



Boris Johnson, Mayor of London  
Housing Standards MALP  
FREEPOST LON15799  
GLA City Hall, post point 18  
The Queen's Walk  
London SE1 2AA

By email: [mayor@london.gov.uk](mailto:mayor@london.gov.uk)

21 June 2015

Dear Boris

**Public consultation on Draft Minor Alterations to the London Plan – Housing Standards**

Clean Air in London (CAL) welcomes the opportunity to respond to the Great London Authority's (GLA's) consultation on Draft Minor Alterations to the London Plan – Housing Standards (the Consultation) in particular for 'Energy and Carbon dioxide'. The Consultation can be seen here:

<https://www.london.gov.uk/priorities/planning/london-plan/minor-alterations-to-the-london-plan-2015>

CAL is a voluntary organisation which campaigns to achieve urgently and sustainably full compliance with World Health Organisation (WHO) guidelines for air quality throughout London and elsewhere. Further information about CAL can be found at <http://cleanair.london/>.

CAL is independent of any government funding, has cross party support and a large number of supporters, both individuals in London and organisations. CAL provides a channel for both public concern and expert opinion on air pollution in London. This document provides both general and expert comments in response to the Consultation.

**Background**

We refer to the recent judgments of the Supreme Court in ClientEarth versus Defra and the Court of Justice of the European Union:

<https://www.supremecourt.uk/cases/uksc-2012-0179.html>

Separately, it is open to the European Commission to pursue infraction proceedings against the UK for exceedances of NO<sub>2</sub> limit values since 2010, including in the Greater London zone, and it commenced this process in February 2014. You will understand that this is wholly separate to the Government's responsibilities to the Supreme Court.

For details:

<http://cleanair.london/hot-topics/europe-at-its-best-takes-legal-action-against-uk-at-its-worst-on-air-pollution/>

You may be aware of guidance published by Environmental Protection UK (EPUK) in 2010. That guidance has been updated by EPUK and the Institute of Air Quality Management<sup>1</sup>. However, neither EPUK's 2010 guidance nor the updated guidance takes account of or correctly states the significance of the very recent legal developments which have clarified the law. For that reason *inter alia* it is our view that the guidance is flawed in important respects.

The legal judgments, letter of clarification previously from the European Commission to CAL (attached), Directive 2008/50/EC on ambient air quality and cleaner air for Europe and prospect of escalating infraction action make clear *inter alia* that: NO<sub>2</sub> limit values must be achieved urgently and 'as soon as possible' to protect public health; limit values are absolute obligations that must be attained irrespective of cost; limit values apply everywhere with three exceptions (see Section A, paragraph 2 of Annex III of Directive 2008/50/EC and the letter of clarification referred to earlier); limit values must not be exceeded once attained; and where air quality is 'good', Article 12 of the directive applies i.e. Member States shall not only maintain the levels below the limit values but also "endeavour to preserve the best ambient air quality compatible with sustainable development".

Further, Article 4(3) of the Treaty of the Functioning of the European Union sets out that:

*"States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the treaties or resulting from the acts of the institutions of the Union."*

All public authorities are subject to this duty.

You will be aware that many roads in London have among the highest illegal levels of NO<sub>2</sub> in the UK with some expected to be breaching the limit values beyond 2030:

<http://www.howpollutedismyroad.org.uk/hotspots.php>

<https://www.gov.uk/government/publications/50-highest-modelled-nitrogen-dioxide-no2-concentrations>

CAL brings particularly to your attention the widespread nature of the breaches of NO<sub>2</sub> limit values i.e. along many roads across London where development will take place (attached and via link below):

<http://cleanair.london/wp-content/uploads/CAL-264-ULEZ-2020.pdf>

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<sup>1</sup> [http://cleanair.london/wp-content/uploads/CAL-304-EPUK-IAQM-air-quality-planning-guidance\\_Final-130515.pdf](http://cleanair.london/wp-content/uploads/CAL-304-EPUK-IAQM-air-quality-planning-guidance_Final-130515.pdf)

Please see also evidence confirming the link between buildings and NO<sub>2</sub> emissions in the Mayor's Air Quality Strategy published on 14 December 2010:

<https://www.london.gov.uk/priorities/environment/publications/mayors-air-quality-strategy>

Increasing NO<sub>2</sub> emissions and therefore NO<sub>2</sub> concentrations at any location where limit values apply and NO<sub>2</sub> limit values are breached would be unlawful.

CAL also brings to your attention its analysis and complaint to the European Commission about breaches of air quality laws arising from the suspension of the M4 bus lane:

<http://cleanair.london/legal/government-treats-limit-values-with-contempt-by-m4-bus-lane/>

### **Consultation**

The Consultation documents state inter alia:

Page 22 of the Integrated Impact Assessment (IIA):

*"The clarification of the application of the energy targets for development means developers are more likely to continue to reach higher energy targets. The outcomes for air quality are unknown as it depends on how the developers choose to reach the energy targets and what energy infrastructure is provided. Boilers and CHP contribute to poorer air quality, whereas heat pumps and PVs have no effect. In addition, technology is constantly improving and changing. The changes in policies are considered to have an unknown effect upon this objective. **Unknown effect**"*

It is apparent that some responses by developers to the proposed minor alterations to Policy 5.2 'Minimising carbon dioxide emissions' and consequential amendments (notably boilers and CHP) would worsen NO<sub>2</sub> emissions and therefore concentrations. With large parts of London exceeding NO<sub>2</sub> limit values it is inevitable that any worsening of NO<sub>2</sub> concentrations in such places would be unlawful. The Mayor cannot 'elevate' or 'average' the issues such that the specifics are harder to identify or would be ignored.

### **CAL's response**

**It is apparent from the documents published by the GLA that the proposed policy alterations to the London Plan for 'Energy and Carbon dioxide' would worsen air quality where limit values are breached.**

Limit values apply everywhere with three exceptions as mentioned above. 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 achieved.

In CAL's opinion the proposed policy alterations for 'Energy and Carbon dioxide' would worsen air pollution in a number of places where limit values are exceeded or likely to be exceeded. **Mitigation measures, such as through the 'implementation of wider London Plan policies' cannot be relied**

**upon to reduce their impact. Similarly, it is not lawful to ‘average’ such impacts across London.**  
Limit values apply everywhere with three exceptions, must be attained quickly and cannot thereafter

be exceeded. Further, as the Supreme Court judgment and the European Commission’s letter of clarification to CAL show, the limit values are absolute requirements and cannot be ‘traded’ against the Mayor’s economic, social or other priorities or actions.

**It is apparent from the documents that the proposed policy alterations, if approved, would worsen already illegal concentrations of NO<sub>2</sub>. To worsen air quality contradicts the duty under Directive 2008/50/EC and would be unlawful. None of the exceptions to attaining limit values applies. Please therefore reject the proposed policy alterations for ‘Energy and Carbon dioxide’ to amend the London Plan. There can be no other outcome.**

**In CAL’s opinion, the Mayor should consider instead changes to the London Plan for ‘Energy and Carbon dioxide’ – Policy 5.2 and consequentially – which would protect explicitly against breaches of Directive 2008/50/EC e.g. by boilers and/or CHP.**

Please contact me if you have any questions or would like more information on any of the points raised in this letter.

CAL would be pleased to give oral evidence to the independent planning inspector at a joint public examination later this year.

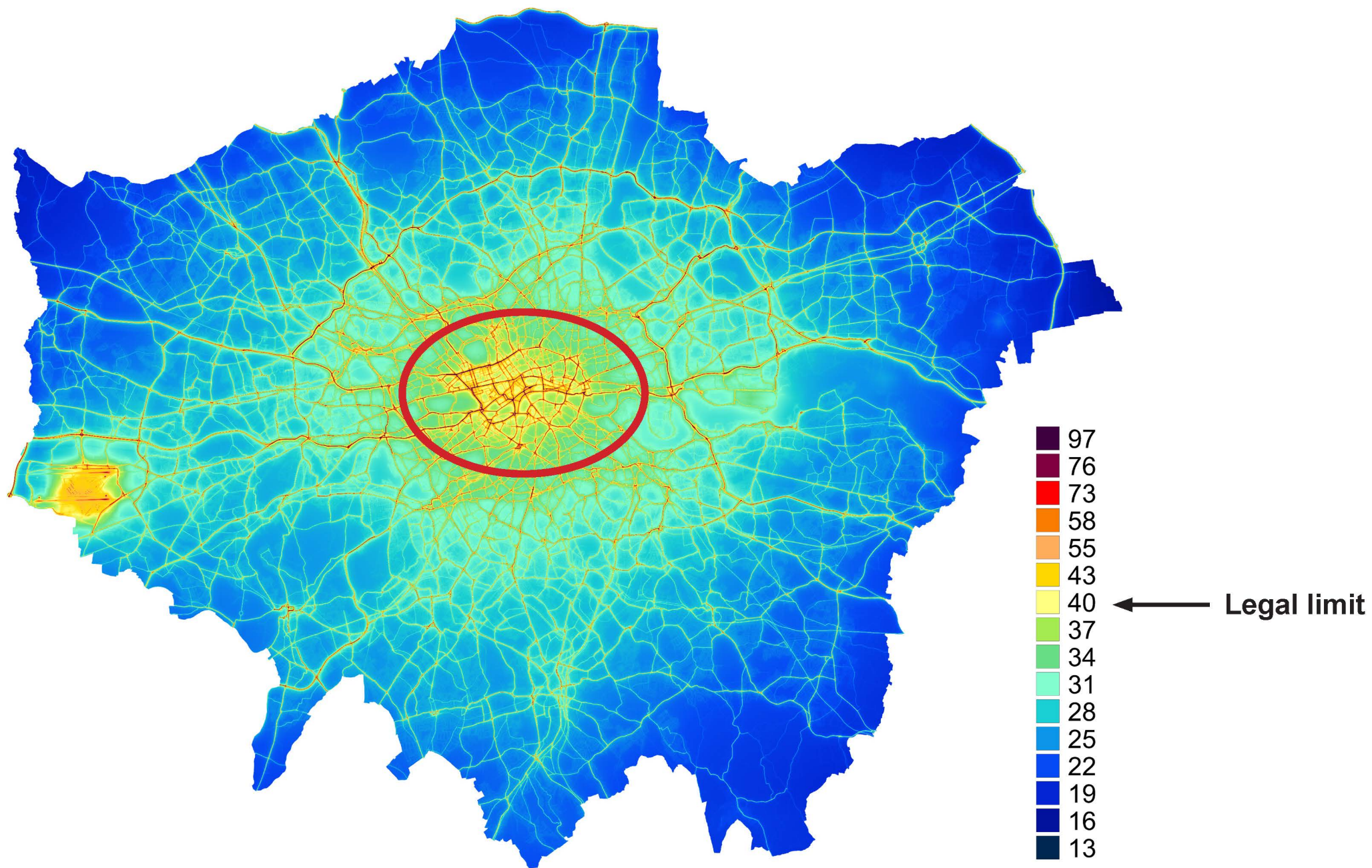
Yours sincerely

Simon Birkett  
Founder and Director

## **Enclosures**

1. Letter of clarification from the European Commission dated 19 February 2014
2. NO<sub>2</sub> concentrations in 2020





NO<sub>2</sub> annual mean concentrations in 2020 (μg/m<sup>3</sup>)



**EUROPEAN COMMISSION**  
DIRECTORATE-GENERAL  
ENVIRONMENT  
Directorate C - Quality of Life, Water & Air  
ENV.C.3 - Air & Industrial Emissions

Brussels,  
ENV.C.3/MG/dp ARES(2014)

Mr. Simon Birkett  
Founder and Director  
Clean Air in London  
Per email: [REDACTED]

**Subject: Your email dated 14 October 2013**

Dear Mr. Birkett,

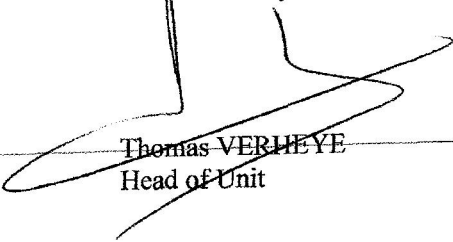
Thank you for your letter of 14 October by which you seek clarification on certain provisions of Directive 2008/50/EC, and my apologies for the delay in replying.

The authoritative interpretation of EU law is the prerogative of the EU Court of Justice; subject to this caveat, your understanding of the Directive largely coincides with the way we would interpret the relevant provisions, if requested by the Court. In particular:

1. The obligation to achieve compliance with the limit values includes the obligation to maintain such air quality status once compliance is achieved (Article 13, first paragraph).
2. With the only three exceptions listed in Annex III (Section A, paragraph 2), limit values must indeed be complied with throughout the territory of any given air quality zone, and compliance should not be determined nor assessed as an "average" of concentrations measured in different locations within the same zone.
3. Unlike target values, which create an objective to be achieved "where possible" or "where not entailing disproportionate costs", limit values create an obligation of result which is unconditional and absolute, irrespective of costs (Article 2, paragraphs 5 and 9).
4. Where air quality is already good, Article 12 of the Directive applies. This provision spells out in legal terms the "non-deterioration" principle, according to which Member States shall not only maintain the levels below the limit values, but also "endeavour to preserve the best ambient air quality compatible with sustainable development".

Finally, I have no objections to the disclosure or dissemination of this letter, to whom it might concern.

Yours sincerely,

  
Thomas VERHEYE  
Head of Unit