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To: Judicial Review Consultation
Ministry of Justice
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102 Petty France
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1st November 2013

Dear Sirs

Re: JUDICIAL REVIEW: PROPOSALS FOR FURTHER REFORM

The City of London Law Society ("CLLS") represents approximately 15,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees. This response to the Ministry of Justice's Consultation Paper entitled *Judicial Review: Proposals for Further Reform* has been prepared by the CLLS Planning & Environmental Law Committee.

Preamble

These comments upon the Consultation Paper address those questions that immediately concern the planning and environmental law practitioners who make up the membership of the Committee. Accordingly where no specific response is made to any particular question, it should not be assumed that the Committee either agrees or disagrees with its content.

Generally, the CLLS consider that this further set of proposals for the reform of Judicial Review from the Ministry of Justice is premature when the results of the earlier reforms introduced last July through the Civil Procedure (Amendment No 4) Rules 2013

(SI 2012/1412), and similarly the planning fast-track procedure introduced by the Administrative Court, have yet to be properly assessed. There appears to be a determination on the part of the Government to constrain the judicial review procedure for primarily political reasons. The articulation of the "three inter-related issues" of (i) the impact of judicial review on economic recovery and growth, (ii) the inappropriate use of judicial review as a campaign tactic; and (iii) the use of delays and costs associated with judicial review to hinder actions the executive wishes to take" is clear evidence of this. It is a matter of grave concern to the Committee as, in the absence of a written constitution, the process of Judicial Review, the successor to the prerogative orders, is fundamental to the protection of the rights of the citizen, and provides the "critical check on the power of the State". The Committee is astonished that such statements should emanate from the Ministry of Justice.

Responses to Questions 1 and 2

The concept of a specialist Planning and Environment Court is not a new one. Professor Malcolm Grant and Lord Woolf promulgated such an idea over twenty years ago, citing as examples the experience of such courts in New South Wales and in New Zealand. The idea was welcomed by the Law Society of England and Wales at that time. The reorganisation of the Lands Tribunal with the Upper Tribunal (Lands Chamber) has facilitated the creation of a specialist Planning Chamber.

It seems to be envisaged that the existing Lands Chamber will be re-named the Land and Planning Chamber and will exist as one tribunal. It would seem more appropriate to have a discrete specialist Planning Chamber as part of the Upper Tribunal, whose judges and members would be specialist planning judges, which would encompass both serving members of the Bench (High Court judges) and Deputy High Court Judges (QCs who specialise in planning law). The advantage, as envisaged in the Consultation paper, would be always to deploy a judge experienced in planning law. Whilst this usually now happens within the Administrative Court, the fact that it was necessary to introduce the fast-track procedure, demonstrates that it did not always happen and that there was, and still is, an element of lottery on the appointment of a judge to hear a planning case, depending upon the other pressures on the Administrative Court, particularly where there is an expedited hearing. This has been the experience of members of our Committee. In one instance where a rolled-up hearing was arranged a retired High Court Judge heard the matter as a "Deputy Judge". Whether it would still be necessary to continue with the fast-track procedure rather depends upon the assessment of its operation since inception. The new specialist court ought not to need a liaison judge to continue to act in this administrative role.

We would also suggest that its name should be the Planning **and Environmental** Chamber, as many cases now have a primarily environmental focus e.g. compliance with the Habitats Regs./Directive. Thus, in response to Question 2, there would be merit in including linked environmental permits, and also challenges to other orders that are necessary to enable a development to proceed e.g. highway/footpath stopping up orders.

Response to Question 3

Yes

Response to Question 4

Yes. See the examples that were provided as part of the various responses from the law societies and development representative bodies: BPF, London First, etc. to the last consultation process.

Response to Question 5

See our responses to Questions 1-3 in relation to planning and environmental cases.

Response to Question 6

No. Particularly as the definition of an NSIP appears to be a "moveable feast" in terms of its definition.

Response to Question 7

No

Response to Question 8

In the particular circumstances, set out in the question, we do not agree with legal aid continuing to be available for such challenges.

Responses to Questions 9-11

In terms of planning and environmental cases, the question of standing is not perceived as a problem. The permission stage acts as a filter and if a permission stage is also introduced for statutory challenges (see Question 3) then the likelihood of an exceptional case is further reduced. We are opposed to legislation to amend the test for standing as set out in the Senior Courts Act 1981 and the process provided in the Civil Procedure Rules.

In terms of Question 11, we are content to leave the matter to the courts, and do not support the Government's concern about the apparent widening of the interpretation of standing.

Response to Questions 14-16

Judicial review of planning decisions are primarily founded upon procedural irregularities. For instance, the failure to carry out an appropriate screening of a development as part of assessing the need for EIA is a procedural matter, but it is fundamental to the consideration of the package of documentation that comprises an application for planning permission, as is the steps taken to carry out an EIA. Accordingly, the focus in these questions on the threshold for a procedural flaw are inappropriate in the context of planning and environmental matters, as to decide upon the threshold of what constitutes a no difference procedural flaw can go to the heart of the proposal. We therefore oppose bringing forward consideration of the "no difference" arguments to the permission stage. The application of the principle must be based upon a full hearing of the case.

Response to Question 31

In relation to third parties and the award or otherwise of costs, it is normal for the developer to be joined as a party, or seek to be joined as a party, where a planning decision is being challenged. The challenge is made against the local authority or the secretary of state, as the originator of the decision. Often a local planning authority has neither the means in terms of resource or interest, or enthusiasm, in "defending" their action properly. The developer therefore seeks to intervene as a third party to protect their interest and investment. It has become practice that third parties are not entitled to an award of costs in such circumstances where such challenge is unsuccessful, even though it is their interest that is the most impacted. Moreover, the local planning authority is also more prone to agree a PCO.

Responses to Question 35-39

We can envisage circumstances where it would be necessary to "leapfrog" an appeal to the Supreme Court in relation to an NSIP or where the outcome would affect a large number of people. Where such infrastructure projects are involved, practice has shown that leapfrogging is already occurring. We therefore are equivocal of the need to codify the circumstances, as there will always be an exception not caught by the definition and doubt whether there would be so many such cases, that it needs to be formalised. To do so would inevitably provide opportunities for references to the ECHR.

Leapfrogging should be available from the specialist Land and Planning Chamber.

Yours faithfully

For and on behalf of

The City of London Law Society

THE CITY OF LONDON LAW SOCIETY
PLANNING & ENVIRONMENTAL LAW COMMITTEE

Individuals and firms represented on this Committee are as follows:

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