LAZARI PROPERTIES 2 LIMITED

THE BRUNSWICK CENTRE, BLOOMSBURY, LONDON, WC1N 1BS

Appeal Ref: APP/X5210/X/21/3277179

Reply to the Council's Response to the Appellant's Costs Application

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1. This note sets out the appellant's reply to the Council's response to the application by Lazari Properties 2 Limited for a full award of costs in relation to the appeal.

2. The Council's response runs to more than 6,500 words and the Council's written representations are in excess of 14,000 words, excluding appendices. These documents were received from the Council on 2 September 2021, more than two months after the appellant submitted its appeal and exactly one year after the appellant submitted its application for a certificate of lawfulness.

3. Prior to receipt of these documents, the Council has never indicated that it was minded to refuse the appellant's application (in contradiction to what is said at paragraph 4.4 of the Council's response). Nor had the voluminous information and allegations contained in these documents ever been disclosed to the appellant, much of which is at odds with the statements made to the appellant during the application process. By way of example, on 8 December 2020, Gary Bakall, Principal Planner stated as follows in an email to the appellant's agent:

> *"We agree with your Counsel opinion that the recent changes to the UCO in respect of condition 3 of planning permission PSX0104561 does allow for the Brunswick [Centre] to operate within Class E not in compliance with this condition, i.e. no restriction on A2-financial and professional or A3-restaurant."*

4. That statement is, in terms, the certificate that the appellant is seeking and demonstrates that the Council could have determined the appellant's application 10 months ago. However, the Council has now reneged from its previous position and is engaged in an ex post facto justification of its unreasonable behaviour without proper regard to the reality of the correspondence between the parties prior to the appellant's reluctant decision to proceed with this appeal.

5. There are a number of allegations made in the Council's response about the appellant and the appellant's agent that are simply not borne out by the correspondence, and which are deeply regrettable. The appellant is accused of being "aggressive and uncooperative", "high-handed", "dismissive", "misleading", of making assertions that are "not true", of "chancing it" and of "poor conduct". None of these pejorative allegations is justified and it is both unfair

and unhelpful for a public authority to characterise the appellant's exercise of its lawful rights in this way.

6. The truth of the situation is that the appellant sought clarification of the impact on its premises of the amendments to the Use Classes Order very promptly after they came into effect on 1 September 2020. Faced with empty retail premises due to the Covid-19 pandemic, and the consequent serious financial impact on its business, the appellant understandably wished to understand its lawful options as a result of the government's stated intention to provide greater flexibility to help high streets and town centres adapt quickly to what consumers and businesses need. Rather than take action precipitately, the appellant sought to work prospectively with the Council to obtain certainty and establish a shared understanding of the position. It is bizarre that it should be criticised for doing so.

7. The determination period for an application for a certificate of lawfulness is eight weeks. The appellant thus reasonably expected to have received a decision from the Council by the end of October 2020. In fact, the application was only *validated* by the Council on 27 October 2020, the day before the expiry of the determination period. On 30 November 2020, Gary Bakall emailed the appellant's agent to say that he was intending to write up the application that week. The appellant therefore anticipated that a decision would be issued promptly thereafter. No substantive comments on the application had been received from the Council by that time.

8. On 8 December 2020, in the email referred to in paragraph 3 above, Gary Bakall suggested that the best way forward was for the application to be amended so that it only specified condition 3 and the units that could change uses within Class E. The appellant's agent responded the next day to confirm that the amendment being sought had in fact already been stated in the covering letter for the application, but that the appellant was willing to make the point clearer or to agree the specific wording for the use on the certificate if necessary. Such wording was proposed on 14 December 2020.

9. A series of emails were then exchanged between various officers at the Council and the appellant's agent. The appellant's agent responded promptly, politely and constructively to every request made by the Council and sought to speak to officers directly whenever possible in order to address any misconceptions or misunderstandings. However, it will be apparent from a review of the relevant correspondence that the appellant's agent frequently had to chase Council officers in order to progress the application and that points were often raised by officers that had already been addressed in previous correspondence or in the original application itself. Understandably, this has led to frustration at the lack of progress and the serious ongoing impact on the appellant's business.

10. On 13 April 2021, Gary Bakall stated that *"physical evidence"* would be required for a single planning unit to confirm the lawful use for the past 10 years to show that it was immune from enforcement action and still in compliance with other planning conditions. It is not clear what was meant by "physical evidence", but it is apparent from this statement that the Council had fundamentally misunderstood the application that was before them. The appellant has never sought to argue that the premises in question were lawful as a result of continuous use for 10 years and therefore immune from enforcement action. No change of use was ever involved, only the expansion of available uses by virtue of Parliament's introduction of Class E.

11. Instead, the application simply sought confirmation that the premises could be used in accordance with Class E following the introduction of that use class on 1 September 2020. This was explained to the Council in an email from the appellant's agent on 20 April 2021. A letter from the appellant's solicitors was sent to the Council on 12 May 2021 setting out further details of the legal position.

12. There followed a period of further delay over three months while the Council took legal advice from Counsel. Assurances were frequently given by Council officers to the appellant that the application would be determined imminently, but those assurances were consistently breached:

    a. Email from Neil McDonald dated 13 May 2021: *"it is still hoped that we will have the advice by next week … However if there is any delay we will let you know and hope you will be able to grant us a short extension."*

    b. Email from Neil McDonald dated 20 May 2021: *"We have received correspondence from our Counsel which raises more queries at this point which need to be cleared up before she can come to a definitive view. We are working hard to answer these mindful of your need for urgency."*

    c. Email from Neil McDonald dated 24 May 2021: *"It would be preferable if you could bear with us until we have established more clarity on certain issues and can issue you with a decision … this may take us into next week although I certainly don't see it going beyond that in order for us to come back to you with our definitive position."*

    d. Email from Neil McDonald dated 4 June 2021: *"what with it being half term and other reasons, the key players have not been around to progress this. However, we will reflect on where we've got to on the further information Counsel has requested next week and hopefully then be in a position to definitively confirm*

which way we are minded to go on this one. … I can update you as to the position the middle of next week which may provide you with more clarity."

e. Email from Neil McDonald dated 10 June 2021: *"I believe [Counsel] will have everything she requires now to provide us with an opinion which by my reckoning should be just a few more days away."*

13. Given that the Council appeared to have no intention of determining the application within a reasonable timeframe, the appeal was lodged as a matter of last resort on 14 June 2021. This was done reluctantly and very much against the appellant's preference for the application to be determined locally. As explained above, it then took a further 11 weeks for the Council finally to advise the appellant that it would have refused the application. This belies the assertion made at section 5.3 of the Council's response that the appellant *"could, and should, have waited a few days"* rather than lodging the appeal.

14. The Council was thus in a position to *grant* the certificate of lawfulness based on its own stated position in December 2020. Its belated decision that it would have *refused* the application instead is stated to be based on the following reasons for refusal (in summary):

a. Planning conditions imposed on the original grant of planning permission remain in force and prevent the use of the premises in accordance with the full range of uses authorised by Class E.

b. There is insufficient evidence that the premises were lawfully operating within a use that on 1 September 2020 fell within Class E.

c. The application lacked clarity.

15. The appellant disputes each of these reasons and will address them at the hearing. However, for the purpose of this costs application, it is clear that the Council could have arrived at all three of these reasons for refusal many months ago and none of them provides a proper justification for the Council's failure to determine the application either promptly or at all. This behaviour was unreasonable. The Council's delay and failure to determine the application resulted in the appellant's reluctant decision to submit an appeal and to seek a full award of costs. The Council's behaviour is not justified by its retrospective statement that it would have refused the application anyway. Had it done so in a timely manner, the appellant would have been in a position to make an informed decision as to whether or not to submit an appeal against refusal.

16. Section 4 of the Council's response includes convoluted and legally flawed comments on substantive points that will be addressed at the forthcoming hearing. The appellant rejects those comments but does not intend to comment on them further in this reply. The appellant

also reserves the right to make further costs submissions at the hearing in relation to the Council's comments and the Council's failure to substantiate valid reasons for refusal.

17. Accordingly, there are two limbs to the appellant's application for a full award of costs:

    a. A procedural costs award is sought in respect of the unreasonable delay and behaviour by the Council in its conduct and processing of the appellant's application. In line with paragraph 16-047 of the PPG, delay, a lack of cooperation and only supplying information at the appeal stage is behaviour which may properly lead to the award of costs. Paragraph 16-048 makes it clear that an absence of substantive reasons to justify delaying the determination of an application may also lead to an award of costs against a planning authority.

    b. A substantive award of costs is sought in respect of the Council's failure to substantiate its reasons for refusal, details of which will be further set out in submissions to be made at the hearing. Paragraph 16-049 of the PPG states that a failure to evidence a reason for refusal is behaviour which may lead to an award of costs.

    Both elements set out above have directly led to unnecessary and wasted expense incurred by the appellant, namely consultancy and professional fees associated with the application and this appeal.