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Ms Tasnim Shawkat

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Copied to:

Councillor Elizabeth Campbell, Leader of the Council (cllr.elizabeth.campbell@rbkc.gov.uk)

Councillor Johnny Thalassites, Lead Member for Planning, Place and Environment (cllr.johnny.thalassites@rbkc.gov.uk)

This letter will be sent electronically only:-

emma@elflaw.org

14 January 2021

Dear Ms Shawkat

Re: Light Segregation Cycle Lane – Kensington High Street

1) Thank you for your letter of 8 January 2021. We welcome the Council's acknowledgment that it is required to reconsider the decision of 2 December (we referred to this in our pre-action protocol letter as 'the December Key Decision'). Your letter does not refer to the decision taken by Cllr. Thalassites on 26 November 2020, which as we explained, was evidently the operative decision. Implicit from your letter is the Council's acceptance that both the decisions on 26 November and 2 December 2020 were flawed and unlawful. We note your reference to taking into account 'all material considerations.' This is evidently a concession that the Council

took both decisions without regard to all material considerations. Accordingly, were this matter to proceed, we would at the very least be successful on Grounds 3 and 4 of our proposed claim.

2) The Council has acknowledged that the approach it took was not the correct one. Unless it changes tack and takes the active steps we proposed in our pre-action letter and in this one, it will simply repeat the same mistakes. The Council should commit to a substantive change of approach, not merely an exchange of words and a slightly longer decision. Any fresh decision taken by the Council without regard to the matters set out below would be flawed and unlawful, and we would have no alternative but to challenge it. We will await your response to this letter before issuing a judicial review claim.

Failure to comply with the pre-action protocol

3) We draw your attention to paragraphs 22 and 23 of the Civil Procedure Rules' Pre-Action Protocol for Judicial Review. Your letter substantially fails to comply with the protocol:
    a) If you were conceding the claim, you have failed to do so in clear and unambiguous terms (para 22);
    b) If you were conceding the claim in part, or not conceding it at all, you have failed to say this in clear and unambiguous terms (para 23);
    c) Although you have said that you will 'reconsider this decision,' and 'reconsider this matter' by on or around 17 March 2021 you have not stated in terms that you will issue a new decision. The letter leaves ambiguous the status of the prior decisions of 26 November and 2 December 2020. Is the Council intending to issue a new decision and treat the decisions of 26 November and 2 December as effectively quashed? This lack of clarity renders your letter non-compliant with para 23, in particular para 23 (a). Please provide confirmation of the position.
    d) In order to comply with para 23 (c) your letter was required to 'address any points of dispute, or explain why they cannot be addressed.' Save for stating that the Council does not accept that it is under a duty to consult, you have not addressed any of the points of dispute. You have not, in respect of the duty to consult, provided anything other than an unreasoned statement. Your letter therefore does not comply with para 23 (c).

e) We had requested disclosure of documents pursuant to your duty of candour. You have neither referred to those requests nor provided a timescale for provision of the documents. Accordingly, your letter does not comply with para 23 (e).

f) Our letter stated that any claim would be an Aarhus Convention claim, if you do not accept this para 23 (g) required you to state this and explain the reasons.

4) We would ask for a CPR compliant Pre-Action Protocol response, addressing the deficiencies we have highlighted above, along with a response to the other matters we raise below, by **21 January 2021**. We note that pursuant to paragraph 20 of the Pre-Action Protocol you would be expected to provide a pre-action protocol response within 14 days of the date of our letter; that time has now lapsed.

Reinstatement of the cycle lanes

5) You refer to taking into account 'any further data.' There is an obvious distinction between 'data' and 'opinions' or 'views.' We have made it very clear that the Council could not take a lawful decision without data gathered over a reasonable period of the Scheme's operation.

6) The Council had publicly stated that the cycle lanes would remain in place for a trial period of up to 18 months, to include progressing to Phase 2 of the Scheme. The cycle lanes were in place for less than eight weeks at the time of removal. It is abundantly clear that the Council removed the cycles lanes before the end of a reasonable (and legitimately expected) period which would have included continuing to Phase 2. It is therefore unsurprising that the report accompanying the Key Decision ('the Report') acknowledged a paucity of data. And it is unsurprising that the decisions were flawed. The Council simply did not have time in which to collect that data in the Scheme's drastically curtailed life.

7) **The Council must re-instate the cycle lanes immediately and leave the Scheme to operate for a reasonable trial period. We re-iterate that this would extend to enabling Phase 2 of the Scheme to be implemented. At this juncture we say that the Scheme should be in place for a minimum of no less than six months to include completion of Phase 2 and allow for the Scheme to become established.**

8) Any decision taken without re-instating the cycle lanes on the basis outlined above would be taken without the benefit of essential data. We say essential, because of course the Council

itself publicly confirmed it would be collecting this data to assess the Scheme (see paragraph 48 of our pre-action protocol letter). In particular, we point to the following key data sets (see paragraphs 49 and 50 of our Pre-Action Protocol letter):

a) Data on any impact on traffic of the cycle lanes. We remind the Council of paragraph 5.4 of the Report which acknowledged that it was not possible to assess the contribution of any congestion to the cycle lanes given other factors in play at the time, including road works;

b) Data on bus journey times during the operation of the Scheme (as compared to prior levels). We remind the Council of paragraph 5.6 of the Report which acknowledged that this data was not available;

c) Data on the use of the cycle lanes over a reasonable period;

d) Air quality data. We remind the Council of paragraph 5.6 of the Report which acknowledged that this data was not available;

e) Any quantitative financial assessment of the financial impact of the cycle lanes on businesses;

f) Accident data to include data from the Metropolitan Police. We remind the Council of the striking failure to refer to safety in the Report.

9) If it fails to re-instate the cycle lanes the decision the Council intends to take on 17 March 2021 would suffer from exactly the same flaws as the previous decisions. It would therefore be impossible for the Council to say it had taken into account material considerations, including the points we have raised regarding the lack of data.

10) We raise a separate issue about the duty to consult below, but clearly allowing the Scheme to operate for a reasonable period would enable those who have and may express views about it to do so with the benefit of knowledge rather than what might be called a ‘knee-jerk’ reaction to a change in the status quo.

Consultation

11) You state that the Council ‘does not accept that it is under a duty to consult.’ You provide no reasons for this statement, or any challenge to the points we make at paragraphs 38 to 43 of our Pre-Action Protocol letter. Why does the Council say it was under not duty to consult? It had (a) carried out a consultation prior to the implementation of the Scheme, referring to this as a ‘consultation’ in its public documents and (b) carried out something which appeared to be

an informal consultation with various groups prior to removing the cycle lanes, but did not comply with the law on consultations. We set out the legal position in our Pre-Action Protocol letter. What is the basis for the Council's rejection of the law and the facts which clearly support a duty in this case?

12) **In order for the Council not to fall into the same errors it has with the prior decisions, the Council must conduct a consultation over the course of the trial period**. The Council must consult the bodies and individuals set out in paragraph 40 of our Pre-Action letter:

    a) Better Streets and other groups representing the interests of cyclists;
    b) Users of the cycle lanes;
    c) Councillors and other bodies representing the interests of residents of neighbouring boroughs;
    d) Imperial College;
    e) Schools;
    f) TfL;
    g) The Metropolitan Police;
    h) Businesses;
    i) Emergency Services.

13) The Consultation must, amongst other matters:

    a) Set out the data it has gathered to underpin the prospective decision. Consultees should not be expected to give views in the abstract, and if they do, their responses will suffer from the problem we identify at paragraph 7 above, of being reactive to change rather than properly informed;
    b) Set out the Council's proposed improvements to the Scheme. The Council had publicly committed to considering whether improvements should be made (see paragraph 48 of our Pre-Action letter).
    c) Give adequate time to respond;
    d) Set out the alternatives which the Council's own officers proposed to the Council in the Report (with which there was no substantive engagement). Consultees have the right to know that the choice is not a binary one between cycle lanes and no cycle lanes.

Additional steps

14) At paragraph 58 of our pre-action protocol we set out additional steps which we consider the Council would need to take in order to reach a lawful decision. We maintain that the Council should now take those steps:

    a) Conduct a full study of the impact on emergency services and any mitigation measures that could be put in place;
    b) Consider and analyse any possible improvements to the Scheme;
    c) Consider their obligations under s. 149 of the Equalities Act 2010.

Duty of Candour and disclosure

15) Attached to our Pre-Action Protocol letter was a table setting out the disclosure which we considered was required pursuant to the Council's duty of candour. As explained in the section of this letter on your letter's failures to comply with the CPR, you have not addressed this in your response. The Council's duty of candour is engaged and we repeat our request. In addition, we have updated this table with additional requests highlighted in yellow. As with our prior request, we would be grateful to receive a response by **21 January 2021**, in which you set out your responses to the requests and provide any documents. If any documents are not available by that point, we would ask that you indicate this in the enclosed table and provide details as to when they might be available.

Period for Reply

16) We would be very grateful if you would reply substantively by **4.00pm on 21 January 2021**. It would assist us greatly.

Yours sincerely,

Emma Montlake
Environmental Law Foundation