



Appeal Decision

Inquiry opened on 4 April 2018

Accompanied site inspection made on 4 April 2018

Unaccompanied site inspections also made on 3 and 19 April 2018

by Pete Drew BSc (Hons), Dip TP (Dist) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 11 May 2018

Appeal A Ref: APP/E5900/C/17/3178757

Land at Temple Lounge, Unit 1, 14 Hertsmere Road, West India Quay, London E14 4AF

- The appeal is made under section 174 of the Town and Country Planning Act 1990 [hereinafter "the Act"] as amended by the Planning and Compensation Act 1991.
 - The appeal is made by Mr Naz Choudhury against an enforcement notice issued by the Council of the London Borough of Tower Hamlets.
 - The enforcement notice, numbered 40/2017, was issued on 22 May 2017.
 - The breach of planning control as alleged in the notice is: The following unauthorised developments have been undertaken without the benefit of planning permission or Listed Building Consent: 1. Change of use of the Premises from a restaurant (A3) to a mixed use development including use as a restaurant and a shisha bar (sui generis). 2. The installation of guttering and side panels to four umbrellas approved under scheme PA/15/03338/NC to provide perpetual shelter.
 - The requirements of the notice are: (1) Cease the use of the Premises for the sale and consumption of shisha; (2) Remove the unauthorised guttering and side panel elements (shown in Annex B) from the existing four umbrellas approved PA/15/03338/NC from the Premises including all associated fixtures, fittings and debris therefrom.
 - The period for compliance with both of these requirements is two (2) months.
 - Appeal A is proceeding on the grounds set out in section 174(2) (a), (b), (c) and (f) of the Act.
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Appeal B Ref: APP/E5900/C/17/3181952

Land at Unit 5, Block D, 14 Hertsmere Road, West India Quay, London E14 4AF

- The appeal is made under section 174 of the Act.
 - The appeal is made by Mr Naz Choudhury against an enforcement notice issued by the Council of the London Borough of Tower Hamlets.
 - The enforcement notice, numbered 49/2017, was issued on 21 July 2017.
 - The breach of planning control as alleged in the notice is: The following unauthorised developments have been undertaken without the benefit of planning permission or Listed Building Consent: Installation of four umbrellas with associated guttering and side panels.
 - The requirements of the notice are: Remove the four unauthorised umbrellas, guttering and side panel elements (shown in Appendix A) from the Premises including all associated fixtures, fittings and debris therefrom.
 - The period for compliance with this requirement is two (2) months.
 - Appeal B was lodged on the grounds set out in section 174(2) (a), (d) and (f) of the Act, but I comment further on the grounds on which this appeal is proceeding below.
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Appeal A: Decision

1. I direct that the enforcement notice be corrected by the deletion of the words "*or Listed Building Consent*" in paragraph 3 of the enforcement notice. I direct

that the enforcement notice be varied by the deletion of the words "*Cease the use of the Premises for the sale and consumption of shisha*" in paragraph 5.1 of the enforcement notice and their replacement with the words: "*Cease the mixed use of the Premises as a restaurant and a shisha bar*".

2. Subject to the above, Appeal A is allowed, the corrected and varied notice is quashed and planning permission is granted on the application deemed to have been made under section 177(5) of the Act for the development already carried out, namely the change of use of the Premises from a restaurant (A3) to a mixed use development including use as a restaurant and a shisha bar (*sui generis*) and the installation of guttering and side panels to four umbrellas approved under scheme PA/15/03338/NC to provide perpetual shelter on land at Temple Lounge, Unit 1, 14 Hertsmere Road, West India Quay, London E14 4AF referred to in the enforcement notice, subject to the following conditions:
 1. The use of the premises hereby permitted shall only take place between the hours of 0900 and 2300.
 2. The use hereby permitted only take place with the benefit of the mitigation measures stated in the Environmental Noise Measurement Report by Waterloo Acoustics Ltd having been implemented and maintained: (1) adequate primary/secondary silencers are to be fitted with the ability to attenuate the excessive noise levels as stated in the aforementioned acoustic report; and (2) the noise breakout from the fans should be in an acoustic enclosure so that the fan noise is reduced to approximately 37dB(A) freefield.
 3. Within 3 months of the date of this decision a plan showing the proposed location of the brazier associated with the shisha use shall be submitted to the Council, as Local Planning Authority. The brazier shall be positioned in the location as approved in writing by the Council within one month of the date of its written approval and shall thereafter be retained in its approved location during all periods when it is lit.

Appeal B: Decision

3. I direct that the enforcement notice be corrected by the deletion of the words "*or Listed Building Consent*" in paragraph 3 of the enforcement notice. I direct that the enforcement notice be varied by:
 - i. the substitution of the plan attached to this decision for that attached and labelled as Annex A to the enforcement notice;
 - ii. the deletion of the word "*four*" in paragraph 3 of the enforcement notice and its replacement with the word "*two*" and, at the end of that paragraph, the addition of the words "*shown labelled H and I on the plan attached to this appeal decision*";
 - iii. the deletion of the word "*four*" in paragraph 5 of the enforcement notice and its replacement with the word "*two*"; and,
 - iv. the deletion of the words in brackets in paragraph 5 of the enforcement notice and their replacement with the words "*shown labelled H and I on the plan attached to this appeal decision*".
4. Subject to the above, Appeal B is allowed, the corrected and varied notice is quashed and planning permission is granted on the application deemed to have been made under section 177(5) of the Act for the development already carried out, namely the installation of two umbrellas with associated guttering and side panels on land at Unit 5, Block D, 14 Hertsmere Road, West India Quay, London E14 4AF, as referred to in the enforcement notice.

Procedural matters

5. The Inquiry sat for 4 days on 4, 5, 19 and 20 April 2018. All witnesses at the Inquiry gave evidence after giving an affirmation.
6. A number of corrections and variations to both enforcement notices were canvassed during the Inquiry. I consider that the reference to listed building consent in the allegations of both enforcement notices is inappropriate given that such consent is the subject of a separate Act, namely the Planning (Listed Buildings and Conservations Areas) Act 1990 [hereinafter 'the LBCA Act'].
7. A listed building enforcement notice that was issued by the Council of the London Borough of Tower Hamlets, which was the subject of a third appeal [Ref APP/E5900/F/17/3178755] by the same Appellant, has been withdrawn.
8. In relation to the notice subject of Appeal A it was conceded by the Council that the requirement to cease the use was excessive and that this should be varied to require the mixed use alleged in the notice to cease in order to protect any lawful use rights. In relation to the notice subject of Appeal B it is agreed¹ that 2 of the umbrellas were substantially completed more than 4-years before the date of issue of that notice, such that it would be appropriate to vary the notice to reflect this fact. Allied to this a revised plan was submitted and is agreed.
9. I consider that all of the above corrections and variations can be undertaken without injustice to either main party. My view in this matter is confirmed by the stance adopted by both main parties at the Inquiry. The ground (d) in Appeal B was conditionally withdrawn subject to the above variations to that notice² and so I take no further action in respect of that ground of appeal.
10. At the Inquiry an application for a partial award of costs in relation to Appeal A was made by Mr Naz Choudhury against the Council of the London Borough of Tower Hamlets. This application is the subject of a separate Decision.

Appeal A: Ground (b): Approach

11. The Planning Practice Guidance [hereinafter "the Guidance"] says³ that in enforcement appeals the onus of proof in respect of matters of fact is on an Appellant. Under this ground of appeal the Appellant therefore needs to show that: "*...the breach of control alleged in the enforcement notice has not occurred as a matter of fact*" [as per section E. (b) of the appeal form].
12. It is common ground that the works alleged in the notice subject of Appeal A have taken place. The issue to be addressed under this ground of appeal is whether the shisha use, which is agreed to take place at the premises as a matter of fact, is ancillary to the use of the premises.

Appeal A: Ground (b): Reasons

13. The Appellant's testimony reveals that shisha is an important component of the use subsisting. Under cross-examination he said it was a "*very important part of the business*"; "*one of the main elements that draws people in*"; that shisha "*glues everything together*"; and without shisha he would be "*very worried*" for the survival of the business. So whilst there is no reason to doubt that shisha has accounted for around 12 % of sales since trading started⁴, it appears to

¹ Points 3 and 15, Document 17.

² As recorded in paragraph 44 of Document 20 and point 15, Document 17.

³ See for example paragraph: 053, Reference ID: 16-053-20140306.

⁴ Letter from accountant dated 29 January 2018, which is slightly less than the figure quoted in the accountant's letter dated 16 March 2016.

be fundamental to the viability of the business in this particular location. This view is reinforced by the Appellant's proof, which says: "*Without alcohol sales we have had to provide an array of offerings, and these are critical to the survival of the business. This includes mainly the shisha, which replaces the margin made on alcohol beverages*"⁵ [*my emphasis*]. Thus the Appellant's own testimony strongly suggests that the shisha is not merely an ancillary⁶ use and given the onus of proof on the Appellant I attach this factor significant weight.

14. The availability of shisha is not only important to the viability of the business, it would also appear to be a key reason why customers attend the premises. The majority⁷ of the reviews before the Inquiry from www.tripadvisor.co.uk refer to shisha and of those it would appear many who wrote those reviews attended the premises for shisha. Most unambiguous is that posted on 12 August 2017 which says: "*We went for shisha*". However the focus of a number of the other entries is on shisha rather than the food or drink offer⁸. I consider this view to be consistent with the Appellant's sworn testimony that the availability of shisha is one of the "*main elements*" that draws customers to the premises.
15. My attention has also been drawn to the way in which local residents have described the use subsisting in their communications with the Council. These include: (i) "*The business operates as a Hookah Bar providing smoking facilities to customers*"; (ii) "*...the applicant would appear to be trading illegally from the premises as there is no the planning or listed building consent for the current trading use as a Shisha Bar*" [sic]; (iii) "*...their main business purpose...is as a smoking lounge; the majority of customers appear not to eat*"; and, (iv) "*...the majority of the business is made up from sales of Shisha tobacco*"⁹. Although I recognise that 2 of the letters submitted in connection with these appeals refer to the premises as a restaurant, I note that one of the authors has: "*...tried the shisha on occasions*"¹⁰. Given that a third letter refers to it as a "*shisha bar*", and a fourth as an "*open air un-licensed smoking club*"¹¹, the 2 letters to which the Appellant draws to my attention are not determinative. On balance the written submissions of local residents support a finding that a main purpose of the premises, which is focussed on the terrace, is for the smoking of shisha.
16. My view in this matter is reinforced by the manner in which the premises are marketed. The logo for the business is a hookah pipe, which appears centre stage between the words "*Temple*" and "*Lounge*"¹² and the subliminal message that this logo sends out is clear. The website has a number of links across the top¹³ and apart from practicalities, such as locations and contact, the key links that are central to the row are: "*FOOD & DRINK*" and "*SHISHA GARDEN*". In that context, whilst I accept the website relates to both outlets, the fact that the terrace¹⁴ is being advertised as a "*shisha garden*" rather than, for example, "*outdoor dining*", gives the impression its main purpose is for smoking shisha.

⁵ Source of quote; paragraph 3.18 of the Appellant's main proof of evidence.

⁶ The Appellant's dictionary definition of which is: "*subservient, subordinate, auxiliary, providing support*", which appears to have been relied on in paragraph 20 of *Winchester City Council v SSCLG* [2008] 1 P & CR 15.

⁷ Only 2 of the 19 published reviews during the period from June-November 2017 do not mention shisha.

⁸ See entries dated 11 November 2017, 21 September 2017, 26 August 2017, both entries on 22 July 2017, 3 out of the 5 entries on 21 July 2017 and that posted on 19 July 2017

⁹ Source of quotes: pages 17, 32, 35 and 36, respectively, to Appendix 13 to proof of Mr Roberts.

¹⁰ Source of quote: letter from Mr Kulah dated 1 November 2017.

¹¹ Source of quotes: letter from the owner of an apartment dated 8 November 2017 and letter from Mrs Miller dated 1 November 2017, respectively.

¹² See Appendix JP14 and the second and fourth photographs in Appendix A to rebuttal proof of Mr Roberts.

¹³ Excerpts at Appendix 8 to the proof of Mr Roberts, which appear to be more recent, and hence different, from that reproduced at Appendix C to Appendix A.2 the proof of Mr Montague.

¹⁴ The Appellant accepted in cross-examination that the photograph on the website was of Canary Wharf.

The importance of shisha is underlined by the separate menu on the website, also displayed at the premises¹⁵, which gives an extensive choice of flavours.

17. The Appellant's own evidence corroborates a finding that the outside terrace is extensively used for smoking shisha. Under cross-examination he agreed that a reasonable estimate of the maximum number of hookah pipes in use would be approximately 25-30. Although there are around 100 pipes kept at the premises, different pipes are used for different combinations of flavours. On the basis that there are 80 covers on the forecourt of Unit 1, the Appellant agreed that over 37 % of those covers make use of a shisha pipe¹⁶. Given that shisha appears to be shared between groups the proportion of customers' actually smoking shisha might be higher still¹⁷. My own observations during my final unaccompanied inspection¹⁸ are not inconsistent with such a view. Indeed Mrs Miller asserted that: "...almost all customers smoke shisha"¹⁹. In the Edgware Road appeal the Inspector said: "*The smoking activity itself must necessarily be concentrated on the forecourt of the premises, having regard to the ban on smoking inside, thus resulting in a more intensive use of this part of the premises than might ordinarily be the case with simply a restaurant use*"²⁰. That rationale applies here too and given the modest number of covers within the building this supports a finding that shisha is not merely an ancillary use.
18. The Council has drawn attention to other statements on the website that relate to shisha. The website tells customers that they can: "*Relax with shisha at the end of a delicious meal or enjoy our range of refreshing vapour flavours*"²¹ [*my emphasis*]. I accept the submission that this suggests shisha is not being marketed just as something to have at the end of a meal, but that customers are encouraged to have shisha even without food. Although I recognise that the website says: "*Minimum order of 1 sheesha between 2 people plus drink or minimum spend of...£12.50 at our Canary Wharf branch. During busy periods 2-hour time limits will apply*"²², it is possible to have shisha without food. The website also says: "*Our unique heated Shisha Garden has become famous for high quality ambience and service*"²³. Again I accept the related submission that this infers the business is famous in its own right for the sale of shisha.
19. In the Edgware Road appeal the Inspector said: "...*smoking of a pipe can take between one and two hours; that in quiet times people might come in only to smoke a pipe and have a drink; and that for the last hour or so before closing, the only thing that customers would be doing is smoking shisha and consuming cold drinks*"²⁴. Whilst there is evidence of food being served in that last hour, shisha preparation also appears to have continued until 2240 hours²⁵ and so these general sentiments might otherwise be said to apply to these premises. Amongst other things it is clear that one can comply with the minimum spend by just ordering shisha and a drink, and the time limit appears to be imposed because of the time that it can take to smoke shisha. As a matter of logic the time limit is not going to be enforced where a group is ordering food, such as

¹⁵ Fourth photograph in Appendix A to rebuttal proof of Mr Roberts.

¹⁶ Appellant in cross-examination.

¹⁷ At my accompanied site inspection there were no customers using the 16 covers inside.

¹⁸ As reported back to the Inquiry at the start of the final sitting day.

¹⁹ Source of quote: my contemporaneous note of her evidence on the afternoon of day one of the Inquiry.

²⁰ Source of quote: paragraph 8 of appeal decision APP/X5990/C/14/2221704 & 2221706.

²¹ Source of quote: excerpts from website at Appendix 8 to proof of Mr Roberts.

²² Source of quote: excerpts from website at Appendix 8 to proof of Mr Roberts.

²³ Source of quote: excerpts from website at Appendix 8 to proof of Mr Roberts.

²⁴ Source of quote: paragraph 8 of appeal decision APP/X5990/C/14/2221704 & 2221706.

²⁵ Paragraph C2.20 of Mr Montague's proof.

- desserts, and spending money, whereas that might not be the case with a shisha shared between a group of friends that is smoked over a long period.
20. During my accompanied site inspection I was shown what the Council calls an outside tent like structure within which the shisha pipes are stored and shisha is prepared. Although the Inquiry was advised that the charcoal is lit within the kitchen in Unit 1, it would appear to be common ground that the remainder of the activity related to the preparation of shisha takes place in this area²⁶. To this extent the shisha is functionally separate to arguably a greater extent than was the case in the Cafe Baku appeal where the shisha storage areas appear to have been more integrated with the food preparation area²⁷. In line with the factual position in that case "*specialised shisha duties*"²⁸ are carried out by up to 3 dedicated staff at the premises. In cross-examination the Appellant said that 4/5 waiters at the premises can also take shisha orders. Although I accept the proportion of staff focussed on shisha duties is less²⁹ than was the case in the Cafe Baku appeal the number of dedicated shisha staff is not immaterial.
21. I appreciate that in an email dated 21 March 2016 an Officer of the Council said: "*Having reviewed the information provided, it is apparent that the shisha bar at the premises is operating as an ancillary operation to the main use of the restaurant*"³⁰. The information provided was primarily³¹ the accountant's letter which indicated at that time that the shisha sales were 13 %, but that letter did not state that shisha is always served either with food or a drink. Inspectors have attached weight to that factor in reaching a view as to whether a shisha use was ancillary³². Case law³³ has confirmed that smallness itself is not a reason for holding a use to be ancillary to another and yet this appears to have been the main consideration in leading the Officer to the conclusion that he reached in that instance. In the circumstances, noting again the Appellant's own testimony to this Inquiry, I do not find the view expressed in that email to be determinative, still less binding, to the outcome of the ground (b) appeal.
22. I have taken account of the Council's concession³⁴ that the use of the terrace is immune from enforcement action. Given the date of the planning permission if one assumes that the planning permission was implemented straight away the use of the terrace might have become lawful in September 2015. As the shisha commenced in 2013 and continued at its current level of operation³⁵ the use of the terrace might not be lawful because the mixed use might have comprised a material change of use. Whilst I consider materiality below I am not persuaded that the logic of this argument should be overriding. Despite the absence of a Lawful Development Certificate [LDC] the Council has accepted that the terrace has been used for more than 10-years. That is to the Appellant's advantage. To take that to the next level and say that, in consequence, I must find that

²⁶ Labelled "*Shisha Preparation Area*" and shown in the photograph at Figure 1 to the proof of Mr Thomas.

²⁷ See paragraph 9 of appeal decision APP/X5990/X/16/3153284.

²⁸ Source of quote: paragraph 20 of appeal decision APP/X5990/X/16/3153284.

²⁹ 2 out of 7 staff in the case of Café Baku, compared to a maximum of 3 out of 14-18 staff here, as detailed in the accountant's letter dated 29 January 2018.

³⁰ Source of quote: email, together with "*the information provided*", at Appendix 8 to the Appellant's proof.

³¹ Apart from an earlier email from the Council dated 2013, together with the food and dessert menus but not, it would appear, the shisha menu.

³² See for example paragraph 17 of appeal decision APP/X5990/X/16/3153284 and paragraph 23 of appeal decision APP/E5900/C/10/2133439.

³³ *Main v SSE & South Oxfordshire DC* [1999] J.P.L. 195.

³⁴ Point 2, Document 17.

³⁵ The Appellant's evidence to the Inquiry confirmed that the premises has operated broadly in the same manner since it opened in 2013.

the shisha use is ancillary appears to strain this otherwise helpful concession. In these circumstances I decline to attach this factor a great deal of weight.

23. I accept that the various appeal decisions before the Inquiry turn on their own facts and that there are factors at play in this case that are materially different. This includes the fact that Unit 1 has extensive cooking equipment, including a tandoori oven, a large commercial grill, a commercial 6 burner cooker oven, griddles, fryers and microwaves. I accept, again in contrast to the situation in the Café Baku appeal, that Temple Lounge serves a significant range of food. However the fact that the extraction system is serviced 4 times a year due to the amount of cooking that takes place, being twice what is recommended³⁶, is tempered by the fact that the kitchen serves the forecourt of Unit 5 at present. The Appellant acknowledged that there are approximately 80 covers on that forecourt in addition to those at Unit 1 and so I cannot rule out the possibility that this is a significant reason for the high level of servicing at Unit 1.
24. Just as there are differences, some of the factors relied upon by Inspectors in the earlier appeals appear to be applicable here. Paragraphs 14 and 15 of the Café Baku decision sets out a number of reasons why shisha smoking was said to be different from smoking cigarettes and cigars. I agree with the distinctions that are made there and my observations of the appeal site reinforce the view that shisha smoking is a social activity in itself. Just as Mr Roberts said he would choose a restaurant because of its food, not because of the opportunity to smoke a cigarette, the corollary must be that if shisha is a reason to choose to go to these premises this distinguishes it from a conventional restaurant.

Appeal A: Ground (b): Conclusion

25. For the above reasons I conclude as a matter of fact and degree, and on the balance of probability, that the premises is in mixed use as a restaurant and a shisha bar. The Appellant has not discharged the onus of proof to show that the mixed use alleged has not occurred and so the appeal on ground (b) fails.

Appeal A: Ground (c): Approach

26. The Guidance says that an Applicant is responsible for providing sufficient information to support an application for an LDC³⁷. Lawful development is development against which no enforcement action may be taken, for example because it does not involve development. This is the equivalent of ground (c) in an enforcement appeal and so the Appellant needs to show: “...*there has not been a breach of planning control*” [as per section E. (c) of the appeal form].
27. It is common ground that the works alleged in the notice subject of Appeal A comprise a breach of planning control. It is also agreed that intensification does not form part of the Council’s case³⁸. The issue to be addressed under this ground of appeal is whether there has been the making of a material change in the use of the land to the mixed use that is alleged.
28. The lawful use provides the starting point from which to assess the materiality of any actual use. In this case the permitted use relates just to Unit 1 but the parties agree that the use of the terrace in connection with the permitted use is lawful. Despite there being no LDC and some doubt in that matter, given its use for shisha since 2013, I propose to take that as my starting point.

³⁶ Letter from *Ventilation Guru* dated 9 February 2018, at Appendix 6 to the Appellant’s proof.

³⁷ Paragraph: 006, Reference ID: 17c-006-20140306.

³⁸ Point 14, Document 17.

29. The Council's claim that there are 2 main tests for the materiality of a change of use has not been disputed. The first relates to a change in the character of the use itself including the land where it is located. The second is the effect of the change on neighbouring uses and the locality. I shall examine each in turn.

Appeal A: Ground (c): Reasons

30. In terms of character, the Inspector who dealt with the Café Baku appeal said: *"The manner of use of the premises, with customers necessarily sitting outside in order to smoke, often for quite long periods - is somewhat different from a normal café type use, where customers may smoke outside, but usually for short periods"*³⁹. There are a number of reasons why I find this premises has been used in a similar way, such that there has been a change in its character.
31. One of Mrs Miller's letters submitted in connection with these appeals talks about: *"...smoking tobacco 364 or 365 days & nights a year"*⁴⁰. Although that comment is made with reference to the umbrellas, in her oral evidence she said there are customers at Temple Lounge 364 days a year, regardless of whether it is windy, raining or winter. The physical changes have facilitated a change in the character of the use of this forecourt, but the need to sit outside appears to be driven by the shisha use, which has to take place outside to comply with smoke free legislation. Mrs Miller's oral testimony was that customers smoke for a *"very long time"*⁴¹ and that they are normally there laughing and talking. She contrasted that with the other forecourts that she said were very quiet out of season, for example during the winter, when she claimed that they had no customers at all. Given that Mrs Miller is a resident, and hence has observed what is going on at the premises and its neighbours over a number of years, it is appropriate to attach this aspect of her evidence significant weight.
32. This finding appears to be corroborated by the comments of Mr Montague who observed the premises on Friday 26 January 2018. He records that the weather was cold, less than 7° c, and damp, but that: *"...all of the tables in the external seating area of unit 1...were occupied"*⁴². Paragraph C2.20 states that the site continued at a similar level of capacity for the majority of the evening. Paragraph C2.18 says the external seating areas for the other restaurants and bars were less busy, although they were utilised. In particular the external area of Pilgrim Pizza was: *"...only used by small groups"*⁴³, and the external areas of Burger and Lobster, and Browns: *"...had little to no patrons outside except for occasional smokers in limited numbers"*⁴⁴. This comment underlines what I see as the key difference between a restaurant use and the mixed use with shisha, where customers appear to sit outside for long periods in order to smoke as an inherent part of the social experience of sharing a hookah pipe.
33. In winter the terrace outside Rum and Sugar is said to have been: *"...less used, with typically between 5-20 people"*⁴⁵. The external terrace of The Sipping Room: *"...was less busy in the winter with only few patrons"* [sic]⁴⁶. However Mr Montague accepted that Rum and Sugar and The Sipping Room are not A3.

³⁹ Source of quote: paragraph 23 of appeal decision APP/X5990/X/16/3153284.

⁴⁰ Source of quote: letter to The Planning Inspectorate dated 1 November 2017.

⁴¹ Source of quote: my contemporaneous note of her evidence on the first morning of the Inquiry.

⁴² Source of quote: paragraph C2.16 of Mr Montague's proof of evidence.

⁴³ Source of quote: paragraph C2.28 of Mr Montague's proof of evidence.

⁴⁴ Source of quote: paragraph C2.37 of Mr Montague's proof of evidence.

⁴⁵ Source of quote: paragraph 4.2.13 of Mr Montague's proof of evidence.

⁴⁶ Source of quote: paragraph 4.2.15 of Mr Montague's proof of evidence. Although the enclosed igloos were occupied the Inquiry was advised that they do not have the benefit of an extant planning permission and so it is appropriate to make the comparison with the use of the external terrace for this reason.

34. Turning to the effect of the change upon neighbouring uses and the locality, the Council is concerned with noise and odour. Dealing initially with noise it appears to be common ground that the main source is customer conversations. In this respect Mr Montague accepted in cross-examination that he did not undertake a comparison between the appeal site and existing A3 uses on the terrace. The comparison in paragraph 5.2.6 of his proof is instead with Rum and Sugar and The Sipping Room. In that context his finding that the level of noise from Temple Lounge is comparable to those noisier premises is relevant.
35. I accept the Council's submission that the comparison should instead be made between Temple Lounge and those units in A3. In the absence of this exercise having been done the Council has attempted a crude comparison that assumes the forecourt of the appeal site was at capacity with 80 customers and that the terrace outside Burger and Lobster or Browns had 5 customers. Mr Montague agreed that comparison was appropriate and that it was 16 times the number of people. Paragraph 6.2.7 of his proof records that a 12 dB increase in noise in terms of an increase in the number of people talking at the same vocal effort would equate to more than 15 times the original number of people. Although he considered in practice the difference would be less, for example because customers would be more spread out and further from the façade, he stated it could be as much as 7 dB. I would regard that to be a material difference.
36. In light of the above I cannot accept Mr Montague's finding that the addition of shisha to an A3 use has no observed effect⁴⁷, as set out in the Guidance. Among other things I have given reasons why the shisha is likely to give rise to an increase in the number of patrons using the terrace. Mrs Miller's answer to the albeit hypothetical situation is instructive on this point. She did not accept that the same number of patrons would smoke so much or be outside so much if Unit 1 closed down and a new A3 operator, even one serving alcohol, came in. The flaw in Mr Montague's argument therefore appears to be to assume that there would be an equal number of customers. Diners are less likely to eat outside during the winter and so the addition of shisha, which has to be undertaken outside and would appear to be of a relatively long duration, would increase the number of people and, as a consequence, increase noise from the volume of people talking. This is not a comment on the character of the noise. My own limited observations would tend to support Mr Montague's claim that the culture and behaviour of patrons of Temple Lounge is considerate and not boisterous. However this does not alter my overall finding that the mixed use of the premises has resulted in a material increase in the level of noise.
37. In terms of odour, the Inspector who dealt with the Café Baku appeal said: "*It is clear that shisha smoking generates a quite distinctive smell*"⁴⁸. This does not appear to be in dispute. Mr Thomas refers, in paragraph 4.2.3 of his proof, to detecting "...a faint, fruity odour" and, in paragraph 6.1.1 of his proof, says shisha can be "...a potential source of odour". The Inspector also suggested that the burning of charcoal in a brazier might affect air quality. In this respect Mr Thomas says, in paragraph 5.1.6 of his proof: "*There may be some smoke and odour when first lit and when fresh charcoal is added*". In paragraph 6.1.3 of his proof he refers to "*smoke drift*", and during my inspections I observed smoke from the hookah pipes being carried in the wind. I was readily able to pick out the locations where shisha was being smoked by virtue of the trail of smoke. This is not to dispute the statement of Mr Thomas that the dilution and

⁴⁷ Paragraph 6.2.13 of Mr Montague's proof of evidence.

⁴⁸ Source of quote: paragraph 22 of appeal decision APP/X5990/X/16/3153284.

- dispersion of shisha smoke occurs rapidly, particularly when windy. However it does support a finding that the smoke generated from shisha is detectable by reason of both its odour and its visible trail, or drift, from its source.
38. There is evidence from residents before the Inquiry to support this conclusion. These include: (i) reference to "...*tobacco smoke entering the flats*"; (ii) reference to an "...*uncomfortable smell*"; (iii) "...*there are significant pungent smells emanating from the shisha bar*"; (iv) "...*strong smells of smoke*"; and, (v) "...*smell as a result of the outdoor usage has had a negative impact*"⁴⁹.
 39. Although others⁵⁰ are not attributable to the appeal site, the oral testimony of Mrs Miller reinforces my view that smoke and odour arising from the mixed use of the premises, including for shisha, has had an effect upon neighbours. Her main concern did appear to be cooking odours associated with the ventilation system and I also acknowledge that she described the smell as being similar to tobacco or a pipe rather than a cigarette, which appears to conflict with expert evidence from Mr Thomas⁵¹. However my view that she used that description in respect of the smell arising from the appeal site is confirmed by the fact that one of her concerns was walking to the entrance, between Units 1 and 5, and having shisha smoke on both sides. In that context I regard the prospect she was conflating a different source, for examples smoke from another forecourt, with the odour from shisha when she was in her flat to be less than probable.
 40. It is therefore material that she said it was "*not acceptable at all*"; "*not a pleasant smell*"; "*not bearable*"; and "*every single day*"⁵². She also said that she had to keep her windows closed because of the smell. Whilst I record here that Mrs Miller's claim that there was no smell at the time of my accompanied site visit because there was no shisha smoking taking place proved to be wrong because there were 4 customers smoking shisha, I do not find her concerns to be invalidated on this basis. Mrs Miller sincerely believes that there is a smell that arises from the shisha use which has an effect on her living conditions. This strongly supports a finding that there has been a material change of use.
 41. Once the planning unit takes on a mixed use then, in line with *Trio Thames Ltd v SSE* [1984] JPL 183, it is likely that there would be a material change of use. That logic appears to have coloured the findings of the Inspectors in paragraph 14 of the Edgware Road decision and in paragraph 25 of The Canopy decision⁵³. However I have gone far beyond that reasoning in my analysis of this ground. I have referred to the Inspector's findings in the Café Baku decision and his rationale for finding there had been a material change of use, by reason of impacts on odour, noise and character, is consistent with my reasoning above.
 42. I appreciate the established use of the terrace is not seasonal, but the issue is whether an A3 operation would use the terrace year round. Having regard to the evidence of limited use of similar nearby forecourts, the answer appears to be clear. The key distinguishing factor is therefore the shisha, which has to take place outside. So whilst I have had regard to the shorter opening hours in winter and the accountant's evidence of the seasonality of the business, this does not demonstrate that there has not been a breach of planning control.

⁴⁹ Source of quotes: pages 17, 27, 33, 35 and [No 13] 39, respectively, to Appendix 13 to the proof of Mr Roberts.

⁵⁰ Pages 18 and [No 12] 39 to Appendix 13 to the proof of Mr Roberts.

⁵¹ Paragraph 115 of the Appellant's closing [Document 20] claims Mrs Miller said: "...*the smell was not tobacco*". However my contemporaneous note records precisely the opposite and I have recorded what she said in quotes, which signals to me that it was said verbatim, as being: "*Similar to tobacco or pipe not cigarette*". I do however acknowledge that she said the smell was "*not fruity*", which contrasts with the evidence of Mr Thomas.

⁵² Source of quote: my contemporaneous note of her evidence on the first morning of the Inquiry.

⁵³ Appeal references APP/X5990/C/14/2221704 and APP/E5900/C/10/2133439, respectively.

43. I have noted reference to viability but I am not persuaded that it is material to this ground of appeal. I attach little weight to the existence of structures on the forecourt and the prospect of mobile furniture being used in the future and have instead examined the use subsisting and its effects. Whilst I have noted the time of year at which complaints were made to the Council's Environmental Protection team, the fact is that there was a complaint about noise and another about smoke/smell issues.

Appeal A: Ground (c): Conclusion

44. For the above reasons I conclude that there has been the making of a material change in the use of the premises to a mixed use as a restaurant and a shisha bar. The Appellant has not discharged the onus of proof to show that there has not been a breach of planning control and so the ground (c) appeal also fails.

Appeals A & B: Ground (a)

Preliminary matters

45. On the final day of the Inquiry the main parties agreed an *Additional Statement of Common Ground* [Document 18]. Paragraph 1 thereof unambiguously says that: "*The parties agree that both of the appeals should be allowed under ground (a)...*". Paragraph 2 confirms, with reference to just Appeal A, planning permission should be granted for the use and operations subject to conditions. This agreement cannot be binding on the decision maker, but it is nevertheless a material consideration to which I attach significant weight in these appeals.

Main issues

46. There are 2 main issues that fall to be determined in the deemed planning application under ground (a) in Appeal A, but only one main issue, the second, which applies to the ground (a) in Appeal B. The first is the implications of the development for neighbours' living conditions, with particular reference to noise, disturbance, odour and smoke. The second is the effect of the development on the character and appearance of the Grade I listed building known as the "*Warehouses and general offices at western end of North Quay*" and its setting within the West India Dock Conservation Area [WIDCA].

Planning policy

47. The Development Plan [DP] includes the London Plan [LP], the Core Strategy [CS] and the Managing Development Document: Development Plan Document [DPD], which were adopted in 2016, 2010 and 2013, respectively. Whilst the CS pre-dates the National Planning Policy Framework ["the Framework"] the Statement of Common Ground [Document 17] records that the parties agree that full weight should be given to relevant CS Policies SO1, SO4, SP03, SP04 and SP10. Reference is also made to the emerging Local Plan "*Tower Hamlets 2031: Managing Growth and Sharing the Benefits*" [eLP]. Applying paragraph 216 of the Framework, the Statement of Common Ground [Document 17] records that the parties agree that limited weight should be given to relevant Policies S.DH1 and S.DH3. I have no reason to interfere with this consensus.

Reasons

Appeal A: (i) Neighbours' living conditions

48. Temple Lounge is an A3 food and drink use operating from Unit 1 that serves approximately 160 seats on the terrace outside Units 1 and 5, as well as the 16 seats within Unit 1 itself, on the quayside at West India Quay. The walkway

between the terraces outside Units 1 and 5 is accessed by customers as well as residents who live in flats above ground floor level within the listed warehouse. The nearest dwellings are generically referred to as the Port East Apartments.

Noise and disturbance

49. Dealing initially with noise and disturbance, I take as my starting point the Council's acceptance, in the light of the expert evidence of Mr Montague, that there is not an unacceptable impact on living conditions by virtue of noise⁵⁴. The evidence⁵⁵ shows that the background noise levels, which establish the noise climate for Temple Lounge, are broadly the same in summer and winter. Under the ground (a) it is not appropriate to confine the comparison to A3 uses and so I accept the finding, at paragraph 5.2.8 of Mr Montague's proof, that the noise levels from Temple Lounge are in keeping or even lower than those of other premises along the quayside. Nothing that I observed during the multiple site visits that I made to the vicinity of the site, as well as the video evidence that was shown at the Inquiry, would lead me to dispute that conclusion. The character of the area has been described by the Council as lively, animated and vibrant, and would be so with or without Temple Lounge operating.
50. Amongst other things I do not doubt that the use of shisha pipes does not generate significant noise and I have no reason to doubt that moving them is comparable with other activities, such as moving chairs or setting tables. I also have no reason to think that the presence of the side sheets/guttering has any material impact in terms of noise emission from Temple Lounge. At most the effect might be that their existence draws more customers because they provide some protection from the elements, but I accept that even when used to capacity there is no evidence of an unacceptable noise impact. The Council's observations under the title '*Amenity*' in the report on the applications for planning permission and listed building consent underline this conclusion⁵⁶.
51. For reasons given under the ground (c) head, I have had cause to identify the potential for an increase in noise of more than 3 dB. However that was in comparison to A3 forecourts but again that is not the appropriate comparison to be made under the ground (a) appeal. In the circumstances this is not a sound basis on which to dispute the statement, at paragraph 6.2.10 of Mr Montague's proof, that even a doubling of the numbers of patrons would have no observed adverse effect, as defined in the Guidance. This logic is entirely consistent with the stance adopted by the Council by the close of the Inquiry.
52. I accept the finding, at paragraph 6.3.6 of Mr Montague's proof, that noise levels from some of the other units would be significantly higher at resident's windows than those recorded at Temple Lounge. My empirical observations confirmed the evidence that loud music was clearly audible when the door to Rum and Sugar was opened and that this occurred regularly. Although it has been suggested that some of the accommodation above some of the units is for staff the position is by no means clear and in any event, adopting a balance of probability, main habitable room windows might still be proximate.
53. During the winter months it is more likely, adopting the balance of probability, that residents would have their windows closed. Mrs Miller's evidence to the Inquiry confirmed that she kept her windows closed when the premises are open during the winter period. There is no evidence before the Inquiry to

⁵⁴ Paragraph 28, Document 19.

⁵⁵ Compare readings after 2300 hours in the tables at paragraphs C1.9 and C2.9 of Mr Montague's proof.

⁵⁶ See report at Appendix A5 to Mr Montague's proof.

dispute Mr Montague's claim that basic double glazing would provide at least 30 dB reduction to conversational noise. The assertion, at paragraph 6.4.1 of Mr Montague's proof, that the flats have secondary glazing installed was true of Mrs Miller's flat. Even with the bedroom window open, to provide ventilation, and the connecting door[s] open I found the noise level in her living room to be very quiet during my inspection because of the combination of the double and secondary glazing. This underlines the statement in Mr Montague's proof that such an arrangement would give rise to a high level of sound reduction.

54. There appears to have been just one complaint to the Council's Environmental Protection team with regard to noise, which was closed within a matter of days because no noise nuisance was witnessed. In that context I do not propose to repeat my analysis of earlier submissions made by local residents because the low level of response in relation to this appeal is of greater significance. Aside from the letters of support submitted at appeal stage, the letter of objection dated 8 November 2017 only alleges noise nuisance in relation to opening after 2300 hours. The condition agreed between the main parties would resolve any possible ambiguity as to the time at which the premises would close. Given the planning history and the view that has been taken that the terrace is not the subject of any planning condition to restrict hours at the moment, the prospect of imposing such a condition represents a planning gain and I attach this factor significant weight in the overall planning balance.
55. Mrs Miller's letter[s] dated 1 November 2017 does not expressly cite noise as being of concern. Her oral testimony referred to laughing and talking during opening hours, but after some initial confusion her evidence was that she had no problem getting to sleep after 2200 hours and when she did sleep in her living room it was by choice. I have already recounted my experience of noise levels in the living room with the window in the bedroom open for ventilation and, in the light of this and taking Mrs Miller's evidence in the round, I am unpersuaded that this arrangement or noise level would be unacceptable. This is with the clear caveat that a planning condition to restrict hours is necessary.

Odour

56. Turning to odour the Statement of Common Ground [Document 17] records, with reference to Table 3 in the proof of Mr Thomas, that the main parties agree that the "*pathway effectiveness*" and the "*receptor sensitivity*" are high. Although the Council originally took issue with the expert assessment of Mr Thomas that the "*source odour potential*" was small, Mr Roberts conceded in cross-examination, having regard to the IAQM guidance [Document 8], that it should be adjudged to be small.
57. With specific reference to Table 8 of the IAQM guidance I agree with what is now a consensus between the main parties that the "*source odour potential*" is small. In terms of magnitude Mr Roberts accepted it was below the Part B threshold and that material usage would not be hundreds of tonnes/m³ per year. Mr Thomas explained that whilst the hookah pipes might be used in every quadrant of the forecourt because the smoke would arise from spots, distinct from a pond surface or an equivalent area, and the area source would be tens of m² rather than hundreds. Mr Roberts gave me no basis to disagree with this analysis or what Mr Thomas describes as effective and tangible mitigation that leads to little or no residual odour. Amongst other things the main parties have agreed that a planning condition should be imposed with regard to the location of the charcoal brazier, which has the potential to

address any adverse impacts from this potential source of odour in the future. It could also deal with one of the main potential sources of smoke that, in contrast to the spots at which hookah pipes are used, which might vary from one day to the next, is likely to be in a relatively fixed position.

58. Under cross-examination Mr Thomas pointed out Table 8 just gives examples⁵⁷ and the key factor that led him to find that the "*source odour potential*" is small is the pleasantness of the aroma. I have no basis to dispute this expert opinion and in reaching this view I attach significant weight to the WHO report [Document 12] which says, at paragraph 26, that waterpipe tobacco products, which includes shisha, are perceived to have a "...*pleasant flavour and aroma*" [*my emphasis*]. This supports the expert assessment of Mr Thomas that the odour from shisha is not unpleasant and is comparable to the odour of incense or a general fruity smell, which have a positive value on the hedonic scale⁵⁸. In the alternative⁵⁹, for example in the scenario that the odour might be mixed with smoke from charcoal, which has a negative hedonic score, I consider it would at worst be categorised less offensive in Table 5 of the IAQM guidance.
59. In light of the above I accept the expert assessment of Mr Thomas that the likely odour effect at Port East Apartments is slight. This descriptor derives from his Table 1, which is based on the IAQM guidance, at least in terms of descriptors. In the context of Table 3 of the IAQM guidance it is said that where the effect is greater than slight adverse the effect is significant. This is reflected in paragraph 3.3.3 of his proof. It follows that I accept the conclusion, in paragraph 6.1.5 of his proof, that smoking of shisha does not have a significant effect on the living conditions of the residents of the Port East Apartments.
60. This finding is broadly consistent with the limited number of complaints that have been made to the Council. There is a tension in my view between the description of the complaint made on 16 May 2016⁶⁰ and the Officer's later statement that the Council had not received any complaints regarding the smoking of shisha. It is perhaps conceivable that the complaint related to the charcoal brazier. However even if that were correct I accept the Appellant's submission that there have been very few objections or complaints on the basis of odour over the 5-year period that Temple Lounge has been operating.
61. In that context I do not propose to repeat my analysis of earlier submissions made by local residents. The low level of response in relation to this appeal is significant. Mrs Miller's letter specifically refers to "*tobacco smell*" and I have given a reason why I accept that might be her descriptor of the shisha smell, as she has to pass the smoking area to access her apartment. Although that would remain the case, given the expert view of Mr Thomas and, among other things, the position of her flat relative to the prevailing wind⁶¹, I do not find that the use has or would cause an unacceptable level of odour or fumes. If that were the case I would expect others to have raised this issue and whilst I note her suggestion that the lack of objection derives from her being an owner and tenants being able to move out, that is contradicted by the terms of the other letters received at appeal stage, all of which are from owner occupiers.

⁵⁷ Confirmed in the paragraph under the 3 factors set out on page 29 of the IAQM guidance.

⁵⁸ "*Hedonics of Odors and Odor Descriptors*" Andrew Dravnieks, Journal of the Air Pollution Control Association, Volume 34, No 7, July 1984.

⁵⁹ Noting "or" under title "*Small Source Odour Potential*" in Table 8 of the IAQM guidance.

⁶⁰ Identified to be: "...*smoke/smell issues from external seated area*" in Appendix A3 to the proof of evidence of Mr Thomas.

⁶¹ Figure 3 in the proof of evidence of Mr Thomas.

Conclusion on the first main issue in Appeal A

62. On the first main issue I conclude that, subject to the imposition of necessary planning conditions, the development would have no adverse implications for neighbours' living conditions, by reason of noise, disturbance, odour or smoke. As such I find no conflict with DPD Policy DM25 (e) because the development would not create unacceptable levels of noise, odour or fume pollution and so I can be satisfied that the amenity of existing residents would be protected. The imposition of necessary planning conditions would also ensure that noise would be minimised, mitigated and/or managed in accordance with CS Policy SP03.

Appeals A & B: (ii) Effect on designated heritage assets

63. The West India Dock Conservation Area Appraisal and Management Guidelines [CAA] were adopted in March 2007; it is appropriate to attach them significant weight. The CAA says the Import Dock provides an impressive forecourt to the surviving Grade I listed Gwilt Warehouses, which represent the last of the multi-storey dock warehouses of the late Georgian period in London. The CAA describes the dock buildings as the most significant in the WIDCA and says they are characterised by their use of stock brick and stone dressings in a restrained, austere classical style. I note this language derives from the list description itself, which records that the warehouses were first listed relatively early in July 1950, albeit that the reasons for designation appear to date from, or have been amended in, 2007. Those reasons highlight its group value with a number of other structures built as part of the dock, as well as the fact that it is: "...the earliest remaining multi-storey warehouse in the Port of London".
64. The main parties both rely on the staged approach to proportionate decision making set out in Historic England's Good Practice Advice [GPA] Note 3 "*The Setting of Heritage Assets*". The appeal sites lie within the WIDCA⁶², but the development at issue is also within the setting of the Grade I listed warehouse and the Grade I listed West India Quay walls, copings and buttresses to the docks⁶³. The Council confirmed that no other designated heritage assets⁶⁴ are affected. The duties in section 66 and 72 of the LBCA Act are clearly engaged.
65. Dealing initially with the listed buildings their grading confirms that they are of exceptional, indeed national, interest. Only a small proportion of buildings are listed as Grade I. Mr Handforth's assessment of the significance of the listed warehouse is that it has evidential, historic, aesthetic and communal value; I agree. However Miss Crone draws attention to the list entry insofar as it describes the buildings as fine Georgian warehouses and on this basis I regard it to have architectural interest too⁶⁵. There is also group value arising from the intrinsic link between these adjacent Grade I listed assets for example by reason of historic and aesthetic values.
66. Turning to the contribution of setting to the significance of the listed buildings, paragraph 9 of GPA3 emphasises that the importance of setting lies in what it contributes to the significance or to the ability to appreciate that significance. Mr Handforth says that the warehouse is primarily of interest aesthetically

⁶² See later analysis, but I am satisfied that most of the appeal sites lie within the designated area.

⁶³ Miss Crone's proof, paragraph 3.6, which "...are now the only surviving examples of the first intensive period of London dock construction" [as per the list description at Appendix 2 to Miss Crone's proof].

⁶⁴ As listed in Miss Crone's proof, paragraph 3.8.

⁶⁵ Having regard to the definition of significance (for heritage policy) in the Glossary to the Framework.

through its sheer scale. In my view that can best be appreciated from across the dock⁶⁶ because in many other vistas the building now appears relatively modest in scale compared to the modern development in Canary Wharf. This is the key location from which it is possible to appreciate the group value with the quay walls. However its scale can also be appreciated when walking along the walkway in front of the warehouses⁶⁷ due to its close proximity and the human scale. In my view this is broadly the vantage-point that the Inspector had in mind when referring to: "...views from the edge of West India Dock"⁶⁸. It is not identified as an important view in the CAA, but it is a key location from which it is possible to understand and appreciate the significance of the warehouses.

67. The significance of the WIDCA, but more particularly the vicinity of the appeal site, derives predominantly from the listed warehouse. My reading of the CAA plan⁶⁹ is that there is a somewhat random boundary to the WIDCA, such that the appeal sites appear to straddle it. The appeal sites contribute positively to the lively, animated character of the forecourt, but in terms of appearance its importance lies in its contextual setting for views towards the listed warehouse.
68. There can be no doubt that the setting of the listed warehouse has changed dramatically over time. It has been established that the listed warehouse would originally have been inward looking with a walled enclosure around the wider dock area and quay sheds in front of the warehouse⁷⁰. However those historic structures are no longer evident⁷¹ and there is no reference to them in the list description. Whilst I accept that the warehouses would have been functional and were not intended by the architect, George Gwilt & Son, or others involved in its design and construction, to be appreciated as, for example a palace, the *Step 2 Checklist* in GPA3 sets out a range of factors to be considered. Change over time is one such factor but the warehouse is now a visually dominant focal point for the WIDCA and the wider quay. The third bullet-point in paragraph 9 of GPA3 says the contribution of setting to significance does not depend on public access and that the potential for appreciation of the asset's significance might increase. As such I attach limited weight to this aspect of the evolution of the warehouse. The relatively open contemporary setting allows all these designated heritage assets to be appreciated from a number of public vantage-points and in my view it is important to conserve that going forward. This approach is wholly in line with the thrust of paragraph 132 of the Framework.
69. The third step in GPA3 is to assess the effects of the development on the significance or the ability to appreciate it. The starting point for this analysis must be the structures that are immune, as detailed on the plan at Document 4.2⁷². This immediately leads me to take issue with the assessment by Miss Crone which, perhaps understandably, was undertaken on the basis of those breaches that were alleged in the enforcement notices issued by the Council.
70. In my view the fact that there are 2 lawful umbrellas with guttering [F and G] in front of the façade of the warehouse, together with side sheets at rights angles to Unit 5, is significant. Taken with the lawful jumbrella [A], with side sheets, that stands in front of Unit 1, this means that views towards the lower façade of the warehouse are obscured in some public views from the south.

⁶⁶ See for example Plate 1, Appendix 2, to Mr Handforth's proof.

⁶⁷ See for example Plate 3, Appendix 2, to Mr Handforth's proof.

⁶⁸ Source of quote: paragraph 14, appeal decisions APP/E5900/C/14/2222252 & APP/E5900/A/14/2218929.

⁶⁹ Page 3 of 19 at Appendix JP22.

⁷⁰ See for example Figures 5 and 8, Appendix 1, to Mr Handforth's proof.

⁷¹ The Inquiry was told that the quay sheds were removed circa 1980.

⁷² This can also be seen to some extent, albeit not in colour, on the plan attached to this decision.

71. In that context Mr Handforth says that when seen from across the dock the addition of gutters and wind breakers is not readily discernible in long range views. The side sheets were lowered and raised at this sort of distance during the accompanied site inspection and that exercise leads me to agree with this submission. At this distance the existence of the lawful structures, together with the muted colour of these forecourt structures, means that the additional gutters and side sheets, together with the 2 additional umbrellas, H and I, in front of unit 5, barely register. Even when the side sheets are lowered they do not detract from the scale of the warehouse, the clear and uninterrupted line of the quay wall or the relationship between these designated heritage assets.
72. The Council relies on the Inspector's decision from August 2015 and it remains pertinent because his assessment of the second jumbrella then at issue was made in the context of the lawful jumbrella [A]. Although I have noted what is said in paragraph 5 of that decision, reference to the submitted plans would suggest this was "*free standing glass screens/wind breakers*"⁷³, which appear to be materially different from the side panels now at issue. On this basis the claim of a lack of consistency has not been made out. The fact that planning permission has been granted for 4 individual umbrellas on the forecourt of unit 1 since that date does not invalidate it. Mr Handforth does acknowledge that the guttering and wind sheets when unfurled reduce the visibility of the listed warehouse from certain angles, especially when close to the building; I agree.
73. In close views from the walkway⁷⁴ the addition of gutters and wind breakers is readily discernible, particularly the side panels to umbrellas C and E. Views of the ground floor of the warehouse are obscured because whilst the side panels are 'see through' to a limited extent they do not allow an appreciation of the bricks, windows and other architectural detailing of the warehouse. With reference to the *Step 3 Checklist* in GPA3 the additions do not permit visual permeability. Whilst the side sheets are not permanent and might be seasonal, as their use appears to be largely weather related, the guttering appears to be more permanent. As the Council has demonstrated, the combined structure at Unit 1 has a larger area than the jumbrella that was dismissed at appeal.
74. Similar criticisms apply to the additional works on the forecourt of unit 5. The additional umbrellas, incorporating the extra gutters and side sheet, add to the clutter of existing structures on this forecourt and are readily discernible in close views from the walkway. This detracts from an appreciation of the detail and architectural significance of the warehouse. Cumulatively the additional structures on both forecourts, whilst having a neutral or positive⁷⁵ effect on the character of the WIDCA, would detract from its appearance to a limited extent.
75. I accept the additional works that are the subject of the deemed applications do not compete with the warehouse, but they do detract from the experience of the listed warehouse within its setting. Although there has been criticism of the previous Inspector's analysis of harm, I reject the contention that either he or I have equated loss of view to harm. What is particularly significant in this instance is that the operations affect the setting of a Grade I listed building. In this context I have considered the development against LP Policies 7.4, 7.6, 7.8 and 7.9, CS Policy SP10, DPD Policies DM24 and DM27 and eLP Policies S.DH1 and S.DH3. It is notable that LP Policy 7.8D requires development to conserve

⁷³ Source of quote: annotation on plan at Appendix JP6.2.

⁷⁴ See for example Plates 6, 7 and 8 Appendix 2, to Mr Handforth's proof.

⁷⁵ Positive to the extent that the structures facilitate greater activity particularly at certain times of the year, such as in the winter, which would reflect the significant activity that was characteristic of the area's mercantile past.

the significance of heritage assets and their setting by being sympathetic to, amongst other things, their materials and architectural detail. DPD Policy DM27 also says, amongst other things, that development will only be approved where it enhances or better reveals the significance of the asset or its setting. The claim that the policy test goes beyond the Framework does not lead me to find no conflict because the starting point for the decision maker is the DP⁷⁶ and in any event the parties agree that the policy should be given full weight⁷⁷. The CAA has identified visual clutter as being a threat to the WIDCA. Whilst any harm must be given considerable importance and weight, I agree with the Council's assessment that the harm in this instance is less than substantial.

Other matters

76. In reaching this view I have taken account of the various planning permissions that the Council has granted in respect of structures on other forecourts of the listed warehouse. The planning permissions at Browns include jumbrellas⁷⁸ as well as a timber support structure, but the former are spaced out and the trees further distinguish this area from the situation here. Whilst a retractable roof has been permitted at Burger and Lobster⁷⁹, the basic wooden structure can be clearly distinguished from these deemed applications. The Council does appear to have granted permission for 2 blocks of 4 jumbrellas without spacing outside Drake and Morgan⁸⁰ but, whilst the plan is not that clear, the claim that it does not include side sheets has not been disputed. The jumbrellas permitted as part of that scheme do appear to be relatively insubstantial⁸¹. The 13 October 2016 planning permission has not been implemented to date and a subsequent planning permission⁸² shows 4 jumbrellas with good separation between them. The igloos on part of that forecourt do not appear to have planning permission. The forecourt of Rum and Sugar has umbrellas but these are modest in size and no planning permission, if required, has been identified. The planning permission at Pizza Pilgrims includes umbrellas and what has been referred to as a "tuk tuk", but which the approved plans describe as a "...taxed & insured roadworthy vehicle [that] can be driven away when required"⁸³. On that basis I again find a reason to distinguish what has been permitted from the terms of the deemed planning applications that fall to be considered here.
77. I have also taken account of the photographic and other evidence⁸⁴ that there were umbrellas with roll down side sheets on what appears to be the forecourt of Unit 5 as far back as 2002. However it is difficult to ascertain as to whether the roll down sides were just at the rear, next to the warehouse, or elsewhere. It is unclear whether these structures were lawful for planning purposes. The planning history⁸⁵ does not reveal any relevant entry for planning permission or an LDC. In all of the circumstances I attach very limited weight to this factor.

Weight to be given to public benefits

78. Accordingly, in line with paragraph 134 of the Framework, it is necessary to weigh the harm against the public benefits of the proposal. The Guidance says

⁷⁶ Section 38(6) of the Planning and Compulsory Purchase Act 2004.

⁷⁷ Point 18, Document 17.

⁷⁸ Appendix JP2.2.

⁷⁹ Appendix JP2.3.

⁸⁰ Now The Sipping Room.

⁸¹ See "JUMBRELLA REFERENCE IMAGE" on drawing No 94.29/301E, Appendix JP2.4.

⁸² Appendix JP2.4, second entry.

⁸³ Source of quote: annotation on approved plan at Appendix JP2.1.

⁸⁴ Appendix 1 to the Appellant's proof.

⁸⁵ Page 2, Document 17.

that public benefits may follow from many developments and could be anything that delivers economic, social or environmental progress as described in the Framework, but should flow from the development⁸⁶. At the Inquiry a number of public benefits were identified, which I set out below in no particular priority, but with commentary as to the weight that I attach to each.

79. The first is that without this operational development it would not be viable to operate Unit 1, the kitchen of which currently serves both forecourts, as either an A3 or a mixed A3/shisha use. Given that the original planning permission was for just 16 covers, the year round use of the forecourt that is facilitated by the operational development thereon secures the viable use of the listed building. This alleged public benefit reflects the broad thrust of DPD Policy DM27 (2) (e). It appears to be the single most important factor that has led the Council to change its position at the Inquiry. I agree and attach substantial weight to this factor in the particular and slightly unusual circumstances where such a small restaurant has been permitted within part of the listed building.
80. The second is that the premises provide a diverse offer, including food and drink, which contributes to the social role, improves the lives of the ethnically diverse community, enhances cultural well-being and reflects the community's needs. This is in line with CS Policy S01, the first bullet-point of which seeks to ensure Tower Hamlets continues to be a place of diversity, enterprise and cultural significance, together with the thrust of LP Policy 4.6. Particularly in the context of the first benefit I attach this factor significant weight.
81. The third is that this is an accessible location; I agree it is well served by public transport and in close proximity to major employment locations. CS Policy S04 seeks a hierarchy of vibrant and inclusive centres that are mixed use hubs, and I consider the use of the appeal sites fully complies with this focus. It brings activity and vibrancy to an area where there appears to have been a high turnover of units with some vacancy. I also attach this factor significant weight.
82. The fourth is the economic benefit arising from the employment on the appeal sites, as well as indirectly, whether through suppliers, contractors or through the multiplier effect. The business plainly has a positive effect on the economy and it is appropriate to attach this factor moderate weight given that there may be additional economic benefit directly arising from the built development. It was also said that casual dining is under threat at the moment in the macro economy and this reinforces my view that this is a positive factor in this case.
83. The fifth was the claim that the development has a positive effect on the character and appearance of the area. In terms of character, I have previously found that the effect is neutral or positive, for example on a seasonal basis over the winter. However I have given reasons why I have found harm to the appearance of the WIDCA. On balance I attach very little weight to this factor.
84. The sixth is that the development is better than the fallback. I take this to be a reference to the alternative high back exterior seating and non-fixed umbrellas that have been referred to⁸⁷. However I am unpersuaded by this argument as such furniture does not involve development, as defined in the Act. For this reason I attach this factor extremely limited weight.

⁸⁶ Paragraph: 020, Reference ID: 18a-020-20140306.

⁸⁷ Appendix 11 to the Appellant's proof.

Balancing exercise and overall conclusion on the issue of heritage

85. In considering the effect of the development on the Grade I listed warehouse and its setting within the WIDCA, I have had special regard to the desirability of preserving the setting of the listed buildings and paid special attention to the desirability of, at a minimum, preserving the appearance of the WIDCA. For the reasons I have given the development has led to less than substantial harm to the significance of these designated heritage assets, but I have identified a number of public benefits, which include securing the viable use of part of the listed warehouse, as well as a number of other economic and social benefits.
86. On balance I conclude that these public benefits outweigh the harm in the particular circumstances of these appeals, together with the identified conflict with DP Policies. My conclusion is reinforced by the Council's ultimate stance at the Inquiry. This leads me to conclude overall, on the second main issue in Appeal A and the only main issue in Appeal B, that there are material considerations that outweigh the identified harm and conflict with DP Policies.

Other matters

87. The reasons for issue of the notice subject of Appeal A allege a conflict with CS Policy SP04, but no such conflict is alleged in the reasons for issue of the notice the subject of Appeal B. This might suggest that the alleged breach of the policy arises from the use rather than the operations. However even applying that logic I have been unable to identify a conflict with the terms of the policy.
88. The reasons for issue of both notices also allege a conflict with DPD Policy DM23 which, as paragraph 23.1 of the supporting text explains, sets out how development can contribute to streets and the public realm. I note that it relates back to CS Policy SP09, with which the Council allege no conflict. In this case I find a clear distinction has been maintained between the private terrace and the public realm, including the access to the apartments. For this reason I am again unable to detect a conflict with the terms of this adopted DP Policy.

Conclusion on the deemed planning applications

89. For the above reasons, and having regard to all other matters raised, I conclude overall that the ground (a) appeals should succeed. The appeals on ground (f) in Appeals A and B do not therefore need to be considered.

Conditions

90. The *Additional Statement of Common Ground* [Document 18] identifies 3 suggested conditions pertaining exclusively to the use in Appeal A only. In relation to the first I agree that a condition to control the hours of opening is necessary in the interests of neighbours' living conditions. It is common ground that the use should not be carried on after 2300 hours, which is night time for noise purposes⁸⁸. However there is an inconsistency between the original *Statement of Common Ground* [Document 17] and the *Additional Statement of Common Ground* [Document 18] as to start time. No good reason is given for restricting the opening time to 1100 hours, as suggested in the latter, and so I shall permit an opening time of 0900 hours to allow the Appellant flexibility.
91. The second suggested condition is effectively carried forward from the 2005 planning permission for the use of the building. Given the extent of the red line area it must follow that the planning permission that I intend to grant will

⁸⁸ Paragraph B4.4, Mr Montague's proof.

supersede the extant permission for the use of Unit 1 and so the condition is necessary. However, as discussed at the Inquiry, given that the works have been undertaken it would be appropriate to bring the condition up to date by, in particular, inserting a clause to require the scheme to be maintained.

92. The third suggested condition requires a scheme to be submitted to and agreed in writing by the Council with regard to the location of the brazier, which is also necessary in the interests of neighbours' living conditions. I shall revise the suggested condition in the interests of precision and, in particular, to ensure that the brazier is only positioned in the approved location when it is lit.
93. The original *Statement of Common Ground* [Document 17] had suggested a condition to preclude amplified music from being played externally at any time. Having drawn this to the attention of the main parties at the conditions session of the Inquiry the consensus was that there was no need for such a condition because such matters would be covered by the premises licence. I have no reason to dispute this consensus and, as such, I shall not impose the condition.
94. No suggested conditions have been put forward in relation to the operational development that is the subject of both appeals. For the reasons given in my main reasoning and having regard to the consensus between the main parties I concur that no conditions that meet the relevant tests in paragraph 207 of the Framework should be imposed in this respect in either Appeals A and B.

Appeals A & B: Conclusion

95. For the reasons given above, I conclude that both appeals should succeed on ground (a) and planning permission will be granted on the applications deemed to have been made under section 177(5) of the Act.

Pete Drew

INSPECTOR

Plan

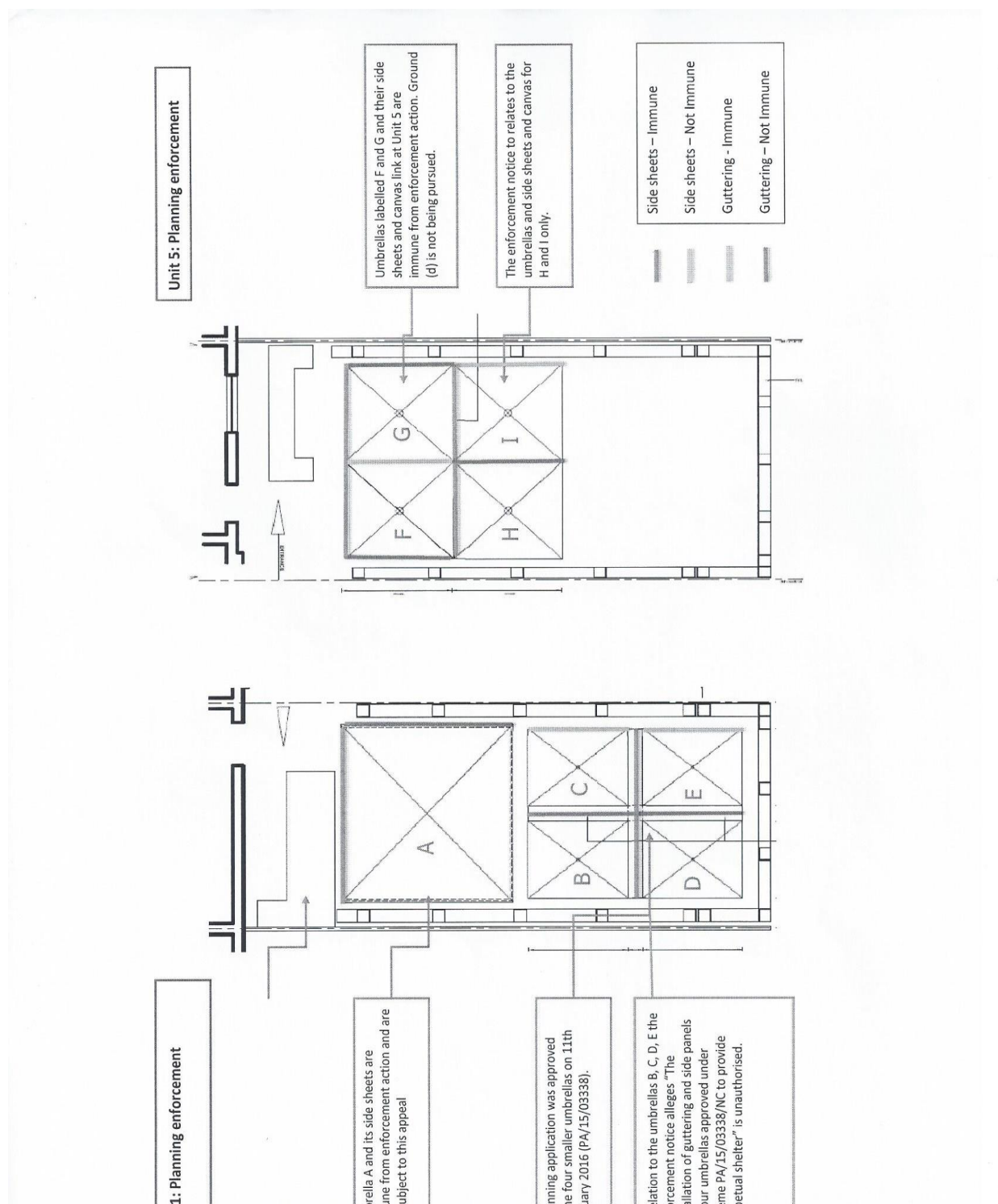
This is the plan referred to in my appeal decision dated: 11 May 2018

by Pete Drew BSc (Hons), Dip TP (Dist) MRTPI

Land at Unit 5, Block D, 14 Hertsmere Road, West India Quay, London E14 4AF

Appeal B Ref: APP/E5900/C/17/3181952

Scale: Do not scale as the original plan has been scanned.



APPEARANCES

FOR THE APPELLANT:

Victoria Hutton

Counsel, instructed by Bidwells LLP.

She called:

Naz Choudhury

Appellant.

Bob Thomas BSc (Hons),

Managing Director, Air Quality Assessments Ltd.

PgDip, MSc, MEnvSc,

MIAQM CSci

Lee Montague BEng

Senior Consultant, Cole Jarman.

(Hons), MIOA

Steven Handforth BA

Divisional Partner, Heritage Team, Bidwells LLP.

(Hons), MSc

Jonathan Phillips BA

Group Partner, Planning Division, Bidwells LLP.

(Hons), Dip TP, MA, MRTPI

FOR THE LOCAL PLANNING AUTHORITY:

Andrew Parkinson

Counsel, instructed by Sophie Chapman,
Solicitor, Council of the London Borough of
Tower Hamlets.

He called:

Lucy Crone BA (Hons),

Heritage and Design Officer, Council of the
London Borough of Tower Hamlets.

MSc

Joe Roberts MA

Planning Compliance Officer, Council of the
London Borough of Tower Hamlets.

INTERESTED PARTY:

Mrs Miller

Local resident.

Documents submitted at the Inquiry

1. List of appearances on behalf of the Appellant.
2. Rebuttal proof of Naz Choudhury with 3 attachments.
3. Rebuttal proof of Jonathan Phillips.
4. Documents submitted on behalf of the Appellant comprising: (.1) aerial view of Port East Apartments; and (.2) plan showing those parts of the structures that are immune and not immune.
5. Documents submitted on behalf of the Appellant comprising: (.1) email from Irfan Khan; (.2) email from Jason Yefet; (.3) email from Councillor Oliur Rahman; and (.4) letter from Alex Holroyd-Jones.
6. Rebuttal proof of Joe Roberts with appendices comprising: (A) photographs and menu; (B) Trip Advisor reviews; (C) floor plan; and, (D) bundle of appeal decisions.
7. Document submitted on behalf of the Council comprising letter from the occupier of apartment D205.
8. IAQM publication "*Guidance on the assessment of odour for planning*".
9. Judgment submitted on behalf of the Council comprising *Steer v SSCLG and others* [2017] EWHC 1456 (Admin).

10. Opening statement on behalf of the Appellant.
11. Opening comments on behalf of the Local Planning Authority.
12. Document submitted on behalf of the Appellant comprising World Health Organisation [WHO] Framework Convention on Tobacco Control report "*Control and prevention of waterpipe tobacco products*", 18 July 2014.
13. IEMA publication "*Guidelines for Noise Impact Assessment*".
14. Defra guidance "*Nuisance smells: how councils deal with complaints*".
15. Documents submitted on behalf of the Council comprising: (.1) email from the Council to Mr Choudhury dated 19 January 2017; and (.2) email from the Council to Mr Choudhury dated 1 February 2017.
16. Documents submitted on behalf of the Appellant comprising: (.1) bundle of emails between the Council and Mr Choudhury prior to 16 May 2017; and (.2) bundle of emails between the Council and Mr Choudhury prior to 2 March 2017.
17. Signed and agreed *Statement of Common Ground* dated 6 April 2018.
18. Signed and agreed *Additional Statement of Common Ground* dated 20 April 2018.
19. Closing comments on behalf of the Local Planning Authority.
20. Closing submissions for the Appellant, together with Appendix A.