CONSULTATION PAPER ON STRATEGIC PLANNING IN LONDON: DRAFT MAYOR FOR LONDON ORDER 2008 AND GOL CIRCULAR 2008

COMMENTS BY THE LONDON FORUM OF AMENITY AND CIVIC SOCIETIES

1. The London Forum welcomes the Circular as a clear statement of how strategic planning in London should be undertaken, but has strong reservations about the new discretionary power to take over certain "strategic" applications. We are concerned that the proposed Order offers too great a scope for defining applications as "strategic" and no provision, other than judicial review, to appeal against a decision by the Mayor to take over a planning application.

2. Our comments below include:

   - our views on the new discretionary power and the lack of an appeal process;
   - our concerns about the reduction in the threshold for notification of housing schemes based on experience with the current Order since 2000 (see Annex 1);
   - the lack of clarity about what "taking account of borough performance" means;
   - the need for specific rights for civic and amenity societies to make representations at hearings; and
   - the need for clarity about legal challenge.

New Discretionary Power

3. The London Forum recognises that the Greater London Authority Act 2007 introduces a discretionary power for the Mayor to decide certain strategically-important planning applications which ensure that his regional policies, as set out in the London Plan, are implemented, and that all areas of London contribute to meeting the Capital's key challenges – such as providing affordable housing, contributing to London's transport infrastructure and ensuring the right facilities are in place for disposing of London's waste.

4. We strongly support the intention that this discretionary power should be used sparingly, only for a "small number of cases" (Circular para 1.5), for a "small numbers of key applications" (Circular para 5.2), that "few will raise issues that justify the Mayor taking over the application" (Circular para 5.8) and that intervention be a matter of last resort (para 5.48). We agree with this intention. But we consider that, taken together, the proposals in the consultation paper will give the Mayor too much unfettered authority, so that the stated intention to limit the number of cases where the Mayor takes over responsibility may not be achieved, while the objectivity and balance of the planning process in London risks being undermined.

5. In essence the proposals set out a procedure for the Mayor to decide:

    a. whether an application comes within the definition of an application of potential strategic importance (PSI) for which he may take over jurisdiction;

    b. whether the application passes a 'stringent' policy test; and

    c. whether to allow let borough proceed with its proposed decision, direct a refusal or take over jurisdiction himself.

6. The proposals envisage no right of appeal against the Mayor's decision. They do not alter the current power of the Secretary of State to overrule a Mayoral direction to refuse permission, but they appear not to envisage a similar power to overrule a Mayoral direction to take on jurisdiction (there is no such provision in the draft Order, although para 5.56 of the draft Circular appears to suggest that there is).

7. If stage b above were wholly objective – ie, if there could be no possible argument about whether a PSI application passes the policy test, it might be acceptable not to include in the procedure some method of reviewing or overturning the Mayor's decision. But the policy test requires the Mayor to exercise his judgement about the nature and scale of the proposed development; about whether there are 'sound planning reasons' (whatever that may mean) for him to take over jurisdiction; and about the borough's performance in achieving London Plan targets. In their nature, these decisions cannot be wholly objective. **In our opinion the absence of a clear method of reviewing the Mayor's decisions is therefore unacceptable.**

8. Our view is reinforced by consideration of the overall nature of the Mayor's decision. The point is made in para 5.35 of the draft circular that the decision to take over jurisdiction is not itself a decision whether planning permission should be granted. However, in reality the Mayor is unlikely to take over jurisdiction in cases which he opposes since a direction to refuse will be equally effective. The most likely type of case in which he will wish to take over jurisdiction will be one where he wishes to grant a permission which the borough is minded to refuse (or to impose conditions or secure planning obligations with which the borough would disagree). Where the Mayor then grants permission there is no further right of appeal (unlike cases where the borough refuses permission following a Mayoral direction). The case for a mechanism to review the Mayor's decision to take over jurisdiction is therefore even stronger than the case for the existing provision that enables review of Mayoral directions to refuse permission.

9. In these circumstances we consider that a borough which objects to the Mayor's decision should have a right of appeal to the Secretary of State

which could be dealt with by a planning inspector considering written representations. This would ensure that the decision is made objectively. An alternative, though somewhat less satisfactory, method of securing review of the Mayor's decision would be to enable the Secretary of State to overrule it in the same way as she can overrule a direction to refuse permission. The procedure could essentially be the same as for such directions: the Secretary of State would be notified of the decision at the same time as the borough and would have a limited time in which to reverse it: the decision would be quasi-judicial like other decisions of the Secretary of State under planning law.

Need to reflect experience since 2000

10. It is, therefore, important that thresholds for notification and the criteria for selecting such cases should focus on genuinely strategic applications.

11. We agree that the new Order and Circular should also reflect the experience of the operation of the 1999 Act (Draft Circular para 1.1), but consider that:

    - the choice of the revised threshold for housing is not evidence-based in terms of its understanding of the numbers of additional cases that would be generated (55 rather than 30 cases per year), few of which would be strategic; and
    - the degree to which the Mayor gets involved in the detailed aspects of applications, not just strategic issues, is currently excessive (cf Draft Circular 5.17).

Policy Tests

12. We **strongly support** the concept of policy tests as criteria for determining whether the Mayor should take over an application, to ensure that the Mayor can only intervene in the most important applications. We do not, however, consider that, despite the importance of providing more housing, particularly affordable housing, that this justifies extending the threshold for referral of housing applications to the Mayor down to schemes as small as 150 units.

13. A review of over 350 housing developments between 150 and 499 units permitted from July 2000 to late 2007, demonstrates that few if any of these schemes, individually or cumulatively, would justify intervention on grounds that they were strategic in terms of the implementation of the London Plan. We are concerned that Government Office for London may not have had sufficient evidence, either on the number of applications or their composition, to justify the choice of a threshold of 150 units. (See Annex 1 for more detail.) We consider that there is no evidence base to support this arbitrary threshold. **We consider that if the threshold for notifying housing schemes should be lowered it should be no lower than 300 units.**

Density

14. We **strongly disagree** with the emphasis on “maximising” the delivery of housing from housing schemes. (Circular para 5.42). The Mayor has sought to raise housing densities by applying his London Plan Density Matrix, which establishes the “appropriate density range” for each site. We strongly endorsed this matrix at the recent Examination in Public into the Further Alterations to the London Plan, but were very concerned about its abuse. Having established the “appropriate density range” for sites and used it to determine their capacity, research undertaken to review the Density Matrix showed that more than two-thirds of all schemes with 10 or more units were achieving densities above, often considerably above, the appropriate density range of the sites. Using the word “maximise” (see Circular para 5.40) encourages this. We are concerned that pitching the size threshold at 150 units, combined with an emphasis on maximising the amount of housing, has led to a number of very high density schemes which are considerably higher than the appropriate density range in the Density Matrix.

15. Most cases of disagreement between Boroughs and the Mayor on housing schemes it is not a matter of whether there should be housing or not on a site, but usually how much and at what density. We consider that the Density Matrix in the London Plan provides an agreed basis for assessing the capacity of sites and the appropriate density of development. The disagreement is usually about the difference between an “appropriate density” and the higher density being proposed by the developer. This difference – which could be the difference between 200 units being desirable in terms of the density matrix and a proposal for 250 units – is not a strategic issue and should not be a candidate for intervention.

16. **We suggest that the Mayor should not take over a housing scheme, which is above the appropriate density range for the site. This needs to be explicit in the Circular and para 5.40 needs to be amended to delete reference to maximising the quantity of housing in schemes.**

Taking account of borough performance

17. Apart from strategic housing targets, we are unaware of “any relevant development plan targets” of a strategic nature, let alone any that might attract intervention by the Mayor. It needs to be clear that this only refers to housing**.**

Representation hearings

18. The London Forum is generally pleased with the degree that the Circular and the Order has responded to concerns about the Mayor being subject to the same legal requirements with regard to openness and transparency as all

other local planning authorities, including producing a document setting out from whom he will hear oral representations. We would like this to formally include representations from third parties, such as local civic and amenity societies.

19. **We propose that para 5.50 of the Circular, line 6, be amended by adding after “any other persons” the words “, such as civic and amenity societies,”.**

Legal challenge

20. The London Forum is concerned that the Mayor should have to give clear and specific reasons for taking over applications (see Paragraph 7(7) of the Draft Order), and that the remedy for concerns about Mayoral decisions be made clear. Whilst there may be circumstances where the Secretary of State might use reserve powers to intervene (Circular para 5.56), the Circular should make clear that if the Mayor does not give adequate reasons for taking over a case, that this may be challenged in the courts.

Propriety

21. We **strongly support** paras 5.63-64 of the Circular, which make clear that the Mayor will need to be careful about promoting developments for which he may become the local planning authority. We welcome the proposed code of conduct.

The Mayor of London Order 2008

22. The London Forum:

- **objects to the reduction in the threshold for notification of housing schemes from 500 to 150**. We consider that this would capture too many planning applications for housing schemes – an additional 55 to 60 schemes a year (not 30 as estimated by GOL), most of which would not be considered as “strategic”
- **welcomes the requirement to give reasons for making a direction that the Mayor is to be the local planning authority (Paragraph 7(7)) is concerned about the catchall reference to “any other targets” in Paragraph 7(3)(b)**
- **welcomes the requirements for access to representation hearings and documents, but is concerned that, while this includes all current statutory requirements, it does not embrace current good practice which enables third parties to make representations at hearings – this needs to addressed in the Circular**

23. The London Forum is concerned about:

- the potential mismatch between the powers and purposes of intervention and the opportunities provided by the Order for intervention in non-strategic cases. There is a lack of clarity about what is or could be strategic in regional terms. As set out, the Order provides the opportunity for the Mayor to intervene in a large number of non-strategic cases, with very limited safeguards against micro management and against intervention in non-strategic cases. There is too much scope for “mission drift”.

  There needs to be a clear understanding about what constitutes a strategic decision and the need for safeguards – ie procedures through which decisions to intervene can be challenged

- the thresholds adopted for potentially strategic decisions, particularly for:
  - housing developments (150 dwellings is too low) which are unlikely to meet the main objectives of selective use and ensuring that intervention is limited to the few applications which are of strategic importance for planning in London. and
  - large-scale developments in the City of London, where the high thresholds proposed would result in the City being exempted from contributing to meeting the Capital’s key challenges (such as contributions towards affordable housing and public transport infrastructure)

- the lack, in the Circular, of a clearly-specified need to give clear and specific reasons for intervention, indicating exactly why a case is considered to be strategic, not just in general terms. Paragraph 7(7) of the Order does cover this, but this should spelt out in the Circular.

- the lack of clear rights for third parties to be heard at representation hearings for applications decided by the Mayor.

Yours sincerely,

Peter Eversden
Chairman

ANNEX 1: Threshold for Housing Schemes

One of our main concerns is the proposal to lower the threshold for notification of housing schemes to the Mayor as potentially strategic applications from 500 to 150. We consider that that there is no basis for choosing a threshold of 150 and that, based on an analysis of all permissions for housing schemes in London from July 2000 to the end of 2007 which included between 150 and 499 dwellings, that a higher threshold – we suggest 300 – would me more appropriate.

The main basis for our case is that:

- there is **no evidence base for selecting 150 dwelling as the threshold for the notification to the Mayor of housing schemes as potentially strategic** – 150 dwellings is neither strategic in regional nor sub-regional terms in a London context. Indeed it would not even be strategic in Borough terms in most London Boroughs. An analysis of the list of housing schemes between 150 and 499 dwellings granted planning permission since July 2000 (see attachment) would suggest the choice of a higher threshold. From July 2000 to December 2007, the distribution of cases was:
    - 150-199 units: 123 cases;
    - 200-249 units: 88 cases;
    - 250-299 units: 46 cases;
    - 300-399 units: 56 cases;
    - 400-499 units: 38 cases.

  An initial analysis, suggests that none of the schemes between 150 and 299 units could be regarded as strategic in terms of the Draft Order or the Draft Circular.

  London Forum proposes that the threshold for notification be lowered from 500 dwellings to 300 dwellings

- **the vast majority of applications for housing schemes between 150 and 499 dwellings are allowed and few are refused because housing is not acceptable on the site.** Refusal is usually because the density/quantity of dwellings proposed is regarded by the Borough as too high. The difference between the London Borough and the Mayor for a scheme is **unlikely to be strategic**. For example where the Borough would accept a scheme for 200 units but has refused a scheme for 250 units (ie a difference of 50 units) - the difference would not be a "strategic" issue. **For "positive" intervention the Mayor must be able to demonstrate why the case is strategic.**

London Forum considers that the Mayor should in all cases where he proposes to take over an application give clear and specific reasons why he considers the application to be strategic.

- **the Mayor should not call in schemes which are above the “appropriate density range” for a site in order to promote higher densities than in the Density Matrix in the London Plan:** The Mayor has applied the Density Matrix in the London Plan and, as part of the Housing Capacity Study, established the capacity of major sites on the basis of the mid-point in the “appropriate density range” that applies to the site. In practice, however, **the Mayor has encouraged densities above the “maximum” of the appropriate density range of sites** and, as revealed by the GLA’s review of the density matrix for the Further Alterations of the London Plan, the outturn density of housing schemes over 10 units shows that two-thirds (67%) of the schemes had densities above, often considerably above, the “maximum” of the appropriate density range for the sites. **London Forum consider that if the Mayor were to “call-in” applications for densities above the maximum of the range for a site, this would be unreasonable and probably not be strategic**

- **the choice of the 150 dwelling threshold would generate an extra 55-60 cases a year:** GOL has estimated that the choice of this threshold would only add 30 applications a year to the Mayor’s workload – evidence from the GLA’s development database reveals that for the period July 2000 and the end of 2007 an average of over 50 schemes a year with between 150 and 499 dwellings were completed, if those not developed and those refused were included this could be as high as 55-60 applications per year – double the workload estimated by GOL. If the numbers of cases to be notified is to be kept small, **London Forum considers that up to 15 extra cases per year that were large enough to be strategic would justify a trigger threshold of 300 dwellings**

ANNEX 2: LONDON FORUM'S RESPONSE TO QUESTIONNAIRE

Question 1: Procedures

1. We consider that the proposed procedures would be acceptable providing that a right of appeal against the Mayor's decision to take over jurisdiction or a power for the Secretary of State to overrule such a decision is included.

2. If no such power were included we would regard the procedures as unacceptable so long as the Mayor's decision is not wholly objective in a way that could easily be tested by the courts.

Question 2: Thresholds

3. The consultation paper and draft circular emphasise the importance that the Government attaches to strengthening the Mayor's ability to intervene to secure the achievement of London Plan housing targets. It is the London Forum's view that these targets can be achieved without stretching local infrastructure, prejudicing local amenities or damaging the valuable character of many local areas by encouraging densities in excess of the "appropriate density range" in the London Plan Density Matrix. However, there is a danger that giving the Mayor power to intervene with the purpose of promoting relatively small, high-density housing projects against the wishes of the borough concerned will be at the expense of other local amenities which only the borough can properly assess. **A housing development with 150 homes could be no bigger than a single block of flats. We do not believe it is appropriate for the Mayor to be able to intervene on cases as small as this and consider that the minimum size of development should be no smaller than 300 homes.**]

4. We are concerned that the proposal to increase the height and size thresholds for PSI applications in the City of London will make it more difficult to secure appropriate section 106 agreements in relation to such developments. It is essential that commercial developments under 100,000 square metres make a contribution to London's strategic transport infrastructure, much of which seeks to support the City's role as world city. The Mayor plays an important role in this respect, which we consider should not be diminished. **We therefore consider that the size and height thresholds for developments in the City should not be changed.**

Question 3: the policy test

5. We consider that it is reasonable to require any PSI application for which the Mayor might take over jurisdiction to meet criteria (a) and (b) as set out in para 4.24 of the consultation paper. **We do not agree that criterion (b) - significant effects likely to affect more than one London borough -**

should not apply to housing developments for the reasons set out in para 10 above relating to thresholds.

6. We agree in principle with the proposal that the Mayor should take on jurisdiction for a planning application only when he has 'sound planning reasons' for doing so. But it is important that there should be clear guidance as to what such sound planning reasons might be. The only indication given in the published documents is the statement (in para 5.42 of the draft circular and para 4.31 of the consultation paper) that the Mayor's consideration of borough performance against targets (see below) will form an important part of the consideration of whether there are sound planning reasons for the Mayor to intervene in an application. **The circular should include a clear explanation of what the Government considers would be sound planning reasons for the Mayor to make such a decision.**

7. The planning system includes other instances where understanding of the meaning of a qualitative expression such as 'sound planning practices' has evolved as cases have been decided. But this evolution has always taken place in a context in which decisions are open to challenge or review. The inclusion of this criterion in the policy test makes it all the more important to provide that the Mayor's decision on whether to take on jurisdiction can be reviewed.

8. As regards the proposal that the Mayor must take account of borough performance against targets, we welcome the intention, set out in para 5.42 of the draft circular, that the Mayor should intervene only where is necessary to ensure implementation of SDS policies; and, as set out in para 5.45, that the mayor should not normally assume jurisdiction for an individual application where he disagrees with the borough's decision but the borough is delivering against relevant development plan targets. However, the judgement whether or not a borough is achieving development plan targets is not a wholly objective one - for example there may well be differences of view about what a target requires. As formulated this proposal would enable the Mayor to make his decision on the basis of his opinion of the borough's performance without any need to demonstrate that that opinion is justified.

9. We are particularly concerned that the Mayor might take a narrow view of the targets that are relevant for particular applications. For example, although a borough may be meeting overall housing targets for its area, it may not be meeting particular targets, eg for affordable housing of one type or another or for housing in a particular part of the borough's area. This may be for entirely justifiable local reasons, and the authority may indeed have adjusted its policies in order nevertheless to achieve its overall targets. **We consider that the borough should not be penalised in such a situation. This should be spelt out clearly in the guidance, and, once again, we consider that**

providing for a review of the Mayor's decision will meet many of our concerns on this score.

Question 4: the draft circular

10. As indicated in para 3 above, there is an inconsistency between the draft order and para 5.56 of the draft circular. Para 5.56 says:

    Where the Mayor directs a borough to refuse an application or takes over jurisdiction of that application, the borough must follow that direction, unless the Secretary of State has issued a direction prohibiting the local planning authority from implementing the Mayor's direction….

Article 6 of the draft order replicates the existing provision requiring the Mayor to send a copy of a direction to refuse planning permission to the Secretary of State and enabling the Secretary of State to prohibit the local planning authority from implementing the Mayor's direction. There is no similar provision in article 7 relating to the Mayor's direction that he is to take over jurisdiction. As drafted, para 5.56 clearly applies to both types of direction. As already made clear, we consider that the draft order should, as a minimum, be brought into line with the wording of the circular on this point. Clearly the discrepancy needs to be removed.

Some of our other comments would entail changes to the circular, notably para 13 above concerning the need for a clear explanation of what would be 'sound planning reasons', and para 16 above concerning the need to make clearer how the Mayor is to take account of a borough's performance against targets.