In the matter of

Proposed Parking Standards

Changes to the London Plan

OPINION

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1. I am jointly instructed in this matter by Transport for London (TfL) and the Greater London Authority (GLA). It concerns proposed amendments to policies in the London Plan (LP) which are comprised in the Minor Alterations to the London Plan (MALP) and their compatibility, or otherwise, with the requirements of the EU Directive on Ambient Air Quality 2008/50/EC (the Directive).

2. The issue arises because the MALP includes proposed changes to policy on maximum parking standards for new housing development in outer London which may have the effect of increasing traffic and in turn impacting on air quality. Friends of the Earth (FoE) and Clean Air in London (CAIL) have objected to these changes on the ground that they would be unlawful under the Directive.

3. The MALP is coming up for Examination in Public (due to begin on 21 October 2015 with parking standards to be considered on 22 October) and TfL/GLA have requested this Opinion for use in that context.

4. I will deal with the issues in the following order:

   (1) The LP and MALP generally.
   (2) The proposed changes to policy on parking standards.
   (3) The likely impact of such changes.
   (4) The Directive.
   (5) The arguments of FoE and CAIL.

(6) Discussion and conclusions.

The LP and MALP

5. I will deal with this only briefly by way of background. The LP is the spatial development strategy for London under Part VIII of the Greater London Authority Act 1999 (the GLAA). Before it is published an examination in public must be held (s. 338). The Mayor is under a duty to review it from time to time (s. 340). The procedure for alteration is set out in the Town and Country Planning (London Spatial Development Strategy) Regulations 2000 No. 1491, which apply in relation to proposals to alter or replace the strategy (reg. 2(1)). There are requirements as to public participation (reg. 7) with special provision for minor alterations (reg. 7(7)). There are provisions for the examination in public of the proposed alterations (reg. 8).

6. By reg. 6 the Mayor is required to have regard to a number of specified matters in formulating the strategy, but these do not include air quality. However, under s. 41(4) and (5) of the GLAA, the Mayor in revising the LP must have regard (among other things) to the effect which the proposed revision would have on the health of persons in Greater London and the need to ensure that the LP is consistent with national policies and with the EU obligations of the UK.

7. The examination of the MALP is subject to para. 182 of the National Planning Policy Framework (NPPF) and will be considered against the test of soundness, which includes whether it enables the delivery of sustainable development in accordance with the policies in the NPPF.

8. Under para. 174 of the NPPF policy on local standards should be set out in the plan, and the likely cumulative impacts on development of all existing and proposed local standards should be assessed. Evidence supporting the assessment should be proportionate, using only appropriate available evidence.

9. Para. 39 of the NPPF says that if setting local parking standards, local planning authorities should take into account the accessibility of the development; the type, mix and use of development; the availability of and opportunities for public transport; local

car ownership levels; and "an overall need to reduce the use of high-emission vehicles". It may be noted that there are other parts of the NPPF which support or require the adverse impacts of car traffic generated by proposed development to be properly assessed and mitigated. These include para. 32 on transport assessments, para. 35 on location and design of development in terms of promoting sustainable modes of transport, para. 36 on travel plans, and para. 69 on promoting healthy communities.

10. It is important to note that the policy in para. 39 has been supplemented by the Written Statement to Parliament of the then Secretary of State, Sir Eric Pickles MP, on 25 March 2015:[1]

> "This government is keen to ensure that there is adequate parking provision both in new residential developments and around our town centres and high streets.
>
> The imposition of maximum parking standards under the last administration lead *(sic)* to blocked and congested streets and pavement parking. Arbitrarily restricting new off-street parking spaces does not reduce car use, it just leads to parking misery. It is for this reason that the government abolished national maximum parking standards in 2011. The market is best placed to decide if additional parking spaces should be provided
>
> However, many councils have embedded the last administration's revoked policies. Following a consultation, we are now amending national planning policy to further support the provision of car parking spaces. Parking standards are covered in paragraph 39 of the National Planning Policy Framework. The following text now needs to be read alongside that paragraph: "**Local planning authorities should only impose local parking standards for residential and non-residential development where there is clear and compelling justification that it is necessary to manage their local road network.**"

11. By para. 120 of the NPPF the effects (including cumulative effects) of pollution on health, and the potential sensitivity of the area to adverse effects from pollution, should be taken into account.

12. By para. 124, planning policies should sustain compliance with and contribute towards EU limit values or national objectives for pollutants, taking into account the presence of Air Quality Management Areas and the cumulative impacts on air quality from individual sites in local areas. It should also be noted that there is clear and detailed guidance in National Planning Practice Guidance on how local planning authorities should address air

[1] https://www.gov.uk/government/speeches/planning-update-march-2015

quality, both in the context of local plans, specific development, undertaking air quality assessments, and mitigating impacts (see ID 32-001-20140306).

13. National Planning Practice Guidance ((Paragraph 008 Reference ID: 42-008-20140306) contains the following passage on parking standards:

> "Maximum parking standards can lead to poor quality development and congested streets, local planning authorities should seek to ensure parking provision is appropriate to the needs of the development and not reduced below a level that could be considered reasonable."

14. A Technical Seminar in preparation for the EIP was held on 26 August 2015. At this seminar TfL presented an overview of the proposed changes to parking standards and the evidence on high level impacts and modelling. FoE raised the issue of compliance with EU law, and the Inspector indicated that he would expect to hear discussion on this at the EIP.

15. In September 2015 the Inspector published a draft list of matters to be examined. Matter 2 is parking standards and the relevant questions (c and j) are: whether the evidence in the integrated impact assessment report on parking standards (IIA) is sufficiently robust; whether any of the minor negative impacts referred to in the IIA are of significance in the overall balance of issues; and whether there is any evidence that the proposed approach to parking standards would lead to (i) a negative impact on the number of new dwellings delivered; (ii) a lower quality of urban design; (iii) a decline in air quality; (iv) a reduction in physical activity levels and/or widening of health equalities; or (v) an increase in car ownership which may have consequences for inner London Boroughs; and if such evidence exists how would the Mayor address these issues?

The proposed changes to policy on parking standards

16. The Consultation Draft on the MALP (May 2015) refers to a letter dated 27 January 2015 from the then Minister of State for Housing and Planning welcoming a review of parking standards in Outer London and restating the Government's view, namely that more spaces should be provided alongside new homes that families want and need, especially in areas of low public transport connectivity. The Mayor recognised the opportunity to adopt a

more flexible approach in parts of outer London, particularly where public transport connectivity levels are lower.

17. The proposed change (after suggested changes made in August 2015 in response to consultation responses) is essentially that, while maximum parking standards will remain in effect, outer London Boroughs should demonstrate that they have actively considered more generous standards for housing development in areas with low public transport connectivity[2] (generally PTALs 0-1) and take into account current and projected pressures for on-street parking and their bearing on all road users, as well as the criteria set out in the NPPF para. 39 (see proposed Policy 6.13.E.e).

18. The proposed amendments further state (6.42i) that in developing residential parking standards, outer London Boroughs should take account of residents' dependency on the car in areas with low public transport connectivity and that where appropriate Boroughs should consider higher standards, particularly to avoid generating unacceptable pressure for on-street parking: this may be especially important in "suburban" areas and for areas with family housing. In outer London a more flexible approach to applications may also be acceptable in some limited parts of areas within PTAL 2, in locations where the orientation or levels of public transport mean that a development is particularly dependent on car travel, taking account of the criteria set out in para. 39 of the NPPF (6.42j). Account should be taken of the extent to which public transport might be provided in the future (6.42k). The basic maximum residential car parking standards for suburban areas range from 1-2 spaces depending on PTAL, and for urban areas either 1 or 1.5 spaces depending on PTAL and density.

The likely impact of such changes

19. The IIA (April 2015) assesses the proposed alterations in terms of its environmental, social and economic performance against a series of sustainability objectives. Of particular relevance for this advice is the assessment of the impacts in terms of air quality. The overall assessment is that the proposed alteration would be generally positive for social and economic outcomes but slightly negative for environmental outcomes.

[2] Public transport access levels (PTALs) are based on walking time from the area to the public transport access point, and the reliability, frequency and level (waiting time) of the service.

However as the proposed alteration only affects a small proportion of the areas where London's housing is to be delivered, both positive and negative effects would be relatively limited.

20. It is also pertinent to note that the IIA does not take into account possible mitigation measures.

21. The IIA notes (para. 3.12) that in considering reasonable options as alternatives to the proposed alterations, one option would be to do nothing (i.e. leave the plan unchanged). However, in that case any more recently published Government guidance on parking standards would have to be considered when the decision-maker determines a planning application.[3] It also refers to the Ministerial Statement of the then Secretary of State on 25 March 2015, set out above at para 10 above.

22. The IIA considers three options: the proposed preferred amendment to provide for more flexibility in the areas of worst PTAL scores (0-1); a wider amendment to provide for such flexibility in areas of PTALs scoring 0-2/3 in outer London; and a "do nothing" approach of no change.

23. In terms of health and well-being, the IIA notes that the increased provision in car parking under the preferred amendment is likely to result in at least some additional car journeys and less walking and cycling, though the extent is uncertain. The modelling suggests the increase in car trips over 24 hours would be around 0.8% which is seen as a marginal change and a minor negative effect (Table 4.1, item 3).[4] The broader amendment would have a slightly more negative effect in increasing car trips, categorised as a negative effect. The do nothing option would have a minor positive effect in air quality and encouraging walking and cycling, but a minor negative effect on the health and well-being of persons with mobility problems.

24. In terms of air quality, again the IIA notes that the increased provision in car parking is likely to result in at least some additional car journeys, though the extent is uncertain. It makes an assumption of a causal effect between more liberal parking provision and car

[3] This more recent guidance is summarised at Appendix 2 to the IIA, Table 1, para. 4.1.

[4] Though there would be also a minor positive effect for those with health issues that are less mobile.

trips. Evidence suggests a marginal increase, though as housing will generally be low density, the number of additional homes and therefore of car journeys will be relatively minor (Table 4.1, item 16). It is also noted that there are wider policies to support alternative forms of travel and low emission vehicles. It is categorised as having a minor negative effect. The wider amendment is categorised as having a negative effect, and the do nothing option as having a minor positive effect.

25. It is also noted that at the local level the change could have more strongly felt effects, especially if there is some traffic congestion, and that this may affect how the outer London Boroughs chose to apply the policy (para. 4.14).

26. I am informed that modelling at this stage of the IIA can only give broad brush results at a borough-wide level. It cannot identify impacts on specific links of road. This could only be undertaken at the stage of a proposal for development at a specific location.

The Directive

27. The relevant requirements of the Directive are in Articles 12 and 13. The relevant pollutant is nitrogen dioxide (NO_2).

28. Article 12 states that in zones where the levels of NO_2 are below the relevant Limit Value, "Member States shall maintain the levels of these pollutants below the Limit Values and shall endeavour to preserve the best ambient air quality, compatible with sustainable development."

29. Article 13 obliges Member States to ensure that throughout zones, levels of NO_2 in ambient air do not exceed the Limit Values specified in Annex XI from 1 January 2010. Compliance with this requirement is to be assessed in accordance with Annex III. Margins of tolerance laid down in Annex XI shall apply in accordance with Article 22(3) and 23(1).

30. "Limit Values" are defined as levels fixed on the basis of scientific knowledge, with the aim of avoiding, preventing or reducing harmful effects on human health and/or the environment as a whole, to be attained within a given period and not to be exceeded once attained (Article 2(5)).

31. The Limit Values for NO_2 are 200 µg/m^3 on a one hourly basis, not to be exceeded more than 18 times per calendar year and 40 µg/m^3 on an annual basis. The margin of tolerance in both cases is 50% on 19 July 1999, diminishing by an equal annual percentage to reach 0% by 1 January 2010.

32. Annex III requires assessment at all locations except for the three categories listed at Section A.2(a)-(c) (areas where members of the public do not have access and there is no fixed habitation; factory and industrial premises; and on road carriageways and central reservations to which there is no pedestrian access). The actual siting of sampling points is to be undertaken in accordance with the criteria in Sections B and C. The site selection procedures must be fully documented in accordance with Section D.

33. Article 22(1) allows for Member States to postpone the deadlines specified in Annex XI, but only for a maximum of five years and on condition that an air quality plan under Article 23 is established. That plan is to be supplemented by information listed in Section B of Annex XV demonstrating how conformity will be achieved before the new deadline. These include information on all air pollution abatement measures considered at local, regional or national level, including measures to limit transport emissions through traffic planning and management, and measures to encourage a shift of transport towards less polluting modes (Annex XV, section B.3(d) and (e)).

34. In cases where compliance is postponed, the Member State must ensure that the Limit Value is not exceed by more than the maximum margin of tolerance specified in Annex XI.

35. Under Article 23(1) where pollutants exceed any Limit Value, Member States must ensure that air quality plans are established for the relevant zone or zones. If the relevant attainment deadline has already expired, the plan must set out appropriate measures so that the exceedance period can be kept as short as possible. The plan must incorporate at least the information set out in Section A of Annex XV.

36. Consideration of these provisions involves also considering the decisions of the European Court and Supreme Court in Case C-404/13 R (ClientEarth) v. Secretary of State.[5] It is

[5] [2013] UKSC 25; [2015] UKSC 28.

clear that Limit Values are hard and binding requirements. Article 22, as was explained by the Commission in Client Earth, was added in 2008 as a limited way of derogating from the requirements of Article 13, subject to significant procedural and substantive requirements and safeguards and supervision by the Commission.[6] It would extend the period so as to avoid a breach occurring. Article 23, by contrast, applies where a breach has already occurred and is not as such a derogation but rather an "emergency mechanism" to be seen as a specific implementation of the general duty of Member States under Article 4(3) TEU to remedy breaches.[7]

37. The Supreme Court recorded the position regarding non-compliance in the UK and elsewhere in the EU, the fact that the EU had not sanctioned any loosening of the Limit Values, and that formal infringement proceedings had been instigated against the UK in respect of NO_2. It was accepted by the Government that previous air quality plans published in June 2011 would need to be revised to take account of new information and of new measures to address the problems.

38. The CJEU, as the Supreme Court noted, did not directly address the question of whether a Member State is obliged to make an application under Article 22 in the event of non-compliance by the 2010 deadline. The point had in fact become academic, as any extension could only have been until 1 January 2015. The Supreme Court did not decide the issue but appears to have been inclined to follow the suggestion of the Commission that Article 22 is an optional derogation rather than a mandatory requirement (see para. 27). With respect, that seems correct. The UK was not obliged to apply under Article 22, but if it wished to obtain an extension of the deadline beyond 1 January 2010 would have had to do so. Failure to apply means that as from the 2010 deadline the UK was in breach and Article 23 applied. Of course, even if the UK has applied for and been granted an extension, it could not run beyond 1 January 2015.

39. Thus the UK's obligation is to submit a plan for any non-compliant zone which conforms to Article 23, and setting out measures to keep the period of non-compliance "as short as possible". The UK is of course already out of time to do this, as the plan should have been submitted no later than 2 years after the end of the year the first exceedance was observed.

[6] [2015] UKSC 28, paras 11-12.
[7] [2015] UKSC 28, para 12.

40. The Government in *ClientEarth* had indicated its intention to submit a new plan by December 2015. The Supreme Court accepted however that it is for the national court to impose such order as is necessary to ensure the plan is established and imposed a mandatory order that new plans be prepared within a defined timetable, to end with submission to the Commission by no later than 31 December 2015.

41. The Government published for consultation in September 2015 its proposal for the necessary draft plans. This notes (para. 109) that local authority planning policies should sustain compliance with and contribute towards meeting air quality limit values for pollutants, taking into account the cumulative impacts on air quality from individual sites in local areas (para. 109). In Air Quality Management Areas planning decisions should ensure that that any new development is consistent with the local air quality action plan. It also emphasises the importance of encouraging cycling, walking and shifts to cleaner ways of travel (para. 130).

42. The consultation includes Table C1 which details relevant local authority measures within Greater London to achieve the relevant air quality standards. Each borough has put forward a detailed package, which have common features (e.g. encouraging alternative travel modes) but which is specific to each borough.

The arguments of FoE and CAIL

43. In its e-mail of 22 June 2015, to the Mayor, FoE cites the ClientEarth case. It says that air pollution limits are absolute, must be met irrespective of costs, and cannot be averaged across a zone. Article 12 of the Directive imposes a "no deterioration principle" where Limit Values are being met. A new breach must not be caused and an existing breach must not be exacerbated. Because London is not compliant with Limit Values, FoE suggests that any measures conceived of as mitigation to render a development neutral in terms of air quality would have to be discounted as the UK is required to be taking such measures already. It concludes that any amount of worsening of air quality (the amount not being relevant) renders the proposals unsound.

44. In its letter of 21 June 2015 to the Mayor, CAIL also refers to the ClientEarth case and a letter of clarification from the European Commission, and makes the following submissions:

(1) NO_2 limit values must be achieved urgently and as soon as possible to protect public health;
(2) Limit values are absolute obligations that must be attained irrespective of cost;
(3) Limit values apply everywhere with three exceptions;
(4) Limit values must not be exceeded once attained;
(5) Where air quality is good, by Art. 12 of the Directive Member States must not only maintain levels below limit values but also endeavour to preserve the best ambient air quality compatible with sustainable development.
(6) It is unlawful to worsen air quality breaching limit values and would not be consistent with sustainable development to worsen it where limit values are being achieved.
(7) Mitigation measures, such as through the implementation of London wide policies cannot be relied on to reduce the impact.
(8) The proposed policy alteration would worsen already illegal concentrations of NO_2. To worsen air quality contradicts the duty under the Directive. None of the exceptions to the duty to attain Limit Values applies.

Discussion

45. Plainly the UK is in breach of Article 13 in respect of a number of areas of London in that Limit Values for NO_2 were exceeded after the relevant date of 1 January 2010, and continue to be exceeded. There is a general obligation under Article 4 of the Treaty on European Union (Lisbon Treaty) to "take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaty or resulting from the acts of the institutions of the Union" and to "refrain from any measure which could jeopardise the attainment of the Union's objectives". In the specific context of the Directive, this manifests itself in the Art. 23 obligation to set out in the plan, and take, appropriate measures, to keep the exceedance period "as short as possible".

46. The Mayor and TfL are plainly parts of the State for this purpose and are subject to these obligations (though of course it is for the Secretary of State to comply with the specific

obligation regarding the plan). Specifically under s. 41(4) and (5) of the GLAA, the Mayor is obliged to have regard to the effect of the proposed revision on the health of persons in Greater London, and the need to ensure that the LP is consistent with national policies and with the EU obligations of the UK.

47. Accordingly, if for example TfL or the Mayor were promoting or considering a project which would generate air pollution which would adversely affect the UK's compliance with the Directive, this would be an important consideration in whether to proceed with the project.

48. However, it cannot simply be assumed (as FoE and CAIL) appear to do, that the proposed change to policy would have that effect.

49. First, it has to be born in mind that what is at issue here is policy. The proposed change contemplates a possible relaxation of parking standards in limited cases. It would be for the relevant London Borough as planning authority to decide whether a more flexible approach should be adopted in its area or in relation to a particular planning application, having regard to all relevant considerations. Those considerations would include potential effect on air quality which would have to be assessed and mitigated as appropriate, having regard to all material factors, including compliance with EU air quality requirements and the implications for human health.

50. Plainly any change to a local plan would have to be considered and assessed in terms of its possible cumulative effect on air quality in accordance with the NPPF and Planning Practice Guidance set out above and as indicated in the Government's proposed draft plan to rectify the UK's breach of the Directive. Similarly under the same requirements, the potential impacts of any specific development which made more liberal provision for parking would have to be considered. It would be possible at that stage to get a much more accurate picture of whether it might impact on air quality standards at link road level. It would also be possible to take proper account of the local situation in terms of public transport provision, measures to encourage walking and cycling and use of lower emission vehicles, etc, in a way which is not possible at the MALP stage.

51. Secondly, even irrespective of the proposed change in policy in the LP, the local planning authority would be obliged to have regard to the national policy set out above in the

NPPF as supplemented by the Ministerial Written Statement and the NPPG. To the extent the LP did not take account of such up to date policy its own weight as a material consideration would be diminished and arguably it would be unsound.

52. Thirdly, even leaving aside these previous two points, it is not clear that the proposed policy change would impact adversely on compliance with the UK's legal obligations under the Directive.

53. If it is assumed that relaxation of parking standards for new development in areas of low public transport connectivity would in some cases result in some households having an additional car, and this would generate some additional trips, the evidence suggests that the numbers would be very modest relative to existing levels of traffic.[8] This is without considering mitigating measures which might be required in respect of the development (as opposed to London-wide measures) to encourage alternative modes of transport. It is in my view proper to take such specific measures into account in considering what the likely impact of the development will be.

54. Further, in deciding whether it is likely that the modification of the policy will result in a breach of the obligation to keep the exceedance period as short as possible it does not seem to me to be irrelevant to consider the London wide measures such as the ULEZ which will hopefully improve air quality and indeed the measures anticipated by London Boroughs under the September 2015 draft plan. Any likely adverse effects of the policy change should it seems to me be assessed against the background of those projected improvements in considering whether they will result in the period of exceedance not being kept as short as possible.

55. Accordingly, it cannot simply be assumed that the effect of the policy modification would be to cause a Limit Value measured in the relevant locations in accordance with Annex III of the Directive to be breached or would result in compliance with the Limit Value being delayed. The fact that there are continuing breaches of Limit Values at some locations within the zone does not in my view necessarily prohibit any action which might have some adverse impact on air quality generally. That seems to me to be too

[8] It is also clear from recent research in the study Health Impacts of Cars in London (GLA, September 2015) that many car trips in London are very short distance (less than 5 km and often only 2km or less) and hence may be expected to have effects on air quality largely within the borough.

wide a proposition. Article 13 is concerned with specific exceedances of the Limit Value, measured as concentrations either on the annual basis, or on an hourly basis with a tolerance of up to 18 hours exceedance per year.

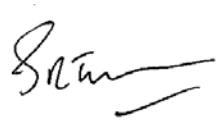
56. The other limb of the FoE/CAIL argument is based on the obligation in Article 12 to endeavour to maintain levels of pollutants below the Limit Values and to endeavour to preserve the best ambient air quality, compatible with sustainable development. This of course will be applicable throughout the zone. There is no evidence that the proposed modification will cause levels of NO_2 to exceed the Limit Values as these can only be measured at the local level at specific locations. The obligation to "endeavour" to preserve the best ambient air quality is qualified, so far as this is compatible with sustainable development. This in my view involves balancing the environmental, economic and social considerations, which is what TfL/the Mayor have sought to do in the consultation. This is of course also the paradigm requirement under the NPPF. Whilst the effect of the relaxation on policy on parking standards would be a minor adverse effect on air quality, there would be beneficial social effects in terms of assisting those with mobility problems and in reducing parking problems and related traffic issues. That approach seems to me compatible with Article 12, which plainly does not require that ambient air quality should automatically trump other considerations.

57. The position therefore seems to me to be that Government policy clearly requires that local parking standards should only be imposed where there is clear and compelling justification for them, because of the adverse local effects they can have on parking. The MALP is not proposing that maximum standards should be abolished, merely that outer London Boroughs in areas where public transport connectivity is poor should demonstrate that they have actively considered more generous standards in these areas, taking into account pressures for on-street parking and their bearing on all road users, as well as the criteria set out in para. 39 of the NPPF. Para. 39 of the NPPF includes as one of its bullet points the overall need to reduce the use of high-emission vehicles. The MALP is therefore plainly not suggesting that outer London Boroughs should ignore the implications for air quality of more generous parking standards. Local authorities would have to consider the issue in any event in order to comply with the NPPF and planning practice guidance, as well as their own duties under EU law and the national legislation on air quality. If it was desired to make that more explicit on the fact of the MALP,

reference could be made to considering the implications for air quality or to the relevant provisions of national policy dealing with this, as set out above.

58. In short therefore, relaxation of parking standards may or may not be problematic for air quality at the local level. It will depend on the situation within the Borough and the location and scale of the proposed development. If it is not problematic there is no reason why the London Borough should not relax the standard, as contemplated by national policy, having regard also to considerations such as encouraging more sustainable modes of transport, and more healthy modes such as walking and cycling. If on examination, the relaxation appears to have significant adverse implications for air quality, this would be a material consideration to be considered by the London Borough, and nothing in the MALP precludes that.

59. In my opinion therefore it is not correct to say that approval of the proposed modification of the relevant LP policies on parking standards would be contrary to either EU or UK law.



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Mr Mike Lancaster