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21 December 2020

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 pre-action protocol letter dated 2 December 2020 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) Our first pre-action protocol letter was written without sight of the Council’s 2 December ‘Key Decision’. This decision will be referred to as ‘the December Key Decision’, and the Key Decision dated 16 July 2020 under which the Scheme was implemented will be referred to as the July Key Decision. Although the Council’s case appears to be that the December Key Decision is the operative decision, it appears to the Claimant that it was in fact the 26 November decision. At the very least there is confusion as to which was operative. Accordingly, references in this letter to ‘the Decisions’ are to both the 26 November decision and the December Key Decision.
- 3) On 9 December, the Council replied to our letter indicating that it would provide a substantive response by 16 December. On the same date, we informed the Council that in light of the December Key Decision we intended to send a further letter by 16 December. The Council requested that our further letter be sent on 14 December failing which the Council will treat any further letter as a new pre-action protocol letter. Given the developments arising from the December Key Decision the instant letter is to be treated as a pre-action protocol letter which supersedes our prior letter.

#### **THE CLAIMANT**

- 4) 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**

- 5) The proposed defendant is the Council.

## **AARHUS CONVENTION**

- 6) 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**

### *The Council's policies*

- 7) The Council Plan, adopted in March 2019, set out its key priorities over the next four years. The Council's Constitution at 8.1.4.4 explains: "It is the key document which will guide what we do." The five priorities highlighted are: "Grenfell recovery; A great place to live, work and learn; supporting and safeguarding vulnerable residents; healthy, clean and safe; A place of culture to visit and explore."
- 8) Also relevant to the decisions are the Council's Climate Change Strategies and Action Plan which seek to fulfil the Council's declaration of a Climate Emergency. The Air Quality and Climate Change Action Plan 2016-2021 (Version 2 2 January 2019). Section 1 of the plan sets out the high level priorities, including 'engage with businesses, schools and the wider community to promote less polluting technology and modes of transport,' 'collaborate with other London boroughs, the Mayor of London and central government departments to achieve substantial reductions of harmful emissions across the city.' The Introduction (page 5) recognises the health risks of roads, 'for children living and going to school near busy roads, lung development is being impaired, in some cases by as much as 10 per cent. Levels of NO2 in some busy areas are at least twice the national objective level which is based on health criteria.' The objectives (page 9) include: 'reduce levels of motor traffic in the Borough by increasing sustainable transport levels, in particular cycling and walking.' Notwithstanding this commitment the borough was placed last amongst inner London boroughs in the 2019 Healthy Streets Scorecard.

### The July Key Decision

- 9) Following the first lockdown (24 March 2020), the Government emphasised walking and cycling as preferred transport options. This included £5 billion in new funding and a published policy ‘Gear Change.’ The Government published statutory guidance on 9 May under section 18 of the Traffic Management Act 2004, which gave advice to local authorities on reallocating road space to encourage cycling and walking. The recommended interventions included: ‘Installing cycle facilities with a minimum level of physical separation from volume traffic; for example, mandatory cycle lands, using light segregation features such as flexible plastic wands.’
- 10) The Council was slow to react. On 1 and 10 May Better Streets wrote to the Council suggesting a range of measures that could be taken. On 16 May the Council announced a limited series of measures, including ‘light segregation’ of a cycle lane in Chelsea (this was never actioned). On 20 May Better Streets wrote to the Council welcoming these steps but emphasising the need for an East-West protected cycle lane (the Holland Park cycle lane scheme would have been one such). On 1 June, Better Streets wrote to the Council suggesting a pop-up cycle lane on High Street Kensington, the rationale for this was published on Better Streets’ website on 16 June. On 18 June, the Council informed Better Streets that unspecified stakeholders would be informed of plans for a cycle lane along High Street Kensington. A press release confirmed this on 19 June. On 10 July, Better Streets wrote to the Council to enquire on progress, and on 13 July was invited, along with residents and business groups to a virtual exhibition of the proposed route.
- 11) On 16 July, Councillor Johnny Thalassites, the Council’s Lead Member for Planning and Transportation signed a key decision<sup>1</sup> (the July Key Decision) approving the report dated 16 July by Amanda Reid, the Director of Planning and Place, and Mahmood Siddiqi, Director of Transport and Highways (the “Active Travel Plan”). The reason given for the decision (3.1) was:

*‘The Covid-19 public health emergency has had a profound impact on how people travel in London. Recent Government guidance makes clear that there is a pressing need to ensure that the massive reduction in public transport capacity does not result in a large increase in*

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<sup>1</sup> Forward Plan Reference KD05659/20/T/A

*car use, congestion and air and noise pollution. Councils must ensure that the recovery of businesses is not undermined because their employees and customers are unable to travel.'*

- 12) The Active Travel Plan stated that 'Light segregation cycle lanes using traffic wands between LBHF and WCC boundaries were to be implemented from August 2020 for up to 18 months.' Announcing the measure on its website the Council said:

*'As part of post COVID-19 recovery measures, the Council is introducing temporary with-traffic-flow segregated cycle lanes on Kensington High Street to support the local economy and to help people walk and cycle safely, while capacity is reduced on public transport.'* The Council stated that *'The scheme is an important part of the Council's plan to boost the local economy - with more passing trade for shops and businesses as they bounce back after lockdown – and will make cycling to Kensington feel much safer as more people return to work by bike.'*

- 13) The Active Travel Plan was to use funding from the Council (£343,000), from the Department for Transport (£100,000) and from Transport for London (TfL) (£185,000). The funding scheme was approved by Councillor Thalassites on 27 July 2020 and announced in a press release dated 30 July 2020. He was quoted, 'we are doing all we can to instil confidence in both new and experienced cyclists.' Justin Abbott of Better Streets was quoted in the same release, 'No10's recent publication Gear Change confirms the importance of protected cycle lanes, so we're keen to see the first protected lane in our borough now happen quickly in Kensington High Street.' We understand the estimated costs of the Scheme increased between the July Decision and the Scheme's design and build. The December Key Decision (para 10.1) states the estimated cost of the Scheme to be £320,000, and highlights a risk that Transport for London may not now fund this. It further states the additional cost of removal of the Scheme to be estimated at £30,000.

### Equality Impact Assessment

- 14) The Council produced an Equality Impact Assessment (EqIA) dated 16 July. It found that in respect of each protected characteristics the cycle lanes' impact was neutral. The EqIA contained the following positive comments:

- a) As to concerns about the risk of cyclists striking older or visually impaired people: 'Injury collisions between pedestrians and cyclists are much less common than collisions between pedestrians and motor vehicles...where the new cycle lanes are provided, gaps between cyclists are more likely than those previously in this lane between vehicles;
- b) 'The scheme has the potential to open up other modes of travel for disabled people. The Cycleways will be able to be used by adapted bicycles, with the smallest sections at least 2.5m wide in both directions.'
- c) 'It is expected that provision of protected cycle lanes will reduce the number of collisions on Kensington High Street, which have historically been high amongst pedestrians and cyclists. Provision of the scheme offers an alternative, safe mode of travel for BAME groups. The EqlA noted that BAME Londoners, both adults and children are twice as likely as white Londoners to be injured on the roads. BAME Londoners are also less likely than white Londoners to say that they feel safe on from road accidents when walking around London at night;
- d) 'The proposed cycle lane is segregated from vehicle traffic, providing a solution to fear of cycling on busy roads when travelling by bike. Sixty-seven per cent of women stated, 'cycle lanes separated from traffic' as the number one thing that will get more women cycling.'
- e) 'Provision of cycle routes has positive implications for society, opening up cheap, socially distanced, fast travel for people of all protected characteristics, increasing their mobility to workplaces, education, retail, leisure and health destinations and friends and family.'

15) The EqlA noted that fourteen dedicated loading spaces in side streets were to be created as part of the scheme, and no taxi ranks were being removed. The EqlA stated: '*no disabled parking bays are proposed to be removed. As the scheme settles in there will be opportunities to review waiting and loading restrictions-including disabled parking bays-in side roads,*' (page 3). In fact, we understand the 14 spaces were not created. The December Key Decision said (para 8.1): '*The EIA noted mitigation measure such as the provision of additional loading spaces in side roads that would help passengers with reduced mobility to be dropped off close to their destination. Removing the lanes would also remove the need for this mitigation.*' Since the scheme was rescinded before it had settled in, there were no opportunities to review waiting and loading restrictions as anticipated at para 3 of the EqlA.

### Design of the scheme

- 16) Following discussions, on 10 August designs for the scheme were shared with 'resident groups, members and statutory consultees' (page 5 of the EqIA). Better Streets provided feedback.
- 17) The Council stated on its website: *'From late September, we will begin introducing the cycle lanes and protective wands along the full length of Kensington High Street, starting at the western end. This involves converting most of the nearside carriageway lane to space reserved for cycling. This is our 'Phase 1'. Phase 2 will upgrade four major signalised junctions along the High Street, to continue the protection for cyclists. Work to traffic signals takes time to design and implement, but Transport for London, the signals authority, is working hard to deliver Phase 2 from November 2020.'*
- 18) The July Key Decision stated that the scheme would be in place 'for up to 18 months.' There was certainly no indication that the Council would have the option to abandon the scheme before it had been completed.

### Implementation of the scheme

- 19) The scheme was implemented from 30 September although Phase 1 was not completed until 14 October. Phase 2 had not commenced by the time the Council took the decision to withdraw the scheme.
- 20) During the short life span of the Scheme the following key events happened:
- a) On 31 October the Government announced a second lockdown due to be eased on 2 December. Of course in the period of writing this letter London has now gone into Tier 4 until at least 30 December. The impact of the retrograde step the Council took on the day of easing the restrictions taken will be even more keenly felt as Londoners face limited opportunities for exercise (cycling, walking and running being the main permitted forms);
  - b) There were substantial roadworks on the High Street and a number of adjoining roads. The December Key Decision makes reference to this in paras 5.3 and 5.4. In para 5.3 it refers to an increase in journey times along the route in the week of 26 October and the first half of the week of 2 November. It notes that this coincided with

roadworks 'in and close to the High Street that would have contributed to the longer journey times', and that the spike prior to 2 November coincided further with the lead up to a period of lockdown. The Council's data, from which this is extracted, showed the pre-lockdown spike to be indexed consistent with London generally, and that after this journey times returned to those prior to the Scheme's introduction. The Claimant's understanding is however that significant roadworks continued through to 13 November. By way of examples (i) roadworks by Thames Water at one stage reduced all traffic to one lane to cover both directions, and (ii) works on adjoining Campden Hill Road necessitated temporary traffic lights and led to queues for those wishing to turn left from the High Street.

### 26 November decision

- 21) In or around the end of October (not long after Phase 1 of the Scheme had been completed), Better Streets learnt that Tony Devenish (the Conservative GLA member for West Central London) had been campaigning against the Scheme. Better Streets contacted the Council to express their views on 26 October and 20 November, and sent a tweet on 30 October encouraging those who were in support of the scheme to write to the Council. On or around 13 November Better Streets learnt that the Council had held a meeting on 12 November with various individuals and organisations. It subsequently became clear that the Council had met with only residents' associations and business groups which were opposed to the Scheme.
- 22) The Council invited Better Streets to a meeting on 18 November. At this meeting Better Streets were given an update, and shown data which indicated that levels of cycling had increased significantly, and that traffic congestion was no different to prior to the scheme. Critically, the Council did not mention that this was part of a consultation as to whether to remove the Scheme.
- 23) Following the meeting, on 19 November 2020 Better Streets wrote to the Council explaining that it had heard independently that Phase 2 of the works was being paused, and urging the Council to continue it. Better Streets also enquired (i) about the proposed cycle lane on Queensgate due to link to the High Street Kensington scheme, and (ii) about the date for the next review. The Council replied that there was not yet a date for a further review but provided Better Streets with the data discussed at the meeting on 18 November and confirmed that Better Streets could publicise this on its website. The Council had not stated that it was considering abandoning the Scheme mid-trial. Nor were there any reasons for Better Streets



to expect that it needed to rally support for the scheme by a certain date, not least because the Council had said there was no date set for a further review. As it transpired, just five working days later the Council announced its decision to remove the cycle lanes.

24) On 25 November Better Streets learnt that Felicity Buchan MP and Tony Devenish AM had written a public letter to the Council demanding the removal of the cycle lanes. On the same day, Better Streets wrote to the Council asking for an assurance that it was not intending to abandon the Scheme. On 27 November the Council responded suggesting a meeting that day. Mr. Abbott of Better Streets met with Cllr Thalassites and urged the Council not to abandon the Scheme, citing support from a range of stakeholders. In fact, Cllr Thalassites had already distributed a letter dated 26 November announcing that the Scheme would be removed over five nights from 2 December 2020.

25) Cllr Thalassites' letter of 26 November said:

*'I have asked Council Officers to begin removing the temporary bicycle lanes on Kensington High Street from 2 December 2020....*

*We had hoped that a scheme might help local businesses attract shoppers to the high street; and that residents would regard as useful an east-west path.*

*Alas - more than two months after installing temporary 'wands' on the road - it is clear that large majorities of local businesses and residents do not think the experiment has worked. Kensington Business Forum and Kensington and Chelsea Chamber of Trade and Commerce have asked the Council to take out the lanes, so that they can make the most of a busy holiday season; as have our resident associations across the high street, due to increased congestion.*

*We understand this ask is supported by disability groups, such as Action Disability K&C, who are anxious about impacts on their members (including visually impaired people); as well as by Felicity Buchan MP and Tony Devenish AM, who ran a local survey on the subject.*

*We want to listen to local businesses and local people. That is why we have acted to get the high street moving again.'*

26) We consider the 26 November letter constituted the operative decision. Cllr Thalassites had opened the letter stating he had 'asked Council Officers to begin removing the temporary bicycle lanes', indicating the operative decision had already been made. Although the Council subsequently issued the December Key Decision, on the same evening (2 December)

vehicles and manpower were in place to start the process of removing the scheme (and would have done so if not for protests that evening). We find it highly unlikely that these could have been mobilised in such a short period of time after the December Key Decision, meaning that they were already in position to start the work.

27) As we indicated in our first pre-action protocol letter, at the time of the 26 November 2020 decision no further information had been made available regarding (i) the legal basis on which the decision had been taken (ii) details of the scheme of delegation under which the decision was taken (iii) the reasons for the decision (iv) the failure to progress to Phase 2 (v) the ongoing criteria by which the scheme was to be assessed; and (vi) reports or recommendations from officers to Mr Thalassites relating to the decision.

28) As the Council is aware, reg.8(1) of the Openness of Local Government Bodies Regulations 2014 requires that the written record of decisions made by officers under delegated powers, together with background papers, must as soon as reasonably possible be made available for inspection by members of the public, with obstruction of review of a document as required by regulation 8 without reasonable excuse being an offence (reg.10).

29) The paucity of publicly available information severely hampered consideration of this matter, and in particular (i) consideration of it prior to the public meeting on 2 December 2020 and (ii) consideration prior to the Council taking steps to remove the cycle lanes.

#### 25 November- 2 December

30) From 25 November to 2 December Better Streets campaigned to prevent the abandoning of the Scheme, writing on a number of occasions to the Council with examples of support and urging them to pause and reflect. These messages were unanswered with the exception of the meeting of 27 November mentioned above. Better Streets is aware of a number of other stakeholders who expressed their strong support for the Scheme during this period.

#### Meeting 2 December

31) The Council held a scheduled full Council meeting on 2<sup>nd</sup> December, at 6.30pm. The potential removal of the cycle lanes Scheme was not on the agenda. As a COVID-19 adjustment, the Council has allowed members of the public to submit in advance a written question of up to 120

words<sup>2</sup> (the Council permits eight questions in total). Four residents' questions were asked<sup>3</sup> relating to the Scheme. Cllr Thalassites answered those questions with a prepared statement which was largely identical to the one which would be published on 3 December. Consistent with the issues raised in this pre-action protocol letter, none of the questions were directly answered and Cllr Thalassites provided no more than a vague statement and assertions. One of Cllr Thalassites' comments in particular was peculiar, he suggested that there was inconsistency in a school which supported the Scheme also requesting funding for additional parking spaces, using this as his sole piece of evidence that things were not 'black and white.' Of course there will be staff who have to travel much longer distances than cycling will allow or may be disabled in some way. The opposition objected to the Council's position, pointing in particular to the lack of proper consultation with the emergency services, and that the trial had identified design issues with the Scheme which were the Council's responsibility and which it had now effectively abnegated responsibility for rectifying. Although the opposition had an opportunity to make a brief statement, there was no discussion of the withdrawal of the Scheme because:

- a) It was not on the agenda;
- b) The decision to withdraw had been made two hours earlier as per the December Key Decision, frustrating any democratic process which would have enabled the decision to be subject to scrutiny.

32) Two other issues raised at the meeting are striking:

- a) One of the questions was 'what are the Council's plans to ensure that any 'beneficial changes' emerging across the Royal Borough during the COVID crisis are carried forward into actionable policy when we eventually progress out of it?' Clearly one of the beneficial changes is the rise in number of people choosing modes of travel which promote health and the environment. Either by design or omission, the question was not directly answered by the lead Councillor who chose instead to refer to reducing risks from COVID-19 and repairing (it wasn't clear what was being repaired). The opposition picked up on this;

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<sup>2</sup> There was one exception to the 120 word rule. A submission from an opponent of the Scheme which was read. Subsequently Mr Abbott wrote to the Mayor of the Council to complain at this demonstrably unfair conduct. Mr. Abbott has been told that this was an administrative error.

<sup>3</sup> (i) What criteria the cycle lanes were being assessed by and how it had failed to meet them, (ii) what data had been used in reaching the decision, (iii) what constituencies had been consulted and what form the consultation had taken (iv) how many emails and petitions for and against the cycle lanes had been received as of 2 December.

- b) There was a motion for debate on the use of Electric Vehicles, the first line was 'Now is the time-following our borough's 'Vision Carbon Zero' pledge and Government's Ten-Point Plan for the Environment' to bring forward innovative plans to cut omissions across the borough.' It is bizarre that the Council would permit debate on one policy plan to address the Climate crisis and not the other (increasing use of cycling).

### The December Key Decision

33) The December Key Decision is dated 2 December 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.

34) The December Key Decision is signed by Cllr Thalassites and states:

*'With regard to the report dated 2 December 2020 by the Chief Transport Policy Officer, I direct officers to remove the temporary cycle lanes from Kensington High Street.*

*In taking this decision I concur in the advice contained in the officer's report.'*

35) The reasons in the Report are at para 3.1:

*'One of the main reasons for installing the cycle lanes was to assist the recovery of local businesses in the High Street area by making it easier to visit by bike. Since the cycle lanes were introduced, many of these businesses have reported that the cycle lanes have not helped and have in fact made the High Street a less attractive place to trade. Many of the key stakeholder groups who gave their backing to the temporary scheme before it was implemented have concluded that the cycle lanes have not been the success that they hoped for, and have asked us to remove them.'*

36) 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.* There is no analysis by the Council of the cogency of the local businesses' financial arguments, and no analysis of whether a short period would enable the Council to institute a fair and lawful process for considering other stakeholders' views.

## **PROPOSED GROUNDS**

37) 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) Pre-determination;
- (6) Irrationality: The decision to withdraw the Scheme was not one which a reasonable Council could have taken;
- (7) Reasons: The Council failed to give adequate reasons in the Decisions (alone or together).

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

38) 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>4</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>5</sup> 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>6</sup> In this case cyclists were being deprived of an existing benefit and advantage.

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<sup>4</sup> *R (Moseley) v LB Haringey* [2014] UKSC 115, Lord Wilson at para 24

<sup>5</sup> *R (Article 39) v Secretary of State for Education* [2020] EWCA Civ 1577, Baker LJ at para 29

<sup>6</sup> *Moseley* para 26

39) Better Streets and other stakeholders had a legitimate expectation that they would be properly consulted on any plans to abandon the Scheme. For the avoidance of doubt, although Better Streets were invited to a meeting on 18 November, it was never made clear that this was a consultation meeting regarding plans to abandon the Scheme. Better Streets and other relevant stakeholders were never consulted on plans to abandon the Scheme. 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.

40) Alternatively, the failure to consult the following gave rise to conspicuous unfairness:

- a) Better Streets and other groups representing the interests of cyclists: Abandoning the Scheme withdraws a benefit directly affecting these groups;
- b) Users of the cycle lane: Para 5.3 of the Report confirmed that an estimated 3,000 cyclists were daily using the lanes (this doubled the number of cyclists using High Street Kensington). Again, this withdrew a benefit. Cllr Thalassites' letter of 26 November confirmed that one of the two reasons for implementing the Scheme was to create a useful 'east to west path.' The interests of the cyclists are directly linked to one of the reasons for the Scheme.
- c) Councillors and other bodies representing the interests of residents of neighbouring boroughs: This gave rise to conspicuous unfairness because the Scheme was explicitly intended to connect 'to similar facilities at the borough's boundaries with London Borough of Hammersmith and Fulham and Westminster City Council.' (page 1 EqIA). Further, one of the reasons for the scheme was to boost local business. Without consulting neighbouring boroughs the Council had no information on whether those boroughs' residents would be deterred from accessing the high street without the cycle lanes;
- d) Imperial College: Linked to the above, Imperial College has two campuses which were intended to be connected by the joined-up cycle lanes between White City and Exhibition Road. Removing one of the arteries of this system would clearly impact the students and all staff travelling between the two;

- e) Schools: Had the Council consulted local schools it would have learnt that there was an increase in the uptake of cycling by both pupils and staff directly linked to the provision of a safe cycle route;
- f) TfL: This body clearly had an interest in the scheme; (i) the Council could seek to reclaim funding from TfL for abandoning it, (ii) whether or not the cycle lane affected bus journey times (or indeed more positively reduced overcrowding on public transport) directly impacts TfL. Para 5.6 of the Report says the Council had yet to receive further data from TfL on bus journey times. It is unclear whether the Council had actively sought this data, but the reference to it underlines that it was an important factor and yet the decision was taken without this information;
- g) The Metropolitan Police: The Police have an interest in the safety of High Street Kensington, particularly where the Council acknowledged in its EqlA that there have been historically a high number of collisions amongst cyclists and pedestrians. It was conspicuously unfair to everyone interested in the safety of cyclists not to consult the police and better understand the impact on cycle safety of the protected lanes;
- h) Businesses: Ultimately one of the central reasons given in the Report for the December Key Decision was the asserted and un-evidenced impact on local businesses. Given this, fairness dictated the Council should have carried out a proper, even if informal, consultation of local businesses. This patently did not happen:
  - i) The Kensington and Chelsea Chamber of Commerce ('KCCC') whose views the Council took into account is chaired by an individual who runs an accountancy firm outside of the borough. Clearly an accountancy firm will not benefit from passing trade, not to mention that it is not a local business;
  - ii) The Chair of Kensington Business Forum ('KBF') runs an estate agency which had no trading premises, and is registered to a correspondence address in Essex;
  - iii) In any event KBF has since issued a statement stating that the Council had either misrepresented or misunderstood their position. KBF had not asked the Council to remove the cycle lanes, but had passed on views of businesses for and against, and that the KBF executive did not share the negative views of the Scheme;
  - iv) The High Street has approximately 125 retail outlets, many of which are chain outlets. A number of these businesses have now been surveyed by members of the public. No major retailer has requested the removal of the Scheme either in

private or public. As examples Japan House and Ole & Steen, both members of KBF, have said they were not in fact consulted on the removal.

- v) The Council did not directly survey businesses, but rather took into account the results of a survey conducted by KBF which collated public rather than member-only responses, the details of which (such as which retailers on High Street Kensington took part in the survey, and their views) have not been disclosed.

41) The Council's position on whether or not it carried out an informal consultation is unclear.

Para 7.1. of the Report states *'there was no formal public consultation on the introduction of the cycle lanes, and if we are to remove the lanes before Christmas in response to requests to support the local businesses, there is no time to carry out a consultation on the lanes' removal.'*

42) However, since the Council has placed weight on (i) the views of businesses and residents' associations, (ii) reading some but not all emails in the Active Travel inbox and (iii) a change.org petition (iv) Tony Devenish's survey and (v) emails received by Felicity Buchan MP it appears the Council's did undertake some form of consultation. An informal consultation must still meet the requirements of fairness<sup>7</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.'*

43) 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>8</sup> Fairness

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<sup>7</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.

<sup>8</sup> *R v North and East Devon Health Authority ex p Coughlin* [2001] QB 213 at para 108.



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>9</sup>

44) Any informal consultation the Council says it did undertake fails the test of fairness:

- a) At no time was it made public that the Council was informally consulting. Whilst it was possible to send emails to the Council with views on the Scheme, any person providing their views would not have known that the Scheme might be withdrawn prior to completion of Phase 2. It follows that there was no adequate time for responses, because any potential respondees didn't know they had to respond or what they were responding to;
- b) Even if it is said the 26 November decision was a preliminary decision, this gave less than 4 working days before the 'final' decision and the removal of the cycle lanes;
- c) There was no publicised deadline for a response. The Council arbitrarily and in private took either 25 November (the day before the 26 November) or 30 November (two days before the December Key Decision) as the cut-off point for any expression of views;
- d) There was no proposal to remove the scheme. Even if there had been one (unpublicised), the Council did not give sufficient reasons for the proposal to remove. It did not publicise:
  - i) Officers' advice informing the decision until after the December Key Decision;
  - ii) Explanations given by the groups representing businesses as to why businesses would be impacted. The only explanation now publicly available is at para 3.1 of the Report, that the High Street has been made a less attractive place to trade. There is still no explanation as to why this is the case, no explanation as to how the Council has tested the cogency of this assertion.
  - iii) The Council's own analysis of the financial impact on businesses, including the levels of trading pre-the second lockdown as compared to trading prior to the first lockdown and during the currency of the cycle lanes;
  - iv) The data on the number of shoppers who travel by car to shop. This was a key metric. TfL's recent data shows that 60% of shoppers in the borough visit by foot or cycle, 20% by public transport and 20% by car. The numbers using cars on the High Street would be expected to be lower given the limited parking and ample public transport.

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<sup>9</sup> Moseley para 27.

- v) The Council's analysis of levels of congestion. As with the financial impacts this should have included analysis of congestion before the first lockdown, and congestion during the period of the operation of the cycle lane, alongside consideration of other factors such as roadworks. The only analysis of the levels of congestion appears in the Report published after the December Key Decision. This said (referring to the roadworks, volatility of traffic and the cycle lanes) at para 5.4 'it is difficult to be certain how much of the congestion can be attributed to each of these different contributory factors.'; (underlined for emphasis). In fact the data provided by the Council to certain groups on 12 November, to Better Streets at their meeting of 18 November and in soft copy on 19 November appeared to show unchanged journey times prior to and then during the Scheme's operation;
- vi) The results of Tony Devenish's survey. Cllr Thalassites referred to this as a 'local survey' in the 26 November decision. The Claimant notes that the methodology of this 'survey' appears to have failed all standards expected for a transparent and accurate consultation of local people and any results should not have informed the Council's decision
- vii) The explanations given by the disability action groups for their opposition to the cycle lanes. The Claimant notes that it is not clear if those groups were made aware that the Council would use the removal of the cycle lanes as a reason not to introduce additional parking spaces (which would make reasonable adjustments for disabled passengers, irrespective of the cycle lanes);
- viii) Any information as to discussions with emergency services, any study of the impact on emergency services, and whether the Council had considered how to mitigate of any concerns. In respect of the latter two it is clear that this is because the Council had not addressed them;
- ix) Any information as to proposed improvements to the Scheme and why they had been discounted.
- e) The Council acknowledged that it had received 2,300 emails by 30 November, and more than a further 1,000 had been received by 1 December, i.e. a total of over 3,300 emails. Of those only 1,000 were analysed by the time it took its decision. The product of the consultation was not conscientiously taken into account because over 2,000 responses were not considered (ie, more than double the number that had been considered);
- f) The Council took into account the views of business groups, without enquiring as to what proportion of businesses in the area they represented, whether businesses had

in fact been properly consulted and whether they were in fact local businesses (see paragraph 40 above);

- g) Para 6.1 of the Report set out three options the officers considered were available. The third was *'remove part of the cycle lane, in the areas where it may be having the greatest impact on traffic congestion.'* The Council did not make it publicly known that there was a third option, 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;
- h) The Council took into account a petition for the removal of the cycle lanes with over 3,000 names on it (para 4.5 of the Report). The Council did not analyse what proportion of the petitioners were residents of the Borough, but applied that test to the 1000 emails it received and read prior to the December Key Decision.

45) 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**

46) Representations, statements, and 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.

47) In making a decision at this early juncture, the Council failed to properly take into account the existence of Better Streets' and other stakeholder's legitimate expectation.

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

48) 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 states what information it considered would be relevant to any decision on the Scheme on its website in a section of the FAQs which asked how the Council would be 'monitoring the new arrangements,' *"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."*

49) Based on the Council's own position, it failed to take into account relevant information, as evidenced by:

- a) The lack of any substantive data on drive times and traffic flow on the High Street compared to the pre-COVID-19 levels (which would be the fairest measure). The data that was provided to the Claimant on 19 November showed that in fact the drive time had not been material disturbed;
- b) The Council's admission that it did not have data from TfL on bus journey times (para 5.6 of the Report);
- c) The Council's admission at para 5.4 of the Report that it was not able to be certain of the contribution to any congestion of the cycle lanes, as one of three possible explanations;
- d) The Council's admission that it was too early to have air quality data (para 5.6 of the Report);
- e) The omission from either of the Decisions of details or analysis of 'possible improvements' that had been considered by the Council.

50) In addition, the failure to take into account relevant information is evidenced by:

- a) The Council's failure to consider more than 2,000 emails by the date of the December Key Decision;
- b) The Council's striking omission from the December Key Decision of the second of the 'main reasons' for the Scheme. Para 3.1 of the Report only references the reason

relating to positive impact on businesses. It does not refer to the other reason identified by Cllr Thalassites in the 26 November decision, that the cycle lanes would be a useful east-west route. We can only assume this is because the cycle lanes did prove a useful east-west route. One of the rationales for the Scheme was fulfilled and the Council has not been able to counter this;

- c) The fact that the Council failed to reflect that on its own pre-Scheme assessment (the EqIA) some increase in travel time might be expected, but that this would not render the Scheme unsuccessful;
- d) The absence of any quantitative assessment of the financial impact on businesses;
- e) The December Key Decision's failure to record that the Government's guidance remained that people should cycle where possible;
- f) Other than the above reference to air quality data, the absence of any reference to the environment, environmental issues, or the Council's climate and environment commitments;
- g) The absence of any reference to safety in either the Report or the Decisions. The word 'safety' does not appear in the Report. The word 'safe' appears only once, at para 9.3 in reference to the Road Traffic Regulation Act, and the Council's duty to 'secure the expeditious, convenient and safe movement of vehicular and other traffic.' Para 9.3 not in any event a consideration of safety as it is in the context of considering legal implications of removing the cycle lane and notes that there were no traffic orders made in respect of the cycle lanes;
- h) The Council's failure to propose any measures to mitigate concerns raised by the emergency services. Para 5.2 of the Report makes it clear that those were not blanket concerns. The Ambulance (LAS) and Fire Services had told officers that they would not instruct their drivers to use the cycle lanes to move past slow-moving traffic. This could have been resolved with discussions between the Council and those services. It would be quicker for emergency services to travel down a road with only cyclists and stopping buses than a congested High Street. The LAS had not expressed opposition to the Scheme, it had asked the Council to review it. The Council did not review it;
- i) The Council's failure properly to refer to or consider its s. 149 of the Equality Act 2010 duties when removing the cycle lanes. The Report refers to the EqIA (para 8.1) but the only implication of the removal is said to be that the Council will no longer be required to introduce additional loading spaces. There is no analysis of the impact on those with protected characteristics of removing the cycle lanes and no analysis of whether the positive impacts identified in the EqIA would now militate against its

removal. The Council is required to have regard to s. 149 in the exercise of all of its functions, this would be true of removing the cycles lanes as implementing them.

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

51) In the July Key Decision (para 9.1) the Council refers to its duties under s16 (Network Management Duty) of the Traffic Management Act 2004, and the statutory guidance updated 13 November 2020. In particular Local Transport Note 1/20. LTN 1/20 notes that it is important “that [trials] take place for long enough to allow a scheme to settle down as people get used to the new arrangement.” Material considerations also include the necessity of coordination with other boroughs (TMA 2004, s16, 1(b) and 2(b)), and the ensuring of expeditious and efficient use of the Council’s own road network. There is no reference to this duty, or the Council’s consideration of it in the December Key Decision. It is clear that the Council did not have regard to it in reaching the Decisions.

#### **Ground 5: Pre-determination**

52) In *R (Lewis) v Redcar & Cleveland BC* [2009] 1 WLR, Rix LJ found:

*‘The test would be whether there is an appearance of predetermination in the sense of a mind closed to the planning merits of the decision in question. Evidence of political affiliation or of the adoption of policies towards a planning proposal will not for these purposes by itself amount to an appearance of the real possibility of predetermination or what counts as bias for these purposes. Something more is required, something which goes to the appearance of a predetermined, closed mind in the decision-making itself.’*

53) Rix LJ went on at para 96 to approve Collins J’s statement in *R (Island Farm Development Ltd) v Bridgend County Borough Council* [2007] LGR 60 at paras 31-32, that councillors “*must approach their decision-making with an open mind in the sense that they must have regard to all material considerations and be prepared to change their views if persuaded that they should...*”

54) Collins J said that there should be *‘positive evidence to show that there was indeed a closed mind.’* There is positive evidence in this case:

- a) The 26 November decision was not expressed to be a provisional or preliminary one. It was a final decision;
- b) By the time of the December Key Decision, which was disseminated at around 4.30pm, arrangements had already been made to remove the cycle lanes. Cllr Thalassites acknowledged in his open letter of 3 December, that these arrangements cost residents money when paused on 2 December following protests. The Council had evidently already committed to the spending prior to 2 December;
- c) The Report was dated 2 December. The Council has not publicly disclosed when this Report was made available, but it is difficult to see how the Council would have had an opportunity to digest and properly consider the contents of this advice in a matter of hours;
- d) The December Key Decision was taken without any scrutiny. It was timed two hours before the scheduled Council meeting. There is no adequate explanation for why the decision could not have been delayed until after the 17 December Overview and Scrutiny Meeting or other later date, to enable opposition challenge and public response;
- e) The reasons given at para 3.1 of the Report omit to mention one of the two reasons for the Scheme, namely that it would be a useful east-west route and refer only to the reason on which we say the Council had already made its decision;
- f) There is no weighing up of the three options identified in the Report. This is strongly suggestive of the Council not in fact carrying out a balancing exercise and the Report being used to justify a decision that had already been taken;
- g) In his open letter Cllr Thalassites said, *'threatening us with legal action or financial penalties will make no difference to our decision, London boroughs aren't here to be bullied into submissions through sanctions.'* This statement makes clear that despite letters raising cogent legal objections to the Council's process, the Council closed its mind to any other possible decision. Also telling is that although Cllr Thalassites said he had *'the utmost respect for school teachers, families, and commuters who have dedicated themselves to fighting for something they believe,'* at no point did Cllr Thalassites say that the Council had taken those objections into account when reaching its decision of 2 December;
- h) Para 7.1 of the Report acknowledged that by the end of 30 November it had received over 2300 emails. Only 1000 of those had been counted by 30 November. By 1 December there were more than a further 1000 emails that had not been counted. At no point did the Council suggest that it would pause the decision-making process to allow it time to consider over 2000 emails, or the letters intimating pre-action

challenges, or raising other concerns regarding the legality of the process adopted by the Council.

### **Ground 6: Un-reasonableness**

55) The Decisions themselves and the actions of the Council in reaching them are so unreasonable as to meet the test of *Wednesbury* unreasonableness<sup>10</sup>. In addition to the points highlighted above the Claimant particularly draws 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. The rationale as to promoting business had not been tested;
- 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 as it related to a legitimate expectation of a longer trial period;
- c) That the decision had been pre-determined;
- d) The Council's frustration of the democratic process by reaching a decision two hours prior to a Council meeting, the issue not being subject to debate and scrutiny, and there being no cogent reasons why the decision could not have been delayed until after the 17 December council meeting.

### **Ground 7: Failure to give adequate reasons**

56) The reasons given by the Council in the Decisions were not intelligible or adequate. 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) The Claimant points in particular to:

- a) The rationale for the Scheme as it related to safer cycling and mitigating the impact of COVID-19 on travel in London had been met. There is no explanation which would assist interested persons as to why the Council concluded otherwise;

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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).



- b) An occasionally stated objective to boost the local economy with ‘more passing trade for shops and businesses’ (EqIA) had not been tested in any substantive manner. There is no explanation as to (i) why it had not been tested and (ii) why, in the absence of those tests, the Council had still proceeded to withdraw the Scheme on that basis.
- c) There was no explanation for businesses’ and residents’ objections, other than vague references to congestion and making the High Street less attractive;
- d) The lack of reference to public health and safety or the environment. There is no explanation as to why the Council did not consider those factors important;
- e) As to the December Key Decision specifically:
  - i) There is no analysis of the three options identified at para 6 of the Report;
  - ii) The explanation of urgency fails the reasons test: The Council used a Special Urgency provision under Part 4, 1.36 of the constitution. The Council did not explain why compliance with either the regular Key Decision requirements, or even the Standard Urgency Procedure was ‘impracticable.’

## **ACTIONS**

58) The Council is asked to:

- a) Agree to withdraw and reconsider the Decisions (subject to (b) and (c) below)
- b) Agree to re-instate the cycle lanes, allow Phase 1 of the trial to conclude as originally proposed, and to complete Phase 2 of the trial subsequent to this;
- c) In re-considering the decisions:
  - i) Engage in dialogue and proper consultation with interested parties and stakeholders including users and those affected by the scheme;
  - ii) Collect and analyse data relating to asserted financial impacts upon local businesses;
  - iii) Collect and analyse data relating to traffic flow, congestion, pollution levels and safety;
  - iv) Consider their obligations under s149 The Equalities Act 2010.
  - v) Conduct a full study of the impact on emergency services and any mitigation measures that could be put in place;
  - vi) Consider and analyse any possible improvements (per the Council’s commitment on 9 September 2020) to the Scheme.

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

## **DUTY OF CANDOUR AND DISCLOSURE**

60) Attached to this pre-action protocol letter is a table setting out the disclosure which the Claimant considers is required pursuant to the Council's duty of candour. There are a number of items which fall for disclosure. We would ask you return the table with your responses and the relevant documents by the date we have suggested for a reply. However for any documents and responses that you are not able to provide by that date, we would suggest that you complete the table with an indication as to when those documents and/or responses will be provided.

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

61) 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)

62) We would be very grateful if you would reply substantively by 4.00pm on 8 January 2021. It would assist us greatly.

Yours sincerely,

Emma Montlake  
Environmental Law Foundation