

Appendix 2:

Audit of the Mayor's Planning Powers in Relation to Development Control

The Mayor's role in planning applications

Stage I

1. Applications of 'potential strategic importance' (as defined by the Mayor of London Order 2008) are referred to the Mayor by the local council as soon as practicable after they have been submitted. The Mayor has six weeks, from date of receipt of all relevant documents, to provide a statement of compliance with the London Plan (known as stage I). At this stage of the determination process the Mayor is a statutory consultee along with others such as the Environment Agency, English Heritage or the Health and Safety Executive. However, his statement of compliance would be considered in the context of his power to refuse permission or take over applications for his own determination (dealt with at Stage II).

Risks:

2. **That the statement is factually incorrect:** There are various quality control measures in place within the Planning Decisions Unit (PDU) to ensure that planning reports are accurate and planning judgements are based on sound reasoning.

3. **That the Mayor's statement of compliance is not justified:** The implementation of most London Plan policies requires the application of planning judgement and balance. Therefore a difference of opinion of the application of policy is not necessarily an indication of a lack of judgement or reasoning. Planning and legal officers are present when the Mayor considers stage I reports to assist the Mayor in the application of policy, based on previous experience, case law etc. Furthermore if the applicant or council disagreed with the Mayor's statement there is scope between stage I and stage II for negotiation/clarification.

Stage II

4. After the local planning authority (LPA) has resolved to grant or refuse permission it must refer the application back to the Mayor, giving him 14 days to decide whether to direct refusal, direct that he is to become the local planning authority and determine the application himself or allow the LPAs decision to stand.

Risks of directing refusal:

5. If the Mayor directs refusal of the application, the applicant has the right to appeal. The Mayor would be responsible for defending his decision at appeal. If the decision is overturned by an inspector this could undermine the implementation of the London Plan and could undermine the credibility of the Mayor. The decision to refuse may be unpopular locally, if it were an application people supported, and in general may be seen as overriding local decision making. Defending appeals can be expensive as counsel is usually required and often other expert witnesses or evidence are needed, costs of £100,000s are likely. It is also possible that

the Mayor could have costs awarded against him, i.e. he has to pay the appellant's fees as well. For a complex or long inquiry this could be punitive.

6. Planning and legal officers are present when the Mayor considers stage II reports to assist the Mayor in his decision making, based on previous experience, case law etc. Officers and the Mayor are guided by the requirement of the Mayor of London Order 2008, that he can only refuse applications that are (a) contrary to the spatial development strategy or prejudicial to its implementation; or (b) otherwise contrary to good strategic planning in Greater London. The Order also sets out a range of matters that the Mayor must have regard to.

7. Not all directions to refuse result in an appeal. Historically about half of all Mayoral directions have been cancelled following receipt of new information, amendment to the application or a revised section 106 agreement. Not all of those that have not been cancelled have led to appeal.

8. There is a risk that the Mayor may overturn an officer recommendation and decide to direct refusal. This is no different to a planning committee overturning an officer recommendation. Whilst such decisions can be harder to defend at appeal, they are not always unsuccessful.

Risks of taking over an application:

9. If the Mayor directs that he is to be the local planning authority there is a risk, irrespective of his final decision, that he may be seen as overriding local decision making. Taking over a large number of applications also has resource implications for the GLA and could undermine the credibility of the Mayor. This was a key area of debate during the Bill's passage through Parliament, and therefore the Government put various safeguards in place to limit the number and type of applications that the Mayor could take over.

10. The Mayor can only take over applications that are referable under Category 1 or 2 of the Order, thus reducing the number of potential applications to be taken over. The Mayor can only take over an application if it meets the three tests set out in the 2008 Order. The Mayor also has to have regard to the relevant council's performance against relevant development plan targets. Finally the Government circular that accompanies the 2008 Order provides further guidance emphasising in particular that only the most strategic applications should be considered for take-over and only a limited number of take-overs would be expected in any one year.

11. There is a risk that a council or individual may challenge the Mayor's decision to take over an application in the courts. Provided that the reasons for taking over are justifiable then a challenge would not be successful. Planning and legal officers are present when the Mayor considers stage II reports to assist the Mayor in his decision making, based on previous experience, case law etc.

12. There is a risk that the process of determining an application that has been taken over may not be followed correctly or that a flawed decision could be made, resulting in a challengeable decision.

13. The process by which the Mayor makes his decision was also the subject of much debate during the passage of the Bill through Parliament, particularly the need to hear the views of the public. As a result there is a requirement to hold a representation hearing. The requirements for this are set out in the 2007 GLA Act and the 2008 Order.

14. The GLA Act requires the Mayor to give the LPA and the applicant the opportunity to make representations at a hearing. The Act also requires the Mayor to publish a document setting out who else may make representations, the procedures to be followed and the arrangements for identifying information that must be agreed by persons making representations. The Act also requires the Mayor to give 14 days notice of the hearing to those entitled to speak. The Order sets out that representation hearings must be treated as if they were a meeting of a council in terms of access to information etc. In particular the agenda and reports must be published seven clear days in advance of the meeting.

15. The process for taking over and application and holding a representation hearing is unique in the UK planning system. Therefore no other policies and procedures are directly comparable. However, GLA officers took the view that the most comparable situation was a planning committee where the applicant and objectors are permitted to speak. This approach fits with the intention of the Order to apply local government procedures to the hearing and reflects the debate in Parliament. With that in mind it is clear that the hearing is **not** akin to an informal hearing or public inquiry held by an inspector into an appeal against refusal/non-determination.

16. In preparing the representation hearing document GLA officers sought to draw on the best practice within London borough councils for dealing with speakers at planning committee. Officers carried out a survey of all boroughs and discussed best practice with key development control staff in the boroughs.

17. The Mayor published the document setting out the details required by the Act in May 2009. The document states that a formal review will be carried out after the first six hearings. In fact lessons have been learnt from the two hearings held so far and it is likely that minor amendments to the document will be made.

18. The Act and Order only given limited prescription to procedures, with the detail left for the Mayor to decide. The published document sets out this procedure in detail. Provided that the procedures are followed there is no reason a legal challenge would be successful.

19. If the Mayor grants permission for a development there is always a risk that this might be challenged on some other procedural failing (e.g. consultation with a statutory body has not been carried out) or that his decision was '*Wednesbury*' unreasonable, in the same way that a council decision could be challenged. The applications that the Mayor takes over are some of the largest and most complex in London, often with a range of objectors and other interest groups. The fact of taking over raises the profile of schemes, potentially bringing in more interested parties and generally placing the decision making process under a greater spotlight. PDU and legal officers are fully aware of this and therefore ensure, as far as is practicable, that the report to the Mayor and his subsequent decision is challenge proof.

20. The Mayor is also fully aware of his responsibilities in taking over applications and making a determination and has received advice and training on this from GLA lawyers.

General matters of probity

21. GOL Circular 1/2008, which accompanies the 2008 Order, highlighted the need for the Mayor to comply with all legal requirements regarding procedural fairness and propriety and ensure that decisions are properly based on planning considerations. The Circular draws attention to the Secretary of State's guidance to the GLA on ethical standards and the guide for elected members issued by the Standards Board for England. The Circular highlighted the need for the Mayor to take particular care in relation to his public statements and behaviour regarding planning applications, particularly when one of his functional bodies has an interest in an application, and encouraged the Standards Committee to draw up a code of conduct to cover the Mayor's new role in relation to planning applications.

22. In response to this, a new code of conduct for the Mayor and Assembly Members was drawn up and agreed by the Standards Committee in January 2010. In addition new planning protocols were agreed for staff with delegated authority to take planning decisions (currently Sir Simon Milton and Giles Dolphin) and for all other staff.

23. The code requires personal and prejudicial interests to be declared, requires decisions to be delegated where a prejudicial interest has been declared, gives guidance about pre-determination and specific guidance and requirements about the Mayor's involvement in meetings with applicants, councils or other interested parties.

24. Various new measures were put in place following adoption of the new code and protocols. The Standards Committee reviewed operation of the code and protocols in December 2010 and subject to some minor changes did not express any concern with the operation of the Code/protocols.