Case Name: *London Borough of Hillingdon, R (On the Application Of) v Mayor of London* [2021] EWHC 3387 (Admin) (15 December 2021)

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Commentary:
The Claimant, London Borough of Hillingdon, brought an application for judicial review of the decision made by the Mayor of London to grant permission for the construction of a mixed-use development, comprising buildings of up to 11 storeys in height, at the site of the former Master Brewer Motel in Hillingdon.

There were three grounds to the judicial review brought by the Council:
1. The Defendant misinterpreted Policy D9 of the London Plan 2021 by concluding that, notwithstanding conflict with Part B of that policy, tall buildings were to be assessed for policy compliance against the criteria in Part C;
2. The Defendant erred in failing to take into account a material consideration, namely, the Claimant's submissions and accompanying expert evidence as to air quality; and
3. The Defendant acted unlawfully and in a manner which was procedurally unfair in that he failed to formally re-consult the Claimant or hold a hearing, prior to his re-determination of the application, following the adoption of the London Plan 2021.

The claim succeeded solely in respect of Ground 3, although Mrs Justice Lang refused relief under section 31 (2A) of the Senior Courts Act 1981. The claim was dismissed on all other grounds.

Ground 1 concerned the interpretation of Policy D9 of the London Plan 2021. The relevant parts of Policy D9 provide as follows:

A: "Based on local context, Development Plans should define what is considered a tall building for specific localities, the height of which will vary between and within different parts of London but should not be less than 6 storeys or 18 metres measured from ground to the floor level of the uppermost storey."

B: "1) Boroughs should determine if there are locations where tall buildings may be an appropriate form of development, subject to meeting the other requirements of the Plan. This process should include engagement with neighbouring boroughs that may be affected by tall building developments in identified locations.
2) Any such locations and appropriate tall building heights should be identified on maps in Development Plans.
3) Tall buildings should only be developed in locations that are identified as suitable in Development Plans."

C: "Development proposals should address the following impacts:
1) visual impacts [...]

2) functional impact […]
3) environmental impact […]
4) cumulative impacts […]"

The Council submitted that the ordinary meaning of the words in Policy D9, read as a whole, sets out a clear process for the grant of planning permission for tall buildings. In terms of the definition and location of tall buildings, the Council submitted that the planning judgment of the local planning authority at the plan-making stage is given primacy. Policy D9 did not permit the Mayor of London to claim policy support for overriding the LPA's judgment by reference to Part C when determining an application for planning permission. Rejecting this submission, Mrs Justice Lang found that there is no wording that indicates that Part A or Part B are gateways or pre-conditions to Part C – that is, when considering whether to grant permission for a tall building which did not comply with Part B(3), a decision-maker is permitted to rely on the factors set out in Part C. Further, the Council' submission would lead to the absurd result that a decision-maker in those circumstances would be required to assess the impacts of the proposal in a vacuum.

On Ground 2, the Council submitted that the Mayor of London failed to take into account the Claimant's consultation response and accompanying expert evidence (the AQE Report) on the issue of air quality. Mrs Justice Lang accepted the Mayor's submission that he did not fail to take account of the evidence but rather exercised his planning judgment to conclude that the development would comply with the relevant policy in respect of air quality impacts.

As for Ground 3, the Council submitted that the Mayor of London acted unlawfully and/or in a manner that was procedurally unfair in that he failed either to formally re-consult the Council or hold a hearing prior to his re-determination of the application following the adoption of the London Plan 2021. The Council also submitted that the Update Report should have been published prior to the Council making its submissions to enable the Council to know how the GLA officers intended to advise the Mayor and that the Council should have been given an opportunity to comment on the Technical Note produced in response to the Council's AQE Report. Mrs Justice Lang rejected the argument that fairness required another oral hearing. She also found that the Update Report did not need to be published prior to the council making its submissions, as it was clear that the Council was well aware of the issues to be addressed.

Regarding the Technical Note, Mrs Justice Lang held that it should have been disclosed to the Council as it was a response to their AQE Report, which could have been commented on in their representations to the Mayor if they so wished. The failure to disclose this Report was procedurally unfair and unlawful. However, Mrs Justice Lang found that it was highly likely that the Mayor would have granted planning permission even if the Council had made further submissions to the Mayor having considered this

note. She therefore refused relief under section 31(2A) of the Senior Court's Act.

Accordingly, the claim failed on Grounds 1 and 2, but succeeded in part on Ground 3. No relief was granted.

For further discussion see Simonicity.

Case summary prepared by Stephanie Bruce-Smith