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Our ref: Z2004383/JBY/JD3

18 May 2020

Dear Ms Monger

Proposed claim for Judicial Review - Holocaust Memorial and Learning Centre in Victoria Tower Gardens

1. We write in response to your letter of 11 May 2020. In your letter, you say the London Parks and Gardens Trust intends to bring a claim for judicial review of the procedure for planning approval for the UK Holocaust Memorial and Learning Centre.

The proposed claimant

2. The London Parks and Gardens Trust (Registered Charity No. 1042337), Duck Island Cottage c/o The Store Yard, St James's Park London SW1A 2BJ.

The proposed defendant

3. The Secretary of State for Housing, Communities and Local Government ("the Secretary of State").

Proposed interested parties

4. We consider that the Rule 6 parties in the public inquiry are interested parties, as follows:
   a. Thorney Island Society;
   b. Learning from the Righteous; and
   c. Baroness Ruth Deech.

Westminister City Council should also be named as an interested party in any claim.

Details of the matter being challenged

5. Your letter does not indicate a decision of the Secretary of State that is proposed to be challenged. Paragraphs 4-5 of your letter sets out a chronology of the planning application, the "call in" by the Secretary of State of the application for planning permission for development of the proposed

Holocaust Memorial and Learning Centre in Victoria Tower Gardens London on 5 November 2019 and the public inquiry that has been set up in order to consider all the relevant aspects of the development proposed by the planning application. Nevertheless, it is clear from your letter that your essential complaint is to the decision to 'call in' the planning application under section 77 of the Town and Country Planning Act 1990 ("the Act"). We therefore respond on that basis.

6. At paragraph 7 of your letter, you contend that:

    a. Any decision taken by the Minister of State or any Minister in the Ministry for Housing Communities and Local Government ("MHCLG"), whether in accordance with the departmental handling arrangements or otherwise, to grant planning permission will be unlawful because the procedures in question do not provide an appropriate separation between the conflicting functions of the applicant for planning permission and the decision-taker;

    b. Any decision taken by a Minister of State or any Minister in MHCLG to grant planning permission will be unlawful because of the manifesto commitments made by the Government and various statements made by the Prime Minister and the Secretary of State;

    c. The development of any part of the 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 be a breach of section 8(1) of the London County Council (Improvement) Act 1900 ("the 1900 Act");

    d. The Secretary of State has overreached his powers by failing to seek prior parliamentary approval for the application for planning permission and committing to spend public money on it.

Response to the proposed claim

7. Your proposed grounds of claim are without foundation. If you issue a claim, it will be resisted and we will seek our reasonable costs in doing so.

Timing

8. Although you have not clearly articulated the matter being challenged, it is in substance a challenge to the Secretary of State's exercise of powers under section 77 of the Act to call in the planning application.

9. The decision to call in the planning application was made by the Minister of State on 5 November 2019. Rule 54.5(5) of the Civil Procedure Rules requires that a claim in relation to a decision under the Act "must be filed not later than six weeks after the grounds to make the claim first arose". You are therefore out of time to challenge the Secretary of State's decision to determine the planning application in this way. Moreover, as you note in paragraph 4.15 of your letter, at the pre-inquiry meeting held on 10 March 2020, the appointed inspector read out in full the statement of handling arrangements put in place by MHCLG. Any attempt to rely on the publication of those handling arrangements as the basis for the running of time in your claim would accordingly be misconceived, since it is now well over six weeks since the date of the pre-inquiry meeting.

Conflict of interest

10. You claim that the decision by the Minister for Housing or any Minister of MHCLG to grant planning permission will be unlawful because the process does not provide for the appropriate separation between the conflicting functions of the Secretary of State as applicant and decision-maker. You further claim that the decision will be contrary to article 9a of Directive 2014/52/EU ("the EIAD") and regulation 64(2) of the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 ("the EIA Regulations"); and that the handling arrangments for the decision will not provide the necessary structural independence to make the decision.

11. We reject this assertion. As stated in our letter dated 9 March 2020 in response to the letter sent to Richard Buxton Solicitors on behalf of the Thorney Island Society (and copied to you), the departmental handling arrangements fulfil the requirement for "appropriate administrative arrangements" under

regulation 64(2) of the EIA Regulations and will enable the Housing and Planning Minister to fulfil the duties under those regulations and the Act in an objective manner and so as not to find himself in a situation giving rise to a conflict of interest.

12. We reject as unarguable your contention that article 9a of the EIAD requires that the arrangements to implement an appropriate separation between conflicting functions, when performing the duties arising from the EIAD, must be in the form of a framework of legal rules established specifically for that purpose. Administrative arrangements made within an existing framework of legal rules, in the form of statutory duties and procedural rules with which the planning decision maker must comply in performing the duties arising from the EIAD, are plainly sufficient to fulfil the requirements of article 9a of the EIAD.

Predetermination

13. It is also wrong to claim that any decision taken by the Minister of State or any Minister in MHCLG to grant planning permission will be unlawful because of the manifesto commitments made by the Government and various statements made by the Prime Minister and the Secretary of State.

14. The position at common law is to be found in the decision of the Court of Appeal in R (Lewis) v Redcar and Cleveland Borough Council [2009] 1 WLR 83. At [96], Rix LJ said that the test is whether there is an appearance of predetermination in the sense of a mind closed to the planning merits of the decision in question. Evidence of the adoption of policies towards a planning proposal will not for these purposes by itself amount to such an appearance of predetermination or bias. It is necessary to show the appearance of a predetermined, closed mind in the decision-making itself. See also Longmore LJ at [106] – [109].

15. There is no arguable basis upon which it may reasonably be said that the appearance of predetermination as explained by the Court of Appeal in Lewis has either arisen, or is likely to arise, in the present case. There is no reasonable basis to infer other than that the Housing and Planning Minister will exercise the decision making functions to which we have referred properly, fairly and in accordance with the procedural requirements that they impose.

16. There is nothing remarkable about the facts of the present case that change this position. There is nothing unusual about public authorities (i) promoting schemes; and (ii) later deciding whether to permit them in accordance with the statutory framework of decision making duties, the lexicon of material considerations and the procedural rules laid down by the applicable legislation.

The 1900 Act

17. The lawfulness of the decision to call in the planning application is unaffected by section 8(1) of the London County Council (Improvement) Act 1900 ("the 1900 Act"). It is a decision as to the statutory procedure to be followed for the purpose of determining the planning application under Part 3 of the Act. It does not engage section 8(1) of the 1900 Act. Your proposed claim, if pursued, will not place "issues relating to the VTG proposal" before the Court. All substantive matters relating to the planning application will be for the appointed Inspector to consider and to report to the Minister of State in accordance with the procedure laid down by The Town and Country Planning (Inquiries Procedure) (England) Rules 2000 ("the Inquiries Procedure Rules"). Those matters include section 8(1) of the 1900 Act, insofar as it is engaged by the planning application. The Inspector must consider all material considerations, including any relevant legislation, in preparing the inquiry report under rule 17 of the Inquiries Procedure Rules. All parties to the inquiry will have the opportunity to make submissions on those matters to the Inspector at the inquiry.

Parliamentary authority

18. Your claim that the Secretary of State is in error of law in failing to seek prior parliamentary approval for the proposal is misconceived. The making of the planning application to Westminster City Council did not involve any conceivable breach of the 1900 Act. Nor did the decision to call in the planning application involve any such breach. Nor will determination of the planning application by the Housing and Planning Minister give rise to a conflict with collective ministerial responsibility, since he must make

that determination in accordance with the duties imposed by the Act and the Rules. Your assertion that the Secretary of State has acted unlawfully in committing to public expenditure on the planning application is accordingly unarguable.

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19. It follows that there is no substance or merit in the concerns that you have raised in your letter.

ADR proposals

20. You do not raise any proposals for alternative dispute resolution. Paragraph 3 of your letter indicates that your core concern is "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". In truth, your concern is fundamentally about the substance of the application rather than the procedure for determining it. You have the opportunity for your concerns about the substance of the planning application to be heard at the inquiry once it resumes.

Address for further correspondence and service of court documents

21. Please send any further correspondence regarding this matter to James Barry at james.barry@governmentlegal.gov.uk and Sarah Spottiswood at sarah.spottiswood@governmentlegal.gov.uk.

22. Due to the on-going coronavirus pandemic, **service of new claims should be by email to:** newproceedings@governmentlegal.gov.uk. Please copy James Barry and Sarah Spottiswood to any such email and mark it for our attention quoting reference Z2004383/JBY/JD3. Please visit https://www.gov.uk/government/organisations/government-legal-department for further information.

Yours sincerely

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