1 APPELLANT'S RESPONSE TO LOCAL PLANNING AUTHORITY'S STATEMENT OF CASE

Introduction

1.1 Dunmoore Group Ltd have submitted an appeal against Horsham District Council's refusal of a Section 73 (s73) application to vary conditions linked to a consented scheme, DC/21/1107, at Hilland Farm, Hilland Road, Billingshurst. This appeal has been confirmed as valid by the Planning Inspectorate and is assigned reference APP/Z3825/W/24/3357838.

1.2 This document provides the appellant's response to the Statement of Case submitted by the local planning authority (LPA), dated February 2025. In accordance with the written representations appeal procedure, it provides final comments the appellant wishes to make in response to representations submitted by the LPA. No new evidence is introduced.

Response to Points Raised

1.3 Firstly, in response the LPA's **paragraph 3.7**: The fact that the appellant did not appeal the Lawful Development Certificate refusal has no bearing on this appeal; it is not an indication that Dunmoore agreed with the Council's reasoning or accepted the decision. Instead, the appellant chose to make the s73 application, after discussing this with the LPA first, as this was considered a more positive and proactive approach that amended the condition to something that met the condition tests and offered greater clarity on the scope of the permission and conditions.

1.4 At **para 3.10** of their Statement of Case the LPA "*maintains the view that there is no power available under a s73 application to introduce wording within an existing condition, or to add a new condition which then creates a conflict with the operative part of the wording of the original planning permission*."

1.5 The appellant agrees that a s73 will not allow condition wordings to be changed if they then conflict with the operative part of the consent (i.e. the description of development). The appellant however does not accept that this would occur as a result of the proposed s73 amendment. The description of development of the hybrid permission refers to "B1(c)" use which is now anachronistic following the 2020 revision to the Use Classes Order (UCO) and so creates uncertainty. The appellant has correctly applied the current UCO in the submitted s73 proposal to interpret this description of development wording in the current legislative context. Therefore "B1(c)" use should now be read as "E(g)(iii)" use. There is then no conflict created.

1.6 The appellant also disagrees with the LPA's phrased contention that the change would lead to "*an extended mix of uses*". In fact the opposite is true. Condition 65 is currently a part-restrictive condition in that it does not seek to prevent changes which are not development but does prevent changes which rely on PD rights. Accordingly, changes which are not restricted by the General Permitted Development Order (GPDO), such as non material changes within Class E, i.e. E(g)(iii) to E(a), which is expressly identified as 'not development' within S55(2) Town and Country Planning

Act 1990, are not captured by the current Condition 65. This reflects the opinion of Richard Ground KC, as set out in Appendix 3 of the appellants SoC. As such, the proposed change to Condition 65 via s73 would in fact restrict the operative part of the consent by constraining a default E class permission to E(g)(iii) only, with the sole exception of E(a) use in plot 18, thereby limiting and not extending the permissible mix of uses.

1.7 At their **paragraph 3.11** the LPA make the point that in the s73 application there was no mention of inappropriateness of condition 65. Again, this is immaterial; the appellant sought to remedy this situation with the proposed s73 new condition wording. The flaws of the existing wording were considered to be plain to see, and it was not thought to be necessary nor advantageous to point these out to the LPA. At that juncture the appellant was not in an appeal situation and was trying to work proactively to remedy the condition and address its uncertainties. Not describing the failings in the condition wording in the s73 application is immaterial to the appellant's view of the reasonableness of Condition 65.

1.8 Additionally, in response to **paragraph 3.11**, it should be noted that the appellant never accepted that there existed an enforceable restriction limiting movement within Class E, nor that such a change would be material to the operative part of the consent. As indicated the s73 application sought to apply an enforceable restriction over the remainder of the plots within Phase 2, because the existing condition 65 was not considered to do so. In doing so, the appellant sought to narrow the operative part of the planning consent.

1.9 In response to **paragraph 3.12**, it was not necessary to challenge the condition wording previously because previous reserved matters applications have been for uses for which the conflict did not arise. The fact that it was not challenged cannot be said to imply that the appellant found the condition wording to be clear or to meet the necessary tests of a condition.

1.10 In the case of **paragraph 3.13**, for clarity, the appellant disagrees that condition 65 meets the necessary tests of a valid condition, for the reasons previously set out in our Statement of Case.

1.11 At their **paragraph 3.15** the LPA considers that "*the proposed wording of Condition 65 would not be clear or precise its intention, as the new reference to units being 'brought forward' for a purpose does not appear to include any restrictions over subsequent uses following first occupation / use. The Council therefore contends that the appellant's argument that the proposed revised condition would meet the necessary tests for planning conditions, would not be met.*"

1.12 The appellant acknowledges this point and, in the interests of agreeing a mutual way forward, would be content to accept a re-working of the condition wording that restricts the uses described as to be in perpetuity and not just to their first use. We suggest that the revised condition 65 wording could read:

"65: Regulatory Condition: Notwithstanding the provisions of the Town and Country Planning (General Permitted Development) (England) Order 2015 (or any order amending or revoking and/or re-enacting that Order), or the Town and Country Planning (Use Classes) Order 1987 (or any statutory instrument revoking and re-enacting that Order), no unit granted

by this permission shall be in use for any purpose other than for E(g)(iii), B2 or B8 use, and for no other purpose as described within Use Class E; with the exception of Plot 18, (as identified by plan RM8-LP-01) which may additionally be used for E(a) bulky goods retail use; without express planning consent from the Local Planning Authority first being obtained."

1.13 In relation to the LPA's suggested conditions (**Section 5**), the appellant notes these have been replicated in full from the decision notice to which the appeal application relates DC/21/1107. If the appellant's appeal is granted as argued it would be necessary for an additional Plan RM8-LP-01 to be added to the Approved Plans Condition 1. It would also be necessary for it to be referenced in Condition 65 in a manner as suggested in paragraph 1.12 above or otherwise to the Inspector's satisfaction. Finally, it would be necessary for Condition 42, which is a mirror of Condition 65, to be deleted altogether or amended to reflect the new wording of Condition 65.

Alternative approach if Inspector considers there to be conflict with the operative part of the consent

1.14 The appellant does not believe that amended Condition 65 introduces a conflict with the operative part of the consent, and therefore believes that the s73 as applied for should be grated. However, if the Inspector agrees with the LPA that conflict does exist with the operative part of the consent resulting from suggested replacement Condition 65, it would be possible to make a smaller change to Condition 65 which would have a similar important benefit of making it more precise, enforceable and reasonable in all other respects.

1.15 The change to condition 65 would be as follows:

"65: Regulatory Condition: Notwithstanding the provisions of the Town and Country Planning (General Permitted Development) (England) Order 2015 (or any order amending or revoking and/or re-enacting that Order), no change of use of the units hereby permitted from the uses granted for that unit by this permission shall take place without express planning consent from the Local Planning Authority first being obtained. For the avoidance of doubt this condition does not require express planning consent for a use which does not involve development under section 55(2)f Town and Country Planning Act 1990"

1.16 This amendment makes the condition more precise because it makes it clear that it does make express consent necessary for something that is allowed under statute as not even being development. The condition will therefore be made more precise. [¶ 57 NPPF] It is enforceable and reasonable in all other respects[1].

1.17 This condition will not be in conflict with the operative part of the permission for the reasons that are explained in Reid v Secretary of State [2022] EWHC 3116[2] which was referred to in the appellant's

[1] Para 57 NPPF for all conditions test.

[2] https://vlex.co.uk/vid/freddie-reid-v-secretary-916589490

Statement of Case at ¶4.23ff. In that case the High Court quashed an Inspector's decision that found there was conflict with the operative part of the permission by removing conditions which only allowed holiday lets. The effect of 55 (2) f Town and Country Planning Act 1990 is that it is lawful to use for another use within the same use class. In that case the description of development was for "self-catering holiday units". The High Court found that by the operation of law and section 55 (2) f that the operative part of the consent allowed any C3 residential use it was the conditions that would prevent that. If the conditions were removed and the use changed to a C3 non holiday use that would not need a variation of the operative part of the permission because that could remain as it is. The operative part or description of development allowed this by operation of the law in particular by section 55 (2) f. The particularly relevant parts of the judgment are as follows.

> *34. Secondly, a change of use to another purpose within the same Use Class (as specified by an order of the Secretary of State) will be excepted from counting as development (section 55(2)(f)). The Order specifies various Use Classes. A change from one use within a particular Use Class to another use within the same Class will be excepted from the definition of development in section 57(1) and so does not need planning permission.*
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> *35. It was common ground that a change of use from holiday accommodation to residential accommodation amounts to a change of use within the same Use Class (see article 3 of the Order read with Use Class C3 at para 3 of Schedule 1 to the Order). By operation of the Order, such a change of use is not development and does not require planning permission.*
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> *37. For similar reasons, a grant of permission for a particular described use cannot in itself constitute a condition inconsistent with consequential development permitted by the Order; otherwise, the operation of the Order would be curtailed in a way which could not have been intended (Dunoon Developments v Secretary of State and Poole Borough Council (1993) 65 P & CR 101, 107). It is nevertheless lawful for a local planning authority to impose a condition which removes the statutory benefit of the Order and restricts the use of land to that which is described in the planning permission (Dunoon, 104). It appeared to be common ground before me that the question whether a condition removing the benefit of the Order should be imposed or subsequently removed is a question of planning judgment.*

1.18 The High Court in that case then quashed the decision under paragraph 57 because the Inspector treated the operative part or the description as only allowing holiday use and precluding other uses permitted by the order and 55 (2) f Town and Country Planning Act 1990. Farbey J said the following.

> *55. In the present case, the Inspector asked herself whether the use of the site for "unrestricted residential uses" would be inconsistent with the description of development restricted to holiday accommodation. She concluded that the change from holiday to residential accommodation would not be consistent with the description. In considering this question, she ought to have taken into consideration that what can be done with the use of the land may not be exhaustively written into the description but may arise by the operation of law.*
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> *56. By law (section 55(2)(f) of the Act and the relevant provisions of the Order), the operational part of the permission allowed a developer to use the land for residential*

purposes if he or she chose to do so. The only bar to using the land for residential purposes was the imposition of conditions denying the benefit of the Order. The removal of that bar would as a matter of fact change the use of the land because the claimant proposes to build residential accommodation. But the removal of the bar cannot possibly lead to any alteration of the operational part of the permission (the description) because the operational part of the permission would remain identical.

57. The Inspector in effect treated the conditions as having changed the description, taking the view that the description allowed only restricted use (holiday accommodation) and that it precluded development permitted under the Order (which the inspector called "unrestricted use"). In my judgment, she has thereby curtailed the operation of the Order in a way which could not have been intended.

1.19 In the same way in this case if a building is built out in accordance with the operative part of the permission and then under section 55 (2) f it changes to a different Class E use that would not be in conflict with the operative part of the permission.

1.20 Condition 65[3] and indeed 42 which was a duplicate did not intend to make it necessary to have express consent for something that was not even development. It used a different form of words in condition 30 when it sought to restrict the uses perpetually.

1.21 Thus for the same reason as the High Court set out in Reid, the amended clarified condition would not be inconsistent with the operative part of the permission, in such an instance the Inspector was minded to agree

1.22 In this alternative the Section 73 Town and Country Planning Act 1990 appeal can be allowed and all the conditions reimposed with the condition at para 1.15 replacing conditions 42 and 65 or indeed one of those could be deleted because they are duplicated. It would not be necessary to alter condition 1 by inserting the Plan RM8-LP-01.

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[3] The list of replacement conditions in the LPA statement is out by 1 so the equivalent is 64 and 41 and 29 in their list.