Claim no

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
(PLANNING COURT)

IN THE MATTER OF AN APPLICATION FOR PERMISSION TO APPLY FOR JUDICIAL REVIEW

B E T W E E N :-

THE QUEEN
on the application of
RIGHTS: COMMUNITY: ACTION

Claimant

and

THE SECRETARY OF STATE FOR
HOUSING, COMMUNITIES AND
LOCAL GOVERNMENT

Defendant

DETAILED STATEMENT OF FACTS
AND GROUNDS

References to [**X**] are references to page X in the Bundle.

Recommended essential reading (estimated 1 hour):

-These grounds

-The application for urgent interim relief

-The impugned SIs and published Impact Assessments (see further below) [**D1-D81**]

Introduction

1. On 21 July 2020, the day before Parliament's summer recess, the Secretary of State for Housing, Communities and Local Government ("the Secretary of State") laid three statutory instruments before Parliament (together: "the SIs").[1] The SIs make sweeping changes to the Town and Country Planning (Use Classes) Order 1987 ("the Use Classes Order") in England, and the Town and Country Planning (General Permitted Development) (England) Order 2015 ("the GPDO"). A week after they were laid, the SIs

[1] The Town and Country Planning (General Permitted Development) (England) (Amendment) (No. 2) Order 2020/755; The Town and Country Planning (General Permitted Development) (England) (Amendment) (No. 3) Order 2020/756; and The Town and Country Planning (Use Classes) (Amendment) (England) Regulations 2020/757. See further below.

were described by the Prime Minister's Office in a press release as *"the most radical reforms to our planning system since the Second World War."*[2] The SIs come into effect between 31 August 2020 and 1 September 2020: 1 September 2020 being the first day Parliament returns from its summer recess. Accordingly, Parliament has had no opportunity to debate these radical measures before they come into force.

2. But it is not just parliamentary scrutiny of the legislation that has been deficient: it is also all the usual processes and principles of Strategic Environmental Assessment, Equalities Impact Assessment, and public consultation. The grounds of claim each relate to failures to properly assess the impacts of these radical reforms before they take effect.

3. The Claimant is a non-governmental campaign organisation incorporated as a limited company.[3] It is made up of campaigners, lawyers, planners, facilitators, writers and scientists, united by a shared commitment to tackle the Climate Emergency. It challenges the lawfulness of all three SIs under the following grounds:

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

(2) GROUND 2: In respect of each of the three SIs, the Secretary of State failed to have due regard to the Public Sector Equality Duty ("the PSED") in s.149 of the Equality Act 2010 ("the EA 2010").

(3) GROUND 3: In respect of each of the three SIs, the Secretary of State failed to consider the weight of the evidence against these radical reforms, including prior consultation responses and the advice of his own experts. This composite ground is divided as follows:

Ground 3a: The Secretary of State failed to conscientiously consider the responses to the consultation on proposed planning reforms which ran from 29 October 2018 to 14 January 2019,[4] contrary to the fourth *Sedley/Gunning* principle (*R v Brent London Borough Council, ex p Gunning* (1985) 84 LGR 168).

Ground 3b: In respect of the two SIs that expand Permitted Development rights (SI 2020/755 and SI 2020/756), the Secretary of State failed to take into account

[2] https://www.gov.uk/government/news/pm-build-build-build
[3] Registered at Companies House under company number 12132847.
[4] *Planning Reform: Supporting the high street and increasing the delivery of new homes:* https://www.gov.uk/government/consultations/planning-reform-supporting-the-high-street-and-increasing-the-delivery-of-new-homes.

the advice of the government's own experts: in particular, the findings of the Building Better, Building Beautiful Commission's "Living with Beauty" Report ("The BBBB Report"), and the findings of his own commissioned expert report "Research into the quality standard of homes delivered through change of use Permitted Development rights" ("The Clifford Report").[5]

Ground 3c: In respect of the two SIs that expand Permitted Development rights (SI 2020/755 and SI 2020/756), the Secretary of State adopted an approach which was unfair, inconsistent and/or irrational in the context of the approach taken to similar proposed Permitted Development reforms: namely those relating to the deployment of 5G wireless masts.

Ground 3d: In respect of SI 2020/756, the Secretary of State was required to re-consult before introducing Class ZA. There was a legitimate expectation of re-consultation on the proposal for a permitted development right allowing the demolition and rebuild of commercial properties, arising from an express promise to re-consult which was made in the original consultation document.

4. By way of urgent interim relief, the Claimant seeks an order suspending the operation of the SIs until the disposal of this claim. This is on the basis that the SIs come into effect on 31 August 2020 (SI 2020/755 and SI 2020/756) and 1 September 2020 (SI 2020/757). Given the significant environmental consequences of these reforms, and in light of the precautionary principle of EU environmental law, it is considered that the balance of convenience clearly favours suspension (see further the Claimant's separate application for urgent interim relief).

5. By way of final relief, the Claimant seeks an order declaring that the decision to lay the SIs was unlawful. The Claimant also seeks an order quashing the SIs for unlawfulness.

Aarhus Convention Claim and significant Planning Court claim

6. This is an Aarhus Convention claim and the Claimant seeks costs protection under CPR Part 45 (VII). Pursuant to CPR 45.42(b), the Claimant has filed and served with the claim form a schedule of the Claimant's financial resources, including details of the Claimant's significant assets, liabilities, income and expenditure, and financial support (provided or likely).

7. Under Practice Direction 45E, para 3.1, Planning Court claims may be categorised as "significant" by the Planning Liaison Judge. Pursuant to para 3.3 of PD 45E, the

[5] https://www.gov.uk/government/publications/quality-standard-of-homes-delivered-through-change-of-use-permitted-development-rights

Claimant submits that this claim should be so categorised, given that it raises an important point of EU environmental law, and the fact that the relief sought is the quashing of three significant statutory instruments. The Claimant submits that the shortened time frames under para 3.4 of PD 45E should follow from this categorisation.

Background to the impugned SIs

A. Initial consultation on Permitted Development and Use Class reforms

8. The government consulted on the changes brought about by the SIs between 29 October 2018 and 14 January 2019.[6] In respect of a proposed permitted development right to demolish commercial buildings and replace with residential units, the initial consultation document [**D82**] noted at para 1.50 (emphasis added):

> "We would welcome views as to the design of a right which could operate effectively to bring sites forward for redevelopment. The responses to these questions will inform further thinking and **a more detailed consultation would follow**."

9. The government published its response in May 2019 ("Government response to consultation on Planning Reform: Supporting the high street and increasing the delivery of new homes") [**D129**].

10. The consultee responses were highly negative. For example, in respect of the proposal for a Permitted Development right to demolish commercial sites and replace as housing, 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."

11. The response to the various proposals to allow upward extensions to buildings for new homes was also largely negative. In response, the government noted at para 35:

> "We welcome the range and detail of responses to the questions on the introduction of a permitted development right for upward extensions of existing buildings to create new homes. As set out in the Planning Update Written Statement we intend to take forward a permitted development right to extend upwards certain existing buildings in commercial and residential use to deliver additional homes. We want a right to respect the design of the existing streetscape, while ensuring the amenity of existing neighbours is considered. The review of permitted development rights for change of use of buildings

[6] https://www.gov.uk/government/consultations/planning-reform-supporting-the-high-street-and-increasing-the-delivery-of-new-homes.

to residential use in respect of the quality standard of homes delivered announced in the Written Statement will inform this work. We recognise the complexity of designing a permitted development right to build upwards and will continue to engage with interested parties on the technical details."

12. In respect of equality impacts, the government's consultation response noted at paras 59-60:

> "With regard to equalities, concerns were raised that the proposals may lead to the loss of amenities and shops in the local community due to them changing use, and which could impact on the elderly or the disabled. The prior approvals for both the conversion to offices and to homes from hot food takeaways allow for local consideration of the adequate provision of services and the sustainability of the shopping area by local planning authorities and the local planning authority is required to consider equalities in its decision taking. It was noted that homes in town centres often lack amenity space and therefore are unsuitable for families, and new homes delivered by extending buildings upwards would be unsuitable for those with limited mobility. Concerns were also raised about the impact of larger extensions to dwellinghouses on neighbours…"
>
> "These comments have been taken into consideration in preparing an assessment of impact and a public sector equality duty assessment regarding the changes being taken forward."

B. <u>Permitted Development: SI 2020/755 and SI 2020/756</u>

13. The impugned SIs relating to Permitted Development (SI 2020/755 and SI 2020/756) should be understood in the context of previous changes to Permitted Development rights. Permitted Development has existed in some form since the statutory planning system was first introduced in 1948. However, Permitted Development rights have been gradually expanded by successive governments over time, and expanded more widely in recent years. For example, the 2015 GPDO made permanent the temporary changes introduced in 2013 which allowed the conversion of offices (use class B1a) into residential use (as use class C3 dwellings) through Permitted Development- known as Class O.

14. Permitted Development operates through a combination of s.59 of the Town and Country Planning Act 1990 ("TCPA 1990") and the GPDO. Section 59 of the TCPA 1990 states that the Secretary of State shall provide for the granting of permission through a *"development order"* which may either itself grant planning permission for development specified, or for development of any class specified, with the express power for that order to be *"a general order … applicable to all land".* The GPDO is one such development order made under s.59 of the TCPA 1990. Thus, planning permission is granted in principle for development falling within the Classes of Permitted Development set out in the GPDO.

15. The Town and Country Planning (General Permitted Development) (England) (Amendment) (No. 2) Order 2020 (SI 2020/755) and the Town and Country Planning (General Permitted Development) (England) (Amendment) (No. 3) Order 2020 (SI 2020/756) were laid before Parliament on 21 July 2020, and come into force on 31 August 2020, at 9am and 10am respectively. The two SIs make sweeping changes to the GPDO. In particular:

    (1) Article 3(2) of SI 2020/755 inserts the new **Class AA** into the GPDO, which permits the enlargement of a dwellinghouse by the construction of new storeys on top of the highest existing storey of the dwellinghouse. Two storeys may be added if the existing dwellinghouse is two or more storeys tall, or one additional storey where the dwellinghouse consists of one storey.

    (2) Article 4(2) of SI 2020/756 inserts into Part 20 of Schedule 2 to the GPDO a new Permitted Development right, **Class ZA**. 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 old building must have been built before 1990 and have been vacant for at least six months before the date of the application for prior approval. 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.

16. The Explanatory Memorandum to SI 2020/756 notes at 10.2 (p 6) (emphasis added):

> "The Government has introduced the right **without further public consultation** in order to support regeneration of our towns and cities and our broader economic renewal. In framing the right, the Government has considered the range of planning matters that should provide for local consideration through a prior approval while maintaining a simplified planning process that will bring forward such development."

17. The Explanatory Memorandum to SI 2020/756 states that Article 3 of the General Permitted Development Order sets out, as a default assumption, that development that is screened as requiring an Environmental Impact Assessment is not permitted (7.18, para 4). However, there is no mention in either document of cumulative environmental impacts or impacts at a strategic level as a result of these changes.[7]

18. At the time of issuing, no impact assessment has yet been published in respect of SI 2020/755. The impact assessment document in respect of SI 2020/756 provides an

[7] See further Ground 1 below.

economic rather than environmental or equalities analysis [**D45**]. Moreover, it states under the heading 'Policy Rationale' that there was an abandoned commitment to consult further on the detail of a Permitted Development right to demolish commercial buildings and rebuild as residential properties (p3):

> "In the response to the 2018 'Planning Reform: Supporting the high street and increasing the delivery of new homes consultation' the government committed to give further consideration to the scope of a permitted development right to demolish commercial buildings and redevelop as residential, and to consult further on the detail. Subsequently, the Secretary of State announced on 12 March 2020 in 'Planning for future' that the proposed right would allow 'vacant commercial buildings, industrial buildings and residential blocks to be demolished and replaced with well-designed new residential units which meet natural light standards'. In his 30 June 2020 economy speech (Build, Build, Build) the Prime Minister announced a package of planning reform, of which the new right is part, to support the economy and to boost construction and housing delivery."

C. Use Classes: SI 2020/757

19. Use Classes have been a feature of the statutory planning system since the Town and Country Planning (Use Classes) Order 1950/1131. New use classes have been created, and old use classes subsumed, by successive governments through a variety of statutory instruments. The most recent instrument consolidating Use Classes is the 1987 Use Classes Order (SI 1987/764).

20. The significance of the changes to the Use Classes Order brought about by SI 2020/757 can be illustrated by a description of how Use Classes operate under the Planning Acts. It is trite that planning permission is required for anything which meets the statutory definition of development by virtue of s.57 of the TCPA 1990. Section 55 of the TCPA 1990 sets out the definition of development. Section 55(2) provides an important carve-out:

> "The following operations or uses of land shall not be taken for the purposes of this Act to involve development of the land—
>
> (f) in the case of buildings or other land which are used for a purpose of any class specified in an order made by the Secretary of State under this section, the use of the buildings or other land or, subject to the provisions of the order, of any part of the buildings or the other land, for any other purpose of the same class."

21. Thus, the use of any building or land for a different purpose within the same Use Class does not constitute development. It is entirely outside planning control.

22. The Town and Country Planning (Use Classes) (Amendment) (England) Regulations 2020 were laid before Parliament on 21 July 2020, and come into force on 1 September 2020. The Regulations place a large number of formerly separate Use Classes into a composite Use Class, **Use Class E.** The effect of this, by operation of the statutory provisions summarised above, is to significantly deregulate planning control in England by removing previous changes of use from the definition of development. The Explanatory Note summarised the reforms as follows:

> "Regulation 2 of this instrument revokes Parts A and D of the Schedule to the Use Classes Order in relation to England and subject to the transitional and savings provisions set out in regulations 3 and 4. Regulation 13 of this instrument amends the Use Classes Order in relation to England to insert a new Schedule 2 providing for new classes, Class E (Commercial, business and service), Class F.1 (Learning and non-residential institutions) and F.2 (Local community). 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) (see regulation 7 of this instrument). Class F.1 and F.2 subsume some 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)."

23. The Explanatory Memorandum to the SI 2020/757 notes (emphasis added):

> "Following [the Consultation], the government announced that it would amend the A1 (shops) use class to ensure it captured current and future retail models and include clarification on the ability of (A) use classes to diversify and incorporate ancillary uses.
>
> 10.5 However, in response to the economic impact of Coronavirus on our high streets and those premises in A1 and A3 use in particular, the government **has decided to go further and to introduce these more wide-reaching reforms to the change of use rules.**
>
> **Given the pressing need to support town centres, these reforms have been implemented without further public consultation."**

24. A document labelled as an "Impact Assessment" was published only very recently alongside the legislation [**D70**]. The focus of this document is on economic impacts. Environmental and equality impacts are not mentioned in the document, except as follows (at p11):

> "Outside of the restricted uses described above, some use classes can have a detrimental externality on surrounding residents and businesses. For example, noise and smells from a restaurant might disturb users of a bookshop. There are however other environmental regimes that are intended to control such impacts."

D. Permitted Development: comparable re-consultation in the context of 5G Masts

25. Alongside the consultation mentioned above, the government consulted separately on proposals to use permitted development rights to support the deployment of 5G networks and extend mobile telephone coverage. 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"* [**D158**], 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"* (para 5). 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."

26. As is noted in the Grounds below, it is not clear what distinction can be drawn between 5G masts and tall buildings in respect of e.g. landscape and environmental impacts, such that the former requires a technical further consultation but the latter does not.

E. Permitted development: Controversy over Class O and the government's expert reports on previous permitted development expansion

27. As stated above, Class O was introduced by the government in 2013. Class O was controversial because it allows developers to create new residential units out of former office blocks without the need to apply for planning permission. As permission in principle was established, there are very few factors a local planning authority can consider before granting approval, which is largely automatic. This led to criticism of Class O from a number of sources, including the government's own independent experts.

28. In its January 2020 report 'Living with Beauty' (The BBBB Report) [**D199**], the government's Building Better, Building Beautiful Commission discussed the previous expansion of Permitted Development rights. It noted on p 69 (emphasis added):

> "Most notably, permitted development rights for office to residential change of use has led to around 42,000 additional new homes over three years but also to much criticism for reducing quality, delivering lower levels of affordable housing and the lack of developer contributions. Town and country planning association (TCPA) President,

Nick Raynsford, told us earlier this year that, 'some market players will produce slums, especially where no space standards are applied to permitted development.'

A Royal Institution of Chartered Surveyors (RICS) study of the extension of permitted development rights in just five local authorities found they may have lost £10.8m in planning obligations and 1,667 affordable housing units from approved conversions, as opposed to the more conventional planning permission route. (However, they also gained more homes). The report also criticised the small size of such new homes. They found that that just 31 per cent of the 1,085 permitted development homes examined in Croydon met national space standards. Only 14 per cent had access to private or communal amenity space. **In some instances, we have inadvertently permissioned future slums**."

29. The BBBB Report went on to say at p 70 (emphasis added):

> "There is a role for permitted development rights. Not all building work or changes of use necessarily require permission from the local government. However, there is a problem at present with how permitted development rights work in practice and the circumstances in which they are being used. It derives from a general planning permission granted by Parliament, rather than from permission granted by the local planning authority. This means that only building regulations apply. And there are reduced 'betterment payments.' No contributions towards local social or physical infrastructure via negotiable Section 106 agreements apply. However, Community Infrastructure Levy is not increased to compensate for this and developments may well create costs for local authorities. We have thrown the baby out with the bathwater.
>
> **Do we want to be encouraging people to live within former offices on business parks miles from public transport? Do we think it is going to be politically tenable in two-storey metroland England for individual home-owners to extend their homes upwards by two storeys with no practical way for the impact on their neighbours to be considered? It seems hard to answer 'yes' to these questions**."

30. The controversy around Class O, particularly regarding the quality of the homes created as a result of office conversations, is likely to have contributed towards the Secretary of State's decision to commission independent research into the quality of homes created through Permitted Development rights. It did so in the Clifford Report [**D389**]. It is unclear from the Report at what date it was commissioned by the Secretary of State, but the Report's stated objective was to *"consider the quality standard of homes delivered through change of use permitted development rights"* (p 14).

31. The Clifford Report was highly critical of the quality of homes delivered under existing Permitted Development rights. For example, the executive summary notes (p10):

> "There was… a notable tendency that PD schemes were more likely to be located in primarily commercial areas (like business parks) and primarily industrial areas than planning permission schemes (7.9% of PD schemes compared to 1.0% of planning

permission schemes; about eight times more). Our site visits found that some of these locations offered extremely poor residential amenity."

"Overall, only 22.1% of dwelling units created through PD would meet the nationally described space standards (NDSS), compared to 73.4% of units created through full planning permission. In many cases, the planning permission units were only slightly below the suggested standard, whereas the PD units were significantly below (for example, studio flats of just 16m2 each were found in a number of different PD schemes). 68.9% of the units created through PD were studios or one bedroom compared to 44.1% of the planning permission units."

"Regarding amenity space, just 3.5% of the PD units we analysed benefitted from access to private amenity space, compared to 23.1% of the planning permission units. It is the combination of very small internal space standards, a poor mix of unit types, lack of access to private amenity space / outdoor space, and inadequate natural light which can provide such a poor residential experience in some permitted development units."

"Given these considerations, we would conclude that permitted development conversions do seem to create worse quality residential environments than planning permission conversions in relation to a number of factors widely linked to the health, wellbeing and quality of life of future occupiers. These aspects are primarily related to the internal configuration and immediate neighbouring uses of schemes, as opposed to the exterior appearance, access to services or broader neighbourhood location. In office-to-residential conversions, the larger scale of many conversions can amplify residential quality issues."

32. The Clifford Report was delivered to the Secretary of State in January 2020.[8] However, publication of the report was delayed until 21 July 2020: the day the SIs were laid before Parliament, and the day before Parliament broke up for the summer recess.

33. In an interview with the BBC on 4 August 2020, the primary author of the report, Dr Ben Clifford, stated that the Secretary of State "ignored" the warnings raised in the Report [**D602**]. The BBC interview noted:

"According to Dr Clifford, 'there was no follow-up so we didn't have engagement with the ministry as to any further discussion as to the content of the report, our findings'".

Relevant legal principles

F. Strategic environmental assessment

(1) The requirements of the SEA Directive

34. The aims of the SEA Directive are apparent from Article 1, which states:

[8] https://www.bbc.co.uk/news/uk-politics-53650657

"The objective of this Directive is to provide for a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation and adoption of plans and programmes with a view to promoting sustainable development, by ensuring that, in accordance with this Directive, an environmental assessment is carried out of certain plans and programmes which are likely to have significant effects on the environment."

35. 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:

"Scope

1. An environmental assessment, in accordance with Articles 4 to 9, shall be carried out for plans and programmes referred to in paragraphs 2 to 4 which are likely to have significant environmental effects.

2. Subject to paragraph 3, an environmental assessment shall be carried out for all plans and programmes,

(a) which are prepared for… town and country planning or land use and which set the framework for future development consent of projects listed in Annexes I and II to Directive 85/337/EEC, or

(b) which, in view of the likely effect on sites, have been determined to require an assessment pursuant to Article 6 or 7 of Directive 92/43/EEC.

3. Plans and programmes referred to in paragraph 2 which determine the use of small areas at local level and minor modifications to plans and programmes referred to in paragraph 2 shall require an environmental assessment only where the Member States determine that they are likely to have significant environmental effects.

4. Member States shall determine whether plans and programmes, other than those referred to in paragraph 2, which set the framework for future development consent of projects, are likely to have significant environmental effects.

5. Member States shall determine whether plans or programmes referred to in paragraphs 3 and 4 are likely to have significant environmental effects either through case-by-case examination or by specifying types of plans and programmes or by combining both approaches. For this purpose Member States shall in all cases take into account relevant criteria set out in Annex II, in order to ensure that plans and programmes with likely significant effects on the environment are covered by this Directive.

6. In the case-by-case examination and in specifying types of plans and programmes in accordance with paragraph 5, the authorities referred to in Article 6(3) shall be consulted.

7. Member States shall ensure that their conclusions pursuant to paragraph 5, including the reasons for not requiring an environmental assessment pursuant to Articles 4 to 9, are made available to the public…"

36. Annex II to the Directive provides the 'Criteria for determining the likely significance of effects referred to in Article 3(5)':

"1. The characteristics of plans and programmes, having regard, in particular, to

- the degree to which the plan or programme sets a framework for projects and other activities, either with regard to the location, nature, size and operating conditions or by allocating resources,

- the degree to which the plan or programme influences other plans and programmes including those in a hierarchy,

- the relevance of the plan or programme for the integration of environmental considerations in particular with a view to promoting sustainable development,

- environmental problems relevant to the plan or programme,

[…]

2. Characteristics of the effects and of the area likely to be affected, having regard, in particular, to

- the probability, duration, frequency and reversibility of the effects,

- the cumulative nature of the effects,

- the transboundary nature of the effects,

- the risks to human health or the environment (e.g. due to accidents),

- the magnitude and spatial extent of the effects (geographical area and size of the population likely to be affected),

- the value and vulnerability of the area likely to be affected due to:

- special natural characteristics or cultural heritage,

- exceeded environmental quality standards or limit values,

- intensive land-use,

- the effects on areas or landscapes which have a recognised national, Community or international protection status."

37. 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".

38. Article 5(1) of the Directive provides:

> "Where an environmental assessment is required under Article 3(1), an environmental report shall be prepared in which the likely significant effects on the environment of implementing the plan or programme, and reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme, are identified, described and evaluated. The information to be given for this purpose is referred to in Annex I."

39. Annex I to the Directive sets out the detailed requirements of the 'Information referred to in Article 5(1)', with a view to the preparation of environmental reports.

(2) Can secondary legislation amount to a 'plan or programme' for the purposes of the Directive?

40. 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 *Associazione "Verdi Ambiente e Società – APS Onlus (VAS)" v Presidente del Consiglio dei Ministri* (C-305/18) [2019] Env. L.R. 33 ("*APS Onlus*"). In *APS Onlus,* the CJEU held that Italian basic legislation and implementing legislation which revised upwards the capacity of existing waste incineration facilities and provided for the construction of new installations came under the "notion" of "plans and programmes" for the purposes of the Directive. The CJEU noted at [53]:

> "It is for the referring court… to ascertain whether national legislation such as that at issue in the main proceedings sets the framework for future development consent of projects."

41. The fact that a plan or programme may include domestic legislation was noted by Dove J in *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]. Moreover, In *R. (on the application of Cala Homes (South) Ltd) v Secretary of State for Communities and Local Government* [2011] EWHC 97 (Admin) (upheld on appeal), Lindblom J (as he then was) noted that

> "The question whether any of the provisions of the Localism Bill, which has been laid before Parliament since the present proceedings were begun, requires, or ought to have been screened for, Strategic Environmental Assessment is not before the court."

(3) The purpose of SEA

42. In a very different context, the SEA Directive was considered by the Supreme Court in *R (on the application of Buckinghamshire County Council and Others) v Secretary of State for Transport* [2014] UKSC 3; [2014] 1 WLR 324 ("*Buckinghamshire*"). In that case, the Supreme Court held that a HS2 command paper was not a plan or policy for the purposes of the Directive. Lord Carnwath noted at [35] that the purpose of the SEA Directive *"is to prevent major effects on the environment being predetermined by earlier planning measures* ***before the EIA stage is reached****"* (emphasis added).

43. It follows that the availability of EIA protection at a *project* level under a given plan or programme does not mean that the plan or programme escapes the requirement of SEA at the *strategic* level.

G. <u>Public sector equality duty</u>

44. Section 149 of the EA 2010 created the public sector equality duty ("the PSED"). Section 149(1) provides:

> "A public authority must, in the exercise of its functions, have due regard to the need to—
>
> (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
>
> (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
>
> (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it."

45. 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 about impacts 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].

H. The requirements of lawful consultation

46. 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 ("*Moseley*") at [25]). Those principles are as follows:

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

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

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

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

47. Lord Wilson for the majority in *Moseley* noted the importance of the concept of fairness in a consultation, linked it to the duty to *test* the relevant information received (rather than simply dismiss it out of hand):

> "23…irrespective of how the duty to consult has been generated, that same common law duty of procedural fairness will inform the manner in which the consultation should be conducted.
>
> 24. Fairness is a protean concept, not susceptible of much generalised enlargement. But its requirements in this context must be linked to the purposes of consultation. In *R (Osborn) v Parole Board* [2013] UKSC 61, [2013] 3 WLR, 1020, this court addressed the common law duty of procedural fairness in the determination of a person's legal rights. Nevertheless the first two of the purposes of procedural fairness in that somewhat different context, identified by Lord Reed in paras 67 and 68 of his judgment, equally underlie the requirement that a consultation should be fair. **First, the requirement "is liable to result in better decisions, by ensuring that the decision-maker receives all relevant information and that it is properly tested"** (para 67). Second, it avoids "the sense of injustice which the person who is the subject of the decision will otherwise feel" (para 68). Such are two valuable practical consequences of fair consultation. But underlying it is also a third purpose, reflective of the democratic principle at the heart of our society."

48. 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. 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.

Grounds of Challenge

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").

49. The Prime Minister's Office Press Release dated 30 June 2020 summarised the reforms as follows:

> "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."

50. *"The most radical reforms to our planning system since the Second World War"* should have been subject to, alternatively screened for, a strategic environmental assessment under the SEA Directive. The sweeping changes introduced by the SIs amount to a new plan or programme, or a modification to an existing plan or programme, for the purposes of the SEA Directive.

51. 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], and endorsed in *APS Onlus* at [45]:

> "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]".

52. As Lord Carnwath commented in *Buckinghamshire* at [21], *"the word "required" in this context means no more than "regulated"".*

53. 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 is within the scope of the SEA Directive:

> "It follows from the foregoing considerations that the answer to the first question is that Article 2(a) of Directive 2001/42 must be interpreted as meaning that a procedure for the total or partial repeal of a land use plan… falls in principle within the scope of that directive, so that it is subject to the rules relating to the assessment of effects on the environment that are laid down by the directive."

54. Moreover, in general, the CJEU noted in *Patrice D'Oultremont v Region Wallonne* (C-290/15), with reference to *IEB*:

> "48. Furthermore, as the Advocate General stated in point 55 of her Opinion, it is necessary to avoid strategies which may be designed to circumvent the obligations laid down in Directive 2001/42 by splitting measures, thereby reducing the practical effect of that directive (see, to that effect, judgment of 22 March 2012, *Inter-Environnement Bruxelles and Others*, C 567/10, EU:C:2012:159 , paragraph 30 and the case-law cited).
>
> 49. Having regard to that objective, it should be noted that the notion of 'plans and programmes' **relates to any measure which establishes, by defining rules and procedures for scrutiny applicable to the sector concerned, a significant body of criteria and detailed rules for the grant and implementation of one or more projects likely to have significant effects on the environment**."

55. Finally, as was noted recently by the CJEU in *Terre Wallonne ASBL v Region Wallonne* (Case C-321/18) [2020] 1 C.M.L.R. 1 at [24]:

> "Lastly, given the objective of the SEA Directive, which is to provide for such a high level of protection of the environment, the provisions which delimit the scope of the directive, in particular those setting out the definitions of the measures envisaged by the directive, must be interpreted broadly."

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

57. 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".*

58. By way of example, the failure to carry out a SEA means that important regional or area considerations such as flood risk and cumulative environmental impacts cannot now be fully considered for development falling within these changes. Project-level consideration is all that is possible under Permitted Development:

(1) Although EIA applies to individual applications for Permitted Development by virtue of Article 3(10) of the GPDO, that safeguard is not adequate to deal with *cumulative* environmental impacts of Permitted Development changes that may not, as individual projects, meet the threshold for EIA: for example, the slow transition of a former industrial estate into a housing estate through Class ZA (which is entirely possible under the SIs).

(2) As noted in the Witness Statement of Naomi Luhde-Thompson, under the Permitted Development regime, flood risk considerations do not operate in the same way as they would for new developments that require full planning permission. The effective transition of an industrial estate into a housing estate would not require the application of the flood risk sequential test or the exceptions test.[9] This is because the principle of development has already been established – in an area that might be entirely unsuitable for housing due to flood risk.

59. Accordingly, the SIs should have been subject to an environmental assessment pursuant to the SEA Directive and the SEA Regulations; or alternatively, screened for such an assessment. Neither exercise was carried out, contrary to EU environmental law.

GROUND 2: Public Sector Equality Duty

60. The 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 Clifford Report [**D389**] notes at p 75 that

> "where [schemes under Class O] 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."

61. 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

[9] https://www.gov.uk/guidance/flood-risk-assessment-the-sequential-test-for-applicants

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 else remain homeless) will be cut off from many public services, including healthcare and social care.

62. Moreover, in the absence of any published equality impact assessment, it cannot be said that the Secretary of State had regard to any of the potential impacts of Use Class E on persons with protected characteristics: such as the effect of changes of uses of shop frontages on the elderly, and disabled persons who rely on diverse local high streets.

63. Failure to take account of these impacts was a breach of the PSED.

64. In circumstances where some negative equality impacts were brought the Secretary of State's attention as a result of the initial consultation, it was incumbent on the Secretary of State to review the proposals as part of having due regard to the need to eliminate discrimination and foster good relations. Further, pursuant to the duty of enquiry, this exercise required further information gathering on the extent and seriousness of the impacts on elderly persons and persons with disabilities. In failing to undertake either exercise, the Secretary of State acted unlawfully.

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

65. 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 and his past promises to re-consult. The following points are pleaded as specific examples of this, but should also be considered together, as illustrating the failure of the Secretary of State to consult properly.

Ground 3a: Failure to conscientiously consider consultee responses

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

67. The highly negative response of consultees were 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].

68. The Secretary of State notes in his own Explanatory Memorandum to SI 2020/756 *"the government committed to give further consideration to the scope of a permitted development right to demolish commercial buildings and redevelop as residential, and to consult further on the detail."* No such further consultation was carried out, despite the highly negative responses and the numerous issues flagged with the proposed reforms. It is clear that from the outset the Secretary of State entertained no possibility of changing course.

69. This unlawful approach is borne out by the Secretary of State's refusal to submit the reforms to any Parliamentary scrutiny at all before they come into effect.

<u>Ground 3b:</u> *Failure to take into account the government's own expert advice*

70. 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.

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

    (1) The report of the BBBB Report, which, as set out above, remarked that the existing Permitted Development policy has "inadvertently permissioned future slums", a finding which was undoubtedly material to the decision to expand Permitted Development rights further. The Secretary of State gave no proper consideration to the issues identified in this report.

    (2) The findings of the Clifford Report, which he himself had commissioned. As set out above, the Clifford Report noted severe negative impacts of the existing Permitted Development regime, which undoubtedly were material to the decision to extend Permitted Development rights further. The report's author has now stated publicly that his findings were "ignored" by the Secretary of State.

72. It is clear that Dr Clifford was correct. Both of these reports were ignored without proper consideration of their contents. Nowhere in the published impact assessments of the SIs, or the Explanatory Notes or Memorandums, is there any consideration of these findings or an explanation of how the Secretary of State changed course, or considered changing

course, to mitigate them. Indeed, the Secretary of State announced the new planning reforms on the same day he decided to publish the Clifford Report, despite having received it in January 2020.

73. 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

74. Given that there are likely to be very similar environmental and landscape concerns regarding the erection of tall structures without planning permission, it is 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. Indeed, as the Explanatory Memorandum to SI 2020/756 notes, the government's original commitment was to carry out a very similar consultation on the details of the Permitted Development changes.

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

Ground 3d: Failure to re-consult in respect of Class ZA

76. It is well-established that when a public authority has promised that it will engage in consultation before making a specific decision, fairness generally requires it should be held to this promise: *Council for Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at page 401.

77. In the present case, consultees to the initial consultation on permitted development rights [**D82**] were expressly promised a further consultation in respect of the demolition and rebuild of commercial properties (now Class ZA in SI 2020/756): *"The responses to these questions will inform further thinking and a more detailed consultation would follow"*.

78. This express promise gave rise to a legitimate expectation for consultees to be consulted further on Class ZA before it was introduced. Introducing Class ZA in the absence of a further consultation on the detail of the proposal was a breach of this legitimate expectation. It is therefore unlawful.

Conclusion and relief sought

79. For the above reasons, the grounds of challenge are clearly arguable, and indeed strong.

80. By way of interim relief, the Claimant seeks an interim order suspending the operation of the SIs until this claim is disposed of, in light of the precautionary principle and likely environmental harm caused. Further details are provided in the application for interim relief that is submitted alongside these grounds.

81. By way of final relief, the Claimant seeks:

(1) A declaration that the decision to lay the SIs before Parliament was unlawful, and that the SIs are themselves unlawful;

(2) An order quashing the SIs,

(3) Costs.

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26.08.2020