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property & planning  
design and access statement and planning statement**

**DESIGN AND ACCESS STATEMENT AND PLANNING STATEMENT.**

**RETENTION OF WORKS AND CHANGE OF USE OF 56-58 FORTUNE GREEN ROAD LONDON NW6 1DT FROM MOTOR VEHICLE SHOWROOMS (SUI GENERIS) TO CLASS A1/A3 MIXED USE SANDWICH BAR/CAFE AND SHISHA SMOKING PLACE (SUI GENERIS) AND ASSOCIATED WORKS OF DECKING AND HANDRAIL AND BALUSTRADING.**

**FOR: MR M ALAYAN AND MR D KHAN TRADING AS MONTE CRISTO.**

**BY: ALAN WIPPERMAN BA MRICS MRTPI C DIP AF**

**3 APRIL 2014**

## **1 THE LOCALITY AND DESCRIPTION OF THE PLANNING UNIT.**

- 1.1 The planning unit comprises the leased corner lock-up shop type property at ground floor only with private forecourt at 56 and 58 Fortune Green Road.
- 1.2 The extent of the property and ownership can be seen in both the freehold title, including forecourt, and in the leasehold title with forecourt as shown in the title plans, both in Appendix 1.
- 1.3 The property forms the ground floor of a mixed use block of property with residential flats over and is also part of a small local shopping parade and is shown on the location and site application plan forming part of this application.
- 1.4 Constructed as a shop unit, the property has last been used as a retail shop by a Londis, but this last use does not appear to have been an authorised and lawful use. The last authorised and lawful use was for the sale of motor vehicles selling scooters and mopeds. The company trading at 56-58 has relocated nearby. The previous use included parking on the forecourt as can be seen from the photograph and the rating assessment in Appendix 2. The appearance of the vacant premises before the current use shows the indications of the previous authorised and lawful use still showing is in the street scene photographs in Appendix 2. The rating assessment from the VOA website confirms the past use. (Appendix 2).
- 1.5 The current use can be best described as in use internally as a sandwich bar/café use selling light refreshments, hot and cold drinks, and with some reheated foods. Ice creams are also sold. Sales are for on or off site consumption. During the day there is, as advised to date a significant take away element of trade since opening. This may reflect the limited alternative café/sandwich bar uses in the immediate vicinity as the retail survey below indicates is the case. This is further confirmed by the menu, copy attached as Appendix 3.
- 1.6 It is proposed that the use applied for will have some 24 seats internally for customers to eat and drink at table or to attend and have counter service to customer choice. This is shown on the proposed drawing submitted.
- 1.7 There is a recently installed external temporary deck structure as has been provided by other traders in the vicinity providing a platform with integral disabled ramp access to both the internal area and to the external seating where customers can eat and drink al fresco and smoke as well. In addition to European smoking customers wishing to smoke in the culturally specific shisha method can order a shisha smoking session. The area is not reserved solely for smoking or smoking shisha and there is no requirement for customers to order shisha smoking. The shisha smoking use is thus ancillary and incidental to the mixed sandwich bar/café use proposed. There will be 40 seats provided outside as shown on the proposed drawing as submitted.
- 1.8 It is difficult to assess at this early stage what the use over the year might ultimately be. Allowing for seasonal variations and this being a new business and following detailed consideration the applicants consider it is likely to be and will

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have the characteristics of a sui generis mixed A1/A3 retail and café use with the outside area used as a shisha smoking place.

- 1.8 **This is confirmed by the absence of internal canopy, duct, or flue installed for cooking and extracting heat and odours etc. and cooking equipment from fresh ingredients.** This can be confirmed on-site inspection and from the application drawings. Given the nature of the use over the year it is very likely the shisha smoking element of the use will not be the primary or dominant use and the use it will be the mixed use as described and applied for. Catering equipment being used is shown on the application drawings and is further confirmed below as typical of a mixed use A1/A3 catering business:

Microwave for re-heating food and liquids.

Toaster.

Grinder for coffee beans etc.

Blender/juicer for fruit drinks etc.

Coffee machines.

3 x chilled counter displays for food.

Under counter fridges.

Shrink wraps for take-aways.

Ice cream display freezer.

Tap/wash area.

- 1.9 It is assumed it is common ground with the local planning authority that this application will be treated as an application for a mixed A1/A3 use with shisha smoking place as has been concluded for similar uses at appeals. Any change of description should be agreed with the Applicants. (See National Planning Practice Guidance).
- 1.10 The defined planning unit at ground level and forecourt encompasses all the areas to be used and is as shown on the application drawings.
- 1.11 The works to be retained and installed without prior permission are:
- (i) The raised external decking area and ramp, essentially a temporary structure which can be readily removed should the use cease.
  - (ii) The extending retractable canopy (if permission is required).
  - (iii) The shopfront alterations which have been minimal incorporating the main sliding door installed by others and now repainted in grey.
  - (iv) Other shopfront changes including the fascia sign and backing film applied to glazing as shown are applied for in a separate application seeking advertising regulation approval.
  - (v) Further hand-railing and bicycle parking is also being applied for as shown on the proposed drawing.
- 1.11 It can be further seen from the photographs submitted with the application (Appendix 4) that the area is mainly residential but within a Neighbourhood

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Shopping Area where the ground floor units have a mix of shop and commercial business uses as well as some D1 and D2 class uses. There is a variety of traders operating at ground floor although there are two units vacant ON either side of the road at present and one unit has been lost to residential use. (See retail use survey referred to below). Most shop type properties have residential use over. (See photographs in Appendix 4).

- 1.12 The local retail activities are limited and although there are some A3 uses in the immediate vicinity of Fortune Green and opposite there is only one café use with external tables and chairs. However there is no other shisha smoking operator in this defined centre. See the traders survey in Appendix 5 where the uses observed are noted on this side of the centre and listed. These uses may not all be the lawful and authorised uses.
- 1.13 The property is located within the defined Fortune Green Neighbourhood Centre where specific development plan policies apply and this is also referred to further below. It will be an area where the residents living there can expect and no doubt do have some impact on residential amenity from the retail and commercial uses, with a number of A3 uses having external seating and other business having external parking including scooter parking to forecourts.
- 1.14 The survey confirms the use would be of significant benefit to the vitality of the centre and area and would bring back at least a partial A1 primary use as part of sui generis use in keeping with the area at a scale that should be acceptable to nearby residents when subject to conditions.

## **2 SUMMARY OF THE PLANNING HISTORY.**

- 2.1 The Planning History of the planning unit is limited and is in Appendix 6. It is recorded as both 56 and 58 Fortune Green Road and both history summaries are provided from the website.
- 2.2 No. 56 appears to carry the main history and the access from the highway was approved in 1955, copy consent and drawing available, not appended, for a motor car showroom use. Then, in 1990 permission was given for shopfront alterations as shown on drawings for the existing car showroom for an Alfa Romeo dealer use followed This shopfront appears similar to the shopfront found today. No shopfront or door alterations have been undertaken by the Applicants subsequent to the previous occupier, save repainting and the fascia and film to glazing advertising installed and also applied for separately.
- 2.3 There does not appear to have been any application for a change of use from motor car showrooms to date. There was until recently a use selling mopeds and scooters. This would probably not have needed consent, but the change of use to a Londis grocery would have been to a Class A1 retail use from a sui generis use and therefore permission would have been required.

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- 2.4 As there can be significant adverse impacts from a vehicle showroom use, including cars or motorcycles passing over and crossing the pavement, and parking on the pavement and forecourt, it can be both a noisy and dangerous use for pedestrians. The present use of the sloping forecourt area is a significant benefit. Cars and vans are still parked on the forecourt of other businesses as can be seen from the photographs in Appendix 4.
- 2.5 As the current use is a vehicle based sui generis use any change of use to any A Class use and particularly an A1 related use must be of significant benefit and fully accord with the adopted development plan policies, as well as recent guidance for town centres in the Planning Practice Guidance issued 6 March 2014, Portas review etc.

#### **4 THE CURRENT AND THE APPLIED FOR USE.**

- 4.1 The current use is applied for is as a mixed use for Class A1 retail sandwich bar and A3 café use with shisha smoking place. The primary use given it only commenced fully on the 10<sup>th</sup> February 2014 is as a sandwich bar in A1 use selling cold foods with ancillary re-heated foods with a mix of on-site and take-away trade with sufficient seating to give a significant element of a Class A3 use, such that the use is a mixed A1/A3 use.
- 4.2 The A1/A3 mixed use allows for cold foods and sandwiches to be prepared and sold, for hot and cold drinks to be served and sold, and for light refreshments to be served including snacks and small meals where foods may be produced from pre-mixed doughs and mixes which can be re-heated or toasted and served at tables and to customers for take away. The menu in Appendix 3 confirms this is the case and the use with the tables and chairs provided conforms to these mixed use characteristics, both as a matter of fact, and degree. The outside seating is used al fresco but the use is dependent upon weather, rain and temperatures, and therefore all external use falls off during winter and on chilly evenings. Outside use is heavier in summer and is used by all kinds of smokers incidental to the use, when “European” smoking takes place, i.e. cigars, cigarettes etc.
- 4.3 However in addition there is a shisha smoking offered, again confirmed in the menu, and this can only be served outside. Shisha smoking is usually ordered with drinks and snacks and the use is incidental and ancillary to the mixed A1/A3 use and of sufficient anticipated scale over the year that it should be added to the sui generis permission now being sought. Even if not of sufficient scale the use in the permission is sought to give certainty to the business use now operating.
- 4.4 Many appeal decisions for this type of use have been given permission for a use meeting this description and scale of mixed use which of course can vary in character over the year and this unit has only been trading a few months.
- 4.5 Further minor amended works are proposed in addition to the retention of decking and outside seating area are proposed in association with the use change, comprising additional handrail, thin profile balustrading, and space for cycle parking for two bicycles as shown on the proposed drawing.

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- 4.6 A separate advertising regulation application is also being made by the Applicants for the fascia signs and the film applied internally to the window glazing.
- 4.7 The re-painting of the walls and doors and window frames are not considered to require planning permission. However if in the opinion of the local planning authority permission is required then this too is sought.

## **5 SHISHA SMOKING AS A USE.**

- 5.1 Prior to the 2007 indoor “smoking ban” “shisha parlours” could often be considered as a matter of fact and degree to have a primary or dominant use of a planning unit for smoking shisha for which an express permission would usually then be required. Smoking in conjunction with another use might or might not amount to a change of use.
- 5.2 Once the ban came into effect this was no longer possible. Any use prior to the ban is now irrelevant.
- 5.3 Many shisha parlours inevitably closed. Now shisha smoking places can only lawfully operate in the open, with shelters that have at least 50% open sides. The Regulations for this were made under Health Act legislation and are set out in SI 3368 of 2006, (Health Act 2006). (See Appendix 7). Further guidance has also been given by the Local Government Regulation Unit regarding the implementation of this “Smoke Free Legislation”, and this guidance confirms that the legal requirements for “shisha bars” as a use is no different from any other premises or enclosures required to be smoke free. (Appendix 8).
- 5.4 Shisha smoking is relatively profitable when operated well with a high quality offer. This requires a stock of high quality tobaccos with a good range of flavoured and scented tobaccos with charcoals and or lighters for the smoke. Experienced, attentive and skilled staff will also be required to maintain the smoking experience during a booked session of pipe use. Specific flasks for specific flavours are used. Customers nearly always take drinks and snacks when smoking and so the use is usually part of and ancillary to the catering use. The demand is now very strong for this use in Central London and increasingly in this area given the character of the resident and some tourist populations as recent Census evidence is beginning to confirm.
- 5.5 Shisha smoking may not have a significant physical presence or be a major part of the turnover of any business, but where it is offered it can be a very significant and important part of the profitable income, especially for a small catering business such as this one.
- 5.6 The activity is not always understood or readily accepted by some, not being indigenous. It is now my experience that a minority of objectors will display misunderstanding and hostility to the activity with a significant element of cultural prejudice which they would not apply to European style smoking or to outside eating associated with drinking alcohol. As a result there can be a small number of persistent objectors in shisha smoking related applications and appeals very often not always consistent with proximity and not well founded on sound planning grounds. This is not to discount sound planning objections and each case has to be considered on its merits. Complaints known of to date are considered below.

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5.7 However the use as described and the menu confirms that the use meets the description of similar uses allowed by Inspectors on appeal with residential properties in close, even immediate proximity when above or next to such mixed sui generis uses.

5.8 A description of the nature and activity of shisha smoking is given in Appendix 9.

## **6 OTHER SHISHA SMOKING USES IN CAMDEN.**

6.1 Shisha smoking is not new in Camden and as is the case with many other London Boroughs the demand for shisha smoking is being met by existing and new business offering shisha smoking.

6.2 As shisha smoking is usually offered and undertaken with refreshments, being snacks or small meals and drinks, the use is usually a mixed use.

6.3 The British Heart Foundation researched tobacco related activities in 2011 and at that time Camden Council appeared to be aware of twelve “shisha bars” operating in 2011. See Appendix 10.

6.4 The Council’s planning applications database using the key word “shisha” gives no results so the number of premises offering shisha smoking as lawful and authorised planning uses is unknown. The use appears to be considered part of an A3 use however, see “David’ Deli”.

6.5 The following premises are known by the Applicants to offer shisha smoking and understood be within Camden. A detailed study of this ancillary use in the Borough has not been undertaken:

David’ Deli	341 West End Lane NW6 1RS. This use appears to be accepted as part of a lawful authorised A3 use. See the photographs in Appendix 4.
Rouge Lounge	309 West End Lane NW5. This user is currently at appeal over an enforcement notice as there is no A3 use with an hours of use extension refused in 2013. (Photographs in Appendix 4).
Isis Shisha	Haven Street NW10 8QX. No other information available at present.
Café Natural	263 Eversholt Street NW1 1BA. No relevant planning history noted for the use on the Camden website.
Marrakech	96 West Yard NW1 8AF. No information available at present.
Stables	At the Market Place Camden. Apparently a number of stalls offer shisha smoking. These are not equivalent units and uses.

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- 6.6 The use of the forecourt at David's Deli at 341 West End Lane, with decking, awning and side enclosures in connection with a previously approved Class A3 use (2003) was considered in 2012, application number 2012/3837/P, and this was approved on the 12<sup>th</sup> November 2012, subject to conditions. The decision and report are not reproduced with this Statement as they will be known to the Local Planning Authority. There appears to be residential uses over. (See photograph in Appendix 4).
- 6.7 Permission was given for the decking after enforcement complaints following a smoking use in 2011. In the delegated decision report it was noted that there was a "pd right" for an enclosure up to 1 metre high around the forecourt and as there was no Article 4 directions applied in this location there would in effect be a "fall back position" i.e. to install without permission. (This would also apply at Fortune Green Road but the handrail height proposed in 1100mm).
- 6.8 Hours of use were limited to 9.00 - 23.00 hours Mondays to Saturday and the same hours for Sundays and Bank Holidays. As this use was by then known to have been used in association with external shisha smoking and this aspect of the use was not mentioned in the Report it must be assumed the local planning authority considered shisha smoking to be part of an A3 use and approved it accordingly.
- 6.9 The setting is in a larger commercial area but the use is also below and near residential uses. There is little difference in the external character of the use proposed at 56-58 Fortune Green Road save that the scale of the internal use will be larger but less intense as a class A1/A3 mixed sandwich bar/café use rather than restaurant. The approved layout at 341 West End Lane allows 42 external seats and 16 internal seats. The use at 56-58 Fortune Green Road now seeks permission for 40 external seats and 26 internal seats, rather less external seating than that undertaken at David's Deli and only a few more internal seats.
- 6.10 Lounge Rouge at No. 309 West End Lane is operating without express permission for an A3 use and offers shisha smoking ancillary to that use. It sought permission to operate until 23.30 Mondays to Saturdays and to 22.30 on Sundays. An appeal decision is awaited but it would appear that the appeal should be allowed as similar proposals in similar circumstances have been allowed elsewhere but subject to conditions. As this is at appeal and the conditions likely to be applied to any decision remain unknown, no details are provided. Again this unit can be seen in Appendix 4 photographs. If the appeal is lost the use may be lost to those seeking shisha smoking in the area.
- 6.11 **However the principle of such uses in commercial areas (which this site is) and their impact on residential amenity in Camden appears to have been considered in the vicinity and found acceptable subject to conditions, (David's Deli). There is no evidence on the website of any planning enforcement issues arising since that approval in 2012. Photographs suggest larger seating areas ancillary to A3 use can also be acceptable – see the Pizza Express branch photograph in West Hampstead for example and are often found outside public houses. (Appendix 4).**

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- 6.12 There appears to be perhaps some 12 perhaps less premises currently offering shisha smoking in Camden compared to the many more in Westminster, now thought to be over 100 premises. (See the BHF inquiry of Camden as at January 2012 in Appendix 10), there is likely to be an increasing demand and need for further outlets in Camden as the resident population and character changes. The indigenous population is also seeking out shisha smoking more often. This reflects the increasing popularity with all sections of the population in London. For some the absence of alcohol being served is important and appeals more to some religious and ethnic minorities. Shisha smoking is undertaken by men and women and there is no segregation as some objectors sometimes allege.
- 6.13 In the 2011 Census results it has been found that 42.5% of Camden's population was born overseas up from 38.6% since the last census, with notable rankings of residents from Somalia, the Middle East and Iran, where shisha smoking may also be popular with some.
- 6.14 The Applicants advise that they believe around 75% of customers over the week's trading appear to come from or live within the immediate area, within one mile or so of the application property. It is their view and it has been my experience that as the character of the resident population changes there is a growing local need and demand for shisha smoking in the Borough and this is often sought out in the same way as attending a local public house.
- 6.14 Local outlets thus allow a sustainable location for the activity and so minimise unnecessary travel.

## **7 RELEVANT PLANNING APPLICATIONS AND APPEAL DECISIONS.**

- 7.1 Reference is made below to a number of Appeal decisions in London. Copies of the Appeal decisions and illustrative photographs showing the proximity of habitable room windows to the external tables and chairs can be found in Appendix 11.
- 7.2 1 Church Street London NW8. It can be seen that there are residential premises over at first floor and adjoining as is also the case with this corner property with habitable rooms in close proximity.
- 7.3 This property was at the very extreme edge of a defined District Centre and immediately adjoins residential areas and properties with flats over.
- 7.4 The Inspector noted, importantly in my opinion, that the distinctive smells and odours can be off-putting to some, but that susceptible windows would not be affected if umbrella canopies allowed dissipation and that with a limitation of hours this form of the use would be acceptable. A retractable canopy has a similar effect provided it is used in accordance with smoke free legislation which it can be.
- 7.5 Another comparable appeal case is at 17 Greenwich Church Street a decision following an Inquiry. The Appellant operates a rear courtyard offering shisha smoking where bedrooms can be expected to overlook the area. I have visited this property and can confirm there are residential properties over and close by and taken the photographs supplied.

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- 7.6 Although this was a town centre location it was noted by the Inspector that with regard to objector proximity:

*“ Although the shisha smoking had been the source of complaints, only one complainant appeared at the inquiry. Her evidence was somewhat undermined by her estimate that her house was only 35 metres from the appeal premises whereas in fact it is more like 200 metres in a direct line and closer to a busy main road than to the appeal premises. **The Council had produced no strong evidence to indicate that the use of the appeal premises for smoking shisha in addition to the long-standing food and drink sales had been the source of such a level of complaint that action had been needed.** Furthermore, the premises are located in the town centre close to other uses which generate evening activity, so any noise and disturbance attributed to the appeal premises, where alcohol is not served, might be coming from somewhere else nearby”.*

- 7.7 The permission given at 141 Goldhawk Road, as with Greenwich is a rear yard use again where bedrooms can be expected to overlook the courtyard use. The tent structure was not approved but the use of the area was allowed. The decision and photographs are appended.

- 7.8 At Fattoush Express at 193 Edgware Road a mixed A1/A3 use was allowed with shisha smoking to the frontage on the Edgware Road although not on the adjoining Star Street frontage. No wrap around frontage exists at 56-58 Fortune Green Road.

- 7.9 The appeal decision at Sara Café located at 13a Crawford Street is also provided. This has a similar retractable canopy. Located on a busy junction this small café was given permission for 12 chairs with residential use and habitable rooms immediately above and adjoining. An application for an additional table and two chairs was appealed and permission also given. This later decision is not appended.

- 7.10 With appropriate conditions permissions for businesses offering shisha smoking can operate effectively and acceptably even where there are residential properties very close by as demonstrated by these appeal decisions. It is also demonstrated by the shisha smoking use in association with an A3 use where this is considered to be part of or incidental to the A3 use and an absence of enforcement follows. There is nothing different or unusual in the operations and use of this property, the location or the business characteristics, from the businesses allowed at appeal.

- 7.11 Policy for the areas and considerations will be different of course. Policy is now reviewed below.

## **8 THE NATIONAL PLANNING POLICY FRAMEWORK.**

- 8.1 National Planning Policy Framework is a material consideration and must be considered in its entirety. Up to date policy that accords with the NPPF still has full weight but older policy that does not accord has little or no weight in the planning decision

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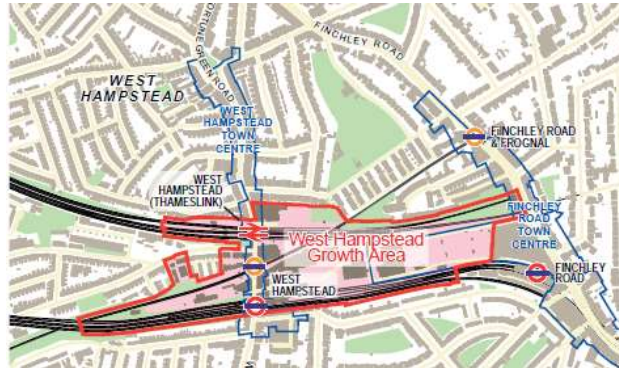
- 8.2 There is now a local need and demand for the provision of more shisha smoking throughout many of the London Boroughs, especially those Boroughs where there is a significant permanent, and many shorter stay periods of residence of people with a Middle Eastern, North African and Levantine background, in addition to these residents are the tourist/holiday visitors. This demand appears underestimated by those not involved in the shisha offer.
- 8.3 It is surely sustainable to meet these local needs locally. This is just like the need for and the provision of public houses These establishments become “locals” as well to the community but without the alcohol fuelled problems that can be associated with public houses and bars, and even some A3 users or anti-social gatherings that can occur with some A5 users.
- 8.3 **Meeting these new and changing needs in Camden accords with the National Planning Policy Framework. Policy is absent or silent with regard to shisha smoking. This is relevant with regard to paragraph 14 of the NPPF. A more detailed review of adopted development plan policy indicates despite conflicting desiderata in the planning documents the use accords with policy, provided it is allowed subject to conditions.**
- 8.4 The provision of shisha smoking in association with a mixed A1/A3 use not only meets local needs and demand but provides support for the mixed A1/A3 use. This use provides refreshment services available to all locally internally and for take away, and externally for all, smoking or not, as well as shisha smoking. Accordingly the local economy benefits, the re-use of this unit provides work, and skilled work, and allows a small new business related to a primary A1 use to grow and develop. **(See in particular the relevant paragraphs of the NPPF 14, 15, 17, 19, 21, 23, 160, 197, 206, and 214).**
- 8.5 **The proposals accord with the development plan policy as required by paragraph 14 of the NPPF as examined and set out below.**
- 8.6 On the 6<sup>th</sup> March new Planning Practice Guidance was issued and replaced Circular 03/2005. However as the old circular and the new guidance follows the law in these matters the approach and assessment as to matters of use, primary and ancillary and de minimus still apply in much the same way.
- 8.7 “Ensuring the Vitality of Town Centres” confirms the NPPF requirement for positive planning for town centres. The scale of the operation is very small and no sequential test is required.
- 8.8 The NPPF records the extant regional spatial strategy for London and there are associated supplementary guidance documents as well but these are not considered to be relevant to this small scale use in this location.
- 8.9 Reference is made to the Borough development plan documents and policies below.

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## 9 THE CAMDEN CORE STRATEGY ADOPTED 2010.

- 9.1 The 2010 Adopted Core Strategy defines the West Hampstead area as growth location with interchange improvements and with the West Hampstead Town Centre area defined in blue on plan. The property and the shopping parade at Fortune Green is outside this defined area growth area, see below.



- 9.2 Policy CS4 applies to areas outside the growth areas and this states:

*The Council will ensure that development in the areas of more limited change respects the character of its surroundings, conserves heritage and other important features and provides environmental improvements and other local benefits where appropriate.*

- 9.3 Policy CS5 will manage growth and sets criteria for this:

- a) *providing uses that meet the needs of Camden's population and contribute to the borough's London-wide role;*
- b) *providing the infrastructure and facilities needed to support Camden's population and those who work in and visit the borough;*
- c) *providing sustainable buildings and spaces of the highest quality; and*
- d) *protecting and enhancing our environment and heritage and the amenity and quality of life of local communities.*

*The Council will protect the amenity of Camden's residents and those working in and visiting the borough by:*

- e) *making sure that the impact of developments on their occupiers and neighbours is fully considered;*
- f) *seeking to ensure development contributes towards strong and successful communities by balancing the needs of development with the needs and characteristics of local areas and communities; and*
- f) *requiring mitigation measures where necessary.*

- 9.4 This Policy recognises a need for balance needs and local areas and requiring mitigation where necessary. This can be achieved by the imposition of appropriate conditions on the use which can then meet local needs as envisaged in the NPPF and operate without significant adverse impacts through mitigation as required by (a) and (b) and as further required in (f) and (g) above and so accord with CS5.

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- 9.5 Paragraph 5.8 makes this clear and refers to more detailed policies considered below:

*Protecting amenity is, therefore, a key part of successfully managing growth in Camden. We will expect development to avoid harmful effects on the amenity of existing and future occupiers and nearby properties or, where this is not possible, to take appropriate measures to minimise potential negative impacts. More detail and guidance on our approach to amenity is contained in Camden Development Policies policy DP26 – and our Camden Planning Guidance supplementary document. Other policies in Camden Development Policies also contribute to protecting amenity in the borough by setting out our detailed approach to specific issues, such as the impact of food, drink and entertainment uses (policy DP12), noise and vibration (policy DP28) and air quality (policy DP32).*

- 9.6 Policy CS7 has relevance to this location being within the defined Neighbourhood Centre of Fortune Green. The Policy seeks the promotion of successful and vibrant centres and the proposals as submitted with appropriate conditions will be fully in accord with criteria (e) to (j):

*The Council will promote successful and vibrant centres throughout the borough to serve the needs of residents, workers and visitors by:*

*e) seeking to protect and enhance the role and unique character of each of Camden's centres, ensuring that new development is of an appropriate scale and character for the centre in which it is located;*

*f) providing for, and maintaining, a range of shops, services, food, drink and entertainment and other suitable uses to provide variety, vibrancy and choice;*

*g) protecting and promoting small and independent shops, and resisting the loss of shops where this would cause harm to the character and function of a centre;*

*h) making sure that food, drink and entertainment uses do not have a harmful impact on residents and the local area, and focusing such uses in Camden's Central London Frontages, Town Centres and the King's Cross Opportunity Area;*

*i) supporting and protecting Camden's local shops, markets and areas of specialist shopping; and*

*j) pursuing the individual planning objectives for each centre, as set out below, including through the delivery of environmental, design, transport and public safety measures.*

- 9.8 Para. 7.11 describes the Neighbourhood Centre and role within which the property is located, and this use meets this objective by offering services locally for day to day needs and activities:

*Camden's 36 neighbourhood centres provide for the day-to-day needs of people living, working and staying nearby (see Map 2 – Town Centres). Due to their relative size, Camden's neighbourhood centres are considered to be equivalent to local centres, as defined in PPS4 ...*

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- 9.9 However changing population characteristics changes local needs for shopping, service and facilities. Cafes and restaurants offering shisha smoking are a feature of these changes and add to activity and vibrancy. The use meets the explanatory guidance to Policy CS7. Likewise paragraph 7.17 confirms the preference for retaining retail uses. Further regard to Policy DP10 is given below.

*The Council will seek to promote the provision of small units where appropriate and independent shops where possible. We will also seek to protect shops, including those on small shopping parades, where their loss would cause harm to a centre or local area. Our detailed approach to protecting shops and promoting small and independent businesses is set out in Camden Development Policies (policy DP10).*

- 9.10 Paragraph 7.20 further clarifies the approach to food and drink uses and makes reference to Policy DP12 referred to below:

*The Council recognises that individual small-scale food and drink uses outside larger centres can be important local facilities, reducing the need to travel and providing community meeting places. **It therefore considers that neighbourhood centres are suitable for small-scale food and drink uses (generally less than 100 square metres) which serve a local catchment, provided they do not cause harm to the surrounding area or residents.***

- 9.11 The sustainable use aspects of A3 type activities allows for their siting outside of the major centres and in neighbourhood centres as defined in the planning documents, but the same approach is applicable for shopping parades as well, especially where there is also A1 use characteristics in that use. **There is no specific policy for mixed A1/A3 uses. This unit, as the rating assessment in Appendix 2 confirms, is less than 100 sq metres (65.5) and therefore accords with the guidance for small scale food and drink use in para. 7.20.**

- 9.12 Policy CS14 seeks the highest design standards and with accessible development, stating that:

*The Council will ensure that Camden's places and buildings are attractive, safe and easy to use by:*

- a) requiring development of the highest standard of design that respects local context and character;*
- b) preserving and enhancing Camden's rich and diverse heritage assets and their settings, including conservation areas, listed buildings, archaeological remains, scheduled ancient monuments and historic parks and gardens;*
- c) promoting high quality landscaping and works to streets and public spaces;*
- d) seeking the highest standards of access in all buildings and places and requiring schemes to be designed to be inclusive and accessible;*

- 9.13 The re-use of the existing shopfront with re-painting has been an attractive re-use solution of the property and the new awning is compatible with the size

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and appearance of the host building. The decking is an affordable and essentially temporary structural response to allow the building to be used by all with good access, and so to be inclusive and accessible. It suits the street scene and context, so meeting the requirements of (a) to (d) of Policy, as above as well.

9.14 Policy CS17 has regard to community safety:

*The Council will aim to make Camden a safer place. We will:*

*a) work with our partners to tackle crime, fear of crime and anti-social behaviour;*

*b) encourage appropriate security and community safety measures in buildings, spaces and the transport system;*

*c) require developments to demonstrate that they have incorporated design principles which contribute to community safety and security, particularly in areas with relatively high levels of crime, in particular Camden Town, King's Cross, Bloomsbury, Covent Garden and Kilburn;*

*d) ensure Camden's businesses and organisations take responsibility for reducing the opportunities for crime through effective management and design;*

*e) promote safer streets and public areas; and*

*f) address the impact of food, drink and entertainment uses, particularly in Camden Town, Central London and other centres.*

9.15 This property and business is located outside the defined areas of particular concern above. However, regard has been had to these considerations and the use is enclosed within the building and the decked area thus limiting access and egress normally to a single point that can be readily managed and controlled. The staff have a level area to operate and within and can readily see any management issues arising with customers should anything untoward happen although this is unlikely with a shisha smoking use. The property will have CCTV installed. An alarm system is already installed.

9.16 A Management Plan can be adopted for controlling and managing the use which will include signing to be provided advising customers to be quiet and courteous towards neighbours when at the property and when arriving and leaving. A log book of incidents can be kept. A suggested draft management plan is provided and could be kept updated following a condition to the grant of any permission if required. (Appendix 12).

9.17 The proximity of the Police Station almost opposite is a material deterrent to anti-social behaviours.

9.18 **The proposed and the existing use and associated minor works fully accords with the Adopted Core Strategy when subject to appropriate conditions.**

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## 10 CAMDEN DEVELOPMENT CONTROL POLICES ADOPTED 2010.

- 10.1 The relevant policies from the above development plan document which although pre-dating the NPPF and the Portas Review, are the policies by which the proposal should be assessed and are as follows:

*Policy DC10 - The Council will encourage the provision of small shop premises suitable for small and independent businesses by:*

*a) expecting large retail developments to include a proportion of smaller units;  
b) attaching conditions to planning permissions for retail developments to remove their ability to combine units into larger premises, where appropriate;  
c) encouraging the occupation of shops by independent businesses and the provision of affordable premises.*

*The Council will seek to protect shops outside centres by only granting planning permission for development that involves a net loss of shop floorspace outside designated centres provided that:*

*d) alternative provision is available within 5-10 minutes' walking distance;  
e) there is clear evidence that the current use is not viable; and  
f) within the Central London Area, the development positively contributes to local character, function, viability and amenity”.*

- 10.2 Criteria (a) and (b), and (d), (e), and (f) are not relevant. This is already an existing double unit formed from two very small shops many years ago. The proposed development will bring back an element of an A1 use to a planning unit with an authorised and lawful motor showroom use, and so accords with (c) as this is a small new independent business.

- 10.3 Although in a Neighbourhood Centre Paragraph 10.7 confirms the Council's intentions for shops in small shopping parades and this is such a location:

*“The Council wishes to retain local shops outside centres where possible, including those on small shopping parades. Therefore, we will resist the loss of shops (Use Class A1) unless there is alternative provision within 5-10 minutes walk (approximately 400-800 metres), depending on the scale of provision. We will also take into account the viability of the premises for the existing use, in particular any history of vacancy in a shop unit and the prospect of achieving an alternative occupier. However, we recognise that, as the number of people shopping locally has declined, it is unlikely that all shops outside centres will continue to find an occupier”.*

- 10.4 In this case the authorised and lawful use appears to be a sui generis use although the last use may have been a Class A1 retail use, it does not appear to have been lawful. The proposed café use internally will be a Class A1/A3 mixed use offering snacks and light refreshments for on and off site consumption and this will have a significant element of A1 use. Given the known difficulty of finding A1 use occupiers and the four units currently vacant this is a very reasonable sui generis use with a significant A1 component and so can go a long way to meet the Council's intent for small shopping parades and for neighbourhood centres.

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- 10.5 Policy DC12 considers non-A1 uses in town centres and in the Borough, particularly with regard to food, drink and entertainment uses in retail areas, and their impact on surrounding residential uses. Given the number of criteria in this very relevant policy I have assessed each criterion with commentary in regular text inserted between the italic text extracts of the policy below:

*The Council will ensure that the development of shopping, services, food, drink, entertainment and other town centre uses does not cause harm to the character, function, vitality and viability of a centre, the local area or the amenity of neighbours. We will consider:*

*a) the effect of non-retail development on shopping provision and the character of the centre in which it is located;*

(With an authorised and lawful sui generis use for vehicle showrooms this use brings back a significant element of A1 retail use and improves the appearance and vitality of the area with higher customer use and patronage than high value intermittent vehicle sales uses).

*b) the cumulative impact of food, drink and entertainment uses taking into account the number and distribution of existing uses and non-implemented planning permissions, and any record of harm caused by such uses;*

(There is only one café style A3 or mixed A1/A3 use in the vicinity. Other uses appear to be A3 restaurants or A5 take-aways. The A1 use element is re-introduced and so there is no cumulative adverse impact and there is no provision of A1/A3 mixed use services for on-site or take away food).

*c) the impact of the development on nearby residential uses and amenity, and any prejudice to future residential development;*

(There is no prejudice to future residential development. There should be no significant adverse impacts on residential amenity for this mixed A1/A3 use internally and with the reasonable external seating and smoking by customers including shisha smoking customers outside. It should not give rise to undue impacts provided there are appropriate conditions to any permission and these are complied with. This reflects the view of many Inspectors at Appeal. (Relevant appeal decisions are submitted with this application).

*d) parking, stopping and servicing and the effect of the development on ease of movement on the footpath;*

(The external seating areas are on the private forecourt as confirmed by the title plan as submitted with the application and will not interfere with ease of movement of pedestrians. The retail properties in this location do not have on-site parking and provision of parking is on street. Off street parking on forecourts is common and is associated with the existing authorised and lawful use and would encourage car/vehicle use. Parking is of course a problem everywhere in London and the proposed use will, as would many other A1 uses, attract custom and parking in the vicinity. This is not likely to be either unusual or excessive given the small size and scale of the business).

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*e) noise and vibration generated either inside or outside of the site;*

(Since the smoke free regulations were introduced this has resulted in outside smoking places for public houses and cafes and restaurants. This is no longer unusual. Inevitably there will be more noise experienced nearby than from internal uses but this can be ameliorated by conditions. Shisha smoking is usually both quiet and contemplative as well as a more social exercise. It is not usually considered to be any more or less noisy of itself than other al fresco uses by Planning Inspectors. With suitable conditions and the availability of other legislative controls the use can be effectively controlled by a local authority should problems arise. No vibration is expected).

*f) fumes likely to be generated and the potential for effective and unobtrusive ventilation;*

(Fumes in this policy context are from cooking and extract ventilation however, this use will not cook from fresh ingredients and no cooking equipment is installed to give rise to problems of noise, vibration or smell should arise. There will be exhaled smoke and also fumes from a charcoal burner. However these will dissipate quickly if there is no undue obstruction or enclosure other than the retractable canopy. Shisha smoking is subject to the same legislation requirements as any other form of smoking and Planning Inspectors note that although there can be distinctive smells off-putting to some, these are not significant for passers-by or nearby residents, including those with habitable rooms above or next to the areas used for shisha smoking).

*g) the potential for crime and anti-social behaviour, including littering;*

(There is no direct correlation between shisha smoking and crime or anti-social behaviour any more than there is a direct link with this and other A3 uses. If there are problems then there are other legislative controls for this. This operation is an up-market operation and it would not assist the business to develop and grow if there were such problems).

*To manage potential harm to amenity or the local area, the Council will, in appropriate cases, use planning conditions and obligations to address the following issues:*

*h) hours of operation;*

(The Applicants are willing to accept the following hours of opening and trading as applied for:

Monday-Thursday: 08.00-23.00

Friday- Saturday: 08.00-24.00

Sundays and Bank Holidays: 09.00-22.30

If this is a problem please contact the Agent).

*i) noise/vibration, fumes and the siting of plant and machinery;*

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(No plant and machinery is required – see above).

*j) the storage and disposal of refuse and customer litter;*

(The unit has ample space for this and is shown on the application drawings).

*k) tables and chairs outside of premises;*

(There will be up to 40 chairs externally offering space for al fresco refreshments and smoking by all smokers, and for shisha smoking. **External tables and chairs will not be reserved for shisha smokers only.** Hours of use inside and outside will control the noise impacts for residents. A further 24 seats will be provided inside. Total maximum at any one time of seated customers to be 64) on the layout shown on the application drawings. Allowing for take-away customers a maximum of 70 customers could be imposed by condition).

*l) community safety;*

(There does not appear to be any planning issue arising in this regard).

*m) the expansion of the customer area into ancillary areas such as basements;*

(There is no basement to the leased area).

*n) the ability to change the use of premises from one food and drink use or one entertainment use to another (within Use Classes A3, A4, A5 and D2);*

(As a sui generis mixed use once permission has been given then a new permission will be required for any change of use to any other use).

*o) the use of local management agreements to ensure that the vicinity of premises are managed responsibly to minimise impact on the surrounding area.*

(The Applicants are willing to agree a management plan by way of a condition for their use and have submitted a suggested arrangement with this application).

*Contributions to schemes to manage the off-site effects of a development, including for town centre management, will be sought in appropriate cases.*

(The application, subject to suitable conditions brings back an A1 use element with vitality and interest as well as meeting a growing demand for shisha smoking in London in local areas as well as town centres, in many ways like the local public house. However no alcohol will be sold).

10.6 The proposed use subject to conditions thus fully accords with this Policy.

10.7 Policy DP13 is not directly relevant to the proposal but the use will retain employment activity and provide employment with skilled activities in providing food and beverages and providing flavoured tobaccos and shisha smoking expertise in safe and careful delivery of the shisha smoking experience. The proposal accords with DP13.

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- 10.8 Policy DP15 is of relevance insofar as the café type use with a shisha smoking element of the use does provide a place for people to meet and socialise where alcohol is not served. This is attractive to those for religious reasons do not wish to attend pubs or restaurants or cafes where alcohol is served. This does not preclude all members of the community attending as customers but reflects the growing number of residents in Camden of North and East African, Levantine or Middle Eastern origin, who would like to attend places like Monte Cristo whether they smoke or not.
- 10.9 Given the nature of complaints made it is important to note that many women smoke shisha and are welcome to attend and smoke, or not, as they wish. Shisha smoking is not the dominant or primary use. There is no community facility where such a use can readily take place in this Neighbourhood Centre and this meets a local need.
- 10.10 The use would also accord with para. 5.19 which states:
- “The Council is opposed to any reduction in the provision of leisure facilities because of their contribution to our quality of life and to Camden's cultural character”.*
- 10.11 At present it is thought there are only about 12 or so number of businesses offering shisha smoking in Camden and only two others locally, both in the West Hampstead Centre at West End Lane, one of which is subject to enforcement action at present.
- 10.12 Policy DP17 is met by the provision of cycle parking on site. The decking area now covering an area used for car parking offers space for external cycle parking of two bicycles as shown on the application drawings, available on demand.
- 10.13 Policy DP19 is met as no off-street parking is to be provided.
- 10.14 Policy DP22 does not apply as the change of use of non-residential floor space is less than 500 square metres.

Design and Access.

- 10.15 Policy DP24 requires high quality design. The change of use has allowed a substantial refit internally to look attractive and welcoming to internal customers. The existing external appearance has been enhanced by utilising the existing shopfront and upgrading the appearance with the business logo added to the glass areas by internal film, and for repainting in a rich claret colour with matching extending awning/canopy to go out over the seating area to give weather protection when needed. This works well and looks attractive, matching the scale and size of the host building thus meeting criteria (a) and (b) below. The quality of the materials is of a high standard meeting (c) as well. It is of higher standard of appearance than many comparable properties close by.
- 10.17 In order to integrate the external forecourt area with the internal trading area and to ease use between the two and the access/egress available to the public, and for staff, decking has been installed to support the external seating area. This is a

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commonly used means of providing external seating areas and in this case it is required to secure the integration of the different levels from street to internal floor levels. A ramp has also been installed for disabled access. As a result an interesting and vibrant element to the street scene has been added thus meeting (a) and (b) again and (d), (e), and (f) as well. It has been used by others, e.g. by Pumpkin Café nearby. It is also accessible to all.

10.18 Criteria (g) and (i) are also met, whereas (h) is not relevant.

10.19 DP24 states:

*The Council will require all developments, including alterations and extensions to existing buildings, to be of the highest standard of design and will expect developments to consider:*

- a) character, setting, context and the form and scale of neighbouring buildings;*
- b) the character and proportions of the existing building, where alterations and extensions are proposed;*
- c) the quality of materials to be used;*
- d) the provision of visually interesting frontages at street level;*
- e) the appropriate location for building services equipment;*
- f) existing natural features, such as topography and trees;*
- g) the provision of appropriate hard and soft landscaping including boundary treatments;*
- h) the provision of appropriate amenity space; and*
- i) accessibility.*

10.20 The proposed works and appearance as now installed meets the requirements of Policy DP24 and para. 56 of the NPPF. It is A good and functional design.

10.21 Policy DP25 relates to Conservation Areas/heritage assets. However the property is not listed and is not within a Conservation Area and so this policy does not apply.

10.22 Policy DP26 seeks to protect amenity of occupiers and neighbours and is a very relevant policy. It will only grant permission where there is no harm to amenity and given the subsequent introduction of the NPPF this will require the significant adverse impacts to outweigh the benefits. As above the policy is in italics and the criteria are considered in regular text.

*The Council will protect the quality of life of occupiers and neighbours by only granting permission for development that does not cause harm to amenity.*

*The factors we will consider include:*

- a) visual privacy and overlooking;* (This is not considered to be compromised).
- b) overshadowing and outlook;* Ditto.
- c) sunlight, daylight and artificial light levels;* Ditto.
- d) noise and vibration levels;* (No vibration. Noise can be controlled).
- e) odour, fumes and dust;* (No dust. Odours and fume can be controlled).
- f) microclimate;* (Not relevant).

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g) *the inclusion of appropriate attenuation measures.* (This can be achieved by condition).

*We will also require developments to provide:*

h) *an acceptable standard of accommodation in terms of internal arrangements, dwelling and room sizes and amenity space;* (Not relevant).

i) *facilities for the storage, recycling and disposal of waste;* (This is achieved).

j) *facilities for bicycle storage; and* (This is achieved).

k) *outdoor space for private or communal amenity space, wherever practical.* (Not relevant).

10.23 Policy DP24 can be accorded with by the use of conditions.

10.24 Policy DP28 gives more regard to noise. Vibration is not an issue. The noise generated by the activity is mainly external arising from the use of outside seating and customers attending and leaving the premises. Policy states:

*The Council will seek to ensure that noise and vibration is controlled and managed and will not grant planning permission for:*

*a) development likely to generate noise pollution; or*

*b) development sensitive to noise in locations with noise pollution, unless appropriate attenuation measures are provided.*

*Development that exceeds Camden's Noise and Vibration Thresholds will not be permitted.*

*The Council will only grant permission for plant or machinery if it can be operated without cause harm to amenity and does not exceed our noise thresholds. The Council will seek to minimise the impact on local amenity from the demolition and construction phases of development. Where these phases are likely to cause harm, conditions and planning obligations may be used to minimise the impact.*

10.25 With the appropriate conditions the use can be controlled and so meet Camden's noise thresholds (referring to PPG24). It can also meet also guidance in para. 123 of the NPPF following the Noise Policy Statement for England and the type and scale of use has been accepted at appeals as a means of adequate control. The Management Plan approach can also assist informally. External seating on a larger scale operates already, e.g. Pizza Express in West Hampstead, where alcohol and therefore more noise can be expected.

10.26 Table D Is part of the policy relevant to the proposed use. It gives the following requirements (overleaf):

Table D: Noise levels from places of entertainment on adjoining residential sites at which planning permission will not be granted

Noise description and measurement location	Period	Time	Sites adjoining places of entertainment
Noise at 1 metre external to a sensitive façade	Day and evening	0700-2300	L <sub>day</sub> 5m shall not increase by more than 5dB*
Noise at 1 metre external to a sensitive façade	Night	2300-0700	L <sub>day</sub> 5m shall not increase by more than 3dB*
Noise inside any living room of any noise sensitive premises, with the windows open or closed	Night	2300-0700	L <sub>day</sub> 5m (in the 63Hz Octave band measured using the 'fast' time constant) should show no increase in dB*

\* As compared to the same measure, from the same position, and over a comparable period, with no entertainment taking place

- 10.27 It has not been the case to date that on site specialist noise assessments have been required by Planning Inspectors in similar Appeal decisions to demonstrate the noise from external seating uses meets any of the above or the NPS/DEFRA technical standards.
- 10.28 There has not been time to meet the Council's suggested need for such a submission in this application having to be submitted by 4 April.
- 10.29 However the use can be controlled by a condition regarding measureable noise levels as stated.
- 10.30 Improved access has been achieved by the provision of the ramp to the decking. Policy DP29 has been complied with. Further hand-railing is proposed.
- 10.31 Policy DP30 has been met as the shopfront has not been altered and is retained. Minor enhancements to colour and appearance with advertising have enhanced the appearance of the property. The canopy/awning is a practical and proportionate installation that matches the size and character of the host building. Criteria (a) to (e) insofar as applicable are met.
- 10.32 Appendices. As the space is below 500 sq metres there is no need for a Transport Assessment for either an A1 or A3 use. Likewise there is no requirement to provide cycle parking but this can be provided and two cycle spaces for staff or on customer demand are shown on the proposed drawing.
- 10.33 **Accordingly the application and proposals as submitted accord with the adopted Development Management Policies.**

## 11 CAMDEN SUPPLEMENTARY GUIDANCE.

- 11.1 Camden's relevant Supplementary Guidance comprises CPG1 Design 2013, CPG3 Sustainability 2013, CPG5 Town Centres Retail and Employment 2013, CPG6 Amenity, CPG7 Transport and CPG8 Planning Obligations.

### CPG1 Design.

- 11.2 Para. 2.22 advises Design and Access Statements reflect the size and complexity of the scheme. This is a relatively simple change of use proposal and the scope for a different solution to that which has been adopted is limited. Unfortunately the volume of policy and guidance issued by Camden has to be considered and responded to given the complaints received and a possible campaign to secure

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objections as appears referred to in the complaints to date. (See complaints section below).

11.3 Para. 2.9 requires good design that will:

*positively enhance the character, history, archaeology and nature of existing buildings on the site and other buildings immediately adjacent and in the surrounding area, and any strategic or local views. This is particularly important in conservation areas;*

11.4 This scheme achieves a good design solution for the reasons given above. It enhances the forecourt and appearance of the area compared to nearby properties which are not as attractive and where forecourts are not level.

11.5 The works undertaken are proportionate in scale and colour and match the host building well, providing visual interest and an activity to view. Building design objectives are achieved in para. 2.10.

11.6 Land use and materials guidance as found in 2.12 and 2.13 is met.

11.7 Shopfront guidance in Section 7 is met insofar as this has been altered. Alterations are superficial. The re-used existing shopfront is largely clear glazed with some obscured glass with the logo and this has been tastefully applied in proportion to the glazed area with the trading symbol internally by film. The existing shopfront was of limited accessibility with an unattractive slope to the forecourt which the decking has now addressed. It has made an attractive and improved shopfront appearance compared with that previously installed for the motor vehicle use. (See and compare photographs in Appendix 2 and 4).

11.8 Colours and materials used are as shown on the application drawings and as required by this guidance. The colours complement the host building and are a significant improvement in claret and grey and cream.

11.9 The retractable awning provides essential cover to diners and smokers. The enclosure cannot be more than 50% of the sides to the area to meet the smoke free regulations.

11.10 Para. 7.19 states that:

*Shopfront canopies and blinds are only likely to be acceptable where they are:*

- *retractable;*
- *traditional canvas;*
- *blind box integrated with the overall design;*
- *attached between the fascia and shopfront; and*
- *be flush with the fascia level.*

11.12 This has been adequately achieved and looks far superior to adjoining properties.

11.13 Section 8 considers advertising and a separate advertising regulation application is being made for advertising displayed. The signing is non-illuminated and unobtrusive with well-made lettering in discreet matching colours as described in

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the application drawings and above. It is shown on the photographs in Appendix 4.

11.14 Para. 8.7 requires:

*Generally advertisements will only be acceptable at fascia level or below.*

11.15 This is achieved. **Advertising as installed and now proposed conforms with the adopted local guidance.**

11.16 Guidance for designing out crime is met with a well-defined active frontage. Although not currently installed the application proposes thin balustrading with handrail to define the customer area safely and so make unauthorised access and egress more difficult as well providing a safer operating environment. However a Crime Impact Statement is not required due to size. There is a Police Station almost opposite.

11.17 Alcohol is not served. Anti-social behaviour is not expected.

11.18 Requirements for waste storage and re-cycling are met with food waste requirements also met. The application drawings define a waste separation and storage area sufficient in size to meet Camden's guidance.

11.19 There are no building equipment installations in situ or proposed.

11.20 **No artworks or memorials are proposed and therefore the design guidance and requirements of Supplementary Planning Document CPG1 Amenity are met.**

CPG3 Sustainability 2013.

11.21 Guidance requires an Energy Statement to be submitted where there is a scheme of more than 500 sq metres. This is scheme is too small to require a Statement.

11.22 The application submission shows energy efficiency measures to be employed as a retro-fit to an existing building. However the guidance in Appendix 1 is followed and the check list form has been completed and is being submitted as an application document.

11.23 The location is too remote for connection to a decentralised energy network and too small an operation for CHP installation.

11.24 Again as a leased ground floor property there is little scope for using renewable energy or on site generation.

11.25 At less than 1000 square metres there is no requirement for grey water recycling. Again as a leased ground floor unit there is no scope for rainwater harvesting etc. Space has been allocated for separated waste storage as shown on the drawings with sufficient storage to meet Camden Council's every other day collections.

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- 11.26 In the re-use of materials the site has been appropriately re-used with existing walls and shopfront, and re-cyclable materials used for the decking understood to be from sustainable forest resources.
- 11.27 A Sustainability Assessment applies to retail type units of 500 sq metres or larger and so this is not required.
- 11.28 There is limited, effectively no scope, for green walling at this property and it is not provided.
- 11.29 **Insofar as there is scope and need for compliance with guidance this has been undertaken.**

CPG 5 Town Centres Retail and Employment.

- 11.30 This topic guidance is directly relevant to the use proposed. The Appendix confirms the property is located on the edge of the Fortune Green Neighbourhood Area:

*Fortune Green Road 56-118 Fortune Green Road (east side)*

- 11.31 Para. 6.13 refers to new food and drink uses with outside tables and chairs and para. 6.15 refers to smoking areas. Para. 6.13 states:

*When the Council considers planning applications for new food and drink uses, it considers the potential impacts of tables and chairs placed outside a building. A condition may be attached to planning permissions for development for new food and drink uses which prevents the placing of tables and chairs outside buildings, or which puts restrictions on their use, if appropriate.*

- 11.32 The Applicant's proposal is well defined and will not interfere with the passing public. Hours of use, and if necessary noise limitation conditions can limit and control the use appropriately, as appeal decisions confirm. The smoking activities can also be well managed and controlled as the draft Management Plan submitted confirms (Appendix 12). This will confirm the acceptability of the hours of use sought as guided in para. 6.17:

*Generally, earlier closing times will be more appropriate in neighbourhood centres and residential areas than in town centres and other commercial areas. Closing time will be considered to be the time by which all customers should be off the premises and all noise-generating clearing up activities audible from outside of the premises should cease.*

- 11.33 Insofar as applicable the guidance has been taken into account in this application and the use as undertaken and now proposed to be undertaken will accord with the Supplementary Planning Document's guidance. The latest time is 23.30 for Fridays and Saturdays only. If this is an issue please contact the Agent.

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CPG7 Transport.

- 11.34 A Travel Assessment is not required and a Travel Plan is not essential for the scale of the use. Customers attending site do not accord readily to a Travel Plan. However staff, four part time and two full time directors, I am advised arrive mainly by public transport.
- 11.35 The scale of the premises excludes the property from guidance, see para. 4.6 at less than 1,000 sq metres.
- 11.36 There is no on-site parking as vehicle showrooms and forecourt would have had. No parking use is proposed. It is car free.
- 11.37 Cycle parking for staff and visitors has been provided with sufficient room for at least two spaces.

CPG8 Planning Obligations.

- 11.35 As a small scale change of use the proposal does not appear to trigger any planning obligations.
- 11.36 A CIL Form has been completed and is submitted with the application. It is below 100 sq metres.

**12 FORTUNE GREEN AND WEST HAMPSTEAD NEIGHBOURHOOD PLAN.**

- 12.1 This emerging policy document produced under the changes brought in by the Localism Act 2011 is in final draft form and consultation took place to the end of February 2014 The Plan states that it:

*draws on and adds to Camden Council Supplementary Planning Guidance. It also reflects the recommendations in Camden Council's Place Plan for West Hampstead (March 2012), and has drawn on the consultations and findings upon which this document was based.*

- 12.2 It will cover the period 2014-2031. The Draft Plan identifies the area's main architectural characteristic as:

*the notable red brick Victorian and Edwardian terraces and mansion blocks. These buildings have numerous design features, detailing and characteristics - which are highly valued and appreciated.*

- 12.3 These proposals do not adversely affect any existing such characteristics and the host building has no structural alterations or any permanent alterations. The host building is not listed and lies outside any conservation area.

- 12.4 The Vision for the Area is stated as:

*Development in Fortune Green and West Hampstead will allow for a mixed, vibrant and successful local community. The Area has a distinct and widely appreciated village character with a variety of amenities and excellent transport*

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*links. This Plan seeks to retain and protect these positive features, while allowing for new housing, new jobs and sustainable growth in the years ahead.*

12.5 The proposed and existing use does not conflict but contributes to this Vision.

12.6 There will be no significant or permanent effects on character and the design suits the host building. There will be a contribution to the local economy with a new small business and offering new employment:

*Development will promote and support a successful local economy, with thriving town and neighbourhood centres. Development shall protect and support existing jobs and employment sites - as well as providing new jobs and attracting new businesses to the Area. Such development shall also provide flexible space, particularly for small and micro-businesses.*

12.7 Policy 2 for Design and Character is stated in italics and comments are made in regular type within brackets by criterion below:

*There shall be a presumption that all development shall be of high quality of design, which complements and enhances the distinct local character and identity of the Area, and which promotes high environmental standards. This shall be achieved by:*

*i. Development which positively interfaces with the street and streetscape in which it is located.*

(This proposal achieves a positive solution to the level changes and use of the external area and links well with the internal areas of the use. There is no harm or adverse impact on the street scene and the colours used and the scale of the installation match the scale and colours of the host building).

*ii. Development which maintains the positive contributions to character of existing buildings and structures.*

(For the same reasons as above this is achieved).

*iii. Development which is human in scale, in order to maintain and create a positive relationship between buildings and street level activity.*

(This is confirmed by the bringing the levels of the street and building together).

*iv. Development which has regard to the form, function, structure and heritage of a place – including the scale, mass, orientation, pattern and grain of surrounding buildings, streets and spaces*

(Again this improves the street scene and use and function of the forecourts and is better in use than other older arrangements which can be a trip hazard or make passage difficult for the disabled and infirm).

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*v. A presumption in favour of a colour palate which reflects, or is in harmony with, the red brick and London stock brick of existing development.*

(The colour palette adopted for both the fascia and shop walls as well as the warm claret colours of the shopfront and awning is in harmony with the host building's character and the local area colours and is a very significant improvement on those nearby).

*vi. New buildings or extensions that are no higher than existing buildings in their immediate vicinity.*

(Not applicable).

*vii. Extensions being in character and proportion with existing development and its setting, including the relationship to any adjoining properties.*

(For the reasons given above this is also the case).

*viii. A presumption against basement development more than one storey deep or outside the footprint of the property.*

(Not applicable).

*ix. The provision of associated high quality public realm.*

(The proposals do not encroach on the public realm).

*x. A presumption in favour of protecting the views across the Area.*

(No views are affected).

12.8 With regard to parking paragraph D12 states:

*There are a range of views on street **parking**, which this Plan does not attempt to address. Some businesses and residents have called for more short-term parking in retail areas and neighbourhood centres. Camden Council should bring forward proposals for such provision and consult with residents and businesses about how to take these plans forward.*

12.9 The proposed use of the premises in an A1/A3 mixed use with shisha smoking is not likely to attract or generate more car activity than an unregulated A1 convenience store used over a 24 hour period as was previously operating.

12.10 Policy 8 is complied with by the provision of some cycle parking.

12.11 Policy 9 is met by being set back from the pavement area and giving ready access to the disabled.

12.12 Policy 14 is for the Fortune Green Road Neighbourhood Centre. The Draft Plan states in paragraph F9:

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*The retail area of Fortune Green Road is also designated by Camden Council as a Neighbourhood Centre. Like the Mill Lane Neighbourhood Centre, this area would benefit from better signage; improvements to pavements and shop fronts; and other measures designed to encourage footfall and use.*

- 12.13 This has been implemented with better signing, improved pavement appearance, e.g. see the adjoining property at No. 60, and refurbished shopfront, and is also an activity that will serve local people and beyond, and so encourage footfall and use. Draft Policy 14 states:

*Development (including changes of use) shall protect and enhance the character of the Neighbourhood Centre and provide for a diverse range of shops, businesses and economic activity.*

- 12.14 **The use now undertaken brings back a strong element of an A1 use and enhances and diversifies shop and business activity. Policy is fully accorded with.**

- 12.15 Insofar as there are relevant draft policies applicable this application they appear to have been complied with.

### **13 OTHER MATERIAL CONSIDERATIONS.**

- 13.1 The business currently employs 4 part time and 2 full time directors also working as staff, i.e. at least 4 full time equivalent posts. These jobs benefit the local economy and activity. The staff working at the property will have catering and in particular specialist shisha smoking serving skills as well. The provision of employment, training, and the efficient use of the whole planning unit is a material consideration. Considerable skill and care is needed for providing a good shisha smoking experience.

- 13.2 The changing needs and the changing character of local residents alike, whether from North African, Levantine, Middle Eastern and related Arabic communities, or not, include somewhere to go locally and if they wish smoke shisha. Their needs are still being overlooked, but with more outlets adding serving shisha to their offer, or opening in response to demand, as the local population's character changes and grows should be planned for. This is a need to be met and is a material consideration especially where the development plan policies are silent.

- 13.3 A high proportion of customers, so far thought to be about 75% live within a mile of the premises.

- 13.4 Amenity issues have been considered fully in this Statement already.

- 13.5 Many health concerns raised are matters for other legislation, see further below.

### **14 COMPLAINTS.**

- 14.1 This application follows prompt and efficient enforcement team action after complaints were received from residents. Redacted copies have been supplied. It is not readily possible to assess locations of residents motivated to complain. Some confirm they do not live near the property.

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14.2 The complaints received to date can be summarised as follows and I have commented below each concern:

(i) Potential fire hazard.

This is not considered to be the case when properly operated and is in any event a matter for other statutory authorities/legislation.

(ii) Was A1 use now A3 use.

This is not the case for the reasons set out in this application as the Londi's store did not obtain planning permission.

(iii) Past midnight use.

This is not being applied for and such alleged use, if it continues, can be controlled by condition/breach of conditions notice and this has been explained to the Applicants.

(iv) Residential area unsuited to this type of activity.

The property is in commercial use in a defined Neighbourhood Centre so this assertion is incorrect. Subject to appropriate conditions the use can operate in close proximity, even immediately adjacent to residential property and habitable rooms, as appeal decisions confirm. The presence of families in Burrard Road, Achilles Road and Ulysses Road is not materially different from any other form of residential occupation and the extent and type of adverse impact alleged by the unknown objector is unclear.

(v) The large number of seats encourages large groups to gather and disturb the neighbourhood. Others have none or one or two.

Whilst it is possible large numbers may attend very occasionally, the attendees are unlikely to be known to each other in large numbers, and seat occupation rates will vary with, and without shisha smokers, being present. Other businesses have more than one or two chairs or tables as has the Pumpkin café locally, and further afield as at Pizza Express in West Hampstead also demonstrate. (Appendix 4 photographs).

(vi) Concerns over the smell of smoke and for children.

Inspectors have noted the distinctive smell, off-putting for some, but allow the appeals in close proximity to residential use. The reference to children in the context of a use operated in accordance with smoke free legislation is not understood.

(vii) Deterioration in parking for residents.

The provision of parking is limited in the Borough and any A1 or A3 type re-use could readily generate parking demand and use at or in excess of that which this relatively small business is likely to generate.

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- (viii) Should be closed down immediately. Opens late afternoon and closes late into the night, in an incredibly unsuitable place, no women attend, very intimidating. Objector does not live in immediate vicinity but cannot park already due to gym use. Have had enough around here.

I cannot comment further on these representations made as they appear unsound assertions without evidence and are probably biased given the reference to implied intimidation. Hours of use are as applied for.

- (ix) No appreciable benefit to families in surrounding streets. Not appropriate to a residential neighbourhood. Causes double parking outside.

The use offers an A1/A3 mixed café use with take away as well as shisha smoking and there is a significant benefit to all who may wish to use the services offered. All are welcome. There may be parking and obstruction problems but these may be as a result of customers of the gym, other restaurants and take ways and/or Monte Cristo. There appears to be a parking problem already in the area, as there is with very many parts of London. This should not be a reason for refusal unless the use was outside the defined Neighbourhood Centre, but it is not.

- (x) Already an overcrowded overloaded area.

Same comments as in (ix) above).

- (x) Although not living near, concerned it opened without planning permission and is causing a nuisance to people who do not live close due to parking problems. Fumes noticeable. Must be unpleasant for those living close as well as noise into the early hours. No other restaurants have outside seating.

Again a resident not living near (see the Greenwich Church Street appeal decision at Inquiry appended in Appendix 11). These issues have been addressed above.

- (xi) Shocked by opening of Monte Cristo. Smoking den for shisha, smell and parking on pavement totally unexpected. Remove "it" from area.

Some people fail to understand the full nature of the use and also initially react adversely to it as it can seem strange. Shisha smoking is rarely a primary use, and it is not a "den", perjorative representations do not assist in giving weight to the representations made.

- (xii) According to the In Touch magazine this has opened with permission and without an alcohol licence. Parking problems outside near a bend and a zebra crossing opposite the Nautilus. Seating is full and not yet summer.

No alcohol will be served. Parking problems alleged have been considered above. Seating may be full on occasion but not all the time all the day. The In Touch magazine has covered the issue.

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- (xiii) Received a leaflet encouraging me to write to you as it has bothered me since opening. Inappropriate use in a residential area. Noisy loud patrons. Absolute traffic hazard. Racket of cars revving and people talking loudly in the street. West End Lane now blockaded every evening raising pollution and will cause accidents. **None of the patrons appear to be local, and I can see it is not locally supported.** Already over-served with cafes (two exact replicas within 100 yards). 20 cafes already just a few hundred yards away. A blight to residents and nothing else, dangerous and hazardous to health.

This objector of unknown address may not have written if not encouraged to do so and clearly has not considered the use in detail. Again there may be unfamiliarity with the use. There is no evidence given as to how the clientele has been considered and assessed not to be local save on an apparent, i.e. presumably visual basis. The assertions as to the use and distances are unclear. However coffee shops such as Café Nero and Starbucks are usually a mixed A1/A43 use and can be within 100 yards of another branch. There are no other premises offering shisha smoking in this Neighbourhood Centre. There appears to be only one café rather than restaurant uses in the Centre.

- 14.3 Although there are legitimate concerns being raised and material considerations for the planning decision maker to take into account by some, these must be considered in the context of the use within a defined commercial use area, where subject to conditions, such a use should be acceptable within the development plan policy context. It is also within the guidance in the National Planning Policy Framework and Planning Practice Guidance, as well as in the light of the Portas Review and the three/four vacant units observed. The appeal decisions also confirm the use can be undertaken subject to conditions.
- 14.4 There does appear to be a superficial reaction by some objectors not necessarily resident nearby and some appear of uncertain motivation or only motivated by campaigning.
- 14.5 **The soundly grounded and material considerations raised can be resolved by conditions to limit hours of use, noise, the numbers capable of being accommodated, and a management plan for daily operations and layout.**

## 15 SUMMARY.

- 15.1 The use commenced without planning permission and this is a common misunderstanding that the sandwich bar A1 use with shisha smoking falls within an A1 use. The previous use being a Londis would appear to have been A1 but it appears the authorised and lawful use is in fact a sui generis motor showroom use thus requiring planning permission.
- 15.2 On careful examination the use is very likely to be, after assessment over a year's trading, primarily an A1/A3 mixed use as sandwich bar/café with shisha smoking place outside, as are so many other uses of this type, where only a very small proportion of customers take shisha smoking only. Almost all seek refreshments and some smoke outside, of whom some will smoke shisha, sometimes a large

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proportion, at other times not. There is no requirement to smoke shisha, it is the customer's choice as to what to order.

- 15.3 Accordingly the use then brings a significant and primary retail A1 element of use back to this locality, and within this defined Neighbourhood Centre, and so accords with development plan policy in principle, and having regard to the NPPF and the Portas review, and the three, possibly four vacant units, has significant benefits.
- 15.4 The Applicants consider that so far around 75% of customer come from within a mile of the premises, and although objectors say otherwise this may be based upon a historical view of local residents given the recent 2011 Census evidence. Local population needs and uses will be changing in response to a changing population. The provision of a local sustainable small business and the only one offering shisha smoking in this Centre, would have significant benefits to the local communities and the vitality and activity at this Centre.
- 15.4 There are material considerations which could give rise to significant adverse impacts and the Applicants accept they have traded perhaps too late on occasion. However they are prepared to trade in accord with the hours applied for, and accept these hours in the conditions. To accept conditions over noise limits, total numbers in the premises at any one time, inside and outside seated, and to operate to a management plan if required as suggested, should be sufficient to allow permission to be given.
- 15.5 Such conditions would allow the use to be operated without any significant adverse impacts and allow action to be taken by breach of condition notice with no right of appeal.
- 15.6 The Applicants would be pleased to discuss the conditions and if there are any clarifications or problems arising please contact the Agent.

Alan Wipperman BA MRICS MRTPI C Dip AF

3 April 2014

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**APPENDIX 1**

FREEHOLD TITLE PLAN – NOT TO SCALE.



a copy of the title plan on 6 MAR 2014 at 10:37:53. This copy does not take account of any application made after that time even if still pending in the L. y when this copy was issued.

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LEASEHOLD TITLE PLAN.

NOT TO SCALE.

Land Registry  
Current title plan

Title number **NGL788869**  
Ordnance Survey map reference **TQ2585SW**  
Scale **1:1250**  
Administrative area **Camden**



This is a copy of the title plan on 13 DEC 2013 at 09:12:37. This copy does not take account of any application made after that time even if still pending in the Land Registry when this copy was issued.

This copy is not an 'Official Copy' of the title plan. An official copy of the title plan is admissible in evidence in a court of law.

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**APPENDIX 2.**

**OLD STREET SCENE VIEW.**



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RATING ASSESSMENT AS AT MARCH 2014.

Address of property: GND F FRNTS 56-58, FORTUNE GREEN ROAD, LONDON, NW6 1DT

Rating list: 2010 (Current)

With effect from: 01 Apr 2010

Description: SHOWROOM AND PREMISES

Billing authority: CAMDEN

Billing authority reference: 00121005605808

Special category code: 251 - Showrooms

Basis of measurement: NIA

Valuation scheme reference: 116081

Unadjusted £ m2/unit: £400.00/m2

Valuation

Ref.	Floor	Description	Area m2/unit	£ m2/unit	Value
1	Ground	Retail Zone A	57.20	£400.00	£22,880
2	Ground	Retail Zone B	8.30	£200.00	£1,660
Total area:			65.50	Subtotal:	£24,540
			<b>Spaces</b>	<b>Area m2</b>	<b>Value</b>
Car parking:			2		£2,300
					£2,300
Total value:					£26,840
Rateable value:					£ 26,750

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**APPENDIX 3.**

MENU TO FOLLOW.

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**APPENDIX 4.**

**PHOTOGRAPHS.**

The application property as existing and in use within the immediate parade and uses:



External seating area for alfresco refreshments and drinks, and for smoking:



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Properties and traders opposite (A3/A5 and scooter showrooms as was the previous use of No.s 56 and 58:



West Hampstead Police Station almost opposite the application property:



Adjoining forecourt concrete and stepped:



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Photographs of the local shopping area (indicative of uses and frontage and forecourt appearances - not a full survey):



Cars parking on forecourts to non-A1 Users:

No. 110 Pumpkin Café – only similar cafe use with similar external decked seating:



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David's Deli at West Hampstead operating with planning offering shisha smoking:

Rouge Lounge operating subject to an appeal also at West Hampstead:



Large A3 user with external seating at West Hampstead (Pizza Express);



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## APPENDIX 5

### RETAIL SURVEY GROUND FLOOR USES.

The external walk by survey was undertaken on the 19<sup>th</sup> March 2014.

<u>No.</u>	<u>Trader:</u>	<u>Apparent use class:</u>
56-58	Monte Cristo	A1/A3 mixed use with tables and chairs.
60	GPS Property Maintenance.	B1a.
62	M&F Cuts Hair Saloon.	A1
64	Cromwell Security Services.	A1
66	Lordz Estates Agents	A2
68	D&D dry cleaners	A1 possibly.
70	Bijou.	Use not clear.
72	Prestige Beauty Clinic.	A1 possibly.
74	Fortune Green Books.	A1
76	London Habitat. Est.Agent.	A2
78	Vacant.	
80	The Medical Centre.	D1
82	Sushi Kol restaurant.	A3
84	Sweet Homes Est Agent.	A2
86	Hayes and Wilson Est. Agt.	A2
88	Crystalline Health & Beauty.	A1
90	Bomaby Heights restaurant.	A3
92	Vacant.	
94	Pizza Miceo.	A5
98	Converted to residential.	C3
100	West Hampsead Food/Wine.	A1
102	Yuzu restaurant.	A3

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104	Mina Nails.	A1
106	Fortune Green Dental.	D1
108	Nutts and Mutts.	A1
<i>Ingham Road breaks frontage, then:</i>		
110	Pumpkins Café.	A3 or A1/A3 mixed use external tables.
112	Green & White Cleaning.	B1a
114	Groom Barbers.	A1
116	Newsagent – unsigned?	A1
118	Living – estate agents.	A2.

Summary:

There are some 30 units in the parade on the same side as “Monte Cristo”. There are a number of A1 uses in this parade of shops, probably 11 from external observation or about 33%. There are two vacant and one permanently residential.

This does not suggest a healthy residential parade with many A1 uses being more of a service use. This has been addressed by new space with Tescos. However although there are a number of A3 and A5 uses there is only one comparable café use at 110.

This provides tables and chairs for external al fresco use and for ordinary smoking. No shisha smoking is offered at this unit or elsewhere in this centre.

On the opposite side of West Green Road there is a new development with considerable opportunity for recent additional retail space which is being let but only one unit is let so far for retail use. This is a new Tesco Express in A1 use. Experience Learning is probably a D1 use or A1/D1 mixed use, the Gymnasium is in D2 use, and there are still two units vacant and to let but one may be under offer.

There is a fish and chip restaurant/take away opposite the application property and a scooter showroom adjoining.

**It is reasonable to conclude that the proposed use will add to the A1 use element in this area and also add to the vitality choice and interest with all day opening in the locality with limited alternative offers except in larger centres.**

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**APPENDIX 6.**

**PLANNING HISTORY OF THE SITE.**

The following has been obtained from the Council's website:

No.56:

No.58:

Application Number	Site Address	Development Description	Status	Date Registered	Decision
2012/4974/P	56 Fortune Green Road London NWS 10T	Installation of 3 air conditioning units at ground floor level within a brick enclosure adjacent to the existing shopfront to be used in connection with use as retail unit (Class A1).	FINAL DECISION	10-10-2012	Refused
0005300	56-58 Fortune Green Road NWS	Alterations to the shopfront as shown on drawing nos. LOM8983/01-03 as amended by letter dated 14.11.90.	FINAL DECISION	06-06-1990	Grant Full or Outline Planning Permission.
0000820	56-58 Fortune Green Road NWS	the display of an internally illuminated fascia sign and two circular projecting internally illuminated signs as shown on drawing nos. LOM8983/01-03 as amended by letter dated 14.11.90	FINAL DECISION	06-06-1990	Grant Approval for Advertisement <i>No documents</i>
14/0/023450	No. 56, Fortune Green Road, Hampstead.	The formation of a new access to the highway from No. 56, Fortune Green Road, Hampstead.	FINAL DECISION	11-03-1955	permission

Application Number	Site Address	Development Description	Status	Date Registered	Decision
00382	56, Fortune Green Road, Hampstead.	Installation of new shop-front at No. 56, Fortune Green Road, Hampstead.	FINAL DECISION	20-03-1955	permission
000900	56A Fortune Green Road NWS	Retention of the use of No.56A as a self-contained unit. (Plans submitted)	FINAL DECISION	12-06-1995	Withdrawn after Reg'n (not used on PACIS)
003861	56 Fortune Green Road NWS	Change of use and works of conversion to form two self-contained units including the erection of a mansard extension as shown on drawings numbered 58 FGR/05A/05A/05 and 15A as revised on 28th October 1988 and 27th October 1989.	FINAL DECISION	27-01-1989	Refuse Full or Outline Permission <i>Residential adj.</i>
000310	56-58 Fortune Green Road NWS	Alterations to the shopfront as shown on drawing nos. LOM8983/01-03 as amended by letter dated 14.11.90.	FINAL DECISION	06-06-1990	Grant Full or Outline Planning Permission. <i>Same as 56.</i>
000820	56-58 Fortune Green Road NWS	the display of an internally illuminated fascia sign and two circular projecting internally illuminated signs as shown on drawing nos. LOM8983/01-03 as amended by letter dated 14.11.90	FINAL DECISION	06-06-1990	Grant Approval for Advertisement <i>No documents</i>

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**REQUIREMENTS FOR SMOKING WITHIN ENCLOSURES.**

**2006 No. 3368**

**PUBLIC HEALTH, ENGLAND**

**The Smoke-free (Premises and Enforcement) Regulations 2006**

<i>Made</i> - - - -	<i>13th December 2006</i>
<i>Laid before Parliament</i>	<i>18th December 2006</i>
<i>Coming into force</i> - -	<i>1st July 2007</i>

The Secretary of State for Health, in exercise of the powers in sections 2(5), 10(1) and (2) and 79(3) of the Health Act 2006(a), makes the following Regulations:—

**Citation, commencement, application and interpretation**

- 1.—(1) These Regulations may be cited as the Smoke-free (Premises and Enforcement) Regulations 2006 and shall come into force on 1<sup>st</sup> July 2007.
- (2) These Regulations apply in relation to England only.
- (3) In these Regulations “the Act” means the Health Act 2006.

**Enclosed and substantially enclosed premises**

- 2.—(1) For the purposes of section 2 of the Act, premises are enclosed if they—
  - (a) have a ceiling or roof; and
  - (b) except for doors, windows and passageways, are wholly enclosed either permanently or temporarily.
- (2) For the purposes of section 2 of the Act, premises are substantially enclosed if they have a ceiling or roof but there is—
  - (a) an opening in the walls; or
  - (b) an aggregate area of openings in the walls,which is less than half of the area of the walls, including other structures that serve the purpose of walls and constitute the perimeter of the premises.
- (3) In determining the area of an opening or an aggregate area of openings for the purposes of paragraph (2), no account is to be taken of openings in which there are doors, windows or other fittings that can be opened or shut.
- (4) In this regulation “roof” includes any fixed or moveable structure or device which is capable of covering all or part of the premises as a roof, including, for example, a canvas awning.

LOCAL GOVERNMENT REGULATION GUIDANCE.



Implementation of smokefree legislation in England

**Compliance with smokefree legislation**

**Application of the smokefree legislation to shisha bars**

Smokefree legislation in England came into effect on 1 July 2007 and it has therefore been in place for more than three years. The Government has stated that there is no intention to review the legislation at the present time as it is seen to be saving its purpose. The virtual absence of date of legal challenges to the legislation is an indication that it is both effective and accepted.

The inclusion of premises that serve shisha is in keeping with the primary objective of the legislation, which is to reduce the risks to health from exposure to secondhand smoke in enclosed and substantially enclosed public places and workplaces. Organisations representing shisha bar operators were specifically included in the consultation on the proposed legislation which was considered carefully by Parliament before it received Royal Assent. The fact that the new law would include the smoking of shisha was debated specifically in the House of Lords (9 May 2006) and during this debate, the views of shisha bar owners were specifically considered.

The smokefree legislation is intended to be comprehensive and to apply to virtually all enclosed workplaces and public places in England. The effect on businesses that serve shisha is therefore not disproportionate. Shisha can still be smoked in places that are not enclosed or substantially enclosed and the effect is therefore no different to that of traditional pipes, ‘commercial’ cafes, private members clubs set up for the smoking of cigars and all other hospitality premises.

There have not been any legal challenges to the inclusion of shisha smoking within the smokefree legislation. However, an Appeal Tribunal was held to determine a decision by the Commissioners for Her Majesty’s Revenue and Customs (HMRC) to classify tobacco mix used in waterpipes as liable for duty. The Tribunal found that colloquially the use of the product is called ‘smoking’, that technically when used as intended it does produce smoke, and the user inhales this and is therefore properly to be said to be smoking. The appeal was dismissed (Appeal number IOA/2009/7071).

**Requirements in the Health Act 2006**

Under Section 1(2) of the Act, smokefree legislation in England applies to the smoking of tobacco or anything which contains tobacco, and being in possession of it tobacco or anything in which contains tobacco, or being in possession of any other substance in a form in which it can be smoked. This includes waterpipes.

The Act prohibits smoking in enclosed and substantially enclosed parts of **virtually all premises that are open to the public or are used as a place of work by more than one person**. This clearly includes premises such as lounges and cafes where waterpipes are offered and which are commonly known collectively as shisha bars.

The requirements for shisha bars are no different to those for any other premises required by law to be smokefree and therefore the general advice contained in the Guidance for Regulatory Officers – Second Edition (Section 7) issued by LACORS in 2009 applies.

**Essentially waterpipes can only be smoked outside in the open air, or where the requirements have been properly met for a structure to be non-substantially enclosed.**

Local authority officers may therefore want to pay particular attention to the signage requirements to ensure that the correct signage is properly displayed at every entrance to an enclosed or substantially enclosed part of the premises. Additional signage might also be recommended to specifically prohibit staff from lighting and extinguishing waterpipes in enclosed and substantially enclosed areas and to direct people smoking shisha pipes that they must



**SHISHA SMOKING AS A USE.**

**SHISHA SMOKING.**

- 1 One of the activities people from the Middle East, Levant and North African backgrounds enjoy and miss in the UK and London especially, both men and women, is the sophisticated Middle Eastern urban cafe lifestyle with al fresco style external eating and drinking, especially in the many countries where shisha smoking has developed as part of this activity often with cigarette and cigar smoking as well. These are essentially places where coffees, fruit juices and other hot and cold drinks are served, with light refreshments and snacks and where all kinds of tobacco smoking takes place, but especially shisha smoking.
- 2 Shisha smoking when visiting a cafe is a form of tobacco smoking appreciated by those originally from these Middle Eastern communities whether resident locally, visiting relatives or tourists. Tobacco smoke is inhaled but first cooled and filtered through water. This is the reason for the water flask. Many cafes and coffee shops offer shisha smoking to customers in the Middle East where smoking can be social. The pipe used is shown in Appendix 1 to my Statement.
- 3 The bowl is filled with tobacco and covered with a foil, the charcoal embers are put on the foil to create smoke which then passes down through the water in a base bottle or vase, the water can also be flavoured with fruit juices, and then along the hose for inhalation through a mouthpiece. Mouthpieces are supplied or brought by the customer. The embers burning the tobacco can be from specialist charcoal of various wood types, then taken from a burner in a small can to the pipe, or can be from individual instant lighting charcoal from specialist pack suppliers, but traditional charcoal is preferred.
- 4 The act of smoking is the same with cigarettes or pipes, inhalation of smoke, but instead of buying the items from the shop, restaurant or public house visited, the tobacco is purchased and the hookah used by the customer, and Sara Cafe charges per session.
- 5 The activity is treated under UK law the same as any other form of smoking and smoke free legislation applies in the same way. European smoking is usually considered incidental to any catering use, whether falling classes A1, A3, A4 or A5. Shisha smoking appears to be treated differently by the UK planning system although this approach has not been challenged to date as a matter of law. It is usually seen as incidental to Class A3 uses but not for other use classes or sui generis uses.
- 6 The shisha flask comprises a vase, tobacco bowl and tray, air valve and stem and the hose which is sucked upon to inhale the tobacco smoke. The smoke is filtered and flavoured. The construction is described in the picture overleaf:

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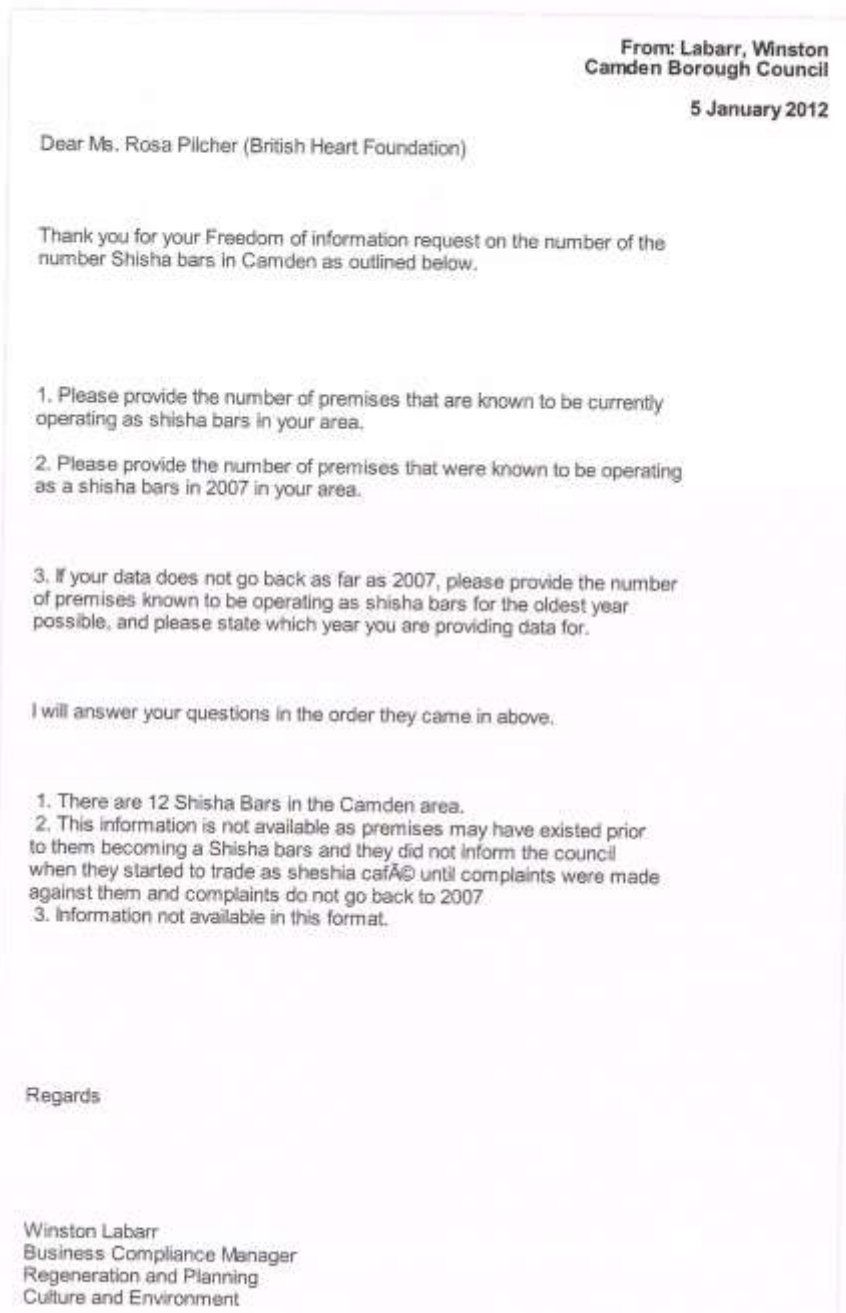


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**APPENDIX 10.**

**BHF INQUIRY OF CAMDEN REGARDING "SHISHA BARS" AS AT JANUARY 2012.**



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**APPEAL PROPERTY PHOTOGRAPHS AND APPEAL DECISIONS.**

**PHOTOGRAPHS OF APPEAL PROPERTIES:**

**1 CHURCH STREET NW8.**



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**13A CRAWFORD STREET W1.**



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**17 GREENWICH CHURCH STREET SE10.**

**REAR VIEW FROM EXTERNAL SEATING AREA.**



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**FRONT ELEVATION.**



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**141 GOLDHAWK ROAD LONDON W6.**

Tented area to rear where there is shisha smoking (structure not approved but the use was allowed) with residential habitable rooms over and around and to rear:



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FRONT ELEVATION 141 GOLDHAWK ROAD:

(Residential over – access via red door to side).



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**193 EDGWARE ROAD LONDON W2.**

Pre-appeal photographs:



Residential flats of Cambridge Court over.

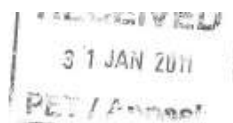
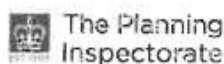


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## APPEAL DECISIONS.

### 1 Church Street NW1.



## Appeal Decision

Site visit made on 12 January 2011

by **John L Gray DipArch MSc Registered Architect**

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 28 January 2011

### Appeal Ref. APP/X5990/A/10/2137271

#### 1 Church Street, London, NWS 8EE

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
- The appeal is made by MFK Ltd against the decision of the City of Westminster Council.
- The application, ref. 10/00722/FULL, dated 27 January 2010, was refused by notice dated 27 April 2010.
- The development proposed is change of use to composite mix of A1/A3/sui generis.

#### Clarification

1. The refusal notice describes the proposal as "continued use of basement and ground floors as a mixed use comprising an internet café and shisha pipe parlour (smoking of shisha) (Sui Generis)". I consider this both more accurate and more self-explanatory than the application description, though the words in brackets seem unnecessary.

#### Decision

2. I allow the appeal and grant planning permission for the continued use of the basement and ground floors as a mixed use comprising an internet café and shisha pipe parlour at 1 Church Street, London, NWS 8EE, in accordance with the terms of the application, ref. 10/00722/FULL, dated 27 January 2010, and drawings nos. JLK0658-01, 02 and 03 submitted therewith, subject to the following conditions.
  - 1) The use hereby permitted shall not be open to customers outside the hours of 0900-2300 on any day.
  - 2) There shall be no more than ten tables and 24 chairs in the courtyard when the premises are open for business.
  - 3) There shall be no primary cooking of raw or fresh food on the premises.
  - 4) No fixed patio heaters shall be placed in the courtyard.
  - 5) No amplified music shall be played and no TV programmes shall be shown in the courtyard.

#### Main Issue

3. There is no objection to the principle of the use within what is a designated District Centre. That, however, does not remove the need to consider potentially adverse impacts from what is proposed. Accordingly, the main issue is whether continued use for shisha smoking in the external courtyard would cause undue noise, disturbance or odour nuisance for neighbouring residents.

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### Reasons

4. An enforcement notice, upheld on appeal in a decision dated 7 December 2010, appeared to have been complied with when I made my site inspection. The roof structure illustrated in a photograph in the Council's statement had been removed and replaced by four large square umbrella canopies; and the four patio heaters had been replaced by two portable ones. There were twelve small tables in the courtyard and 30 chairs, two fewer tables but two more chairs than shown on the application plan.
5. Use of the courtyard as part of the internet café could cause noise and disturbance for various residential properties. The representations say that there are two flats above the appeal premises. Only the second floor, however, has windows in the gable, directly above the courtyard. The first floor flat might be affected by comings and goings at the café but would be less likely than the second floor flat to suffer noise and disturbance from the use of the courtyard by customers. There appear to be other upper floor flats in Church Street whose occupiers could also experience noise and disturbance from comings and goings. 135 Lisson Grove stands south-west of 1 Church Street; its north-east-facing first and second floor rooms could be susceptible to noise and disturbance from the courtyard. The windows are about 5.0m from the nearest point of the courtyard. Other properties in Lisson Grove would be less susceptible to the extent that they are further away. Shisha smoking in the courtyard could cause an odour nuisance for the occupiers of, in particular, 135 Lisson Grove and the second floor flat in 1 Church Street; distance and direction would tend to limit any impact further from the appeal premises.
6. On noise and disturbance, Church Street is part of a District Centre. Residents' expectations of this area cannot be as high as in a purely residential area, even allowing that the appeal premises are at the extremity of the District Centre. An internet café is an appropriate use in a District Centre. In my judgement, a limitation on opening hours would afford an appropriate compromise between what is permissible in the area in principle and any noise or disturbance that might be generated. Lisson Grove is outside the District Centre but is busy road where there must always be relatively high background noise levels, especially in the vicinity of the light-controlled junction. Again, a limitation on opening hours would, I judge, safeguard appropriate living conditions. Indeed, I note that the complaints of noise are more about very late in the evening, into the early hours of the morning, rather than at other times of the day.
7. On odours, I appreciate that the distinctive smells associated with shisha smoking can be off-putting to some. The second floor of 1 Church Street, with windows directly above the courtyard, would be susceptible to smoke and odours infiltrating through an open window. 135 Lisson Grove is also close enough to the courtyard for odours to cause a nuisance, though it would tend to require either still conditions or a northerly breeze. On the other hand, I judge that removal of the former canopy in favour of the umbrella canopies should allow smoke and odours to dissipate more readily, reducing the potential for nuisance. Also, a limitation on opening hours would reduce the extent to which odours could cause a nuisance.
8. Accordingly, I conclude that conflict, to the extent that there may be any, with saved UDP Policies STRA 16, STRA 17, TACE 8 and ENV 6, is capable of being overcome by attaching conditions to planning permission.
9. The Council suggests three conditions in the event that the appeal is allowed. I have already indicated the need for a condition limiting opening hours – I

consider 2300 hours appropriate for Mondays to Saturdays but see no tangible benefit from curtailing that to 2230 hours on Sundays or bank or public holidays. In addition, the conditions limiting occupancy of the courtyard and preventing primary cooking are both reasonable and necessary to secure an appropriate standard of residential amenity. That said, I consider the Council's suggested limit on tables and chairs to be unnecessarily low in terms of both the capacity of the courtyard and the potential for noise, disturbance or odours; given what I saw at my site inspection, ten tables and 24 chairs would be a comfortable maximum. There are also two matters not raised by the Council. Firstly, the application plans show four patio heaters, which presumably relates to the position prior to the enforcement notice being upheld at appeal; for the sake of clarity, I shall attach a condition to preclude fixed heaters in the courtyard. Secondly, the representations indicate occasions when there has been a TV screen in use in the courtyard or when amplified music has been played; both are inappropriate, even before 2300 hours, in terms of residential amenity.

10. I have taken into account all other matters raised in the representations but have found nothing, individually or cumulatively, to outweigh my conclusions above, which have led me to my decision.

*John L. Gray*

Inspector



## Appeal Decision

Hearing held on 5 August 2010  
Site visit made on 5 August 2010

by **Nigel Burrows BA MRTPI**

an Inspector appointed by the Secretary of State  
for Communities and Local Government

The Planning Inspectorate  
4/11 Eagle Wing  
Temple Quay House  
2 The Square  
Temple Quay  
Bristol BS1 6PN

☎ 0117 372 6372  
email:enquiries@pins.gsi.gov.uk

Decision date:  
24 September 2010

### Appeal Ref: APP/X5990/C/10/2125101

#### The building and associated land at 13A Crawford Street, London, W1U 6BZ

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeal is made by Amypro Limited against an enforcement notice issued by City of Westminster Council.
- The Council's reference is 06/35481/I.
- The notice was issued on 8 February 2010.
- The breach of planning control as alleged in the notice is a change of use of the Property from Class A1 (Retail) to a mixed use comprising Class A1, Class A3 (Restaurants and Cafes) and Sui Generis purposes as a shisha cafe within the last ten years without the benefit of planning permission.
- The requirements of the notice are discontinued the use of the basement, the ground floor and the forecourt of the Property (shown in Photograph A attached) for mixed use purposes comprising the following uses:
  - Class A3 (Restaurant and Café)
  - Sui Generis (Shisha Smoking Place).
- The period for compliance with the requirements is two months.
- The appeal is proceeding on the grounds set out in section 174(2) (a) (f) and (g) of the Town and Country Planning Act 1990 as amended.

**Summary of Decision: The appeal is allowed, the enforcement notice is quashed, and planning permission is granted in the terms set out below in the Formal Decision.**

#### Procedural Matters

1. At the hearing the main parties agreed that a more accurate description of the breach of planning control would be 'the change of use of the property from retail (Class A1) to a mixed use for retailing, restaurant and café purposes and as a shisha smoking place'. Consequently, the requirement in paragraph 5 of the notice should be to cease the use of the property for restaurant and café purposes and as a shisha smoking place. It was common ground between the parties that the notice could be corrected in these respects without causing injustice. I agree and intend to correct the notice accordingly.
2. The enforcement notice relates to 13A Crawford Street, which comprises the ground floor and basement of a six storey building located on the northeast corner of the junction of Crawford Street and Gloucester Place in Westminster. The enforcement notice plan appears to be drawn too widely as it also includes 13B and 13C Crawford Street. I shall therefore correct the plan so that it excludes these properties. I am satisfied that no injustice would be caused to the parties by making this correction.

#### The appeal on ground (a) and the deemed application

3. I consider the main issue in this case is the effect of the development subject of the enforcement notice on the living conditions of residents in the vicinity of the site and the amenity of the area, with particular reference to noise, disturbance and odours.

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### *Planning Policy*

4. The development plan includes the 'saved' policies of the City of Westminster Unitary Development Plan (UDP) adopted in 2007. Policy STRA 16 aims to protect and improve the residential environment of the City. Policy ENV 13 has similar objectives. Policy TACE 8 is concerned with entertainment uses; amongst other things, it seeks to ensure they do not harm residential amenity or local environmental quality as a result of noise or smell. The Council has cited its Supplementary Planning Guidance 'A Planning Guide for Food and Drink Premises' adopted in 1999. However, this guidance does not appear to take account of the changes introduced by the Town and Country Planning (Use Classes) (Amendment) (England) Order 2005, which included the splitting of the former A3 (Food and Drink) use class into three new classes. As the document appears to be significantly out of date in some respects, this limits the weight I can give to it.

### *Reasons*

5. The appeal property is known as 'Sara Café'. The property has a shopfront facing Crawford Street and there is a small private forecourt abutting the footway. There is also a basement light well which can be accessed via external stairs and a gated entrance on the Gloucester Place frontage, or internally through the property.
6. There is no dispute the lawful use of the property is for retailing purposes (Class A1). According to the appellant the previous uses of the property include a hairdressers and a sandwich shop/café. However, the parties agree the current mixed use is in breach of planning control. At the hearing it was confirmed that in addition to retailing, the property is used for café purposes (including the provision of refreshments, light meals, snacks, and confectionery) and as a shisha smoking place. No alcohol is sold at the premises. A shisha home delivery service is provided. The basement light well contains a charcoal burner; this is used in connection with shisha smoking and kept alight during trading hours. The upper floors of the building contain a number of flats.
7. The Council confirms the property is not listed although it lies within the Portman Estate Conservation Area. The neighbouring properties on this side of Crawford Street include a dry cleaners together with a café/sandwich bar and a restaurant (both of which have tables and chairs on their forecourts). Residential accommodation exists above the commercial frontages. The premises on the opposite side of the street include an embassy, a hotel and a number of flats. There are a variety of uses close by in Gloucester Place, including hotels and embassies as well as residential properties. This section of Gloucester Place is a busy one-way thoroughfare situated between Portman Square and Marylbone Road and it forms part of the A41 traffic route.
8. The Council's stance is that the use attacked by the enforcement notice, particularly the use of the forecourt by customers for the consumption of food, refreshments and for shisha smoking causes noise and nuisance to local residents and harms the amenity of the area. The planning history of the property includes the refusal of a retrospective planning application for the use during 2009. At this time the Council received about 72 letters of support and about 15 letters of objection. The objections cited, amongst other things, late night opening, noise from within the premises, noise from customers sitting on the forecourt and smells from shisha smoking and burning charcoal.
9. The Council contends that although the premises benefit from a late night refreshment license issued in 2007, the licensing objectives do not necessarily coincide with the relevant development control and planning policy objectives. At the hearing the appellant's representatives confirmed the premises are used between 0900 to 2330 hours Mondays to Thursdays, 0900 to midnight on Fridays and Saturdays, midday to 2230 hours on Sundays, and midday to midnight on Sundays before Bank Holidays. The closing times appear to be within the terms of the late night refreshment license.

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10. The conditions attached to the license stipulate, amongst other things, there should be a maximum capacity of 50 persons on the ground floor and basement, and covers shall be limited to 50 inside the premises and 6 on the private forecourt. At the hearing it transpired there was some ambiguity about whether 'covers' meant tables or chairs. The Council argued that for planning purposes it meant chairs and therefore equated to 6 customers. The appellant's representatives indicated that 'covers' meant tables; the license allows 6 tables on the forecourt and each of these has 2 chairs, therefore, 12 customers can use the forecourt. There is some justification for this view, given that the plans annexed to the license show 6 tables and 12 chairs on the forecourt.
11. In any event, the Council and local residents allege the conditions of the license are not always adhered to. The Council's investigations have revealed that on some occasions there are more tables and chairs on the forecourt than allowed by the licence and the premises often close later than the stipulated hours. There is also persuasive evidence from local residents to substantiate these concerns. The residents also maintain that areas beyond the private forecourt have consistently been used for sitting out, including the light well. The appellant refutes these allegations. Be that as it may, on the evidence before me, it is clear that the mixed use of the premises has attracted a substantial number of complaints from certain local residents. It is also difficult to escape the impression that the appellant has failed to operate a rigorous management policy at the premises in order to ensure the use is operated in a considerate manner.
12. However, there is extensive support for the use. Whilst this is mainly from customers, the use evidently meets a significant demand especially for shisha smoking. A local resident suggests the premises should close at 1600 hours to reflect the closing hours of Mina's Café. In my view this suggestion is unrealistic. The appellant indicates there are no planning limitations on the opening hours of the premises for retail use. This is not disputed by the Council and I attach significant weight to this consideration. The Council would not be able to exercise planning control over the trading hours of the property if it were to be used for some form of retail use with late-night closing hours.
13. I have also borne in mind that residents living in a busy city location such as this must expect significantly higher levels of activity than those who live within a wholly residential area. The premises are situated adjacent to a traffic-light controlled junction on a main traffic route. There is a considerable amount of stop/start traffic together with periods of stationery traffic with the attendant noise and fumes from buses, lorries, vans and cars. The noise climate within the area appears to be dominated by traffic. Some of the representations from local residents also acknowledge that other entertainment uses in the area, such as pubs and restaurants, close at 2300 hours.
14. On balance, I am not persuaded the continuation of the use in this particular location would cause unreasonable levels of noise or disturbance to local residents, provided it is controlled by appropriate planning conditions. To my mind, any noise resulting from the use of the premises and the forecourt is likely to be subsumed into the background noise levels during the day and in the evening. Nevertheless, the activity generated by the use is likely to be more noticeable later at night, when there would normally be a progressive decrease in traffic flows in the area with a corresponding reduction in the overall background noise levels. Notwithstanding the closing times stipulated in the license, I am firmly of the opinion that a closing time of 2300 hours on Mondays to Saturdays and 2230 hours on Sundays and Bank Holidays would strike a more acceptable balance between allowing a beneficial use of the premises, whilst protecting the living conditions of residents from unacceptable late night noise and disturbance.
15. I also consider that conditions restricting the numbers of forecourt 'covers' to 6 tables and 12 chairs and limiting the number of customers at the premises to 30 at any one time would significantly diminish the level of noise or disturbance likely to be experienced by residents. A condition prohibiting the cooking of raw or fresh food would also reduce the likelihood of any intrusive odours emanating from the premises.

16. The smell of sweet scented tobacco and the burning of charcoal associated with shisha smoking appear to have been a concern of some local residents. However, the separation between the forecourt of the premises and the nearest flats should ensure that tobacco smells can be adequately dispersed. The use of charcoal tablets in the burner should also reduce the likelihood of local residents experiencing an unacceptable decline in air quality. This could be secured as part of a management plan to be agreed with the Council. The plan could also address other matters such as the arrangements for containing noise within the building (including music), ensuring the forecourt furniture is taken inside quietly at closing time, ensuring customers behave appropriately within and outside the premises and the arrangements for waste storage.

#### *Other Considerations*

17. In view of the history of complaints concerning the use, I recognise that some residents may be apprehensive about the likelihood of the appellant complying with any conditions attached to a planning permission. However, I have no doubt that any material breach of the planning conditions would be readily detected, given the monitoring of the use that appears to occur. The Council could also exercise effective control over such matters by issuing a Breach of Condition Notice, if necessary.
18. Other concerns have been raised including the impact of the use on highway conditions; it is also alleged the use of the light well for charcoal burning creates a potential fire risk and a fire exit route has been obstructed. However, the appellant confirms that health and safety inspections have been carried out and the Fire Brigade has raised no fundamental objections to the current arrangements. In any event, the Council has not taken enforcement action for these reasons. I have not been presented with any compelling evidence to demonstrate these concerns, individually or collectively, would amount to decisive objections to the use. In other respects, the Council does not allege the use would harm the character or appearance of the Portman Estate Conservation Area. I see no reason to come to a different conclusion.
19. Concerns have also been expressed about ownership rights over the basement area and light well. However, the fact remains that this area is currently used in connection with the premises. The issue of whether the appellant is entitled to use this area is a private property matter that would need to be resolved between the parties concerned. The existing shopfront appears to have been installed without planning permission. Nevertheless, this is not a matter before me in relation to the current appeal because the enforcement notice only seeks to address the unauthorised use of the property.

#### **Conclusions**

20. I conclude the continuation of the use would not significantly harm the living conditions of residents in the vicinity of the site or the amenity of the area provided it is controlled by appropriate planning conditions. Subject to this proviso, it would not be inconsistent with the objectives of UDP policies STRA 16, ENV 13 and TACE 8, which seek to ensure that entertainment uses do not harm residential amenity or local environmental quality. I conclude the appeal on ground (a) and the deemed application should therefore succeed. The notice will be quashed and planning permission will be granted for the use. Accordingly, grounds (f) and (g) of the appeal do not fall to be considered.
21. I have taken into account all the other matters raised, including the appellant's concerns regarding the authenticity of some of the representations received in connection with the use and the use characteristics of other licensed premises and shisha smoking establishments in the area. However, I find they do not alter or outweigh the main considerations that have led to my decision in this particular case.

#### **Conditions**

22. As the development has already been carried out, it would not be necessary to impose

a condition concerning the implementation of the permission. I shall impose conditions addressing the matters referred to above in paragraphs 14-16, in order to protect the living conditions of residents and amenity of the locality. The appellant has suggested the closing times should coincide with the existing licence (albeit with 0730 opening hours Mondays to Saturdays), more covers should be allowed on the forecourt, and up to 40 customers should be allowed on the premises at any one time. Nevertheless, I consider the stricter limitations I have imposed concerning these particular matters are fundamental to the acceptability of this use. I am also satisfied these conditions meet the tests set out in Circular 11/95 ('The Use of Conditions in Planning Permissions').

### Formal Decision

23. I direct that the enforcement notice be corrected by:-
- (a) The substitution of the attached plan for that accompanying the enforcement notice and the replacement of the words '*edged red on the attached plan*' by the words '*edged with a bold black line*' in paragraph 2 of the notice.
  - (b) Deleting all the words in paragraph 3 after '*THE BREACH OF PLANNING CONTROL ALLEGED*' and replacing them by '*The change of use of the property from retail (Class A1) to a mixed use for retailing, restaurant and café purposes and as a shisha smoking place*'.
  - (c) Deleting the requirements in paragraph 5 of the notice and replacing them by '*Cease the use of the property for restaurant and café purposes and as a shisha smoking place*'.
24. Subject to the above corrections I allow the appeal, and direct that the enforcement notice be quashed. I grant planning permission on the application deemed to have been made under section 177(5) of the 1990 Act as amended for the development already carried out, namely the change of use of the property from retail (Class A1) to a mixed use for retailing, restaurant and café purposes and as a shisha smoking place at 13A Crawford Street, London, W1U 6BZ as referred to in the notice, subject to the following conditions:
- 1) The use hereby permitted shall cease within two months of the date of failure to meet any one of the requirements set out in (i) to (iv) below:-
    - (i) Within 3 months of the date of this decision details of each of the matters set out below shall have been submitted for the written approval of the local planning authority and the details shall include a timetable for their implementation:-
      - (a) A management policy for the operation of the use which shall include the arrangements for charcoal burning, for containing noise within the building (including music), ensuring that furniture on the forecourt is taken inside quietly at closing time, and ensuring appropriate standards of customer behaviour within and outside the premises.
      - (b) The waste storage arrangements to serve the use.
    - (ii) Within 11 months of the date of this decision the details shall have been approved by the local planning authority or, if the local planning authority refuse to approve the details or fail to give a decision within the prescribed period, an appeal shall have been made to, and accepted as validly made by, the Secretary of State.
    - (iii) If an appeal is made in pursuance of (ii) above, that appeal shall have been finally determined and the submitted details shall have been approved by the Secretary of State.
    - (iv) The approved details shall have been carried out and completed in accordance with the approved timetable.

- 2) The use hereby permitted shall not be open to customers outside the following times:
  - (i) 0800 to 2300 hours Mondays to Saturdays inclusive.
  - (ii) 0800 to 2230 hours on Sundays, Bank Holidays and Public Holidays.
- 3) At no time shall more than 6 tables and 12 chairs be placed outside the premises and these shall be confined to the existing private forecourt of the property.
- 4) Not more than 30 customers shall be allowed into the property at any one time, including those seated on the forecourt of the premises.
- 5) No primary cooking of raw or fresh food shall be carried out at the premises.

*Nigel Burrows*

INSPECTOR

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## Appeal Decision

Inquiry held on 21 and 22 February 2012

Site visit made on 21 February 2012

by **David Pinner BSc (Hons) DipTP MRTPI**

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 5 April 2012

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**Appeal Ref: APP/E5330/C/11/2160913**

**17 Greenwich Church Street, London SE10 9BJ**

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeal is made by Mr B Geyik against an enforcement notice issued by the Council of the Royal Borough of Greenwich.
- The notice was issued on 17 August 2011.
- The breach of planning control as alleged in the notice is without planning permission, the change of user of the ground floor of the premises from a sandwich shop (Class A1 of the Town and Country Planning (Use Classes) Order 1987 to use as a restaurant (Class A3 of the Town and Country Planning (Use Classes) Order 1987) and as a shisha bar in the rear garden.
- The requirements of the notice are to:
  - (a) cease the use of the land as a restaurant;
  - (b) cease the use of the rear garden for the smoking of shisha;
  - (c) remove all advertisements advertising the land as a restaurant and café;
  - (d) remove all fixtures and fittings associated with the unauthorised restaurant use including all cooking facilities, shisha pipes, tables and chairs.
- The period for compliance with the requirements is one calendar month.
- The appeal is proceeding on the grounds set out in section 174(2)(a), (d), (e), (f) and (g) of the Town and Country Planning Act 1990 as amended.
- An application for planning permission is deemed to have been made under section 177(5) of the Act as amended.

**Summary of decision:** The appeal is allowed, the enforcement notice is corrected, varied and quashed and planning permission is granted on the deemed application, as set out in the Formal Decision below.

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### Application for costs

1. An application for costs was made by Mr B Geyik against the Council of the Royal Borough of Greenwich. This application is the subject of a separate Decision.

### Ground (e)

2. The site identified on the enforcement notice plan includes part of the former garden area of the property which had previously been sold off to an adjoining owner. That owner was not served with a copy of the enforcement notice. I can correct this error by simply substituting the plan attached to the enforcement notice with an amended plan showing the true extent of the appeal property. This was accepted by the parties and this ground of appeal was pursued no further.

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### **Grounds (d) and (c)**

3. I shall deal with these grounds together for reasons that will become obvious.
4. At the inquiry, a clear picture emerged of the way the appeal premises had been used since 1996/7. The starting point is that the premises were believed to be in use as a retail shop prior to the start of the period under scrutiny. I shall refer to the premises as "the shop", but that is simply for convenience and should not be taken as an indication that they may have been in use as a shop within the meaning of Class A1 of the Town and Country Planning (Use Classes) Order 1987 at any time relevant to this appeal.
5. The premises were acquired by Mr and Mrs Luk, who started their business in 1996 or 1997 and used the shop to sell cakes and sandwiches, together with light hot snacks, such as baked potatoes, and full English breakfasts. Food could be purchased to take out but there were also tables and chairs to the rear of the shop so that food could be eaten in. Additionally, stackable tables and chairs would be put out in the rear garden for use by customers when the weather was nice. Mrs Luk explained that, when she and her husband started the business, there were not so many places in Greenwich where people could sit down for a drink or a snack and, especially at weekends, their business was very busy. She described how, on occasions, large parties would come into the shop and occupy all the tables and chairs, including those in the garden. At weekends, there might be 5 or 6 people waiting on tables. This was confirmed by Miss Shllaku, who lived above the shop with her parents between 1998 and 2000, but also worked part-time in the shop as a waitress between 1998 and 2003. Mrs Luk's breakdown of sales showed that food and drink consumed on the premises generally accounted for more than two-thirds of total sales, although total sales fell off considerably towards 2008 compared to earlier years. There were several reasons for this, notably that Mr Luk had died, leaving Mrs Luk to raise her children, who were still young, and run the business on her own. There was also a great deal more competition than when they had first set up their business and there is now a wide choice of places in and around Greenwich town centre where people can sit down for a meal or a hot drink.
6. Mrs Luk explained that hot food was rarely purchased to take out. Sandwiches and cakes were the main takeaway items, but could also be eaten in. Most customers purchasing hot food ate it on the premises. The hot and cold drinks served were non-alcoholic.
7. Mrs Luk's description of her use of the appeal site was confirmed by several other witnesses who had variously undertaken surveys of the site, provided insurance cover for the business or had been customers.
8. Mrs Luk sold the business as a going concern in 2008 to a man whose name was the subject of discussion at the inquiry because of different spellings or pronunciations. I shall refer to him as Mr Xu. He paid a premium for the business and leased the premises from Mrs Luk. Unfortunately, he could not make a success of the business and could not keep up with the rent payments. He surrendered the lease in September 2009 and disappeared off the scene, taking with him much of the furniture and equipment. The appellant acquired the lease in June 2010, but was permitted to enter and start refurbishment works before then. After refurbishing the premises, he opened his restaurant in August 2010. Although his signage referred to a shisha bar, he did not start

to sell shisha until about 10 months later. He stopped serving shisha at the beginning of February 2012 and said that it was not a major part of the business, but was intended more as a promotional thing to differentiate his business from others and to get people through the door. The premises currently serve food to be taken away or eaten on the premises and the rear garden is also used by customers as an outdoor eating, drinking and smoking area.

9. The Council had no evidence to suggest that Mrs Luk's description of her use of the premises was in any way inaccurate. Apart from the decline in takings, the business was essentially of the same nature throughout Mrs Luk's period of operation. The premises are small and I think that it is unlikely that any shift in the balances between hot and cold food and food sold for consumption on or off the premises would amount to a material change in the use. I do not think it is necessary or helpful to try to attach a label to the use or to relate it to any Use Class. In my view, the decline in the business did not result in a material change in the nature of the use and I conclude that the use of the premises for the sale of hot and cold food and non-alcoholic drinks for consumption on or off the premises, had become lawful by the time Mrs Luk sold the business to Mr Xu in 2008.
10. I heard little evidence of the way Mr Xu used the premises, but I have no reason to doubt that he simply carried on the use that had by then become lawful. The fact that he was not successful and may have stopped trading before he surrendered the lease, did not amount to the abandonment or material change of the use. I am also of the opinion that, as a matter of fact and degree, the period of non-use after Mr Xu left whilst the appellant refurbished the premises did not amount to the abandonment of the lawful use established by Mrs Luk.
11. Although the appellant may have intended to sell shisha when he opened the premises for his new business in 2010, he did not sell shisha until 10 months later. Then, as now, the business involved the sale of hot and cold food and non-alcoholic drinks for consumption on or off the premises. That was not a material change from the use carried out by Mrs Luk and continued by Mr Xu and so I conclude that it was a lawful use when commenced in 2010.
12. The critical question then, is whether a material change of use occurred when the shisha smoking activities commenced in 2011. The appellant's argument is that the shisha smoking activities were merely ancillary or incidental to the lawful use, whereas, in essence, the Council's view is that the shisha smoking activities added a new component to a mixed use of the premises; that the addition of the shisha activities affected the way that the premises were used in a way that had planning implications and that a material change of use had therefore occurred, for which planning permission was required but which had not been granted.
13. I was not able to see shisha smoking in progress, but the appellant described the process. It is not relevant to describe it in much detail here, but the essential features are that the smoke is produced in the shisha pipe from tobacco leaves flavoured with various fruits and molasses. The smoke is water-filtered by being bubbled through the pipe via the smoking tube. It produces a taste in the smoker's mouth, but makes the mouth dry so that it is necessary to have drinks also. Participants tend to take turns at smoking the shisha pipe.

14. When considering whether a particular activity is ancillary, incidental or an additional use, it is necessary to look at the nature of the activity and also determine whether the activity raises issues that have planning implications. A use that is not incidental but has no planning implications would not result in a material change in the use of the premises as a whole.
15. Smoking is clearly not functionally related to eating or drinking. However, it is a fact that some people who go to restaurants are smokers and some are not. That is a long-standing situation and it would normally be the case that smoking would be permitted in eating establishments as a matter of course. Since July 2007, when no-smoking laws took effect in England, it is usual for food and drink establishments to permit smoking outside and often some provision of shelter is made. Historically, food and drink establishments might have sold cigarettes, often from a machine, but there was no requirement that only cigarettes purchased on the premises could be smoked; no equipment provided by the establishment was needed, no preparation was required on behalf of the establishment and smoking would not normally be promoted as a specialist activity of the particular establishment. Smoking per se, even if it was not an incidental activity, would not usually have raised issues that have planning implications. Whether that would still be the case, now that smoking is only permitted outside, would depend on the particular circumstances.
16. Shisha smoking is markedly different in that the smokers do not go to the premises equipped with a shisha pipe and their own tobacco, the establishment has to prepare the tobacco and the pipes, and it would be expected that the shisha smoking facility would be something that is promoted by the establishment as a product or service for which a charge would normally be made.
17. In the appeal case there were no complaints about the use of the premises until the shisha smoking activities commenced. The shisha smoking facility was advertised with the expectation that it would attract customers to the premises because shisha smoking is not an activity that would usually be catered for in all eating and drinking establishments. The appellant said there were several pipes available. Given that shisha could only be smoked in the rear garden area, which is not particularly large, it seems to me that the intention was actively to promote shisha smoking, rather than simply to make provision for those customers who happened to be shisha smokers. The "augmented" photograph of people smoking shisha pipes for an advertisement on a website specifically aimed at shisha smokers is another strong indicator that this was more than an incidental use of the premises. I conclude, as a matter of fact and degree, that shisha smoking was not incidental to the use of the premises for the sale of hot and cold food and non-alcoholic drinks for consumption on or off the premises, but was an additional component of the overall use of the premises. As there were clearly planning implications, as evident from the fact that it was this component of the mixed use that prompted complaints, I conclude that a material change of use occurred with the commencement of the shisha smoking. There is no dispute that the mixed use that included shisha smoking had not been carried out for 10 years. I therefore conclude that the appeal on grounds (d) and (c) must fail. However, I shall vary the notice so that the alleged breach of control takes account of my findings that it is only the shisha smoking element that resulted in a material change of use of the premises. The deemed application will therefore be based on that varied allegation.



### **Ground (a) and the deemed application**

18. The Council's objections to the use are essentially policy objections. However, those policy objections, which are concerned with the protection of retail shopping frontages (Class A1 of the Town and Country Planning (Use Classes) Order 1987) and the need to protect the viability and vitality of the town centre, cannot realistically be applied. The recent publication of the National Planning Policy Framework does not change this situation. The appeal premises were not in retail use at the time when the policies were adopted and their last lawful use is not a Class A1 retail use, so their use for the sale of hot and cold food and drinks for consumption on or off the premises and for the smoking of shisha would have no effect on those matters that the policies are intended to address. Furthermore, the town centre does not appear to be suffering in terms of its vitality and viability and is a very lively place, notwithstanding the large number of food and drink uses. I have therefore dealt with the deemed application on its own particular merits rather than by reference to policy.
19. The use of the rear garden has meant that large umbrellas have been put at the tables for shelter, but the umbrellas have not caused alterations to the fabric of the appeal building, which is a listed building, and would be required anyway even if the shisha smoking activities were not resumed. The shisha smoking component of the mixed use has no significant effect on the character or appearance of the conservation area in which the site lies.
20. Although the shisha smoking had been the source of complaints, only one complainant appeared at the inquiry. Her evidence was somewhat undermined by her estimate that her house was only 35 metres from the appeal premises whereas in fact it is more like 200 metres in a direct line and closer to a busy main road than to the appeal premises. The Council had produced no strong evidence to indicate that the use of the appeal premises for smoking shisha in addition to the long-standing food and drink sales had been the source of such a level of complaint that action had been needed. Furthermore, the premises are located in the town centre close to other uses which generate evening activity, so any noise and disturbance attributed to the appeal premises, where alcohol is not served, might be coming from somewhere else nearby.
21. The shisha smoking was promoted as an activity in its own right with a view to getting people through the door. Because of its nature, it has to be carried on outside the building and it is more of a communal activity than smoking cigarettes because people are expected to take turns at the shisha pipe. The activity is therefore likely to increase the likelihood of people congregating in the rear garden of the premises and any noise they might make as a social gathering of people would not be attenuated to any great extent. I doubt that such noise would be more disturbing to nearby residents than the general noise to be expected in this busy town centre, but it would be necessary to ensure that the activities do not take place at unsocial hours. This could be achieved through a condition. I think it would be reasonable for people living nearby to expect the area to quieten down after 23:00, so I shall limit the times for shisha smoking accordingly. So that customers are not being discharged into the surrounding area at unsocial hours, midnight would be a reasonable time to expect the inside element of the use to cease, but with an hour earlier on Sundays. This is because it is usual for late-night uses in town centres to close earlier on Sundays, so the area could be expected to quieten down earlier than

on other nights. It is also necessary to ensure that the outside garden area is not used too early in the morning, whereas the sales of food inside the premises could reasonably commence with the serving of breakfasts. I have worded the condition accordingly.

22. The Council has suggested that a condition prohibiting the playing of amplified music in the garden area is necessary. I agree that this is necessary to avoid undue disturbance to nearby residents.
23. For these reasons, I conclude that the appeal should succeed on ground (a). I shall grant planning permission on the deemed application and quash the enforcement notice. There is therefore no need for me to consider the remaining grounds of appeal.

### **Formal decision**

24. I direct that the enforcement notice be corrected by the substitution of the plan attached to the notice with the plan attached to this decision. I also direct that the notice be varied by the deletion of the allegation and its substitution with the following allegation: "Without planning permission, the material change of use of the property to use for the sale of hot and cold food and non-alcoholic drinks for consumption on or off the premises and for the sale and smoking of shisha". I direct that the requirements of the notice be varied by the deletion of items (a), (b), (c) and (d) and by the substitution of a new requirement to cease the use of the premises for the sale and smoking of shisha. Subject to those corrections and variations, I quash the enforcement notice.
25. I grant planning permission on the application deemed to have been made under s177(5) of the Act for the development already carried out, namely the material change of use of the property to use for the sale of hot and cold food and non-alcoholic drinks for consumption on or off the premises and for the sale and smoking of shisha at 17 Greenwich Church Street, London SE10 9BJ, subject to the following conditions:
- 1) The premises shall not be open to customers otherwise than in accordance with the following requirements:
    - i) The garden area shall not be available for use by customers before 09:00 on any day;
    - ii) The garden area shall not be available for use by customers after 23:00 on Mondays to Saturdays, or after 22:00 on Sundays.
    - iii) The indoor part of the premises shall not be available for use by customers before 07:00 Mondays to Saturdays or before 08:00 on Sundays;
    - iv) The indoor part of the premises shall not be available for use by customers after midnight Mondays to Saturdays or after 23:00 on Sundays;
  - 2) No amplified music shall be played in the garden area at any time.

*David C Pinner*  
**Inspector**

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## Appeal Decision

Site visit made on 7 October 2013

by **David Leeming**

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 25 October 2013

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### Appeal Ref: APP/H5390/C/12/2188130

#### 141 Goldhawk Road, London W12 8EN

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
  - The appeal is made by Mr Salah Rashid against an enforcement notice issued by the Council of the London Borough of Hammersmith & Fulham.
  - The Council's reference is 2012/01097/COUOTH.
  - The notice was issued on 25 October 2012.
  - The breach of planning control as alleged in the notice is:
    - (ii) The change of use of the ground floor/basement premises together with the rear yard for use as a social club.
    - (iii) The erection of a canopy covering part of the rear yard in connection with the use as a social club.
  - The requirements of the notice are:
    - (i) Cease the use of the ground floor/basement shop premises and the rear yard as a social club;
    - (ii) Remove from the ground floor/basement shop premises all tables and chairs and other furniture and equipment associated with the use of the premises as a social club;
    - (iii) Cease the use of the rear yard for the purposes of smoking shisha pipes and other social activities;
    - (iv) Remove from the rear yard the canopy structure; all tables and chairs, other furniture, fixtures and fittings, and equipment including shisha pipes associated with the use of the premises as a social club.
  - The period for compliance with the requirements is 3 months.
  - The appeal is proceeding on the grounds set out in section 174(2)(a), (b) and (g) of the Town and Country Planning Act 1990 as amended.
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### Decision

1. The enforcement notice is corrected as follows:

- (1) by the deletion from the recital and from paragraph 1 of the words 'GROUND FLOOR AND BASEMENT'
- (2) by the deletion of paragraph 2 (i) and the substitution of 'the change of use of the front ground floor, rear first floor, rear lower ground floor, basement stores and rear courtyard to a mixed use as a sandwich bar/café with shisha smoking place (sui generis).'
- (3) by the deletion from paragraph 2 (ii) of the words 'in connection with the use as a social club' and the substitution of the words 'in connection with use as a shisha smoking place.'

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2. Subject to the above corrections, the appeal is allowed in so far as it relates to the use specified in the notice, as so corrected. Planning permission is granted on the application deemed to have been made under section 177(5) of the 1990 Act as amended in respect of this part of the development enforced against, subject to the conditions set out in the attached Schedule. The appeal is dismissed in so far as it relates to the canopy structure. The notice, as corrected, is upheld and planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended in respect of this part of the development enforced against.

#### **Application for costs**

3. An application for costs was made by the appellant against the Council. This application is the subject of a separate Decision.

#### **Procedural Matters**

4. The enforcement notice is stated in the recital and in paragraph 1 to relate to land at 'ground floor and basement', 141 Goldhawk Road. However, as the appellant points out, the planning unit comprises the ground floor, upper rear first floor and lower rear ground floor, together with the rear courtyard and basement stores. Given that the land identified by the red line on the plan attached to the notice effectively encompasses the planning unit (including the rear courtyard) the description of the site in the notice can be corrected without injustice to reflect the actual planning unit.
5. Although the recital and allegation in the notice are being corrected, no variation is being made to the requirements. To do so could give rise to two inconsistent permissions, the conditional one being granted and an unconditional one deemed to have been granted under section 173(11) as a result of the variation cutting down the requirements. In accordance with the judgement in *R v Chichester Justices Ex Parte Chichester DC* [1990] 60 P & CR 342, reliance is placed on section 180 of the Act to mitigate the effect of the notice so far as it is inconsistent with the permission being granted.
6. Reference has been made by both parties to previous appeal decisions that concern shisha smoking. It is an established planning principle that each case be determined on its own merits. As such, limited weight is attached to the other examples referred to.

#### **Ground (b) and the allegation**

7. This ground of appeal is that the breach of planning control alleged in the enforcement notice has not occurred as a matter of fact. It relates to the alleged change of use of the planning unit to use as a 'social club'. As commonly understood, a social club is a formal association of people with similar interests. A person attending a social club would be a member of that club.
8. The appellant's unchallenged evidence is that the use has not been that of a social club. Instead the appellant advances an alternative description of the change of use to that of a mixed use as a sandwich bar/café with shisha smoking place (sul generis). From the available evidence, including the site visit to the premises, this alternative description is accepted. The allegation of the notice will therefore be corrected accordingly. To that extent the appeal on ground (b) succeeds.

### **Ground (a) and the deemed planning application**

9. Having regard to the above, the deemed application is that arising from the revised allegation. There are two main issues to be addressed. One concerns the effect of the development on the living conditions of local residents in relation to noise and disturbance. The other is the effect of the canopy structure on the character and appearance of the appeal property and the surrounding area.
10. Dealing firstly with the canopy structure, this extends across virtually the whole of the rear courtyard. It is noticeably tall, rising above the height of the tall boundary wall at the rear of the courtyard. It has retractable sides and an open end on the side nearest the building, to ensure compliance with public health regulations. Even so, by reason of its overall size and height, it appears as a dominant feature at the rear of the premises, where it has an unduly enclosing effect on the courtyard. Furthermore, whilst intended as a permanent feature in connection with the commercial use of the planning unit, its materials and general appearance are that of a temporary-looking feature at the rear of the property. As a result the development appears at odds with the host building.
11. It was noted on the site visit that there is a large shed in the neighbouring rear yard to the east and also an extension in the form of a garage/workshop at the end property in the terrace, to the west. Even so, the appeal canopy is taller than both, and neither of these neighbouring structures has a temporary-looking appearance. This reinforces the unsympathetic and incongruous impact of the canopy structure at the rear of the property, where there are partial views of it from the residential cul-de-sac, Augustus Close, behind the terrace. The canopy structure is therefore contrary to the aims of the Council's Development Management Local Plan Policy DM G3, which has replaced the former UDP Policy EN8B referred to in the enforcement notice.
12. In the event of this part of the appeal failing, the appellant states that alternative arrangements can be made to provide shelter to users of the yard area, including individual table parasols or pop up gazebos. Given the unacceptability of the existing canopy structure, but with the alternative shelter arrangements in mind, attention is now turned to the use.
13. The use at the premises is stated by the Council to be unacceptable because it has resulted in late night and early morning disturbance from patrons gathering in the rear yard and entering and leaving the premises. The appellant accepts that there has been some late night opening at the premises but denies that this has created undue noise disturbance. In any event, he states that the premises now close at 23:00 hours.
14. No details of who has complained have been supplied. However, the Council officer, in his report, refers to many residential properties that have habitable rooms, including bedrooms, which overlook the rear yard. There are indeed flats at second floor level in the appeal property and in those adjoining. There are also dwellings in Augustus Close to the rear. However, what is clear from the officer's report is that the complaints about the use of the rear yard and the comings and goings at the premises relate to noise disturbance at unsocial hours, when people could be expected to be sleeping. There is no suggestion that the Council object to the use at other times. The particular concerns about noise disturbance have been addressed following the reduced opening

hours. Furthermore, the appellant would accept a condition to ensure that there was no further late night opening and hence the potential for unacceptable noise and disturbance at unsocial hours in the future.

15. The Council officer's report also makes reference to other complaints from residents about undesirable behaviour from some customers, including parking on pavements, urinating in the street and alleged drug dealing. However, the appellant refutes that any of his customers have been involved in this; and there is insufficient evidence to link such behaviour to customers of the appeal premises. Given that there are various other premises in the vicinity that trade in the evenings, including those that, unlike the appeal premises, serve alcohol, the behaviour complained about could, in reality, be by customers visiting other local premises.
16. In addition to a condition restricting the opening hours, the appellant has put forward a number of other conditions to ensure that the use was properly controlled, not only in relation to noise but also potential disturbance from smells. Neither the Council officer's report nor the enforcement notice mentions the latter. However, there is reference to complaints about smell from shisha pipes in the Council's response to the appellant's Freedom of Information request. With the provision of parasols or gazebos instead of the current canopy, any smell arising from shisha smoking in the courtyard is likely to be dispersed more readily, such that there would be no unacceptable nuisance from it to occupiers of the upper flats in the property or terrace, or to any other local residents.
17. Drawing matters together, subject to conditions along the lines suggested by the appellant (but with some variations), the use would not conflict with the aims of Policy CC4 of the Council's Core Strategy 2011 and Policies DM H9 and DM H11 of their Development Management Plan. The latter two policies have replaced Policies EN20B and EN21 in the Council's now revoked UDP, which were referred to in the enforcement notice. Neither would the use conflict with the aims and objectives of the National Planning Policy Framework. In so far as it relates to the amended description of the use enforced against, the appeal on ground (a) therefore succeeds, subject to conditions.

**Ground (g)**

18. This ground of appeal only falls to be considered in respect of that part of the development for which the deemed planning application fails, namely the canopy structure. However, in appealing the notice on ground (g), the appellant made it clear that he was not contesting the period for compliance in relation to the canopy. It is not therefore necessary to consider this ground further.

*David Leeming*

INSPECTOR

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DOC REF: FORTUNE GREEN ROAD D&A & PLANNING STATEMENT 15593AS

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## Appeal Decision

Hearing held on 21 November 2013  
Site visit made on 21 November 2013

by **Ron Boyd BSc (Hons) MICE**

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 6 January 2014

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**Appeal Ref: APP/X5990/A/13/2200913**

**Fatoush Express, 193 Edgware Road, London W2 1ET**

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
  - The appeal is made by Mr Moufid Hamze against the decision of City of Westminster Council.
  - The application Ref 12/11733/FUL, dated 26 November 2012, was refused by notice dated 30 May 2013.
  - The development proposed is use as a mixed sandwich bar/café (Sui Generis) with external tables and chairs for shisha smoking.
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### Decision

1. The appeal is allowed and planning permission is granted for the use of premises as a mixed sandwich bar/café (Sui Generis) with external tables and chairs for shisha smoking at Fatoush Express, 193 Edgware Road, London W2 1ET in accordance with the terms of the application, Ref 12/11733/FUL, dated 26 November 2012, subject to the conditions on the attached schedule.

### Procedural matters

2. In the light of without-prejudice discussions at the Hearing, regarding the possible restriction of the location of the external tables and chairs by condition, and my decision, above, which is subject to just such a condition, I have amended the description of the proposed development from that used by the Council in its decision notice to that in the heading above. I consider the amendment necessary in the interests of consistency with my decision and for the avoidance of doubt. I am satisfied that the amended description adequately describes the development proposed.
3. Mr Malthouse attended the Hearing both as a resident of Star Street and as Chair of the Star Street Residents' Association. However, in the absence of any documentary evidence of the membership of the Association, or of Mr Malthouse's authority to speak on behalf of the membership, I have considered Mr Malthouse's contribution to the Hearing as that of an individual resident.

### Main issues

4. I consider these to be the effect the proposal would have on:
  - the character and function of the surrounding area in respect of late night activity and disturbance and the loss of a retail unit;
  - the living conditions of neighbouring residents; and

- highway safety.

### **Reasons**

5. The appeal site comprises a ground floor and basement unit within a six-storey plus basement building, Cambridge Court, located on the south-west side of Edgware Road occupying the frontage between Star Street and Sussex Gardens. It lies within the Edgware Road Central Activity Zone (CAZ). The building's ground floor is occupied by commercial units with basements, the five floors above by residential flats.
6. The appeal unit, on the corner between Edgware Road and Star Street, has the lawful use designation as a retail shop (Use Class A1) but operates as a sandwich bar /café on the ground floor (12 tables - 24 seats) with shisha smoking at external tables. There are shopfront elevations fronting both Edgware Road and the south-east side of Star Street with a central splay-frontage main access door. The external tables are placed on the forecourt areas to both main frontages, these being paved areas some 1.1m deep running immediately adjacent to the frontage elevations of the premises and containing pavement lights to the basements beneath. There is a secondary double-door access at the south-western end of the Star Street frontage which appeared, at my site inspection, not to be in regular use. Staff and customer toilets are in the basement which is currently otherwise unused. The business trades, as depicted on the shop-front fascias, as Fatoush Express.
7. The proposal is for the sui generis sandwich bar /café use to operate on both the ground floor and in the basement by means of the existing ground-floor tables and an additional 10 tables (20 seats) in the basement. There would be 9 external tables, 5 along the Edgware Road frontage and 4 on the return into Star Street, with 18 chairs. These would accommodate any demand for shisha smoking.
8. Policy S21 of the Council's City Plan Adopted November 2013, which supersedes the Core Strategy of January 2011, states that existing retail use will be protected throughout Westminster except where the Council considers such use not to be viable, as would be demonstrated by a long-term vacancy despite reasonable attempts to let. The Reasoned Justification for the Policy explains that a concentration of non-A1 uses such as cafés and fast-food take-aways can harm the appearance, character and retail function of a shopping centre by breaking up its frontage. Saved Policy SS5 of the Council's Unitary Development Plan adopted 24 January 2007 (the UDP) similarly states that proposals for non A1 uses in CAZ areas should not lead to a concentration of non-A1 uses, detailed as amounting to three or more consecutive such uses along a frontage.
9. The Council considers the proposal to be for an entertainment use. Due to the concentration of entertainment uses along Edgware Road to the south-east of Marylebone Road the Council has designated this length of Edgware Road as a Stress Area. City Plan Policy S8 states that new entertainment uses will only be allowed in such areas where they are considered to be low-impact and not resulting in an increased concentration of late-night uses. Policy S24 further requires that new uses should demonstrate that they are appropriate in terms of the type and size of use, scale of activity, relationship to any existing concentration of entertainment uses, and any cumulative impacts. UDP Policy



TACE 8 sets out the criteria for new café uses which will generally be permissible, including in Stress Areas.

10. The appellant advised that there was a period of some 18 months between the closure of the previous business, a handbag shop, and his acquisition of the lease, although no evidence of any marketing attempts to secure an entirely A1 use has been submitted. Whilst there is no indication that the proposal would reduce the present level of A1 sandwich-bar use of the premises, and the Council accepts that some retail floorspace would be retained, I consider that it would provide the potential for some weakening of the retail character of the adjoining frontage. Nevertheless, there are several material considerations to take into account when considering the proposal against the above mentioned Policies.
11. As is acknowledged in the Officer's Report the proposed use would not result in three consecutive non-retail units and would maintain an active street frontage. Notwithstanding the proposed extent of non-A1 use, the business would serve local workers, residents, and visitors to the area, and make a contribution to the vitality and viability of the locality. In terms of gross floorspace, as recorded in the Council's Officer's Report, the size of the proposed bar/café would be relatively modest and well within the generally permitted area of 150 sqm as set out in UDP Policy TACE 8 in respect of Stress Areas.
12. I consider that in terms of type, size and scale the business, including the element of shisha smoking would be generally appropriate in the context of this length of Edgware Road. In such context, and subject to compliance with the opening hours stated in the suggested conditions put forward by the Council, it would be of low impact and would not result in an unacceptable concentration or cumulative impact of entertainment uses in the immediate locality. I note that the appellant acquired the lease of the premises in 2003 and that the business is well established. At the Hearing the local residents who attended, whilst objecting to elements of the proposal that they considered would have a detrimental impact upon the living conditions in Star Street, described Fatoush Express as a well-run business which they had no desire to see cease operating.
13. I conclude that the above considerations are sufficient to outweigh the development plan presumption against the loss of a wholly retail unit in this case. The proposed development would have no unacceptably harmful impact upon the character and function of its Edgware Road surroundings, subject to a number of conditions, discussed at the Hearing and to which I refer below.
14. However, the character and function of Edgware Road, with its late-evening activities, is very different to that of Star Street. Notwithstanding the return frontages of the appeal property, and Lloyds Bank, opposite, into the street, and the presence of a small number of business premises, the length of Star Street between Edgware Road and Sale Place has a well-defined quiet residential character. City Plan Policy S24 includes the requirement that new entertainment uses should adversely affect neither the local environmental quality and character nor residential amenity of the surrounding area.
15. To my mind the presence and use of tables and chairs along the Star Street frontage of the appeal premises, with the inevitable associated late-evening social activity and disturbance, would amount to an encroachment of the external character and function of Edgware Road into Star Street. This would

detract from the residential nature of the street, adversely affecting its environmental quality and character to the detriment of the living conditions of neighbouring residents. The effect would be exacerbated should the secondary access on to Star Street be brought into general use in connection with the proposed development of the basement.

16. The preclusion of tables and chairs from the Star Street frontage by means of a planning condition was discussed, without prejudice, at the Hearing. The appellant was only reluctantly prepared to accept the loss of tables in Star Street. He stated that it was important that his business should be able to offer the facility for shisha smoking, although no quantification of such importance was submitted. I accept that the provision of shisha smoking along both frontages would be likely to provide some additional financial benefit to the business compared with such activity being limited to the Edgware Road frontage. However, this is not a consideration sufficient to outweigh the harm that the proposed provision and late-evening use of the tables along the Star Street frontage would cause. Nor do I consider the presence of the Rob Roy public house, with tables along its frontage on to Sale Place, or the tables currently placed in front of the unit trading as Suzan's Café, to be a justification for the proposal before me. I consider both the exclusion of tables from the Star Street frontage, and the restriction of the use of the secondary access on to Star Street to that as an emergency exit, to be necessary if the proposal is not to erode the character of Star Street by extending late-evening activity characteristic of Edgware Road into it.
17. Whilst I note the appellant's contention that the return frontage of the premises should be regarded as part of Edgware Road, I consider that the two frontages of the appeal property should each acknowledge the character of the thoroughfare they front. I am therefore imposing conditions to preclude the placing of tables along the Star Street frontage and to restrict use of the secondary access. Subject to compliance with the conditions I conclude there would be no unacceptable impact from the proposed development upon either the living conditions of neighbouring residents or the character of Star Street.
18. In respect of highway safety the Council was concerned that the proposed outdoor tables and chairs would block the flow of pedestrians and make it difficult to clean the footway. In view of my conclusion above that no tables should be provided along the Star Street frontage the concerns are only relevant in respect of the proposed 5 tables and 10 chairs proposed for the Edgware Road frontage. I am satisfied that a row of tables can be accommodated along this frontage without any unacceptable obstruction of the footway or cleaning operations. I note that the Highway Authority for Edgware Road, Transport for London (TfL) has no objection to the proposal. However, to ensure no obstruction of the main access to the premises the number of tables should be restricted to 4 with 8 seats. I am imposing a condition to this effect. Subject to compliance with the condition I conclude that there would be no adverse effect upon highway safety.
19. As to whether the Edgware Road forecourt area is public highway I note from the submitted Land Registry extracts that the Title of the appeal property includes the forecourt and extends effectively to the kerb-line of the carriageway. Clearly public highway rights have been established over at least the majority of this area. However, notwithstanding the statutory consultation response from TfL dated 28 December 2012, I am not satisfied that sufficient

evidence has been submitted to justify a conclusion on whether or not such rights exist over the forecourt area. Accordingly, without prejudice to any further investigation or resolution of this matter, the permission for the tables will be on the basis of a temporary period of 12 months in line with that granted on appeal in respect of 179-181 Edgware Road (APP/X5990/A/12/2170120).

20. I have taken account of all the other matters raised in the evidence but find nothing to outweigh my conclusions in respect of the main issues which have led to my decision on this appeal. For the reasons given above I conclude that subject to conditions as discussed below, the appeal should succeed.
21. I have considered the conditions suggested by the Council, both as included in Appendix A of its Hearing Statement and as appended to the Officer's Report, along with others referred to above, in the light of advice in Circular 11/95. I consider the conditions in the attached schedule to be reasonable and necessary.
22. These deal with opening hours; internal seating; provision of the external tables and chairs; use of the Star Street access; cooking on the premises; amplified sound; delivery services; and the storage of waste and recyclable material. They are in the interests of the character, appearance and function of the surrounding area; the living conditions of occupants of neighbouring property, and public safety. In addition, other than as set out in this decision and conditions, it is necessary that the development shall be carried out in accordance with the approved plan, for the avoidance of doubt and in the interests of proper planning.
23. The conditions were discussed on a without-prejudice basis at the Hearing. The Council accepted, and I agree, that continuation of the present de minimis level of cooking at present carried out on the premises, primarily in respect of eggs and baking with pre-prepared dough, would not amount to a breach of the condition relating to the cooking of fresh/raw food on the premises – Condition No. 9 on the attached schedule.

*R.T.Boyd*

Inspector

## **Schedule of conditions**

- 1) The development hereby permitted shall begin not later than three years from the date of this decision.
  - 2) Other than as set out in this decision and conditions the development hereby permitted shall be carried out in accordance with approved plan No. 1216/12/01.
  - 3) The premises shall not be open for customers and no customers shall be allowed on the premises outside the following hours: -
    - 0800 – 2400, Mondays – Saturdays; and
    - 0800 – 2300, Sundays and Bank Holidays.
  - 4) No more than 44 customers shall be seated inside the premises at any one time.
  - 5) Notwithstanding the number and location of tables shown on the approved plan No. 1216/12/01 the external tables and chairs shall:
    - be placed only on the forecourt along the Edgware Road frontage within an area measuring 1.1m by 4.4m:
    - be at least 1 metre from the main entrance doorway;
    - be limited to 4 tables and 8 chairs;
    - be of the type as shown in Appendix B of the submitted Design and Access Statement or similar;
    - be used only by customers of Fatoush Express at 193 Edgware Road; and
    - not be on the forecourt outside the hours of 0800- 2300 hours.No tables or chairs shall be placed on the Star Street frontage.
  - 6) The use of the Edgware Road frontage forecourt for the placing of tables and chairs shall be for a period of 12 months from the date of this decision. At the expiry of this period the use shall cease and the tables and chairs removed.
  - 7) No permanent or temporary moveable means of enclosure or screening around the tables and chairs hereby permitted, including vertical awnings attached to projecting canopies, or blinds, shall be installed.
  - 8) The existing double-door access on to Star Street shall not be used by customers other than as an emergency exit from the premises.
  - 9) No raw or fresh food shall be cooked on the premises.
  - 10) No amplified sound from within the premises or associated external seating hereby permitted shall be audible within the nearby residential properties.
  - 11) No delivery service, even as an ancillary part of the use hereby permitted shall be operated from the premises.
  - 12) Within a period of 13 weeks from the date of this decision full details of the provision of facilities for the storage of waste and recyclable material shall be submitted to the local planning authority. No development of the basement area shall take place until such details have been approved in writing by the local planning authority. The facilities as approved shall be put in place prior to the use of the basement as hereby permitted.
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**DRAFT MANGEMENT PLAN.**

This Management Plan for the operation of the use approved has been prepared by and submitted on behalf Mr M Alayan and D Khan trading as Monte Cristo.

It has been prepared by Alan Wipperman BA MRICS MRTPI C Dip AF.

**THE MANAGEMENT POLICY.**

**1 ARRANGEMENTS FOR CHARCOAL BURNING.**

- 1.1 The charcoal burner will be used with charcoal and charcoal tablets sufficient for efficient fume free burning. The charcoal burner will be of a type and size as necessary for keeping charcoal available but usually will not require space greater than 750mm x 750mm. Any change in the size, type of burner will be notified to the local planning authority.
- 1.2 The advice of the London Fire Brigade and other relevant local authority departments will be taken for use and siting of the charcoal burner. The use and installation of the charcoal burner will continue to be in accordance with the guidance of the relevant Fire Brigade Officer and Environmental Health Officer as given or updated.
- 1.3 All relevant statutes, fire precautions, and recommendations for the use of the charcoal burner will be complied with.
- 1.4 The charcoal burner will not usually be lit until after 11.00 hours and the burner will be fully extinguished by 23.00 hours Mondays to Thursdays, 23.30 hours on Fridays and Saturdays, and by 22.30 hours on Sundays, Bank Holidays and Public Holidays. Towards closing time the amount of charcoal in the burner will be reduced.
- 1.5 It will be kept well lit and hot and will not be allowed to smoulder or smoke save for the very short period on lighting and extinguishment of the charcoal in the burner and kept in a safe and shielded location.
- 1.6 All customers will be offered a choice of charcoal fired shisha from the burner and also tablet fired shisha and this will be made clear on the menu cards for the Cafe.
- 1.7 A fire safety assessment will be undertaken yearly. All fire extinguishers and fire related safety items will be serviced at least yearly and maintained in accordance with supplier guidance.
- 1.8 Staff will be given regular guidance and training in the use of fire safety equipment and fire safety awareness.

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## **2 ARRANGEMENTS FOR THE CONTAINMENT OF NOISE WITHIN THE BUILDING (INCLUDING MUSIC).**

- 2.1 The use of television, radios, and car radios by customers sitting at the external tables will not be allowed. Personal radios, audio devices and laptops will be allowed to be used with headphones/earpieces.
- 2.2 Customers using external and internal seating will be encouraged to conduct themselves quietly and behave with respect for neighbours especially after 22.00 hours, by the display of easily read signs in English and Arabic. Should any customers become unacceptably noisy, staff will request their co-operation to be quiet, and if necessary, ask them to leave.
- 2.3 Any complaint by a neighbour made directly to the Management will be investigated and dealt with expeditiously, and a record entered into the incident book to be kept at the premises.
- 2.4 The use of television, audio equipment and radios within the premises will be played at a background level so as not to be audible to any significant degree externally.

## **3 BRINGING IN FURNITURE FROM THE FORECOURT QUIETLY AT CLOSING TIME.**

- 3.1 If required the tables and chairs being brought in will be undertaken quietly.
- 3.2 Where regularly moved each day the feet of tables and chairs used will be fitted where possible with covers and will be lifted when being taken into and out of the premises. Staff will be instructed to lift and not to drag the furniture by notice and verbal reminders, and customers will be asked by notice not to move or drag the tables or chairs.
- 3.3 All customers seated externally will be asked to leave by the relevant closing time by Notice in both English and Arabic and if necessary will be reminded verbally and asked to leave to allow closure.
- 3.4 No new customers will be served after 23.00 hours Monday to Thursday or 23.30 hours Friday and Saturday, and 22.30 hours Sundays, Bank Holidays and Public Holidays. Take away customers will be served up to closing time. Customers arriving close to closing time will be advised by Notice in English and Arabic of the closing time and will be reminded verbally when still present approximately 10 minutes prior to closure and will be given their bills for payment approximately five minutes prior to closure.

#### **4 ENSURING APPROPRIATE STANDARDS OF CUSTOMER BEHAVIOUR WITHIN AND OUTSIDE THE PREMISES.**

- 4.1 In addition to the Notices in English and Arabic and the verbal advice given above to customers, including where necessary asking noisy customers to leave, any customers congregating or standing on the street outside will be asked to either sit down inside or on the chairs on the private forecourt.
- 4.2 Any customers seen parking inappropriately will be asked to park properly and safely, and to arrive and leave quietly, keeping car radio switched off and car related noise down. A Notice will be displayed externally asking customers not to slam car doors or car boots, or to talk loudly beside cars or on leaving the premises. These requests will be displayed by Notice in English and Arabic visible within the premises and the forecourt.
- 4.3 Should any customer asked to leave as a result of unacceptable behaviours and refusing to do so will be advised that the Police will be called. Police will be called if there continues to be a problem.
- 4.4 An Incident Book will be kept on the premises to record incidents:
- (i) These will be any incident worthy of note, such as a complaint received or of an event at the premises.
  - (ii) Incidents of any public nuisance occurring.
  - (iii) Incidents of any public nuisance in the vicinity and noted but not related or connected to the business.
- 4.5 The Incident Book will be available to the local planning authority upon request.

#### **5 OTHER MATTERS.**

- 5.1 Goods being delivered will be taken directly in from the delivery vehicles without wherever possible first being stacked on the pavement or on the private forecourt.
- 5.2 Neighbours are welcome to call in to discuss any problems arising and if the time is inconvenient then an appointment will be made.