London Parks & Gardens Trust

The Rt Hon Christopher Pincher MP
Minister for Housing
Ministry of Housing Communities & Local Government
2 Marsham Street
London
SW1P 4DF

31st March 2020

Dear Minister

Re: APP/X5990/V/19/3240661: Victoria Tower Gardens, SW1P 3JU

We are a Rule 6 party to the above Planning Inquiry. We are writing to you to express our concern about the lawfulness in the way this Inquiry is to be conducted having regard to the peculiar circumstances of this particular enquiry. It seems to us to be sensible to put our points forward now rather than wait for a Judicial Review, since it would be a simple matter at this stage for you to make the necessary changes to meet our objections, and thus save a lot of time and money.

We are aware of the letter written to your Department (MHCLG) by Richard Buxton Solicitors on the 19th February on behalf of the Thorney Island Society, also Rule 6 objectors. We will refer to it in this letter but we stress that this letter is on behalf of ourselves alone and not necessarily endorsed by other Rule 6 parties.

At the outset we make it clear that the question at issue is not whether a Holocaust Memorial (HM) should be built but where? That is to say whether it should be built at Victoria Tower Gardens? The facts we rely on are as follows:

1. The Appellant UKHMC is wholly owned and financed by the Government through the MHCLG. They are led by the Department's Special Representative or Envoy Lord Pickles. They are for all intents and purposes one and the same and would be so viewed by any reasonable observer.

2. The Government has unequivocally and forcefully committed themselves to the current plan to build at Victoria Tower Gardens (the Park). First it was in the Manifesto on which this Government was elected as an outright commitment to build the HM as planned[1]. Additionally, the Secretary of State has reaffirmed the Government's commitment in unequivocal terms both before and after the election. Then on a third occasion making it

[1] P53 of the Conservative Manifesto 2019, Get Brexit Done, Unleash Britain's potential states: "We will support the construction of the planned **UK Holocaust Memorial**."

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clear that the decision had been made to build on the Park by writing to the Westminster City Council "The Government remains implacably committed .....at the heart of our democracy next to our National Parliament....." Thus showing beyond reasonable doubt that the commitment is to build on the Park and has been so understood by all parties. It is not just to build an HM but to do it on the Park. For full details and references I refer to para 3 of the Richard Buxton Solicitors letter of the 19th February.

3. The Inspector is currently appointed to report to the Minister. He is employed on a regular basis by the Planning Inspectorate (a non-departmental public body accountable to MHCLG) with the expertise to review planning legislation. At present his recommendation is subject to review and over-rule by you, as Minister and he is therefore not being given the full freedom to act independently in this case. Ordinarily this would not matter because it is not usual for the Government and its Ministries to have committed itself in advance to achieve a pre-determined result in respect of the subject matter of the inquiry.

4. It is established in Law that these inquiries are quasi-Judicial and subject to Divisional Court review on grounds of unlawfulness in procedure.

We would add that the insistence on parties to stick to the original bespoke timetable, despite Covid 19 restrictions, disadvantages smaller representatives such as ourselves where we do not have internet infrastructure and rely on witnesses in the vulnerable category. We have requested a postponement but received no answer to date. We would urge postponement both of the Public Inquiry dates and the time frame with which to submit proof of evidence.

Based on the above, we therefore adopt and endorse the grounds of objection in the Richard Buxton Solicitors letter. However, we would ask that the Inspector continue to assess this case given their expertise but report instead to an independent decision-maker. For the avoidance of doubt, we wish to stick as closely to the normal procedure relying on the Inspector's expert investigative powers but with oversight by some person or panel wholly independent to perform what would normally be the Secretary of State's function. We rely on the Common Law principles of Natural Justice and in particular '*Nemo judex in sua causa*'. As you are aware, we do not have to establish actual bias; it is sufficient to establish imputed bias. That is to say would an ordinary reasonable person apprised of the facts be satisfied that there was no possibility of bias or to put it another way would he/she say justice is manifestly seen to be done? We find it difficult to find a stronger case of imputed bias. It is similar to a Magistrate announcing in advance of a trial that he is going to find the defendant guilty.

All members of the Government have signed up to that manifesto commitment and whoever is appointed to make the decision cannot be unaware of its unequivocal nature. In the modern interpretation of our unwritten constitution it is accepted that a manifesto commitment is one that all members of the governing party are honour-bound to see enacted so far as circumstances will allow. Whichever politician is appointed as the decision-maker from the ruling party is already be committed by the manifesto and will therefore be severely conflicted as will his appointees if their livelihoods depend upon the Ministers goodwill to adopt the same position.

We are aware of the response to the Richard Buxton Solicitors letter of 9th March from the Government Legal Department, because at the pre-inquiry hearing the Planning Inspector read out the statement prepared by MHCLG to all parties as a response. This states that the member of the Government who makes the decision will be impartial because that is what he is instructed to be and that MHCLG have put all measures in place to ensure this. That statement

cannot be right because if so there could never be a case of imputed bias because impartiality is the requirement for all judicial and quasi-Judicial functionaries. This is the sort of logic that a hostile press might refer to as "topsy-turvy Alice in Wonderland logic". We therefore consider the current MHCLG response inadequate in addressing the concerns about conflicts of interest that have been raised. This leaves the Government through you, committed to decide in favour regardless of the Planning Inspector's recommendation.

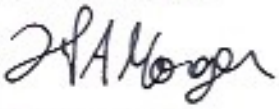
We are also aware of the case of the Court of Appeal in R (Lewis) v Redcar and Cleveland Borough Council [2009] 1 WLR 83. At [96] Rix LJ about the appearance of determination and also of Longmore LJ at [106] – [109] and the principle that there is nothing wrong in there being a policy. We entirely agree, but what the Government has committed to is not a policy in the sense where that word is used in the case. A policy in the sense referred to in the case is a principle or set of principles or presumptions to be applied to a class of cases when making a decision. It does not mandate a specific result. It allows for a different decision if the facts so justify. It recognises that it is often impossible to foresee every circumstance. It is a way of creating consistency while avoiding cases of gross injustice or unreasonableness. Thus, to revert to the Magistrate illustration, in criminal law sentencing there are policies to cover many different classes of case. For instance, in the case of a drink driving conviction, there is a policy that if the defendant is over twice the limit he should be sent to prison, but what that means is that the Magistrate can mitigate that penalty if circumstance justify so doing. To call the Government's unequivocal commitment a "policy" is to play with words. It is a decision as to what should happen in a specific case, namely the case that the HM shall be built on the Park.

There is policy applicable to this case and all similar cases, and that is the policy enshrined in the National Planning Policy Framework and subsequent local policies that attempts to build on public open space and in particularly historically significant parks should be refused. Under those policies, exceptions are very rare and need to be justified on grounds of overwhelming necessity, which of course is for the Inquiry to determine.

We would suggest that the Government could get out of the difficulty they have got themselves into (of prejudging the case in unmistakable terms), by legislating for the Inquiry to be conducted as arranged but decided on a one-off basis by an independent decision-maker or panel. Examples of appropriate appointees include High Court Judges or any other suitably qualified independent person or group of people who have had no previous dealings with this matter and no future interest in this case.

I trust that this can be done at the earliest possible opportunity, whilst all parties prepare their Proofs of Evidence.

Yours sincerely



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Helen Skinner, Case Worker, Planning Inspectorate