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Your ref:
Our ref: **Z1628446/JUS/B5**

20 October 2016

Dear Sirs

London Borough Of Southwark v Secretary of State for Communities and Local Government

1. The Claimant
Southwark LBC (the "Council").

2. From
Secretary of State for Communities and Local Government (the "Secretary of State").

3. Reference details
The reference details for this matter are **Z1628446/JUS/B5**.

4. The details of the matter being challenged
You seek to challenge the Secretary of State's decision of 16 September 2016 not to confirm the London Borough of Southwark (Aylesbury Estate Site 1B-1C) Compulsory Purchase Order 2014 (the "Order").

5. Response to the proposed claim
You claim that the Decision is unlawful for six reasons:

(1) Procedural unfairness in failing to allow the Council an opportunity to address daylight and sunlight issues;
(2) Failure to have regard to the Council's change of policy in respect of the need for leaseholders to apply their savings to alternative accommodation;
(3) Unlawful finding that the Council had not taken reasonable steps to acquire interests by agreement;
(4) Failure to discharge the public sector equality duty ("PSED") under section 149 of the Equality Act 2010 (the "EA 2010");
(5) Unlawful assessment of well-being; and
(6) Breach of human rights.

For the reasons set out below, there is no merit to any of these proposed grounds. They are all unarguable. If you proceed to commence judicial review proceedings, the Secretary of State will robustly defend the same and seek his costs of doing so.

(1) Procedural unfairness

You suggest that "No issue of the adequacy of 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 the objectors. The issue was not raised by the Inspector. The Council had no fair opportunity to address the point."

Your assertion is factually wrong. The Order was made under section 226(1)(a) of the Town and Country Planning Act 1990 (the "1990 Act"), which empowers a local authority, authorised by the Secretary of State, to acquire land compulsorily in its area "if the authority think that the acquisition will facilitate the carrying out of development, re-development or improvement on or in relation to the land". That power is subject to section 226(1A), which provides that a local authority must not exercise it unless it thinks that the development, re-development or improvement is likely to contribute to the achievement of any one or more of the following objects:

(a) The promotion or improvement of the economic well-being of their area;
(b) The promotion or improvement of the social well-being of their area; or
(c) The promotion or improvement of the environmental well-being of their area.

The promotion or improvement of the environmental well-being of the Council's area was thus always a key issue in the case. The Council dealt expressly with daylight and sunlight issues in its Planning Committee Report of 23 April 2015, which was before the Inspector, at paras 133-139 and paras 157-163. At para. 139, the Planning Committee noted that "It is acknowledged that failure to achieve full compliance with BRE guidance for minimum ADF levels is a less positive aspect of the proposal", albeit that they needed to be considered in context. The figures in the Inspector's Report at [IR/368] and [IR/369] come directly from these passages, as indicated in footnote 223.

The issue of daylight and sunlight was also covered in the Council's evidence at the inquiry. Ms Bates, who gave evidence on behalf of the Council at the inquiry, stated at para. 6.7, fourth bullet point, that:

"All the proposed new buildings will comply with current environmental standards, including energy efficiency, good daylight with a high percentage having dual aspect and BREEAM Communities' standard."

Further, at para. 6.8, 3rd bullet point, of her proof of evidence, she stated that:

"The intensified density of the development has been carefully managed through the design process to present suitable massing in terms of scale and variety. The tall blocks across the park frontage are slim and compact in footprint to enable good sunlight to penetrate into the development."

This passage from Ms Bates' evidence was expressly referred to by the Inspector at [IR/89]. Ms Bates further addressed the issue of daylight and sunlight at the inquiry. She was asked questions about daylight and sunlight during the course of her evidence by the Inspector. These included questions in relation to the orientation of the scheme and the implications of having higher buildings to the south for daylight and sunlight purposes. Ms Bates confirmed that some dwellings would not meet the usual daylight and sunlight standards and that some of the amenity areas would be overshadowed. The Council's closing submissions expressly relied on this passage in Ms Bates' evidence, at para. 101(iii)d.ii. Further, objections on the grounds of daylight and sunlight, and overshadowing, were expressly made in objection numbers 440 and 437, listed in the Planning Committee Report, and by Mr Piers Corbyn at the inquiry.

Accordingly, it is clear that your suggestion that daylight and sunlight issues were not raised at the inquiry, and that the Council did not have an opportunity to deal with them, is factually wrong. Such matters were squarely in issue and were dealt with expressly by the Council in it its evidence and submissions. There is no substance to this ground of challenge.

(2) Failure to have regard to change of policy

Under this head, you argue that the Secretary of State had failed to have regard to, or to consider the effect of, the Council's change of policy in respect of the requirement for leaseholders to apply their savings towards alternative accommodation. This is plainly wrong.

At [DL/7]-[DL/8], the Secretary of State dealt with the change in policy in the following terms:

"7. On 9 June 2016, the Secretary of State wrote to all the parties to invite comments on a Southwark Council report dated 8 December 2015 which made reference to a change in policy concerning the

requirement in respect of leaseholder's savings for resident homeowners affected by regeneration schemes and eligibility for council-assisted rehousing options.

8. The Secretary of State has had regard to all the views expressed in response to this report and all the correspondence received has also been taken into account. He considers, in the light of the facts of this case, that the matters raised do not alter his conclusions and decision."

Accordingly, it is clear that the Secretary of State did have regard to, and consider the effect of, the change of policy relating to the use of leaseholder's savings. He invited submissions on the issue which he considered. He concluded that the change in policy did not affect his decision. That was a conclusion he was lawfully entitled to reach. The fact that the Secretary of State otherwise agreed with particular aspects of the Inspector's reasoning does not assist your argument. The Secretary of State expressly stated that the matters raised by the change of policy "do not alter" his conclusions and decision. Thus it is clear that he considered the effect of the change of policy against the conclusions which he, in reliance on the Inspector's reasoning (see, for example, [DL/18], referring to [IR/395]-[IR/402]), had reached and decided that it did not affect it. That is unsurprising. Those passages in the Inspector's Report are detailed and set out a range of reasons why the Council had not taken reasonable steps to negotiate. There is no error on this ground.

(3) Unlawful finding on reasonable steps to acquire by agreement

At the outset in respect of this ground, the Secretary of State would note that your suggestion that nearly 90% of leasehold interests had been acquired by agreement is potentially misleading. The majority of the 541 homes acquired by agreement were occupied by tenants who were subject to different rehousing options to leaseholders (for example, some were subject to possession orders under the Housing Act 1988), whereas the objectors were predominantly leaseholders.

You contend that the Secretary of State failed to apply his own guidance that offers to acquire property by agreement should be valued under the compensation code and ignored the fact that the Council could only offer to buy at a level based on market value. This is wrong. Notably, the Inspector began her conclusions on this issue at [IR/399] by stating that "Compensation is not a matter before the inquiry". Accordingly, she did not err in her approach to the issue of compensation. She went on to note the effect of the offers on the position of leaseholders; that was a material consideration which she was entitled to take into account and which did not involve either determining issues of compensation, or mis-applying the Secretary of State's guidance.

You further argue that the Secretary of State purported to apply his new guidance retrospectively, in respect of the "reasonable steps" test, when he had already concluded that the guidance should not be applied. This complaint is difficult to understand. Although the Council argued at the inquiry that the new tests in the new guidance should not be applied retrospectively, it expressly argued that there was general continuity between the old and new guidance insofar as the "overriding", or "over-arching", tests were concerned. Thus, the Inspector recorded the following arguments by the Council:

"35. In terms of the overriding tests to be applied by the Secretary of State in deciding whether to confirm the CPO there is very substantial continuity between the old guidance and new. There are no relevant substantive changes as between 06/2004 and the new Guidance affecting planning matters, well-being or alternatives in this case.

36. The over-arching test for the Secretary of State was whether the acquiring authority had sought to acquire land by negotiation wherever practical. The new guidance asks '*whether the acquiring authority has demonstrated that it has taken reasonable steps to acquire the land ... by agreement*'."

By contrast, the Report highlights the Council's submission that "significant changes" were made in the section of the new guidance under the heading "What should acquiring authorities consider when offering financial compensation in advance of a compulsory purchase order?": [IR/37]. The Council's position at the inquiry was that there was no substantive difference between the new and old guidance as regards the efforts to acquire by agreement that had to be demonstrated. There is, therefore, no basis for the Council now to criticise the approach taken by the Inspector and the Secretary of State which was, in any event, plainly correct.

The basis of your assertion that the Inspector refused to have regard to evidence on negotiations between the Council and objectors is unclear. It is plain from the Inspector's report that she had proper regard to such

matters (see, for example, the arguments recorded at [IR/111]-[IR/118]). The Inspector did not refuse to consider evidence on such matters.

Finally, you assert that the Secretary of State's conclusion on this matter is perverse. *Per* Laws LJ in *CA v. Secretary of State for the Home Department* [2004] EWCA Civ 1165, [2004] Imm AR 640, at [27]: "Perversity means what it says". You come nowhere near that high threshold. This ground is without merit.

(4) PSED

You allege that the Secretary of State erred in purporting to discharge the PSED. You argue that he acknowledged that he had insufficient material before him to discharge the PSED but nonetheless purported to do so and so was in breach of the obligation to obtain sufficient material to discharge his legal obligations.

There is no substance to this ground. *Per* McCombe LJ in *Bracking v. Secretary of State for Work and Pensions* [2013] EWCA Civ 1345, [2014] Eq LR 16, at [78]:

> "The concept of "due regard" requires the court to ensure that there has been a proper and conscientious focus on the statutory criteria, but if that is done; the court cannot interfere with the decision simply because it would have given greater weight to the equality implications of the decision than did the decision maker. In short, the decision maker must be clear precisely what the equality implications are when he puts them in the balance, and he must recognise the desirability of achieving them, but ultimately it is for him to decide what weight they should be given in the light of all relevant factors. If Ms Mountfield's submissions on this point were correct, it would allow unelected judges to review on substantive merits grounds almost all aspects of public decision making."

In *R (UNISON) v. Lord Chancellor* [2015] EWCA Civ 935, [2015] IRLR 911, Underhill LJ held, in a challenge to the adequacy of an equalities impact assessment, that "To the extent that views are expressed on matters requiring assessment or evaluation the Court should go no further in its review than to identify whether the essential questions have been conscientiously considered and that any conclusions reached are not irrational": [116]. Underhill LJ, in the same passage, endorsed the judgment of Davis LJ in *R (Bailey) v. Brent LBC* [2011] EWCA Civ 1586, [2012] Eq LR 168, who held that a decision-maker could not be expected "to speculate on or to investigate or to explore such matters ad infinitum; nor can they be expected to apply, indeed they are to be discouraged from applying, the degree of forensic analysis for the purpose of an EIA and of consideration of their duties under s.149 which a QC might deploy in court": [102].

Finally, and most recently, *per* Laws LJ giving the judgment of the Court in *R (West Berkshire Council) v. Secretary of State for Communities and Local Government* [2016] EWCA Civ 441, [2016] 1 WLR 3923, at [83], "The requirement to pay due regard to equality impact under section 149 is just that. It does not require a precise mathematical exercise to be carried out in relation to particular affected groups".

The Secretary of State summarised the effect of the PSED in [DL/23]. You do not suggest that he made any error in doing so. At [DL/24], the Secretary of State concluded that:

> "The Order, if confirmed and the scheme if carried out would have negative and positive impacts on protected groups as a result of the proposal. The Secretary of State finds that, on balance, there are significant negative impacts on protected groups if the Order is confirmed."

The Secretary of State then went on to explain in more detail the nature of the positive and negative effects of the Order, at [DL/25]-[DL/28]. Your reference to the Secretary of State acknowledging that he did not have sufficient information before him, appears to be a reference to [DL/29], where he held that:

> "Given the lack of clear evidence regarding the ethnic and/or age make-up of those who now remain resident at the Estate and who are therefore actually affected by any decision to reject or confirm the Order, it is not possible to clearly identify BME groups (either of the elderly or children) as disproportionately impacted by the proposal. However, given that 67% of the population living on the Estate were of BME origin (see IR 394), it is highly likely that there is a potential disproportionate impact on the elderly and children from these groups, who are likely to dominate the profile of those remaining on the Estate and who are therefore likely to have to move out of the area if the Order is confirmed."

At [DL/30], the Secretary of State explained that this meant that there was a "further dimension" to the adverse impacts on these groups, which he had already described at [DL/25]-[DL/28]. At [DL/31]-[DL/32], he further explained that the impact on BME leaseholders' ability to retain contact with their own culture might be greater than assumed by the Inspector, depending on the precise ethnic make-up of those resident at the Estate.

There is no error in these conclusions. They demonstrate a careful and considered application of the PSED. Your complaints about the application of the PSED demonstrate precisely the sort of forensic analysis which the Court of Appeal has deprecated in the cases set out above. In response to the particular criticisms you make under this head:

1. Insufficient evidence: the Secretary of State did *not* conclude that he had insufficient evidence to reach a decision on this point. Rather, he noted the absence of clear evidence as to the ethnic and/or age make-up of those who remained resident at the Estate at the time of the decision but drew an inference from the overall figures for those residents who had been living on the Estate and who were members of BME groups. That is an entirely fair and reasonable inference to draw. There is no error in that approach. Indeed, your criticism is surprising since it was the Council who, as the acquiring authority, should have provided this information. As such, there was no duty to obtain further information in these circumstances.

2. Treating PSED as an obligation of outcome: this criticism is difficult to understand. There is nothing in the Secretary of State's consideration of the PSED at [DL/23]-[DL/33] which supports the suggestion that he misunderstood the fundamental nature of the PSED. On the contrary, he correctly summarised the contents of section 149 EA 2010 at [DL/23] and proceeded to apply it with conspicuous care. Notably, you do not suggest that the legal summary in [DL/23] is in any way incorrect.

3. Inconsistency with Inspector's findings: this criticism is misconceived. The fact that the Secretary of State agreed overall with his Inspector's conclusions on this issue did not mean he had to replicate them in every individual respect. At [DL/32], he commented on the position in the event that the ethnic make-up of those remaining did not replicate that over the Estate as a whole. He took that approach in light of the shortage of evidence on the ethnic make-up of those individuals, for which, as noted above, the Council was at least in part responsible. That was plainly a sensible approach and demonstrates the care with which the Secretary of State approached this matter.

4. Failure to take into account the change of policy: for the reasons set out above, this allegation is without merit.

5. Unlawfully narrow approach to mitigation: this is precisely the sort of forensic criticism consistently rejected by the Court of Appeal in the case-law on this subject. The Secretary of State considered modifications and compensation at [DL/33]. You do not specify what other "support" options he should have considered. The Secretary of State does not respond further in the absence of such detail.

6. Failure to consider the full range of relocation options: for the reasons set out below in respect of your proposed ground 5, this is without merit.

For these reasons, the PSED ground is without merit.

(5) Well-being

Under this proposed ground of challenge, you repeat a number of the arguments made elsewhere in your letter. For the same reasons as explained above, they are wrong.

You begin by suggesting that the Secretary of State erred by agreeing with the Inspector that the Order did not achieve the social, economic and environmental well-being that was sought, because the Order was promoted to achieve the well-being identified in the Aylesbury Area Action Plan ("AAAP"). That argument is misconceived. The Inspector expressly concluded that the Order accorded with the planning framework for the area, including the AAAP: [IR/339]. But that says nothing about whether the Order would promote social, economic or environmental well-being. For the reasons set out in the Inspector's Report and the Secretary of State's Decision Letter, the Order here did not.

You suggest that the Secretary of State failed to have regard to the fact that the benefits of the proposals could not be achieved without some adverse impacts. That is wrong. The Inspector's Report and the Decision Letter both clearly identify the benefits of the proposals as well as the adverse impacts: see, for example, [IR/353].

In respect of your complaint about daylight and sunlight, this has already been dealt with above. Insofar as you rely under this head on an alleged failure to apply the Council's policy, this is misconceived. The effect of the analysis at, for example, [IR/368]-[IR/370] is not to apply the Council's policies, but to evaluate whether the statutory test in respect of the promotion of environmental well-being has been met. This was not an impermissible re-consideration of the planning merits; it was an essential part of the application of the statutory test under section 226(1A) of the 1990 Act.

Finally, insofar as you rely again on matters relating to leaseholders' contributions to relocation, the PSED and locations of alternative housing, this adds nothing to the points already dealt with above.

(6) Human rights

Finally, you allege that "The Secretary of State's judgement on human rights is obviously undermined by one or more of the other errors in the DL". You do not specify which human rights are in issue. For the reasons set out above, your allegations of legal errors are ill-founded. However, more fundamentally, you ignore the fact that the Council cannot be a "victim" for the purpose of the European Convention on Human Rights (the "ECHR") or the Human Rights Act 1998 (the "HRA").

The standing requirements for claims under the HRA are set out in section 7 HRA. Section 7(1) HRA provides that a person who claims that a public authority has acted unlawfully under section 6(1) HRA may rely on Convention rights in any legal proceedings "but only if he is (or would be) a victim of the unlawful act". Section 7(3) HRA provides that if the proceedings are brought on an application for judicial review, the applicant is to be taken to have a sufficient interest in relation to the unlawful act only if he is, or would be, a victim of that act. Section 7(7) HRA provides that, for the purposes of section 7, a person is a victim of an unlawful act only if he would be a victim for the purposes of Article 34 ECHR if proceedings were brought in the European Court of Human Rights in respect of that act. Article 34 ECHR provides that the Court may receive applications from "any person, non-governmental organisation or group of individuals" claiming to be the victim of a violation by one of the Contracting States.

A local authority may not be considered to be a "non-governmental organisation" under Article 34 ECHR and, therefore, cannot be a victim under the Human Rights Act: *R (Westminster City Council) v. Mayor of London* [2003] BGLR 611. Similarly, it may not bring proceedings in reliance on the Convention rights of the inhabitants of its administrative area: *Westminster*, *per* Maurice Kay J at [93]-[96] (and see also *Aston Cantlow and Wilmcote with Billesley PCC v. Wallbank* [2003] 1 AC 546, *per* Lord Hope at [48] and *Danderyds Kommun v. Sweden*, App. no 52559/99 (7 June 2001, unreported)). Nor can a local authority rely on the ECHR rights of its residents to bring a claim under the HRA: *R (Medway Council) v. Secretary of State for Transport, Local Government and the Regions* [2002] EWHC 2516 (Admin), *per* Maurice Kay J at [20].

It is, therefore, clear that the Council as a local authority is precluded from advancing claims under the Human Rights Act due to its own lack of victim status. Nor is it able to rely on the rights and potential victim status of residents within its administrative area in order to advance such claims indirectly. This proposed ground of challenge is misconceived.

Conclusion on proposed grounds of claim

For these reasons, the proposed grounds of claim you have advanced in your letter of 2016 are unarguable. If you proceed, despite this response, to issue a claim for judicial review, the Secretary of State will defend the same robustly.

Alternative dispute resolution

In the circumstances of the present case, the Secretary of State does not consider that alternative dispute resolution would resolve the issues you have raised.

6. Details of any other interested parties

The Secretary of State does not consider that there are any other interested parties aside from those identified in your letter.

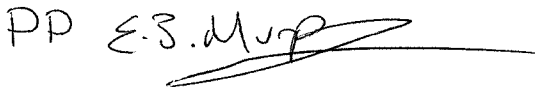
7. Information sought

You do not seek any information from the Secretary of State at this stage.

8. Address for further correspondence and service of court documents

The address for such purposes is set out above in the letterhead.

Yours faithfully



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