

LDC Report	11/05/2018
Officer	Application Number
John Diver	2018/0865/P
Application Address	Recommendation
Unit to the rear of 115 Finchley Road London NW3 6HY	Refuse Lawful Development Certificate and Authorise Enforcement Action
Proposal	
Use of the unit to the rear of 115 Finchley Road as a Class B1c 'Commercial Kitchen'	
Assessment	
<p>1. Subject Site</p> <p>1.1. The subject site (approx. 487 m²) is located to the rear of 115-119 Finchley Road (west side of Finchley Road and near to the Swiss Cottage tube station). The site is accessed via a private lane that runs down the side of 115 Finchley Road. The main access to the building is south facing. There is an open forecourt area to the rear (west part of the site).</p> <p>1.2. The site is surrounded by residential properties to the north, south and west and on the upper floors of the commercial units along Finchley Road (east of the building). Directly to the north of the site is the car-parking area for Cresta House which is accessed from Belsize Road (a 9 storey building with residential units on the upper six floors and commercial on the lower three). There was previously a fence separating the subject site from the private carpark, however this appears to have been removed recently.</p> <p>1.3. The site is located within the Finchley Road/ Swiss Cottage Town Centre, it is not located within a Conservation Area and nor is the building listed. Finchley Road (A41) is part of the Transport for London Road Network (TLRN).</p> <p>1.4. The existing building is a two storey brick building which extends to the rear of 115-119 Finchley Road. There is access to the upper floor of the building from Finchley Road, however the upper floor does not form part of the area occupied by the users and is a separate operation.</p> <p>1.5. The unit has been converted into 9 purpose built kitchens where food is prepared and cooked, and delivered to customers via pedal cycles and scooters. There is no ability for customers to visit or access the site, orders are placed solely online, prepared fresh to order and delivered immediately by delivery staff. The site can be accessed from 08:30am and operates 7 days a week, and orders can be placed from 17:00 Monday to Wednesday</p>	

and 12:00 Thursdays to Sundays. Orders can be received up until 22:45 and the kitchens close at 23:00. All plant equipment and noise generating activities will finish by 24:00. A site visit to the property was undertaken on the 27th November 2017 and again in April 2018. The level of commercial cooking activity and comings and goings from delivery persons would remain at its highest / most intense when the highest proportion of customers would be at home wishing to order a meal (i.e. in the evening and at weekends). The submitted legal opinion states that the kitchens “*mirror casual dining in that they are busiest between the hours of 19.00 – 21.00*” (para.14).

2. History

2.1. The application site has the following planning history:

Planning application **PL/9200229** at 119 Finchley Road, was granted on 8th May 1992, for the ‘Change of use of ground floor from class A1 to mix use of A1 and B1, as shown on drawing no 47902R’.

Retrospective planning application **2017/4737/P** has been made for the unit to the rear of 115 Finchley Road for the installation of external plant, including 3 no. extract ducts, 4 no. flues, 3 no. air intake louvres, 1 rooftop extract and 3 no. air condenser units. This permission was refused on the 11/05/2018 with warning of enforcement action to be taken. Reasons for refusal relate to the impact upon residential amenity by means of inadequate noise and odour/fume mitigation information as well as the visual impact caused by the extract equipment.

3. Neighbouring Responses

3.1. Whilst there is no statutory consultation for Lawful Development Certificates, a number of responses have been received from neighbours at:

- 53 Dobson Close;
- Cresta House Residents Association;
- Flat 19 Cresta House, 133 Finchley Road;
- 26 Belsize Rd;
- 69 Dobson Close;
- Dobson Close (number not given).

3.2. The objections and comments relate to:

- Nuisance to neighbours;
- Disturbance from odour/fumes from cooking and scooter exhausts;
- Number of vehicle movements;
- Food waste generated;
- Visual impact of extract equipment;
- Public safety (pedestrians and road users);
- Potential to put high street shops out of business;
- Noise generated by delivery vehicles; and
- Noise generated by plant equipment and cooking activity.

4. Proposal

- 4.1. The application relates to the use class of the current occupants of the premises. The application seeks to demonstrate that lawful/establish use of the unit is for B1 purposes and that the continuing operating activity on site falls under use class B1(c), such that the continued use would not require planning permission as that is the lawful use of the site.
- 4.2. The scheme can only be assessed against the relevant planning legislation which is the Town and Country Planning Act 1990, the Town and Country Planning (General Permitted Development)(England) Order 2015 ("GPDO") and the Town and Country Planning (Use Classes) Order 1987.

5. Applicant's Evidence

5.1. The applicant has submitted the following information in support of the application:

- Statement in support of Application for a Certificate of Lawful Use, 17232/MM/TH, February 2018;
- Copies of planning permission TP.21868/NW and PL/9200229;
- Marketing brochure by Stint Q2-2017;
- Photos prior to current occupation and following occupation;
- Operational Management Plan, prepared by Deliveroo;
- Legal opinion from Sasha White QC in relation to the Deliveroo Editions use;
- Delivery Noise Impact Assessments, prepared by Noise Solutions;
- Transport Statement, prepared by i-Transport;
- Kitchen Canopy Ventilation Details and Odour Maintenance Plan, prepared by Chapman Ventilation;
- Decision notices from other boroughs: Haringey temporary use for five years for B1(c) HGY/2017/3207, Tower Hamlets temporary B1(c) use for 18 months PA/16/03605 and PA/16/03491, Nottingham City Council change of use from sui generis to B1(c) 17/02412/PFUL3 and Leeds City Council change of use from D1 to B1 17/06441/FU.

5.2. The applicant has also submitted the following plan:

- Block and location plans 2017-075-106 Rev A.

6. Council's Evidence and Application Assessment

- 6.1. The Town and Country Planning (Use Classes) Order 1987 as amended [hereafter referred to as the 'Use Classes Order/UCO'] describes use classes of various activities. The applicant proposes the new activity described above as falling within the same use class (B1(c)).
- 6.2. With regard to the established use of the site, the applicant has submitted evidence of past planning history for the site including details of the works approved under application PL/9200229 (1992). While this information goes some way to evidence a previous planning consent, little more has been provided in terms of confirmation of the implementation of this permission or to give further evidence the established lawful use of the site remains that given in 1992. Following a search of tax records, the Council's officers found no record

of business tax records for this unit within the postcode area given, adding uncertainty to the claims around established use. As no further information is provided, officers do not feel that on the balance of probability, the evidence provided is sufficient to demonstrate that the established lawful use of the unit remains under Use Class B1.

6.3. The Use Classes Order 1987 defines Use Class B1 as Business Uses for all or any of the following purposes—

as an office other than a use within class A2 (financial and professional services),

for research and development of products or processes, or

for any industrial process, being a use which can be carried out in any residential area without detriment to the amenity of that area by reason of noise, vibration, smell, fumes, smoke, soot, ash, dust or grit.

6.4. The main considerations in relation to establishing whether the operations of the current occupant fall within use class B1(c) industrial process as the applicant submits, are therefore:

- 1) Whether the primary use of the premises is for an industrial process; and
- 2) If so, whether the activity is a use that can be carried out in any residential area without detriment to the amenity of that area by reason of noise, vibration, smell, fumes, smoke, soot, ash, dust or grit.

6.5. Consideration of either of these elements will now follow:

(1) Whether the primary use is an industrial process:

6.6. An industrial process is a systematic series of operations that produce or manufacture something, typically on a large scale. The term is defined in the Use Class Order at Article 2, as “*process for or incidental to any of the following: -*

a) the making of any article or part of any article (including a ship or vessel, or a film, video or sound recording);

(b) the altering, repairing, maintaining, ornamenting, finishing, cleaning, washing, packing, canning, adapting for sale, breaking up or demolition of any article; or

(c) the getting, dressing or treatment of minerals;

in the course of any trade or business other than agriculture, and other than a use carried out in or adjacent to a mine or quarry...”

6.7. Notwithstanding the legal opinion provided by the Applicant to support the application and the decisions referred to within it, it is considered that the Deliveroo use cannot properly be considered to fall within Use Class B1(c), given in particular the delivery component which is a key element of the overall use.

6.8. The business model of the use means that each individual order made by a customer has to be prepared fresh to order and delivered to the customer while still warm. This means that the level of comings and goings associated with the use far exceed that of a typical industrial process and the level of the deliveries is materially different from those for a typical Class B1 use. It is accepted that class B1(c) uses are likely to result in deliveries and a degree of comings and goings. However, rather than items being produced and then removed from the site on a wholesale basis as is considered consistent with a B1 or B2 use, in the case of the Deliveroo activity each order is individually prepared and then delivered to a specific end user, on demand. It is noted that due to the specific and unique use in operation, the cooking/food preparation and delivery elements of the use are not severable uses, with neither being ancillary to the other. Further to the above, it is noted that the hours of operation associated with the use are specifically targeted towards the hours of peak customer orders and are unconventional for an industrial use – being open seven days a week and with a heavy reliance upon late evenings. For the above reasons, it is considered that this system of production and delivery on demand is not one that is traditionally or properly associated with a B1 or B2 use. This has resulted in particular local impacts which reflect the nature of the overall use.

6.9. The business model for the proposed use is principally for the preparation of hot food for consumption off the premises and its prompt delivery to the customer. The lack of direct customer access and onsite payment for food suggests that the use falls outside that of the traditional A5 use class (hot food takeaways). Therefore the use is more properly considered to be a *sui generis* use. On this basis, planning permission would have been required prior to the commencement of the use onsite.

6.10. Notwithstanding the above, as the applicants dispute this position and consider the use to be an industrial process, consideration should be given as to whether the use is one that can be carried out in any residential area without detriment to the amenity of that area as specified in Class B1(c) as set out above, and as is now addressed.

(2) Whether the activity is a use that can be carried out in any residential area without detriment to the amenity of that area

Noise and vibration

6.11. Given that the continued use would require the heavy servicing from delivery vehicles and the retention and continued operation of numerous sources of noise generation from mechanical plant on a property surrounded on all sides by residential units, standards relating to maximum noise emission should be applied to avoid impacts to amenity. Appendix three of the Local Plan (pg.312) states that relevant standards (e.g. BS 4142) or guidance document(s) should be referenced when determining values for Lowest Observed Adverse Effect Level (LOAEL) and Significant Observed Adverse Effect Level (SOAEL) for non-anonymous noise and that at a 'Rating Level' of 10 dB below background noise levels is expected (15dB if tonal components are present). In this instance, the 'Rating Level' of 10 dB below background levels at the nearest receptor would be considered necessary to avoid harm to the amenities of surrounding residential occupiers.

6.12. Submitted alongside the application was a Delivery Noise Impact Assessment (DNIA) report dated 09 January 2018 prepared by NSL Ltd. The submitted reporting has been reviewed alongside the Council's Environmental Health officers who also attended the site on Sunday 29 April 2018.

- 6.13. The submitted DNIA includes an existing noise climate assessment, informed by onsite measurements taken over a 22hr period between midday Wednesday 02 August and 10:00 Thursday 03 August 2017. This survey concluded that the lowest background levels observed during this period were 54-59 $L_{A90,15min}$ during the day and 52-58 $L_{A90,15min}$ during the night. Given the aforementioned thresholds set out in the Local Plan, the report then assesses the likely impacts resulting from the anticipated levels of delivery vehicles to and from the site by seeking to quantify the anticipated sound pressure levels associated with delivery scooter pass-bys measurement of scooters, and then comparing these against local and national guidelines.
- 6.14. While, at face value, the DNIA concludes that predicted noise emissions from the delivery vehicles would not increase the internal noise levels within the nearest dwelling, officers raise significant concerns regarding the scope of the report and its methodology.
- 6.15. Firstly, it is noted that at no point in the submitted DNIA report is reference made to the resulting impacts from installed/pre-existing plant equipment, a major secondary source of noise for the local environment associated with and inextricable from the use. Officers note that pre-existing plant may serve the upper floor unit which is understood to have separate tenants, however, as this equipment was never granted express permission and evidence points towards it being installed within the last 3 years (see appendix one of the report), it would be expected that the cumulative impact of all plant equipment be assessed together with the predicted delivery vehicle information to provide a true reflection of the resulting impacts. As was outlined in the officers report for the application for the retention of the installed plant, officers consider that the continued use of this plant equipment alone would result in disturbances from noise. Without full details in relation to the overall predicted noise levels emitted from all plant within the site operating together alongside noise from delivery vehicles, officers cannot be confident that levels at noise sensitive receptors would remain within acceptable limits. It is considered that the submitted DNIC does not provide a true reflection of the overall impacts in terms of noise.
- 6.16. Secondly, concern is raised with regard to the environmental sound survey completed and the resulting effect on measured existing background noise levels. Within submission documents as well as the DNIA itself it is stated that the proposed use will operate between 08.30-00.00 seven days a week, with deliveries and cooking occurring up to 23:00. The existing noise climate assessment includes a 22hr period only, taken mid-week. Due to the nature of the site and the surrounding areas, officers note that it is likely that levels of background noise levels are lower during weekends than during the week. This is especially the case on Sunday's when one would reasonably expect sources from road traffic to be lower. This is also the day where surrounding residents are most sensitive to noise impacts. Given that the submitted Transport Statement and the DNIA itself states that on Sundays alone, a total of 1165 scooter movements are expected, it is felt that background noise levels should have been presented for weekend periods as any drop in existing background levels would have a significant impacts upon the maximum design criterion levels for plant equipment and delivery vehicles. Given the sensitivities of the site and surrounding residential uses and the fact that the use would operate until 00:00 daily, officers are therefore not convinced that the submitted NIA provides a robust enough basis to demonstrate the worst case potential noise impact across all days.
- 6.17. Thirdly, officers express concern that the submitted DNIA does not provide full details of the methodology for the calculation of the reference noise data for delivery activities (given as 57 SEL dB(A) in table 4). At para.6.5, levels given are stated to have been "*obtained by measurements made at other Deliveroo kitchens*", without any

justification or reasoning. Given the importance of this figure in the following impact assessment, the uncertainty raised regarding the comparison of the other source sites and the application site requires full consideration. Due to the enclosed setting of the entrance ramp from Finchley Road, the lower level of the application unit and the manner in which noise is contained to the rear of the site, the appropriateness for the assessment of the unique site circumstances remains unclear. This view has been evidenced by the recent submission of numerous complaints received by the Council from local residents with regard to disturbances from noise associated with delivery vehicles.

6.18. Finally, also with regard to the environmental sound survey completed, it is noted that the monitoring equipment for the survey included a single recorder which had been affixed to a lamp post within the rear parking area to 121 Finchley Road. While this location is considered by the applicant to be representative of the nearest sensitive receptor, considering the sensitivities of the site officers consider that this monitoring should have taken place at the nearest sensitive receptor. If this had of not been possible due to access issues, then it would have been expected that this should be mentioned in the report. The noise climate in this car park is dominated by a large plant room on the ground floor facing the monitoring location. This plant room is unlikely to be audible at the nearest sensitive receptor and, although other plant items might be audible, the level of uncertainty increases substantially.

6.19. In light of the above officers are of the view that the submitted reporting has failed to fully demonstrate the resulting impacts from all sources of noise associated with the continued use. Specifically, the DNIA has not demonstrated that all plant operating in tandem on the host property would remain within the Councils acceptable noise thresholds for emissions, either individually or when combined with the noise emissions resulting from delivery vehicles. Given the significant lack of justification, officers remain unconvinced that it would be possible to attenuate all sources of noise to the necessary levels to remain policy compliant. Officers also question the validity of the calculations for reference noise data for delivery activities without further clarification as to how comparable the measurement kitchens were against the application site. In the absence of more comprehensive reporting, the continued use is thus considered to result in harm to neighbouring amenity by virtue of noise.

6.20. As will be discussed further below, the level of comings and going from the site associated with the continued use therefore raises significant concerns including impacts from noise. The number and frequency of traffic from scooter drivers to and from the site has brought about issues in relation to noise and disruption and considering the limited site access, could not be easily addressed via amended management. The disruption to residents caused by delivery drivers has been evidenced by the submission of numerous objection comments as well as formal complaints to the Council's Environmental Health department in relation to noise disturbances from delivery scooters. This will be discussed further below:

Transport

6.21. A transport statement has been prepared by i-Transport and submitted by the applicant. The statement concludes that 'there is no evidence to suggest that the transport implications are severe'. It is clear however, that the activities on site result in a significant number of scooter trips and a smaller number of cyclist trips (90% of deliveries are by scooter and 10% by bicycle). The statement advises the catchment for deliveries is 2.5km, with the maximum delivery time being 15 minutes and an estimate of 25 riders at the site

during lunch and 60 at dinner periods. The transport statement estimates during a lunchtime hour there would be 50 riders (both scooters and cyclists) to the site and 49 leaving and during an hour in the evening 111 in to the site and 104 out. During a site visit completed during a stated 'quieter period' for the business (Wednesday 15:45pm); officers observed a total of 17 scooters parked on the access ramp and across the pavement to Finchley Road. Given that the submitted Operational Management plan claims that a member of staff would be patrolling this ramp to ensure that drivers park at the top of the ramp and then walk down to the unit, this does not seem to be enforced onsite. This has also been evidenced in comments submitted to the Council from local residents.

6.22. It is considered that the frequency of trips far exceeds that which would be anticipated for a 'light industrial' use where it would be more common for much less frequent bulk deliveries leaving the site during the daytime. As aforementioned the site is accessed via a narrow ramp off Finchley Road down to lower ground level. All delivery drivers are expected to pull in off Finchley Road and park on this ramp/the forecourt at lower level however, as evidence above, this has often not been enforced onsite. The enclosed nature of this access lane means that this concentration of vehicle movement is particularly disruptive to neighbouring occupiers. As access into the site from the rear is obstructed by locked gates at the top of Belsize Road and the adjacent car park (see appendix two), this ramp is the only viable access arrangement for all site access and egress for delivery drivers. It is therefore not clear how this issue could be addressed via the submitted Operational Management Plan.

6.23. The Council has received multiple complaints about disruption caused by the delivery scooters, which are part of the operation, including noise generation and safety for pedestrians. The sheer volume of trips to and from the site generates disturbance for neighbours considered harmful to their amenity.

6.24. Although it is recognised that highways safety is not directly referred to in Class B1(c), it is noted that concern has been raised about access to the site on Finchley Road being blocked by scooters and bikes. It would be unacceptable for scooters to block the footway on Finchley Road at any time. The blocking of the footway also raises safety concerns, as pedestrians may be required to step in to the road to get around parked vehicles, which increases the potential for collisions.

Smell and Fumes

6.25. Odours, fumes and dust can be generated from commercial cooking and can have the potential to cause a range of health problems, including respiratory diseases, as well as harm residential amenity. Development likely to generate nuisance odours should therefore ensure to install appropriate extraction equipment and other mitigation measures. These should be incorporated within the building where possible. In order to avoid harm to residential amenity, where mechanical or passive ventilation is required to remove odour emissions, the release point for odours must be located above the roofline of the building and, where possible, adjacent buildings. This is in line with DEFRA guidance relating to the design of kitchen extract systems.

6.26. There are a total of 4 extract ducts (1 pre-existing and 3 recently added by the applicant) venting at roof level of the host building. At least three out of four of these ducts would discharge gaseous by-products from commercial kitchens associated with fast food/takeaway cooking. As the ground level of the site is below that of Finchley Road, these discharge points would each remain below the level of all habitable room windows

to flats with Cresta House and the flats within 115-119 Finchley Road. These discharge point are also at a similar level to a number of habitable room windows at first floor or above to properties to the West and South. Given the above and the sheltered nature of the site, officers raise significant concern with regard to concentrations of odours or fumes resulting in disturbances to surrounding occupiers. This concern has been evidenced by the recent submission of numerous objection comments as well as complaints from residents received by the Council with regard to disturbances from strong odours in neighbouring properties. During the site visit, odours from cooking were observed by officers when stood on the access point shown in appendix two. This position was in close proximity to the rear facing windows at upper floors of 115-119 Finchley Road.

6.27. The applicant has submitted Kitchen Canopy Ventilation Details and an 'Odour Maintenance Plan' prepared by Chapman Ventilation presenting the proposed preventive maintenance schedule. While this has gone some way in addressing concerns in relation to the continued servicing and management of this equipment, limited information has been forthcoming in terms of an analysis to estimate the odour risk of the proposed site or demonstration of appropriate design for the odour abatement systems to be used. Given the sensitivities of the site and its surroundings, the low discharge point for extract systems and the intensive commercial cooking use occurring on site; this lack of information is of significant concern.

6.28. Due to the size of the kitchen, the proximity of the nearest sensitive receptors/residential units and the site history, the Council would expect (as a minimum) an assessment of these systems installed in line with Annex C of "Guidance on the Control of Odour and Noise from Commercial Kitchen Exhaust Systems, Defra (2005)". Given the lack of any formal assessment in line with this National guidance, the Council's Environmental Health and planning officers feel that the information submitted does not provide enough evidence to demonstrate that the required level of odour control is in place for this particular scenario (multiple kitchens) and that the proposed development will not cause significant loss of amenity. Given the above, officers do not feel confident that the provision of full details of such odour abatement system could reasonably be secured by condition. Further concern is raised by the uncertainty of proposals shown on the submitted Ventilation plan (202-014-01 Rev C) which is annotated with labels such as 'Potential Odour Control Plant deck required' without any further discussion

6.29. In light of the above, it is evident to the Council that kitchen users generate smell and fumes which are likely to impact on neighbours which surround the site. The information submitted alongside this application is not considered to have demonstrated that these concerns have been or could be addressed via the appropriate design and installation of odour abatement equipment.

Conclusions on Use

6.30. Although the unit is at the rear of a busy road (Finchley Road), the site is located within close proximity to residential properties and is surrounded on three sides by residential sites. It is clear the activity has an impact upon neighbouring residential occupiers, through in particular, odour associated with the production of food, and noise generated by plant equipment and the comings and goings of delivery vehicles throughout the day and into the evening. There are also other problems arising in this case relating to litter, waste, storage, recycling and servicing.

6.31. The measures relied upon by the Deliveroo to address the various impacts have not prevented the impacts that have occurred and would be unlikely to be able to do so, given

the nature of the operation. While the Council's concerns in relation to odour and fumes and noise relate to a lack of full information, for the reasons outlined above it is considered that matters relating to noise from plant equipment and the comings and goings from delivery vehicles could not be adequately addressed via attenuation measures or altered management. Based upon the information provided it would consequently not be possible for officers to accept the assertion that the use could continue in a manner which would not jeopardise the amenities of local residents subject to mitigation and management. It should also be noted that, as confirmed by the agent for the application, an Operational Management Plan has been put in place on site which currently dictates the use. Officers were not asked to review or comment on the Management Plan prior to its use by Applicant and neither has its adoption led to a reduction in the number of noise or odour complaints received by the Council.

7. Recommendation: Refuse Certificate of Lawfulness and Authorise Enforcement Action

Refuse Certificate of Lawfulness

7.1. As indicated above, insufficient evidence has been submitted for the Council to accept that, on the balance of probability, the application unit has an established/lawful B1 use. Notwithstanding this, the current use is not considered to fall within Use Class B1(c) or to constitute an industrial process. The current activity within the unit is considered a change of use to a 'sui generis' activity that would require planning permission. It is evident, given the nature and increase in level of activities occurring on site, that a change of use has occurred for which express permission is required. This change of use has resulting in undue detrimental impacts upon residential amenity. An unlawful change of use is therefore considered to have occurred.

Authorise Enforcement Action

7.2. Given the above considerations and the retrospective nature of the application, officers have now issued instructions to the Council's Legal Services and Planning Enforcement teams.

APPENDIX ONE: Historic Imagery of site

June 2015 – Source Google Earth:

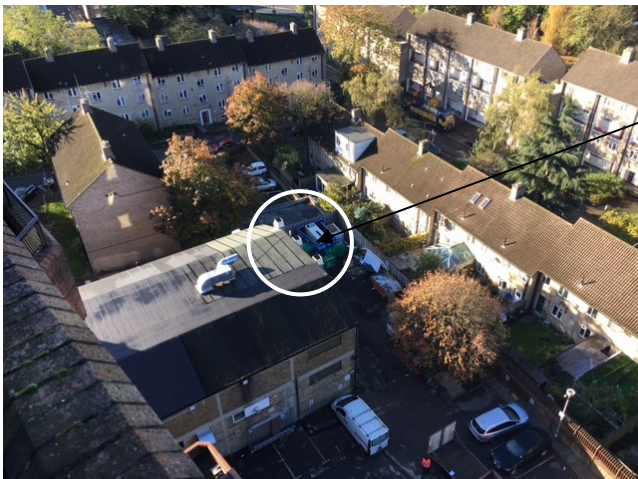


April 2017 – Source Google Earth:



'Pre-existing' Roof plant installed

October 2017 – Officer's photographs taken during site visit



Commercial kitchen extract and AHUs installed

**APPENDIX TWO:
Photographs taken during officer's site visit (@15:45pm - 11/04/18)**



(1) View from Finchley Road looking towards parked scooters (17 counted in total) and proximity to residential units
(2) View from upper GF access down towards site entrance and bin store



(3) Access into the car park to the rear parking area to 121 Finchley Road of locked with no access for delivery drivers