

PLANNING APPLICATION FOR CHANGE OF USE FROM MIXED A1/A3 SUI GENERIS USE TO CLASS E RESTAURANT USE

PLANNING AND HERITAGE STATEMENT

**298-302 KENTISH TOWN ROWN, LONDON, NW5
2TG**

ON BEHALF OF BERBERE UK LIMITED

**TOWN & COUNTRY PLANNING ACT 1990 (AS AMENDED)
PLANNING (LISTED BUILDING AND CONSERVATION AREAS) ACT 1990**

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1. INTRODUCTION

- 1.1 Katie Priest Town Planning is instructed on behalf of Berbere UK Limited ("The Applicant") to submit an application for planning permission at the ground and basement floors at 298-302 Kentish Town Road, London, NW5 2TG in conjunction with their proposed operation of the site as a pizza restaurant. The proposed development is as follows:

"Change of use from mixed Class A1/A3 sui generis use to Class E restaurant"

- 1.2 The proposal will allow the applicant to operate their award-winning pizza restaurant from the site lawfully.
- 1.3 This Planning and Heritage Statement provides the background to the application, including details of the site and surrounding area, together with the relevant planning history, policy context and proposals and impact on heritage assets.
- 1.4 This Statement will consider whether the proposal is compliant with the policies at local level, as well as other material considerations, including the National Planning Policy Framework.

2. SITE AND SURROUNDINGS

- 2.1 The application site is located within the administrative area of Camden Council and is located at 298-302 Kentish Town Road. The site is located on the eastern side of Kentish Town Road in a block stretching from Leverton Place to the north to Leighton Road to the south.
- 2.2 The application site is edged in 'red' below and covers an area of 0.01ha.



Figure 1: Extract from the Site Location Plan

- 2.3 The application site is also known as 300 Kentish Town Road, but covers properties from 298-302 Kentish Town Road. It is situated within a three storey building which has most recently been occupied by The Rabbit Hole The Hutch as a restaurant at ground floor and basement area. The first and the second floors are occupied by

residential uses. There is existing extraction and ventilation to the rear of the site which has been used for the previous operators.



Photograph 1: The front elevation of the site (from Google Street View August 2021)

- 2.4 The site is located within the designated Kentish Town Town Centre and is a designated Primary Shopping Frontage. This is shown on the extract map below:

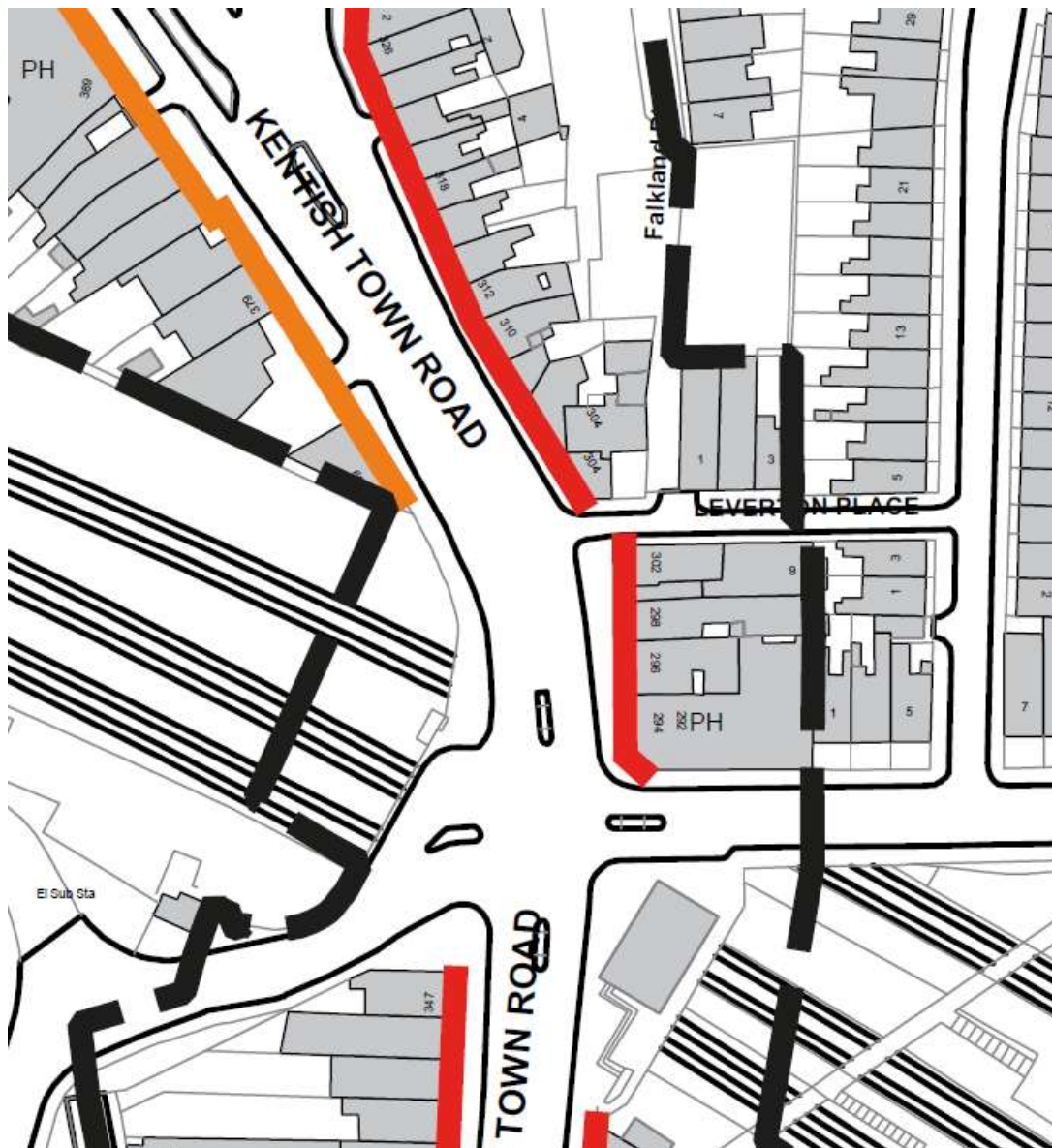


Figure 2: Extract from Camden Local Plan Policies Map Adopted Version June 2017

- 2.5 The site is located within the designated Kentish Town Conservation Area. However, the site is not a Listed Building. Despite not being listed, the site is considered to be a non-designated heritage asset in the Kentish Town Neighbourhood Plan, having once been a Police Station. The nearest Listed Buildings are Nos 1 & 2 Leverton Street to the rear of the site and the Assembly Public House located to the south of the site on the corner of Kentish Town Road and Leighton Road. There are other listed buildings to the north on Kentish Town Road and on Leverton Street.

2.6 The map below indicates the site and surrounding listed buildings.



Figure 3: Extract from Camden Council's online mapping tool showing the site in the context of Listed Buildings; blue indicates Grade II Listed Buildings.

2.7 The site is in Flood Zone 1, the area least likely to flood. There are no other relevant designations affecting the site.

3. PROPOSAL

- 3.1 This application is a proposal for the change of use of the site from a mixed A1/A3 sui generis use to a Class E restaurant. The proposal is for the change of use only; no external alterations are proposed to the property as part of this application.
- 3.2 The existing permission at the site is for a sui generis use, with a condition which set out a minimum floorspace area that must be used for Class A1 (retail) purposes, as well as a condition which prevents the sale of any ancillary takeaway from the site.
- 3.3 The applicant intends to occupy the site as a pizza restaurant and will operate a limited amount of ancillary takeaway from the restaurant. As such, this application is to facilitate their occupation of the site and will allow them to lawfully operate from this location.
- 3.4 There is existing extraction and ventilation equipment at the site from previous occupiers. The applicant can occupy the site utilising this existing plant, so external plant is not included in this application. If a new arrangement of plant is required at a later date, this will be subject to a further planning application.

4. PLANNING HISTORY

- 4.1 The site's planning history relates mainly to its use as a commercial unit.
- 4.2 Planning permission **2004/3464/P** was granted in November 2004 for the following development:

"Reconfiguration of existing retail (class A1) and restaurant (class A3) uses at basement and ground floor levels to increase the proportion of A3 floor space and reduce the proportion of A1 floor space, the relocation of the entrance for flats on the upper floors from Kentish Town Road to the site elevation on Leverton Place and installation of new shopfront."

- 4.3 Condition 5 of this permission required that the provision of A1 retail floorspace within the building shall not fall below the level of 59 sqm.
- 4.4 Condition 6 of this permission stated that tables and chairs should not be located outside the front of the premises.
- 4.5 Condition 7 of this permission stated that there shall be no takeaway sales from the restaurant.
- 4.6 Condition 8 of the permission set out the opening hours from 11am to 11pm Mondays to Fridays and 11am to midnight on Saturdays. The use was not permitted to open on Sundays.
- 4.7 Permission **2008/0781/P** was granted in 2008 to vary condition 8 of permission 20/3464/P to allow the opening hours to 07.00am to midnight, Monday to Thursday, 07.00am to 00.30am Friday and Saturday and from 07.00am to 11.00pm on Sundays and not at all on Bank Holidays, as well as removing condition 6 of 2004/3464/P to allow tables and chairs to be placed outside the building. This approval also required the tables and chairs from the forecourt to be removed by 11pm every evening and for the forecourt not to be used for food or drink purposes after 11pm.
- 4.8 A further amendment to the opening hours condition, **2009/0652/P** was granted in November 2009. This allowed the site to open from 7.00-Midnight Monday to Thursday, 7.00-00.30 on Friday and Saturday and 07.00-11.00 on Sundays. This amendment removed the restriction regarding opening on Bank Holidays.

- 4.9 Other applications at the site relate to minor works such as signage or shopfront alterations, or to the residential uses on the upper floors of the property.

5. PLANNING POLICY FRAMEWORK

5.1 Section 38(6) of the Planning and Compulsory Purchase Act 2004 states that planning applications should be determined in accordance with the 'Development Plan' unless material considerations indicate otherwise.

5.2 In this instance, the Camden Local Plan (adopted 3 July 2017) is the key document for the borough, in conjunction with the Policies Map Alterations, (adopted in June 2017). Other *material considerations* that are relevant to the development proposals include the following:

- National Planning Policy Framework (NPPF) (published February 2019);
- National Planning Policy Guidance (NPPG);
- The London Plan (March 2021)
- The Kentish Town Neighbourhood Forum Neighbourhood Plan adopted September 2016
- Camden Planning Guidance Town Centres and Retail (January 2021)

National Planning Policy Framework (2019)

5.3 **Para 11** outlines the importance of an up-to-date development plan, stating that proposals that accord with an up-to-date development should be approved without delay.

5.4 **Para 80** of the NPPF relates to support for business via the planning system. This states:

"Planning policies and decisions should help create the conditions in which businesses can invest, expand and adapt. Significant weight should be placed on the need to support economic growth and productivity, taking into account both local business needs and wider opportunities for development..."

5.5 **Para 81** goes on to state that planning policies should (inter alia):

"...c) seek to address potential barriers to investment, such as inadequate infrastructure, services or housing, or a poor environment; and

d) be flexible enough to accommodates needs not anticipated in the plan, allow for new and flexible working practices..., and to enable a rapid response to changes in economic circumstances."

- 5.6 **Paras 117 - 118** of the NPPF states that planning decisions should promote and support development of under-utilised land and buildings, especially if this would help to meet identified needs for housing.

The London Plan (March 2021)

- 5.7 **Policy GG2** of the London Plan relates to making the best use of land. This seeks to create sustainable mixed-use places which make the best use of land. The policy requires planning decision- takers to (inter alia) enable the development of brownfield land.
- 5.8 **Policy GG5** relates to growing a good economy. This policy seeks to conserve and enhance London's existing global economy and ensure that economic success is shared by Londoners. The policy seeks to promote and strengthen London's economy overall.
- 5.9 **Policy E2** relates to providing suitable business space. This requires the London Boroughs to support businesses to meet the needs of businesses and firms in their areas looking to expand or start-up.
- 5.10 **Policy SD6** relates to Town Centres and High Streets. This supports the vitality and viability of London's town centres, and states these should be promoted and enhanced by (inter alia):

1) *"Encouraging strong, resilient, accessible and inclusive hubs with a diverse range of uses that meet the needs of Londoners, including main town centre uses, night-time economy, civic, community, social and residential uses..."*

5) *Ensuring town centres are the primary locations for commercial activity beyond the CAZ and important contributors to the local as well as London-wide economy."*

5.11 The policy goes on to state that:

"B. The adaptation and diversification of town centres should be supported in respect to the challenges and opportunities presented by multi-channel shopping and changes in technology and consumer behaviour, including improved management of servicing and deliveries."

5.12 Policy SD6 also states:

"F. The management of vibrant daytime, evening and night-time activities should be promoted to enhance town centre vitality and viability..."

5.13 **Paragraph 2.6.4** of the London Plan is important. This states:

*"Over the years, town centres have absorbed change and new technologies. To continue to thrive they will need to evolve and diversify in response to current and future economic trends, technological advances, consumer behaviours, and the development of the 24-hour city. This **need for adaptation and diversification**, together with their good public transport accessibility, makes many town centres appropriate locations for residential-led intensification or mixed-use development that makes best use of land. Bringing new residents into town centres can enhance their commercial role, increasing footfall, particularly to support convenience retail, leisure uses and the evening and night-time economy. Town centres will also need to diversify the range of commercial uses, particularly smaller centres and those with projected decline in demand for retail floorspace. Boroughs and others should ensure their strategies, policies and decisions encourage a broad mix of uses while protecting core retail uses to meet demand."*

5.14 **Policy E9** relates to Retail, Markets and Hot Food Takeaways. This policy refers specifically to proposals for hot food takeaway in Class A5 use (now sui generis use class) and states that these should not be permitted where these are within 400m walking distance from entrances and exits of schools. However, the policy does not refer to restaurant uses which propose an ancillary element of takeaway use.

Local Planning Policy

Adopted Camden Local Plan (2017)

- 5.15 **Policy E1** of the Local Plan seeks to secure a successful and inclusive economy in Camden. The policy seeks to support local businesses operating within the borough and help to meet their needs.
- 5.16 **Policy A1** of the adopted Local Plan relates to managing the impact of development. This states that the Council will seek to ensure that the amenity of communities, occupiers and neighbours is protected and will require mitigation measures where necessary. This will be balanced against the needs of development and the characteristics of local areas and communities.
- 5.17 **Policy TC1** relates to retail development. This confirms that shopping and related uses will be focused in existing centres. The Council will apply the sequential approach to development.
- 5.18 **Policy TC2** relates to Camden's shopping centres. This confirms that the Council will promote successful and vibrant centres. The Council will (inter alia) provide for a range of shops, food, drink and other suitable uses. This policy also confirms that the Council will *"protect the primary frontages as locations with a high proportion of shops (A1) in order to maintain the retail function of the centre;"*. Given that Class A1 has now been superseded and amalgamated into Class E, this part of the policy is considered to be out of date.
- 5.19 **Paragraphs 9.29 – 9.30** of the adopted Local Plan acknowledge the role that food, drink and entertainment uses can have in the night time economic, socially, economically and in job provision. However, the paragraphs also state that there can be conflicts between such uses and residents living locally.
- 5.20 **Paragraph 9.31** states that food and drink uses, can affect the viability and vitality of a centre by eroding the retail offer. This paragraph states that secondary frontages are the preferred location of such uses. However, this paragraph is considered to be superseded by the recent changes to the Use Classes Order, and amalgamation of Class E.
- 5.21 **Policy TC4** relates to Town Centre Uses. This policy states that non-retail town centre uses should not cause harm to the character, function, vitality and viability

of a centre and the amenity of neighbours. In assessing applications for such uses, the Council will consider:

- "a. the effect of development on shopping provision and the character of the centre in which it is located;*
- b. the cumulative impact of food, drink and entertainment uses, taking into account the number and distribution of existing uses and nonimplemented planning permissions and any record of harm caused by such uses;*
- c. the Council's expectations for the mix and balance of uses within frontages for each centre are set out in Appendix 4;*
- d. the individual planning objectives for each centre, as set out in the supplementary planning document Camden Planning Guidance on town centres and retail;*
- e. impacts on small and independent shops and impacts on markets;*
- f. the health impacts of development;*
- g. the impact of the development on nearby residential uses and amenity and any prejudice to future residential development;*
- h. parking, stopping and servicing and the effect of the development on ease of movement on the footpath;*
- i. noise and vibration generated either inside or outside of the site*
- j. fumes likely to be generated and the potential for effective and unobtrusive ventilation; and*
- k. the potential for crime and antisocial behaviour, including littering."*

5.22 **Policy TC4** goes on to state that in appropriate cases, planning conditions or obligations would be considered to address the following issues:

- "l. hours of operation;*

- m. noise/vibration, fumes and the siting of plant and machinery;*
- n. the storage and disposal of refuse and customer litter;*
- o. tables and chairs outside of premises;*
- p. community safety;*
- q. the expansion of the customer area into ancillary areas such as basements;*
- r. the ability to change the use of premises from one food and drink use or one entertainment use to another (within Use Classes A3, A4, A5 and D2); and*
- s. the use of local management agreements to ensure that the vicinity of premises are managed responsibly to minimise impact on the surrounding area."*

Kentish Town Neighbourhood Forum Neighbourhood Plan Adopted September 2016

- 5.23 The site is located within the Kentish Town Neighbourhood Forum Area and thus falls within the remit of policies in the Neighbourhood Plan.
- 5.24 The Neighbourhood Plan sets out policies which seek to restrict changes of use in the Secondary Frontages of Kentish Town Town Centre. However, it does not include any policies relating to the Primary Frontage.

Camden Planning Guidance Town Centres and Retail January 2021

- 5.25 Guidance in this Supplementary Planning Guidance document reiterates the policies already contained within the adopted Local Plan.
- 5.26 **Paragraph 4.51** of the Planning Guidance states that the Council will not permit planning permission where the level of retail uses in a frontage will drop below 75% in a primary frontage. **Paragraph 4.52** goes on to state that where the number of retail premises in a frontage is already below that percentage, then no further loss of retail will be permitted. **Paragraph 4.53** states that the Council will generally resist concentrations of non-retail uses, such as more than 2 consecutive premises in a primary frontage being within non-retail uses.

5.27 It is unclear why this document, which was published in January 2021, does not refer to the amendments to the Use Classes Order from 2020 which amended the Use Classes of retail and other town centre uses. As such, this appears to be out of date in this respect.

6. PLANNING ASSESSMENT

6.1 Having reviewed the relevant planning policy at the national and local level, the key issues in determination for this application are set out below:

1. The existing use of the site;
2. The acceptability of the proposed use of the site;
3. Impact on neighbouring amenity; and
4. Ancillary takeaway use.

6.2 Relevant issues are considered in turn below.

The Existing Use of the Site

6.3 The site's planning history indicates that it has a lawful use as a mixed Class A1/Class A3 sui generis use. Condition 5 of the planning permission 2004/3464P from 2004 which granted the mix of uses at the site stated that 59sqm must be used for Class A1 purposes. As such, the lawful use of the site is sui generis, with a condition requiring a certain amount of floorspace to be in Class A1 use.

6.4 Notwithstanding the site's lawful use, it would appear that the various previous occupants at the site have been in breach of this condition for a number of years. The most recent operators appear to have been using the site as a restaurant without adhering to Condition 5. It does not appear that the Council have sought to enforce against this breach of condition.

6.5 It is therefore considered that the site's lawful use is a mix of Class A1 and Class A3 and is therefore a sui generis use. It is noted that both these uses have been superseded by the alterations to the Use Classes Order in September 2020 and that both are now considered to be in Class E.

The Acceptability of the Proposed Use of the Site

6.6 The proposal is to change the use of the site from a mix of retail and restaurant (sui generis) to restaurant (Class E).

- 6.7 Given that the existing lawful uses of the site are both now classified as Class E, it is considered that this use is acceptable in principle and that planning permission should be granted.
- 6.8 It is notable, that as stated above, previous occupants have operated the site as a Class A3 (now Class E) restaurant and have breached the condition requiring 59sqm of floorspace to be used for retail purposes. The Council have not taken any enforcement action on this issue. As such, this application seeks to regularise what has already been occurring at the site for over ten years to enable the applicants to lawfully occupy the site.
- 6.9 The London Plan was published following the amendments to the Use Classes Order in 2021. The London Plan therefore acknowledges the Government's intention to reduce bureaucracy and increase flexibility relating to town centre uses, with the introduction of Class E to cover the majority of town centre uses. Policy SD6 of the London Plan is supportive of diversification of town centre, stating: *"The adaptation and diversification of town centres should be supported..."*
- 6.10 The London Plan is reflective of the Government's alterations to the Use Classes Order in 2020, which amalgamated various high street retail uses, as well as some other community and business uses into a new Class E – Commercial, Business and Service use.
- 6.11 The reason behind this amalgamation is partly in response to the pandemic, but also in recognition that businesses including the retail and hospitality industry need to be able to respond quickly and flexibly to societal changes. This also acknowledges that hospitality businesses such as restaurants play an important role in maintaining the vitality and viability of high streets and town centres as more "traditional" retail uses. In this regard, the introduction of the new Class E effectively supersedes planning policies which seek to restrict some of the uses within Class E and which promote others. They are now all the same use class and should be considered as such.
- 6.12 Paragraph 9.31 of the adopted Local Plan states that food and drink uses can harm the viability and vitality of town centres by eroding the retail offer. However, this is now considered to be contradictory to the Government's new approach to town centres, where restaurants are considered as an important contributor to town centre vitality and viability and not harmful.

- 6.13 In any event, this proposal should be considered in respect of the current use of the application site; it is an existing non-retail use with a lawful use mixing a restaurant use with an element of retail. This is a mixed sui generis use. The proposed change of use at the site will not result in the loss of a retail unit, as the site is already not in retail use. The impact of the proposals in land use terms is negligible and in real terms, is nil, given that the site has not operated within its lawful use for more than 10 years.
- 6.14 Additionally, it is important to consider that if the site were in lawful retail (formerly Class A1) use, the use of the site as a restaurant would also not constitute development and the site could operate as a restaurant without any planning permission or control.
- 6.15 It is therefore considered that these are material considerations which should be weighted more heavily than Policy TC4 of the adopted Local Plan when considering the merits of this proposed change of use. It is considered that the proposal is acceptable in principle and that planning permission should be granted.

Impact on Neighbouring Amenity

- 6.16 The proposed change of use, which is effectively just regularising a use which pre-exists at the site, will have an acceptable impact on residential amenity.
- 6.17 The site is located in a primarily commercial area in Kentish Town Town Centre, where there is significant late night noise and activity. Surrounding uses include night time economy uses such as The Assembly public house and various restaurants and take aways.
- 6.18 Notwithstanding this, the site is already operating in a sui generis use, which has been utilised as a restaurant use for the past ten years. The current lawful planning permission contains conditions designed to protect residential amenity, and for the most part, similarly worded conditions would be acceptable to the applicant.
- 6.19 The 2004 application, 2004/3464/P, contained conditions to do with waste storage, noise from plant, extraction and ventilation, sound insulation between the site and the upper floors and opening hours. The opening hours were subsequently varied by applications 2008/0781/P and then 2009/0652/P which allowed amended opening hours and for the site to open 7 days a week. Application 2008/0781/P

also permitted the use of the front forecourt of the property for tables and chairs and for this to open until 11pm daily.

- 6.20 The applicant would be happy to adhere to these conditions and for similar opening hours and noise limits to be applied to any change of use application.
- 6.21 In terms of extraction and ventilation, this is already present on site for the existing sui generis use and the applicant could utilise this without the need to apply for planning permission, provided that they adhere to relevant noise guidance. As such, extraction equipment and plant does not form part of this application.
- 6.22 However, if extraction and ventilation equipment is proposed in the future, then the applicant would be happy to discharge a condition relating to this, or otherwise submit a separate planning permission. Any plant proposed would adhere with the Council's noise standards.
- 6.23 This application is purely for a change of use of the site and does not involve any external works including new plant. The application should be considered on this basis.

Ancillary Takeaway Use

- 6.24 The applicant intends to operate a new pizza restaurant from the site. The pizza restaurant will mainly cater for customers who eat on site. However, a small portion of the applicant's business involves takeaway pizza.
- 6.25 This small, but important portion of the business is crucial to running a viable restaurant at the site. Repeated lockdowns and pausing of the hospitality industry as a whole have demonstrated that restaurants need to offer this service in order to remain viable during tough conditions.
- 6.26 The current permission at the site includes a condition which limits there being any takeaway use from the site. It is requested that any new planning permission issued does not limit the restaurant from offering an ancillary amount of takeaway use.
- 6.27 The applicant is not planning on running a takeaway business from the site, or indeed even a mix of takeaway and restaurant. Rather, they are intending to operate as a restaurant with the ability to offer an ancillary amount of takeaway

which will be in addition to the main use. Although this will be a small part of their business, it is important to ensure that the restaurant is viable.

- 6.28 It is notable that the Council have granted planning permission for a restaurant recently in May 2021 at 67 Whitfield Street via 2020/5930/P. In this decision the Council did not impose a restriction on offering an ancillary takeaway service from the site. This demonstrates that the Council do not currently consider that imposing restrictions on ancillary takeaway from restaurants to be necessary in more recent permission.
- 6.29 An application was granted via 2021/0021/P at 306 Kilburn High Street in April 2021. This application was for a mixed use restaurant and takeaway. In reading this application, it appears that the Council were happy to grant such a use without any management plan for the takeaway. The unit in question at 306 Kilburn High Street was significantly smaller than the application site and this necessitated the use to be a mix of takeaway and restaurant rather than as ancillary to the restaurant use. This is not the case at the application site, where there are intended to be over 100 covers on the ground and basement floor and utilising the outdoor terrace are. At the application site, the use will clearly be a Class E restaurant, with the takeaway use being ancillary and a small part of the overall business.
- 6.30 In November 2021, a notable appeal decision was approved at 68-70 Wardour Street via Appeal APP/X5990/W/21/3270770. A copy of this Decision Notice is at Appendix 1.

APPENDIX 1 – APPEAL APP/X5990/W/21/3270770 AT 68-70 WARDOUR STREET

- 6.31 This appeal was against the failure of Westminster City Council to take a decision against a Section 73 application to remove a condition applied to a planning application. The condition in question was worded: *"You must not sell any hot-food take-away on the premises, nor operate a delivery service, even as an ancillary part of the primary Class A3 use."*
- 6.32 The Inspector considered at paragraph 10 that the main issue was *"...whether condition 6 restricting a delivery service from the premises is reasonable and necessary having regard to the effects on the development on living conditions of neighbouring properties and the need to support sustainable forms of transport.."*

6.33 At paragraph 16 of the appeal decision, the Inspector set out the Council and third party concerns regarding delivery services which expand the catchment area and number of non-eat diners, reduce limited cycle and vehicle parking spaces, detract from the pedestrian environment, with concerns raised about queueing, non-compliance with highways rules, as well as concerns with noise and disturbance as a result.

6.34 However, at paragraph 17, the Inspector states:

"The changes to the Use Classes Order, including the revocation of Class A and its partial replacement with Class E is recognised as better reflecting the diversity of uses found on high streets, and providing flexibility for businesses to adapt and diversity to meet changing demands. By creating a broader use class, the revised Order acknowledges the importance of a flexible approach to the use of commercial buildings, and the acceptance that a wide range of uses can be accommodated in town centres. Concerns about potential harms associated with some businesses, and recognition of the need for local control to be retained is reflected in the exclusion of certain uses from Class E including former Class A5 hot food takeaway uses. The limitation in Class E and exclusion of hot food takeaways from it is reflected in Policy 16 of the WCP which only supports deliveries from restaurants and cafes where it is demonstrated that the facilities do not result in a change of use to a hot food takeaway."

6.35 At paragraph 18, the Inspector goes on to state:

"Although the area is likely to be busy during the day many of the premises near to the appeal site are in uses that will open later into the evening and the area around the appeal site will also experience elevated levels of noise and disturbance, vehicles and footfall in the evenings and later at night. Within the terms of the planning permission hours of opening are restricted to protect the environment of residents adjacent to the building after certain hours. Moreover, a restaurant use, to comply with the parameters of Class E sale of food and drink for consumption (mostly) on the premises, would place a limitation on the delivery of food."

- 6.36 In terms of the impact of permitting ancillary takeaway on highways, the Inspector states at paragraph 19:

"I acknowledge that there is limited spare capacity in the cycle stands and parking bays within close proximity to the appeal premises, however, there is no evidence before me that a delivery service would occupy more cycle and parking spaces than customers collecting their food from a takeaway service. Further, as part of a street in which there are a variety of uses including other restaurants and cafes, there are no site-specific circumstances that distinguish the appeal site from its immediate surrounding commercial ground floor uses that would suggest the need to restrict a delivery service."

- 6.37 In terms of the potential for consumption on the street and concerns regarding packaging, the Inspector states at paragraph 20:

"The Council refers to there being no information provided about how products would be packaged to encourage the consumption of take away food at home rather than on the street. However, it is likely that where a delivery service is used food will be packaged to be eaten at the delivery destination and unlikely to be consumed on the street."

- 6.38 She concludes at paragraph 21:

"Overall, I conclude that condition 6 is not necessary to protect the living conditions of neighbouring properties or to support sustainable forms of transport and there would be no conflict with Policies 7, 16 E, 25, 28(B), 32(D), 33, 38(c), 43 (D) of the WCP where these policies seek to protect the living conditions of residents, promote sustainable transport and restrict take away facilities in certain circumstances."

- 6.39 The appeal site at Wardour Street referred to above is a similar circumstance to the application site at Kentish Town Road. It is considered that ancillary takeaway could be accommodated at the application site in a similar fashion without harming the amenity of neighbouring residents or sustainable transport.

- 6.40 It is also notable that as the appeal at Wardour Street related to a restaurant use with the takeaway part being only ancillary, the Inspector gave no consideration to Policy E9 of the London Plan which relates to takeaway uses. As such, it is considered that Policy E9 is not relevant to this application, as a takeaway use is not proposed – only ancillary takeaway will be offered.
- 6.41 Any takeaway occurring from the site or use of a delivery service would also be bound by the conditions on the site in terms of opening hours and therefore would not operate at anti-social hours. Such an offer would be limited by the lawful use of the site, being at a level which is ancillary to the restaurant use. By virtue of this, any ancillary would be limited to ensure that a change of use would not be deemed to have occurred.
- 6.42 It is notable that there is on street cycle parking immediately to the front of the site which could be used to accommodate a delivery service. However, any other form of transport used for a delivery service, and indeed all customers visiting the site, would be bound by highway rules and regulations with regard to parking and stopping.
- 6.43 As such, it is considered that it is acceptable for the site to operate as a Class E restaurant use with no restriction on ancillary levels of takeaway either via collection or via a delivery service.
- 6.44 The applicant would be happy to submit an operational management plan for approval for ancillary takeaway if required by planning condition.

7. HERITAGE STATEMENT

- 7.1 The site is located within the Kentish Town Conservation Area and is located within the vicinity of Listed Buildings. The site itself is considered to be a non-designated heritage asset.
- 7.2 However, the proposals set out in this application relate only to the use of the site and do not propose any external alterations to the property. As such, this will not impact the character and appearance of the heritage assets.

8. CONCLUSION

- 8.1 This application is for planning permission for a change of use from sui generis mixed use Class A1/A3 to a Class E restaurant use at 298-302 Kentish Town Road.
- 8.2 This Planning and Heritage Statement has demonstrated that the development is acceptable in principle. It has been shown that the site is an existing non-retail use that has been used as a restaurant for more than 10 years. This planning application will regularise the existing use of the site.
- 8.3 This planning application is made in light of recent amendments to the Use Classes Order which emphasises flexibility and diversity of high street uses. This update to how the government classes high street uses is an important material consideration and should be taken into account the by decision maker.
- 8.4 It should also be noted that the applicant could also operate from the site under the existing planning permission lawfully as a restaurant, albeit with some floorspace given over to retail; previous occupiers have done so, albeit they have not been in compliance with this condition and the Council have not taken enforcement action. To occupy the site in compliance with this condition would be harmful to the viability of the applicant's intended use of the site. However, this is a realistic fallback position and the decision taker should consider this as a robust fallback and material consideration in the assessment of the acceptability of the site.
- 8.5 The proposal has been demonstrated to be acceptable with regard to impact on the amenity of nearby residential uses; most of the conditions imposed on the previously approved applications at the site could be reimposed or adhered to to ensure this is maintained.
- 8.6 It has been shown that an ancillary amount of takeaway should be permissible from the application site. The applicant does not intend to operate a mixed use restaurant and takeaway at the site. However, a limited and ancillary amount is crucial to the viability of their business and is in accordance with the Government's thrust towards flexibility in the high street.
- 8.7 Accordingly, it is considered that the proposal is acceptable and that planning permission should be granted.

APPENDIX 1

APPEAL APP/X5990/W/21/3270770 AT 68-70 WARDOUR STREET

Appeal Decisions

Site visit made on 19 October 2021

by Diane Cragg DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 22 November 2021

Appeal A: Ref: APP/X5990/W/21/3270770

68-70 Wardour Street, London W1F 0TB

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a failure to give notice within the prescribed period of a decision on an application for planning permission under section 73 of the Town and Country Planning Act 1990 for the development of land without complying with conditions subject to which a previous planning permission was granted.
 - The appeal is made by Sapcote Group PLC against City of Westminster Council.
 - The application Ref 20/06834/FULL is dated 27 October 2020.
 - The application sought planning permission for flexible use of the ground and basement floors for either retail (Class A1) or restaurant use (Class A3), without complying with a condition attached to planning permission Ref 20/01448/FULL, dated 23 June 2020.
 - The condition in dispute is No 6 which states that: You must not sell any hot-food take-away on the premises, nor operate a delivery service, even as an ancillary part of the primary Class A3 use.
 - The reason given for the condition is: We cannot grant planning permission for unrestricted use in this case because it would not meet TACE 9 of our Unitary Development Plan that we adopted in January 2007.
-

Appeal B: Ref: APP/X5990/W/21/3270773

68-70 Wardour Street, London W1F 0TB

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a failure to give notice within the prescribed period of a decision on an application for planning permission under section 73 of the Town and Country Planning Act 1990 for the development of land without complying with conditions subject to which a previous planning permission was granted.
 - The appeal is made by Sapcote Group PLC against City of Westminster Council.
 - The application Ref 20/06833/FULL is dated 27 October 2020.
 - The application sought planning permission for flexible use of the ground and basement floors for either retail (Class A1) or restaurant use (Class A3), without complying with a condition attached to planning permission Ref 20/01448/FULL, dated 23 June 2020.
 - The condition in dispute is No 10 which states that: You must apply to us for approval of details of secure cycle storage for the retail or restaurant use. You must not occupy the retail or restaurant use hereby approved until we have approved what you have sent us. You must then provide the cycle storage in line with the approved details prior to occupation. You must not use the cycle storage for any other purpose.
 - The reason given for the condition is: To provide cycle parking spaces for people using the development as set out in Policy 6.9 (Table 6.3) of the London Plan 2016 (R22FA)
-

Decision

1. **Appeal A** -The appeal is allowed, and planning permission is granted for flexible use of the ground and basement floors for either retail or restaurant use at 68-70 Wardour Street, London W1F 0TB in accordance with the

application Ref 20/06834/FULL dated 27 October 2020 without complying with condition 6 previously imposed on planning permission Ref: 20/01448/FULL, dated 23 June 2020, and subject to the conditions set out in the schedule at the end of this decision.

2. **Appeal B** - The appeal is allowed, and planning permission is granted for flexible use of the ground and basement floors for either retail or restaurant use at 68-70 Wardour Street, London W1F 0TB in accordance with the application Ref 20/06834/FULL dated 27 October 2020 without complying with condition 10 previously imposed on planning permission Ref: 20/01448/FULL, dated 23 June 2020, and subject to the conditions set out in the schedule at the end of this decision.

Procedural Matters

3. As set out above there are two appeals on this site. Each appeal seeks to vary a different condition of the original planning permission. I have considered each proposal on its individual merits. However, to avoid duplication I have dealt with the two schemes together, except where otherwise indicated.
4. The appeals relate to variation of condition applications that were not determined by the Council within the prescribed period. The Council has provided a statement of case which sets out the reasons why it would not support the discharge of the conditions although for reasons I come to later the Council accepts that condition 6 could be varied. I have had regard to the parties' submissions in establishing the main issues which I set out below.
5. Since the variation of condition applications were submitted the Westminster City Plan 2019 – 2040 (the WCP) was formally adopted in April 2021; the London Plan 2021 (the LP 2021) was formally adopted in March 2021; and a revised version of the National Planning Policy Framework (the Framework) was published on 20 July 2021. The main parties have had the opportunity to comment on the implications of these changes for their cases. My decision is made in the context of the relevant policies and guidance within the WCP, the LP 2021 and the Framework. I am satisfied that the parties' interests have not been prejudiced by this approach.
6. The Government reformed the Town and Country Planning (Use Classes) Order 1987 (as amended) (Use Classes Order) from 1 September 2020 to, among other things, revoked Class A1 and Class A3 and create a new 'E' use class. Although Class A1 and Class A3 are referred to in the banner heading above, I have had regard to the changes to the Use Classes Order in my consideration of the appeals and my decisions omit references to Class A1 and Class A3 to reflect these changes.

Background

7. Planning permission was granted for the basement and ground floor of the appeal premises as a mixed-use café /bakery (sui generis) in 2011¹. Subsequently variations to the conditions of that permission were allowed². Conditions on both permissions require cycle parking and restrict the operation of a hot food delivery service from the premises. The Council confirms that this permission was implemented.

¹ RN: 11/06088

² RN: 14/09082

8. In 2018 Planning Permission was granted for use of the basement and ground floor for retail and restaurant purposes together with various works concerning plant and machinery³. I have been provided with a copy of the decision notice. There is no condition on this permission restricting cycle parking and whilst a delivery service is restricted, takeaways are not.

Use of the ground floor and basement

9. The Council considers the appeal site can be occupied in accordance with the 2011 planning permission, as amended by the 2014 permission, for uses within Class E of the Use Classes Order, this would include the sale of food and drink for consumption (mostly) on the premises. Within the context of an appeal under section 78 of the Act it is not for me to formally determine the lawful use of the site. Nevertheless, the Council accepts that the building can operate as a restaurant with an ancillary take away facility and does not therefore seek to pursue the takeaway restriction within condition 6.

Main Issues

10. Having regard to the above, in respect of Appeal A, the main issue is whether condition 6 restricting a delivery service from the premises is reasonable and necessary having regard to the effects of the development on living conditions of neighbouring properties and the need to support sustainable forms of transport.
11. In respect of Appeal B, the main issue is whether condition 10 requiring cycle parking is reasonable and necessary having regard to the need to promote cycling as a sustainable transport mode.

Reasons

12. The appeal site is the vacant ground floor and basement of a four-storey building last occupied as a Latin food and wine bar within Soho Conservation Area. The upper floors of the building are in residential use.
13. Wardour Street includes a mix of uses; generally, there are commercial premises at ground floor with offices and residential uses at upper floors including residential dwellings above and opposite the appeal site. Within the commercial premises at ground floor, there are a range of uses including cafes and restaurants.
14. A one-way system for traffic operates outside the appeal site. In the general vicinity of the appeal site, there are sections of single and double yellow lines together with lengths of on-street permit holders/pay & display parking bays. There is secure cycle parking on the pavement at the end of Meard Street, and a public bicycle hire scheme and motorcycle parking on Wardour Street close by. A pedestrian crossing adjacent to the appeal site restricts parking to part of the appeal site frontage and the pavement here is relatively narrow.

Appeal A

15. Spatial Policy 2 of the WCP identifies that Wardour Street is within the West End Retail and Leisure Policy Area where over the plan period certain priorities will be delivered including a diverse evening and night-time economy and

³ RN 18/05649/FULL

enhanced cultural offer. Policy 16 supports food, drink and entertainment proposals of a type and size appropriate to their location.

16. The Council and third parties are concerned that a delivery service would expand the catchment area and the number of non-eat in dinners, reduce limited available cycle and vehicle parking spaces, and detract from the pedestrian environment with particular concern about queuing outside the site and non-compliance with highway rules. There are also concerns about the potential for increased noise and disturbance resulting from a delivery service.
17. The changes to the Use Classes Order, including the revocation of Class A and its partial replacement with Class E is recognised as better reflecting the diversity of uses found on high streets, and providing flexibility for businesses to adapt and diversify to meet changing demands. By creating a broader use class, the revised Order acknowledges the importance of a flexible approach to the use of commercial buildings, and the acceptance that a wider range of uses can be accommodated in town centres. Concerns about potential harms associated with some businesses, and recognition of the need for local control to be retained, is reflected in the exclusion of certain uses from Class E including former Class A5 hot food takeaway uses. The limitations in Class E and exclusion of hot food takeaways from it is reflected in Policy 16 of the WCP which only supports deliveries from restaurants and cafes where it is demonstrated that the facilities do not result in a change of use to a hot food takeaway.
18. Although the area is likely to be busy during the day many of the premises near to the appeal site are in uses that will open later into the evening and the area around the appeal site will also experience elevated levels of noise and disturbance, vehicles and footfall in the evenings and later at night. Within the terms of the planning permission hours of opening are restricted to protect the environment of residents adjacent to the building after certain hours. Moreover, a restaurant use, to comply with the parameters of Class E sale of food and drink for consumption (mostly) on the premises, would place a limitation on the delivery of food.
19. I acknowledge that there is limited spare capacity in the cycle stands and parking bays within close proximity to the appeal premises, however, there is no evidence before me that a delivery service would occupy more cycle and parking spaces than customers collecting their food from a takeaway service. Further, as part of a street in which there are a variety of uses including other restaurants and cafes, there are no site-specific circumstances that distinguish the appeal site from its immediate surrounding commercial ground floor uses that would suggest the need to restrict a delivery service.
20. The Council refers to there being no information provided about how products would be packaged to encourage the consumption of take away food at home rather than on the street. However, it is likely that where a delivery service is used food will be packaged to be eaten at the delivery destination and unlikely to be consumed on the street.
21. Overall, I conclude that condition 6 is not necessary to protect the living conditions of neighbouring properties or to support sustainable forms of transport and there would be no conflict with Policies 7, 16 E, 25, 28(B), 32(D), 33, 38(c), 43 (D) of the WCP where these policies seek to protect the living

conditions of residents, promote sustainable transport and restrict take away facilities in certain circumstances.

Appeal B

22. Access to the building is from Wardour Street for staff and customers. There is no outside space to the rear of the building which is in close proximity to a residential block accessed from Bouchier Street. The internal layout contains an entrance with limited width and a spiral staircase to the basement which is not suitable to allow bikes to be taken downstairs. There was no evidence at my site visit that cycle parking has previously been provided inside the building.
23. Policy T5 of the LP 2021 seeks to remove barriers to cycling and create a healthy environment by, among other things, securing the provision of appropriate levels of cycle parking which should be fit for purpose, secure and well located. In this case the LP 2021 has a minimum cycle parking standard of two spaces. Even so, Policy 25 of the WCP does not require the application of the LP 2021 standards where the development is not a major development as is the case here.
24. I note that the Council acknowledged in granting permission in 2018 that requiring cycle parking within the building would not be reasonable given the building's existing use and none was sought by condition.
25. In this specific case the configuration of the internal layout, and the lack of a space to the rear of the building provides limited options for provision of convenient and secure cycle parking within the appeal building. Additionally, the property is vacant, and the appellant has confirmed that the restrictions placed on the permission including the requirement of onsite cycle parking is affecting the ability to let the property. Although limited there is cycle parking and a cycle hire scheme close to the appeal site and the site is accessible by public transport.
26. Taking the above matters together, I conclude that condition 10 is not necessary to promote sustainable transport modes. The removal of the condition would not conflict with the LP 2021 where it seeks cycle parking that is fit for purpose and well located or the WCP which requires secure cycle parking in accordance with the LP 2021 where the proposal is a major development.

Other Matters

27. The appeal site is located within the Soho Conservation Area (SCA). Section 72(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 (the Act) requires that special attention is paid to the desirability of preserving or enhancing the character or appearance of the conservation area.
28. Within Wardour Street many of the ground floor of building's are in commercial use and commercial uses are part of the character of the area. The proposal would bring an existing vacant unit back into use without external alterations to the building. In the context of the street scene, the character of the conservation area would be preserved. Consequently, the impact on the character, appearance, and significance of this part of the SCA would be neutral. As such, the proposal would accord with the Act and the Framework where it seeks to protect the significance of designated heritage assets.

Conditions

29. The Planning Practice Guidance makes it clear that decision notices for the grant of planning permission under section 73 should also restate the conditions imposed on earlier permissions that continue to have effect. As I have no information before me about the status of the other conditions imposed on the original planning permission, I shall impose all those that I consider remain relevant. If some have in fact been discharged, that is a matter which can be addressed by the parties.
30. I have removed references to Class A1 and Class A3 as these classifications are no longer relevant, and I have amended the time limit referred to in the Council's covering letter with their decision to reflect the date of expiry of the original permission. I have taken into account the comments received in relation to condition 13 of the planning permission. In light of these comments, I have re-imposed this condition (condition 12 in the attached schedule) in accordance with the Council's suggested wording.

Conclusions

31. For the reasons set out above, Appeal A and Appeal B are allowed, and planning permission is granted for the discharge of conditions 6 and 10 as set out in the formal decision above.

Diane Cragg

INSPECTOR

Schedule of conditions

- 1) The development hereby permitted shall begin not later than 22 June 2023, which is the expiration date of the approved planning permission ref: 20/01448/FULL.
- 2) The development hereby permitted shall be carried out in accordance with the drawing No WS-PP-02 and any drawings approved subsequently by the City Council as local planning authority pursuant to any conditions on this decision letter.
- 3) Should the premises be used for restaurant purposes, the provision of a bar and associated bar seating must not take up more than 15% of the floor area of the restaurant/retail premises. You must use the bar to serve restaurant customers only, before, during or after their meals.
- 4) Should the premises be used for restaurant purposes, customers shall not be permitted within the premises before 09:00 or after 24:00 on Monday to Saturday (not including bank holidays and public holidays) and before 09:00 or after 22:30 on Sundays and bank holidays and public holidays.

- 5) Should the premises be used for restaurant purposes, you must not allow more than 115 people onto the premises at any one time.
- 6) Notwithstanding the detail shown on the approved drawings, you must apply to us for approval of revised details of how waste and recycling is going to be stored on the site. You must not occupy the retail or restaurant use hereby approved until we have approved what you have sent us. You must then provide the waste and recycling store in line with the approved details prior to occupation, and clearly mark it and make it available at all times to everyone using the premises. You must not use the waste and recycling store for any other purpose.
- 7) You must not play live or recorded music on your property that will be audible externally or in the adjacent properties.
- 8)
 - (1) Where noise emitted from the proposed internal activity in the development will not contain tones or will not be intermittent, the 'A' weighted sound pressure level from the internal activity within the retail or restaurant use hereby permitted, when operating at its noisiest, shall not at any time exceed a value of 10 dB below the minimum external background noise, at a point 1 metre outside any window of any residential and other noise sensitive property, unless and until a fixed maximum noise level is approved by the City Council. The background level should be expressed in terms of the lowest LA90, 15 mins during the permitted hours of use. The activity-specific noise level should be expressed as LAeqTm, and shall be representative of the activity operating at its noisiest.
 - (2) Where noise emitted from the proposed internal activity in the development will contain tones or will be intermittent, the 'A' weighted sound pressure level from the internal activity within the retail or restaurant use hereby permitted, when operating at its noisiest, shall not at any time exceed a value of 15 dB below the minimum external background noise, at a point 1 metre outside any window of any residential and other noise sensitive property, unless and until a fixed maximum noise level is approved by the City Council. The background level should be expressed in terms of the lowest LA90, 15 mins during the permitted hours of use. The activity-specific noise level should be expressed as LAeqTm, and shall be representative of the activity operating at its noisiest.
 - (3) Following completion of the development, you may apply in writing to the City Council for a fixed maximum noise level to be approved. This is to be done by submitting a further noise report including a proposed fixed noise level for approval by the City Council. Your submission of a noise report must include:
 - a) The location of most affected noise sensitive receptor location and the most affected window of it;
 - b) Distances between the application premises and receptor location/s and any mitigating features that may attenuate the sound level received at the most affected receptor location;
 - c) Measurements of existing LA90, 15 mins levels recorded one metre outside and in front of the window referred to in (a) above (or a suitable representative position), at times when background noise is

- at its lowest during the permitted hours of use. This acoustic survey to be conducted in conformity to BS 7445 in respect of measurement methodology and procedures;
 - d) The lowest existing LA90, 15 mins measurement recorded under (c) above;
 - e) Measurement evidence and any calculations demonstrating that the activity complies with the planning condition;
 - f) The proposed maximum noise level to be emitted by the activity.
- 9) Prior to occupying the premises for restaurant purposes, you must apply to us for approval of details of all separating structures (walls, ceilings and glazing) demonstrating that the internal activity will comply with the Council's noise criteria as set out in Condition 8 of this permission. You must not occupy the restaurant use hereby approved until we have approved what you have sent us. You must then install the separating structures in line with the approved details prior to occupation and retain them for as long as the restaurant is in situ.
- 10) The restaurant use hereby approved shall not commence until details of how odours in connection with the kitchen have been submitted to and approved by the City Council. The duct must then be installed in accordance with the approved details and must thereafter be retained at all times that the premises is in use as a restaurant.
- 11) In the event that the restaurant use is implemented, you must apply to us for approval of new Operational Management Statement which should detail how staff and customers who wish to smoke will be managed. You must not start the restaurant use until we have approved what you have sent us. You must then carry out the measures included in the approved Operational Management Statement at all times that the restaurant is in use.
- 12) Notwithstanding the provisions of Class E of the Town and Country Planning (Use Classes) Order 1987 (as amended September 2020) (or any provision equivalent to that class in any statutory instrument revoking or re-enacting that order) the retail accommodation hereby approved shall not be used for food/supermarket purposes.

