Dear POPLA Adjudicator,

I am appealing the parking charge notice (PCN) reference xxxx. The charge has been issued against me as the registered keeper of the vehicle Reg no. xxxx. It should be noted throughout this appeal that the burden of proof on all points lies solely with the company issuing the charges. Therefore if any assertions put to Smart Parking Ltd are not refuted, then this appeal should be upheld.

The appeal is on the following grounds:

1. The Notice to Keeper does not establish keeper liability under the Protection of Freedoms Act 2012 1

2. The Notice to Keeper was not served within the 14 day time period after the alleged parking event, as required In the PoFA 2012 Schedule 4 Para 9 2

3. No 'period of parking' is given on the Notice to Keeper (in violation of PoFA 2012 Schedule 4), and the actual 'period of parking' was not more than what was paid for (when taking into account the minimum grace period as required by the BPA CoP V8 Clause 13). 3

4. The alleged breach was less than a minute over the minimum amount of grace period required by the BPA CoP V8 Clause 13 - therefore the overstay is de minimis, and within the scope of a reasonable grace period for a person covered under the Equality Act 2010 Section 17 (4) 4

5. The Parking Charge is punitive, unreasonable, not proportionate and not commercially justifiable 5

6. The operator uses misleading & predatory tactics to lure drivers into incurring parking charges 7

7. The ANPR System is neither reliable nor accurate, and has not been shown to comply with the ANPR general principals as set out in the BPA CoP Section 22 7

8. Smart Parking Ltd must provide evidence of their compliant authority to operate on the land 8

9. Insufficient signage to make regular visitors aware of a recent change in terms & conditions 9

10. No Planning permission from Cherwell District Council for Pole-Mounted ANPR Cameras and no advertising consent for signage 9

Evidence: 10

1. The Notice to Keeper does not establish keeper liability under the Protection of Freedoms Act 2012

The BPA CoP Section 21.2 states:

> *"As long as the strict conditions of Schedule 4 are met, you may claim payment from the keeper or the hirer of the vehicle rather than from the driver"*

The PoFA 2012 Schedule 4 Para (5) states the conditions which must be met for the purposes of claiming unpaid parking charges from the keeper of a vehicle:

"The first condition is that the creditor—
(a)has the right to enforce against the driver of the vehicle the requirement to pay the unpaid parking charges; but
(b)is unable to take steps to enforce that requirement against the driver because the creditor does not know both the name of the driver and a current address for service for the driver."

Notice of the parking charge was delivered to me (the registered keeper) by post, and the driver has not been identified at any point. The keeper has been identified as paying for the parking and using the facilities of the landowner, but this does not in any way infer who was driving the vehicle at the time, and no presumption can be made from this - a vehicle can be driven by any person with the consent of the owner, as long as the driver is insured.

I have attached copies of the original Notice to Keeper, and a letter of response to the rejected initial internal appeal, dated 22 March 2023.

It should be noted that neither the Notice to Keeper, nor the response letter, state that Smart Parking Ltd (the creditor) is attempting to hold the driver liable for the parking charge, nor has any other communication been made to this effect at any point. The creditor must therefore rely on keeper liability in order to claim the parking charge.

The PoFA Schedule 4 Para 9(2)(e) states that a notice which is given to the keeper of a vehicle must:

"*state that the creditor does not know both the name of the driver and a current address for service for the driver and invite the keeper—*
(i) to pay the unpaid parking charges; or
(ii)if the keeper was not the driver of the vehicle, to notify the creditor of the name of the driver and a current address for service for the driver and to pass the notice on to the driver"

As the notice does not contain any of this information, it does not comply with the strict conditions of the PoFA Schedule 4 - as required by the BPA CoP Section 21.2 quoted above - and cannot be considered an enforceable Notice to Keeper.

2. The Notice to Keeper was not served within the 14 day time period after the alleged parking event, as required In the PoFA 2012 Schedule 4 Para 9

The PoFA 2012 Schedule 4 Para 9 states:

The notice must be given by—
(a)handing it to the keeper, or leaving it at a current address for service for the keeper, within the relevant period; or
(b)sending it by post to a current address for service for the keeper so that it is delivered to that address within the relevant period.
(5)The relevant period for the purposes of sub-paragraph (4) is the period of 14 days beginning with the day after that on which the specified period of parking ended.

The following dates can be observed on the Notice to Keeper:
- Date of Contravention: 11/02/2023
- Date Issued: 24/02/2023 (Friday)

The PoFA Schedule 4 Para 9 (6) states:

"*A notice sent by post is to be presumed, unless the contrary is proved, to have been delivered (and so "given" for the purposes of sub-paragraph (4)) on the second working day after the day on which it is posted; and for this purpose "working day" means any day other than a Saturday, Sunday or a public holiday in England and Wales*"

The notice cannot therefore be presumed to have been received before Tuesday 28/02/2023 - 17 days elapsed from the date of alleged contravention.

3. No 'period of parking' is given on the Notice to Keeper (in violation of PoFA 2012 Schedule 4), and the actual 'period of parking' was not more than what was paid for (when taking into account the minimum grace period as required by the BPA CoP V8 Clause 13).

The PoFA 12 Schedule 4 Paras 9(2) states that the Notice to Keeper must:

(a) specify the vehicle, the relevant land on which it was parked and the period of parking to which the notice relates;
(b) inform the keeper that the driver is required to pay parking charges in respect of the specified period of parking and that the parking charges have not been paid in full;

Logically, a vehicle cannot be considered to be parked while moving, therefore the arrival and departure times cannot be used to define the 'period of parking'.

In order to *fully* determine the definition of a 'period of parking', I refer to the court case judgment *National Car Parks Ltd v Revenue And Customs [2019] EWCA Civ 854*, in which Lord Justice Newey dismissed NCP's appeal:

"*In the hypothetical example, the precise figure was settled when the customer inserted her pound coin and 50p piece into the machine and then elected to press the green button rather than cancelling the transaction. The best analysis would seem to be that **the contract was brought into being when the green button was pressed**. On that basis, the pressing of the green button would represent acceptance by the customer of an offer by NCP to provide an hour's parking in return for the coins that the customer had by then paid into the machine*"

As can be seen by this ruling, a contract between the operator and the driver can only be seen to have been accepted after the payment was made. The 'period of parking' cannot have begun before the contract has been accepted.

The BPA CoP Section 20.1 also states the following:

"When you issue a parking charge notice the charges you make have to be reasonable"

While this appears to make reference only to the charge itself, it would also follow that this applies to the terms and conditions under which the charge is issued too. I assert that it is unreasonable to expect a driver to keep track of the exact time that they entered the car park (and were therefore picked up by the ANPR cameras) before they have been afforded a chance to read the terms & conditions of parking which states that they must do this. The driver also cannot be reasonably expected to estimate - having already paid - how long it will take to leave the car park.

A reasonable definition of 'period of parking' would therefore follow as: **The time between the customer 'pressing the green button' to accept the contract, and the vehicle leaving the chosen car parking space.**

Considering the above - and as the operator should have a record of when the payment was actually made and therefore the 'period of parking' began - I also put Smart Parking Ltd to strict proof that the 'period of parking' (as defined above) was actually more than the 60 minutes paid for (plus the minimum grace period of 10 minutes as defined in BPA Code of Practice V8 section 13.3).

I also assert that this renders the Notice to Keeper unenforceable, as the arrival and departure time are the only times given on the notice, therefore no 'period of parking' is specified (As required in the PoFA Schedule 4 Para 9(2) quoted above).

4. The alleged breach was less than a minute over the minimum amount of grace period required by the BPA CoP V8 Clause 13 - therefore the overstay is de minimis, and within the scope of a reasonable grace period for a person covered under the Equality Act 2010 Section 17 (4)

The appeal rejection letter from Smart Parking dated 22 March 2023 states:

> *"We can confirm that the contravention is in relation to insufficient paid time. This is due to the fact that our payment system confirms that 60 minutes were purchased against Vehicle Registration Mark (VRM)* xxxx *however the vehicle was on site for 70 minutes."*

The BPA CoP Section 13.3 states the following:

> "*Where a parking location is one where a limited period of parking is permitted, or where drivers contract to park for a defined period and pay for that service in advance (Pay & Display), this would be considered as a parking event and a Grace Period of at least 10 minutes must be added to the end of a parking event before you issue a PCN*"

The words 'at least' indicate that the 10 minute grace period is a ***minimum*** that should be given. To any reasonable interpretation, less than a minute more than this (In this case the original notice claims 51 additional seconds) can be considered de minimis, and should therefore not be taken into account. To perfectly illustrate this point, Smart Parking Ltd's own appeal rejection letter (quoted above & attached) does not even mention the additional 51 seconds, simply stating "*the vehicle was on site for 70 minutes*".

Additionally, section 13.1 of the BPA CoP states:

> *"The driver must have the chance to consider the Terms and Conditions before entering into the 'parking contract' with you. If, having had that opportunity, the driver decides not to park but chooses to leave the car park, you must provide them with a reasonable consideration period to leave, before the driver can be bound by your parking contract. The amount of time in these instances will vary dependant on site size and type but it must be a minimum of 5 minutes."*

Although this relates to a driver deciding not to park, it acknowledges that 5 minutes is a minimum amount of time that should be afforded to a driver on entry to a car park, in order to consider

whether or not to park their vehicle, decline the contract, and leave. It stands to reason then, that a driver who does decide to park should be afforded the same opportunity to consider the contract, in order to accept it. This time would then be in addition to the 10 minutes grace given at the end of the parking time in order to leave the car park.

The topic of grace periods and their implications were also discussed during a BPA Professional Development & Standards Board meeting held on 30th July 2015. The minutes of this meeting show that after lengthy discussion, the board members were in agreement that the grace period needed to exceed the current minimum of 10 minutes:

> *"Implications of the 10 minute grace period were discussed and the Board agreed with suggestion by AH that the clause should comply with DfT guidelines in the English book of by-laws to encourage a single standard. Board agreed that as the guidelines state that grace periods need to exceed 10 minutes clause 13.4 should be amended to reflect a mandatory 11 minute grace period."*

The recommendation follows:

> *"Reword Clause 13.4 to 'If the location is one where parking is normally permitted, the Grace Period at the end of the parking period should be a minimum of 11 minutes."*

(Source:
http://www.britishparking.co.uk/write/Documents/Meeting%20Notes/Governance/20150730_PDandS_Board_Action_Notes.pdf)

In addition, the Equality Act 2010 states:

> *"(3) A person (A) discriminates against a woman if, in the period of 26 weeks beginning with the day on which she gives birth, A treats her unfavourably because she has given birth.*
> *(4) The reference in subsection (3) to treating a woman unfavourably because she has given birth includes, in particular, a reference to treating her unfavourably because she is breast-feeding."*

In this case, it was explained to the operator on the first appeal that the purpose of the visit to the leisure centre on the day in question was to take a 3 month old child swimming. I assert that it is unfair not to allow a breastfeeding mother an extra minute of grace period above the bare minimum (as required in the current BPA CoP) to leave a car park, and that to continue to pursue this charge amounts to unfavourable treatment, and therefore discrimination under section 17 of the Equality Act 2010.

5. The Parking Charge is punitive, unreasonable, not proportionate and not commercially justifiable

The BPA CoP Section 20.5 states:

> *"If the parking charge that the driver is being asked to pay is for a breach of contract or act of trespass, this charge must be proportionate and commercially justifiable. We would not expect this amount to be more than £100"*

Section 20.6 of the BPA CoP also states:

"If your parking charge is based upon a contractually agreed sum, that charge should not be punitive or unreasonable."

I assert that a £100 charge is neither proportionate, nor commercially justifiable, in this case for an alleged overstay (when taking into account the minimum grace period as required in the BPA CoP) of 51 seconds.

The *Parking Eye vs Beavis* case is mentioned on the Notice To Keeper. However, it is not relevant as in that case the charge was £85 and the overstay was nearly an hour, in a free (for a limited period) car park. In this case, parking time was paid for and the operator is attempting to charge £100 (note that this is the maximum amount allowed without justification - as per section 20.5 of the BPA CoP) for an overstay of less than a minute over the minimum grace period. The calculated cost per second of this alleged overstay comes in at £1.96 per second, or £7058.82 for an hour, which is clearly neither reasonable nor proportionate.

I refer to the far more relevant case of *ParkingEye vs Cargius*, in which it was held that the Beavis case did not apply:

*"both those cases dealt with **free** car parks, where the only charges recovered by ParkingEye were from those motorists who overstayed. Thus it was argued that the parking charge of £75.00 or £80.00 levied on overstays was commercially justifiable, as this was the only revenue received by ParkingEye for managing what was otherwise a free car park. This is not the case here. ParkingEye are charging a significant sum of money to motorists who park in the Snowdon Mountain Railway car park. Motorists who park for two or four hours pay £1.00 an hour and the hourly tariff reduces with the length of stay. Mr Cargius paid £4.00 for a 4 hour stay and, had he fully appreciated the fact that he could have paid for an extra two hours before leaving the car park, the additional cost to him would have been £2.00. It therefore appears in my judgment that ParkingEye accept that there is no real loss to them by motorists overstaying, provided that they pay for further parking time at the advertised rate before they leave the car park."*

In this case, a fee of £0.80 was paid, and an extra 30 minutes could have been purchased for £0.40 more. Therefore no more than £0.40 can be claimed to have been lost from the extra time not having been paid for.

In the rejection letter dated 22 March 2023 they state "*Please be advised that additional time can be purchased at any point during your vehicles stay, before exiting the car park*". This is disingenuous however. In this case, it is clear that a genuine customer of the landowner was intending to fully comply with the terms and conditions, and an offer to rectify the situation by paying for an extra hour of parking to cover the extra time was even rejected by the operator at the appeal stage.

This shows that the operator is not interested in the commercial interests of the land owner, only in applying punitive and unreasonable charges, and I put Smart Parking Ltd to strict proof that the claimed time unpaid prevented another potential customer from parking or spending money with the land owner so as to commercially justify the charge, or that they suffered any loss more than the sum of £0.40 from the act of parking.

6. The operator uses misleading & predatory tactics to lure drivers into incurring parking charges

Section 9.5 of the CoP states:

> *"You must not use predatory or misleading tactics to lure drivers into incurring parking charges. Such instances will be viewed as a serious and sanctionable instance of non-compliance and may go to the Professional Conduct Panel"*

I put it to Smart Parking Ltd that they have put in place a system which is intentionally designed to lure drivers into punitive & unreasonable charges. As the car park operator has already invested in the ANPR system, and are therefore able to immediately calculate the duration of a vehicle's stay, I assert that it would have been trivial for them to implement a 'pay on exit' system (as used by many car park operators nationwide).

This would allow drivers to pay in full, and only for the time they have used, without being required to keep track of the time the car park operator has supposedly calculated they have been on site for - therefore avoiding wasting everybody's time and money issuing unnecessary charges. I put Smart Parking Ltd to strict proof that there is a genuine practical or financial reason (other than in pursuing motorists for inflated parking charges) for not implementing a system which would benefit patrons of the landowner in this way.

7. The ANPR System is neither reliable nor accurate, and has not been shown to comply with the ANPR general principals as set out in the BPA CoP Section 22

The duration of the alleged infraction as (incorrectly) defined by Smart Parking Ltd hinges on the accuracy of time stamps from Smart Parking Ltd's ANPR camera system, as the period of alleged overstay (when including the minimum grace period as required in the BPA CoP) is less than a minute.

Section 22.2 of the BPA CoP states:

> *"Quality checks: Before you issue a parking charge notice you must carry out a manual quality check of the ANPR images to reduce errors and make sure it is appropriate to take action."*

Section 22.3 also states:

> "*You must keep any ANPR equipment you use in your car parks in good working order. You need to make sure the data you are collecting is accurate, securely held and cannot be tampered with. The processes that you use may be audited by our compliance team or our agents".*

Smart Parking Ltd must therefore demonstrate the accuracy and security of their system, and provide the result of any audits which have been carried out by compliance agents. Specifically, I put Smart Parking Ltd to strict proof that the time & date stamp on the entry & exit cameras were accurate & correctly synchronised in the car park in question, as this is critical to establishing whether an overstay of such a small period of time has actually occurred.

The operator must also provide documentary proof that a manual quality check of the ANPR images was carried out to ensure that the action it is currently taking is appropriate, as required in Section 22.2 of the BPA CoP.

I assert that the ANPR images given on the NTK are not accurate, as the close-up of the number plate superimposed onto the 'Vehicle Exiting Site' image is not from the image above it that it is supposed to have come from. When compared to the full vehicle image the close-up is supposedly from, it is clear that the image has been doctored or replaced, as the colour & saturation of the two images are totally different to each other. This is in contrast to the 'Vehicle Entering Site' camera, which is in full colour and is comparable to the image it is supposed to have come from.

If the images have been altered in any way, then this suggests a breach of Section 22.3 of the CoP, and the data contained in the images cannot therefore be considered to be reliable or accurate enough to be used as evidence of an alleged breach of contract.

8. Smart Parking Ltd must provide evidence of their compliant authority to operate on the land

BPA CoP V8 Section 7.1 states:

> "*If you do not own the land on which you are carrying out parking management, you must have the written authorisation of the landowner (or their appointed agent)*".

As they do not have proprietary interest in the land, I put Smart Parking Ltd to strict proof that they have obtained written authorisation from the landowner to pursue outstanding parking charges.

A witness statement cannot be considered as sufficient evidence of the above. The operator must provide an un-redacted contract, or any other 'site agreement' or 'user manual', which may contain vital & relevant information agreed upon between the land owner & the operator.

Specifically, Smart Parking ltd must provide proof of:

- Definition of the services provided by each party to the agreement, including how much the landowner authorises the agent to charge (this cannot be assumed to simply be the amount stated on the signs, which just happens to be the maximum amount allowed by the BPA CoP without having to justify the charge)
- Definition of the land on which Smart Parking Ltd is allowed to operate on, including a site map, so that the boundaries of the land can be clearly seen
- Conditions or restrictions on parking control and enforcement operations, including restrictions on hours of operation
- Who has responsibility for putting up & maintaining signs
- Grace periods agreed upon between the operator and landowner (which may be longer than the bare minimum times set out in the BPA Code of Practice)
- The expiry date of the current contract
- Any exemptions, such as 'genuine customer' or 'genuine resident' exemptions

Many parking contracts with retailers include genuine customer or first time offender clauses so as not to penalise accidental infractions - and rightly so. This is because the landowner's main business

is selling items or services, and not parking. This is a known and frequent clause in parking contracts, and I put Smart Parking Ltd to strict proof that they are allowed to issue charges on these grounds.

As per the BPA CoP Section 23.16b, any witness statement produced by the operator must be signed by a representative of the landowner or his agent, and not by a member of the operator's staff.

9. Insufficient signage to make regular visitors aware of a recent change in terms & conditions

BPA CoP Section 19.10 states:

> *"Where there is a change in the terms and conditions that materially affects the motorist then you must make these terms and conditions clear on your signage. Where such changes impose liability where none previously existed then you must consider a transition to allow regular visitors to the site to adjust and familiarise themselves with the changes. Best practice would be the installation of additional/temporary signage at the entrance and throughout the site making it clear that new terms and conditions apply. This will ensure such that regular visitors who may be familiar with the previous terms become aware of the new ones."*

It can be seen from the following news article (which also happens to report on the unethical practices of the operator in question, in pursuing disabled motorists for unfair PCNs, leaving some "shaken and upset") that the ANPR system has only been in place since October 2022.

https://www.banburyguardian.co.uk/news/people/changes-to-banburys-spiceball-car-park-leads-to-fines-for-some-drivers-including-blue-badge-holders-3958830

As the alleged offence took place less than 4 months after the introduction of the new system, I put Smart Parking Ltd to strict proof that they have sufficiently considered a transition to allow regular visitors to the leisure centre to familiarise themselves with the changes, providing evidence of the locations of any temporary signage which may have been installed at the entrance or throughout the site, and the duration for which this signage was displayed.

10. No Planning permission from Cherwell District Council for Pole-Mounted ANPR Cameras and no advertising consent for signage

Pole-Mounted ANPR cameras require planning permission if a new pole is erected to mount the cameras, and advertising consent is a legal requirement for any signage over 0.3m^2 in size.

I note that according to Cherwell District Council website, no planning permission has been obtained for pole-mounted cameras or indeed for anything in relation to a managed car park, and no planning permission has been obtained for anything on the site of Spiceball Leisure Centre since 01/12/2011:

https://planningregister.cherwell.gov.uk/Search/UPRNApplicationSearch
Search for post code: OX16 2BW

As can be seen from the article referred to in the point above, ANPR has only been in operation on this site since October 2022. Therefore unless Smart Parking Ltd can provide evidence that they do

have planning permission & advertising consent, it should be noted that they are currently seeking to enforce terms & conditions displayed on illegally erected signage, using equipment for which no planning application has been made. The common law principal *'ex dolo malo non oritur actio*' says that a court should not lend its aid to a man who has committed an immoral or illegal act. In this case, the operator should not be allowed to profit from illegally erected signage or ANPR cameras.

I therefore put Smart Parking Ltd to strict proof that the correct planning applications were submitted (and approved) for the pole-mounted ANPR cameras (or that the structures they are mounted on were pre-existing), and that advertising consent has been gained for signage larger than $0.3m^2$, prior to the date of this appeal.

Evidence:

I attach the following evidence in support of my appeal:

- Copy of the original Notice to Keeper
- Copy of the internal appeal rejection letter from Smart Parking Ltd

Thank you for your time and consideration in this matter.

Sincerely,
xxxx