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19 May 2021

Dear Ms Shawkat

**PRE-ACTION PROTOCOL LETTER  
THIS LETTER REQUIRES YOUR URGENT ATTENTION**

**Re: Light Segregation Cycle Lane – Kensington High Street**

**INTRODUCTION**

- 1) We write further to our first pre-action protocol letter dated 2 December 2020 ('First PAPL') in which we intimated an application for judicial review to quash the decision of the Royal Borough Kensington and Chelsea ('the Council'), dated 26 November to remove the High Street Kensington light segregation cycle lanes ('the cycle lanes', also referred to in this letter

as 'the Scheme') implemented using traffic wands between the London Borough of Hammersmith and Fulham and Westminster City Council boundaries.

- 2) Following our correspondence, correspondence from Transport for London (TfL) and extensive objections to the Council's unlawful decision to remove the Scheme, the Council agreed to reconsider the decision to remove the cycle lanes. The Council commissioned a report entitled 'Kensington High Street Temporary Cycle Lane Scheme,' prepared by Mahmood Siddiqi, Director, Streets and Regulatory Services. The report is undated, and we are not sighted on when the report was made available to either the Leadership Team or the wider Council (in which we include councillors from opposing parties). The report set out the following Options:
  - a) Option 1: Install temporary cycle lanes in full;
  - b) Option 2: Install parts of temporary cycle lanes;
  - c) Option 3: Do not install temporary cycle lanes but consider an alternative scheme in the longer term;
  - d) Option 4: Do not install temporary cycle lanes.
  
- 3) On 17 March 2021, following a Council meeting the Council decided to follow Option 3. Announcing the decision Council Leader Elizabeth Campbell stated that the Leadership Team had *'unanimously opted to commission research into transport patterns in the post-Covid world and will not reinstall temporary cycle lanes on Kensington High Street.'*
  
- 4) We consider that the Council's decision of 17 March 2021 ('the Decision') is flawed, the Council has repeated the errors that plagued its last decision making.

## **THE CLAIMANT**

- 5) The proposed claimant is Better Streets for Kensington and Chelsea ('Better Streets'), an unincorporated association. Better Streets is a local group campaigning for greener, safer, and healthier streets. Since in or around June 2019, following the Council's refusal to implement a proposed cycleway along Holland Park Avenue, it has been actively seeking to hold the Council to its policy commitments to increase green, sustainable and healthy travel.

## **THE DEFENDANT**

- 6) The proposed defendant is the Council.

## **INTERESTED PARTY**

- 7) We will also consider adding the Secretary of State for Transport as an interested party.

## **AARHUS CONVENTION**

- 8) If the Claimant applies for permission for Judicial Review, it will attract costs protection, as the claim falls within the scope of the Aarhus Convention, since the decision relates to a bicycle lane, and is therefore a question of active travel and comes within the scope of the environment. The Scheme was inherently linked to addressing issues of air quality and the health risks it poses. It is brought by members of the public/an unincorporated association of limited means by way of judicial review of a decision within the scope of Article 9(3). As such, Better Streets would ask for a cap on the recoverable costs against it of £5,000, pursuant to CPR 45.41.

## **BACKGROUND**

- 9) This letter does not rehearse the background set out in paragraphs 7 to 36 the First PAPL.

### *The December Key Decision*

- 10) The December Key Decision is dated 2 December 2020 and was made publicly available in a link provided in an open letter from Cllr Thalassites published on the Council's website on 3 December 2020. However, this decision was disseminated two hours before the Council meeting, i.e. at around 4.30pm.

- 11) An urgency pro forma was also completed which stated: *'The reasons for urgency are set out in the report which is available on the Council website.'* In fact, the only use of the word 'urgent' or 'urgency' or indeed any other term meaning this is at para 5.6 of the Report: *'Whilst we have yet to receive further data from TfL on bus journey times and it is too early to have air*

*quality data, there is an urgency expressed by local businesses that swift action needs to be taken.'*

Better Streets' correspondence 23 December- 16 March 2021

- 12) Our First PAPL was dated 23 December 2020. The Council responded on 8 January 2021 acknowledging that it was required to reconsider the decision of 2 December 2020. Implicit from the Council's acknowledgement was that it accepted that both the November and December Key decisions were flawed and unlawful and in particular had failed to take into account 'all material considerations'.
  
- 13) On 14 January 2021 we wrote to the Council to encourage it to avoid falling into the same errors as it had with the November and December Key decisions by taking several steps following its commitment to re-take the decision.
  
- 14) We explained that the Council should undertake a consultation with bodies and individuals including:
  - 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.
  
- 15) The Consultation should 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 elsewhere, 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.

16) Additionally (and as set out at paragraph 58 of our first pre-action protocol letter) we considered that in order to reach a lawful decision the Council would need to:

- 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.

We did not receive a substantive response to this letter, but rather received a letter dated 21<sup>st</sup> January 2021 which invited us to await the outcome of the "reconsideration". We wrote to the Council on approximately fifteen occasions prior to the receipt of the Council's report, aggregating various groups of support, including (1) support from Imperial College NHS Trust; Chelsea and Westminster NHS Trust; NHS pan-London Bicycle User Group; (2) a wide number of local schools; (3) road safety groups; (4) young people, including the RBKC Youth Council, and a range of community groups; (5) national bodies such as Sustrans and experts in transport; (6) residents and other Londoners; (7) a number of well-known institutions directly bordering the route, such as Imperial College and the Royal College of Music; (8) environmental groups such as Greenpeace, Friends of the Earth and Client Earth; and (9) businesses such as Waitrose and Boots. These emails were then further compiled and re-sent as a single folder for your convenience. As we noted in our letter to you of 16 March, a striking quantity of this was omitted from your report altogether and not referred to in the Council's meeting of 17 March 2021.

17) On 9 March 2021 the Council disseminated the Kensington High Street Temporary Cycle Lane Scheme report, prepared by reporting officer Mahmood Siddiqi ('the Report.'). The Report is undated and we are not aware of when this was distributed to Council members.

18) We wrote to the Council's Leadership Team again on 16 March 2021. This was a detailed letter in which we set out a number of concerns about the contents of the Report. We don't repeat these in full here.

### The March 2021 Report

19) Although we do not here repeat or expand on comments on the deficiencies of the Report we made in our letter of 16 March, we would note at the outset that in several paragraphs the Report reveals a failure to adopt a balanced and impartial approach to the Council's actions, and underscores the fundamental unfairness and irrationality of the Council's approach.

- a) The Report attempts to re-frame the decision as one in which the Council is considering introducing a temporary cycle lane, rather than reviewing the lawfulness of its decision to remove it in the first place, see paragraph 1.6: *'whether to introduce a temporary cycle lane in Kensington High Street as we begin to come out of the third lockdown, over the next few months.'* This demonstrates the fundamental unfairness of the Council's approach. The Council had committed to re-taking the decision to remove the cycle lanes. It has used its unlawful removal of the lanes as a reason to reframe the argument and take a decision that is an altogether different one. At the very least the Report shows a lack of impartiality in glossing over entirely the unlawful decision to remove the cycle lanes;
- b) Paragraph 1.7 states *'The lesson of the past year has been that all plans (including experimental local transport plans of this type) are subject to major contingencies and may need to be urgently adapted. The case for, and against, implementing an experimental cycle lane in Kensington High Street involves balancing considerations of design, safety, transport congestion as well as the Council's overall aim of encouraging walking and cycling. The case also requires the Council to have regard to the full variety of attitude and opinion from residents, businesses, public agencies, visitors and other stakeholders.'* There were no major contingencies or reasons for urgent adaptation to the Scheme. It was removed without proper reasoning and as

the Council has acknowledged, because it failed to take into account material considerations. It is surprising that the Report does not reflect this;

- c) The framing of the four options is skewed away from the options which would involve some form of installation of the temporary cycle lanes. No negative comments are ascribed to either of Options 3 or 4 (the 'do not install temporary cycle lanes' options), but in respect of Option 1 (install temporary cycle lanes in full), the Officer has said *'This would allow the Council to carry out further monitoring of the cycle lanes, but would still not be conclusive while traffic patterns continue to be atypical as a result of the current and any future lockdown restrictions required due to the pandemic,'*;
- d) At paragraph 6.25 the Report says, *'The cycle lanes were always intended to be temporary. Had there been appetite for them to remain, the Council would have required a full consultation to take place before making them a permanent fixture.'* This demonstrates the Council's irrational approach to this issue. The Council removed the cycle lanes before establishing if there was an appetite for them to remain, and accordingly by its own actions frustrated the possibility of any full consultation whilst they were in place before 'making them a permanent fixture.'

#### The Council's decision 17 March 2021

- 20) There is no formal written decision and no proper reasoning for the Decision, which took place after a discussion which appeared to be as full, if not more so, of the types of deficiency to which we alluded in our letter of 16 March concerning the Report. The only written reasoning appears on the Council's website: *'The Kensington High Street scheme was a temporary solution to an urgent problem but permanent changes to our roads need full and proper consultation. This has been a divisive issue and passionate arguments were made on both sides. I would urge people to come together and work with us to find an alternative for our whole community.'* We address the paucity of reasons below.
- 21) The minutes of the meeting at which the Decision were made includes the following resolution: "The Leadership Team RESOLVED to not install temporary cycle lanes on Kensington High Street but to develop plans to commission research into post-Covid transport patterns, in partnership with local residents and local institutions including academic and research partners."
- 22) It is accordingly unclear whether part of what was stated as Option 3, ("consider an alternative plan in the longer term") is or is not part of the Decision.

## PROPOSED GROUNDS

23) There are seven proposed grounds of judicial review:

- (1) Fairness: Failure to consult;
- (2) Fairness: Procedural legitimate expectation as to duration of trial;
- (3) Illegality: Failure to take into account relevant information;
- (4) Illegality: Failure to take into account material considerations;
- (5) Irrationality: The decision not to re-instate the Scheme (having pre-emptively removed it) in order to give the Council an adequate period in which to assess its efficacy was irrational.
- (6) Reasons: Failure to give adequate reasons in the Decision;
- (7) Breach of the Public Sector Equality Duty.

### **Ground 1 Fairness: Failure to consult**

24) The purpose of consultation is (i) to lead to better decision-making 'by ensuring that the decision-maker receives all relevant information and that it is properly tested, (ii) to avoid the 'sense of injustice' that will be created if no consultation takes place, (iii) to reflect 'the democratic principle at the heart of our society.'<sup>1</sup> A duty to consult may arise at common law, either where there is an established practice of consultation or because a failure to consult would lead to conspicuous unfairness.<sup>2</sup>

25) The demands of fairness are likely to be greater 'when an authority contemplates depriving someone of an existing benefit or advantage than when the claimant is a bare applicant for a future benefit.'<sup>3</sup> In this case cyclists were deprived of an existing benefit and advantage. The Council should not now be permitted to rely on its own unlawful conduct in removing the Scheme without proper consideration by arguing that the fairness demands are not engaged because there is no 'existing benefit or advantage.' The only reason the benefit or advantage does not currently exist is because the Council without regard to material considerations, removed it.

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<sup>1</sup> *R (Moseley) v LB Haringey* [2014] UKSC 115, Lord Wilson at para 24

<sup>2</sup> *R (Article 39) v Secretary of State for Education* [2020] EWCA Civ 1577, Baker LJ at para 29

<sup>3</sup> *Moseley* para 26



26) As we explained in the First PAPL, Better Streets and other stakeholders had a legitimate expectation that they would be properly consulted on any plans to abandon the Scheme. It stands to reason that they would equally have a legitimate expectation of proper consultation where the Council was re-taking a decision which it had accepted was flawed for failure to take into account material considerations.

27) We say that the Council established a practice of consultation by consulting Better Streets prior to the July Key Decision and continuing to consult it on the form of the Scheme throughout August. In a section of the EqIA marked 'Consultation' (pages 5-6) the Council acknowledged that it had consulted 'local residents and business groups' (Better Streets is made up in large part of local residents) and specifically refers to the invitation to review designs which Better Streets and other stakeholders received. The fact that the Council chose to quote Mr. Abbott of Better Streets in its press release following the July Key Decision is highly indicative of the Council considering Better Streets a key stakeholder.

28) Paragraph 6.3 of the Report states that *'there has not been a formal consultation on the scheme, neither prior to its original implementation nor since. Nonetheless the scheme has elicited considerable comment and observation.'* This underlines the Council's failure to grapple with the law on consultations, the possibility of an informal consultation and that an informal consultation must also meet the requirements of fairness (see below). There is no reference to 'informal consultation,' in the Report. There was at the very least, and based on the Council's own wording, on informal consultation on the institution of the Scheme.

29) An informal consultation must still meet the requirements of fairness<sup>4</sup>. *R (Article 39) v Secretary of State for Education* [2020] EWCA Civ 1577, Baker LJ found:

*'Leaving aside for a moment the question whether the Secretary of State was under a duty to consult, the fact is that he did consult, albeit informally and over a limited period. In those circumstances, the case law is clear that, whether or not a consultation is a legal requirement, if it is embarked on it must be carried out properly and fairly: R (Coughlan) v N and E Devon Health Authority.'*

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<sup>4</sup> Moreover, the principles applying to non-statutory and statutory consultations are the same *R (Partingdale Lane Residents Association) v Barnet London Borough Council* [2003] EWHC 947 (Admin), [2003] All ER (D) 29, at para 45.

30) Even if carried out informally the Council should have undertaken a *'consultation at a time when proposals are still at a formative stage, it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for these purposes; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken.'*<sup>5</sup> Fairness may also require, as it did in this case, that *'interested persons be consulted not only upon the preferred option but also upon arguable yet discarded alternative options.'*<sup>6</sup> Following the Council's decision on 8 January 2021 to re-take the decision it did not even informally consult stakeholders.

31) We had advised the Council prior to taking a further decision that it could only reach a lawful and fair decision if it carried out a consultation. The Report itself makes it clear that the failure to carry out a consultation was not only unfair but also irrational since it gave rise to a limited basis on which the Council could reach its decision. We point to the Report's own wording:

- a) At paragraph 6.7 the Report states that 3,134 emails from unique addresses as of 12 February 2021 *'are obviously self-generated; they are not necessarily representative of broader opinion. No representative surveys of opinion were commissioned by the Council. These responses needed to be weighed with that in mind.'* Clearly the Council would not have had to weigh the responses had it carried out a survey of opinion;
- b) At paragraph 6.9 the Report states, *'It is important to note that this method [a convoluted one in which the officers had to analyse each email and categorise them] does not guarantee fully that individuals are in fact the category they have been allocated. A typical consultation process- such as feedback survey or form- would have allowed all individuals to self-declare as a resident, visitor or other. But as no formal consultation was undertaken as part of the cycle lane scheme, officers can only make a judgment on the status of the respondent on what was provided in the body of responses.'*

32) Deficiencies in the Report highlight the Council's failure to carry out a consultation:

- a) Nowhere in the report does it break down the responses and make it clear whether the opposition to the cycle lanes was total opposition or whether some may individuals may have been willing to countenance the re-introduction of the

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<sup>5</sup> *R v North and East Devon Health Authority ex p Coughlin* [2001] QB 213 at para 108.

<sup>6</sup> *Moseley* para 27.

temporary Scheme with a longer-term assessment of its viability. This is an obvious flaw in the Council's decision not to carry out a consultation in which it put to stakeholders a variety of different options;

- b) The Report says nothing about the start period for the receipt of the emails only (in paragraph 6.7) that it had received them 'as of 12 February 2021';
- c) At paragraph 6.4 the Report explains that it had received 5,188 emails in support of the cycle lanes in the first two weeks of December. Of those 15 per cent of the emails were from 'residents of the borough or people who visit the borough.' The Report does not explain what the other percentage comprised, nor how it made the determination that 85 per cent did not live in or visit the borough. It is also a conflicting analysis with the analysis at paragraph 6.11 which divides the responses into 'resident,' 'visitor' and 'other.' These emails were apparently analysed separately from the emails that were sent directly to the Council because they had been received from the same email address (via London Cycling Campaign website). Prior to you the Council's officer writing his report, we specifically stated that should you have any questions regarding emails via the London Cycling Campaign, then you should contact us, which you failed to do. Interested groups were forced, due to the Council's unfair approach to take matters into their own hands. The end result has been that the Council has been unable to produce a comprehensive analysis. It is also not clear from the Report whether the responses of residents are weighted more than the responses of visitors or 'other.'

33) It fell to TfL to carry out a survey of opinion. This is recorded at paragraphs 6.16 to 6.20 of the Report. This showed a clear majority (70%) in favour of measures to make cycle routes in the area safer and 59% (i.e. a majority) in favour of protected cycle lanes on main roads in RBKC and 56% in favour of protected cycle lanes on Kensington High Street. The Report's analysis of this data is incomplete and unclear. Paragraph 6.19 states that *'Respondents were asked to estimate how far away they lived from Kensington High Street and as 19 per cent of them estimated over 4 miles from Kensington High Street (and some gave postcodes outside the borough, this metric should be viewed with caution.'* [sic]

34) It is not clear what metric the Report thinks should be viewed with caution. It is unclear why an estimation of distance from Kensington High Street would be problematic. If what the Report is trying to say is that support for the cycle lanes should be viewed with caution, then this is nonsensical (i) because the Report doesn't say what proportion of the 19% and those who gave postcodes out of the borough were in support of the scheme, (ii) it might stand to reason

that those who live closest to the High Street might not have as much use for a cycle lane (and indeed the demographic of those who can afford to live in this part of the borough may be very different from those who live further away, but who the Council still has a responsibility for. The implication of the Report appears to be that the Council would be entitled to place less weight on this survey of opinion. No rational reason was advanced for this. Indeed, in the absence of a survey of opinion conducted by the Council, and which the Report acknowledges would have assisted the Council in reaching its decision, TfL's survey should have been accorded significant weight.

35) Even if, which isn't clear from the Report, the Council suggests that by announcing on 8 January it would re-take the decision it effectively opened up to an informal consultation clearly this consultation failed the test of fairness:

- a) There was no publicised deadline for a response, with a number of people expressing surprise at automated replies stating that no guarantee could be given as to whether views would be taken into account after a certain date (but that they might be);
- b) The Council did not make it publicly known that there were a variety of options that were being considered, and did not take views on this. In *Moseley* this was one of the reasons the local authority's decision was found to be unlawful.

36) In addition to being a breach of procedural fairness, the failure to consult was in contravention of the Council's Local Code of Corporate Governance (pages 234-235).

### **Ground 2 Fairness: Procedural legitimate expectation as to duration of trial**

37) We set out this ground in our First PAPL and we consider it remains relevant here. The Council has chosen to re-frame the decision but its original concession on 8 January 2021 was to re-take the decision to remove the cycle lanes. Accordingly all grounds relevant to that removal remain applicable, since the Council has failed to take action to correct the error it made in removing the cycle lanes without taking into account material considerations.

38) Representations, statements, and direct communications from the Council and Cllr Thalassites gave rise to a procedural legitimate expectation of a longer trial period and that the Council would take into consideration relevant data. In particular, the Claimant notes:

- a) The Council's Active Travel plan set out that Phase 1 would be followed by Phase 2. The public statement on the Council's website on 9 September states that 'the second phase' would be expected to take place by the winter. At no time prior to 26 November did the Council publicly intimate that it would review the Scheme prior to Phase 2.
- b) The EqIA anticipated allowing the Scheme to 'settle in' before review the impact on parking and mitigation measures needed. The Scheme was not allowed to settle in;
- c) The Council did not say at the meeting on 18 November that it was planning to halt the trial and subsequently said that it had not yet set a date for a review;
- d) Signs remained in place along the cycle lanes indicating that Phase 2 would be progressed with until after the 26 November decision.

39) Having acted in a way that was procedurally unfair in removing the cycle lanes the Council has compounded this error by re-framing the decision as one to institute the cycle lanes rather than whether it was correct to remove them in the first place.

### **Ground 3 Illegality: Failure to take into account relevant information**

40) It follows from Grounds 1 and 2, that having failed properly to consult and failed to allow the Scheme to continue in place for a sufficient time in which to gather evidence, the Council would not have relevant information on which to base its decision. The Council set out what information it considered would be relevant to any decision on the Scheme on its website when the Scheme was first instituted,' *"we will be monitoring air quality, traffic flow and journey times, including bus journey times in both the high street itself and nearby roads- as well as monitoring the use of the cycle lanes themselves. This will help us to understand how and where traffic flow is affected, so that the scheme designers can identify possible improvements."*

41) The Report itself is highly supportive of our submission that the Council took a decision without having sufficient data on which to base it. We say that this is pre-eminently because the Council abandoned the Scheme pre-emptively.

42) Cycle data:

- a) The report acknowledges that the number of bikes counted was 50% higher in the second half of October than it was during the construction of the cycle lanes in the first half of the month;
- b) TfL's comparative data from October 2018 and October 2020 showed increases ranging from between 60% and 175%;
- c) The Report suggests that some of the growth in the average daily number of cycles between the cycles lanes' installation and their removal may be explained by an *'initial undercounting'* of a sensor until late November. This comment is concerning in its lack of analysis: (i) there is no indication of the level of undercounting; (ii) the undercounting continued almost entirely throughout the period of the cycle lanes (since they were removed at the beginning of December);
- d) Critically we say that despite the Report being disseminated on 8 March 2021, the Report contains no data for February. The Council had no proper data on the drop off in cycling following the removal of the cycle lanes;
- e) The Report produces no evidence on the demographic of cyclists. We know that the existence of the cycle lanes encouraged children and young people to adopt this active method of travel and to accompany their families on leisure cycles. The Council has collected no data on the impact of removing the cycle lanes on the ability of children, young people and indeed vulnerable adults safely and confidently to continue to cycle.

#### 43) Traffic data:

- a) At paragraph 7.47 the Report acknowledges that since there was only one full week when the cycle lanes were in place, there were no major roadworks (other than the closure of the Melbury Road junction) and the national lockdown was not in effect it *'makes it very hard to draw firm conclusions about the effect of the cycle lanes on congestion.'* This is exactly the point we have made about the Council's decision to remove the cycle lanes before collecting proper data;
- b) Moreover, the Report contains no analysis of the traffic data after the cycle lanes were removed beyond 14 December. There have been frequent reports of vehicles parked in what was the cycle lanes causing congestion. There is no analysis of the impact on traffic flow of what were once cycle lanes being opened up to vehicles parking or being stationary on the road.

#### 44) Impact on local businesses:

- a) The December Key Decision was premised on what we now know to be an unrepresentative and un-evidenced objection from what were said to be local businesses. The rationale for the December Key Decision pointed to the failure of the Scheme to meet the objective of boosting business (this rationale is clear from paragraph 3.1 of the report behind the December Key Decision);
- b) Paragraphs 7.56 to 7.59 of the Report effectively repeat those objections, and continue to do so in vague assertions;
- c) Paragraph 7.57 refers to a survey carried out '*during the autumn*' by the Council to gauge businesses view on a future 'Business Improvement District Model.' No copy of the survey has been provided. Although it is said that 'none of the businesses identified the cycle lanes as a positive attribute to the High Street,' the Report does not tell us if they were asked directly about the cycle lanes. The Report gives us no information about the 15 businesses that objected to the cycle lanes and nothing other than vague detail about the reasons for those objections;
- d) As a whole in this section there is no analysis of the size of the businesses, and the location of the businesses which Kensington Business Forum said it acted on behalf of in conveying views;
- e) There no is analysis of the cogency of the objections that were made to the cycle lanes. Those objections are blandly accepted as valid;
- f) There is no quantitative financial data;
- g) There is no analysis of what type of businesses objected. This is relevant because it has a bearing on what if any weight could be applied to a suggestion that the cycle lanes impact on trade. We note in this respect that 'Moir Wong Orthodontics,' 'Oracare Dental Practice' or 'Melbury Dry Cleaners' (three of the four businesses who individually objected to the cycle lanes, see paragraph 6.21) can't possibly benefit from passing trade. It is hard to see how someone could just pop in for a bit of orthodontics or some dry cleaning of clothes they haven't brought with them.
- h) By comparison, the support of large retailers such as Waitrose, Decathlon and Peter Jones was not mentioned in your meeting. Neither was the fact that Boots had experienced no operational difficulties from the scheme. Instead, Councillor Faulks chose to ask only about what problems there may have been. Given that support of well-known large retailers actually open during the scheme's existence, compared to no such retailers opposing it, it would appear indicative of a deliberately closed minded approach to the Decision.

#### 45) Cycling Safety:

- a) The Report deals in just ten lines at paragraph 7.60 with one of the key reasons for introduction of cycle lanes across the UK, to make cycling safer (and thereby encourage active travel) (this compares to a Report totalling 45 pages, of which 13 pages are dedicated to inconclusive vehicle journey time analysis);
- b) The Report states that there were 45 cycling casualties over the ‘three years 2016 to 2018’;
- c) The Report tries to explain the lack of any more recent data by saying ‘*there is always a long timelag between collisions occurring and being reported.*’ No reason is advanced for why preliminary data has not been collected and made available;
- d) The Report highlights again the irrationality of the Council’s approach and underlines that the decision to remove the cycle lanes pre-emptively gave rise to a paucity of data, ‘*it is likely to be much later in 2021 before we receive data about the two months during which the cycle lanes were in place.*’ Clearly, had the Scheme been in operation for the expected trial period of 18 months, this data would be available;
- e) The Report states: ‘*For temporary schemes of the kind installed through the LSP, the traditional approach to assessing safety benefit is not appropriate, and no data-based conclusions can be made about the impact of cycle lanes on safety.*’ This statement constitutes a complete failure by the Council to grapple with the requirements of obtaining information to inform its decision. Whilst traditional approaches may not be available, the Council could in consultation with others including TfL formulate a method for assessing safety of temporary schemes which is fit for purpose. The Council’s abnegation of all responsibility to assess the improvements brought about by schemes which by their very nature are designed to ensure safety, is striking. It is indicative of the Council’s dismissive approach to the safety of cyclists;
- f) The Council should have carried out a Safety Assessment of the removal of the Scheme, and having pre-emptively removed it, an Assessment of the Safety of continuing not to have a protected East-West cycle route in the entirety of RBKC.

#### 46) Air Quality/Environment

- a) As with the traffic data, the Report (paragraph 7.62) acknowledges the difficulties in analysing the environmental impact brought about by the Council’s actions in removing the cycle lanes, ‘*The cycles lanes were introduced before it was possible to collect enough data to understand what the concentration of air pollutants were in*



*this specific area and it was then removed before the Council was able to gather data post installation,' and 'Data for these is available for October to December 2020 but this is not long enough to be able to draw any firm conclusions.'*

- b) Moreover paragraph 12.1 of the Report states that it is extremely difficult to quantify the environmental impact of the cycle lane due to (i) 'the short time it was in situ';
- c) At (ii) in paragraph 12.1 the Report states that it is also difficult to quantify the environmental impact due to 'the reports of congestion.' This is a misleading statement, people may have reported congestion, but the remainder of the Report provides no evidence that there was any increase in congestion as a result of the cycle lane.
- d) The Report wholly inappropriately leaves a critical question on environmental impacts as a *'judgment for members who may take into account their own local knowledge.'* (paragraph 12.2);
- e) It goes on to state, *'officers advise that there is no data to show that the cycle lane is likely to have a significant effect on the environment.'* This sentence implies that there is data but it is not conclusive. This is wholly incorrect. The reason there is no data is because the Council removed the cycle lane whilst it was still in its trial period.

47) Neighbouring Highway/Local Authorities:

- a) The Report contains no information on whether neighbouring highway or local authorities were notified of the Council's intention to re-take the decision to remove the cycle lanes, and contains no information about the position of those neighbouring authorities. The views of and impact on those authorities and the residents of them was clearly a relevant consideration.

48) Equalities Impact Assessment (EqIA):

- i) The Council conducted a second EqIA (2<sup>nd</sup> EqIA) and prepared a report dated 5 March 2021;
- ii) The 2<sup>nd</sup> EqIA highlighted the paucity of data available due to the Council's removal of the cycle lanes: *'It is too early to know definitively whether the cycle lanes had any positive or negative impact on cycling casualties on Kensington High Street'* (page 6) *'Officers note that the data was incomplete.'* (page 9);
- iii) No data had been collected on the demographics or age of people who had used the cycle lanes (page 7);
- iv) Under the protected characteristic of Disability:

- (1) No data has been collected and/or provided in the 2<sup>nd</sup> EqIA about how many disabled individuals on a regular basis require kerb side drop off and immediate access to shops (i.e. where they are not able to go a short distance from a side street parking);
  - (2) There is no analysis of the impact on disabled users of the cycle lane instead being utilised as an area for short term parking or stationary vehicles which are not dropping off disabled passengers;
  - (3) There is no reference to disabled individuals who may experience a benefit from the existence of cycle lane, i.e. people with autism, mental health issues, or sensory impairments;
- v) The 2<sup>nd</sup> EqIA was poorly reasoned, inconsistent and failed to give credit for the positive impacts of the cycle lanes:
- (1) Under the negative impacts on those with disabilities the 2<sup>nd</sup> EqIA recorded an impact that was obviously positive, *'segregated cycle schemes have the potential to open up alternative, independent modes of travel for people with disabilities, particularly if wide enough to accommodate adapted bicycles.'*
  - (2) Under the protected characteristic of Sex, the 2<sup>nd</sup> EqIA recorded a 'neutral' impact of cycle lanes, despite 67% of women selecting 'cycle lanes separated from traffic' as the number one thing that would get more women cycling.
- vi) The 2<sup>nd</sup> EqIA appeared to have been undertaken without any information as to what schemes would be proposed. An assessment has therefore been done against incomplete background data and therefore was of limited utility:
- (1) At page 9 the assessment says, *'the main negative impact, dependent on what type of scheme were implemented....'* The purpose of the EqIA is to assess against proposed schemes, not to guess at impacts in a vacuum;
  - (2) Also at page 9 the assessment states: *'The current available data on the impact of cycle lanes on people with protected characteristics is inconclusive. The specific design of the cycle lane would determine whether impacts are positive, negative or neutral. Further data should be gathered to inform any future proposals.'* In short, the Council has relied on what it says was a neutral EqIA assessment in concluding that it should not re-instate the cycle lanes (or any protected cycle lane scheme). However, that very assessment says that it was not conclusive (i.e. could not be relied upon) because there were no plans for it to assess against. This is entirely circular.

#### **Ground 4: Failure to take into account material considerations**

- 49) Section 18 of the Traffic Management Act ('TMA') 2004 requires an authority to have regard for the Network Management Duty Guidance issued by the appropriate national authority (i.e. The Secretary of State for Transport) ('the Guidance'). The guidance was first published on 9 May 2020, and since then this has been revised four times: on 23 May 2020, 13 November 2020, 12 January 2021, and 25 February 2021.
- 50) The law is clear, that the decision maker must act in accordance with statutory guidance unless there are clear and cogent reasons for departing from the guidance<sup>7</sup>. The court will scrutinise any reasons given for departing from the statutory guidance '*with the intensity which the importance and sensitivity of the subject matter requires.*'
- 51) Throughout, the Guidance makes clear that the aim of reallocating road space was a dual one. The Guidance states that 'Local authorities in areas with high levels of public transport use should take measures to reallocate road space to people walking and cycling, both to encourage active travel and to enable social distancing during restart.' [Emphasis added]. Of particular relevance to the Scheme in question is the measure which is listed as the first priority that councils "should take", which is: "Installing cycle facilities with a minimum level of physical segregation from volume traffic," and "lanes indicated by road markings only are very unlikely to be sufficient to deliver the level of change needed.
- 52) Paragraph 8.5 of the Report says, 'the Statutory Guidance remains lawful for all intents and purposes.' Despite this statement, the Report makes no reference to the relevant provisions of the Guidance which should have informed any decision about whether to re-instate a Scheme which was unlawfully removed or indeed any decision taken relating to the exercise of the Council's powers under TMA. The only reference to the Guidance comes in the Report's statement (at paragraph 8.6) that the Council would be under no duty to consult when exercising its powers under Section 9 of the Road Traffic Regulation Act 1984<sup>8</sup> or section 64 of The Traffic Signs Regulations and General Directions 2016. No mention was made of the Guidance in the Council's deliberations on 17 March 2021.

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<sup>7</sup> *R (Britwell Parish Council) v Slough Borough Council* [2019] EWHC 988 (Admin) and *R (TG v Lambeth LBC* [2011] EWCA Civ 526.

<sup>8</sup> In fact the Report omits to say which Act it is referring to.

53) It is clear that the Council has misunderstood the purpose and provisions of the Guidance and has failed to apply them. The Council's decision was premised on the measures in the Guidance only intended to last the duration of the COVID-19 crisis. This is incorrect as both the Guidance itself and the government message demonstrate. The Guidance has not been revoked, it should be followed unless there are cogent reasons not to. The Council has demonstrated a wholesale failure to have regard to the Guidance and has advanced no reasons, cogent or otherwise for why it has failed.

54) The Council has also failed to comply with Section 16 of the TMA. This includes at 16 (1) (b) a duty to facilitate 'the expeditious movement of traffic on road networks for which another authority is the traffic authority.' The Council has failed to secure the expeditious movement of traffic<sup>9</sup> in other local authorities. This is evident:

- a) The only reference to the London Borough of Hammersmith and Fulham (LBHF) in the Report is in the list at paragraph 6.21 of organisations which support the Scheme. The Council has clearly failed to consult with this neighbouring local authority which had itself installed temporary segregated cycle lanes from Hammersmith Broadway along the Hammersmith Road and up to Kensington High Street. A Freedom of Information Act request has revealed that LBHF received no correspondence from and had no meetings with councillors or officers from RBKC;
- b) There is no reference to Westminster City Council ('WCC') in the Report. We are aware, from a Freedom of Information Act Request that there were conversations between WCC and the Council about the extension of segregated cycling from Kensington High Street through to CS3 (Hyde Park) up until mid-November. At a meeting attended by a representative from the Council on 13 November, an attendee noted that 'both KHS and KR/KG scheme potentially dependent on each other.' WCC were not informed that the Scheme was going to be removed, and they were clearly judging by the Report not consulted on the decision not to re-instate the cycle lanes.

## **Ground 5: Irrationality**

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<sup>9</sup> Traffic in this context specifically includes cyclists as explained in LTN 1/20: Cycle Infrastructure Design

55) The decision itself and the actions of the Council in reaching it are so unreasonable as to meet the test of Wednesbury unreasonableness<sup>10</sup>. In addition to the points highlighted above we particularly draw attention to:

- a) The fact that the rationale for the Scheme as it related to promoting safe cycling and provision of a useful east-west route had been met;
- b) That the decision was taken in the context of a failure to consult, a failure to have regard to material and relevant considerations, and in breach of procedural fairness;
- c) The decision relied in part upon an EqIA which expressly stated that it could not constitute a sufficient analysis because it was not an assessment against a planned scheme. The Council in refusing to plan a scheme, relied on an assessment which in order to be conclusive required a plan;
- d) The decision left the critical question of environmental impacts to untrained councillors based on their 'local knowledge' without the benefit of any data on to which to inform their decision (paragraph 12.2 of the Report). In circumstances in which this Council had declared a Climate Emergency, this was patently irrational;
- e) If, which isn't clear from the decision (see Councillor Campbell's announcement and the Minutes of the 17 March meeting), the decision was that the Council would 'consider an alternative scheme in the longer term,' this was patently irrational. The Council has shown itself unable to collect and analyse relevant data and formulate alternative schemes. Without re-instating the Scheme the Council would never be in a position to assess the efficacy, safety and environmental impacts of the cycle lanes.

#### **Ground 6: Failure to give adequate reasons**

56) Reasons given must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the principal important controversial issues, disclosing how any issue of law or fact was resolved.<sup>11</sup>

57) In this instance, the main source of the reasons for the decision is the minutes of the March meeting. Whilst the Council's officer prepared a report, it did not purport to make a recommendation. As such, the report contained no reason for the selection of a particular

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<sup>10</sup> *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* (1948) 1 KB 223

<sup>11</sup> *South Buckinghamshire DC v Porter (No. 2)* [2004] UKHL 33 [2004] 1 W.L.R. 1953 at para 36 per Lord Brown).

option which could then have been adopted by the Committee. The minutes fall far short of the standard required.

58) Furthermore, we point to the sole written rationale for the decision in the announcement of Cllr Campbell, which includes this phrase; *'The Kensington High Street scheme was a temporary solution to an urgent problem but permanent changes to our roads need full and proper consultation.'* This reasoning does not address the decision the Council had to take. The Council was not being asked to put in place a permanent change to the road, the Council was being asked to consider whether to re-instate a temporary scheme, to allow a full trial period to run and to conduct the proper consultations during the lifetime of the scheme. On this basis alone the reasoning is clearly deficient.

#### **Ground 7: Breach of the Public Sector Equality Duty**

59) Although the Council carried out an EqIA, for all the reasons set out above we say this was nugatory and accordingly the Council did not comply with its duty in section 149 of the Equality Act 2010. On its own wording the assessment was insufficient and unable to inform any decision because it was unable properly to assess against a plan for any scheme. It was clearly not sufficiently comprehensive or thorough in its analysis.

#### **ACTIONS**

60) The Council is asked to re-instate the temporary cycle lanes for a reasonable period in which to collect all the relevant data that would enable it to make a decision on whether to continue with the Scheme as a permanent feature of its infrastructure.

61) If the Council does not agree, it should explain the basis on which it does not do so in response to this letter.

#### **Address and Period for Reply**

62) The Council's reply to this letter and future correspondence and documents in this matter should be addressed to Emma Montlake of the Environmental Law Foundation, and sent electronically to the email address provided. That is [emma@elflaw.org](mailto:emma@elflaw.org)

63) We would ask for a reply to this letter within the usual timeframes for a response to a pre-action protocol letter, namely 14 days, and accordingly will look forward to receiving your response on 2 June 2021.

Yours sincerely,

Emma Montlake

Environmental Law Foundation