



London Borough of Barnet

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Dear Mayor Khan

London Environment Strategy – Withdrawal of Weekly Separate Food Waste Collection Service – Further consultation prior to the issuing of a potential Mayoral Direction concerning a Food Waste Service Review

We have carefully considered your letter of 2nd August 2018 and the previous correspondence between us in connection with Barnet's decision of 5th June 2018 ("the Decision") to withdraw the Weekly Separate Food Waste Service ("the Service"). We have obtained the advice of Leading Counsel concerning your powers in this matter. I am afraid that as a result of the that advice, as follows, I am forced to disagree with much of your letter.

First, it is plain from your letters of 19th June, 27th June and 2nd August 2018 that your proposal to issue a direction under section 356(1) of the Greater London Authority Act 1999 ("the GLA Act"), including a direction requiring Barnet to undertake a Food Waste Service Review, as set out in the letter of 2nd August ("the Proposed Direction"), has been formulated with the overarching objective of, at least potentially, requiring Barnet to reverse the Decision, and to maintain its previous practice of providing the Service. The clear advice which we have received is that you lack the power to impose any such requirement upon Barnet, whether pursuant to your powers under section 356(1) of the GLA Act or otherwise. A fortiori, second, you also lack the power to make the proposed Direction under that provision. Our reasons for this conclusion are set out below.

Principles

As you are aware, section 355(1)(a) of the GLA Act requires each of the waste collection authorities in Greater London (of which, of course, Barnet is one), in exercising any function under Part II of the Environmental Protection Act 1990, to act "in general conformity" with the provisions of the London Environment Strategy ("the Strategy") dealing with municipal waste management. Section 355(1) is, however, subject to section

355(2). This provides that section 355(1) has effect only to the extent that compliance by an authority with its requirements does not impose excessive additional costs on the authority.

Plainly, the provisions of sections 356(1) and 356(4)(a) require to be read in the light of those of sections 355(1) and 355(2). Accordingly, you cannot, in your capacity as Mayor, lawfully issue a direction under section 356(1) requiring a waste collection authority to do something which may or may not amount to an “act in general conformity with the London Environment Strategy” (as to this, see further below), but which imposes excessive additional costs on the authority concerned.

Next, it is clear from the decision in *R (West London Waste Authority) v Mayor of London* [2007] Env LR 27 that the Mayor’s powers to issue a direction under section 356(1) of the GLA Act are limited. Specifically, such a direction cannot impose more onerous requirements upon a waste collection authority than are imposed by the relevant version of the Strategy, properly interpreted and reasonably applied, itself. Further, as Goldring J observed in giving Judgment in that case (paragraph 74) “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 in each case having regard to what the strategy as a whole says”. As the Judge also noted, endorsing the submissions of Leading Counsel for the claimant (Judgment, paragraph 45), there was “an element of aspiration” in the relevant provisions of the Strategy that was before him; and regard must be had “to what is practical and achievable”. Those observations are of direct relevance to the present version of the Strategy as well.

Application

Applying the above principles to the circumstances of the present case, we would invite you to note the following. Taking the points in reverse:-

- (1) The proposed Direction is formulated with a view to imposing, and itself imposes, more onerous requirements upon Barnet than those which are imposed by the Strategy itself. Policy 7.2.1 of the Strategy aims to “Increase recycling rates to achieve a 65 per cent municipal waste recycling rate by 2030”. Proposal 7.2.1.a is that the Mayor “will set targets for local authority collected waste, a minimum level of service for household waste recycling collections and hold a contract register of waste authority waste contracts”. In connection with this, the explanatory text sets out the Mayor’s view that “Introducing separate food waste collections, in particular, has been proven to boost recycling rates and reduce contamination with dry recycling materials”, as well as reducing the amount of food people waste. The targets in question, set out at page 313 of the Strategy, are described as an “expectation” on the part of the Mayor that waste authorities will “collectively” achieve a 50 per cent LACW recycling target by 2025 (our emphasis), with aspirational household waste recycling rates set for 2025 and 2030. Proposal 7.2.1.b consists in an expectation on the Mayor’s part that local authorities will develop reduction and recycling plans by 2020, “which should include local reduction and recycling targets that contribute to the Mayors’ London-wide targets”, where the explanatory text expressly states that “Reduction and recycling plans should reflect borough circumstances”.

- (2) *By contrast, your aim, in issuing the proposed Direction, is to secure the ongoing provision by Barnet of its previous Service in both the immediate and indefinite future, notwithstanding Barnet's own decision, taken in light of the Borough's circumstances, to cease providing the Service. Plainly, therefore, the direct effect of the proposed Direction, namely to require Barnet to undertake a review of the Service with a view to continuing its provision, would be more onerous than any of the requirements – or, more precisely policies and proposals – that are to be found in the Strategy itself. Those policies and proposals look to the future; and are inevitably aspirational. They also apply to London waste authorities collectively, and not to any individual authority. Accordingly, you have no power to issue a direction to the proposed effect under section 356(1) of the GLA Act, given that its imposition is with a view to requiring a particular waste collection authority, namely Barnet, to retain a particular Service, and to maintain a particular level of separate food waste collection now and in the future.*
- (3) *It also follows from the above consideration that the proposed Direction extends well beyond any step or steps that would require to be taken by Barnet in order to satisfy itself that it is acting in "general conformity" with the provisions of the Strategy dealing with municipal waste management, for the purposes of section 355(1) of the GLA Act. You lack the power to impose such a Direction, which seeks to compel Barnet to do something which it has no statutory or other obligation to do, for this further or alternative reason.*
- (4) *Again further or alternatively, the effect of the proposed Direction and/or of maintaining the existing Service would be to impose additional excessive costs on Barnet. As Barnet's Leader explained in his letter to you of 28th June 2018, complying with the outline direction set out in your letter of 27th June 2018 would result in additional excessive additional cost, as the Council has finalised the savings related to the Service change at £296,766 a year, in addition to other benefits. In the meantime, Barnet is continuing to incur additional excessive costs, having continued to provide the Service whilst this matter remains unresolved. We note that you have not served a direction on the other nine London Boroughs that we believe do not have a weekly separate food waste collection.*
- (5) *In connection with point (4) above, we note that Policy 7.1.2 of the Strategy is that the Mayor will seek to ensure that London is provided with, inter alia, additional funding to take faster action to help cut waste, increase recycling rates, and accelerate London's transition to a circular economy. Proposal 7.1.2.a is that the Mayor will work with the London Waste and Recycling Board ("LWARB") and London's Boroughs to secure the ongoing provision of funding for LWARD and for waste authorities. The explanatory text explains that "Unprecedented funding cuts to local authority budgets has stifled investment in waste and recycling collection services, as boroughs are forced to make savings", and that "Without a guarantee of further funding and fast action from Government, it will not be possible for London, or England, to meet statutory waste targets let alone accelerate to transition to a circular approach". There has been no suggestion by you that any external funding will be made available to off-set Barnet's costs associated with the ongoing provision of the Service. Given that your Strategy itself recognises that, absent such funding, it will not be possible for London to meet statutory targets (or, we would add, non-statutory aspirational ones) it is wholly unreasonable for you to seek to insist that Barnet provides the Service on an ongoing basis, at the expense of core Council services, in circumstances in which Barnet, like all local authorities in London (and England), is "forced to make savings" in the wake of "unprecedented funding cuts".*

In summary, having taken advice, for the above reasons, we are clearly advised that you do not possess the requisite power to make either the proposed Direction set out in your letter of 2nd August 2018, or any Direction which is imposed with the aim of requiring Barnet to continue to provide the Service. We therefore suggest you desist from making any such Direction. Should you issue a Direction, then, as we have previously said to you, we have no option but to challenge that decision. We will also seek our costs of delay and of any legal proceedings that might ensue upon the taking of such a decision.

Please note that we will be sending you separate letters dealing with the other points raised in your letter.

Please respond to this letter within 14 days by 5 p.m. on 22nd August 2018. For the avoidance of doubt, Barnet will continue to provide the Service until the end of this period, with a view to terminating it thereafter. I reiterate my expectation, as set out in my letter to you of 28th June, that the Council's costs incurred as a result of doing so will be reimbursed by your Office.

Yours sincerely

A handwritten signature in black ink, appearing to read "Richard Cornelius". The signature is written in a cursive style with a small dot above the first letter 'R'.

Cllr Richard Cornelius
Leader of the Council