

RICHARD BUXTON SOLICITORS

ENVIRONMENTAL, PLANNING & PUBLIC LAW

Office A, Dale's Brewery
Gwydir Street
Cambridge CB1 2LJ

Tel: (01223) 328933

www.richardbuxton.co.uk
law@richardbuxton.co.uk

The Rt Hon Robert Jenrick MP
Secretary of State for Housing, Communities and Local Government
c/o Planning Casework Unit
5 St Philips Place
Colmore Row
Birmingham
B3 2PW

By email only: pcu@communities.gov.uk
cc to: Andrew.Lynch@communities.gov.uk
Gerry.Carpenter@communities.gov.uk
John.Oakes@communities.gov.uk

Your ref: PCU/RTI/H0900/3255949

Our ref: (SOU1/2)-MM
Email: mmcfeeley@richardbuxton.co.uk

25 February 2021

PRE-ACTION PROTOCOL LETTER THIS LETTER REQUIRES YOUR URGENT ATTENTION

Dear Minister,

1. This is a letter before action sent in accordance with the pre-action protocol for judicial review.

Claimant

2. We are instructed by South Lakeland Against Climate Change - Towards Transition ("**SLACC**"), a registered charity, of 92 Windermere Road, Kendal, LA9 5EZ.

Proposed Defendant

3. The proposed defendant is The Secretary of State for Housing Communities and Local Government ("the **Secretary of State**"), 2 Marsham Street, London, SW1P 4DF.

Partners: Richard Buxton* MA (Cantab) MES (Yale), Lisa Foster Juris D MSc (UEA) MA (York), Simon Kelly BA MSt (Oxon), Paul Taylor BA (Oxon)
Solicitors: Hannah Brown MA (Cantab), Matthew McFeeley BSc MPP Juris D, Ricardo Gama MMathPhil (Oxon), Lucy Cooter BA (Hons),
Sarah Knox-Brown MA (Hons)

Consultants: Paul Stookes* PhD MSc LLB; Solicitor and Practice Manager: Caroline Chilvers BA (Hons)

Office Manager: Kath Kusyn

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* Solicitor-advocate

Decision to be Challenged

4. The Claimant challenges the Secretary of State's ongoing refusal to reconsider whether to call in for his determination the application by West Cumbria Mining Ltd for development of a new underground metallurgical coal mine and associated development at Former Marchon Site, Pow Beck Valley and area from Marchon Site to St Bees Coast, Whitehaven, Cumbria, (Ref. PCU/RTI/H0900/3255949).

Date of Decision

5. Ongoing

Factual Background

6. This matter relates to the proposed development of a new underground metallurgical coal mine and associated works at the Former Marchon Site near Whitehaven, Cumbria ("**the Application**"). The Secretary of State will be familiar with the background to this matter and so it is not set out at length here. However, the brief background is as follows:
7. On 28 September 2020, the Planning Casework Unit at MHCLG ("**the PCU**") on behalf of the Secretary of State wrote to Cumbria County Council ("**the Council**") issuing a "holding direction" under Article 31 of the Town and Country Planning (Development Management Procedure) (England) Order 2015 directing that permission not be granted while the Secretary of State considered whether to exercise his powers under Section 77 of the Town and Country Planning Act 1990 ("**the 1990 Act**") to 'call in' the application for determination.
8. On 9 October 2020, SLACC wrote to the PCU asking the Secretary of State to call in the Application and providing submissions and evidence in support of this request.
9. On 6 January 2021, the Planning Casework Unit wrote to SLACC stating that the "Secretary of State has decided, having had regard to [the Department's call-in] policy, not to call in this application." On the same date a letter was sent to the Council by the Planning Casework Unit indicating the same and lifting the Article 31 Direction.
10. On 14 January 2021, we wrote to the PCU on behalf of SLACC providing certain new information which had not been available at the time of SLACC's call-in request. Inter alia, this email noted that the "annual emissions of this mine will exceed the available emissions in the Climate Change Committee's sixth carbon budget projections for the entire coal mining subsector upon commencement of its mining operations." It also noted that the Climate Change Committee's projections in relation to coking coal use in the UK are incompatible with the Council's assumption, in resolving to grant permission, that the need for coking coal in the UK will not significantly decrease over the coming decades prior to 2050. The email then set out short submissions why, in light of this additional evidence, the criteria in the call-in policy were met and the Application should be called in.
11. On 17 January 2021, an email was received from the PCU acknowledging

receipt of the 14 January 2021 reconsideration request.

12. On 18 January 2021, we emailed the PCU providing a further attachment containing certain data cited in our email 14 January 2021 “[f]or the avoidance of any doubt that the data cited will be among the new information considered by the Secretary of State.”
13. On 21 January 2021, we wrote again to the PCU. This email:
 - (a) Requested that the Secretary of State issue a holding direction, noting that failure to do so could render the Secretary of State’s powers nugatory and that (at that time) “press accounts indicate that the County Council may issue a decision notice very soon”; and
 - (b) Noted that we had become aware of a recent news article which had quoted an MHCLG spokesperson as saying “Planning decisions should be made at a local level wherever possible. This application has not been called-in and is a matter for Cumbria County Council to decide.” Our email noted that “This raises significant concerns that the Department is approaching the question of reconsideration with a ‘closed mind’ and without an impartial consideration of relevant planning issues.” and requested that the PCU assure our client in this respect.
14. On 29 January 2021, we received an email from the PCU attaching a letter of the same date. Both the email and the letter were identical in substance (with the exception that the email stated “see attached letter”) and stated:

*“Thank you for your email/letter, which has been carefully considered.
The decision of 6 January to not call-in is not being reconsidered.”*
15. On 2 February 2021, we wrote to the PCU noting, in summary, that:
 - (a) There was no indication that the Secretary of State had considered any of the new information we had provided, and, in fact, the language of the 29 January 2021 letter raised a strong implication that the Secretary of State had declined to reconsider his decision of 6 January 2021, rather than considering the new information provided by our client and determining that the call-in policy was not met; and
 - (b) There was no indication whether all of the emails we had sent had even been considered given that the letter and email referenced a singular “email/letter”.
 - (c) A 29 January 2021 letter from the Climate Change Committee to the Secretary of State constituted further new information, which the Secretary of State was asked to consider when reconsidering whether to call in the application. The letter then included further detail setting out how the Climate Change Committee letter underlined the extent to which the criteria in the call-in policy were met by this application.
16. On this basis, the 2 February 2021 letter asked the Secretary of State (in summary) to:
 - (1) Reconsider his decision whether to call in the Application;
 - (2) Confirm that the emails of 14, 18 and 21 January and their attachments

- were all considered before making the decision of 29 January 2021;
- (3) Confirm that the information contained in the 2 February 2021 letter and all information in these emails would be considered together in reaching a decision on the reconsideration request contained in the letter; and
 - (4) Provide reasons for any decision.
17. A response to the 2 February 2021 letter was requested within 14 days, i.e. by 16 February 2021, given the time-sensitive nature of the matter.
 18. On 9 February 2021, we wrote again to the PCU noting that we had received no acknowledgement that the 2 February letter had been received, despite our request for one. The 9 February 2021 letter also requested that the Secretary of State issue a holding direction to prevent his call-in powers from being rendered nugatory. Finally, our letter noted that a further news article, published that day, had quoted an MHCLG spokesperson as saying that "Planning decisions should be made at a local level wherever possible. This application has not been called in and is a matter for Cumbria County Council to decide."
 19. Since writing the 9 February 2021 letter, it has come to our attention that one or more MHCLG spokespeople has been quoted in almost identical fashion in other news outlets, indicating that this appears to be a form of words formulated and approved by MHCLG, and no mere 'one-off' accident. A few examples include:
 - (a) On 19 January 2021 a Sky News article relating to a hunger strike against the mine stated "A spokesperson for the department told Sky News: *"Planning decisions should be made at a local level wherever possible. This application has not been called-in and is a matter for Cumbria County Council to decide."*¹
 - (b) On 28 January 2021, an article in the ENDS Report stated "A spokesperson for the MHCLG said *planning decisions should be made at a local level "wherever possible" and that the application was "a matter for Cumbria County Council to decide". The department added that the planning application relates to metallurgical (coking) coal, rather than coal for electricity generation.*"²
 - (c) On 5 February 2021 an article in the Guardian entitled "Experts pile pressure on Boris Johnson over 'shocking' new coalmine" stated "A government spokesperson said: *"Planning decisions are made at a local level wherever possible. This application was not called in by the communities secretary and it is a matter for Cumbria county council to decide. As the business secretary set out previously, this planning application relates to coking coal, rather than coal for electricity generation, which is needed for industrial processes like steel and would otherwise need to be imported into the UK."*³
 20. It may be noted that at the time that each of these articles were published there was an active request for reconsideration before the Secretary of State.

¹ <https://news.sky.com/story/teenage-climate-activists-in-week-two-of-hunger-strike-over-new-cumbria-coal-mine-12191848>

² <https://www.endsreport.com/article/1705784/coal-mine-decision-sparked-whitehall-row-8-things-need-know>

³ <https://www.theguardian.com/environment/2021/feb/05/experts-pile-pressure-on-boris-johnson-over-shocking-new-coalmine>

21. On 12 February 2021, an email was received from a Decision Officer at the PCU acknowledging receipt of our letters of 2.2.21 and 9.2.21 and indicating that a “response will follow shortly.”
22. On 17 February 2021, having had no response within 14 days of our letter of 2 February 2021, we wrote to the PCU noting that we were instructed to prepare a pre-action letter if we did not receive a firm indication by 4pm on 18 February 2021 that the Secretary of State would provide a substantive response to our letter by 4pm on 19 February 2021.
23. On 18 February 2021, an email was received from a Decision Officer at the PCU stating that the announcement by the Council that it would be reconsidering the application at a future meeting of its Development Control and Regulation Committee meant that “[t]he time-sensitive nature of this issue has therefore diminished” and that a substantive response to our correspondence would be provided “shortly.”
24. Later on 18 February 2021 we responded noting that it was not accepted that the Council’s announcement significantly altered the urgency of the matter (for reasons explained therein) and noted that we were instructed to prepare a pre-action letter if we did not receive a firm indication by 19 February 2021 that a substantive response would be provided by 4pm on Monday 22 February 2021.
25. No further response has been received.

Details of the Proposed Grounds of Challenge

26. The Claimant challenges the decision on the following principal grounds:
 - (1) Error of law arising from the Secretary of State’s refusal to consider exercising the call-in power in section 77 of the 1990 Act, despite an express request to do so.
 - (2) Failure to take into account material considerations arising from the failure to have regard to the new information provided by the Claimant on 14 and 18 January 2021 and by the Climate Change Committee, on 29 January 2021.
 - (3) Failure to take into account a material consideration, namely the Secretary of State’s call-in policy; alternatively a failure to give cogent reasons for departing from that policy.
 - (4) Procedural unfairness arising from the failure to give reasons for the Secretary of State’s decision.

Ground 1 – Error of law arising from refusal to consider exercising the call-in power

27. This ground proceeds on the basis that the Secretary of State has declined to consider exercising his call-in power, despite the Claimant’s explicit request on the basis of the relevant new information provided by the Claimant and by the Climate Change Committee, and that he continues to decline to consider the exercise of his power. There are three reasons that the Claimant believes this to be the factual position:
 - (a) The language of the Secretary of State’s 29 January 2021 letter and accompanying e-mail;

- (b) The repeated public statements, given in January and February, set out above;
 - (c) The refusal of the Secretary of State to confirm whether he had declined to consider the exercise of this power.
28. Section 77 of the 1990 Act entrusts the Secretary of State with a power to call-in applications. Where a power is entrusted to a public body, the House of Lords has held that the public body will almost always have a duty to consider whether it should exercise its power: *Stovin v Wise* [1996] AC 923 at 950, per Lord Hoffmann. The Secretary of State is required to consider exercising his discretionary powers “if an express request to do so is made to him”, bringing to his attention matters that are said to bring that development within the relevant power: *Threadneedle Property Investments Ltd v Southwark LBC* [2013] Env LR 1 at §70.
29. This is what has occurred in the instant matter. On 14 January 2021, the Claimant brought to the Secretary of State’s attention new information that brought the development within the power to call-in the Application and expressly requested the Secretary of State to consider exercising his power. The Secretary of State’s refusal to consider exercising the power therefore amounts to an error of law.

Ground 2 – Failure to take into account material considerations

30. It is well established that a decision-maker must take into account matters which are “so obviously material” to a decision that failure to consider them amounts to an error of law: see, eg, *R(Samuel Smith Old Brewery) v North Yorkshire CC* [2020] PTSR 221 at §31.
31. The material brought to the Secretary of State’s attention by the Claimant in the emails of 14 and 18 January and letter of 2 February is so obviously material that a failure to take it into account in deciding whether to exercise the call-in power amounts to an error of law. In particular:
- (a) The publication of the Sixth Carbon Budget reports showed that the annual operational greenhouse gas emissions of this proposed mine would exceed the available emissions in the Climate Change Committee’s sixth carbon budget projections for the entire coal mining subsector upon commencement of its mining operations, and by 2026 would represent 3.7 times the total emissions available for all open coal mines in the UK;
 - (b) The latest expert scientific evidence, provide by the Climate Change Committee in the Sixth Carbon Budget, is that the need for coking coal will significantly decrease over the decades leading to 2050; and
 - (c) Exceptionally, the Climate Change Committee wrote to the Secretary of State expressing the view that the proposed new mine would “*have an appreciable impact on the UK’s legally binding carbon budgets*”; that a grant of planning permission would commit the UK to emissions for decades despite the fact that there may be no domestic use for coking coal after 2035; and the decision to refuse to call in the Application gave a “*negative impression of the UK’s climate priorities in the year of COP26.*”
32. Matters which are relevant to the Secretary of State’s exercise of the call-in power include that the application:
- may conflict with national policies on important matters;
 - is likely to give rise to substantial cross-boundary or national controversy;

- could have significant effects beyond their immediate locality; and
- may involve the interests of foreign governments.

In light of this, the information brought to the Secretary of State's attention by the Claimant and by the Climate Change Committee is "so obviously material" to consideration of whether to exercise the call-in power that the Secretary of State's failure to do so amounts to an error of law.

Ground 3 – Failure to take into account the Secretary of State's own policy

33. The Secretary of State has a policy in place which provides guidance on the criteria relevant to the decision to call-in. The Secretary of State is not bound by the policy, but is required to consider it when determining whether to call in an application and to have good reason to depart from that policy, given: (i) the principle of consistency and avoidance of arbitrariness; (ii) the duty to have regard to relevant matters; (iii) the need to give effect to legitimate expectations: see *R v SSHD ex § Urmaza* [1996] COD 497.
34. In *Westminster City Council v SSCLG* [2014] EWHC 708 (Admin) at §14 the Court emphasised that the discretion conferred by the Secretary of State by section 77 of the 1990 Act is very wide, but that the Secretary of State's judgment should be exercised "having regard to any policy in which he had identified the approach he will take to any call-in consideration". Mr Justice Collins stated: "If it can be shown that [the Secretary of State] has failed to have regard to his policy or has in any particular case misunderstood it, an error of law will have been established."
35. In the instant matter, the Secretary of State has failed to have regard to his policy, either by refusing to apply the policy at all, or by failing to consider whether the new information brought to the Secretary of State's attention against the indicators set out in the call-in policy. Accordingly, the Secretary of State has erred in law.

Ground 4 – Failure to Give Reasons

36. There is no general duty on the Secretary of State to give reasons for refusing to call-in a planning application. However, there may be circumstances where there is something "aberrant" in the particular decision which calls for explanation and thus requires reasons to be given: see *Oakley v South Cambridgeshire District Council* [2017] 1 WLR 3765 at §14. A decision by the Secretary of State to decline to consider the exercise of his powers of call-in, despite an explicit request to do so, amounts to something "aberrant" requiring reasons to be given.
37. In light of the Delphic nature of the Secretary of State's e-mail and letter of 29 January 2021 and the lack of clarity as to whether the Secretary of State had declined to consider the exercise of his power of call-in, the Claimant asked the Secretary of State to provide reasons. The Secretary of State has refused to do so, leading to procedural unfairness.

The Need for Expedition

38. As explained in our email to the PCU of 18 February 2021, in order to prevent the Secretary of State's powers to consider a call-in from being rendered nugatory, there is a need for expedition. If the Secretary of State refuses to issue a holding direction, the Claimant will have to seek expedition in order to

obtain a decision from the High Court before the County Council acts to render the Secretary of State's call-in power nugatory by issuing a decision notice. Expedition is therefore necessary to ensure that there is no doubt that Court will retain full power to order effective relief by the time judgment is given. If the claim is issued, we will therefore seek to have the standard judicial review timeframes significantly abbreviated.

Orders Sought

39. The following orders will be sought from the Court:
- (i) An order that the claim be expedited;
 - (ii) An order requiring the Secretary of State to consider whether to call-in for his determination the application by West Cumbria Mining Ltd for development of a new underground metallurgical coal mine (Cumbria County Council Ref. PCU/RTI/H0900/3255949);
 - (iii) An Aarhus Costs Order;
 - (iv) Costs.

Details of Legal Advisors Dealing with this Claim

40. Richard Buxton Solicitors
Office A, Dale's Brewery
Gwydir Street
Cambridge
CB1 2LJ

Attn: Matthew McFeeley

Tel: 01223 328933

Email: mmcfeeley@richardbuxton.co.uk

Counsel

41. Estelle Dehon, Cornerstone Barristers

Details of Interested Parties

42. Cumbria County Council
Cumbria House
117 Botchergate
Carlisle
Cumbria
CA1 1RD

Attn: Paul Haggin, Development Control Case Officer

Email: Paul.Haggin@cumbria.gov.uk

43. West Cumbria Mining Ltd
4th Floor, Oakfield House
35 Perrymount Road
Haywards Heath
West Sussex
RH16 3BW

Email: info@westcumbriamining.com

44. Please indicate whether the Secretary of State agrees that the above are interested parties in this matter. Should you consider that there are any further interested parties, please provide us with their details and an explanation of their interest.

Details of Information Sought

45. You are required to make full and frank disclosure in judicial review proceedings.
46. We therefore require full information on whether the Secretary of State has declined to consider the exercise of his call-in power and/or how the Secretary of State has considered the Claimant's request to the Secretary of State to call in the Application based on new material information.
47. Further, we ask the Secretary of State to provide answers to the following questions:
- (a) Was the Secretary of State advised as to the content of the new information submitted by the Claimant on 14 and 18 January 2021 before the Planning Casework Unit sent the e-mail and letter of 29 January 2021 to the Claimant?
 - (b) Was the Secretary of State at any point advised that he was not obliged to consider the exercise of his call-in power, despite the Claimant's explicit requests? If so, please provide this advice.

What the Secretary of State is requested to do

48. In order to avoid the need for the Claimant to issue the claim, the Secretary of State is asked to:
- (a) Issue a holding direction so that the Secretary of State can properly consider the information before him and decide whether to call in the Application;
 - (b) Confirm that the information previously submitted by the Claimant will be considered, together with the new information provided by the Claimant and by the Climate Change Committee; and
 - (c) Reconsider his decision whether to call in the Whitehaven mine application (Cumbria County Council ref. 4/17/9007; PCU ref. PCU/RTI/H0900/3255949) based on that information, in light of the Secretary of State's call-in policy.

Other applications

49. If the claim proceeds the Claimant will apply for a protective costs order (PCO) pursuant to CPR 45.43 on the basis that the claim is an environmental matter: *Venn v Sec State CLG* [2015] 1 WLR 2328. If you disagree that this is an Aarhus matter or with the making of a PCO please give your reasons.

Address for Reply and Service of Court Documents

50. Richard Buxton Solicitors
Office A, Dale's Brewery
Gwydir Street
Cambridge
CB1 2LJ

Attn: Matthew McFeeley

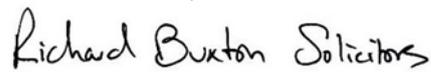
Email: mmcfeeley@richardbuxton.co.uk

Proposed reply date

51. **In light of the need for expedition, the Secretary of State's response is requested as soon as possible and in any event within 7 days, i.e. by 4 March 2021.** This is shorter than the usual time frame for response, but the Claimant considers this is both reasonable and practicable in the circumstances:

- (a) Seven days is reasonable given the time-sensitive nature of this matter as set out above; and
- (b) Seven days is practicable as the legal points and requests for information made in this letter have been raised by the Claimant in correspondence with the Secretary of State on a number of previous occasions (and were all raised by 9 February 2021 at the latest).

Yours faithfully,


Richard Buxton Solicitors
Environmental, Planning and Public Law

cc: Cumbria County Council, Attn: Paul Haggin
West Cumbria Mining