

LDC (Existing) Report		Application number	2019/2271/P
Officer		Expiry date	
David Peres Da Costa		24/06/2019	
Application Address		Authorised Officer Signature	
171 Camden High Street London NW1 7JY			
Conservation Area		Article 4	
Camden Town Conservation Area		Yes	
Proposal			
Use of the premises as a public house (Class A4), and cabaret/dance venue, bar with ancillary floorspace consisting of: use of the basement as storage for beer and stock, use of the ground floor as a cabaret bar with live performances (Sui Generis) and public house (Class A4) including toilets at the rear; use of the first floor as a public house (Class A4) bar area including toilets and use of the first floor external terrace as a drinking / smoking area; use of the second floor as a kitchen, two offices, and two rooms of staff accommodation plus bathroom and use of the third floor as two rooms of staff accommodation, all ancillary to the public house (Class A4) use.			
Recommendation:			

1. Background and site description

- 1.1. This application has been appealed for non-determination. This report is only to set out the Council's stance on the appeal as the application can no longer be determined by the Council
- 1.2. The application / appeal site is located on the west side of Camden High Street and relates to a 4 storey building plus basement known as 'The Black Cap'. The building is rectangular in its configuration, with the ground floor level extending the full length of the Site. The building has been unoccupied since the previous use ceased in April 2015. Site visits to the property were undertaken on the 4th April 2016 and 31st May 2017. The ground floor is laid out with a foyer at the front (providing access to the first floor) separated from the bar, stage and dressing room in the main part of the ground floor with toilets at the rear. There are stairs from the rear of the ground floor leading to fire escape doors at the rear of the site. A staircase connects the ground floor bar area with the basement. The first floor is laid out with a bar and toilets and includes a covered roof terrace with a fire escape staircase leading to doors in the rear boundary wall of the site. The second floor has a kitchen (connected by a dumb waiter to the first floor), a bathroom and a number of other rooms. There are 2 further rooms on the third floor.
- 1.3. The building is not listed and is located in the Camden Town Conservation Area. The site is listed as an Asset of Community Value, nominated 10th February 2015.

2. Application

2.1. The application sought to demonstrate that the use of the premises as “a public house (Class A4), and cabaret/dance venue, bar with ancillary floorspace consisting of: use of the basement as storage for beer and stock, use of the ground floor as a cabaret bar with live performances (Sui Generis) and public house (Class A4) including toilets at the rear; use of the first floor as a public house (Class A4) bar area including toilets and use of the first floor external terrace as a drinking / smoking area; use of the second floor as a kitchen, two offices, and two rooms of staff accommodation plus bathroom and use of the third floor as two rooms of staff accommodation, all ancillary to the public house (Class A4) use”, has existed for 10 years or more such that the continued use would not require planning permission.

2.2. The applicant is required to demonstrate, on balance of probability that the use as set above has existed for a period of 10 or more years.

2.3. It is clear from the evidence that there was no continuity of use after 2015 as this is when the premises closed. As there was a material cessation in the use in April 2015, none of the time since that date can count towards the passage to lawfulness. Therefore, the applicant / appellant needs to demonstrate that lawfulness was achieved prior to the cessation of use in 2015, so evidence of use earlier than 10 years before the date of the CLEUD application (which was dated 29/04/2019) is material and relevant. That is to say, the appellant needs to demonstrate 10 years of evidence from before the closure of the premises in April 2015.

2.4. Background

2.5. Before the current CLEUD application (which is the subject of appeal), a previous lawful development certificate application (planning ref: 2018/4031/P) was submitted 17/08/2018. The description of the lawful use at registration was as follows:

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

2.6. A meeting was held (16th November 2018) with the applicant to understand the applicant's intentions for the site and how the current Lawful Development Certificate application fits in with this. The applicant confirmed they needed clarity of the building's Use Class as this would help the marketing of the property.

2.7. Following consideration of the applicant's evidence and the Council's own records, the following description of the site's lawful use was drafted and provided to the applicant for comment.

Use of the premises as a cabaret/dance venue, bar, and community space (Sui Generis), consisting of: use of the ground floor as cabaret dance bar with live performances including toilets at the rear; use of the first floor as a bar and community space (including toilets) and use of the first floor external terrace as a drinking / smoking area; use of the basement as storage for beer and stock, use of the second floor as kitchen, two offices, and two rooms of

staff accommodation plus bathroom and use of the third floor as two rooms of staff accommodation. Basement, second and third floor uses serve the primary use of cabaret/dance, bars and community space (Sui Generis).

- 2.8. In response, the applicant provided an amended description of the lawful use (6/12/18) which was as follows:

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

- 2.9. It is noted that the applicant's amended description of the lawful use matches that of the current Lawful Development Certificate appeal application.

- 2.10. Given the lack of agreement between the Council and the applicant/appellant as to the lawful use of the property (in relation to 2018/4031/P), further information was sought from those who were likely to have knowledge of the property's use. Officers canvassed evidence via a questionnaire which was disseminated by The Black Cap Foundation (BCF) and the Camden LGBT Forum.

- 2.11. Section 191 (4) of the Town and Country Planning Act 1990 allows the Local Planning Authority to substitute or modify the description put forward by the applicant. Having assessed the applicant's evidence as well as the evidence collected via the questionnaire and relevant planning law, the description of the lawful use was modified as follows:

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

- 2.13. A lawful development certificate with this description was granted 03/07/2019.

- 2.14. The difference between the current appeal application and the previous Lawful Development Certificate application is minimal. The applicant/appellant's description of the lawful use (as set out in the application form) differs from that submitted for the previous application (as set out in the applicant's 'CLEUD report' and the application form). The description of the lawful use matches the description provided to the Council (6/12/18) during

the assessment of the first Lawful Development Certificate application and this description is specifically referred to in the officer's delegated report for 2018/4031/P (at paragraph 6.20-6.22).

- 2.15. The only additional evidence is two web articles (customer reviews of the Black Cap). In addition, the report prepared by Icenii to support the current application (dated April 2019) differs from the report submitted for the previous application (dated July 2018) as it contains an additional paragraph (paragraph 2.11) which sets out the applicant's description of the lawful use.

3. Applicant/Appellant's Evidence

- 3.1. As stated above, apart from the addition of two web articles, the evidence submitted in support of the application now the subject of appeal is identical to that previously submitted. The appellant / applicant's evidence consists of:
- *Photographic records;*
 - *Asset of community value records;*
 - *Heritage records including Black Cap Certificate of Immunity from Listing Application Statement and correspondence from Historic England in relation to its assessment to determine The Black Cap's suitability for listing.*
 - *Planning application and appeal history;*
 - *Floor plans;*
 - *Business records (rates, bills and licences);*
 - *Premises inspection and assessment reports; and*
 - *Press and media evidence.*
- 3.2. This evidence has already been assessed as part of the previous application (ref: 2018/4031/P).
- 3.3. The additional information includes two web articles. One of these has the title 'Beer in the Evening' – The Black Cap [Closed] – pub details' and is a listing on a web pub and bar guide which includes a number of user reviews (four in total submitted) between June 2010 and December 2011 which mention the following of relevance: "this use to be a great pub" dated 22 December 2011 and descriptions of the food served dated 12 June 2010.
- 3.4. The other web article was another review dated 18th November 2010 which appeared on "burgersandbrewsfoodreviews". This included the following of relevance: 'sign did say Great British Pub Food'; 'on the ground floor was the cabaret which was closed at that hour and a sign announced that the food and bar was upstairs so off we went'; 'best fish and chips'; and 'realized it was a drag club'.

4. Council's Evidence

- 4.1. The Council's evidence includes the planning history set out in the delegated report for the previous application 2018/4031/P. Additionally the Council has the evidence collated as part of the previous Lawful Development Certificate application:

2018/4031/P: A mixed use of the premises as a cabaret/dance venue, club, bar/ community space and as a public house (Sui Generis), consisting of: use

of the ground floor as cabaret dance club with bar and live performances and community uses with toilets at the rear and use of the first floor as a bar and community space (including toilets) and use of the first floor external terrace as a drinking / smoking area; with ancillary uses of the basement as storage for beer and stock, the second floor as kitchen, two offices, and two rooms of staff accommodation plus bathroom and the third floor as two rooms of staff accommodation. Basement, second and third floor uses serve the primary use of cabaret/dance venue, club, bar / community space and public house (Sui Generis). Granted 03/07/2019

5. Statutory provisions

- 5.1. Section 149 of the Equality Act 2010, sets out the Public Sector Equality Duty (PSED). A public authority must, in the exercise of its functions, have due regard to the need to—
 - a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
 - b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
 - c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
- 5.2. While the statutory duty is noted, the decision on a lawful development certificate is a determination of fact.

6. Assessment

- 6.1. The additional evidence submitted does not contradict the previous evidence. While it refers to the site being 'a great pub', this is consistent with the finding that the first floor bar operated without the use of the cabaret dance bar during the daytimes and early evenings and may have been the only part of the venue open on certain days (paragraph 6.47 of the officer delegated report for 2018/4031/P). Likewise, the review dated 18th November 2010 which appeared on "burgersandbrewsfoodreviews" is entirely consistent with the evidence assessed under the previous application.
- 6.2. Given the additional evidence submitted with the application the subject of appeal is consistent with and does not contradict the evidence assessed for the previous application (2018/4031/P), the Council's assessment of the lawful use is as set out in detail in the officer's report for planning ref: 2018/4031/P.
- 6.3. *"It is evident that the purposes of the ground and first floor were not unrelated, on the contrary they were mutually supportive and mixed together to provide an overall experience. There was not sufficient physical or functional separation to support a finding that there were two planning units. While the first floor bar can be independently accessed from the entrance foyer, the bar and the uses on the upper floors and basement are physically related to the use on the ground floor. That is to say, the basement beer store can only be accessed from a staircase from within the ground floor cabaret dance bar and therefore the first floor is functionally and physically dependent on access to the ground floor 'cabaret dance' space. Likewise, the ground floor is functionally linked to the second and third floors which provide ancillary office*

and staff accommodation. The second and third floors can only be accessed from within the first floor. On the basis of how the ground floor and first floor were used and how they are accessed, both uses are within the same planning unit which is the unit of occupation”.

7. Appeal against non-determination

7.1. An appeal against non-determination was submitted to the Planning Inspectorate 12th November 2019. A start letter was received from the Planning Inspectorate 9th April 2020.

7.2. The appellant's grounds of appeal can be summarized as follows:

1. The owners want the Black Cap public house to be re-opened as a public house (Class A4). Despite extensive marketing of the premises over a period of almost 5 years, the owners of the building have not been able to secure a tenant. The principal concern expressed by potential tenants / interested parties has been a reluctance to commit to a commercial lease, owing to the uncertainty regarding the existing lawful land use of the premises. The purpose therefore of the CLEUD application was to clarify the existing lawful use of the building based on facts and the submission of evidence.
2. The factual evidence collected by the Appellant suggests the Black Cap is predominantly a public house (Class A4) with an area of cabaret entertainment space at ground floor level.
3. The local planning authority (LPA) have been reluctant to issue a decision on the submitted CLEUD.
4. Camden Council's ACV response included a description of the significance of the Black Cap to the LGBTQ+ community and refers to the premises as a public house.
5. The existing land use of the Black Cap for each of these applications is recorded on Camden Council's planning applications page as 'A4 Drinking Establishments, sui generis'.
6. Following internal review of the responses received Camden Council subsequently sought to unilaterally change the description of use, without an agreement with the owner to describe the Black Cap as a cabaret/dance venue, bar, and community space (Sui Generis). The CLEUD, was granted on 3 July 2019. This CLEUD was granted but in granting the CLEUD the council unilaterally changed the description of development as applied for and as set out by the applicant and for an alternative description of use which is not supported by the facts or the evidence submitted with the CLEUD. It is the Appellant's contention that the description of development as applied for originally was changed unilaterally by the council for the purposes of political expediency. i.e. owing to the local controversy, the council could not be seen to be determining the application on the basis of the evidence submitted and instead made up an alternative description of some other use.
7. The use (as ultimately amended by the council and as set out on the granted CLEUD) does not help the Applicant whatsoever. This is because it does not provide any further certainty with regard to the uses and business activities which may be able to take place at the Black Cap.
8. On 29 April 2019, a further CLEUD application was submitted to Camden Council to determine the use of the basement, first, second and third floor levels as public

house (Class A4) with cabaret entertainment space at ground floor level (Sui Generis). Given the planning history, significant local and political interest in the Black Cap and previous disagreement with the description of use, it is for these reasons that it is understood Camden Council have not sought to determine the application within the prescribed timescales.

9. The Black Cap is and has always been a public house (Class A4). In the latter half of the 20th century, it became a safe space and focus for the LGBTQI and wider community in Camden Town. None of this changed the primary role and function of the premises as a public house (Class A4). The Appellant contends that the evidence submitted supports the lawful use of the building as a public house (Class A4) with ancillary Cabaret space.

7.3. Each of the Appellant's grounds of appeal will be addressed individually replicating the format used above.

1. It is the Council's view that if the premises were clearly a public house, then prospective tenants and leasees would not report there is uncertainty regarding the existing lawful land use of the premises. The fact that the use of the premises includes a cabaret dance bar club use at ground floor and public house use at first floor results in the uncertainty identified by the appellant. However, the lawful use of the premises must be determined on the facts of the case and relevant planning law. The needs of the owner or the requirements of potential leasees are not relevant. The determination of the previous Lawful Development Certificate 03/07/2019 (2018/4031/P) provides the clarity of the lawful use that the appellant seeks.
2. The judgment as to whether a use is ancillary to another, or not, is one of fact and degree and thus fact sensitive. Officers have canvassed evidence via a questionnaire. The questions related to how the ground and first floor were used. The responses received came from a range of informants including those who were regular visitors and those who worked at the Black Cap. Respondents covered a time period from early 1980s until the time The Black Cap closed (April 2015).

Whilst an element of live entertainment would be regarded as ancillary to most A4 uses and this might include use of some of its floorspace as a dance floor or stage, the nature and scale of the cabaret dance bar use of the building is such that on the facts here it cannot be said to be ancillary to the A4 public house use. The ground floor was in effect a well-used dedicated cabaret dance bar of comparable size to the first floor public house use. As a matter of fact and degree, the cabaret use and club space use with music and dance was not ancillary to the use as a public house.

3. Concerns raised by the appellant regarding the delay in issuing a decision on the submitted CLEUD are not relevant to the determination of this appeal. However it is noted that a lawful development certificate was granted 03/07/2019 (ref 2018/4031/P). The CLEUD (2019/2271/P) which is the subject of this appeal was submitted on 29/04/2019, while the previous CLEUD (2018/4031/P) was being assessed. The difference between the evidence submitted in support of the Appeal application and the previous Lawful Development Certificate application is minimal. The applicant's description of the lawful use (as set out in the application form)

differs from that submitted for the previous application (as set out in the Applicant's 'CLEUD report' and the application form). The description of the lawful use matches the description provided to the Council (6/12/2018 and 20/5/2019) during the assessment of the first Lawful Development Certificate application. The only additional evidence consists of two web articles (customer reviews of the Black Cap). The additional evidence submitted does not contradict the previous evidence. The Appeal application is essentially a duplicate application. Given that there was a right of appeal against the first CLEUD decision, officers did not prioritise the determination of the second CLEUD.

4. The asset of community value listing categorises 'The Black Cap' as a public house. All correspondence prepared by the Council and Iceni Projects explicitly refer to The Black Cap as a 'public house' between 23 May 2013 and July 2015. This includes the Council's decision letter dated 8 April 2015 providing the council's reasons for why the definition of an asset of community value had been met. It is also noted that the ACV decision letter dated 8 April 2015 states: "*it is no ordinary gay pub as it also plays an important cultural role as a renowned venue for drag and cabaret performances*".

For the ACV, the Council was not making an assessment of the lawful planning use of the building. When the ACV nomination was discussed and reported different statutory questions were considered and the focus was on the use benefitting the local community rather than establishing the precise lawful use of the building. The CLEUD appeal does not involve judging whether the building is an asset of community value but what its lawful use is and whether it falls within a certain planning Use Class.

5. Prior to the CLEUD determined 03/07/2019 (ref 2018/4031/P), there have been no formal Council determinations on the use of the property.

The officer's report for planning application ref: 2012/1444/P includes the following in the assessment section:

The site as existing operates as a cabaret and nightclub (use class D2) on the ground floor with restaurant and pub on the first floor (use class A3/A4) with ancillary accommodation on second and third floors. The planning history for the site does not indicate when the ground floor pub use altered to a nightclub.

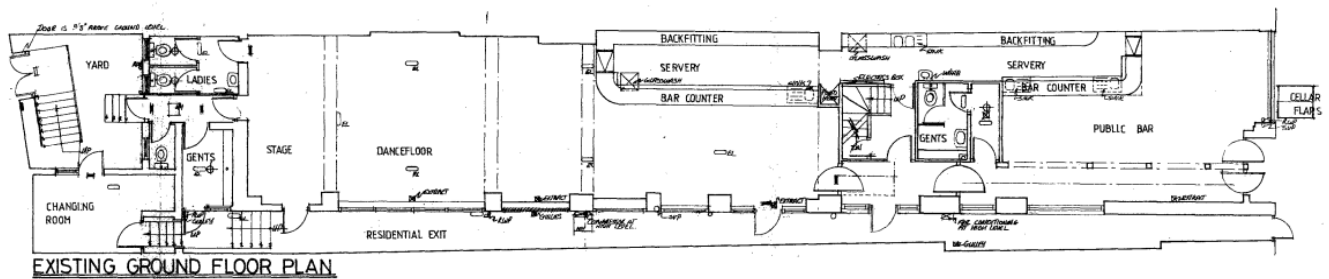
In the appeal APP-X5210-A-2184317 (relating to the refusal 2012/1444/P), the inspector notes that the "current ground and first floors are different in nature with the first floor being a more traditional bar. The Council's view is that the ground floor should be viewed as a sui generis use (cabaret/dance bar) but the difference between this and an A4 use with live music are matters of fact and degree and there have been no formal Council determinations on the current use of the ground floor"(emphasis added).

6. Section 191 (4) of the Town and Country Planning Act 1990 allows the Local Planning Authority to substitute or modify the description put forward by the applicant. The modified description is considered to be the lawful use. This description is based on the evidence and relevant planning law

and describes how the property has been used for a period of 10 years or more. If the Appellant did not agree with the modified description set out in the CLEUD decision notice dated 03/07/2019 (ref 2018/4031/P), they could have exercised their right of appeal. The Appellant was emailed the decision notice and delegated report for the CLEUD (ref 2018/4031/P) on 4th July 2019. The Appellant was advised in this email that if the application is refused or is refused in part, the Applicant may appeal to the Secretary of State. They were also advised, by virtue of substituted section 195(4) of the 1990 Act, a partial refusal of an application includes a modification or substitution of the description in the application.

The Council refutes the Appellant's claim that the description was modified owing to political expediency or local controversy. The description of development as applied for originally (under ref 2018/4031/P) was modified by the council in accordance with s.191(4) of the 1990 Act so that it accurately reflected the evidence gathered and relevant planning law. The Applicant/Appellant explicitly confirmed in a meeting that the purpose of the certificate applications was simply to provide clarity on the lawful use for marketing purposes – an approval meets this requirement whereas a refusal would not.

7. The CLEUD granted 03/07/2019 provides a formal determination by the Council as to the existing lawful use of the premises. The modified description of the use of the premises was based on the evidence and relevant planning law. Certainty regarding the existing lawful use has therefore been provided. Providing certainty with regard to future uses and business activities which may be able to take place at the Black Cap is not relevant for a CLEUD application.
8. The CLEUD application (2019/2271/P) which is the subject of this appeal was submitted on 29/04/2019, while the previous CLEUD application (2018/4031/P) was being assessed. Officers discussed the second CLEUD application (2019/2271/P) during a telephone conversation with the Appellant's agent shortly after submission (1/05/2019). The agent advised they had updated the description and decided to submit a new application as this was the easiest way for doing this. They confirmed they wanted the original CLEUD application determined first and then the new CLEUD application registered. A lawful development certificate was granted 03/07/2019 (ref 2018/4031/P). Given that there was a right of appeal against the first CLEUD decision, officers did not prioritise the determination of the second CLEUD.
9. The planning permission (ref 8903652) granted on 22/03/1990 shows how the building was laid out prior to the change of use of the first floor. The existing ground floor plan submitted with this application (dated October 1989) shows a public bar at the front of the site and a separate bar with dancefloor and stage (with changing room) at the rear of the site (all these elements are annotated on the 'existing plan').



It is agreed by the Appellant and the Council that the ground floor was used as cabaret dance bar. Any question as to whether a use is ancillary to another, or not, is a matter of fact and degree and each case has to be determined on its particular merits. To determine whether the ground floor cabaret dance bar is ancillary to the first floor pub, it is necessary to have regard to the nature and scale of the cabaret dance bar activity and its relationship to the public house use. Whilst an element of live entertainment would be regarded as ancillary to most A4 uses and this might include use of some of its floorspace as a dance floor or stage, the nature and scale of the cabaret dance bar use of the building is such that on the facts here it cannot be said to be ancillary to the A4 public house use. The ground floor was in effect a well-used dedicated cabaret dance bar of comparable size to the first floor public house use.

Applying the severability test, one would ask whether the alleged ancillary use could practically and viably operate on its own were the primary use of the premises to cease. If it could, then the use is very unlikely to be ancillary as there is clearly no linkage or dependency. Likewise, if the ancillary function of a true ancillary use were to cease, the primary use should remain the same. However, the cessation of the cabaret dance club space, which is said by the Appellant to be an ancillary use, would fundamentally change the use of the site. The use of the premises would be fundamentally different without the cabaret dance club use.

8. Conclusion

- 8.1. While some of the applicant's evidence refers to the Black Cap as a pub or public house, these references were without detailed descriptions of the nature or the use. This evidence was submitted to support the use of the land in planning terms but none of the organizations who issued these documents were making an assessment of the nature or the use. Therefore only limited weight can be attached to such evidence (which names the use rather than providing a detailed description of the use). The additional evidence submitted with the current application is consistent with and does not contradict the evidence assessed for the previous application (2018/4031/P).
- 8.2. Assessing the application in the light of the guidance set out in the judgment in *Burdle v. Secretary of State for the Environment* [1972] 1 W.L.R. 1207, it is concluded that there is not a single main purpose carried out at the subject property. Rather 171 Camden High Street is used for a mixed or composite use as a cabaret dance bar club use at ground floor and public house use at first floor. The two uses are interrelated and mutually supportive, but the relationship, scale and character of these uses is such that neither of them could be correctly viewed as ancillary to the other. The evidence

demonstrates that the mixed or composite use began more than ten years before April 2015 (the date of the closure of the premises) and has continued throughout the relevant 10 year period.

- 8.3. Section 191 (4) of the Town and Country Planning Act 1990 allows the Local Planning Authority to substitute or modify the description put forward by the applicant.
- 8.4. Given the additional evidence submitted with the current CLEUD application 2019/2271/P is consistent with and does not contradict the evidence assessed for the previous CLEUD application (2018/4031/P), the Council's assessment of the lawful use remains unchanged and is set out below.

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

9. **Recommendation:** Grant lawful development certificate with modified description as set out above.