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## STATEMENT OF APPEAL

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1. The points and statutory grounds of appeal below are in the alternative.

### Nullity

2. The requirements in paragraph 5 of the enforcement notice require the appellant to commit a criminal offence, in that, for example, they require it to contravene section 28E(1) of the Wildlife and Countryside Act 1981 (“the 1981 Act”).
3. An enforcement notice requiring the commission of a criminal offence is a nullity: McKay v Secretary of State [1994] JPL 806.
4. The enforcement notice is therefore a nullity, without legal effect. The Secretary of State (or his appointed Inspector) should conclude as much and then, in the usual way, decline jurisdiction and take no further action on the appeal.

### Invalidity

5. The requirements of the enforcement notice need to be varied so as to require the appellant, prior to the carrying out of the steps, to give Natural England notice pursuant to section 28E(1)(a) of the 1981 Act and fulfil one of the conditions specified in section 28E(3) of the same. They also need to be varied so as to avoid the appellant committing any criminal offence other than a contravention of section 28E(1) of the 1981 Act.

6. The requirements of the enforcement notice also need to be varied so as to delete the reference to “peat bog” in paragraph 5d) and substitute an accurate description or descriptions.
7. However, varying the terms of the enforcement notice as set out (whether individually or in combination) will cause injustice to the appellant.
8. Given that the invalid enforcement notice cannot be remedied without causing injustice, the appeal should be allowed and the notice quashed.

Ground (a) appeal

9. In respect of both or either of the two breaches of planning control alleged in paragraph 3 of the enforcement notice, planning permission ought to be granted (permanently, or, in the alternative, temporarily).
10. The enforcement notice was issued on 21 September 2018, after the publication of the revised National Planning Policy Framework (“the Framework”). Paragraph 4 of the enforcement notice wrongly refers to paragraphs of the superseded original Framework.
11. The appellant will demonstrate that the reasons in paragraph 4(b-d) of the enforcement notice are unfounded. The appeal development does not have a significant visual impact. It does conserve the landscape and scenic beauty of the National Park. Exceptions set out in the relevant policies do apply. The appeal development does conserve and enhance valued landscape character. It has not resulted in a significant loss of habitat. It is unlikely to have led to compaction and hydrological damage. The appeal development has not had an adverse impact on the integrity of the SAC and SPA. It would not damage or destroy the interest features for which the SSSI has been notified. By contrast, complying with the steps set out in paragraph 5 of the enforcement notice would damage or destroy the interest features for which the SSSI

has been notified. The appeal development is directly connected with or necessary to the management of the European site. The appeal development is in accordance with the development plan, or else there are material considerations indicating that planning permission should be granted.

12. Natural England has no objection to the appeal development subject to mitigation measures and planning conditions/obligations. It has given consent for it under section 28E(3)(a) of the 1981 Act. The appellant is prepared to accept one or more planning conditions being imposed on any planning permission, which it will seek to agree with PDNPA. It may provide one or more planning obligations under section 106 of the Town and Country Planning Act 1990.

#### Ground (f) appeal

13. There was a pre-existing track on the Land.
14. The appellant has laid geotextile matting and wooden log 'rafts' on that pre-existing track.
15. The appellant can only be required to remove the geotextile matting and the wooden log 'rafts'.
16. Paragraph 5 of the enforcement notice requires the appellant to do more than remove the geotextile matting and the wooden log 'rafts'.
17. It follows that the steps required by the enforcement notice to be taken exceed what is necessary.

#### Other matters

18. Lest the Secretary of State (or his appointed Inspector) is minded, despite the ground (f) appeal, to include, in paragraph 5 of the enforcement notice, steps exceeding the

removal of the geotextile matting and the wooden log ‘rafts’ but in substitution for the existing steps a-f, or any of them, the appellant will provide evidence that the existing steps a-f will not work and it will also provide alternative steps to complement retention of the geotextile matting and wooden log ‘rafts’. These alternative steps may also be material to the determination of the ground (a) appeal, whether in connection with planning conditions or otherwise. The appellant will discuss the following draft alternative steps with PDNPA in an attempt to reach agreement:

- a) Spray up to 20% of the existing grass sward with selective herbicide in the Spring following the Appeal Decision, followed by the re-seeding by hand of this area with good quality vernalised local heather. Additional herbicide spraying and re-seeding in the following Spring if heather establishment has not increased by 6% of the total area.
- b) Hand works to the geotextile matting on the 25m total length (6 short lengths) of vertically and horizontally unstable stretches pursuant to agreed protocols.
- c) Hand works to deploy coarse heather brash mini bales and small quantities of local soil to round off the ends of the wooden log ‘rafts’ to encourage further sediment to accumulate, and to encourage growth in the grooves and in the depressed areas between the individual poles, with the possible installation of two under ‘raft’ drainage pipes.
- d) Targeted deployment of various *Sphagnum* plugs in the two wet flush areas with high organic matter content and also in the sediment areas around the wooden log ‘rafts’ in the year following the Appeal Decision and annually thereafter for a defined period.

- e) Possible *Sphagnum* plug deployment, but at a higher density than currently proposed, on the small areas of exposed peat face on the modified deep peat close to the south east origin of the track. This work to occur in the year following the Appeal Decision and annually thereafter for a defined period.
19. The enforcement notice was issued on 21 September 2018. PDNPA failed to serve with it a notice complying with regulation 37(3) of the Town and Country Planning (Environmental Impact Assessment) Regulations 2017. On 6 November 2018, PDNPA sent the appellant by first class post a letter and notice purporting to comply with regulation 37(3). Assuming compliance or immaterial breach, the appellant has 21 days beginning with the date of service within which to apply to the Secretary of State for a screening direction. It intends to do so.
20. PDNPA has to date failed to respond to the appellant on a range of issues relating to the Conservation of Habitats and Species Regulation 2017.
21. Although the appellant is not pursuing a ground (c) appeal, it reserves the right to contend other than in connection with this appeal that the appeal development (or similar) is not “development” within the meaning of section 55 of the Town and Country Planning Act 1990.
22. Given that there was a pre-existing track, the words “to form a track” in paragraph 3 of the enforcement notice should be deleted. The words “used in the construction of the track from the Land.” in the first sentence of paragraph 5b) should be replaced with “in the laying of the geotextile matting.” The words “used in the construction of the track” in the second sentence of paragraph 5b) should be replaced with “in the laying of the geotextile matting”. These corrections will not cause injustice to the appellant or any other party.

### Appeal procedure

23. A local inquiry is appropriate for this appeal.
24. The appeal site is within a SAC, SPA, SSSI and National Park.
25. The issues are complex. Large amounts of highly technical data will be provided in evidence, including as to landscape and visual impact, ecology and biodiversity, compaction and hydrology. There may be a need for EIA or appropriate assessment under the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 or the Conservation of Habitats and Species Regulation 2017. There is a clear need for the highly technical data and evidence to be tested through formal questioning by an advocate. The proposal has generated significant local interest and over 180 objections, together with representations or objections from Natural England and the RSPB. The requirements of the enforcement notice are very unusual and particularly contentious. There is a need for complex oral legal submissions, including as to nullity and invalidity. Evidence may need to be given on oath including as to the past, present and future rationale for and merits of the appeal development. The appellant is likely to have 4-5 witnesses and a local inquiry is likely to last 4-5 days.

### Conclusion

26. The Secretary of State (or his appointed Inspector) should determine that the enforcement notice is a nullity or invalid, or else he or she should allow the appeal under ground (a) or ground (f).

**DUNLIN LIMITED**  
**7 NOVEMBER 2018**