to the High Court under s 113 Planning and Compulsory Purchase Act 2004. There are number of notable points about this special form of challenge:

    a. The challenge may only be brought by a "person aggrieved" and on the grounds that the document is not within the appropriate power or a procedural requirement has not been complied with (s 113(3));

    b. The application must be made within six weeks of the date of publication of the plan (s 113(4) and (11)(e));

    c. If the challenge is pursued on the grounds of a failure to comply with a procedural requirement it must be shown that the interests of the applicant have been "substantially prejudiced" by that failure (s 113(6)(b)); and

    d. The High Court may quash the relevant document wholly or in part, and generally or as it affects the property of the application (s 113(7) and (7C)). Since 6 April 2009, the High Court may also remit the Plan to the Mayor or the examining panel, if necessary with directions as to the steps to be taken and as to how the Plan should be treated (s 113(7B)).

20. The requirement to show that the applicant is a "person aggrieved" has been the subject of considerable litigation in respect of challenges to development plans under s 287 Town and Country Planning Act 1990. The test is apparently harder to fulfil than the normal test for "standing" to bring a claim in judicial review. It would appear to include any person whose property is interfered with or directly affected by the Plan.[24] In the special context of London it is also likely to include any London local authority affected by the Plan.[25]

[24] See *Encyclopedia of Planning Law* paragraph P287.13 and the cases cited there

21. The High Court's power in dealing with an application under s 113 Planning and Compulsory Purchase Act 2004 was the subject of criticism by Sullivan J in *Ensign Group Ltd v First Secretary of State* [2006] 2 P&CR 19, who commented (at [25]):

> It is most unfortunate that the admitted error in the Strategy cannot be remedied by some form of declaratory relief, but s.113 does not enable the court to grant such relief. The power to quash, in whole or in part, or not to quash, is a blunt instrument, made the more blunt by the fact that a procedural error, such as a failure to give reasons at the end of a lengthy statutory process, which may have been carried out in an impeccable manner throughout all the earlier stages, will result in the policy or policies being quashed, so that the process has to be recommenced from the beginning.

22. The recent amendments to s 113, introduced in the Planning Act 2008[26], address that criticism and now allow the matter to be remitted to the appropriate stage of the process, rather than having to restart the entire process because of an error. This mitigates the effect of the difficulty previously encountered when procedural defects at an early stage of the process may infect the entirety of the plan-making process.[27]

23. In summary, the High Court challenge is a restricted route for challenging the Plan, and the relief which the Court gives is discretionary and may now be tailored to the particular facts of the case.

[25] See for example *Cook v Southend BC* [1990] 1 All ER 243

[26] The amendments to section 113(7) which will be effected by section 185 of the Planning Act 2008 are not yet in force

[27] See for example *South Northamptonshire DC v Charles Church Developments Ltd* [2000] PLCR 46

Conclusions

24. In summary, therefore, the stages at which London Plan process can be influenced are as follows:

    a. The initial formulation of the first draft, through non-statutory consultation;

    b. The (recently strengthened) Assembly comments stage, where the Plan will be debated and any comments must either be taken into account or reasons given for not taking those comments into account;

    c. The main public consultation period;

    d. The preparation of (short) written submissions for the examination in public, and possibly further participation in that process;

    e. The ability to persuade the Secretary of State to direct modifications to the SDS

    f. The limited provision for High Court challenges.

25. Those wishing to participate in the process and to secure changes to the draft plan will have to consider (amongst other things):
    a. Is the strategic environmental assessment and sustainability appraisal adequate?
    b. Can it be said that a particular policy does not deal with matters of strategic importance to Greater London?
    c. Can it be said that the particular policy is consistent with the general duties of the Mayor?
    d. Can it be said that the particular policy is consistent with relevant national policy?
    e. Can it be said that the particular policy or proposal is consistent the RSS for an adjoining area?
    f. Can it be said that a particular policy is consistent with the guidance give in GOL Circular 01/2008 (see in particular paragraphs 2.26-2.28)?

g. Does the reasoned justification contain an adequate statement of the regard the Mayor has had to his general duties, regional guidance for adjoining areas, and the Secretary's State's policies on waste[28]?

26. Similar questions can be asked when considering the omission of a particular policy.

27. It is perhaps the strengthening of the role of the Assembly which will prove to be the most significant development in the new London Plan process. What is clear is that this is a lengthy process, and this explains the Mayor's statement that the process will not be completed before 2012.

Neil Cameron QC
Landmark Chambers
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[28] Regulation 6(3) of the Town and Country Planning (London Spatial Development Strategy) Regulations 2000