Leigh Day

By email only

The Secretary of State for Housing, Communities and Local Government
2 Marsham St
Westminster
London
SW1P 4DF

Direct Dial: 020 7650 1102
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Your Ref:
Our Ref: TGY/TWS/00293456/1
Date: 21 August 2020

Pre-action protocol letter requiring urgent attention:

Contracted reply date - 26 August 2020

Dear Secretary of State

Re: Proposed claim for judicial review: planning statutory instruments

We write on behalf of our client, Rights: Community: Action Ltd in respect of three statutory instruments laid by the Secretary of State for Housing, Communities and Local Government ("the Secretary of State") on 21 July 2020 which together make sweeping changes to permitted development rights and change of use.

This letter is sent in accordance with the Pre-Action Protocol for Judicial Review. The statutory instruments with which this proposed challenge is concerned are due to come into force on at 10.00 a.m. on 31 August 2020. Given the urgency of the matter, we request an urgent response by no later than 26 August 2020.

A. The Proposed Defendant

The Secretary of State for Housing, Communities and Local Government:
2 Marsham St
Westminster
London
SW1P 4DF

B. The Proposed Claimant

Rights: Community: Action is a non-governmental campaign organisation. It is incorporated as a limited company (registered at Companies House under company number 12132847). It is made up of campaigners, lawyers, planners, facilitators, writers and scientists, united by a shared commitment to tackle the Climate Emergency.

C. The Defendant's reference details

None as yet.

D. The details of the Claimants' legal advisers, if any, dealing with this claim

Leigh Day:
Priory House
25 St John's Ln
Farringdon
London EC1M 4LB
Our reference: TGY/TWS/293456/1

E. The details of the matter being challenged

The Claimant challenges the lawfulness of the following statutory instruments (together: "the SIs"):

(i) The Town and Country Planning (General Permitted Development) (England) (Amendment) (No. 2) Order 2020/755;
(ii) The Town and Country Planning (General Permitted Development) (England) (Amendment) (No. 3) Order 2020/756;
(iii) The Town and Country Planning (Use Classes) (Amendment) (England) Regulations 2020/757.

F. The details of any Interested Parties

None.

G. The issues

1. Taken together, the SIs make sweeping changes to permitted development rights and change of use:

   (i) The Town and Country Planning (General Permitted Development) (England) (Amendment) (No. 2) Order 2020/755 brings the enlargement of a dwellinghouse by the construction of new storeys on top of the highest existing storey of the dwellinghouse within permitted development for the purposes of the Town and Country Planning (General Permitted Development) (England) Order 2015 ("the GPDO").

   (ii) The Town and Country Planning (General Permitted Development) (England) (Amendment) (No. 3) Order 2020/756 inserts into Part 20 of Schedule 2 to the GPDO a new permitted development right. Class ZA allows for the demolition of a single detached building in existence on 12 March 2020 that was used for office, research and development or industrial processes, or a free-standing purpose-built block of flats, and its replacement by an individual detached block of flats or a single detached dwellinghouse within the footprint of the old building. The right provides permission for works for the construction of a new building that can be up to two storeys higher than the old building, with a maximum overall height of 18 metres.

   (iii) The Town and Country Planning (Use Classes) (Amendment) (England) Regulations 2020 amend the Town and Country Planning (Use Classes) Order 1987 ("the Use Classes Order") by revoking a number of previous use classes and replacing them with much broader use classes. Class E subsumes previous use classes which were specified in the Schedule to the Use Classes Order as Class A1(Shops), Class A2 (Financial and professional services), Class A3 (Restaurants and cafes) and Class B1(Business). Class F.1 and F.2 subsume a number of the previous use classes which were specified in the Schedule to the Use Classes Order as Class D1 (Non-residential institutions) and Class D2 (Assembly and leisure). The result of these changes is that what would previously be a change of

use under the subsumed use classes is no longer considered development under the Planning Acts, and accordingly is no longer subject to planning control.

2. As was noted in the Prime Minister's Office Press Release dated 30 June 2020:

> "Boris Johnson has announced the most radical reforms to our planning system since the Second World War, making it easier to build better homes where people want to live.
>
> New regulations will give greater freedom for buildings and land in our town centres to change use without planning permission and create new homes from the regeneration of vacant and redundant buildings."[1]

3. The SIs were laid before Parliament by the Secretary of State for Housing, Communities and Local Government ("the Secretary of State") on 21 July 2020: the day before Parliament's summer recess began. The SIs come into force at 10.00 a.m. on 31 August 2020: the day before Parliament reconvenes. Parliament has therefore had no opportunity to debate "the most radical reforms to our planning system since the Second World War" before they come into effect, with potentially enormous consequences for the environment.

4. If they are not withdrawn or suspended, the Claimant will challenge the lawfulness of these statutory instruments under the following grounds. The Claimant will seek a final declaration that the SIs are unlawful, and an order quashing them.

GROUND 1: The government unlawfully failed to carry out an environmental assessment of the SIs, pursuant to EU Directive 2001/42/EC ("the SEA Directive") and the Environmental Assessment of Plans and Programmes Regulations 2004 ("the SEA Regulations").

5. Article 3 of the SEA Directive provides that a strategic environmental assessment ("SEA") is required in respect of all plans and programmes that are likely to have significant environmental effects.

[1] https://www.gov.uk/government/news/pm-build-build-build

6. Article 2 defines "plans and programmes" as follows:

> "'plans and programmes' shall mean plans and programmes, including those co-financed by the European Community, as well as any modifications to them:
>
> — which are subject to preparation and/or adoption by an authority at national, regional or local level or which are prepared by an authority for adoption, through a legislative procedure by Parliament or Government, and
>
> — which are required by legislative, regulatory or administrative provisions".

7. A plan or programme may include secondary legislation: see *Terre Wallonne and Inter-Environment Wallone* (C-105/09 and C- 110/09) [2010] ECR 1-5611, and *R. (on the application of Friends of the Earth Ltd) v Secretary of State for Housing, Communities and Local Government* [2019] EWHC 518 (Admin), [9].

8. The changes to permitted development impose mandatory requirements on local planning authorities. As was noted by the CJEU in *Inter-Environnement Bruxelles ASBL and others v Région de Bruxelles-Capitale* (C-567/10) [2012] 2 C.M.L.R. 30 ("*IEB*") at [31], *"plans and programmes whose adoption is regulated by national legislative or regulatory provisions, which determine the competent authorities for adopting them and the procedure for preparing them, must be regarded as 'required' within the meaning, and for the application, of [the SEA Directive]".*

9. With respect to the changes to the Use Class Order, as was noted by the CJEU in *IEB* at [43], a procedure for the total or partial repeal of a land use plan falls in principle within the scope of the SEA Directive.

10. Accordingly, the SIs amount to plans or programmes, or modifications to plans or programmes, for the purposes of the Directive.

11. As to the question of significant environmental effects, the changes to planning rules in England brought about by these SIs are sweeping, as the government itself acknowledges. They include, *inter alia*, the in-principle grant of permission for the demolition of many large buildings without planning permission. These changes are undoubtedly likely to have significant effects on the environment. Regarding the

required approach to this issue, as was noted by Sales J in *Cala Homes (South) Limited v Secretary of State for Communities and Local Government v Winchester City Council* [2010] EWHC 2866 (Admin) at [57], *"a generous purposive approach to the application of the SEA Directive"* is necessary. This is borne out by Article 191 of the Treaty on the Functioning of the European Union, which notes that Union policy on the environment *"shall be based on the precautionary principle and on the principles that preventive action should be taken"*.

12. Accordingly, the SIs should have been subject to an environmental assessment pursuant to the SEA Directive and the SEA Regulations. They were not, and so are contrary to EU environmental law.

GROUND 2: Public Sector Equality Duty

13. Section 149 of the Equality Aact 2010 ("EA 2010") created the public sector equality duty ("the PSED"). Compliance with the PSED requires the decision maker to be informed about what protected groups will be impacted by a decision. That will involve a continuing duty of enquiry, so that the decision-maker is properly informed before making a decision: *Bracking v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 at [26(8)]. The PSED is to consider *"precisely what the equality implications are"*: see *Hurley v SSBIS* [2012] EWHC 201 at [78].

14. The above SIs were introduced without an appropriate equality impact assessment, resulting in a failure to comply with the PSED. In particular, the Secretary of State did not adequately consider the impact of these reforms on the disabled. The Secretary of State's recently commissioned report *"Research into the quality standard of homes delivered through change of use permitted development rights"* notes that

> "where [schemes under the previous expansion of permitted development rights] are being developed as social or managed accommodation, although Bristol has homelessness issues, there is a concern that vulnerable people are being placed in

accommodation that falls short of space standards, often in remote locations in the city."

15. Homeless people are more likely to suffer long term mental illness, which is a disability for the purposes of the EA 2010. The small, out-of-town units that will be created by the new permitted development changes are very likely to be used to house current and future homeless persons, in the same way that existing office-to-residential conversions are. Accordingly, the generally accepted failings regarding these units will impact disabled persons. In particular, any disabled persons who occupy these out-of-town units (including homeless persons who must accept a private rented sector offer under section 193 of the Housing Act 1996 or remain homeless) will be cut off from many public services, including healthcare and social care.

GROUND 3: Failure to take account of consultation responses and other material considerations

16. The Claimant makes one overarching point under this composite ground of challenge: the Secretary of State failed to conscientiously consider the weight of the evidence against these radical reforms, including prior consultation responses and the advice of his own experts. Moreover, in closing his mind to these important considerations, he adopted an approach which was entirely inconsistent with his approach to comparable planning reform proposals.

GROUND 3a: Failure to conscientiously consider consultee responses

17. The SIs were introduced without conscientious consideration of the product of consultation, contrary to the fourth *Sedley/Gunning* principle.

18. The government consulted on the changes brought about by the SIs between 29 October 2018 and 14 January 2019. The government published its response in May 2019.

19. The responses were highly negative. For example, at para 51 of the government response to the consultation, the government noted:

> "Less than a third of the 253 responses to question 1.27 considered a permitted development right for the demolition and replacement build of commercial sites possible. Generally, it was considered that such a right would go beyond what is capable of or appropriate to be delivered through a national permitted development right and that it would require extensive prior approval considerations."

20. In order to be lawful, a consultation must comply with the *Sedley/Gunning* principles of consultation (*R v Brent London Borough Council, ex p Gunning* (1985) 84 LGR 168; endorsed by the Supreme Court in *R (Moseley) v London Borough of Haringey* [2014] UKSC 56 at [25]). Those principles are as follows:

(i) First, consultation must be at a time when proposals are still at a formative stage.

(ii) Second, the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response.

(iii) Third, adequate time must be given for consideration and response.

(iv) Fourth, the product of consultation must be conscientiously taken into account in finalising any statutory proposals.

21. It is a fundamental aspect of good decision making that a decision maker gives "conscientious consideration" to the outcome of the consultation process: see e.g. *Draper v Lincolnshire CC* [2014] EWHC 2388 (Admin) ; *Royal Brompton & Harefield NHS Foundation v Joint Committee of Primary Care Trusts* [2012] EWCA Civ 472. In simple terms, this means the public authority must be able to show that it has considered the outcome of the consultation process carefully and been prepared to change course in response to the outcome of consultation if appropriate. If consultation is to further good administration and ensure that those potentially affected by a decision are treated fairly, the product of consultation must be fed into the decision-making process.

22. In the present case, the highly negative response of consultees was not given the conscientious consideration that was required. Although the Secretary of State may

have been aware of the views submitted in response to the consultation, he dismissed them without truly weighing up their merits. In other words, he approached the consultation with a closed mind. This is therefore a case where *"The Defendant had no intention of changing his mind about the substance"* of the proposed changes: see *R (Stephenson) v SSHCLG* [2019] EWHC 519 (Admin), [58].

23. This unlawful approach is borne out by the Secretary of State's refusal to submit "the most radical reforms to our planning system since the Second World War" to any Parliamentary scrutiny at all before they come into effect.

GROUND 3b: Failure to take into account the government's own expert advice

24. The Secretary of State failed to take into account material considerations before laying the SIs concerned with permitted development rights, namely the advice of his own independent experts on numerous issues affecting office-to-residential conversions under previous reforms to permitted development.

25. In particular, the Secretary of State failed to take into account:

(i) His own commissioned expert report "Research into the quality standard of homes delivered through change of use permitted development rights",[2] which noted severe negative impacts of the existing permitted development scheme. The report's author has now stated publicly that his findings were "ignored" by the Secretary of State.[3]

(ii) The report of the government's Building Better, Building Beautiful Commission, which remarked in its final report that the existing permitted development policy has "inadvertently permissioned future slums".[4]

[2] https://www.gov.uk/government/publications/quality-standard-of-homes-delivered-through-change-of-use-permitted-development-rights
[3] https://www.bbc.co.uk/news/uk-politics-53650657
[4] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/861832/Living_with_beauty_BBBBC_report.pdf

26. These reports were clearly material to any decision to further expand permitted development rights. They were entirely ignored: indeed, the Secretary of State announced the new planning reforms on the same day the first report was published.

27. This failure to take account of material considerations was unlawful.

GROUND 3c: In closing his mind to the issues raised regarding these proposed reforms, the Secretary of State adopted an approach which was unfair, inconsistent and/or irrational in the context of the approach taken to similar proposed reforms

28. In the government's July 2020 document *"Government response to the consultation on proposed reforms to permitted development rights to support the deployment of 5G and extend mobile coverage,"* the government promised a further *"technical consultation on the detail"* of permitted development proposals regarding 5G masts specifically: to include issues such *as "potential impacts on local amenity, protected land including designated landscapes such as National Parks."* The government noted at Para 9:

> "Making these changes requires amendments to Part 16 of Schedule 2 to the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) ('the General Permitted Development Order') through secondary legislation. We will undertake a technical consultation on the detail of the proposals, including appropriate environmental protections and other safeguards, prior to amending the existing legislation."

29. Given that there are likely to be very similar environmental and landscape concerns regarding the erection of tall structures without planning permission, it would be unfair, and/or irrational, to allow consultees on permitted development rights related to 5G masts a second technical consultation on the details, but to deny that same right to consultees in respect of the SIs that this advice is concerned with.

30. This amounts to decision-making which is unlawfully inconsistent, unfair and/or irrational.

H. The details of the action that the defendant is expected to take

The Secretary of State is required to suspend the coming into effect of the SIs, pending the required SEA, impact assessments and Parliamentary debate. If he does not, the Claimant

will seek an urgent interim order suspending the operation of the SIs until the legal challenge is resolved.

I. ADR proposals

This claim is not considered suitable for ADR.

J. The details of any information sought

The Defendant is asked to confirm his agreement that this is clearly an Aarhus Convention claim, which will attract the presumptive provisions of Part 45 (VII) of the CPR.

K. The details of any documents that are considered relevant and necessary

The Claimant seeks the disclosure of the following documents under the Secretary of State's duty of candour:

1. All impact assessments carried out in respect of the SIs, if any: including any equality impact assessments carried out, and the impact assessments referred to in the Explanatory Notes to each of the SIs. This is necessary as the Court will be required to consider whether an appropriate equality impact assessment was in fact carried out.

2. All internal MHCLG correspondence relating to whether the Secretary of State did or did not consider the responses to its initial consultation on the proposed changes to permitted development and the Use Classes Order. These documents are necessary as without them, the Court will be unable to properly decide whether conscientious consideration was given to the consultation responses.

3. All ministerial submissions relating to the SIs. These are highly relevant to the claim that the Secretary of State did not adequately consider (1) equality impacts, (2) consultation responses, (3) its own expert reports.

4. All internal MHCLG correspondence relating to the finalised report "Research into the quality standard of homes delivered through change of use permitted development rights". These documents are highly relevant to the question of whether the Secretary of State took into account the findings of this report.

5. All internal MHCLG correspondence, if any, relating to the finding of the government's Building Better, Building Beautiful Commission that previous permitted development changes resulted in "inadvertently permissioned future slums". These documents are highly relevant to the question of whether the Secretary of State took into account the findings of this report.

6. All internal MHCLG correspondence relating to the decision to provide a further technical consultation regarding changes to permitted development rights related to 5G masts. This is highly relevant to the question of irrational, inconsistent and unfair decision-making in respect of the failure to offer a technical consultation on the impugned SIs.

L. The address for reply and service of court documents

Tom Short, Solicitor:

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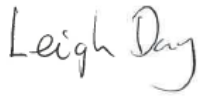
Leigh Day
Priory House
25 St John's Ln
Farringdon
London EC1M 4LB

M. Proposed reply date

Given the fact that the above SIs will come into effect on 31 August 2020, it is considered that a restricted response date is appropriate for this claim. A reply is therefore requested **within 5 days,** i.e. by **12pm on 26 August 2020**, after which the claim and application for interim relief will be issued.

Yours faithfully



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