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The Rt Hon Robert Jenrick MP and The Rt Hon Christopher Pincher MP
Secretary of State and Minister of State for Housing (respectively)
Ministry of Housing Communities and Local Government (MHCLG)
2 Marsham Street
London
SW1P 4DF

11 May 2020

Dear Secretary of State and Minister of Housing

Re: Proposed claim for Judicial Review

1. This action pertains to Victoria Tower Gardens and the procedure for planning approval for the UK Holocaust Memorial and Learning Centre.
2. We, the London Historic Parks and Gardens Trust (LPGT) are a registered charity No. 1042337 and a company limited by guarantee registered in England & Wales No. 2935176, whose primary objectives include protecting London's parks and gardens and other historic green spaces from persistent encroachment and degradation by building projects. We are affiliated to the Gardens Trust (registered charity no: 1053446 and a company limited by guarantee registered in England and Wales no: 03163187) whose primary objectives include protecting parks and gardens and other historic green spaces from persistent encroachment and degradation throughout England and Wales. The Gardens Trust is a Statutory Consultee in the planning process which has delegated to LPGT to advise them on matters pertaining to London and lead on this project. As such we jointly represent a public interest. Accordingly, we are objectors to the above proposal and recognised as one of the Rule 6 parties.
3. We would like to stress at the outset two points. First, we in no way object to a Holocaust Memorial being built. We only object to it being built on precious historic green open space and built in a manner that would completely and irrevocably change the intrinsic nature of the park as a place for enjoyment and relaxation. Second, the Board of the charity do not threaten to take Judicial Review proceedings lightly but only do so because, in the unique and special circumstances of this case, as ordinary reasonable people the circumstances compel us to the view that the proposal has been and is being proceeded with in a manner that flouts the planning process and ignores an existing Act of Parliament.
4. THE ISSUE:
 - 4.1 The Government first proposed to build a Holocaust Memorial and Learning Centre in 2015. On 27 January 2016 the then Prime Minister announced that "the national memorial to the Holocaust will be built in the iconic Victoria Tower Gardens, next to the Houses of Parliament in Westminster" (henceforth 'the VTG Proposal'). The VTG Proposal had by 2017 expanded to include a co-located Learning Centre, to be built underground in the middle of the southern part of the Victoria Tower Gardens park (VTG).

- 4.2 The Applicant for the VTG Proposal is the Secretary of State (the Secretary of State) in the Ministry of Housing Communities and Local Government (MHCLG). In reality the Applicant consists of a number of closely related parties which have been working together on the VTG Proposal with the support of MHCLG civil servants since 2016 mainly at the taxpayer's expense. The Secretary of State is advised by the UK Holocaust Memorial Foundation Ltd (Registered Company no 12099783) (UKHMF). This entity is the owned creature of MHCLG; it was set up in 2016 by the Secretary of State to advise him or her (from time to time) on the VTG Proposal. It is co-chaired by The Rt. Hon Lord Eric Pickles and The Rt Hon. Ed Balls and its directors also include Lord Andrew Feldman and Messrs Gerald Ronson and Peter Freeman. This same group of directors and others subsequently, in January 2019, set up, under the chairmanship of Mr Ronson, The Holocaust Memorial Charitable Trust (Charity No: 1181806 and Registered Company no: 11796550) whose primary activity is "to support the establishment and subsequent operation of a new UK Holocaust Memorial and Learning Centre which is proposed to be built in Victoria Tower Gardens, London". Lord Pickles is also an employee of MHCLG as Special Advisor or Envoy for Post-Holocaust Issues. These entities jointly constitute a coordinated entity which is pursuing the VTG Proposal under the control of the Secretary of State.
- 4.3 On 7 January 2019 the UKHMF applied to Westminster City Council (WCC) for planning permission to build the VTG Proposal in Victoria Tower Gardens.
- 4.4 On 4 February 2019 we put in our objections to the application.
- 4.5 On 7 May 2019, during the early stages of the WCC planning approval process, MHCLG's then Secretary of State committed the government to spending a further £25m on top of the £50m already committed since 2016 to build the VTG Proposal. The commitment was announced by the then Prime Minister, who said: 'Seeing this through is a sacred, national mission. In the face of despicable Holocaust denial, this Memorial will stand to preserve the truth forever.'
- 4.6 On 31 July 2019 Richard Buxton Solicitors (RB), representing one of the other Rule 6 parties, wrote to the Secretary of State and MHCLG pointing out that the building of the VTG Proposal would infringe the terms of the London County Council (Improvements) Act, 1900, which requires the preservation of VTG. MHCLG replied by stating that it would comply with the relevant section of that Act.
- 4.7 On 7 August 2019, RB wrote to Westminster City Council pointing out that the VTG Proposal's Environmental Statement was defective as it did not contain any comparison of the environmental effects of any alternatives considered, which constituted a serious defect that has not since been rectified by the Applicant.
- 4.8 On 9 August 2019 the Secretary of State, MHCLG, said: "The National Holocaust Memorial and Education Centre has the complete and unshakeable support of the Prime Minister and I. It is a project of exceptional national significance" - thus showing a continuation of the already long-standing commitment of MHCLG and successive Prime Ministers to build the VTG Proposal in Victoria Tower Gardens.

- 4.9 On 30 October 2019 the joint Chairs of the UKHMF, The Rt. Hon Lord Eric Pickles and The Rt Hon Ed Balls, wrote to the Secretary of State requesting that the planning application be called in on the basis that it is a proposed development of national significance.
- 4.10 On 5 November 2019 MHCLG's Head - Planning Casework Unit, stating that he was "Authorised by the Secretary of State to sign in that behalf", but in the name of the Minister of State for Housing, sent a letter calling in the VTG Proposal shortly before the date on which Westminster City Council was due to announce the imminent date for its Planning Committee meeting to discuss and decide on the VTG Proposal. The grounds for the proposal's calling-in was stated therein as: "On the information so far available to the Minister of State, the matters which she particularly wishes to be informed about for the purposes of her consideration of the application are:-
- i) Matters pertaining to policies on conserving and enhancing the historic environment as set out at Chapter 16 of National Planning Policy Framework;
 - ii) Matters pertaining to policies on flood risk as set out at Chapter 14 of the National Planning Policy Framework; and
 - iii) Any other matters the Inspector considers relevant."
- 4.11 There was a general election called on 6 November 2019 and in the Manifesto of the then, and now still, governing party for the December 2019 election (at page 53) the party committed itself to "the construction of the planned **UK Holocaust Memorial**." This necessarily implied building on Victoria Tower Gardens the VTG Proposal already submitted to Westminster City Council for planning approval and assumed that the approval would be granted.
- 4.12 On 11 February 2020, the WCC Planning (Major Applications) Sub-Committee sat and unanimously agreed to accept WCC's planning officer's recommendation to refuse the application for the VTG Proposal because of its location, size and design.
- 4.13 On 12 February 2020, the Secretary of State issued another statement on behalf of MHCLG in which he is quoted as saying "The government remains implacably committed to the construction of the Holocaust Memorial and Education Centre right at the heart of our democracy, beside our national parliament to ensure that future generations never forget. No one, whether in national or local government should shirk their duty to deliver on the promise of this memorial, and the government certainly will not". This shows once more that the Government's decision had already been made and its mind entirely made up to build the VTG proposal at the contested site of Victoria Tower Gardens.
- 4.14 On 19 February 2020, RB wrote a further letter on behalf of another Rule 6 party objecting to the arrangements proposed on the grounds of predetermination of the matter, the conflict of interest and lack of independence of the Minister of State for Housing as decision maker, as well as the lack of institutional and functional separation in the process for the approval of the VTG Proposal required by law. We fully endorse its arguments.

4.15 On 9 March 2020 the Government Legal Department (GLD) responded to RB's Letter of 19 February 2020 enclosing a note from MHCLG which summarised and made public for the first time the ad-hoc 'Handling Arrangements' put in place by MHCLG only since the November 2019 call-in. This statement was read out in full on 10 March 2020, at the Pre-Inquiry hearing by the appointed Planning Inspector for the VTG Proposal. RB's position in disagreement with MHCLG's view of these matters, in particular the question of the institutional separation of the decision-maker, was more fully restated in RB's letter to GLD dated 5 May 2020. At the same time RB also reserved the other Rule 6 Party's position in relation to the question of MHCLG's compliance with the London County Council (Improvements) Act, 1900.

4.16 Accordingly, on 31 March 2020, we sent a letter to the Minister of Housing setting out our objections to what we submitted was a fundamentally flawed process. You have that letter.

5. THE DECISION. On 16 April 2020 we received a letter from the Government Legal Department on behalf of the Minister of State for Housing rejecting our arguments and suggesting we should seek Judicial Review if we disagreed. On 20th April we sought to clarify from GLD to whom a disagreement should be addressed if we wished to enquire further, but did not receive a response so have written to both the Minister of State for Housing and the Secretary of State due to the urgency of our request and in the interests of not delaying the court's overview unnecessarily.

6. THE LAW. The relevant law is:

- (1) Article 9a of Directive 2014/52/EU amending Directive 2011/92/EU ("the EIAD") (see also Regulation 64 of the Town and Country Planning (Environmental Impact Assessment) Regulations 2017; and
- (2) The common law relating to predetermination and conflict of interest
- (3) Section 8 (1) of the London County Council (Improvement) Act 1900

7. OUR SUBMISSIONS

(1) *Conflict of interest.* Any decision taken by the Minister of State (or any Minister in MHCLG), whether in accordance with the handling proposals described in GLD's letter of 9.3.20 or otherwise, to grant planning permission for the VTG Proposal will be unlawful because the procedures in question do not provide an appropriate separation between the conflicting functions of MHCLG as the applicant for planning permission and as the decision-taker. As appears from the case-law of the CJEU (set out in paras. 11-16 of RB's letter of 19.2.20), the separation required by article 9a of EIAD cannot be achieved by *ad hoc* arrangements to insulate a particular individual or group of individuals working together of the kind proposed by you in the handling arrangements referred to in 4.15 above. What is required is a pre-existing specific regulatory framework for taking decisions where such a conflict of interest arises. That requirement is not satisfied by the functional separation of the Planning Inspectorate: the problem arises at the stage after the Inspector has made his or her recommendation and when the Minister has to decide whether or not to accept it. Regulation 64 (2) of the 2017 Regulations does not itself provide for such a framework. Nor do the handling arrangements themselves constitute such a

framework (though these would in any event be deficient, as described, for the reasons given in RB's letter of 5.5.20). In any event, no arrangements which depend on designating different individual ministers, on the one hand, to promote the application and, on the other, to decide on it would be capable of providing the necessary structural independence. At paras. 32-37 of RB's letter of 19.2.20 to GLD, they suggested a method by which you could resolve this problem, but you have chosen not to adopt it. These submissions are developed in the correspondence from RB to which we have referred.

(2) *Predetermination.* Further or alternatively, any decision taken by the Minister of State (or any Minister in MHCLG) to grant planning permission for the VTG Proposal will be unlawful because the manifesto commitments made by the Government and the various statements made by the Prime Minister and Secretary of State for MHCLG as identified in various paragraphs in section 4 above demonstrate that the application has been predetermined, and in any event are such as to lead any objective observer to believe that there is a real possibility that that is so. The decision of the Court of Appeal in *Lewis* on which you rely does indeed make it clear that a mere predisposition is not equivalent to predetermination, and that cases where predetermination, or apparent predetermination, is established will be rare. But the (remarkable) facts of the present case are quite different from those of *Lewis* and, for the reasons given clearly pass the necessary threshold.

(3) *The 1900 Act.* Section 8 (1) of the London County Council (Improvement) Act 1900 provides for the re-development of what is now the southern part of VTG, where the Holocaust Memorial is proposed to be built, (which was then part of the un-embanked Thames foreshore) and that it "shall be maintained ... for use as a garden open to the public and as an integral part of the existing Victoria Tower Garden". The development of any part of that land in such a way that it ceases to be a garden open to the public and an integral part of Victoria Tower Gardens would unarguably be a breach of that provision and unlawful on the part of the Secretary of State. As noted in section 4 above, this provision was drawn to your attention in July 2019. Your response was that the development would not be in breach of the provision because it only affected 7.5% of the whole site (and would bring benefits to the remaining part). We believe that the true percentage is far larger; but even if your figure were correct there would still evidently be a breach of the Act. The issue did not require to be pursued at that stage because it was expected (as proved to be the case) that the Council would refuse planning permission; but we take the view that if other issues relating to the VTG Proposal are before the Court it would make sense for it to be resolved now.

(4) *Parliamentary authority.* Finally, we contend that the Secretary of State has overreached his powers by failing to seek prior parliamentary approval for the VTG Proposal and, what is worse, ignoring the pre-existing legislation that prevents the VTG Proposal from being built. All current cabinet ministers and ministers of state are already clearly conflicted in their predetermination of the planning decision in respect of the VTG Proposal, as, under the modern constitution, they do not have the option of taking a decision to refuse planning permission without needing to resign their current posts as part of collective responsibility. The Secretary of State has not only declared his support for delivering the VTG Proposal but has gone further by committing to spend £75m of public money, several millions of which have already been spent. No Minister has the authority to decide of his own fiat the basis on which it is in the public interest for him to proceed on an unlawful course and to spend such

sums of public money on the basis of a commitment without any parliamentary authorisation. Therefore, unless you can satisfy us as to the legal basis for this expenditure, we will contend that the VTG Proposal is unlawful on this basis also.

8. ACTION REQUIRED. We require that the Secretary of State:

- withdraws the application for planning permission for the VTG Proposal on the basis that that Proposal cannot lawfully be proceeded with even if planning permission were obtained.
- acknowledges that the handling arrangements described in the GLD's letter of 9.3.20 fail to satisfy the requirements of article 9a of the EIAD and undertakes to take no further step to proceed with the application unless and until arrangements are put in place that comply with those requirements.

9. For details of other parties see those copied in below. Our name and address for service is:

London Parks and Gardens Trust c/o Helen Monger, Duck Island Cottage, St James' Park, London SW1A 2BJ

10. REPLY DATE. Because of the urgency of the matter in law, and because you have had prior notice of these arguments already, unless we hear from you within 7 days acceding to our requested action above we propose to apply for a Judicial Review Hearing.

Yours sincerely



Helen Monger
Director
London Parks & Gardens Trust

cc.

- The Trustees, Holocaust Memorial Foundation Charitable Trust, 25 Grosvenor Street, London, United Kingdom, W1K 4QN
- The Chief Executive (or appropriate officer), UK National Holocaust Memorial Foundation, 102 Petty France, London, United Kingdom, SW1H 9AJ
- The Local Authority, Westminster City Council, Westminster City Hall, 64 Victoria Street, London SW1E 6QP
- Planning Inspectorate c/o Helen Skinner, Inquiries & Major Casework Team
- Baroness Deech (Rule 6 party)
- The Thorney Island Society (Rule 6 party)
- Learning from the Righteous (Rule 6 party)