

<b>Delegated Report</b>		<b>Analysis sheet</b>	<b>Expiry Date:</b>	16/10/2017
		N/A / attached	<b>Consultation Expiry Date:</b>	15/09/2017
<b>Officer</b>			<b>Application Number(s)</b>	
John Diver			2017/4528/P	
<b>Application Address</b>			<b>Drawing Numbers</b>	
51 Fairfax Road London NW6 4EN			See draft decision notice	
<b>PO 3/4</b>	<b>Area Team Signature</b>	<b>C&amp;UD</b>	<b>Authorised Officer Signature</b>	
<b>Proposal(s)</b>				
Variation of condition 4 of planning permission 2015/3916/P dated 05/04/2016 "Change of use and subdivision of mixed A1/A3 to form an A3 unit at 51. Alteration to the shopfront and the installation of an extract duct from first floor to roof level on the rear elevation" to allow customers to be on the premises between 08:00 to 21:30 on any day.				
<b>Recommendation:</b>		Refused and Warning of Enforcement Action to be Taken		
<b>Application Type:</b>		Variation or Removal of Condition		

<b>Conditions or Reasons for Refusal:</b>	<b>Refer to Draft Decision Notice</b>			
<b>Informatives:</b>				
<b>Consultations</b>				
<b>Summary of consultation:</b>	Multiple site notices were erected around the application site on the 25/08/2017 (expiry date 15/09/2017). The application was also advertised via e-alerts to any person who had signed up to receive such updates for the ward.			
<b>Adjoining Occupiers:</b>	No. of responses	<b>523</b>	No. of objections No. of support	<b>10</b> <b>513</b>
<b>Summary of consultation responses:</b>	<p>Letters of objection were received from the owner/occupiers of nos. 16, 18, 20, 22, 24, 26, 29, 35 and 36 Fairfax Place as well as 8 Gladstone Court. Submitted objection comments can be summarised as follows:</p> <p><u>Background / History</u></p> <ol style="list-style-type: none"> <li>1. Local area is a very quiet residential neighbourhood with a large density of adjoining neighbours</li> <li>2. Fairfax Place, is an extremely quiet cul-de-sac with no through traffic</li> <li>3. Previous Planning Inspectors note that there is a distinction between the quieter Northern, and much noisier and more commercial Southern part of the parade which is close to a 6-branch traffic roundabout and has several restaurants</li> <li>4. Many of the existing restaurants would be unlikely to get permission today due to a changes in regulations and guidance</li> <li>5. Determination of opening hours has already been considered by previous planning applications and appeals where it was repeatedly deemed necessary to restrict hours to 21:00pm to protect residential amenity</li> <li>6. Owner of business was well aware of the restrictions placed upon the premises when they took on the lease and there has been no material changes to expect the Council to amend</li> <li>7. Premise has recently been subject to various enforcement and breach of conditions notices one of which is for staying open well past 9pm (which has since continued to be breached)</li> <li>8. Continually defying the Enforcement Notices produced by Camden Council is a criminal offence</li> <li>9. Concerned that variation is “the thin end of the wedge”: the owner has other restaurants, including SoYo in Golders Green, which is open until midnight daily (except for Friday’s religious observance) and until 3am on Saturday night/Sunday morning.</li> <li>10. At the Licensing Committee hearing for unit the serving of alcohol was restricted to 9pm and various conditions were imposed such as: no more than 30 covers; waitress service only; no drinks to be served to standing customers; drinks only served ancillary to meals; tables outside only until 7pm; only 3 customers allowed to smoke outside at the tables at any one time; any smoking litter removed promptly; and staff who smoke to do so only in the alleyway. Suggestion that none of these conditions have been complied with.</li> <li>11. Concern that issues raised and discussed during previous planning committee hearing have not been discussed within supporting documents [no exact details given]</li> </ol> <p><u>Noise and disruption</u></p> <ol style="list-style-type: none"> <li>12. Residents do not want to be disturbed by customers leaving premise late at night and hanging around in the street</li> </ol>			

- 13. History of patrons onsite until 11pm or later
- 14. Increased activity give rise to additional disturbances
- 15. Homes immediately behind the restaurant are afflicted by noise from operation, flue and plant, plus the illegal air conditioning causing a Statutory Nuisance
- 16. Sound escaping from ill-fitting kitchen windows, holes and vents in the walls,
- 17. Disturbance from staff taking breaks at the back within 6 metres from living accommodation
- 18. Take away service and parties cause additional disturbance, a take-away operation at No. 47 was refused Planning Consent some years ago for this very reason
- 19. Noise assessment has not given due attention to the front of the building

Management / environmental health

- 20. History of staff members urinating in the service road behind the restaurant
- 21. History of failing to deal properly with refuse collection resulting in rotting food left for days in the service road that back onto adjacent homes

Other issues

- 22. Concern about increase levels of traffic to the site
- 23. Concern about increase levels of parking
- 24. Request for all shops to be shut before 7pm.

A letter of petition with 513 signatures has been submitted by the applicant in support of the application. After a description of the restaurant, an overview of its reviews and the company's aims, the petition was worded as follows:

*"The restaurant has endeavoured to abide by the restricted opening hours but it is sometimes an impossible task asking customers to leave the premises by 9pm. And as a consequence, when some patrons leave the premises after 9pm, some complaints have been made to Camden Council. We are therefore seeking support of our patrons and the local community to sign this petition to show your support for the Delicatessen.*

*We will be shortly submitting a planning application to Camden Council's seeking an extension of hours from 9pm to 9:45pm, whilst keeping the restriction of the kitchen to stop cooking at 9pm. That said, all other restaurants in Fairfax Road have much later closing hour restrictions.*

*One who appreciates fine dining, can understand that restaurants like Delicatessen will not be sustainable with a closing time of 9pm, as the majority of our clientele are professionals and or parents who cannot begin dinner before 7:30pm, thus creating immense loss of business. It is important to stress that our patrons leave the establishment quietly and not all at the same time.*

*In order for us to passionately continue serving the community with a desire for excellence, please stand by us by demonstrating your support in our planning application to Camden Council to extend the opening hours until 9:45pm and sign this petition."*

Names and addresses of 513 members of the public were included within the petition submitted via a weblink. At the time of writing the petition had been removed from the website but remains a material consideration. Correspondence from the agent confirms that the application seeks permission for an extension of 30mins not 45min.

**Local groups:**

n/a

## Site Description

The site is a four storey building which forms part of a long and continuous terrace on the western side of Fairfax Road. The application site relates to a ground and basement floor. The site forms part of the Fairfax Road Neighbourhood Centre, which in addition to the terrace also includes properties on Fairhazel Gardens. The upper floors at this site and the surrounding area are predominantly residential. There are two passages through the terrace to allow access to the rear where in addition to servicing areas for the commercial units are a number of residential properties. The site is not a listed building and is not within a conservation area.

## Relevant History

### Parent application:

**2015/3916/P:** Planning permission granted conditional permission at 51 Fairfax Road on the 05/04/2016 for the 'Change of use and subdivision of mixed A1/A3 to form an A3 unit at 51. Alteration to the shopfront and the installation of an extract duct from first floor to roof level on the rear elevation'

Approval of details application **2017/1755/P** (dated 08/05/2017) fully discharged outstanding conditions 5, 9, and 10, and partially discharged conditions 11 and 13 attached to the above permission. Conditions 11/13 (duplicated) required the submission of a noise report for plant equipment and external noise levels following by a post-completion report to confirm the success of attenuation measures.

Subsequent approval of details application **2017/3860/P** (dated 17/11/2017) sought to discharge the final outstanding condition (11/13 post-installation noise report). This application was refused with warning of enforcement action to be taken.

#### Reason for refusal:

*(1) The submitted details fail to demonstrate that the installed plant/machinery/equipment complies with the acceptable noise thresholds as secured by conditions 11 and 13 of application 2015/3916/P, resulting in noise and disturbance to the detriment of the residential amenities of adjoining occupiers contrary to policies CS5 and CS7 of the London Borough of Camden Local Development Framework Core Strategy, policies DP26, DP28 and DP12 of the London Borough of Camden Local Development Framework Development Policies*

### Other planning history for the site:

**2013/7370/P:** Planning permission refused at 51-53 Fairfax Road for the 'Change of use at ground and basement levels from retail (Class A1) to a mixed use of retail and restaurant uses (Class A1/A3), including the installation of rear kitchen extract duct from first floor to roof level'.

#### Reason for refusal:

*1) The proposed restaurant would result in an increase in late night activity, noise and disturbance to the detriment of the amenity of local residents contrary to policy CS5 and CS7 of the LDF Core Strategy and DP12 and DP26 of the LDF Development Policies.*

This development was subsequently Allowed at appeal (APP/X5210/A/14/2216988) on the 18/08/2014. The inspector did however raise concerns in terms of impact upon nearby residents from late night noise and disturbance but considered that the following conditions were necessary and would address this concern:

- no customers on site after 21:00 on any day;
- restricting number of covers (45);
- limiting noise emission levels from plant;

- rear doors to be kept shut outside of specific hours;
- rear windows to be kept shut at all times;
- no outdoor tables after 19:00
- no servicing/deliveries after 19:00
- that no loud music shall be played;

**2013/3896/P:** Planning permission refused at 51 Fairfax Road for “Retention of replacement air-conditioning unit, installation of additional replacement air-conditioning unit, and installation of acoustic baffles to both units, all on rear elevation of premises”. The reason for refusal was:

Reason for refusal:

- 1) *The proposed air conditioning units by virtue of their close proximity to neighbouring residential properties and the proposed duration of their operation are likely to cause noise disturbance and harm to the amenity of nearby residents. This is contrary to Core Strategy policy CS5 and Development Policies DP26 and DP28 of the Camden Local Development Framework.*

This permission was allowed at appeal (APP/X5210/A/13/2210931) on the 11/04/2014. During the course of the appeal a Noise Impact Assessment was submitted that noise levels resulting from the use of plant and machinery set out in Table E of Policy DP28 of the Camden Development Policies (DP) 2010-2025 would not be exceeded.

**2012/5787/P:** Planning permission refused at 51 Fairfax Road for “Installation of air conditioning unit on rear elevation at first floor level in connection with existing retail unit (Retrospective)”

Reason for refusal:

- 1) *The air conditioning unit is detrimental to the amenity of neighbouring properties due to noise nuisance and failing to meet the required standard for noise emission near to sensitive receptors. This is contrary to Core Strategy policy CS5 and Development Policy DP28 of the Camden Local Development Framework*

**2011/5949/P:** Planning application (Ref: 2011/5949/P) submitted at 51 Fairfax Road for ‘Change of use from retail (Class A1) at ground and basement to coffee shop/restaurant (Class A3) including installation of extract flue from first floor to roof level on rear elevation and alterations to shopfront’. This was heard at committee on 28 June 2012 where there was a resolution to grant but with a section 106 legal agreement to cover a number of aspects relating to neighbouring amenity. The applicant subsequently resolved not to enter into such an agreement and appealed against non-determination.

Reason for refusal:

- 1) *The proposed restaurant would result in an increase in late night activity, noise and disturbance to the detriment of the amenity of local residents contrary to policy CS5 and CS7 of the LDF Core Strategy and DP12 and DP26 of the LDF Development Policies.*

The subsequent appeal (APP/X5210/A/12/2185091) was Dismissed on the 06/03/2013. The main issue under consideration was the effect of the proposed development on the living conditions of surrounding occupiers in terms of noise and disturbance and whether a closing time of 21:00 was necessary / reasonable. The inspector concluded that the proposed development later evening opening hours would be harmful to the living conditions of surrounding occupiers in terms of noise and disturbance.

**2011/0962/P:** Planning permission was refused at 51-53 Fairfax Road on the 10/11/2011 for the ‘Change of use from retail use (Class A1) at ground floor and basement level to a mixed retail (Class A1) and restaurant use (Class A3) including installation of extract flue from first floor to roof level on rear elevation’.

Reason for refusal:

- 1) *The proposed restaurant would result in an increase in late night activity, noise and*

*disturbance to the detriment of the amenity of local residents contrary to policy CS5 and CS7 of the LDF Core Strategy and DP12 and DP26 of the LDF Development Policies.*

### **Relevant site planning enforcement history:**

Warning of a breach of conditions enforcement notice (BCN) being issued at the time of writing following the refusal of a post-installation noise report application 2017/3860/P (see above)

**EN17/0732** – Complaint received in relation to an Air conditioning units installed at the rear ground floor A3 unit without express permission. Following officer advice equipment was removed.

**EN17/0227** - Complaint received in relation to Non-compliance with conditions 7 (Servicing) and 12 (Hours of Use) attached to 2015/3916/P. Breach of Condition Notice was served.

### **Other relevant change of use applications within parade (nos.37 – 95 Fairfax Rd)**

The Council has historically determined change of use applications involving A3 uses at several properties within the parade, in each case taking a balanced approach to the assessment based upon the specifics of the case and application unit. This history also demonstrates that the protection of residential amenity in terms of protecting against increased levels of late night activity, noise and disturbance has remained a key concern of the Council in this local area for several decades. This has resulted in a mix of decisions as outlined below:

- **No.39: (9005620)** A1 to A3 Non-D Appeal Allowed (23/09/1991)
- **No.47: (2011/6159/P)** A1 to A5 Refused (15/02/2011)
  - o Reason for refusal related to increased late night activity, noise and disturbance
- **No.63:**
  - o **(24172)** A1 to A3 Refused (20/04/1977)
  - o **(25351)** A1 to A3 Refused (05/12/1977)
  - o **(9401200)** A1 to A3 Refused (03/03/1995)
  - o Above reasons for refusal all included reference to increased late night activity, noise and disturbance
  - o **(2013/5080/P)** A1 to A3 Granted (11/11/2013)
  - o **(2014/3411/P)** A1 to A1/A3 Granted (21/07/2014)
- **No.73: (9501589)** A1 to A3 Refused (02/09/1995)
  - o Reasons for refusal included increased business activity, noise and disturbance
  - o **(T/APP/X5210/A/96/266180/P8)** Appeal Allowed the above (01/10/1996) subject to conditions including sound insulation, opening hours and ventilation and filtration scheme details.
- **No.75: (H6/5/48/2895)** Use as A3 Granted (21/12/1966)
- **No.83: (8400456)** A1 to A3 Granted (20/06/1984)
- **No.95/95a: (PWX0203071/P)** A1 to A3 Refused Granted (22/08/2003)
  - o Reason for refusal related to increased late night activity, noise and disturbance
  - o **(APP/X5210/A/03/1129086)** Appeal Allowed the above (22/01/2004) subject to conditions including plant noise equipment limits, restricted opening hours, no outdoor seating, and no loud music to be played.

It should be noted that the above history relates only to applications where the consideration for a proposed food/restaurant use has been made and does not necessarily reflect the current lawful use to all properties above (several of which have since reverted into alternative uses since). A site plan showing a details from the 2016 Camden Retail survey with an overview of uses along the parade is detailed in appendix one.

## Relevant policies

### National Planning Policy Framework (2012)

### The London Plan 2016

### Camden Local Plan (2017)

- G1 - Delivery and location of growth
- A1 - Managing the impact of development
- A4 - Noise and vibration
- TC2 – Camden’s Centres and other shopping areas
- CC5 – Waste

### Camden Planning Guidance:

- CPG 6 – Amenity (2011)
- CPG 7 – Transport (2011)
- Draft Camden Planning Guidance:
  - Amenity (2017)
  - Town Centres and Retail (2017)
  - (Both of the above were under public consultation at the time of writing and are considered to be material considerations despite their draft form)

It should be noted that in July 2017 the Camden Local Plan was formally adopted following a process of public examination. After this point the previous policy framework (within which the parent application was approved) became superseded. The now superseded policies which were of relevance to the condition as originally applied are as follows:

#### ***LDF Core Strategy (2010)***

*CS1 (Distribution of growth)*

*CS4 (Areas of more limited change)*

*CS5 (Managing the impact of growth and development)*

*CS7 (Promoting Camden’s centres and shops)*

*CS14 (Promoting high quality places and conserving our heritage)*

#### ***Development Policies (2010)***

*DP12 Supporting strong centres and managing the impact of food, drink, entertainment and other town centre uses*

*DP22 (Promoting sustainable design and construction)*

*DP24 (Securing high quality design)*

*DP26 (Managing the impact of development on occupiers and neighbours)*

*DP28 (Noise and vibration)*

## Assessment

### 1. Proposal

1.1. Permission is sought for a variation of condition 4 of planning permission 2015/3916/P dated 05/04/2016. The wording of the original condition is as follows:

*“No customers shall be on the premises outside of the hours of 08:00 to 21:00 on any day.*

*Reason: To safeguard the amenities of the adjoining premises and the area generally in accordance with the requirements of policies CS5 and CS7 of the London Borough of Camden Local Development Framework Core Strategy and policy DP26, DP28 and DP12 of the London Borough of Camden Local Development Framework Development Policies”*

- 1.2. Permission is sought for an extension to the above permitted hours to allow customers to be on the premises between 08:00 to 21:30 on any day (increase of 30mins).

## **2. Background and site context**

- 2.1. The application unit is situated at GF/LGF level of a four storey building which forms part of a long and continuous terrace on the Western side of Fairfax Road. The application unit is densely surrounded by residential accommodation, not only featuring three storeys of residential accommodation above, but also featuring a separation distance of only 6m between the rear of the unit and the terrace of dwellinghouses to the rear of the site along Fairfax Place.
- 2.2. Despite the strikingly residential nature of the wider local area, this terrace includes a parade of GF commercial units, which the Council has sought to protect by designating as a Neighbourhood Centre. As outlined by Local Plan policy TC2, Neighbourhood Centres cater for the day-to-day shopping and service needs of their local populations and reduce the requirements for long journeys for facilities of daily use, helping to encourage sustainable communities. Neighbourhood centres are predominately of benefit to local communities due to their convenience shopping offer, however adopted policy allows for some range in uses, including food, drink and entertainment uses, provided that such uses minimise the impact on local residents and the local area.
- 2.3. As highlighted in submitted comments, although the entire parade is designated as a Neighbourhood Centre a clear distinction can be made between the quieter Northern section of the parade which predominately features a range of retail uses and Southern part of the parade which features a greater level of activity, is closer to the roundabout junction and is host to several restaurants. The break in the frontage where an access way to Fairfax Place is the defining point of this alteration in character. This distinction has been a repeating consideration for both LPA planning officers as well as planning inspectors who have upheld this view.
- 2.4. For instance, in the officers report for the application for a change of use within the Southern section of the parade (no.63 - 2014/3411/P) in 2014 states: *“It is necessary to distinguish this site [no.63] from 51-53 Fairfax Road, where a closing time of no later than 9pm has been sought.... The main one is that there is already a restaurant use on this site which has operated for many years, unlike at 51-53 Fairfax Road which has historically been A1. Another is that the neighbourhood centre changes from a much quieter part in the north where 51-53 Fairfax Road is located, to its main focal point in the south near the roundabout where there is more activity”*. Within the inspectors report following the refusal of permission at no.51-53 for a change from retail to a restaurant use the same year (2013/7370/P); the inspector similarly notes: *“the character of the parade of shops within which the appeal site [no.51-53] forms part (from the Fairfax Place archway northwards) has a higher concentration of lower key retail uses which then leads to an area that is wholly residential and quieter in character. The extant A3 uses are concentrated at the southern end of the road, nearer to the relatively busy roundabout”*. This distinction between the Northern and Southern frontages within the centre is still very much considered to be the case and continues to inform planning determinations.
- 2.5. As outlined in the planning history section of the report, the application site as well as the wider centre has been subject to extensive assessment and discussions relating to the level of acceptable provision of food (A3) uses within both the Northern and Southern sections of the frontage as well as necessary controls to mitigate impacts associated with such uses. The Council has continuously sought to protect the existing quiet character of the Northern frontage and allow for the numerous households adjoining this area to continue to enjoy a high standard of amenity



by repeatedly objecting to developments involving noisy uses which would involve late night/evening operation. With specific reference to the application unit, this approach has been consistently applied, with the Council either refusing subsequent applications or attempting to secure limited opening hours for proposed A3 uses (see 2011/0962/P refused on the 10/11/2011; 2011/5949/P dismissed on the 06/03/2013; and 2013/7370/P refused on the 01/04/2014). Although the principle of the use of nos.51-53 for food/A3 purposes was established when an appeal against refused application 2013/7370/P was allowed in 2014, the above consideration was still upheld by the inspector who found that it was both necessary and reasonable for the premises to be restricted to be closed by no later than 21:00. In the Inspectors decision, they state that *“having regard to the semi-residential nature of the site’s surroundings... and bearing in mind the location of the appeal site situated towards the northern end of the parade of shops away from the roundabout, I also consider that outdoor tables and seating should be removed by 19:00, and that the premises should close to customers by 21:00”*.

2.6. The following year (2015), after the unauthorised sub-division of no.51-53 back into two units and a change of use from a mixed restaurant/retail use (A1/A3) to a purely food (A3) use at no.51, retrospective permission was sought under application 2015/3916/P. The previous appeal decision was a significant material consideration of this case but, while it was considered that the principle of the A3 use had been established by this decision, it was deemed necessary to ensure that the resulting, purely A3 use proposed would not involve any increase to the levels of activity, noise and disturbances as previously allowed. As such elected members resolved to grant planning permission for the proposed change, subject to conditions including a limitation of a maximum of 30 covers at any one time as well as the strict limitations to both the permitted hours of use/operation (21:00) as well as the time by which all customers must have vacated the property on any given day (21:00). These conditions had been particularly crucial to the overall acceptability of the proposals during discussions and the subsequent committee hearing because they acted to limit the amount of associated noise and disruption from late night activity and were not at the time disputed by the applicant.

### **3. Assessment**

3.1. The proposed variation would not include any change of use or external alteration to the host building and would relate to the proposed permitted hours for patrons to be within the premises only. As such the main consideration material for the determination of this application includes the follow:

- The impacts caused upon the residential amenities of any neighbouring occupier
- Impact of the existing condition upon the viability of the A3 use permitted
- Any resulting impacts by virtue of the increased levels of servicing and waste
- Enforcement issues

#### **Residential Amenity**

3.2. Policy A1 seeks to protect the quality of life of occupiers and neighbours by only granting permission to development that would not cause harm the amenity of residents. Policy A1 states that the Council will also seek 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; resist development that fails to adequately assess and address transport impacts affecting communities, occupiers, neighbours and the existing transport network; and require mitigation measures where necessary. In order to consider the above, the following factors are deemed to be of relevance in this assessment: artificial lighting levels; transport impacts, including Servicing Management Plans; noise and vibration levels; odour, fumes and dust; and impact upon wastewater infrastructure. Policy A4 states that the Council will seek to ensure that noise and vibration is appropriately controlled and managed to avoid undue harm. It states that the development should have regard to Camden’s adopted Noise and Vibration Thresholds and that the Council will not grant planning permission for development likely to

generate unacceptable noise and vibration impacts. The above two policies are supported by the guidance outlined in CPGs 5 (Town Centres, retail and employment) and 6 (Amenity). The Council updated these guidance documents in the summer of 2017 and copies of both updated CGPs were out to public consultation at the time of writing.

- 3.3. Following the above, it is widely accepted that impacts from noise can have a major effect on residential amenity. The World Health Organisation (WHO) for example states that excessive noise can seriously harm human health, disturb sleep and have cardiovascular and behavioural effects. As outlined in chapter 6 of CPG5, while restaurant uses can contribute to the vibrancy and vitality of town centres, they can also have harmful effects, such as noise and disturbance to residents, litter, anti-social behaviour, parking and traffic impacts. Restaurant uses can pose particular difficulties in terms of noise and disturbance, as their peak operating time is usually in the evening, when residents are most likely to be at home. In situations such as with the application site where restaurant uses are close to where people live, conflicts can arise and such sources of noise and the character of noise can increase stress levels and cause significant disturbance. In order to avoid such conflicts, the updated Amenity CPG advises that where restaurant uses are proposed, access routes, outdoor standing/seating areas and smoking areas should be sited away from noise sensitive facades and/or effectively screened. Concern is consequently raised with regard to the increased level of noise and disruption from the increased levels of patrons entering, egressing or smoking out the front of the premises as well as from the increased level of kitchen activity and activity within the unit itself.
- 3.4. In this instance, the only public access into the unit is via the front door opening onto Fairfax Road. This area is in very close proximity to the primary habitable room windows to the several residential units directly above which are likely to be kept open during summer months to allow for natural ventilation, exacerbating the impacts upon these rooms/occupiers. Whilst a select number of windows to the front façade of the terrace at upper floors have been replaced with double glazed windows (improving sound insulation levels to these rooms), the vast majority of these upper floor windows remain single glazed crittall. These single glazed windows tend to do little to attenuate noises from external sources and as such residents to these upper floor units are extremely sensitive to noise from evening and late night activities taking place at street/pavement level. As the site benefits from an extant permission for A3 use, the acceptability of the relationship between the main access route, area for outdoor seating and smoking and the proximity to the noise sensitive façade above cannot be readdressed and is not under discussion. It is also unlikely to be practical/feasible to require external screening between ground and upper floors to contain breakout noise due to expected design issues. Notwithstanding this the Council has previously and continues to seek to effectively manage noise from the permitted A3 use, via the application of conditions to control aspects such as (but not limited to): opening times; amplified music and restrictions on times where outdoor standing/seating areas can be used.
- 3.5. As outlined in section 2 of the report, careful consideration has previously been taken regarding the amenities of adjacent residents by both LPA planning officers as well as subsequent inspectors and it has been maintained that conditions as applied were necessary to protect local residents from noise and disruption at the most sensitive times (evening and night time). Although the applicants reason that the additional noise and disruption caused by a 30 minute extension to permitted hours would have a limited level of harm, the Council disagrees. A view is maintained that 21:00 should be the latest permissible hour for customers to have left the unit in order to ensure that the local community are not disturbed by the use of the GF unit. This has been evidenced by the numerous noise complaints received by the Council regarding issues of noise and disturbance from the operation of the business beyond permitted hours.
- 3.6. In an attempt to justify the proposed extended hours, a Environmental Noise Survey has been submitted by the applicant's which explores a potential extension to closing hours until 23:00 [agent has reiterated that this application seeks a 30min extension only]. The scope of this report is described as providing an assessment "*in order assess the impact of this [extension to hours] on residential windows to the rear of the restaurant, in terms of any possible negative impact*". It is

noted that this report makes no mention of the impacts upon the noise sensitive front façade of the host building at upper floors which would be the most affected by virtue of the subsequent later time for patrons to exist the premise onto the external footway. It is noted that evidence in the form of drone video surveillance footage has been submitted in an attempt to demonstrate that patrons leave the premise in an orderly manner and do not linger and cause noise disruption. Whilst this evidence is a material consideration, it is contradicted by the numerous noise complaints (including photographic evidence) submitted by local residents to the Council. It is also worth noting that the patrons filmed leaving the premise are likely to have been aware of the drone recording (drones tend to be clearly audible at ground level) and would also likely have had to have consented to the filming. This means that the Council cannot be confident that the footage pays a fair reflection of how patrons would egress from the premise at night time under usual circumstances.

3.7. Notwithstanding the above, the submitted report was fully reviewed by the Council's Environmental Health (Noise) officers, would have confirmed that they object to the extended hours and do not find that this report has addressed their concerns. Officers from this team have provided the following specific observations:

- The application states the rear of the premises is closed after 17:00 hours and the rear windows to the kitchen fixed. The assessment conducted to the rear should therefore only detect noise breakout from the premise (which should be at minimum in light of the other controls applied) and would not observe the actual impact of the premises in terms of noise
- Patrons will be entering or egressing or smoking out the front of the premises and it is noted that no assessment was completed at the front of the premises observing the effects of the premises on the residents above or across the road
- The periods of continuous automated monitoring undertaken are not considered to be representative of actual level of operation/activity due to the planned nature of recordings and the awareness of the operator of these recording times

3.8. It should be noted that due to the raised concerns summarised by the last point, the Council's Environmental Health team elected to conduct its own monitoring of noise levels to the rear of the site. A full discussion of the findings of these recorded are outlined in the officer's report for the post-installation noise report approval of details application (2017/1755/P) which was recently refused by the Council with the warning of further enforcement action to be taken (see appendix two for this report). In summary however, it was found that during opening hours the level of noise emitted from the unit/associated plant equipment was in breach of conditioned limits and, conversely to the findings of the submitted reporting, resulted in clearly audible sound levels within habitable rooms of adjacent dwellings along Fairfax Place. In light of the above, officers from the Council's Environmental Health team recommend the refusal of the proposed extension to hours as any extension to permitted opening hours would exacerbate this existing harmful impact.

3.9. Overall it is considered that the proposed extension to permitted opening hours would lead to an increase in the level of activity within and outside the GF unit in the evening hours. This would include increased levels of patrons entering and egressing from the unit and smoking outside, an additional quantum of patrons served within the unit per evening (an additional 30 covers described as being possible per night) as well as increase kitchen activity in order to serve these extra covers. Due to the aforementioned density of sensitive residential uses surrounding the site as well as the existing quiet conditions at this end of the parade, it is considered that the proposed extension to opening hours would result in undue noise and disturbances to these residents to a level of detriment.

3.10. It is noted that within the supporting statement, a number of concessions have been proposed by the applicant in an attempt to address the above concerns. These include suggested further conditions as follows:

- That the rear doors shall remain closed between 17:00-09:00 daily (currently no restriction)
- Removal of rights for external dining (currently permitted until 19:00)

- Application of a 'personal permission' so that the permission could not be transferred to an alternative A3 operator
- Application of a temporary permission (1yr) to test compliance
- To restrict no new customers entering onto the premise after 19:30 daily.

3.11. Although it is recognised and welcomed that the applicant is looking to proactively find ways to address concerns raised, it is noted that many of the conditions proposed would not meet the tests of the NPPF or would not address the main reasons for concern, meaning that these suggestions would not address the aforementioned objections raised. Paragraph 206 of the National Planning Policy Framework states that planning conditions should only be imposed where they are *"necessary; relevant to planning and; to the development to be permitted; enforceable; precise and; reasonable in all other respects"*.

3.12. Whilst the restriction of fixing rear doors to be closed would help to contain noise emissions from the LGF kitchen area, and the removal of external seating would improve levels of noise emissions up to 19:00, neither would address the issues outlined above in terms of increased levels of activity and increased levels of coming and goings later in the evening.

3.13. With regard to the suggested temporary and personal permission, it is worth noting that this application is not a fresh application but a variation of condition application made under section 73 of the Act. As such it would not be appropriate to retrospectively seek to make the permission personal or temporary as these elements would fundamentally alter the nature of the development beyond that of a 'minor material amendment' (for which this application seeks). National Planning Practise Guidance (2014) outlines that conditions that modify developments in such a way as to make them substantially different from that set out in the application should not be used. The PPG also sets out that where modifications to conditions proposed are fundamental or substantial, a new planning application under section 70 of the Town and Country Planning Act 1990 will need to be submitted. Irrespective of this, a restriction of time for any permission or securing the permission as personal would also not address those issues raised as discussed above. Finally, as a condition limiting the point at which new customers could enter the site would be unenforceable, such a condition could not be applied.

#### **4. Impact upon viability**

4.1. It is noted that the within supporting statements, concern is raised with regard to the impact that the existing condition has placed upon the viability of the current occupier's business as well as a suggestion that the applied condition may therefore not be considered reasonable. It is suggested that an additional 30mins of opening time daily would allow for the restaurant to serve an additional cover (30 persons) per evening and that this additional trade would significantly improve the sustainability of the applicant's business. Within the planning statement it is reasoned that without the proposed extension, *"the restaurant becomes unattractive to users to the extent the operation would become unviable leading to the restaurant having to shut down on viability grounds, leading to the loss of a type of restaurant which has considerable local support"*.

4.2. In relation to the issue of viability and 'reasonableness' of conditions imposed, paragraph 173 of the NPPF advises that conditions/obligations which unreasonably impact upon the deliverability of an approved development should be avoided. As outlined in the last section, Para.173 also stipulated the six tests for which any applied condition must meet.

4.3. It should be clearly reiterated that planning legislation does not include provisions for the protection of specific business enterprises or models but is instead concerned with the regulation of land use and operational development only. It should also be noted that the permission was granted for a change of use for purposes defined by Use Class A3 which includes 'restaurant and cafes'. Not all businesses operating under Class A3 are specifically designation restaurants focused on evening trade such as the current occupier, and the extant permission would allow for a business such as a café which was more focused on service through the daytime and early

evening. The condition applied to limit opening hours to 21:00 is considered to meet the six tests outlined by the NPPF in this case and the applicant has not provided any formal evidence that:

- a) The current business model is the only A3 business model viable for the site (i.e. that a café or restaurant oriented on daytime trade would not be suitable); or
- b) The existing business is failing to turn a profit and/or is unsustainable by virtue of the condition applied

4.4. In the absence of clear evidence that addressed both of these two points, the claim that the condition unreasonably impacts upon the deliverability of the approved development (use of unit for A3 purposes) is not considered to have been demonstrated.

## **5. Servicing and deliveries**

5.1. As outlined in the submitted planning statement, permission is sought for an additional 30mins of extra operation time to serve customers daily as this would allow for the restaurant to serve an additional sitting (up to 30 persons) per evening. As aforementioned this increased service capacity would, by definition, necessitate an increase in kitchen activity in order to serve these extra covers. As a result, the proposed change would also lead to an increased service requirement of the unit, both in terms of increased levels of waste generated as well as increased levels of deliveries.

5.2. At present, the unit has two large commercial bins within the rear service road with private collection arrangements and deliveries are restricted to specific hours. As highlighted by recent enforcement action as well as several Noise Complaints, these conditions have been continuously breached by the current operators and due to the existing impacts caused upon local residents, formal enforcement action has since commenced. As the existing management has not been historically in line with applied conditions and the existing servicing and waste management has resulted in disturbance, were the extension of hours deemed otherwise acceptable a Service and Waste Management strategy would have been expected to be secured. This document would have been sought to be submitted to and approved by the Council either under a s106 legal agreement (where servicing takes place outside of the redline of the site) or via condition. This would allow for the additional impacts caused by the increased serving capacity to be adequately mitigated against via the careful consideration of these issues.

## **6. Enforcement issues**

6.1. The above assessment has been based upon the merits of the proposal and submitted evidence. When issuing the decision, however, it is relevant to note that the Council has received numerous planning enforcement and noise complaints relating to the management of the property.

6.2. During the course of the assessment, the associated investigations into these various complaints has exposed several examples where the existing business has been managed in such a way that various applied planning and licencing conditions have been breached. As outlined in the planning history section of the report, this has already resulted in formal action being sought by the LPA in relation to the breach of planning/conditions relating to kitchen extract equipment, servicing as well as unauthorised plant. As evidence was also received in relation to the continued operation of the business well beyond permitted opening hours (with several examples of the business remaining open until beyond 22:00), the recommendations to refuse permission will also include a warning of enforcement action in relation to the breach of conditions 4 and 12 of permission 2015/3916/P.

## **7. Conclusion**

7.1. Planning permission was previously granted on the site for an A3 use subject to numerous conditions, each of which were deemed necessary and reasonable in order to ensure that the

permitted use would not result in undue harm from noise and disruption to the numerous surrounding residential occupiers. As has been discussed at length, the area surrounding the site is characterised by its quiet and residential character which may be distinguished as separate from the Southern section of the frontage within the parade. The proposed variation of condition 4 would be considered to introduce increased activity and levels of comings and goings within this quiet and noise sensitive location to the detriment of residential amenity. Although evidence in the form of a Noise Report, Planning Statement and video survey have been submitted to justify the proposed extension; these details are not considered to have provided comfort to planning or environmental health officers that the extended hours would not cause harm as considered above.

7.2. Whilst the popularity of the existing business is in no way questioned (conversely, the level of responses to the online petition clearly shows that the business is highly popular); this does not outweigh the Council's duty to protect the amenities of surrounding residential occupiers and to protect their ability to enjoy their homes. The site is situated within a densely residential and quiet setting and as such the original permission to allow a food use into the unit included stringent but necessary conditions for operational limitations to protect these aforementioned amenities. Due to this dense residential character, this concern is retained and the evidence provided it not considered sufficient to overturn the consideration of the previous planning officer and inspectors in terms of the reasonable time for customers to have left the unit.

## **8. Recommendation**

8.1. A) Refuse variation of condition and Warning of Enforcement Action to be Taken

8.2. B) Authorise enforcement action

That the Borough Solicitor be instructed to issue an Enforcement Notice under Section 172 of the Town & Country Planning Act 1990 as amended and to pursue any legal action necessary to secure compliance and officers be authorised in the event of non-compliance, to prosecute under section 179 or appropriate power and/or take direct action under 178 in order to secure the cessation of the breach of planning control.

### **The Notice shall allege the following breach of planning control:**

The breach of conditions 4 and 12 of planning permission 2015/3916/P dated 05 April 2016 with regard to the failure to cease the permitted use and to ensure that no customers are onsite after 21:00 as permitted:

#### Condition 4 of planning permission 2015/3916/P dated 05 April 2016

*No customers shall be on the premises outside of the hours of 08:00 to 21:00 on any day.*

*Reason: To safeguard the amenities of the adjoining premises and the area generally in accordance with the requirements of policies CS5 and CS7 of the London Borough of Camden Local Development Framework Core Strategy and policy DP26, DP28 and DP12 of the London Borough of Camden Local Development Framework Development Policies*

#### Condition 12 of planning permission 2015/3916/P dated 05 April 2016

*The use hereby permitted shall not be carried out outside the following times 08:00 to 21:00 on any day.*

*Reason: To safeguard the amenities of the adjoining premises and the area generally in accordance with the requirements of policies CS5 and CS7 of the London Borough of Camden Local Development Framework Core Strategy and policy DP26, DP28 and DP12 of the London Borough of Camden Local Development Framework Development Policies*

**The Notice shall require within a period of 1 calendar months of the Notice taking effect:**

- 1) All customers must have vacated the premise by no later than 21:00 on any day in accordance with conditions 4 and 12 of planning permission 2015/3916/P dated 05 April 2016.

**REASONS WHY THE COUNCIL CONSIDERS IT EXPEDIENT TO ISSUE THE NOTICE:**

- (1) The extension of opening hours and for customers to have vacated the site results in an increase in evening activity, noise and disturbance to the detriment of the amenity of local residents, contrary to policies A1 and A4 of the London Borough of Camden Local Plan 2017.