IN THE MATTER OF WATERPERRY COURT
AND INTERPRETATION OF PLANNING CONDITION

SUBMISSION

I. INTRODUCTION

1. This matter arises out of an application for prior approval for the change of use from office to residential use to create 30 flats (the "**Development**") at Waterperry Court, Middleton Road, Banbury, OX16 4QD (the "**Site**").

2. The developer has been informed by an officer at Cherwell District Council (the "**Council**") of a condition in a planning permission granted in respect of the Site in 1989, which purports to limit the uses to which the Site may be put ("**Condition 11**").

3. The purpose of this Submission is to argue that Condition 11 does not exclude the operation of the Town and Country Planning (General Permitted Development) (England) Order 2015 (the **"GPDO**"). The result is that Condition 11 does not affect the application for prior approval nor require a full planning application to be made.

II. FACTUAL BACKGROUND

4. After an application, dated 22 June 1989, planning permission was granted for the following development on the Site, dated 7 Sep 1989:

> "6 No. office units in terrace formation with undercroft and surface parking to provide a total of 59 No. car spaces. New access. (As amended by the plans received on 10th August 1989)" (the "**1989 Permission**")

5. There were 12 conditions attached to the 1989 Permission, including the following:

> "11. That the buildings shall be used only for the purpose of B1(a) and B1(b) and for no other purpose whatsoever, including any other purpose in Class B1 of the schedule to the Town and Country Planning (Use Classes) Order 1987." ("**Condition 11**")

6. The reason given for Condition 11 was as follows:

> "**Reason –** In order to maintain the character of the area and safeguard the amenities of the occupants of the nearby residential premises."

7. Other than a couple of applications for the display of advertisements at the Site in the late 1990s, there do not appear to have any other planning applications since.

8. By an application form, dated 8 October 2020, the developer made an application to determine if prior approval was required for the Development. The Development was described in the application form as:

> "Prior Approval for the Change of Use from Office (Use Class B1a) to Residential (Use Class C3) to create 30 Self-Contained Flats."

9. The application form was accompanied by, amongst other things, a planning statement. It relied on Schedule 2, Part 3, Class O of the GPDO ("**Class O**") as the source of the permitted development right which enabled the Development to go ahead without receiving permission from the Council. The planning statement then proceeded to deal with the various elements contained within Class O. The planning statement concluded with the following:

> "5.1 It has been demonstrated that proposal meets the requirements set out within Class O of the GPDO in terms of the qualifying use and matters of transport, flooding, contamination and noise. Accordingly, the council are respectfully requested to approve this application."

10. I am told that the developer has now received correspondence from the case officer at the Council who has identified Condition 11.

III. LEGISLATIVE BACKGROUND

11. Sections 55 and 57 of the Town and Country Planning Act 1990 (the "**1990 Act**") provide that planning permission is required for "*development*". Pursuant to s58(1) of the 1990 Act, this permission may be obtained through decisions of the local planning authority or through the GPDO.

12. Article 3 of the GPDO provides the following:

> "**3.— Permitted development**
>
> (1) …planning permission is hereby granted for the classes of development described as permitted development in Schedule 2.

(2) Any permission granted by paragraph (1) is subject to any relevant exception, limitation or condition specified in Schedule 2.

…

(4) Nothing in this Order permits development contrary to any condition imposed by any planning permission granted or deemed to be granted under Part 3 of the Act otherwise than by this Order."

13. Schedule 2, Part 3, paragraph O of the GPDO permits:

"**O. Permitted development**

Development consisting of a change of use of a building and any land within its curtilage from a use falling within Class B1(a)(offices) of the Schedule to the Use Classes Order, to a use falling within Class C3 (dwellinghouses) of that Schedule."

14. This is subject to the exceptions and conditions set out in paragraphs O.1, O.2 and O.3 of Class O. They are not relevant for the purposes of this Submission.

IV. SUBMISSION

15. It is submitted that Condition 11 does not excludes the application of Class O and, therefore, the permitted development rights that the Development would usually benefit from.

16. In particular:

a. Although it is possible for a planning condition to exclude the application of the GPDO, the words used must clearly evince an intention on the part of the local authority to make such an exclusion: *Dunnett Investments Ltd v SSCLG* [2017] EWCA Civ 192, §37(iii) (Hickinbottom LJ) ("***Dunnett***"). That is a high bar, reflecting the fact that the GPDO represents rights that Parliament expressly decided to confer on developers. Those rights cannot be lightly removed;

b. In construing a planning permission, including a condition, a court will ask what a reasonable reader would understand the words to mean when read in the context of the other conditions and the permission as a whole: *Lambeth LBC v SSHCLG* [2019] UKSC 33, §16 (Lord Carnwath). The context includes the legal framework within which planning permissions are granted: *DB*

Symmetry Ltd v Swindon BC [2020] EWCA Civ 1331, §63 (Lewison LJ). The reasonable reader, however, must be deemed to have some knowledge of planning law and the matter in question: *UBB Waste Essex Ltd v Essex CC* [2019] EWHC 1924 (Admin), §52 (Lieven J);

c. A reasonable reader would not understand Condition 11 as clearly evincing an intention to exclude the changes of use otherwise permitted by the GPDO. This is for the following reasons:

   i. Condition 11 makes express reference to the Town and Country Planning (Use Classes) Order 1987. It makes no reference to the GPDO. In those circumstances, Condition 11 does not "*clearly evince an intention*" to exclude the GPDO. It could easily have done so, as it did with regard to the Use Classes Order, but the draftsman chose not to;

   ii. Use of the word "*including*" does not undermine this interpretation. As well as rights under the Use Classes Order, Condition 11 would have been seeking to prohibit ancillary uses to the office use;

   iii. Unlike in *Dunnett,* Condition 11 does not limit other uses of the Site "*without express planning consent from the Local Planning Authority first being obtained*". That is a material difference, which suggests that this extra step was not contemplated or intended by Condition 11. In other words, Condition 11 left open a gap by which a change of use could occur. That could only have been by way of the GPDO; and,

   iv. Following the coming into force of the Town and Country Planning (Use Classes) (Amendment) (England) Regulations 2020, those uses previously falling within Use Class B1 will now fall within Use Class E. Use Class E will also include Use Classes A1, A2, A3, D1 and D2. As a result, Condition 11 now makes little sense on it own terms and is of questionable purpose given that it does not prevent changes of use to other uses within Class E.

YAASER VANDERMAN

Landmark Chambers

2 December 2020