Southwark Council
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The Secretary of State for Communities and Local Government
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Date: 7 October 2016
Your ref: NPCU/CPO/A5840/74092

CPR JUDICIAL REVIEW PRE-ACTION PROTOCOL: LETTER BEFORE CLAIM

Dear Sir,

Town and Country Planning Act 1990 Section 226(1)(a)
Acquisition of Land Act 1981
The London Borough of Southwark (Aylesbury Estate Site 1B-1C) Compulsory Purchase Order 2014

I write on behalf of the London Borough of Southwark, 160 Tooley Street, London SE1 2QH ("the Council"). This letter is the Council's letter before claim pursuant to the CPR Judicial Review Pre-Action Protocol.

This letter uses the suggested standard format for such letters (Annex A to the Pre-Action Protocol), but it is important to note at the outset that we consider the grounds of claim to be very strong. It would be appropriate to consent to judgment in this case because it is clear that there have been some basic, clear cut yet fundamental errors in the decision-making process as set out in the first two grounds.

Proposed claim for judicial review: decision to be challenged

The proposed judicial review claim is a challenge to the decision of the Secretary of State for Communities and Local Government ("the Secretary of State") not to confirm the London Borough of Southwark (Aylesbury Estate Site 1B-1C) Compulsory Purchase Order 2014 ("the CPO"). That decision was communicated to the Council by a letter dated 16 September 2016 ("the DL") sent together with the Inspector's Report ("IR") dated 29 January 2016.

The claim would appropriate for allocation to the Planning Court (see CPR 54.21(2)(a)(v)); and we consider should be categorised as "significant" having regard to Practice Direction 54E 3.2, in that all the criteria at (a) to (d) are met in this case.

Proposed Claimant

London Borough of Southwark, 160 Tooley Street, London SE1 2QH.

Proposed Defendant

Secretary of State for Communities and Local Government, The Government Legal Department , One Kemble Street, London, WC2B 4TS. DX 123242 Kingsway.

Proposed interested parties

Beverley Robinson (as chair and spokesperson for the Aylesbury Leaseholder Action Group)
Julius Sangbey
Gil Mutch
Matthew Ukanwa
Miriam Ibrahim
Agnes Kabuto
Ruth Temilade
Leslie Kerrigan
Rita Enuechie
Judi Bos
Paul Palley
Stefan Crossfield
Folashade Oladejo
Mr and Mrs Cilasun
Acqua Plus Developments Limited
35% Campaign
To each of whom a copy of this letter has been sent

Legal adviser

London Borough of Southwark Legal Department: please contact Katharine Reed (katharine.reed@southwark.gov.uk) or Sadia Hussain (sadia.hussain@southwark.gov.uk) or at the address at the foot of this letter.

James Pereira Q.C. and Melissa Murphy of Francis Taylor Building, Inner Temple, London EC4Y 7BY.

The issue

Brief summary of the facts

The Council made the CPO on 23 June 2014. Three letters objecting to its confirmation were received by the Council. The first objection was a letter dated 3 July 2014 (date stamped 5 August 2014) expressed to be from the Aylesbury Leaseholders Action Group, on behalf of a group of ten leaseholders. The second objection was by a letter dated 1 August 2014 from a firm of surveyors, on behalf of Judi Bos, the owner of a leasehold interest on the Order Land. The third was a letter dated 15 August 2014 from Ms Rita Enuechie, the owner of a leasehold interest on the Order Land which was forwarded to the Council on 18 September 2014.

The CPO was submitted to the Secretary of State for confirmation on 7 July 2014.

The express purpose of the CPO was as follows:

> "Facilitating the carrying out of development, redevelopment and improvement on or in relation to the land, in particular, for the purpose of securing the regeneration of the Aylesbury Estate in accordance with the provisions of the Aylesbury Area Action Plan, including the demolition of existing residential units and the provision of a mixed tenure residential development and associated landscaping."

The CPO contemplated development in accordance with the Aylesbury Area Action Plan ("the AAAP"). The AAAP is part of the statutory development plan for the area. It was adopted in January 2010 pursuant to the recommendation of the examination Inspector who conducted an examination into the soundness of the plan in 2009.

The Order Land was the third parcel within the Aylesbury Estate to be brought forward for redevelopment in accordance with the AAAP. The first site to be promoted was Site 1a in the south western part of the Estate. Planning permission was granted in 2009. The site was developed out between 2009 and 2013. The second site to be promoted was Site 7 in the north eastern part of the Estate. Planning permission was granted in 2013. A CPO was necessary and an inquiry to consider objections to the CPO was held in March 2013. The Inspector recommended the confirmation of the CPO. The Secretary of State agreed. The development is near completion and completed blocks are already occupied at the time of writing.

The Council held a competitive process in order to appoint a development partner to bring forward the next phases of development.

On 28 January 2014, the Council selected Notting Hill Housing Trust ("Notting Hill") as its preferred partner and on 28 April 2014, a Development Partnership Agreement was signed.

Notting Hill is a Registered Industrial and Provident Society, a Registered Provider and a charity exempt from registration. It offers affordable housing to a diverse range of residents and any surplus it makes from selling homes is reinvested in the Society.

Although the Order Land is the third parcel of land to be brought forward for redevelopment within the Estate, it is referred to within the Development Partnership Agreement as the First Development Site (or "the FDS").

The land which the Council sought to acquire through the CPO was listed in the Schedule to the CPO ("the Order Land").

The Order Land is a 3.9 hectare site. It is comprised of residential blocks ranging from 4 to 14 storeys. There were a total of 566 residential units on the Order Land, together with ground floor garages, vacant commercial and office space, open grassed space and a games court.

An inquiry was scheduled to consider the CPO. It was set down for four days from 28 April 2015 to 1 May 2015 and sat on those days. On 1 May 2015 it was adjourned to 12 May 2015. The inquiry sat on that day and the inquiry was then adjourned to 13 to 15 October 2015.

The details set out on the first page of the Inspector's report do not accurately record the inquiry sitting days.

The inquiry was originally set down for four days from 28 April 2015 to 1 May 2015. An application to adjourn the inquiry was made on behalf of objectors at the beginning of the inquiry, on Tuesday 28 April 2015; and the Inspector refused it. The inquiry then sat until Friday 1 May 2015, but did not finish because there was insufficient time to hear all of the evidence. A second application for an adjournment was made on behalf of objectors. They sought sufficient time to obtain advice and representation. That too was refused, but as the evidence was not finished, the inquiry was adjourned until 12 May 2015 (the next available date for the parties and the Inspector) and the Inspector indicated that the short adjournment would afford an opportunity for the objectors to seek legal advice in respect of various legal arguments they sought to advance. The inquiry sat on 12 May 2015 and

evidence was completed on that date. Immediately before closing submissions were due to be heard, a further (third) application for an adjournment was made, again on the basis that the Objectors wished to be legally advised/represented. On that third occasion, the Inspector allowed the application and the inquiry was adjourned. There was then a long period of delay before the inquiry was re-fixed. It next sat on 13 to 15 October 2015 (and the Aylesbury Leaseholders Action Group was represented by counsel). Further detailed evidence objecting to the scheme was given; and various leaseholder objectors gave evidence for a second time.

New guidance: "Compulsory purchase process and the Crichel Down Rules: guidance" was published on 29 October 2015. The Inspector invited submissions on that guidance and written submissions were made by the Council and the Aylesbury Leaseholders Action Group.

Numerous emails were sent by individual objectors to the CPO (some of which were copied to the Council) and accepted by DCLG. On three occasions when the Council asked for sight of that material (26 April 2016, 4 May 2016 and 1 August 2016), various emails were sent, but it was only until after the DL had been received and the Council asked for the others, that all representations sent by objectors to the Secretary of State were provided to the Council.

In April 2016 the Council asked for and was afforded an opportunity to respond to the various submissions made by objectors after the close of the inquiry. As part of its response dated 29 April 2016, the Council explained that on 8 December 2015 it had changed its policy in respect of the application of savings to rehousing options. It had been a policy requirement that Council rehousing schemes required individuals to contribute all but £16,000 of their savings if they chose to purchase a property, whether shared equity or shared ownership via one of the Council's rehousing schemes. The policy change sought to alter the rehousing schemes so as to remove that requirement. The Council appended the report to Cabinet and minutes of the Cabinet meeting of 8 December 2015 to its letter of 29 April 2016.

In June 2016 DCLG invited representations on the Council's policy change and representations were made by various objectors. The Council provided a fuller note dated 23 June 2016 explaining the position before the policy change, the reasons for the policy change and the position after that change.

On 16 September 2016 the Council received the DL together with the IR. The Inspector recommended that the CPO should not be confirmed. The Secretary of State accepted that recommendation.

Proposed grounds of challenge

In the light of the above we set out the proposed grounds of challenge below. We reserve the right to amend or add to these grounds in the event that you do not consent to judgment and a claim is brought.

Procedural unfairness

The Secretary of State adopted the Inspector's reasoning and findings in relation to environmental well-being: DL/15 and DL/34. The only negative findings on environmental well-being related to sunlight and daylight within the proposed homes and overshadowing to outdoor amenity space.

However, the Inspector's conclusions were reached in breach of the principles of procedural fairness. No issue of the adequacy of the sunlight and daylight in the accommodation within the proposed scheme was raised as an objection to the CPO, nor was it raised in the evidence given by objectors. The issue was not raised by the Inspector. The Council had no fair opportunity to address the point. The findings were therefore reached in breach of the principles of fairness and natural justice: Edward Ware Homes Ltd v Secretary of State for Communities and Local Government [2016] EWHC 103 (Admin).

Failure to have regard to the Council's change in policy

At DL/7 the Secretary of State recorded that he had been informed of the Council's change in policy in respect of the requirement for leaseholders to apply their savings towards alternative accommodation. This policy had been a key factor in the Inspector's reasoning and findings of adverse social and economic impacts on individual leaseholders affected by the proposed CPO, and the findings that the Council had not taken reasonable steps to acquire leaseholder properties by agreement, and the overall assessment of whether there was a compelling case: IR/371-373, 376-377, 400-402; 421-422. The Secretary of State agreed with most of the Inspector's reasoning in her paragraphs that relied upon the former policy, and used reasoning consistent with the application of the former policy: DL/15, 18-22, 26, 36.

The absence of any consideration of the effect of the change in policy, and the general agreement of the Secretary of State with the Inspector's reasoning based on that policy, demonstrate that the Secretary of State failed to have regard to and consider the effect of this highly significant policy change. That is so notwithstanding the formal recitations in DL/7 and 8.

The finding that the Council had not taken reasonable steps to acquire interests by agreement was unlawful

Before setting out the core reasoning of this ground, it is significant to note that the findings of the Inspector and Secretary of State on this point were made in the context that when the CPO was made, as recorded in the Statement of Case, 541 of the 566 properties had been acquired by agreement. Between the making of the CPO (June 2014) and the Statement of Case (October 2014) one additional leasehold interest was acquired. At that time the Statement of Case was drafted, there were twenty one leaseholders interests which remained to be acquired within the Order lands. By the time of the first sitting date of the Inquiry (April 2015) there were seventeen leaseholders remaining, and prior to the Secretary of State's decision only eight leaseholders remained, of which only four were in occupation and remaining four were residential landlords living off the estate and receiving rental income. It is quite remarkable that the Secretary of State found that reasonable steps had not been taken when nearly 90% of the leasehold interests had been acquired by agreement.

The Secretary of State found at DL18 that the Council had not taken reasonable steps to acquire land by agreement. In doing so, he adopted entirely the reasoning of the Inspector at IR/395-402.

In so doing the Secretary of State erred in the following ways:

A large part of the Inspector's and hence the Secretary of State's reasoning and hence the conclusion was based on the Inspector's perception that the price being offered for leasehold interests was insufficient to enable leaseholders to relocate on the estate or in the local area: IR/399-402, which was adopted by the Secretary of State. In basing his decision on this factor, the Secretary of State failed to lawfully apply his own policy guidance and established practice to the effect that offers to acquire property by agreement should be valued under the compensation code: Tier 1, paragraph 2. The Council's position at the inquiry was that the offers made were compliant with the compensation code, being based on "on- estate" comparables in accordance with decisions of the Lands Tribunal. No adverse finding was made in that respect by either the Inspector of the Secretary of State. Furthermore, the Secretary of State failed to take into account that the Council as an acquiring authority, could only offer to buy at a level based on market value and rather than any enhanced value to reflect the price of premises outside of the estate. The Secretary of State's approach was entirely contrary to the compensation code.

He purported to apply his up to date policy guidance retrospectively, having agreed with the Inspector's reasoning that the guidance should not be so applied. Indeed, the DL itself suggests that the Secretary of State's conclusions were reached without regard to the up to

date policy position (see DL/5, DL/18 and IR/398), whereas the test of "reasonable steps" is only found in the up to date guidance, and not in its predecessor circular 06/2004.

He reached a decision that was perverse in the circumstances of the case. Having acquired nearly 90% of the leaseholder interests within the estate, it cannot sensibly be said that the Council "has not taken reasonable steps to acquire land interests by agreement." (DL/18). His conclusions are inconsistent with any lawful application of his own policy guidance (Tier 1, paragraphs 2, 3, 16 and 17).

He failed to take into account all relevant considerations, since he relied upon the Inspector's reasoning. However, the Inspector had failed to have regard to the all the evidence offered by the Council in relation to negotiations with objectors. A substantial body of evidence chronicling the contact with each objector had been offered to the Inspector by the Council in its written evidence (Mr Maginn's proof of evidence), in its written opening submissions, in its written "Update Statement" and during the evidence in chief of one of its witnesses, Mr. Maginn. The Inspector declined the offer to read this evidence.

He failed to identify in what respects the Council's actions had fallen short of "reasonable steps" or what further steps were needed to remedy the failure he concluded existed.

Failure to lawfully discharge the Public Sector Equality Duty

The Secretary of State concluded that confirmation of the Order would have positive and negative impacts on protected groups [DL/24]. It follows that his decision not to confirm the Order had negative impacts on those with protected characteristics. Lawfully discharging of the PSED was plainly important.

The Secretary of State's assessment covered the elderly (DL26-27) children (28), and BME groups (including the BME elderly and children): DL/ 29-32. The findings in relation to the PSED were critical to the Secretary of State's reasoning on well-being, human rights and the overall balance of considerations: DL/23-33, DL/35.

The Secretary of State erred in purporting to discharge his PSED. While he expressly acknowledged that in his view he had insufficient information (DL/29, 32), he nevertheless went on to reach conclusions on the very matters on which he said the information was lacking: DL/29-32 (for example, his finding that there would be a disproportionate impact on BME residents at DL/32 is entirely inconsistent with his concession at DL/29 that such a finding "is not possible" on the evidence). Moreover, the PSED requires the decision maker

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to have sufficient evidence before him, because performance of the duty is a matter of substance: *Coleman* [2012] EWHC 3725 (Admin) (Lindblom J) at [70].

The Secretary of State erred in not requesting further information. His own policy stated that his practice was to do so post inquiry if the need arose: Tier 1, stage 4, paragraph 33. He had exercised this power in this case when seeking representations on the effect of the Council's change in policy in relation to leaseholders applying their savings to relocation homes. Moreover, the law required him to obtain sufficient information to discharge his duty: Secretary of State for Education v Tameside BC [1977] AC 1014. Had the Secretary of State requested information to inform him about BME occupiers or other protected groups, the Council could have provided that information.

The Secretary of State further erred in treating the PSED as though it concerned an obligation to achieve a particular outcome rather than a duty to have due regard to particular objective. At DL/27 he referred to the CPO's potential impact on the care for the elderly as a matter which "…breaches the PSED requirement to have due regard…". His reasoning can only be explained by a failure to understand the "vital" distinction highlighted in R. (On the application of Baker) v. Secretary of State for Communities and Local Government [2008] EWCA Civ 141.

The Secretary of State further erred at DL/32 since his conclusions are inconsistent with the Inspector's findings at IR/351, with which the Secretary of State in fact purported to agree (DL/14). At IR/351 the Inspector concluded that, "taking account of the ethnic mix within the borough overall..."), BME residents relocating from the estate would not be disadvantaged. This was inconsistent with DL/32, and the inconsistency is not explained by the Secretary of State's reasoning at DL/31.

Further and in any event, the Secretary of State's approach to the PSED was contaminated by the error of failing to take account of the change in the Council's policy on the need for leaseholders to contribute their own savings: DL/26.

Further and in any event, the Secretary of State took an unlawfully narrow approach to the question of how impacts on BME grounds could be mitigated. At DL/33 the only form of mitigation considered was to modify the CPO, whereas the Council's evidence had been that the impacts on those moving from the estate were being mitigated by a range of means of support.

Further and in any event, the Secretary of State failed to have regard to the range of relocation options available, as explained under the challenge to the assessment of well-being (see below).

Unlawful assessment of well-being

In reaching his overall conclusions on well-being, the Secretary of State erred in agreeing with the Inspector that the CPO did not achieve that social, economic and environmental well-being sought: DL/5; IR/377. In so concluding the Secretary of State erred. The CPO was promoted to achieve the well-being benefits identified under the AAAP. Both the Inspector and the Secretary of State expressly concluded that the CPO and the scheme underlying it were in accordance with the Local Plan and the AAAP itself: DL/11, IR/399. Accordingly, the CPO did achieve the well-being benefits sought.

The Secretary of State further erred in failing to take into account that the adverse individual impacts that flowed from the potential need to relocate off the estate were an inevitable consequence of the policy objective of seeking more balanced tenure within the redevelopment proposals. Put simply, there was a failure by the Secretary of State to acknowledge that the benefits which he identified could not be achieved without some adverse impacts.

On environmental well-being, the Secretary of State erred by adopting the Inspector's reasoning and conclusions in respect of sunlight and daylight within the proposed dwellings and overshadowing of amenity space: DL/15. The Inspector's conclusions were based upon an unlawful application of the Council's policies. The Council's residential standards SPD requires a two stage process in relation to sunlight and daylight matters. First, there is the question of whether the BRE guidance is complied with. Secondly, where it is not complied with, the policy advises that the decision-maker must then judge whether the living conditions are nevertheless acceptable, and that such a judgment should be informed by professional advice from a sunlight and daylight expert: see page 19 of the SPD.

The Inspector and the Secretary of State failed to consider the second stage. They failed to consider whether the proposed dwellings that failed to comply with the BRE guidance would nevertheless have acceptable living standards. Had the matter been raised, the Council would have explained why the living conditions in the proposed scheme were acceptable, notwithstanding the breach of the BRE Guidance.

On environmental well-being, the Secretary of State further erred in undertaking a reassessment of the planning merits of a detailed aspect of the scheme, in circumstances where there had been no change in circumstances or new evidence on this matter since the planning permission was granted: see Alliance Spring v. First Secretary of State [2005] EWHC 18 (Admin).

On social and economic well-being, the Secretary of State erred in failing to take into account the change of policy by the Council in respect of leaseholders contributing their own money to relocation homes.

On social well-being, the Secretary of State's conclusions are tainted by his errors in respect of the PSED.

On social well-being, the Secretary of State failed to have regard to the full range of housing options open to leaseholders, and to the locations of alternative accommodation which was available within the estate and very close to the site.

Human rights: unlawful assessment of necessity/proportionality

The Secretary of State's judgement on human rights is obviously undermined by one or more of the other errors in the DL.

Details of the action that the defendant is expected to take

The Defendant is expected to consent to judgment in this case; and in particular to agree the following:

1. That the Secretary of State's decision should be quashed; and
2. That a new inspector should be appointed to hold a second public inquiry to consider the confirmation of the CPO afresh.

Address for reply and service of court documents

Address contained in the footer of the first page of this letter.

Proposed reply date

Please reply by no later than **4pm 21 October 2016** (14 days from the date of this letter).

Yours sincerely,

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