

15 October 2011

Mayor of London ‘found out’ after looking – yet again – for a loophole to avoid compliance with air quality laws

Eight wins for ‘Clean Air in London’ in new London Plan (and five letters between lawyers). Key themes for campaigners, developers, the Mayor and local authorities

Restrictions on development in the most polluted parts of London unless: the Mayor acts to reduce sharply harmful emissions from road transport; and developers act to reduce harmful emissions from buildings

Mayor and local authorities need to consider carefully whether they could be held ‘culpable’ for allowing any development that would increase: air pollution near people; and/or the number of people, particularly vulnerable people or housing, near air pollution

Note: Clean Air in London has highlighted in the text below wording that it considers important

Quotes

Simon Birkett, Founder and Director of Clean Air in London, said:

“The Mayor has been ‘found out’ looking – yet again – for a loophole to avoid compliance with air quality laws. The Mayor should not be undermining protections in the new London Plan that are needed to improve public health.

“It is ridiculous of the Mayor to propose a definition of ‘air quality neutral’ in the Glossary to the London Plan which is consistent with increases in pollution. Further, his wording:

- is inconsistent with the London Plan and the Mayor’s Air Quality Strategy; and
- it is unclear when, how and with whom any consultation on the wording was carried out.

“Even the Mayor’s own ‘Air Quality’ Policy highlights [paragraph 7.49] the need to consult on guidance before it is published as ‘supplementary guidance to the London Plan’.

“The Mayor should be spending his time addressing the biggest public health crisis in nearly 60 years not continually looking for loopholes to avoid legal standards that were put in legislation for dangerous airborne particles and nitrogen dioxide in 1999 to be met by 2005 and 2010 respectively.

“The good news is that – perhaps in part as a result of Clean Air in London publishing an initial list of schools near London’s busiest roads shortly before the Examination in Public hearing on Air Quality in September 2010 – the London Plan includes eight protections on air quality for Londoners.

“These include:

1. Air pollution must be reduced
2. Special protections for vulnerable people
3. No increase in air pollution near people

4. No increase in the number of people near air pollution
5. Demolition and construction practices must be improved
6. Off-setting is not equitable or sustainable and will be difficult to justify
7. Indoor air quality must be given a higher priority to reduce people's exposure to pollution
8. No more biomass boilers in London

“These issues matter. One in three Londoners are dying on average an additional three years early due to long-term exposure to air pollution; air pollution is over twice legal limits near our busiest roads; inequalities are likely to be worsened by air pollution; and London faces fines of up to £300m per year for failing to comply with air quality laws until 2025. This is totally unacceptable.

“The Mayor and local authorities need to consider carefully whether they could be held culpable for allowing any development that would increase: air pollution near people; and/or the number of people near air pollution. In this regard, the London Plan now offers particular protections for those susceptible to air pollution such as the vulnerable or those in housing.

“Whether we're talking about air quality laws or the London Plan, future development in London will be restricted in the most polluted parts of London unless: the Mayor acts to reduce sharply harmful emissions from road transport; and developers act to reduce harmful emissions from buildings.

“The Mayor should define ‘air quality neutral’ sensibly, provide guidance on delivering it as a minimum and consult on his approach.”

The London Plan

The London Plan is the overall strategic plan for London and it sets out a fully integrated economic, environmental, transport and social framework for the development of the capital to 2031. It forms part of the development plan for Greater London. London boroughs' local plans need to be in general conformity with the London Plan, and its policies guide planning decisions on planning applications by councils and the Mayor.

The Mayor published his draft Replacement London Plan for consultation in October 2009. The Examination in Public on the Replacement London Plan was held between 28 June and 8 December 2010. The Plan Report was published in May 2011.

In Week 5 of the Examination in Public, the Mayor of London proposed revisions to his original draft London Plan in response to submissions from Clean Air in London (CAL) and others. See:

<http://www.london.gov.uk/sites/default/files/eip/ED104GLAMatter7E.pdf>

On Monday 13 September 2010, CAL circulated to leading London Assembly Members, copied to the Mayor's team, a list of 75 schools within 400 metres of London roads with an annual average daily flow estimate of greater than 100,000 vehicles.

On Wednesday 15 September 2010, the Mayor submitted further revised proposals for the Policy on Air Quality ahead of a hearing of the Examination in Public on Thursday 16 September 2010 at which CAL gave evidence. In CAL's view, the Mayor's revised wording was an improvement on earlier weaker version drafts. See:

<http://www.london.gov.uk/sites/default/files/eip/ED104GLAMatter7EREVISED.pdf>

The Mayor of London published his new London Plan on 22 July 2011 and it took effect immediately. It can be seen at:

<http://www.london.gov.uk/priorities/planning/londonplan>

When publishing the London Plan, the Mayor of London rejected recommendations of the Panel Inspectors on Policy 7.14 Improving Air Quality of the London Plan and said he would include a 'definition' of 'air quality neutrality' in the Glossary. The Glossary defines 'Air quality neutral' as:

'Best available techniques to be applied to minimise pollutant emissions.'

In CAL's view, such a definition is ridiculous as it is consistent with increases in harmful emissions the effect of which would not be 'air quality neutral'. CAL's legal advisers, Harrison Grant, have corresponded with the Mayor's legal advisers on this matter. During this correspondence, the Mayor's legal advisers have stated:

- '...the wording in the London Plan Glossary (which is **not** part of the statutory Plan, so that **if there was a conflict, what is written in the Plan clearly applies**) is simply an attempt to provide some practical, non-technology specific explanation of what developers should do to meet the test in the policy'. Letter dated 31 August 2011
- 'Strictly, the Glossary is supplementary material supporting the Plan and as such is a material planning consideration... Government Office of London Circular 1/2008 [GOL 1/2008] sets out engagement and statutory consultation requirements for material of this kind (see paragraphs [2.22-2.24 on pages 10 and 11])'. Letter dated 28 September 2011

GOL 1/2008 states in paragraph 2.22:

- *'The guidance must itself be **consistent** with national guidance, as well as policies set out in the [London Plan]. It should be **clearly referenced** in the relevant plan policy which it supplements. It should be issued **separately** from the [London Plan] and made publicly available; **consultation** should be undertaken, and the **status of the material** should be made clear.'*

CAL's legal advisers have written again to the Mayor's legal team seeking further clarification. Further details can be seen in a Chronology at the end of this Campaign Update.

'Air quality neutral'

Any definition or guidance on 'air quality neutral' needs to make clear it means *inter alia*:

- i. short-term and long-term 'concentrations' of regulated air pollutants must not increase in absolute terms (i.e. irrespective of the weather or other factors (which aligns with European Union (EU) limit values and the biomass 'test')) where air pollution laws may be breached. Note: the use of 'concentrations' is important to assess compliance with air quality laws and health impacts;
- ii. if the concentration 'test' is passed (e.g. because a development is small and/or in a very

- polluted area), like-for-like emissions must not increase where air pollution laws may be breached;
- iii. the cumulative impact of all planning approvals affecting an area must be considered;
 - iv. it applies to the demolition and construction phase and on-site (e.g. energy efficiency) and off-site (e.g. transport) impacts thereafter;
 - v. any 'off-setting', if allowed subject to conditions, needs to take place within the same borough, be subject to the same type of tests and deliver equivalent reductions in human exposure to pollutants; and
 - vi. last but not least, 'air quality neutral' is the minimum requirement for any development.

The Mayor should define 'air quality neutral' sensibly, provide guidance on delivering it as a minimum and consult on his approach.

Protections in the London Plan

In CAL's view, the consequences of the new London Plan for campaigners, developers, the Mayor and local authorities include:

1. Air pollution must be reduced

Policy 7.14 states:

'[The Mayor] will work with strategic partners to ensure that the spatial, climate change, transport and design policies of this plan support implementation of his Air Quality and Transport strategies to achieve reductions in pollutant emissions and minimise public exposure to pollution.'

'Development proposals should: ...be at least 'air quality neutral' and not lead to further deterioration of existing poor air quality (such as areas designated as Air Quality Management Areas (AQMAs)).'

Paragraph 7.48 states:

'The Mayor will also use the Local Implementation Plans (LIP) process to ensure that air quality improvement measures are included in borough transport plans.'

The Mayor's Air Quality Strategy states:

The Mayor will ensure that new developments in London shall as a minimum be 'air quality neutral' through the adoption of best practice in the management and mitigation of emissions'

CAL comment: It is no longer acceptable for development proposals, including their Transport Assessments or Transport Statements, to say – where legal standards for air quality may be breached – things like:

- *'...the temporary effect of construction plant and vehicles on local air quality would likely be negligible in the context of local background concentrations and existing adjacent road traffic emissions'*

- *‘Therefore, vehicle emissions as a result of the proposed redevelopment would have a **negligible** effect on local air quality’*
- *‘Therefore, the effect on local air quality associated with the operation of the development’s proposed boilers would be **negligible**’*
- *‘Therefore, the air quality effect of introducing new residential receptors ventilated by fresh air from the [Mechanical Ventilation Heat Recovery] system with an air intake above roof level would be **negligible**.’*
- *‘[The limited provision of car parking] and the proposed redevelopment would continue to give rise to a **negligible** effect on current air quality conditions at the site and its surrounds.’*

This highlights the need to update planning guidance from Environmental Protection UK and others which have referred to ‘negligible’ and similar wording. The requirements to comply with air quality standards are precise and ‘absolute’ (e.g. rather than ‘relative’).

Development proposals should contribute to reductions in air pollution especially in the most polluted areas. ‘Air quality neutral’ is not therefore a target to aim for; instead it is a bare minimum and in practice developers will always need to include a substantial ‘margin of safety’ in order to allow for reasonably foreseeable increases in air pollution due to factors such as population growth, increasing congestion and temperature rises.

2. Special protections for vulnerable people

Policy 7.14 states:

‘Development proposals should: minimise increased exposure to existing poor air quality and make provision to address local problems of air quality (particularly within Air Quality Management Areas (AQMAs) and where development is likely to be used by large numbers of those particularly vulnerable to poor air quality, such as children or older people) such as by design solutions, buffer zones or steps to promote the greater use of sustainable transport modes through travel plans.’

CAL comment: Additional protections for vulnerable people are most welcome.

3. No increase in air pollution near people

Paragraph 7.51 states:

*“**Increased exposure to existing poor air quality should be minimised by avoiding** introduction of potentially sensitive receptors in locations where they will be affected by existing sources of air pollution (such as road traffic and industrial processes). **Particular attention should be paid to development proposals such as housing, homes for elderly people, schools and nurseries.** Where additional negative air quality impacts from a new development are identified, mitigation measures will be required to ameliorate these impacts.”*

CAL comment: The Mayor, local authorities and developers need to consider carefully whether they could be held ‘culpable’ for allowing any development that would increase: air pollution near people; and/ or the number of people near air pollution, with possible adverse health impacts.

4. No increase in the number of people near air pollution

EU limit values, which are enshrined in UK law, must be attained and not exceeded once attained. Further, there must be no increase in air pollution inconsistent with EU law.

CAL comment: These protections, put in place to protect public health, lead for example to the Mayor promising CAL that air quality would be improved in the area formerly covered by the western extension of the congestion charging zone (WEZ) despite the removal of the WEZ scheme on 4 January 2011.

5. Demolition and construction practices must be improved

Policy 7.14 states:

'Development proposals should:promote sustainable design and construction to reduce emissions from the demolition and construction of buildings following the best practice guidance in the [Greater London Authority] and London Councils' 'The control of dust and emissions from construction and demolition'.'

CAL comment: the Mayor needs to tighten the current guidance. It would be inconsistent with the wording of the London Plan for him to weaken the current guidance e.g. in relation to the use of diesel particulate filters. New guidance should include the need for watering and other mitigation when power saws or similar equipment are used in ambient air in areas usually accessible to the public.

6. Off-setting is not equitable or sustainable and will be difficult to justify

Policy 7.14 states:

'Development proposals should: ... ensure that where provision needs to be made to reduce emissions from a development, this is ~~usually~~ made on-site. Where it can be ~~demonstrated~~ that on-site provision is impractical or inappropriate, and it is possible to put in place measures conditions should be used to ~~ensure~~ this, whether on a scheme by scheme basis or through joint area-based approaches.'

CAL comment: People living in polluted areas (e.g. near busy roads or railways) are entitled to the same public health protections as everyone else (e.g. those living in leafy suburbs). Off- setting harmful air pollution is unsound and not sustainable (e.g. it is like planting trees to off-set carbon dioxide emissions). Harmful emissions need therefore to be tackled at their source. Developers (and planning authorities) are likely to find it challenging to pass the multiple tests set by the London Plan for off-setting.

7. Indoor air quality must be given a higher priority to reduce people's exposure to pollution

Policy 7.14 states:

'Development proposals should: minimise increased exposure to existing poor air quality and make provision to address local problems of air quality (particularly within Air Quality Management Areas (AQMAs) and where development is likely to be used by large numbers of those

particularly vulnerable to poor air quality, such as children or older people) such as by design solutions, buffer zones or steps to promote the greater use of sustainable transport modes through travel plans.'

CAL comment: European citizens spend on average over 90% of their time indoors. People can be protected from 90% of air pollutants for up to 90% of the time. Planning permissions should therefore include an obligation or condition (or at least an advisory statement) that buildings with ventilation systems include regularly maintained air filters that comply fully with European guideline EN 13779. These could be inspected during air conditioning or energy efficiency inspections when required anyway by law. Efficient fans and low energy air filters in heating, ventilation and air conditioning systems can reduce substantially energy use, emissions and costs.

8. No more biomass boilers in London

Policy 7.14 states:

'Development proposals should: ...where the development requires a detailed air quality assessment and biomass boilers are included, the assessment should forecast pollutant concentrations. Permission should only be granted if no adverse air quality impacts from the biomass boiler are identified.'

Paragraph 7.50 states:

*'Concerns have been raised over the air quality effects of some biomass boilers. In order to the address these concerns, the Mayor **will** expect an air quality assessment to be undertaken where planning applications are submitted that include proposals for biomass boilers. Where an assessment demonstrates adverse effects associated with the biomass boiler, this type of boiler should **not** be used in the development.'*

CAL comment: In CAL's opinion a biomass boiler is always likely to have some adverse effects compared to lower emission alternatives e.g. heat pumps or sustainably generated electricity. The Clean Air Act should be updated for modern fuels and technologies to prohibit the burning of biomass in the most polluted cities like London.

Chronology

22 July 2011

1. Replacement London Plan published

<http://www.london.gov.uk/priorities/planning/londonplan>

2. Replacement London Plan Chapter 7: London's Living Places and Spaces

Policy 7.14: Improving Air Quality from page 229 (8.5 MB file size)

<http://www.london.gov.uk/sites/default/files/LP2011%20Chapter%207.pdf>

3. Replacement London Plan Annex 5: Glossary

Definition of 'Air quality neutral' on page 296

<http://www.london.gov.uk/sites/default/files/LP2011%20Annex%205.pdf>

4. Mayor's response to the Panel Inspectors recommendations

The Mayor's reasons for rejecting the recommendations of the Panel Inspectors on page 57

<http://www.london.gov.uk/sites/default/files/LP2011%20Mayor%20response%20to%20Panel%20022%20July%202011.pdf>

- 'Action is needed to improve air quality in London and the Mayor is committed to **working towards meeting** the EU limit values of PM₁₀ [dangerous airborne particles] by 2011 and NO₂ [nitrogen dioxide] by 2015.'
- Panel Inspectors asked the Mayor to replace the words in bold and underlined by '**...implementing policies formulated to meet...**'.
 - The Mayor responded: 'Recommendation not accepted. The Panel's recommendation would be misleading as [the] Mayor is not the only actor to have an influence on achieving targets, (as is made clear in the GLA Act) and the suggested wording both overstates the extent of his responsibilities, and downplays the importance of those of other agencies.'
- 'Development proposals should: ... **be at least 'air quality neutral' and** not lead to further deterioration of existing poor air quality (such as areas designated as Air Quality Management Areas AQMAs).'
- The Panel Inspectors asked the Mayor to delete the words in bold and underlined.
 - The Mayor responded: 'Recommendation accepted in part. The Mayor accepts that the concept of air quality neutrality needs further explanation. This has been included in the Mayor's Air Quality Strategy that was published in December 2010. In order to enable consistency between the London Plan and the Mayor's Air Quality Strategy, the Mayor proposes to retain the phrase in Policy 7.14 and to include a clear definition of air quality neutrality in the Glossary.'
- The Glossary in Annex 5 of the Replacement London Plan states: 'Air quality neutrality: Best available techniques to be applied to minimise pollutant emissions.'

3 May 2011

5. Mayor published the Panel Report on the draft Replacement London Plan dated 11 March 2011

<http://www.london.gov.uk/london-plan-eip/replacement-london-plan-examination-public>

The Panel Report – Volume 1

<http://www.london.gov.uk/sites/default/files/eip/Panel-report-Vol-1.pdf>

The Panel Report – Volume 2 Appendices

Mayor's proposed wording on air quality for the draft Replacement London Plan from page 149

<http://www.london.gov.uk/sites/default/files/eip/Panel-report-Vol-2-appendices.pdf>

14 December 2010

6. Mayor of London's Air Quality Strategy published on 14 December 2010

References to 'Air quality neutral' appear on pages 101, 107, 161 and 162

<http://www.london.gov.uk/sites/default/files/Air%20Quality%20Strategy%20v3.pdf>

Page 101

Making new developments 'air quality neutral or better' – by making better use of the planning system to ensure no new development has a negative impact on air quality in London.

Page 107

Policy: The Mayor will ensure that new developments in London shall **as a minimum be 'air quality neutral'** through the adoption of best practice in the management and mitigation of emissions.

Pages 161 and 162

Through the requirements [boroughs] set, boroughs can ensure that new developments are 'air quality neutral' or better. The GLA will work with boroughs to assist in the development of methodologies that will allow accurate assessment of the impacts of emissions of new developments and will provide advice on reducing emissions on-site (energy efficiency), off-site (transport impacts) and in the construction phase.

13 to 16 September 2010

7. Examination in Public hearings

In Week 5 of the Examination in Public, the Mayor of London proposed revisions to his original draft London Plan in response to submissions from CAL and others. See:

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