

Neutral Citation Number: [2007] EWHC 757 (Admin)

Case No: CO/465/2007

IN THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

4th April 2007

Before :

THE HON. MR JUSTICE GOLDRING

Between :

THE QUEEN ON THE APPLICATION OF
WEST LONDON WASTE AUTHORITY

Claimant

- and -

THE MAYOR OF LONDON

Defendant

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

Michael Fordham QC and Mark Vinall (instructed by **West London Waste Authority**
Solicitor) for the **Claimant**

John Bates (instructed by **Greater London Authority Solicitors**) for the **Defendant**

Hearing dates: 2 March 2007

Judgment

As Approved by the Court

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Mr Justice Goldring:

Introduction

1. The West London Waste Authority (WLWA) is a joint authority of the London Boroughs of Brent, Ealing, Harrow, Hillingdon, Hounslow and Richmond on Thames. It undertakes the waste disposal functions of those boroughs. At issue in this application for judicial review is the lawfulness of two directions made respectively on 19 December 2006 and 19 January 2007 by the Mayor of London (“the Mayor”) to WLWA under section 356 of the Greater London Authority Act 1999 (“the GLA Act”). WLWA asserts that the Mayor’s directions, purportedly based upon proposal 96 of his municipal waste management strategy, preclude WLWA implementing other options for the management of waste which would be in accordance with the strategy if it is read as a whole. In shutting out such options the Mayor is exceeding his powers under section 356.

The relevant provisions

2. Section 353 of the GLA Act provides that:

“(1) The Mayor shall prepare and publish a document to be known as the “municipal waste management strategy”.

(2) The municipal waste management strategy-

- (a) shall contain the Mayor’s proposals and policies for the...disposal of municipal waste,
- (b) may contain such other proposals and policies relating to municipal waste as he considers appropriate. ...

(4) In preparing...the...strategy the Mayor shall have regard to –

- (a) ...the national waste strategy...,
- (b) any guidance given to him by the Secretary of State...

(5) In preparing...the...strategy the Mayor shall consult –

- (a) the Environment Agency
- (b) waste disposal authorities in Greater London...”

3. Section 354 provides that:

“(1) Where the Secretary of State considers that either of the conditions specified in subsection (2) below is satisfied, he may give the Mayor a direction about the content of the municipal waste management strategy...

(2) The conditions mentioned in subsection (1) above are...

(b) that a direction about the content of the municipal waste management strategy is required for the purposes of the implementation of the policies contained in the...(national waste strategy)...

(3) The power of the Secretary of State to give a direction to the Mayor under subsection (1) above:

(a) may be exercised either generally or specially, and

(b) may only be exercised after consultation with the Mayor.

(4) Where the Secretary of State gives the Mayor a direction under subsection (1) above, the Mayor shall comply with the direction.

4. Section 355 provides that:

“In exercising any function under Part II of the Environmental Protection Act 1990 (waste on land) –

...(b) each of the waste disposal authorities in Greater London, shall have regard to the municipal waste management strategy.

5. Section 356 provides that:

“(1) Where the Mayor considers that it is necessary for the purposes of the implementation of the municipal waste management strategy, he may give to a...waste disposal authority in Greater London, a direction requiring the authority to exercise a function in a manner specified in the direction...

(3) The Mayor may not give to an authority a direction under subsection (1) above requiring the authority to exercise a function in relation to the awarding of a waste contract if –

(a) the authority is required to comply with the public procurement regulations in awarding that contract, and

(b) in compliance with those regulations the authority has sent the second information notice relating to the awarding of that contract to the Official Journal of the European Communities [“OJEC”].

(4) The power of the Mayor to give a direction to an authority under subsection (1) above –

(a) may be exercised either generally or specially, and

(b) may only be exercised after consultation with the authority concerned.

(5) Where the Mayor gives an authority a direction under subsection (1) above, the authority to whom a direction is given shall comply with the direction.”

6. WLWA is required to comply with the public procurement regulations.

7. Section 358 provides:

“(1) If in the awarding of a waste contract a waste authority is required to comply with the public procurement regulations, the authority shall not send the first information notice relating to the awarding of the contract to the Official Journal of the European Communities unless –

(a) the authority has notified the Mayor that it proposes to send such a notice, and

(b) a period of at least 56 days beginning with the day on which the Mayor is so notified has elapsed...

(3) Where the Mayor has been notified under subsection (1)...above he may direct the waste authority to provide him with such information about the contract as he may require for the purposes of deciding whether the contract would be detrimental to the implementation of the municipal waste management strategy.

(4) Where the Mayor gives an authority a direction under subsection (3) above, the authority to whom the direction is given shall comply with the direction.”

8. Regulation 18(4) of the Public Contracts Regulations 2006 provides that:

“an authority shall publicise its intention to seek offers in relation to the public contract by sending [a Second Information Notice] to [OJEC]... as soon as possible after forming the intention.”

The problem faced by WLWA

9. Environmentally, sending biodegradable untreated waste to landfill is regarded as the least desirable option for the disposal of such waste. When the biodegradable elements decompose methane is produced, which is a potent greenhouse gas. The Landfill Directive of 26 April 1999 sets targets for the United Kingdom for the diversion of biodegradable municipal waste from landfill to other disposal methods. The Waste and Emissions Trading Act 2003 and the Landfill Allowances and Trading Scheme (England) Regulations 2004 (as amended) allocate to each waste authority a reducing “landfill allowance.” An authority which exceeds its allowance will have to

pay substantial financial penalties. It can only avoid that by buying from another authority that part of its allowance which it has not used, assuming there is an authority with an unused allowance. That is permitted by the Landfill Allowances Trading Scheme ("LATS").

10. At present over 99% of WLWA's waste is disposed of by landfill. It needs substantially to reduce that. It wishes, initially, to divert what is a relatively small proportion (up to 110,000 tonnes) of its biodegradable waste away from landfill. It wishes to invite companies to tender for the contract to do that on the basis of a specification it has prepared. WLWA refers to that initial diversion as Stage 1. It is intended later to procure further capacity to divert from landfill: Stage 2. Mr. Nicholls, WLWA's director, states that Stage 1 should be in place by 2009. Although there is a dispute between the parties as to the extent of the financial implications for WLWA (or, to be precise, the council tax payers in its area) if its "Stage 1" waste is not diverted by 2009, it is not necessary for me to resolve it. On any view, if there is no diversion from landfill, the financial implications will be considerable.
11. A waste contractor called Grundon is building an incinerator at Colnbrook, near Slough ("Lakeside"). It is readily accessible to WLWA, being some 200 metres outside its boundary. It should be in place by 2009. In Mr. Nicholls' opinion Lakeside would be well placed to meet WLWA's needs.
12. An incinerator may have a combined heat and power facility (CHP). That means that by burning waste it generates both electric power and usable heat (which can be sold to community heating schemes or industry). As Mr. Nicholls states, that is desirable. It leads to increased energy efficiency and is likely to be environmentally beneficial and economically advantageous. Lakeside will not for some time, if ever, be in the position to sell the heat it will produce.
13. Mr. Richmond, the Senior Policy Officer of the Greater London Authority makes it clear in his witness statement that the Mayor does not agree with the possible use of Lakeside. It is that disagreement that lies behind the issuing of these directions. Mr. Richmond puts it in these terms.

"Unfortunately [WLWA] have made it clear that they would like to consider a bid from Grundon to use...Lakeside...The Mayor considers...that to accept such a bid would be detrimental to the implementation of his strategy and has therefore had to issue three directions to [WLWA] to require them to implement his strategy.

- Lakeside is not a [CHP] facility and does not make use of heat.
- ...[It] does not have state of the art emissions limiting equipment.
- ...waste...will not be subject to pre-treatment prior to incineration.
- Consider (sic) that [WLMWA's] openness to their wish to receive a bid from Grundon and their lack of soft market

testing will discourage other solutions from coming forward.”

14. He also says this:

“...Although WLWA claim that their specification will encourage a range of proposals as it is “technology neutral,” the Mayor is concerned that a bid from Grundon will actively discourage anyone proposing any other solution...

...In my view WLWA’s desire to receive a bid from Grundon will be common industry knowledge, resulting in a perception of bias towards the Grundon facility that is very likely to deter other potential bidders from the costly exercise of bidding for the Stage 1 contract...”

15. Proposal 96 of the Mayor’s strategy, which lies at the heart of the directions, says this:

“In considering any proposed new contracts involving the conventional incineration of municipal waste, the Mayor would seek to ensure that as a minimum:

- waste is subjected to pre-treatment to remove as much recyclable materials as is practicable before the residual waste is incinerated;
- to ensure flexibility is maintained in order to allow movement up the waste hierarchy there should be no guaranteed minimum tonnage contracts;
- state of the art emission limiting equipment and monitoring systems are used to reduce any potential health impacts;
- combined heat and power technologies are used;

The first direction: 17 November 2004

16. The Mayor’s first direction to WLWA was on 17 November 2004. It required WLWA to:

“Commence and complete a BPEO [Best Practicable Environmental Option] assessment for the treatment and disposal of municipal waste arising in WLWA’s area.

Produce a joint municipal waste management strategy for the WLWA area.

Defer the procurement of any further municipal waste treatment services and in particular desist from sending a Second Information Notice to OJEC until the above requirements have been completed.”

17. In his second direction of 19 December 2006 the Mayor said that the first direction had “been met and is hereby revoked.”

The second direction: 19 December 2006

18. On 3 November 2006 Mr. Welsh, WLWA’s clerk and solicitor wrote to Mr. Richmond, the Mayor’s senior policy officer. He stated that having complied with the first direction, WLWA was entitled to proceed to the Stage 1 tendering exercise. It was no longer required to defer the procurement or the sending of the second information notice.
19. On 21 November 2006 the Mayor sent a proposed further direction to WLWA. It became the second direction (that of 19 December 2006). It was in the following terms:

“In accordance with section 356 of the Act, I, Ken Livingstone, Mayor of London, hereby direct that West London Waste Authority will;

1. Ensure any future municipal waste treatment services contracts or arrangements are in conformity with the self-sufficiency policies in the Mayor’s Municipal Waste Management Strategy, particularly Policies 6 and 19, and the supporting self sufficiency targets within the London Plan.

2. Ensure that any future municipal waste treatment services contracts or arrangements fully adhere to policies 17 and 18 contained in the Mayor’s Municipal Waste Management Strategy.

3. For the purpose of implementing the Mayor’s Municipal Waste Management Strategy. Ensure that any future municipal waste treatment services contracts or arrangements are in conformity with the principles set out in proposal 96 of the Mayor’s Municipal Waste Management Strategy that any new contract involving the conventional incineration of municipal waste will as a minimum;

- Ensure waste is subjected to pre-treatment to remove as much as is practicable before the residual waste is incinerated
- ensure flexibility is maintained in order to allow movement up the waste hierarchy by providing that there should be no guaranteed minimum tonnage contracts
- ensure state of the art emission limiting equipment and monitoring systems are used
- ensure combined heat and power technologies are used

4. In order to assist in the implementation of Proposal 36 of the Mayor's Municipal Waste Management Strategy, amend the West London Waste Authority area Draft Joint Municipal Waste Management Strategy to reflect the outcome of their BPEO assessment that reflects regional policy. In particular rewrite section 5.1 of Volume 1...before commencing the procurement of any further municipal waste treatment services.

5. Provide the Mayor with the draft specification of the proposed stage 1 waste treatment and disposal contract at least 28 days before sending a Second Information Notice to OJEC to enable the Mayor to review in light of the current situation in London and the changes to national and regional policy.”

20. Subject to a change in paragraph 5 these proposed directions were confirmed and became the second direction, that of 19 December 2006. It is paragraph 3 of that direction that WLWA seek to quash.

21. On 12 December 2006 Mr. Welsh responded. He set out the background.

“1. It is, and has been for some years, a priority for WLWA to seek to divert municipal waste away from landfill, and towards a solution which is positioned higher up the waste hierarchy. This objective accords with both national and regional policy, and it is also essential in the light of the imminence of substantial financial penalties under the Landfill Allowance Trading Scheme for excessive use of landfill.

2. WLWA resolved on 17 September 2004 to commence a procurement process to further this objective. However, on 22 November 2004, the Mayor gave [his first] direction...

3. WLWA's Joint Municipal Waste Management Strategy was approved on 28 June 2006, after extensive consultation, including with the Mayor's Office. The new draft direction recognises that the requirements of the 2004 direction have now been met by WLWA...

4. However, the situation is now urgent. Any further delay in commencing the procurement process will seriously jeopardise WLWA's efforts to divert waste away from landfill and place WLWA at risk of very substantial financial penalties under the Landfill Allowance Trading Scheme.

5. As set out in WLWA's Joint Municipal Waste Management Strategy, WLWA plans two stages of procurement. Stage 1 would seek tenders for a contract for a limited amount of waste (up to 110,000 tonnes per annum of biodegradable municipal waste) in order to (a) assist in meeting the constraints on WLWA's landfill allowances, and (b) provide alternative capacity in order to open the way for the possible

redevelopment of WLWA's existing facilities at Stage II which would involve much larger quantities of waste. The tender specification would not specify any particular technology, allowing bidders to make use of the most appropriate and desirable technology available...

6. Under s.356 of the 1999 Act, the Mayor has the power to give a direction when he considers that a direction is "necessary for the purposes of the implementation of the [Mayor's] municipal waste management strategy". WLWA accepts that the Mayor is entitled to act to ensure the implementation of his strategy. WLWA has been and remains entirely content to ensure due regard and conformity with the Mayor's Strategy. The draft direction is welcome insofar as this is its purpose and effect.

7. That means, however, his Strategy read as a whole, properly interpreted and reasonably applied. The Mayor is not entitled to use his power under s.356 to give directions for any other purpose. In particular, he cannot lawfully use a direction under s.356 to alter the content of his Strategy, change the status of the requirements in it or take certain aspects of the Strategy in isolation from the Strategy as whole. Where, for instance, the Strategy requires that a particular factor must be taken into account by a waste authority, the Mayor cannot lawfully use a direction under s.356 to transform that requirement into a rigid rule that necessarily elevates that factor over other competing considerations. Similarly, the Mayor may not by means of a direction take one element of the Mayor's Strategy out of its context and require compliance with it without having regard to other countervailing provisions elsewhere in the Mayor's Strategy. That would not be acting for the purposes of the implementation of the Mayor's Strategy.

8. Notwithstanding WLWA's commitment to ensure general conformity with the whole of the Mayor's Strategy, the draft direction would require WLWA to comply with certain specific parts of that Strategy. WLWA's understanding of the draft direction is that it does not, and cannot have been intended to, impose more onerous requirements than are imposed by the Mayor's Strategy itself, properly interpreted and reasonably applied.

9. Furthermore, given the Mayor's obligation under s41(5)(a) and 353(4) of the 1999 Act to have regard to the need to ensure that his strategy is consistent with national policies, the Mayor's Strategy must be interpreted in the light of, and so far as possible so as to be compatible with the relevant national policy...

50. In particular, WLWA would welcome clarification from the Mayor on the following points:

(1) Whether by the draft direction he is seeking to do more than reflect the status and content of his Strategy, properly interpreted and reasonably applied.

(2) Whether the Mayor intends that the draft direction will have the effect of excluding any particular potential tender, specifically...Lakeside...”

22. Mr. Welsh sent the proposed draft specification for Stage 1. It said this:

“In order to reduce its future reliance upon a declining allocation of landfill allowances [under]...the Waste and Emissions Trading Act 2003...[WLWA] wishes to reduce the quantity of biodegradable municipal waste (BMW) that it directs to landfill. It is intended to achieve this:

(a) partly by increasing the amounts of BMW that are separated from the waste stream by the waste collection authorities and sent for recycling and composting, and

(b) partly by diverting some of the Authority’s residual waste to alternative treatment and/or disposal so that there is a reduction in the amounts of BMW that are disposed of in landfill.

2. As an initial step in furtherance of its intention in 1(b), the Authority now invites detailed proposals from Companies who are able to offer proven solutions, forms of technology or other acceptable methods that will enable the Authority to achieve this diversion of BMW from landfill. Proposals submitted that are of interest to the Authority will form the basis of further negotiation that may subsequently result in a contract being awarded.

3. The Authority is seeking proposals that will enable a total diversion of between 30,000 tonnes per annum and 110,000 tonnes per annum of BMW to be achieved...

4. Companies should note that, in the evaluation of their proposals, the Authority will have regard to its Joint Municipal Waste Management Strategy as well as the Mayor of London’s Municipal Waste Management Strategy to ensure that any contract entered into will be in general conformity with and not detrimental to either the Authority’s or Mayor’s Strategy. One aspect of the Mayor’s Strategy is that new and emerging technologies are to be encouraged.”

23. Mr. Fordham QC on behalf of WLWA rightly submits that by reason of Regulation 18(4) of the Public Contracts Regulations 2006 an obligation had arisen on WLWA to send the Notice to OJEC.

24. On 15 December 2006 Mr. Nicholls emphasised the urgency of procuring Stage 1.

“...getting Stage I quickly underway is now absolutely essential if the looming grave financial consequences of the Landfill Allowance Trading Scheme are to be minimised. These consequences are potentially so substantial that they threaten to impact very seriously on the whole range of local government services that my Authority’s constituent boroughs provide...I fear that that the tenderers’ responses we are likely to receive to Stage 1 may well show that very great unavoidable additional cost will ensue as a result of this procurement having been delayed until now. Further delay may greatly exacerbate the position.”

25. On 19 December 2006 the Mayor wrote to Councillor Kinnear, the chair of WLWA. He referred in particular to the two questions raised by Mr. Welsh in his letter of 12 December 2006: whether by the draft direction the Mayor was seeking to do more that reflect the status and content of the Strategy, properly interpreted and reasonably applied and whether he intended that the draft direction was intended to exclude Lakeside. The Mayor said this:

“...In issuing this direction I am seeking to implement my municipal waste management strategy and hence therefore the direction requires WLWA to undertake their functions in line with the policies and proposals in my strategy. I am not able to choose which companies or organisations bid for waste contracts no more than I am able to award waste contracts to bidders who propose solutions that will deliver the aims and objectives of my strategy.”

26. On 3 January 2007 the Mayor consulted “on a proposed further direction.” He wrote:

“[WLWA’s] draft specification does not currently reflect the requirements of the direction of 19 December 2006 and the Mayor considers further direction is necessary for the purposes of the implementation of his [strategy]...The proposed direction would require your Authority to exercise its functions in a manner which addresses the requirements of the direction of 19 December 2006 and to enable the implementation of the Mayor’s policies on the thermal treatment of residual waste and self-sufficiency.”

27. The proposed direction was in the following terms.

“In accordance with section 356 of the Act, I...hereby direct that [WLWA] will;

1. Not send a Second Information Notice to OJEC...until paragraphs 2 and 3 of this Direction...have been complied with.

2. Revise the draft specification...to stipulate conditions requiring:

(a) the pre-treatment of waste received under the contract to remove as much recyclable material as is practicable before the residual waste is disposed of, and

(b) the use of state of the art emission limiting equipment and monitoring systems in any facility in which waste received under the contract is treated or disposed of. For these purposes 'state of the art' means state of the art as at the date on which the contract is signed. Where a contract is to last for more than five years the condition should require upgrading of the equipment to state of the art every five years, and

(c) the use of combined heat and power technologies.

3. Produce within three months of the date of this Direction, a three year plan setting out how WLWA will comply with the Direction of 19th December 2006 and how it will implement the Mayor's policies and proposals on self sufficiency, recycling, residual waste treatment and recovery for the Stage 1 procurement to the Mayor's satisfaction and how the planned Stage 1 and Stage 2 procurement processes – as set out in Mr Mike Nicholls' letter to Mr John Duffy of 15 December 2006 – will be integrated.

28. Initially WLWA sought to quash this proposed direction. However there is now the third direction. That omits paragraph 3. It changes paragraph 2(b). It now part of the third direction which WLWA seeks to quash.

29. On 5 January 2007 WLWA expressed its "very grave concerns about the direction made on 19 December 2006." It emphasised the urgency of the Second Information Notice.

30. On 11 January 2007 WLWA set out its position. Among other things it said this.

"8. WLWA is seeking to commence a "technology neutral" procurement process which specifies the desired outcome without specifying any particular method of achieving it. This will allow the widest possible range of tenders to be made, and WLWA intends to consider them in accordance with its strategy and the Mayor's Strategy, and to choose the tender or tenders which best achieve the objectives in those strategies."

9. The proposed January direction would require WLWA to impose certain rigid conditions on the procurement “up front”, before any tenders are made. The December direction appears designed to insist on those matters as rigid requirements when any contract is considered or entered into. The effect, as things stand, would be that any tender which did not comply with the rigid requirements could not – whatever the circumstances and whatever the alternatives – be considered on its merits by WLWA.

10. In WLWA’s view, acting in compliance with the Mayor’s Strategy cannot be said to necessitate so rigid an approach. Especially when it is remembered that the purpose of WLWA’s procurement is to divert waste from landfill, in circumstances where the Mayor’s Strategy recognises “landfill as the last, and least desirable option for the disposal of London’s waste”. To take a graphic example, it is one thing to have a Strategy which favours CHP in the context of promoting a new incinerator – compared with the option of a new incinerator which does not use CHP. But it is another thing to exclude the option of a new incinerator capacity with no CHP (and no market for heat), but which would divert some capacity from the alternative of landfill. The Mayor is requiring WLWA to prohibit bidders from even putting forward such options to allow them to be considered in accordance with the Strategy read as a whole, on their comparative merits, and in all the circumstances.”

The third direction: 19 January 2007

31. On 19 January 2007 the Mayor sent the third direction. It said this.

“In accordance with section 356 of the Act, I...hereby direct that West London Waste Authority will;

1. Not send a Second Information Notice to OJEC with the draft specification of the proposed contract...or any other such Notice, until paragraph 2 of this Direction has been complied with.

2. Revise the draft specification, in accordance with regulation 39 of the Public Contracts Regulations 2006, to stipulate conditions in respect of conventional incineration requiring:

a. the pre-treatment of waste received under the contract to remove as much recyclable material as is practicable before the residual waste is disposed of, and

b. the use of state of the art emission limiting equipment and monitoring systems in any facility in which waste received under the contract is treated or disposed of. For these purposes ‘state of the art’ means state of the art as at the date

on which the contract is signed. Where a contract is to last for more than fifteen years the condition should require upgrading of the equipment to state of the art every eight years.

c. The use of combined heat and power technologies [CHP].”

32. The requirement in the direction of 19 December 2006 that there be no minimum guaranteed tonnage in any contract was omitted.

33. The Mayor, among other things, wrote:

“WLWA seem to have a preference for using a conventional incinerator operated by Grundon’s at Lakeside...

The Mayor has no objection as such to the use of this particular facility. However it, and any other conventional incinerator, should meet the requirements set out in the Direction. Failure to do so would mean that the implementation of the Strategy would be at risk.”

34. The Mayor accepted that:

“any direction must be necessary for the implementation of the Strategy. Accordingly it must reflect the terms of the Strategy.”

35. He commented on criticisms by WLWA that the phrase “state of the art” was too vague. The Mayor said it was a term used in patent law.

The Mayor’s waste strategy

36. The Mayor’s waste strategy was published in September 2003. It is called “Rethinking Rubbish in London” and contains, among other things, a series of “policies” and “proposals.”

37. Both Mr. Fordham and Mr. Bates on behalf of the Mayor accept that the strategy must not be read as an act of parliament. It must be interpreted more broadly. The essence of Mr. Fordham’s submissions is that the strategy must be read as a whole. If it is, it can be seen to amount to a set of principles regarding the disposal of waste. They are not prescriptive. They are aspirational and to some extent consultative. To pick out proposal 96 in isolation and use it as the basis of a detailed and highly prescriptive direction is to ignore the strategy as a whole. A direction solely based upon it cannot amount to one “necessary for the implementation of the...strategy.” For it is not based on the strategy when read as a whole.

38. Mr. Bates submits that is wrong. The Mayor has the power to give a direction in respect of a discrete area of the strategy. Section 356(4)(a) makes that plain. In terms it states that the power to give a direction “may be exercised either generally or specially.”

39. Under the heading “key policies and proposals” the executive summary states:

“...The proposals provide a clear lead to London’s waste authorities on the actions it is expected they will need to undertake to meet and exceed their targets...The strategy sets out 44 policies, which are accompanied by 101 detailed proposals for consultation.”

- 40. That emphasises that these policies and proposals are a guide, submits Mr. Fordham.
- 41. There is a table specifying timescales for implementation. The degree of priority ascribed to proposal 96 is high. By 4A.11 its implementation should be considered first.
- 42. Chapter 4 sets out “the...Policies and Proposals on municipal waste, which are considered necessary by the Mayor to achieve the objectives of the Strategy.”
- 43. Under the heading “Framework for policies and proposals,” it states (at 4A.2):

“There are two key pressures that will mean that it will not be possible to rely on landfill for the management of a majority of London’s municipal waste in the future. One of these pressures will be the EU Landfill Directive requiring a move away from the landfill of biodegradable municipal waste, and the Government’s control of this through the Tradable Allowances for landfill and the targets...A fundamental change is therefore required in London’s approach to the management of its municipal waste...

...4A.8. The Mayor fully recognises that the waste authorities have their own statutory functions. The Mayor expects authorities to have regard to this Strategy in drawing up their own plans or strategies and in the exercise of their functions, but he recognises that authorities will need to have regard to their own circumstances when applying the strategic guidance of this Strategy. The Mayor is given power to direct authorities to exercise their own statutory functions in a manner that he considers necessary for the implementation of this Strategy but he will do so only after consideration of the circumstances of that authority...

4A.9. The policies and proposals throughout this chapter provide a clear lead to London’s waste authorities on the actions it is expected they will need to undertake to meet and exceed their targets. As stated above the proposals are not prescriptive about the specific measures, but do outline actions intended to achieve consistency of service provision to all Londoners where appropriate and, to help move London towards more sustainable waste management operations. It is intended that waste authorities should implement the proposals to help achieve the policy objective...

4A.10. One of the challenges for London is that each of the 33 waste collection authorities collect and re-cycle waste differently...It is understood that no two authorities will be starting from the same base. The timescales for implementation of each of the proposals will vary depending on the current situation in each authority...

4A.11. Authorities must consider all of the proposals. However, the Implementation Plan in Chapter 5 sets out the level of priority of proposals. Where a proposal is identified as 'key' or 'high', their (sic) implementation should be considered first..."

44. Mr. Bates submits that the last paragraph should be looked at in the context of the Mayor's power of direction.

45. If read as a whole, what it seems to me these paragraphs are saying is this. There must be change as far as the management of London's waste is concerned. There is in particular a need to move away from landfill. The document provides strategic guidance as to how that change is to be achieved. It is not intended to be detailed and prescriptive. The different problems faced by each waste authority have to be taken into account. The waste authorities must consider every proposal in the document. Some are more important than others. They are described as "key" or "high." Their implementation should be considered first. There is in other words, as Mr. Fordham submits, an element of aspiration. Regard must be had to what is practical and achievable.

46. By policy 1 the aim is set to exceed re-cycling and composting targets. By policy 2, it is London's "aim to meet the recovery targets for municipal waste set by the Government." It is said the Mayor "will insist" upon them. Mr. Richmond is critical of WLWA's strategy and the resulting specification in that regard.

47. By Policy 6:

"The Mayor will insist that all proposals use the Best Practicable Environmental Option ["BPEO"] when considering the way to treat particular waste streams taking into account the key considerations of the waste hierarchy, the proximity principle and regional self-sufficiency."

48. Policy 6 plainly recognises the importance of doing what is practicable in the light of the different principles set out.

49. 4A.25-6 state:

"... the over-reliance on a particular waste management technique is unlikely to be the Best Practicable Environmental Option for a whole waste stream..."

The...BPEO is a technique for guiding waste management decisions...[It] establishes, for any given set of objectives, the option that provides most benefits or least damage to the

environment as a whole, at an acceptable cost, in the long as well as the short term.”

50. These paragraphs again emphasise that it is a question of balancing competing aspects in any given case. One of the relevant aspects is cost. The subsequent paragraphs are in the same vein.

51. 4A.34-6 state:

“In considering the Best Practicable Environmental Option the waste hierarchy has to be taken into account. The waste hierarchy sets out the order in which waste management options should be considered based on their impact on the environment. The best option for the environment is to reduce the generation of waste. The next best option is reuse, then recycling and composting. Then recovering energy from waste through new and emerging advanced conversion technologies for waste and new waste treatment methods, such as Mechanical Biological Treatment, before the consideration of incineration. The final option at the bottom of the hierarchy is to dispose of waste to landfill...”

The approach of this Strategy is to concentrate on reducing and reusing waste and recycling and composting. Options to maximise these should be considered first, as set out in Policy 2, and this coupled with existing incineration capacity will help London meet the requirements of the Landfill Directive. This Strategy promotes, where practicable, filling any potential shortfalls with new and emerging advanced conversion technologies or new waste treatment methods, such as Mechanical Biological Treatment...

In concentrating on a top-down approach to the waste hierarchy, the practical issue of incineration ‘crowding out’ recycling is considered, as described in Waste Strategy 2000...”

52. By proposal 9:

“Where appropriate the Mayor will use the power of direction in relation to waste contracts to enforce the consideration of Best Practicable Environmental Option.”

53. The “proximity principle” is dealt with at 4A.40.

“The proximity principle requires waste to be dealt with as close to its point of production as possible and does not take into account regional boundaries. It aims to avoid passing the environmental costs of waste management on to communities that are not responsible for its generation, and reduces the environmental costs of transporting waste. In the context of

London, this should be interpreted reasonably. As with self-sufficiency and the waste hierarchy, the proximity principle cannot be regarded as an absolute, but it is an important consideration in determining the Best Practicable Environmental Option. Other issues such as transportation and land availability also have to be considered when making local decisions. Where possible, waste should be dealt with within a waste disposal authority area. If this is not possible, an alternative site as close as reasonably possible should be sought, preferably within Greater London. However, particularly in the case of a waste authority whose borders are on the boundary of London, it may be more practical to seek a site just outside of London, or one which can utilise sustainable transport such as water or rail, in preference to one within London but not within close proximity...”

54. Regional self-sufficiency is dealt with at 4A.37-9. At 4A.39 it states:

“...Virtually all waste reprocessing facilities...are outside of London and do not accord with the objective of regional self-sufficiency. There are, however, a larger number of landfill sites close to London, although not within the boundary, which would accord with the ‘Proximity Principle’ for the outer London boroughs. Reprocessing plants for certain materials are often too far from London, or do not exist in the UK at present, which may mean that recycling options are not always considered the Best Practicable Environmental Option at the current time. There is need for more appropriately sited reprocessing facilities and plant in and around London...”

55. By Policy 7:

“London should move towards much greater regional self-sufficiency in waste management...”

56. By policy 19:

“In line with Government’s waste hierarchy the Mayor considers landfill as the last, and least desirable option for the disposal of London’s waste and wishes London to move towards self-sufficiency... However, the Mayor recognises that there still will be a role for landfill in the disposal of residual waste resulting from recycling, composting, pre-treatment and recovery processes or for waste streams where landfill represent the Best Practicable Environmental Option. ”

57. By policy 20:

“Waste disposal authorities in London should aim to meet their allocations to reduce the amount of Biodegradable Municipal

Waste being landfilled as stipulated [by]...the Landfill Directive.”

58. Mr. Fordham submits that these “key considerations” of the waste hierarchy, the proximity principle and regional self-sufficiency must be taken into account in any direction given by the Mayor. They are an integral part of the strategy. He is obliged to have regard to the BPEO. The existence of a hierarchy assumes that the waste authority will do its best: will make its decision in accordance with the hierarchy. Whether something is practicable is for the waste authority in the light of what those who tender for the contract can in fact do. One principle cannot be elevated ahead of the others and made a requirement. It could not be in accordance with the strategy as a whole, for example, to make a direction which precluded consideration of any option which did not accord with the proximity principle. There could also be a conflict as between one principle and another. In the end it is a question of what is the BPEO. That is what the Mayor “will insist” upon.
59. In addition to those principles, there is, submits Mr. Fordham, the importance of the targets for landfill which the law lays down and which WLWA must obey.
60. By Policy 17:
- “Where waste cannot be reused, recycled or composted, value should be recovered in the form of materials and energy. In the case of energy, this should be done using a process that is eligible for Renewables Obligation Certificates, maximises the efficiency by using both the heat and the electric power, and minimises emissions of pollutants to all media.”
61. This sets out, submits Mr. Fordham, what must plainly be an aspiration. What it cannot justify is requiring only an incinerator which does both those things. It cannot mean ignoring every incinerator which does not. The consequence of that could lead to landfill being used. That would be to ignore the waste hierarchy. It would ignore practicability.
62. By policy 18:
- “The Mayor will support proposals for the treatment of residual waste through new and emerging advanced conversion technologies for waste or new waste treatment methods.”
63. That is plainly, submits Mr. Fordham, an aspiration.
64. By proposal 34:
- “The Mayor will work with...the waste authorities and local industry to explore the opportunities to develop heat distribution networks to supply heat from the existing incineration plants to housing, commercial and public buildings in the vicinity.”
65. That proposal recognises, submits Mr. Fordham, that this may not be achievable.

66. By proposal 35:

“The Mayor will keep developments in emissions control, monitoring and health impacts under review and, where appropriate, press the organisations responsible to adopt the new techniques.”

67. By proposal 36:

“Having regard to existing incineration capacity in London, and with a view to encouraging an increase in waste reduction, reuse, recycling and composting and the development of new and emerging advanced conversion technologies for waste and new waste treatment methods...the Mayor will support and encourage these waste management methods in preference to any increase in conventional incineration capacity. Each case, however, will be treated on its individual merits, having regard to the Best Practicable Environmental Option and whether it meets the requirements of the Renewables Obligation Order 2002. The aim is that existing incinerator capacity will over the lifetime of the plan, become orientated towards non-recyclable residual waste.”

68. Policy 42 provides that:

“The Mayor will aim to achieve, in liaison with waste authorities, a minimum service level and consistency in waste contracts across London. This will take into account the uniqueness of each London borough and will be developed through the sharing of best practice.”

69. By policy 43:

“The Mayor will take into consideration the aims and objectives of Best Value when reviewing waste contracts.”

70. By proposal 94:

“The Mayor will require authorities to include contract conditions and specifications in waste or associated contracts, which:

- reflect appropriate proposals;
- enable future flexibility for the waste authority to continue to develop sustainable waste management;
- maintain and increase the use of rail and water transport

- reflect best practice, through tailoring of contract conditions and specifications...”

71. Mr. Bates emphasises that this proposal is described as key. It should be considered with policy 42, which speaks of the Mayor aiming to achieve a minimum level of service and consistency in waste contracts across London.
72. By proposal 95:

“The Mayor will develop best practice guidelines.”
73. I shall not repeat proposal 96. It is set out in paragraph 15 above.
74. In my view Mr. Fordham is plainly right when he submits the strategy must be considered as a whole. Much is aspirational. There are different elements. One element may conflict with another in any given case. Some elements are more important than others. There are, as it seems to me, two underlying themes: the practicability of any proposed action and the waste hierarchy. What the strategy is not is a set of absolute requirements each of which can be considered in isolation. It is necessary in each case to consider what in practical terms is achievable having regard to what the strategy as a whole says.
75. That too reflects common sense. If one proposal in isolation is unrealistically elevated to a requirement it will not be achieved: nothing will change. The need to have regard to the BPEO will have been ignored.
76. I note too that proposal 96, the foundation of the disputed direction, speaks of the Mayor “*seeking* (my emphasis) to ensure.” That recognises that in any given case what is an aspiration may not be achievable. The direction, on the other hand, is in unconditional mandatory terms.

The submission to government

77. The Mayor’s strategy was submitted in draft to the Office of the Deputy Prime Minister for comment. No direction under section 354 was given. However, in the formal response of Mr. McNulty, the Under Secretary of State, concern was expressed about the way in which the Mayor’s strategy interpreted the national policy on incineration. Among other things, this was said:

“While we agree that advanced conversion technologies may provide the Best Practicable Environmental Option...in many circumstances, we are concerned that a presumption against a particular activity is a very strong policy measure, and there may be circumstances in which direct incineration provides the BPEO for managing residual waste.”
78. Mr. McNulty made it plain that he assumed that reference in the Mayor’s strategy to “each case should be treated on its own merits” meant that “incineration may be used, if it is found to be the BPEO after waste minimisation, recycling, composting and advanced conversion techniques have been considered.” Mr. McNulty also said that incinerators should include “wherever possible”, combined heat and power systems.

79. There are further references in Mr. McNulty's response which make it clear he was assuming the approach of the Mayor was not in terms of absolutes, but a question of balance having regard to the BPEO.
80. Mr. Fordham's short point is this. By the directions he has given the Mayor is excluding consideration of the BPEO and the waste hierarchy. In doing so he is seeking by direction to go further than the strategy agreed with government. He does not have the power to do that.
81. Mr. Bates submits that the Mayor has done no more than give directions in accordance with the strategy which government approved.
82. It follows from what I have said that if by a direction the Mayor may effectively shut out the BPEO, he is not acting in accordance with the strategy. Government's response is posited on the basis that the BPEO will in the final analysis be applied. Mr. Fordham is right in my view.

The guaranteed minimum tonnage

83. The second direction required that there be no guaranteed minimum tonnage in any contract. That was abandoned in the third direction. It was abandoned, Mr. Bates accepts, because a guaranteed minimum tonnage contract is a "necessary evil" at present. Mr. Fordham submits that in accepting that the requirement had to be abandoned, the Mayor is accepting that any requirement in a direction must have regard to what is practicable. He is accepting that if the consequence of a direction is to rule out an option which would make it possible to move up the waste hierarchy as the strategy requires, such a direction cannot be within the strategy and lawful. In short, in respect of a guaranteed minimum tonnage, the Mayor is accepting the direction cannot be obeyed if regard is paid to the BPEO. To insist on including such a requirement would mean staying with landfill. Mr. Fordham submits the same logic applies to the other directions.
84. Mr. Bates' submission, put shortly, is that once it became clear to the Mayor that a contract without a guaranteed minimum tonnage would not be achievable, it would have been *Wednesbury* unreasonable to include such a direction.

Pre-treatment

85. Mr. Nicholls states that he agrees that pre-treatment in some form is necessary before waste is incinerated. He would envisage the removing of recyclable waste at the kerbside when the waste is collected. By the time of Stage 1 there should be a significant increase in source separation. If (as the Mayor suggested in correspondence and is something referred to in the strategy) what is termed mechanical biological treatment ("MBT") is contemplated, there are reasons why that would or might not be appropriate, says Mr. Nicholls. No plant is available to WLWA (or none that would be within reasonable travelling distance). It might take 4 years to have one available. Unless there were available separate facilities for pre-treatment, Lakeside would be ruled out.

86. Mr. Fordham submitted that the requirement of pre-treatment excludes any potential tenderer who cannot provide pre-treatment. It may as a result keep off the table what may be the BPEO.
87. Mr. Bates submits that although efforts are made to separate waste which may be recycled at the kerbside, that has only had limited success. That means that residual waste will contain recyclable material. That is why there should be pre-treatment before incineration. As it is put at 4E.45, incineration of unsorted waste “must come at the bottom of the hierarchy of recovery methods.” As to the possible methods of pre-treatment, they are referred to at 4E.9 and following in the strategy.
88. There is a need for pre-treatment of residual waste. That pre-treatment could be done at a different place from the disposal of the residue.

State of the art

89. Mr. Nicholls states that all incinerators must operate to exacting standards set by the Incineration Directive. He would not know how to decide in any given case what “state of the art” means. He finds it difficult to see how a contract can be entered into with such a term. It is even more problematical for WLWA and a tenderer to commit themselves years in advance to upgrading to such a standard. He does not know whether Lakeside could be described as state of the art (or how that could be ascertained).
90. Mr. Fordham submits that it is not possible to understand how state of the art can really be defined. It is plainly aspirational in proposal 96. It cannot be an absolute standard. There must too be issues of cost and practicability.
91. Mr. Bates submits the Directive on the incineration of waste only sets out minimum standards. The Mayor in the strategy makes plain his concern about emissions (see 4E.41). He must take into account that a contract might last up to 20 years. There must therefore be periodical upgrading. Proposal 35 of the strategy refers to the Mayor keeping developments in emissions control monitoring up to date and pressing for the adoption by organisations of new techniques. A date by which there must be upgrading is needed for precision and certainty. If there is no incinerator within the United Kingdom with state of the art equipment, it is reasonable for the Mayor to require state of the art so as to encourage operators to use it. There are many possibilities of companies that WLWA could approach.

Combined heat and power

92. While CHP is desirable, Mr. Nicholls says it would be unrealistic to require it in every new contract. It would exclude a new contract with an existing incinerator without CHP or a new one so remotely sited that it could not sell its heat. Special infrastructure is needed to allow heat to be used. At Lakeside the facility is designed to provide CHP. The infrastructure is not in place to provide heat. Discussions are taking place which might result in it in 4 or 5 years. Insisting on such a requirement could result in the most undesirable outcome of having to stay with landfill.
93. The importance of practicability is illustrated by the South East London Combined Heat and Power plant, submits Mr. Fordham. As the strategy states, it was planned as

CHP. It was opened in 1994. However, only electricity, not heat, has been supplied by the plant.

94. The importance of what is practicable as far as heat and power is concerned is also illustrated by paragraphs 5 and 6 of Article 6.6 of the European Directive of 4 December 2000 (2000/76/EC), which deals with the incineration of waste. While making it obligatory not to pollute by emissions, it states that “any heat generated by...incineration...shall be recovered as far as practicable.”
95. Mr. Bates emphasises the efficiency of CHP. That efficiency is referred to in the strategy. It speaks of the development of CHP systems in London contributing to national and London targets: see 4E.3 and 4E.40. He submits it is perfectly proper to require CHP.

Mr. Bates’ additional submissions

96. As I have already indicated, Mr. Bates submits the Mayor can issue a direction requiring the waste disposal authority to implement a proposal in his strategy. Section 356(4)(a) makes it plain it can be specific. Section 358(3) contemplates that such a direction may stipulate terms in a proposed waste contract.
97. Although the direction the Mayor gives must be “necessary for the purposes of the implementation of the strategy,” Mr. Bates emphasises the power he has is subjective and wide. The question of proper interpretation and reasonable application is entirely a matter for him as long as the relevant issues are considered and he does not act perversely.
98. Mr. Bates relies on the observations of Scott-Baker J (as he then was) in *R v The Secretary of State for the Environment, Transport and the Regions ex parte West Sussex County Council* CO/4543/97. In that case the nature of the Secretary of State’s power to direct in respect of structure plans under section 35(2) of the Town and Country Planning Act 1990 was considered. That section provides:

“If it appears to the Secretary of State that the proposals are unsatisfactory he may, at any time before the planning authority have adopted the proposals, direct the authority to modify the proposals in such respects as are indicated in the direction.”
99. The contention on behalf of the Council was that the Secretary of State’s powers were constrained. Scott Baker J did not agree. As he put it:

“As a matter of language it is a subjective provision...the power is triggered when the proposals appear unsatisfactory...the Secretary of State is given a wide power or discretion over which to exercise planning judgment...[he] is entitled to disagree with the local authority on the merits of their proposals. That...is implicit in the reservation of the power to the Secretary of State.”
100. He referred too to the Secretary of State being able to substitute his planning judgment for that of the council. His power to do so was “unfettered.” There was good reason for that. He had to consider the broader planning position.

101. Mr. Bates submits that the Mayor's power to make directions under section 356(1), although not wholly unfettered as was the Secretary of State's under section 35(2), is of the same type.
102. Mr. Bates emphasises that the Mayor has to take account of the broader picture. The purpose of the strategy is to make London a sustainable city so that by 2020 its waste should no longer compromise that vision. The Executive Summary stated how it was necessary to invest and change. Implementation means change. That means looking long term. The contract in Stage 1 could be for 20 or 25 years. It is clear that proposal 96 has a high priority. To achieve the targets he has set the Mayor wishes to move away from landfill and conventional incineration.
103. It is important that incineration does not "crowd out" re-cycling. Waste should principally be used as a fuel or other means of generating energy: see *Commission of the European Communities v Federal Republic of Germany* C 228/00. Lakeside would not do that. It would operate at only 23% efficiency. Its process would amount to simple incineration, which is not satisfactory.
104. A report on Lakeside prepared for WLWA underlines the need for the direction. The report makes it clear how slowly waste authorities have progressed in the United Kingdom. Recycling and composting has made slow progress. There has been a lack of progress in installing capacity for treatment of residual waste other than by landfill.

My conclusion

105. First, as I have said, in my view, in order properly to be understood, the strategy must be considered in its entirety. Underlying the strategy is that waste will be managed having regard to what is the best practicable environmental option taking into account the hierarchy of waste. The directions on the other hand, are unconditional and mandatory. It is all or nothing. If they cannot in practicable terms be complied with, no regard can be had to the waste hierarchy or the best practicable option. If WLWA is right, it would shut out consideration of Lakeside and simple incineration. It would leave landfill, an option lower down the waste hierarchy. That would not be in accordance with the strategy when read as a whole.
106. Second, under section 356 the Mayor may only give a direction if he considers it is necessary for the purposes of the implementation of the strategy when read as a whole. Although it is for him to consider what is necessary, the power he is given is not unfettered. As it seems to me section 356 does not give him the power to exclude an option which might accord with the strategy if read as a whole. Such a direction could not be necessary for its implementation. Its consequence might conflict with the strategy. It is irrelevant in that regard if the direction he gives is general or specific.
107. The power given to the Mayor under section 356 is narrower than the wholly unfettered power which was given to the Secretary of State under section 35(2) of the Town and Country Planning Act 1990 and considered by Scott Baker J in *R v The Secretary of State for the Environment, Transport and the Regions ex parte West Sussex County Council*.

108. Third, it follows, that in order to understand whether the Mayor had the power to give a particular direction, it is necessary to consider the effect of the direction in the context of strategy when read as a whole.
109. Fourth, it does seem to me that the removal of the requirement regarding minimum tonnage is a recognition by the Mayor of the position I have set out. That part of the direction of 19 December 2006 regarding minimum tonnage was in my view unlawful.
110. Fifth, although the present urgency as far as WLWA is concerned may partly be its fault, as Mr. Bates suggests, that it is now urgent to move away from landfill is plain. That is so both for environmental and financial reasons. The Mayor's directions in the context of the strategy as a whole should be considered in that light.
111. Seventh, it is clear that Lakeside is a candidate for the Stage 1 diversion. It will shortly exist. It is near. That does not mean, submits Mr. Fordham, that Lakeside is being proposed or will be accepted.
112. Whatever the history, the following now appears to me to be the position. The specification is on its face technology neutral. As a public body WLWA is obliged objectively to consider each tender submitted to it. Any bid from whatever source will have fairly and properly to be considered on its merits. In considering any bid WLWA is obliged to have regard to the Mayor's strategy.
113. I now turn to the disputed part of the directions.

State of the art

114. I shall take this first.
115. It seems to me Mr. Fordham is right in his submissions regarding "state of the art." The reference to it in proposal 96 is aspirational. It is not possible to understand what in any given case it means. It ignores issues of practicability. If in any given case it can be defined, there would be cost implications. It would be difficult to find a tenderer which committed itself to providing an incinerator so described. It is difficult to understand how years in advance either WLWA or a tenderer could commit themselves to an open-ended commitment to upgrade.
116. In my view this direction would shut out options which would accord with the strategy when read as a whole. In fact, it seems to me the likely consequence would be continuation of landfill. That would ignore the waste hierarchy and not be the best practicable environmental option.

CHP

117. It seems to me the same considerations apply to combined heat and power. While I understand the Mayor's wish to look at these matters long term, a requirement for CHP may not be practicable. Mr. Nicholls sets out the problems with such a requirement. Nothing Mr. Richmond says leads me to conclude Mr. Nicholls is wrong, at least within any realistic time frame and at an achievable cost. The reality of this requirement is that it may shut out any option but the continuation of landfill.

Again, that would be to ignore the waste hierarchy and the best practicable environmental option.

Pre-treatment

118. The position here may be less clear cut on the facts.
119. As I understand it, this is a reference to pre-treatment other than by kerbside re-cycling, which has the sorts of problems referred to by Mr. Bates. Mr. Nicholls, who advocates re-cycling and suggests it would adequately be in place by the time Stage 1 is operational, says MBT could not be available for WLWA within a reasonable distance for some 4 years. If so, WLWA will be left with landfill until that time has elapsed.
120. Assuming Mr. Nicholls is right this requirement would leave landfill in place and would not result in the BPEO. What is clear, however, is that the direction does not leave any room for any solution but pre-treatment. Again, that might preclude any means of management but continuation of landfill. This direction too has the same defect as the others. It shuts out a solution which might in fact be the best practicable environmental solution.

Conclusion

121. It follows from what I have said that I would quash paragraph 3 of the Mayor's directions of 19 December 2006 and the whole of the Mayor's direction 19 January 2007. Their terms go further than the strategy when read as a whole permit. While I will hear any submissions, it seems to me at present unnecessary to go any further.