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# Grounds of Appeal

Brunswick Centre, Bloomsbury, London, WC1N 1BS

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Lazari Properties 2 Limited

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# Appeal Statement

The Brunswick Centre, Bloomsbury

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## 1. Introduction

- 1.1. These Grounds of Appeal have been prepared by Savills (UK) Limited on behalf of Lazari Properties 2 Limited ('the **Appellant**') in respect of an appeal submitted under Section 195 of the Town and Country Planning Act 1990 (the '**Act**') following the failure by Camden Council ('the **Council**') to give notice of their decision on the application described below.
- 1.2. The Appellant is the owner of the Brunswick Centre. An application submitted by the Appellant pursuant to Section 191 of the Act, which sought to certify the existing lawful use of the Brunswick Centre, was registered by the Council as valid on 2 September 2020. It was assigned the reference number: 2020/3988/P ('the **2020 Application**').
- 1.3. The 2020 Application sought to confirm that the following is lawful<sup>1</sup>:
  - i. The use of the floorspace<sup>2</sup> at the Brunswick Centre within Class E of Schedule 2 to the Town and Country Planning (Use Classes) Order 1987 (the '**UCO**'); and
  - ii. That such use can take place without compliance with Condition 3 attached to Planning Permission: PSX0104561.
- 1.4. Article 39(10) of the Town and Country Planning (Development Management Procedure) (England) Order 2015 required the Council to give the Appellant written notice of their decision within a period of eight weeks beginning with the day immediately following that on which the 2020 Application was received. A decision was therefore due to be notified by the Council by 28 October 2020.
- 1.5. Over the lifetime of the application, the Appellant has tried to work proactively and constructively with the Council, providing additional information and evidence to assist with the process of determination. All efforts have been made by the Appellant to enable the Council to process this application at the local level, but unfortunately that has not been possible.
- 1.6. The Council has erroneously interpreted the requirements for the evidence required to certify the use as being 'lawful' and has not provided any of its own evidence to counter that provided by the Appellant.
- 1.7. In order to comprehensively assess the lawful nature of the existing use, this Appeal Statement is structured as follows:

**Section 2.0**      The Appeal Site

**Section 3.0**      Assessment of the Lawful Nature of the Existing Use

**Section 4.0**      Summary and Conclusions

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<sup>1</sup> The description of development on the validation letter was incorrect and the Council was notified.

<sup>2</sup> There are certain units at the Centre that are not purported to be within Class E and these are identified subsequently in this Statement.

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- 1.8. The 2020 Application was submitted in order to provide certainty for the Appellant, and in particular future tenants, that floorspace at the Brunswick Centre can be occupied and used flexibly within Class E. It will help facilitate the re-occupation of vacant floorspace and contribute towards its vitality and viability (a strategic policy objective of the development plan and the National Planning Policy Framework ('NPPF')).
- 1.9. The use of the floorspace within Class E and the flexibility to be certified through the 2020 Application is entirely consistent with the very reason the Government enacted the most recent changes to the UCO<sup>3</sup>.
- 1.10. The Explanatory Memorandum published along with the secondary legislation explicitly stated that the revisions to the UCO would better reflect the diversity uses found within town centres. It also stated that bringing the principal 'main town centre' uses together into a single use class will: *'...allow movement between them and will give businesses greater freedom to adapt to changing circumstances and to respond more quickly to the needs of their communities'*<sup>4</sup>.
- 1.11. For the reasons set out within this Statement, the Appellant submits that if the Council had refused the 2020 Application, its refusal would not have been well-founded. Accordingly, we respectfully request that this appeal is allowed and a certificate of lawfulness of existing use or development be issued in accordance with the terms for which it has been applied.

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<sup>3</sup> The Town and Country Planning (Use Classes) (Amendment) (England) Regulations 2020 (Statutory Instrument 2020 No. 757).

<sup>4</sup> See Paragraph 7.3 of the Explanatory Memorandum to The Town and Country Planning (Use Classes) (Amendment) (England) Regulations 2020.

## 2. The Appeal Site

- 2.1. The Appeal Site is floorspace at the Brunswick Centre in Bloomsbury (**'the Site'**).
- 2.2. The Brunswick Centre is a commercial destination comprising a mix of retail, service and leisure uses configured across ground and two basement levels. There are residential uses above.
- 2.3. There is pedestrian access to the commercial floorspace at the Site from all of the surrounding streets including: Handel Street, Hunter Street, Bernard Street and Marchmont Street.
- 2.4. There is a basement car park and servicing which is accessed via Marchmont Street with egress via Hunter Street
- 2.5. The full extent of the Site is illustrated on the Site Location Plan (BSC/SLP/2020 – Site Location Plan) and the configuration of the commercial floorspace is illustrated on the general arrangement plans included at **Appendix 1**.
- 2.6. As set out in the documents submitted within the 2020 Application, the Site does not include the: Cinema or Unit 36, because both of those units fall within a 'Sui Generis' classification. The two units are identified on the Plans at **Appendix 2**.
- 2.7. The Brunswick Centre is formally identified as a designated retail centre within Camden's adopted Local Plan (2017). The Centre is designated as a 'Neighbourhood Centre' and therefore 'main town centre' uses and other development that contributes towards its vitality and viability is supported by Policy TC2 of the Local Plan and the strategic policies within the NPPF.

### Relevant Planning History

- 2.8. There is an extensive planning history associated with the Site given its age, however the majority is not relevant to the consideration of the lawful use of the floorspace.
- 2.9. On 1 September 2003, planning permission was granted for the following development:

*'Refurbishment of The Brunswick Centre; the forward extension of the existing retail units fronting the pedestrian concourse; the creation of a new supermarket (Class A1) across northern end of the pedestrian concourse; creation of new retail units (Class A1) within redundant access stairs to the residential terrace; erection of new structure above Brunswick Square for potential alternative use as retail (Classes A1, A2 and A3), business (Class B1) or as non-residential institutions (Class D1); redesign of the cinema entrance; redesign of existing steps and ramps at the Brunswick Square, Handel Street and Bernard Street entrances, removal of two existing car park entrances at pedestrian concourse level, installation of retail display windows within Bernard Street elevation, redesign of the existing southern car park stairway; replacement of waterproofing layers to the pedestrian concourse and the residential terrace; concrete repair works and introduction of new hard and soft landscaping surfaces and works'* (App Ref: PSX0104561) (the **'2003 Permission'**).

- 2.10. The 2003 Permission granted provision for a flexible use of the floorspace at the Site including for uses within: Classes A1, A2, A3, B1 and D1<sup>5</sup>. It provides the primary, operative controls for the commercial floorspace at the Site, which was the focus of the 2020 Application and this appeal.
- 2.11. The 2003 Permission was granted subject to 22 planning conditions and a legal agreement, made pursuant to Section 106 of the Act, dated 1 September 2003 ('**2003 Agreement**'). The 2003 Agreement does not impose any ongoing controls on the permitted use of the floorspace.
- 2.12. A series of the conditions attached to the 2003 Permission imposed controls on the operation of the floorspace (in terms of matter such as land use, trading hours and noise outputs). These included:
- C3: A maximum of 40% of the retail floorspace equating to 3,386 sq. m (excluding the supermarket and eye-catcher) is permitted to be used within Use Classes A2 and A3.
  - C4: The permitted use of the 'eye catcher'<sup>6</sup>.
  - C5: The supermarket shall only be used for 'retail purposes'.
  - C11: Units 36, 38, 40, 42 and 69 shall not be occupied by cafes or restaurants.
- 2.13. A copy of the 2003 Permission is included at **Appendix 3**.
- 2.14. The 2003 Permission continues to control all of the floorspace at the Brunswick Centre other than Unit 36.
- 2.15. On 8 November 2013, a planning application was approved at Unit 36 for the: '*Change of use of retail units (Class A1) to a beauty treatment unit (Sui Generis)*' (Ref: 2013/5725/P) ('**2013 Permission**'). The 2013 Permission was granted subject to three conditions and a copy is included at **Appendix 4**.
- 2.16. As set out above, the Cinema and Unit 36 are excluded from the Site and the use to be certified as part of this Appeal as the floorspace within those two premises is acknowledged to fall within the 'Sui Generis' classification.
- 2.17. The rest of the planning history for the Site is not considered to be of any material relevance to the determination of this appeal.

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<sup>5</sup> The 2003 Permission only related to physical works to the entrance to the 'cinema' rather than granting specific provision for its use.

<sup>6</sup> Note that the 'eye catcher' floorspace (which was to be located above the entrance to the 'cinema') was not developed at the Centre.

### 3. Assessment of the Lawful Nature of the Existing Use

- 3.1. As set out above, the 2020 Application seeks to certify that the following is the existing lawful position:
- i. The use of the floorspace at the Site is within Class E; and
  - ii. Such use can take place without compliance with Condition 3 attached to Planning Permission: PSX0104561.
- 3.2. The validation letter issued by the Council on 27 October 2020 erroneously refers to 'proposed work' and a change of use. As per the application documents, the application relates to an 'existing use' (submitted pursuant to Section 191 of the Act) and the only change is due to the recategorisation of the UCO.
- 3.3. Below we provide the justification and evidence to support the Appellant's position on the lawful status of the floorspace and its operation.

#### Use within Class E

- 3.4. On 1 September 2020, the Town and Country Planning (Use Classes) (Amendment) (England) Regulations 2020 (Statutory Instrument 2020 No. 757) was laid before parliament by the Government. It established a series of changes to the UCO in England to simplify the classification of commercial uses.
- 3.5. The effect of the new legislation was to revoke Use Classes A, B1 and D and replace those classes with a new, single classification covering 'Commercial, business and service' uses (Class E).
- 3.6. The amendments made by the Statutory Instrument came into force on 1 September 2020.
- 3.7. As set out above, the established use of the floorspace at the Site was classified within Use Classes A1, A2, A3, B1 and D1 of the UCO prior to 1 September 2020. The uses were established by the 2003 Permission.
- 3.8. A Schedule of the units comprising the Site and their planning use as at 31 August 2020 was provided by the Appellant in the form of a Statutory Declaration by Leonidas Lazari, a Director of the Appellant<sup>7</sup>.
- 3.9. A copy of the Declaration and Schedule is included at **Appendix 5**.
- 3.10. All of the uses of the units at the Site are now correctly defined as an operation within Class E of the UCO.
- 3.11. In correspondence between the Appellant and the Council regarding the 2020 Application, the Council has demonstrated a fundamental misunderstanding of the lawful position in respect of the use of the floorspace at the Site.

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<sup>7</sup> The Statutory Declaration was submitted formally to the Council by email on 19 February 2021.

- 3.12. Both professional officers and the Council's solicitor have stated a requirement for the Appellant to demonstrate that the floorspace has been in continuous use for an operation within Class E for in excess of ten years.
- 3.13. This type of evidence is only required where a use is asserted as becoming lawful over the passage of time<sup>8</sup>. It is not required in an instance such as this where the relevant uses benefit from an express grant of planning permission (the 2003 Permission). The 2003 Permission is *prima facie* evidence of the authorised use of the individual premises at the Site. The actual use of the premises is consistent with the authorised use and is therefore lawful.
- 3.14. The above is particularly the case given that there has been no assertion by the Council, let alone any evidence, that any of the units have been operating in breach of the 2003 Permission.
- 3.15. At no stage has the Council initiated any formal enforcement action at the Site in respect of an alleged breach of planning control relating to an unlawful use (i.e. a land use operating beyond those expressly allowed by the 2003 Permission). That is not surprising since there have been no such breaches at the Site.
- 3.16. There is no evidence from the Council or any other party that any of the floorspace at the Site has or is being used for a purpose that does have an express planning permission.
- 3.17. Notwithstanding the above, the Appellant has provided comprehensive evidence to demonstrate that the use of the floorspace at the Site accords with the 2003 Permission and there has been no unlawful change of use which would preclude the designation of any of the units at the Site within Class E. This evidence<sup>9</sup> includes:
- i. A statutory declaration of uses as at 31 August 2020 (**Appendix 5**);
  - ii. A tenancy schedule for the Site including planning use for a period that exceeds 10 years (see **Appendix 6**); and
  - iii. Details of the Council's own survey of land uses within its defined retail centres (undertaken annually between 2010 – 2018) which demonstrates that the floorspace at the Site has operated throughout that period in accordance with the parameters of the 2003 Permission (see **Appendix 7**).
- The Council's independent surveys confirm that the use of the premises at the Site have been for uses within Classes A1, A2, A3 and D1.
- 3.18. The vast majority of the tenants at the Site are national multiples and their business model and nature of operations are well known and understood. For example, 'retailers' include French Connection, Gap, Vodafone, Boots, Superdrug and Specsavers; 'financial services' include Halifax and HSBC and 'restaurants' include Nandos, Giraffe and Carluccios.

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<sup>8</sup> Namely an authorised change of use operating without enforcement action for 10 years in accordance with Section 171B(3) of the Act.

<sup>9</sup> The Tenancy Schedule and details of the Council's own surveys were submitted formally to the Council by email on 1 April 2021.

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- 3.19. In light of the above, the Appellant submits that:
- a. The units at the Site are being lawfully used and operated in accordance with the uses permitted by the 2003 Permission; and
  - b. The use of each unit at the Site now falls within Class E of Schedule 2 to the UCO.

3.20. To assist with the consideration of this Appeal, a series of example certificates are enclosed from other local authorities which have proactively certified shopping centres can be used lawfully within Class E. A series of examples including decisions from: Thurrock, Warrwick, Warrington and Welwyn Hatfield are included at **Appendix 8**.

3.21. These example certificates support the nature of application submitted by the Appellant. The Council has asserted that individual applications would be required for each individual unit at the Site. That is simply not correct, particularly given all of the units at the Site are controlled by a single planning permission (the 2003 Permission) which governs their use and operation<sup>10</sup>.

### Operation without Compliance with Condition 3 of the 2003 Permission

- 3.22. As set out in Section 2, the 2003 Permission was granted pursuant to a series of planning conditions which sought to control certain aspects of the operation of the floorspace at the Centre and Site.
- 3.23. The 2020 Application seeks to confirm that, given the changes to the UCO, Condition 3 attached to the 2003 Permission no longer provides an enforceable control given its specific wording.
- 3.24. This appeal therefore seeks to confirm that the continued use of the floorspace at the Site without compliance with Condition 3 of the 2003 Permission is lawful.
- 3.25. Condition 3 states:

*'Up to a maximum of 40% of the retail floorspace equating to 3,386 sq. m (excluding the supermarket and eye-catcher) is permitted to be used within Use Classes A2 and A3 of the Town and Country Planning (Use Classes) Order, 1987, or in any provision equivalent to that Class in any statutory instrument revoking and re-enacting that Order.'*

- 3.26. It is the Appellant's position that Condition 3 no longer imposes any continuing restriction or limitation given that all of the floorspace at the Site now operates under the same use class (Class E).
- 3.27. Submitted with the 2020 Application was a written opinion from Leading Counsel (Paul Tucker QC and Stephanie Hall of Kings Chambers), which confirms the Appellant's position in this regard. A copy of the Opinion is included at **Appendix 9**.
- 3.28. The Opinion confirms the following:

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<sup>10</sup> Except for Unit 36 which is excluded from the terms of this application as set out in Section 2.0.

- i. The existing land use of the floorspace at the Site is now correctly defined as falling within Class E;
  - ii. Condition 3 does not include any wording that removes the rights to change use without the need for express consent to do so;
  - iii. As all relevant uses now fall within Class E of the UCO, the floorspace threshold within the Condition can no longer act as a barrier to potential uses; and
  - iv. The wording of Condition 3 includes specific provision to incorporate the new Class E into the Condition (i.e. the references to Classes A2 and A3 are automatically replaced with Class E).
- 3.29. Condition 3 now effectively states that up to 40% of the floorspace can be used within Class E (which is the same primary and permitted use for the rest of the floorspace at the Site). The rationalisation of the UCO to create a single classification for 'Commercial, business and service' uses renders the threshold limitation within Condition 3 meaningless.
- 3.30. In short, all of the floorspace at the Site can be used within Class E.
- 3.31. Given that the explicit intention of the changes to the UCO was to increase flexibility and enable dynamic movements between commercial uses without the requirement for planning permission<sup>11</sup>, the effect at the Site is consistent with those objectives.
- 3.32. It follows that the continued use of the floorspace without compliance with Condition 3 is lawful. Put another way, Condition 3 no longer imposes an enforceable control over the amount or type of land use at the Site, which can be for any operation within Class E.
- 3.33. As set out in the covering letter submitted with the 2020 Application, other conditions attached to the 2003 Permission remain active and enforceable. For example, Condition 11 states that a series of specific units shall not be occupied as a 'restaurant' and Condition 5 states that the supermarket unit shall only be used for 'retail'. Those conditions can still be afforded proper meaning and controls within the new rationalised Class E framework and the Appellant does not seek to contest this.

### Processing and Assessment of the 2020 Application

- 3.34. Section 191(4) of the Act states that, if a local planning authority is provided with information satisfying them of the lawfulness at the time of the application of the use, operations or other matter described in the application, or that description as modified by the local planning authority or a description substituted by them, they shall issue a certificate to that effect.
- 3.35. The Planning Practice Guidance ('PPG') provides further guidance on how an application for a certificate of lawfulness should be assessed<sup>12</sup>. It states:

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<sup>11</sup> Section 55(2)(f) of the Act and Article 3(1) of the UCO are explicit that moving between operations within the same use class is not defined as 'development'.

<sup>12</sup> Paragraphs 006 (Reference ID: 17c-006-20140306) and 009 (Reference ID: 17c-009-20140306).

- The applicant is responsible for providing sufficient information to support an application, although a local planning authority always needs to co-operate with an applicant who is seeking information that the authority may hold about the planning status of the land. A local planning authority is entitled to canvass evidence if it so wishes before determining an application. If a local planning authority obtains evidence, this needs to be shared with the applicant who needs to have the opportunity to comment on it and possibly produce counter-evidence.*
- In the case of applications for existing use, if a local planning authority has no evidence itself, nor any from others, to contradict or otherwise make the applicant's version of events less than probable, there is no good reason to refuse the application, provided the applicant's evidence alone is sufficiently precise and unambiguous to justify the grant of a certificate on the balance of probability.*
- A local planning authority needs to consider whether, on the facts of the case and relevant planning law, the specific matter is or would be lawful. Planning merits are not relevant at any stage in this particular application or appeal process.*

- 3.36. The relevant threshold for the assessment of an existing lawful use is on 'the balance of probability'. The PPG is also explicit that, where the local planning authority has no evidence to the contrary, the applicant's evidence should be accepted where it is sufficiently precise.
- 3.37. The Appellant's submissions in terms of information well exceeds the 'balance of probability' test and accords with the requirement to be precise and unambiguous. For example, the tenancy schedule provided at Appendix 6 charts the operation (operator and land use) for each unit at the Site for well over ten years and is corroborated by the Council's own surveys for at least eight years.
- 3.38. This Appellant's position is supported by solicitors Herbert Smith Freehills ('HSF'), who undertook an assessment of the evidence provided by the Appellant as part of the 2020 Application. A copy of a letter sent by HSF to the Council on 12 May 2021 is included at **Appendix 10**.
- 3.39. The Council however continues to assert the Appellant should provide further evidence to justify the lawful use of the floorspace at the Site. For example, Officers have suggested that copies of individual leases for each unit should be provided. As set out within the correspondence from HSF, this is not required to establish the use for planning purposes, particularly given the conclusive evidence that has already been provided.
- 3.40. The Council has also stated that individual applications will be required for each individual unit. As set out above, this is not correct given the relevant planning history of the Site and the evidence provided by the Appellant (which demonstrates the lawful nature of the use of each unit at the Site).
- 3.41. The position now being adopted by the Council is contrary to that which was established between the parties in December 2020.
- 3.42. The case officer (Gary Bakall) issued correspondence, dated 8 December 2020, confirming that the Council endorsed the position that the Site falls within Class E and that Condition 3 no longer imposed a

restriction on the amount of floorspace for 'financial and professional' or 'restaurant' (formerly Classes A2 and A3).

- 3.43. The Council's planning lawyer (Sam Woodhead) issued further written confirmation, dated 18 December 2020, that the Council agreed the floorspace at the Site can be used for Class E purposes subject to:
- i. Compliance with all conditions in the planning permission dated 1 September 2003 (ref: PSX0104561) save for Condition 3.
  - ii. Confirmation that all units within the centre were in use on 31 August for A1, A2, A3, or B1 purposes.
- 3.44. A copy of the email chain of correspondence is included at **Appendix 11**.
- 3.45. The latest correspondence from the Council which seeks to retract from the original areas of agreement is set out in the email chain of correspondence included at **Appendix 12**.
- 3.46. The Council confirmed on 30 April 2021 that it was instructing its own Counsel to provide further legal opinion on the matters of principle. However, despite the assurances from Neil McDonald (Team Manager, South) that the advice '*...shouldn't take long to turn around*', it remains outstanding at the time of the lodging of this appeal. The decision to seek legal advice in April 2021 must be viewed in the context that the application was originally registered on 2 September 2020 and due a decision by 28 October 2020.
- 3.47. A copy of the email chain of correspondence demonstrating the continued delays to the process are included at **Appendix 13**.
- 3.48. The Appellant has attempted to work proactively and constructively with the Council at all stages of the 2020 Application. It has provided various different pieces of evidence to try and meet the request from the Council to assist with its consideration of the lawful use and its decision making.
- 3.49. It is the Appellant's position that the evidence before the Council is more than sufficient to satisfy the requirement of Section 191(4) of the Act and that if the Council had refused the 2020 Application, their refusal would not have been well-founded or sustainable.
- 3.50. This appeal has been lodged as a matter of last resort. There is no indication that the Council has the intention to resolve and determine the application in a reasonable timeframe and in accordance with its obligations established by the primary legislation.

## 4. Summary and Conclusions

- 4.1. The 2020 Application seeks to certify that:
- i. The use of the floorspace at the Site is within Class E of Schedule 2 to the Town and Country Planning (Use Classes) Order 1987 (the 'UCO'); and
  - ii. That such use can take place without compliance with Condition 3 attached to Planning Permission: PSX0104561.
- 4.2. The Appellant has provided the Council with clear and unambiguous evidence as part of its submissions linked to the 2020 Application. It has included a statutory declaration relating to the current uses, comprehensive details charting use over time and independent evidence prepared by the Council which corroborates the Appellant's position.
- 4.3. The Council has provided no counter evidence of its own which would make the substantial and compelling evidence of the Appellant any less likely.
- 4.4. In the 2020 Application and in these Grounds of Appeal, the Appellant has demonstrated 'on the balance of probability' that the following is the lawful existing use of the floorspace at the Site:
- i. The floorspace at the Site was granted express permission for the various 'main town centre' uses which were in operation on 31 August 2020. Those uses are now correctly defined as falling within Class E of Schedule 2 to the UCO; and
  - ii. The floorspace can operate without compliance with Condition 3 attached to the 2003 Permission. The floorspace limitations no longer impose any enforceable controls given the amendments to the UCO and all floorspace at the Site being permitted for use within Class E.
- 4.5. The Appellant accepts, and does not wish to contest, that the other conditions imposed by the 2003 Permission, which provide ongoing controls, can still be afforded a proper meaning and remain effective and binding on the Site.
- 4.6. The Appellant's position is supported by a legal review from HSF and written advice from Leading Counsel (Paul Tucker QC of Kings Chambers).
- 4.7. As set out above, Class E was introduced to better reflect the diversity of defined retail centres and to increase flexibility to better meet commercial requirements and the demands of local communities. It is intended to facilitate greater adaptability on our high streets to help increase vitality and viability. The grant of this certificate would accord directly with the intended effect of the amendments to the UCO in September 2020.
- 4.8. It is the Appellant's position that the evidence before the Council was more than sufficient to satisfy the requirement of Section 191(4) of the Act in respect of the 2020 Application. For the reasons set out in these Grounds of Appeal, the Appellant submits that if the Council had refused the 2020 Application, their

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refusal would not have been well-founded. We respectfully request therefore that this appeal be allowed and the certificate issued.

- 4.9. An application for the Appellant's full costs is made concurrently with the submission of this Appeal. The application is made on the basis of the Council's 'unreasonable behaviour' which has resulted in the Appellant being exposed to substantial and unnecessary costs and delays.
- 4.10. The Council's approach has frustrated the Appellant's ability to proactively manage the Site and secure new tenants in line with the flexibility envisaged and supported by the changes to the UCO.
- 4.11. The full justification for the application for costs is included in a separate document which is lodged as part of this wider submission.