

**KICKING HORSE 3  
LIMITED**

**THE BLACK CAP, CAMDEN**

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**OPINION**

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**Introduction**

1. I am asked to advise Kicking Horse 3 Limited (“the Owner”) in respect of certain proposals for The Black Cap, Camden (“the Property”).
2. The Owner is the freehold owner of the Property.
3. The local planning authority for the Property is the London Borough of Camden (“the Council”).
4. The Property is presently vacant, having closed as an operating venue in April 2015. I am instructed that prior to closing, it had established itself as “an iconic performance venue in Camden, renowned particularly for its live music and strong LGBTQ+ associations”. I am instructed that it operated as a cultural centre for popular cabaret and drag acts/performers for many years.
5. The Owner is seeking to carry out work to allow The Black Cap to re-open as a venue of the type that previously was in operation. In order to do this, the Owner is proposing to carry out some internal reconfiguration of the Property. The nature of that work is summarised in a feasibility study by Goldstein Heather dated September 2023 (“the Study”).
6. The Study identified modest internal changes to the Property itself to facilitate the resumption of its previous use as a venue (“the Proposals”).
7. The Owner is already satisfied that the Proposals do not constitute “development” for the purposes of section 55 of the Town and Country Planning Act 1990 (“the 1990 Act”) which might otherwise require planning permission under the 1990 Act.

8. Out of an abundance of caution, however, the Owner is proposing to submit an application for a certificate of lawfulness in respect of the proposed use and development of the Property under section 192 of the 1990 Act, as it is entitled to do under the statutory scheme.
9. I have been asked to provide this written legal opinion on whether, as a matter of law, the Proposals are lawful for the purposes of the 1990 Act.
10. For the reasons set out below, I am satisfied that they are lawful for these purposes. As far as I can see, the Proposals do not involve any development which might otherwise require planning permission under the 1990 Act. The Proposals only involve internal works to the Property itself (which would not constitute development as defined in section 55(1) of the 1990 Act). Nor do the Proposals involve, or contemplate, any material change in the use of the Property itself from that already certificated. Accordingly, on that basis I consider a certificate in the proposed form falls to be issued under section 192(2) on the basis of the information identified.
11. I set out my reasons for reaching that conclusion in more detail below.

## **The Legal Framework**

### Development

12. Section 57 of the 1990 Act sets out one of the central elements of planning control, namely that planning permission is required for the carrying out of any development of land.
13. The definition of development for these purposes is contained in section 55 of the 1990 Act.
14. Section 55(1) of the 1990 Act identifies that subject to certain exceptions:

“ ... ‘development’ means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land.”
15. There are, therefore, two basic types of development requiring planning permission:

- a. operational development (eg physical works of development); or
- b. a material change of use.

16. Section 55(2) of the 1990 Act sets out certain exclusions. They include internal works or works not materially affecting the external appearance of the building (so far as material for present purposes), described as follows:

“(2) The following operations or uses of land shall not be taken for the purposes of this Act to involve development of the land-

- (a) the carrying out for the maintenance, improvement or other alteration of any building of works which-
  - (i) affect only the interior of the building, or
  - (ii) do not materially affect the external appearance of the building,

and are not works for making good war damage or works begun after 5<sup>th</sup> December 1968 for the alteration of a building by providing additional space in it underground.”

17. It is therefore axiomatic that it is not development (requiring planning permission) to carry out:

- a. operational works for the maintenance, improvement or other alteration of a building which only affect its interior, or does not materially affect its external appearance; or
- b. a change in the use of any building if that change is not material.

18. In relation to these principles, including what constitutes development consisting of a material change of use, there is a number of well-established principles derived from caselaw relating to the statutory scheme that govern this area. By way of summary only, they include the following:

- a. there is a well-recognised distinction between the primary use of land and other

uses which are ancillary to that primary use; the concept of a material change in use of the land is concerned with a material change in the primary use of the land, rather than changes in the ancillary uses if the primary use of the land does not change; it is therefore generally important to establish the primary use of the land in considering whether any material change in that use is being proposed;

- b. by concentrating on the primary use, planning control permits: fluctuations in the level of ancillary use activity; or initiation of new ancillary uses; or the abandonment of old ancillary uses, without requiring planning permission for such changes: see eg *Emma Hotels Ltd v Secretary of State for the Environment* [1979] JPL 390 or *Allen v Secretary of State for the Environment* [1990] 1 PLR 25;
- c. the link between the primary use and an ancillary use may be lost if the ancillary use grows to the point that it can no longer be considered to be ancillary and becomes a use in its own right (so potentially supplanting the former primary use or resulting in a dual use) see eg *Trio Thames Ltd v Secretary of State for the Environment* [1984] JPL 183;
- d. although the question as to what is the primary use of a property and what are ancillary uses, is a matter of planning judgement, the relevant test is one of functional relationship, rather than one of extent, and it is incorrect to treat an ancillary use as necessarily meaning relatively small: see eg *Main v Secretary of State for the Environment* (1988) 77 P&CR 300 and *Wakelin v Secretary of State for the Environment* [1978] JPL 769;
- e. an ancillary use must be carried on in the same “planning unit” as the primary use - see *Westminster City Council v British Waterways Board* [1984] 3 All ER 737 and *Burdle v Secretary of State for Environment* [1972] 3 All ER 240;
- f. where more than one primary use is carried on in the same planning unit without any primary/ancillary link and no physical separation, the use in question may be a composite or mixed use, where some fluctuation in the level of those mixed uses may occur without constituting development (ie a material change in the use of the unit as a whole): see eg *Wipperman v Barking London Borough Council*

(1965) 17 P&CR 225; this approach should not be stretched too far to distinguish between what are, in fact, different ancillary components of a primary use: see *R(CW Young Ltd) v Secretary of State for Environment, Transport and the Regions* [2001] JPL 1321;

- g. a change merely in the identity of the person carrying on the use will not amount to a material change in the use: see eg *Lewis v Secretary of State for the Environment* (1971) 23 P&CR 125 and *Westminster City Council v British Waterways Board* [1984] 3 All ER 737;
- h. a change of use is not material if it is *de minimis* and in borderline cases it is proper to assess materiality of a change in planning terms (eg in terms of its planning effects); and
- i. internal works to a building do not require planning permission, but if such internal works are only incidental to the making of a material change of use that does require planning permission, those internal works can potentially form part of enforcement action against any material change of use which is not permitted: see *Somak Travel Ltd v Secretary of State for the Environment* [1987] JPL 630.

#### Certificates of Lawful Use or Development

- 19. Although carrying on work or a change of use which is not material does not constitute development under the 1990 Act, and it can be carried out lawfully in any event, the 1990 Act also sets out a statutory procedure for an applicant to seek formal confirmation of that position.
- 20. Section 191 of the 1990 Act enables a person to apply for a certificate of the lawfulness of an existing use or works which have already taken place. Section 191 provides so far as material as follows:

“(1) If any person wishes to ascertain whether-

- (a) any existing use of buildings or other land is lawful;
- (b) any operations which have been carried out in, on, over or under land are lawful; or
- (c) any other matter constituting a failure to comply with any condition or

limitation subject to which planning permission has been granted is lawful,

he may make an application for the purpose to the local planning authority specifying the land and describing the use, operations or other matter.

...

- (4) If, on an application under this section, the local planning authority are provided with information satisfying them of the lawfulness at the time of the application of the use, operations or other matter described in the application, or that description as modified by the local planning authority or a description substituted by them, they shall issue a certificate to that effect; and in any other case they shall refuse the application.
- (5) A certificate under this section shall-
  - (a) specify the land to which it relates;
  - (b) describe the use, operations or other matters in question (in the case of any use falling within one of the classes specified in an order under section 55(2)(f), identifying it by reference to that class);
  - (c) give the reasons for determining the use, operations or other matters to be lawful; and
  - (d) specify the date of the application for the certificate.
- (6) The lawfulness of any use, operations or other matters for which a certificate is in force under this section shall be conclusively presumed.”

...

21. Section 192 of the 1990 Act allows a person to make an application for a certificate of lawfulness in respect of proposed use or development. It provides, so far as material:

- “(1) If any person wishes to ascertain whether-
  - (a) any proposed use of buildings or other land; or
  - (b) any operations proposed to be carried out in, on, over or under land are lawful,

would be lawful, he may make an application for the purpose to the local planning authority specifying the land and describing the use or operations in question.

- (2) If, on an application under this section, the local planning authority are provided with information satisfying them that the use or operations described in the application would be lawful if instituted or begun at the time of the application, they shall issue a certificate to that effect; and in any other case they shall refuse the application.
- (3) A certificate under this section shall-

- (a) specify the land to which it relates;
  - (b) describe the use, operations or other matters in question (in the case of any use falling within one of the classes specified in an order under section 55(2)(f), identifying it by reference to that class);
  - (c) give the reasons for determining the use or operations to be lawful; and
  - (d) specify the date of the application for the certificate.
- (4) The lawfulness of any use or operations for which a certificate is in force under this section shall be conclusively presumed unless there is a material change, before the use is instituted or the operations are begun in any of the matters relevant to determining such lawfulness.”

### **Factual Background**

22. The factual background to the Property is likely to be very familiar to the Council itself. I do not consider it is necessary to rehearse it in any detail here.
23. The Property is a 4-storey building located in the borough of Camden in close proximity to Camden Town Underground Station. It forms part of a parade of shops between Delancey Street to the south and the A4201 to the north. As above, it has been unoccupied since the previous use ceased in April 2015.
24. The Property is not statutorily listed for the purposes of the Planning (Listed Buildings and Conservation Areas) Act 1990, but it is located in the Camden Town Conservation Area.
25. The Property was designated as an asset of community value in 2015 at around the time it closed. That designation does not appear to be shown on the Council’s web-site, but I am instructed that it is confined to the ground floor and the first floor of the Property. The officer report dealing with a recent certificate of lawfulness granted by the Council in respect of the existing use of the Property (see below) stated (amongst other things):

“The local authority believes that the Black Cap furthers social, cultural and recreational interests which cannot be met elsewhere.

The Black Cap has had iconic status for Camden's gay community since the 1960s as a place to meet and socialise. However, it is no ordinary gay pub as it also plays an

important cultural role as a renowned venue for drag and cabaret performances. The pub's heritage contributes to its continued central role in Camden and London's gay scene and means that the community value would not be easily replicable elsewhere.

The community value of the pub is not solely recreation and cultural. The Black Cap plays the role of a community centre for the local LGBT community in the absence of such a dedicated facility. The council has received evidence of its important social role as a meeting point for various support groups (particularly for older LGBT people and those from ethnic minorities), for hate crime outreach work and as a venue for events, consultations and forums. While it could be argued that the recreation and cultural value of the pub is London-wide, even national and international, these groups very much serve Camden's large LGBT community specifically.'

26. The principal reason for not needing to go into more detail about the planning background to the Property is that it already benefits from a recent certificate of lawfulness in respect of its existing use. That certificate was issued by the Council under section 191 of the 1990 Act on 3 July 2019 ("the 2019 Certificate").

27. The 2019 Certificate certified the lawful use of the Property under section 191(4) of the 1990 Act on 30 August 2018 as being:

"A mixed use of the premises as a cabaret/dance venue, club, bar/community space and as a public house (Sui Generis), consisting of: use of the ground floor as cabaret dance club with bar and live performances and community uses with toilets at the rear and use of the first floor as a bar and community space (including toilets) and use of the first floor external terrace as a drinking/smoking area; with ancillary uses of the basement as storage for beer and stock, the second floor as kitchen, two offices, and two rooms of staff accommodation plus bathroom and the third floor as two rooms of staff accommodation. Basement, second and third floor uses serve the primary use of cabaret/dance venue, club, bar/community space and public house (Sui Generis)."

("the Certified Use")

28. In accordance with section 191(6) of the 1990 Act, and unless there has been some material change affecting the continued relevance of the 2019 Certificate, the lawfulness of use of the Property for the Certified Use is conclusively presumed.

29. The reason given for the Council's decision to issue that 2019 Certificate was stated as follows:

"Reason for the Decision:

1. The use began more than ten years before the date of this application."

30. I have been provided with a copy of the Council's officer report that led to the issue of



the 2019 Certificate in that form. It is clear from that report that the Council carefully considered the application for the certificate that had been made by the then owner of the Property, Golden Brick Pubs Ltd, against the planning history of the site.

31. The applicant for the 2019 Certificate originally described the use for certification as:

“Use of the building at basement, first, second and third floor level as a public house (Class A4) with a cabaret entertainment space at ground floor level (Class Sui Generis).”

32. Paragraphs 6.20-6.21 of the officer report explained that over the course of the application the applicant had been in discussion with Council officers and, in consequence, had put forward an expanded description of the use to be certified as follows:

“Use of the premises as a public house (Class A4), and cabaret/dance venue, bar with ancillary floorspace consisting of: use of the basement as storage for beer and stock, use of the ground floor as cabaret bar with live performances (Sui Generis) and public house (Class A4) including toilets at the rear; use of the first floor as a public house (Class A4) bar area including toilets and use of the first floor external terrace as a drinking/smoking area; use of the second floor as a kitchen, two officers, and two rooms of staff accommodation plus bathroom and use of the third floor as two rooms of staff accommodation, all ancillary to the public house (Class A4) use.”

33. In response to this revised proposed description, the officers observed at paragraph 6.22 of the officer report:

“While it [is] not entirely clear from the description what lawful use the applicant is trying to establish, the general thrust of the submitted report and the submitted evidence is that lawful use of the property is as a Public House (Use Class A4) with cabaret uses at ground floor.”

34. The officer report then contains reference to various legal principles relating to the definition of the planning use, before then turning to consider the history of the use of the various parts of the Property in some detail in the report itself. That analysis included the following:

“6.29 The primary uses of land often embrace one or more ancillary activities. The focus of planning control is on the primary uses of the planning unit rather than ancillary uses. The concept of the planning unit is judge made but correct identification of the planning unit is an essential step in determining the lawfulness of its given use.

6.30 The judgment as to whether one use is ancillary to another, or not, is one

of fact and degree and thus fact sensitive.

...

6.42 The evidence shows that throughout the relevant period, there was a single unit of occupation. There is no suggestion that any part of the building was occupied separately from the remainder, with the staff accommodation being ancillary to and accessed through the building.

6.43 The use of the basement and first to third floors were as follows. The basement had cold stores and was as storage for beer and stock, the second floor was used as a kitchen, two offices and two rooms of staff accommodation plus bathroom and the third floor was used as two rooms of staff accommodation. It is accepted that these uses were ancillary to the primary activities carried on in the planning unit.

6.44 It is agreed by the applicant and the council that the ground floor was used as a cabaret dance bar. A cabaret dance bar does not fall within any specified class. To determine whether the ground floor cabaret dance bar was ancillary to the first floor pub, it is necessary to have regard to the nature and scale of the cabaret dance bar activity and its relationship to the public house use. Whilst an element of live entertainment would be regarded as ancillary to most A4 uses and this might include use as some of its floorspace as a dancefloor or stage, the nature and scale of the cabaret dance bar use of the building is such that on the facts here it cannot be said to be ancillary to the A4 public house use. The ground floor was in effect a well-used cabaret dance bar of comparable size to the first floor public house use. This is particularly the case before Faucet Inn took over the management of the property (September 2010) when the ground floor was opened for cabaret or club nights every night of the week. Following the management by Faucet Inn, it has been reported that the ground floor was not always open from Sunday to Thursday. But that it was always open on Friday and Saturday. Taking into account that the use of the ground floor fluctuated more after the change in management, it is nevertheless concluded that even at its reduced level of 2-3 nights a week the cabaret/club use of the ground floor operated in a way which was not ancillary to the use as a public house. As a matter of fact and degree, the cabaret use and club space use with music and dance was not ancillary to the use of the public house.

...

6.48 It is therefore not possible to recognise the single main purpose of 171 Camden High Street to which secondary activities are incidental or ancillary. From the questionnaire evidence it is not concluded that the cabaret dance bar was ancillary to the public house or that the public house element was ancillary to the cabaret dance bar.

...

6.50 There is here a single unit of occupation and the facts support a conclusion that the second Burdle category applied. The analysis above indicates that

the entire unit of occupation should be considered as it is not possible to say that the use of the ground floor as a cabaret dance bar is incidental to the use of the remainder of the building as a public house. Conversely it is not possible to say the use of the first floor (and basement and upper floors) as a public house is incidental to the use of the ground floor as a cabaret dance bar.

- 6.51 While the ground floor's primary use was as a cabaret dance bar (operating between the hours of 9 or 10pm and finishing between 1am and 3am), it is clear from the question of evidence that this space was also used during the daytime for rehearsals or meetings and occasionally for private events as well as by customers moving freely between ground floor and first floor when both floors were operational.

...

- 6.54 While the ground floor and first floor of 171 Camden High Street were used for different purposes these uses were clearly not unrelated rather they were mutually supportive. The first floor served food and drink and was open from noon. It therefore provided a daytime space for socialising as well as a quieter space in the evening. While there was no entry charge for the upstairs bar, there was an entry charge for some events on the ground floor and it is evident that the ground floor cabaret performances and club nights providing music and dance were a big draw for customers and contributed to the venue's distinctive character. It is unclear whether the ground floor always levied a door charge but at least one respondent stated door charges did not apply during the week.

...

- 6.55 From the above questionnaire responses it is evident that the purposes of the ground and first floor were not unrelated, on the contrary they were mutually supported and mixed together to provide an overall experience. There was not sufficient physical or functional separation to support a finding that there were two planning units. While the first floor bar can be independently accessed from the entrance foyer, the bar and the uses on the upper floors and basement are physically related to the use on the ground floor. That is to say, the basement beer store can only be accessed from a staircase from within the ground floor cabaret dance bar and therefore the first floor is functioning and physically dependent on access to the ground floor 'cabaret dance' space. Likewise, the ground floor is functionally linked to the second and third floors which provide ancillary office and staff accommodation. The second and third floors can only be accessed from within the first floor. On the basis of how the ground floor and first floor were used and how they are accessed, both uses are within the same planning unit which is the unit of occupation."

35. Again, I consider it is unnecessary to rehearse all the officers' analysis of the evidence in detail here. The conclusions were summarised in section 7 of the report as follows:

- “7.1 While some of the applicant’s evidence refers to the Black Cap as a pub or public house, these reference were without detailed descriptions of the nature or the use. This evidence was submitted to support the use of the land in planning terms but none of the organisations who issues these documents were making an assessment of the nature or the use. Therefore only limited weight can be attached to such evidence (which names the use rather than providing a detailed description of the use).
- 7.2 Assessing the application in light of the guidance in ‘Burdle & Williams’ judgment, it is concluded that there is not a single main purpose carried out at the subject property. Rather 171 Camden High Street is used for a mixed or composite use as a cabaret dance bar club use at ground floor and public house use at first floor. The two use[s] are interrelated and mutually supportive, but their relationship scale and character of these [sic] uses is such neither of them could be correctly viewed as ancillary to the other. The evidence demonstrates that the mixed or composite use began more than ten years before the date of this application and has continued throughout the relevant 10 year period.
- 7.3 A mixed use or composite [use] is a sui generis use. Thus although one or both uses looked at individually may fall within a Use Class, their joint operation is held to mean that the combined use does not.
- 7.4 Section 191(4) of the Town and Country Planning Act 1990 allows the Local Planning Authority to substitute or modify the description put forward by the applicant. In this case the following description is considered to be the lawful use. This description is based on the evidence and describes how the property has been used for a period of 10 years or more.”

36. Paragraph 7.4 of the officer report then set out the modified description of the Certified Use (set out above) and the 2019 Certificate was issued in those terms.

### **The Proposals and the Proposed Certificate**

#### **The Proposals**

37. The Study (identified above) identifies the Proposals for the Property to facilitate its reopening as a venue for the primary activities identified in the Certified Use. The Study identifies proposed refurbishment of the existing building identified to allow better access and arrangement of rooms at the upper floors. The internal proposals are shown in a number of plans.

38. It is clear from the Study that the Property continues to be laid out for the Certified Use as follows:

- a. basement (general storage associated with the venue);
- b. ground floor (lobby, bar (use class A4) with cabaret for live performances (sui generis) and toilets);
- c. first floor (bar, toilets and associated external beer garden (use class A4));
- d. second floor (kitchen and four bedrooms, albeit two of these rooms were previously used as offices); and
- e. third floor (two bedrooms).

39. The Study identifies the limited proposed internal changes to the Property, summarised for me as follows:

<b>Floor</b>	<b>Existing</b>	<b>Proposed</b>	<b>Change</b>
Basement	Storage	Storage	None
Ground	Lobby, toilets, bar with stage for live performances	Lobby, toilets, bar with stage for live performances	Internal reconfiguration of toilet area to rear of stage
First	Bar, toilets and external beer garden	Bar, toilets, kitchen and external beer garden	Internal reconfiguration of toilet area and introduction of kitchen
Second	Kitchen and 4 bedrooms	5 bedrooms	Introduction of an extra bedroom
Third	2 bedrooms	2 bedrooms	Internal reconfiguration only

40. I am instructed that the accommodation on the second and third floors will continue to be ancillary accommodation. It would be provided for use by performers on a subsidised paying basis (who may otherwise not be able to afford accommodation in London) or staff employed at the Property on a paying basis (including as part of their overall salary package). I am instructed that when not in use by performers and/or staff, the accommodation would be offered to paying customers as 'bed and breakfast' rooms, ancillary to the cabaret/pub function to support its income.
41. I am also instructed that the proposed and experienced operator of the Property (Kirk Spencer) has explained that the provision of in-house accommodation for performers is fundamental to attracting to the Property high-profile and up-and-coming acts.

#### The Proposed Certificate

42. In light of the Proposals, the Owner is proposing to make an application for a certificate under section 192 of the 1990 Act.
43. The terms of the proposed certified use would differ from the Certified Use in the 2019 Certificate only in the following respects (where track changes show the differences):
- ‘Proposed ~~A~~-mixed use of the premises as a cabaret/dance venue, club, bar/community space and as a public house (Sui Generis), consisting of: use of the ground floor as cabaret dance club with bar and live performances and community use with toilets at the rear and use of the first floor as a bar and community space (including kitchen and toilets) and use of the first floor external terrace as a drinking/smoking area; with ancillary uses of the basement as storage for beer and stock, the second floor as ~~kitchen,~~ two offices, and two ~~five~~ rooms of staff-accommodation plus bathrooms and the third floor as two rooms of ~~staff~~ accommodation. Basement, second and third floor uses serve the primary use of cabaret/dance venue, club, bar/community space and public house (Sui Generis).’

#### **Analysis**

44. In light of the existing 2019 Certificate it is clear that:
- a. the Property is regarded to be a single planning unit;
  - b. the Council concluded that the cabaret dance bar use on the ground floor was not ancillary to the pub use on the first floor and *vice versa*;
  - c. accordingly, the Council consider the Property has a composite use as a cabaret

dance bar club at ground floor and a public house at first floor; and

- d. the uses in the second and third floors (bedrooms/kitchen/offices) are ancillary to these primary uses.

45. There has been no change in use of the Property since it closed when it was operating with the Certified Use. Given the relatively short passage of time since closure (from a planning perspective) and the absence of any actual abandonment of the Certified Use of the Property in any event, in the absence of any other material changes it seems clear that the Certified Use continues to represent the current lawful use of the Property.

46. Accordingly, for the purposes of considering the proposed Certificate, the Council simply needs to address whether what is proposed in terms of either building works or changes in the way the Property is used would comprise development.

47. In relation to the former, it is clear from the Study that the proposed operational works are all internal and would not involve any material change to the external appearance of the Property. Accordingly it is self-evident that the Proposals do not involve any operational works constituting development.

48. In relation to the latter, and applying the legal principles I have summarised above, it is also evident from both the Study and the terms of the proposed Certificate that no changes are proposed to the identified mixed Sui Generis use of the Property identified in the Certified Use. It is proposed that the Property would function as a single planning unit for the identified mixed use of cabaret/dance venue, club, bar/community space and public house. Moreover, it is proposed that those main uses which comprise the mixed use would in fact continue to occur in the spaces identified in the Certified Use. In those circumstances, I consider that it is clear that no material change of use is proposed and consequently no development is involved.

49. Indeed, it is self-evident from the table identified above that the only internal alterations are ones that simply affect minor changes in the nature and location of what have previously been seen as ancillary uses to the main mixed use. I cannot see any proper basis for concluding that such minor changes in location within the Property of the ancillary

uses, or as to the extent of the ancillary uses, is capable of materially changing the overall continued Sui Generis use of the Property that was originally identified in the Certified Use. Thus, in particular:

- a. At basement level there are no relevant changes.
- b. At ground floor level the internal reconfiguration simply relates to the toilet areas to the rear of the stage.
- c. At first floor level the changes are limited to internal reconfiguration of toilet areas and the introduction of a kitchen on this floor. The moving of a kitchen from the second floor to the first floor, so as to provide cooking facilities for the main mixed use of the Property, does not materially change the use of the Property in any way. It is also clearly not a case of an ancillary use becoming a new primary use.
- d. At second floor level the relocated kitchen allows for the addition of a further bedroom in addition to the four that already exist. Given that it is already certified that four bedrooms at this level were used lawfully as part of the ancillary uses of the main Certified Use, it is clear that the introduction of one additional bedroom in the internal reconfiguration does not realistically alter that analysis. It is clear that the overall nature of the use of that extra bedroom is intended to continue to be ancillary activity to the main mixed use identified. There is no question of the accommodation becoming physically separated from the primary mixed use of the Property. It also seems clear that no material change is intended to the functional use of that accommodation being ancillary to the main mixed use that is already certified. Making that accommodation available to staff, performers or paying customers as part of a bed and breakfast operation ancillary to the main primary use is intended to be very much an ancillary use to the main primary use that is already certified (which will not change in nature or description). As already noted, fluctuations in ancillary uses, or indeed the introduction of new ancillary uses, does not of itself constitute a material change of use that would be development for the purposes of the 1990 Act. Accordingly given that the accommodation would continue to be available to staff, the fact that it will also be available to performers at the venue or to customers of the venue on a bed and



breakfast basis (even if that constitutes a change in the ancillary use), does not alter the intrinsic ancillary nature of that activity, given that it would continue to be integrated physically into the Property (with none of the bedrooms being self-contained) and does not alter the continued main mixed primary use of the Property.

- e. At third floor level there are only internal reconfigurations, which do not affect the overall existing way in which the floor is used.

50. For all these reasons, I consider that it is clear that what is described in the proposed Certificate does not involve any development for the purposes of the 1990 Act given the existing Certified Use of the Property. Accordingly the proposed Certificate will fall to be issued accordingly, based on the information with which I have been provided.

51. Whilst assessments of primary and ancillary uses are matters for planning judgment, it is difficult to see any reasonable basis upon which what is being proposed could be described as involving any material change in the Certified Use.

### **Summary**

52. For these reasons I consider that the Proposals do not involve any development which might otherwise require planning permission and the proposed Certificate application should accordingly be granted. I would be happy to advise further on any issues that might arise.



**JAMES STRACHAN KC**

**39 Essex Chambers**

**London, WC2A 1DD**

**3 November 2023**