



Appeal Decision

Inquiry held on 15 October 2019 and 28-30 January 2020

Site visits made on 28 and 29 January 2020

by Jean Russell MA MRTPI

an Inspector appointed by the Secretary of State for Housing, Communities and Local Government

Decision date: 4 March 2020

Appeal ref: APP/T5150/C/18/3207116

162 Church Road, London, NW10 9NH

- The appeal is made by Mr Mohammed Dilbany under section 174 of the Town and Country Planning Act 1990 as amended against an enforcement notice issued by the Council of the London Borough of Brent.
- The enforcement notice (ref: E/17/0208) was issued on 4 June 2018.
- The breach of planning control that is alleged in the notice is: without planning permission, the material change of use of the premises from an [sic] restaurant (Use Class A3) to a mixed use as an [sic] restaurant (Use Class A3) and a sui generis Shisha lounge/café use.
- The requirements of the notice are to:
STEP 1: Cease the use as a shisha lounge/café.
STEP 2: Remove all items associated with the shisha café, including the removal of all enclosures, outdoor smoking areas, shisha pipes, tobacco, chairs, tables, and charcoal burners and other related paraphernalia associated with the use from the premises.
- The period for compliance with the requirements of the notice is one (1) month.
- The appeal is proceeding on the grounds set out in section 174(2)(b), (d), (a), (f) and (g) of the Town and Country Planning Act 1990 as amended. Since an appeal is brought on ground (a), an application for planning permission is deemed to have been made under s177(5) of the Town and Country Planning Act 1990.

Summary of Decision: The appeal is allowed, the enforcement notice is quashed, and planning permission is granted in the terms set out below in the Formal Decision.

PROCEDURAL MATTERS

1. Inspector J Whitfield opened the inquiry on 15 October 2019. In short time, he adjourned the inquiry in order to give the Council a fair opportunity to respond to late evidence submitted by the appellant. Mr Whitfield then could not sit on the agreed dates for resuming the inquiry. The parties did not object when the appeal was transferred to me and I am satisfied that neither has been prejudiced.
2. Accordingly, all further references to the 'inquiry' in this decision letter, unless otherwise stated, should be taken as meaning the inquiry when held on 28-30 January 2020. All evidence to the inquiry was given on oath.
3. The original Council's planning witness, Mr Michael Wood (MLW), left the Council's employment after preparing a proof of evidence but before the inquiry was resumed. The Council's new planning witness, Mr Nigel Wicks (NW), prepared his own proof, but MLW's remains part of the written evidence.
4. The late evidence presented to the inquiry on 15 October 2019 was a proof of evidence, including a noise assessment, from Mr Rob Cant (RC). In response the

Council called an additional witness to the inquiry, Mr Martin Wood (MW), and he provided his own 'proof' in the form of witness statements.

5. The appellant and the Council gave notice at the inquiry that they would make applications for costs against each other. The applications were duly made and responded to in writing; the decisions are set out in a separate letter.
6. I made my site visit on 28 January 2020 with the parties just after 12.00 hours. I was unaccompanied for my visit made at around 20.00 hours on 29 January.

THE SITE AND ITS SURROUNDINGS

7. The appeal concerns part of a terraced three storey building which stands at the back of the pavement and faces onto Church Road. There are flats on the upper floors and the site also includes a long back yard which extends to Conley Road; there is a gate to that street on the rear site boundary.
8. I shall refer to the following parts of the premises:
 - The 'ground floor [shop] unit' of the building, which is now used for the restaurant element of the alleged mixed use.
 - The 'front' and 'middle' parts of the ground floor unit; currently, the front part includes food preparation and sales facilities plus seating, while the middle part includes more seating, toilets and a kitchen/storeroom. The middle part is wholly or partly contained in a pre-existing 'addition' to the building¹.
 - 'The extension' which is single storey and connects the pre-existing rear elevation of the building to the Conley Road boundary. The extension has a flat roof but is largely open on its western side² to enable the smoking of shisha in accordance with the smoking ban described later³. There is an uncovered strip of yard by the western side boundary of the site; this area is about 1m wide and serves as a path to the back gate.
9. Adjoining buildings on Church Road are generally in retail, food and drink or community use at ground floor level, and residential use on the upper floors; the parade is within the Church End Local Centre. The site also adjoins a car repair workshop on Conley Road, but that street is mainly lined with dwellinghouses.

THE ENFORCEMENT NOTICE

10. Under s176(1) of the Town and Country Planning Act 1990 (TCPA90), an Inspector may (a) correct any error, defect or misdescription in an enforcement notice, or (b) vary the terms of an enforcement notice, so long as doing so would cause no injustice to the Council or appellant.
11. The appellant queried whether the notice correctly identifies the land subject to the notice or, alternatively, whether the notice correctly identifies the uses of 162 Church Road. These points were raised through the appeal on ground (b) and shall be dealt with under that heading below.
12. As discussed at the inquiry, a mixed use should be treated as a single mixed use. Even if individual components would otherwise fall within any class described in the Schedule to the Town and Country Planning (Use Classes) Order 1987 (UCO), this will not be the case if and when they are part of a mixed use. I can correct

¹ Shown on the 'existing side view' on the plans subject to the '2010 permission' described later.

² Part of the extension at the back of the site is wholly enclosed and sectioned off for incidental storage use.

³ To be clear, this is an assessment of why the appellant built the extension as he did, not whether the extension is in fact sufficiently unenclosed to be used for public or workplace smoking under the Health Act 2006.

the notice without causing injustice so that the alleged use is described simply as mixed use comprising a restaurant use and shisha lounge/café use.

13. I heard discussion as to whether the premises actually is – or was on the date of the notice – in a mixed use as alleged. I am satisfied that this is so, because firstly the site is a single planning unit in single occupation, from where the appellant runs one business which is known as 'Salim Kitchen'; and secondly the business is run so that customers can eat a meal without smoking shisha or vice versa⁴. The mixed use is comprised of two primary uses, a restaurant and shisha lounge/café, neither of which is incidental to the other.
14. The notice does not allege that any operational development has taken place in breach of planning control, but it requires that 'enclosures [and] outdoor smoking areas' are removed alongside other items. Without prejudice to the appellant's ground (f) appeal that this requirement is excessive, I do not find it unclear; it encompasses the extension where the shisha lounge/café use takes place⁵.
15. It has been held by the courts that if an enforcement notice is concerned with an unauthorised material change of use, and that was facilitated by works, the notice may require the removal of the works as well as cessation of the use, in order that the breach of planning control will be remedied through the restoration of the site to its previous condition⁶. It is not necessary for such a notice to allege that there has been operational development, or even for what must be removed to *amount* to development as defined under s55 of the TCPA90.
16. However, there is nothing to prevent a 'use' notice from also alleging facilitating works. The appellant asked that I correct the notice to that end so that he can seek permission for the extension via ground (a). The Council was wrong that the extension would be permitted anyway via any success on ground (a) because the deemed planning application can only relate to the development alleged.
17. It would cause injustice to the appellant if the notice was corrected to say that the extension is in breach of planning control in its own right, because he has lost the opportunity to make any evidenced case that the extension is lawful on ground (d). Moreover, a notice must specify the reasons why the local planning authority consider it expedient to issue the notice⁷, yet none of the reasons for taking enforcement action as set out in this notice refer to the extension⁸.
18. The notice could, however, be worded so that the breach of planning control is described as a material change of use which was facilitated by the construction of an extension. It is undisputed that the extension was built to enable either the change of use itself or the continuation of the alleged use. At the inquiry, the Council did not suggest that making that correction would cause them injustice, but they did submit that the extension is unsuitable for use as a shisha lounge/café. I shall consider ground (a) on that basis.

⁴ It is also possible for shisha customers to eat or drink in the smoking lounge, with the service of food and drink here being incidental to the smoking of shisha, hence the description of a 'shisha lounge/café'.

⁵ The Oxford English Dictionary defines 'enclosure' as an area that is surrounded by a barrier, as the appellant suggests **or** a barrier that surrounds an area. The term is meaningful in the context of smoking regulations.

⁶ *Murfit v SSE & East Cambridgeshire DC* [1980] JPL 598; *Somak Travel Ltd v SSE & Brent LBC* [1987] JPL 630; *Bowring v SSCLG & Waltham Forest LBC* [2013] EWHC 1115 (Admin); and *Kestrel Hydro v SSCLG & Spelthorne BC* [2016] EWCA Civ 784

⁷ S173(10) of the TCPA90 and Regulation 4(a) of the Town and Country Planning (Enforcement Notices and Appeals) (England) Regulations 2002

⁸ At the inquiry, the appellant suggested that the notice should be corrected to allege that the extension is in breach of planning control, but in so doing referred to another appeal decision (inquiry document 12) where the Inspector quashed the notice precisely because it alleged operational development as well as a material change of use, but included no reasons for taking enforcement action against the works. That the other appeal was determined under the 'written representations' procedure makes little difference; I could not correct this notice so as to introduce the same defect that was fatal to another and brought to my attention for that reason.

19. In his case for ground (f), the appellant said that Step 2 is 'hopelessly vague and incapable of correction'. I asked whether that should be taken as a claim that the notice is null, bearing in mind the "hopelessly ambiguous and uncertain" test set out in *Miller-Mead v MHLG* [1963] 2 WLR 225. The appellant confirmed that he does not make that claim. I find that the notice is not a nullity, and also that it is capable of being corrected or, in principle, varied without causing injustice.

THE APPEAL ON GROUND (B)

20. The appeal on ground (b) is that the matters alleged by the notice have not occurred. This, like ground (d), is a legal ground of appeal where the onus is on the appellant to make his case on the balance of probabilities.
21. The appellant does not dispute that there has been a material change of use of the ground floor unit and rear yard to the alleged mixed use. His concern is that the notice relates to the whole of 162 Church Road but omits to mention that the upper floors are in residential use. However, there is no dispute that the flats are separate planning units and not intended to be covered by the notice.
22. The Council considers that the notice creates no difficulty because the restaurant and shisha lounge/café are addressed at no. 162, but the flats are at no. 162A. That submission is consistent with Land Registry evidence and the Statement of Common Ground (SoCG), but the water is still muddy because the Salim Kitchen fascia sign indicates that the use takes place at no. 162A. This may be a clerical error, but photographs show that it was also made on previous signs.
23. I shall correct the notice so that it relates to 'the ground floor and back yard at 162/162A Church Road'. Making this amendment would cause no injustice to any party, since it will ensure that the notice relates to the whole of the land where the alleged use takes place, and no other land. The appeal succeeds on ground (b) to this extent, but the plan attached to the notice does not need correcting.

THE APPEAL ON GROUND (D)

24. Ground (d) is that, at the date when the notice was issued, no enforcement action could be taken in respect of the alleged change of use. Under s171B(3) of the TCPA90, a breach of planning control consisting of a material change of use of land becomes 'immune' from enforcement action after the end of the period of ten years beginning with the date of the breach.
25. The notice was issued on 4 June 2018, and so the change of use must have occurred by no later than **4 June 2008**. It could have occurred before then, but the alleged mixed use must have continued for a ten year period, such that the Council could have taken enforcement action at any time; *Thurrock BC v SSETR & Holding* [2002] JPL 1278.
26. I shall have regard to the principle that, if there is no evidence to contradict the appellant's version of events or make it less than probable, and his evidence is sufficiently precise and unambiguous, it should be accepted. I shall also refer to:
- The '2005 [planning] application' (ref: 05/1699) made on 26 July 2005.
 - The 'smoking ban' or prohibition of smoking in all 'enclosed or substantially enclosed' areas that are open to the public or used as a place of work' under s2 of the Health Act 2006, which came into effect on 1 July 2007.

- The '2009 [planning] enforcement investigation' (ref: E/09/0769) which commenced after receipt of a complaint on 5 November 2009⁹.
- The '2009 [planning] application' (ref: 09/2425) made by the appellant on 13 November 2009¹⁰ and recorded as withdrawn on 7 January 2010.
- The '2010 [planning] application' or '2010 permission' (ref: 10/0078) made by the appellant on 10 January 2010¹¹ and approved on 12 March 2010.

June 2004 to June 2008

27. The appellant purchased the lease of the flats at 162A Church Road in 2000, and the freehold of the whole building on 18 June 2004¹². The ground floor of the building had been used as a solicitors' office, a use which then and now would fall under Class A2 in the Schedule to the UCO.
28. The appellant described in his witness statements and at the inquiry that the use as a shisha lounge/café commenced as soon as he acquired and refurbished the premises. He told the inquiry that the first business name was 'Moktar' and that he has always offered soft drinks and food for sale to shisha customers. However, he did not describe the premises being in mixed use.
29. For example, the appellant wrote in paragraph 13 of his witness statement dated 21 June 2019 (MD1): in *'mid-October 2004 I opened [the premises] as a shisha café/lounge, serving shisha, drinks and cakes. The principal use is for shisha pipe smoking, serving of food and drink is subsidiary or ancillary to smoking'*.
30. MAS, a person who lived above and managed the premises between October 2004 and July 2010, similarly provided a witness statement which said: *'during that period the place was called Moktar Shisha Café...We served Shisha, Hot & Cold Drinks and Cakes and snack ie: crisps, nuts etc'*.
31. By contrast, the 2005 application was for a *'change of use from Use Class A2 (office) to Use Class A3 (restaurant) including the erection of new ducting to the kitchen at the rear...(retrospective)'*. I do not know whether that description was the appellant's or the Council's but, either way, 'retrospective' implies that use of the site as a restaurant commenced before July 2005. However, there is no further information on the 2005 application which could shed more light¹³.
32. Google Street View photographs taken in June 2008 show that the premises then had a fascia sign giving the business name 'Moktar' and business description 'Shisha Café/Lebanese Cuisine'¹⁴. The appellant told the inquiry that this sign was erected in 2004 and that would be consistent with his 2005 retrospective application. However, the sign does not on its own constitute unambiguous evidence that the alleged mixed use was probably taking place.
33. It is clear that the appellant used the premises differently before and after the smoking ban came into force. He said in MD1 *'before the smoking ban, customers used to smoke indoors. In July 2007 the smoking regulations came into force, so I moved the smokers and the shisha reparation out into the back yard to comply with the new regulations'*.

⁹ Inquiry document 15 to be read with Appendix 21 to NW's proof

¹⁰ This is the date given on the Council's decision notice; the SoCG gives a date of 20 November 2009

¹¹ Again, this date is taken from the Council's decision letter; the SoCG gives a date of 15 January 2010

¹² The Land Registry was not updated to that effect until 15 July 2013

¹³ The SoCG indicates that the 2005 application was withdrawn but that it not correct. The application was never determined for reasons unknown, and 'finally disposed of' on 9 November 2012 under Article 36 of the then in force Town and Country Planning (Development Management Procedure) (England) Order 1995 (or 2010).

¹⁴ Appendix 18 to NW's proof; the parties do not dispute the date of any Google photograph.

34. The appellant confirmed at the inquiry that, prior to 1 July 2007, customers primarily smoked and ate inside the building. He also said that customers could use a 'small canopy' in the yard if they wished to smoke in fresh air – and I do not dispute that, but the canopy would have indeed been small, since Google Earth and Bing aerial photographs show that, in 2006, the appeal yard was amalgamated with that at no. 164 in 2006 and primarily used for parking.
35. I heard that, after the smoking ban came in, the appellant bought a 'little marquee' to place beside the canopy. Customers had to be and were moved to these 'small tent type outdoor coverings' in the yard. Gazebo-type structures are indeed shown in the yard in a Google Earth aerial photograph dated 5 March 2008 and Google Street View photographs from June 2008.
36. The appellant told the inquiry that serving food became more important after the smoking ban as customers did not want to be outside in bad weather. But he did not show that the mixed use began then. He said in his second witness statement dated 8 October 2019 (MD2): *'after I bought the premises, I always had shisha in the back of the ground floor but tried various businesses in the front of the ground floor: smoking before the smoking ban in 2007, café, selling fruit and vegetables. If the new business lost money, I would try something else'*.
37. The 2009 application included a Design and Access Statement (DAS) which said: *'the office was...closed down three years ago. Thereafter, a Grocery was opened for about three months but closed down...Currently the premises are closed. This has been the case for over two year now'*. I agree with the appellant that 'about three years' from November 2009 would take us to 2006. It matters not that the office actually closed in 2004. The word 'thereafter' suggests that the grocery use took place after the supposed office closure but before the 'two year' period that the site had been 'closed' – meaning 2006/7.
38. MD2 also suggests that the fruit and vegetable shop was open in or after 2007. At the inquiry, the appellant could not recall when he had run the shop, but he did at least confirm that he had done so for a few months. It seems probable that the shop was opened in an early attempt to make good use of the building after the smoking ban necessitating moving the shisha bar outside.
39. At this stage, therefore, I find there was probably in 2004 a change of use from office use to a shisha café use alone, with food and drink served on an incidental basis. The appellant did not need to use the ground floor or yard for any other purpose and there is little evidence that he did. After the smoking ban came into force, he had to find space that was not 'enclosed or substantially enclosed' where shisha could be smoked, plus a new use for the ground floor unit, and there was probably a change of use to a mixed use as a shisha lounge and shop.
40. The question now is what happened after the shop closed. The 2009 application plans included a photograph of the site with a 'Fouz Fruit and Vegetables' fascia sign – but that was undated. The 2010 application plan included the same image, but also a drawing of the 'existing front view' of the building with a Moktar sign. That is consistent with the Google Street View photograph of the Moktar sign being in place in June 2008.
41. The 5 November 2009 complaint to the planning department suggested that the premises had *'mainly been in retail use'* since 2005, but not that there was still a shop¹⁵. The complaint was that *'work is currently taking place to convert'* the building to a restaurant – but again it was not said that the new use was taking

¹⁵ The content of this complaint may explain references to a 'change of use from retail/office...' in the 2009 enforcement and 2010 application documents.

place. At this stage, it seems probable that the use as a shisha lounge/café was taking place on the material date of 4 June 2008, but not that there had been a change of use to the alleged mixed use.

August 2009 to November 2013

The 2009 Enforcement Investigation and the 2009 and 2010 Planning Applications

42. As noted above, the 5 November 2009 complaint was about conversion works. A planning officer visited the site on 10 November and saw the sign for a restaurant 'and shisha' but also that the premises was 'closed'. The Council wrote to the appellant on 16 November about an unlawful '*change of use of [the] premises from retail/office to restaurant and shisha at 162 Church Road...*' but it seems that the enforcement investigation subsequently turned to the extension, perhaps because the appellant had by now applied for permission for A3 use.
43. The agent for the 2009 and 2010 applications was NB of Haplin Engineering Ltd, and it is expected that he prepared the documents and plans. I heard discussion about why the applications might have been made as they were, but NB did not appear at the inquiry to give his own account. He was not a planner, but he was appointed in a professional capacity and I assume that he behaved accordingly.
44. The 2009 application was for a 'change of use from office to a restaurant (A3)'. I would not say that the appellant concealed his intended shisha use, since that was noted in the DAS submitted with the 2010 application: '*the owner has developed a plan to renovate the existing premises and change it to a restaurant (A3) and a smoking area/shisha at the back*'. However, I will note that the appellant again described his proposal as for a single rather than mixed use.
45. Just as the 2009 DAS said that the premises were closed, the application form stated that the existing and lawful use was as an office, which had been 'closed down for over two years' or since 'Aug 2007'. The appellant told the inquiry that he did not know why NB had written that, but he did admit that he had 'met [NB] on site' and showed NB around the site. Even if NB was wrong that the premises had been closed for 'over two years', the application still points to the alleged use not taking place in November 2009.
46. The 2010 application was made (or at least approved) for a change of use from retail (Use Class A1) to restaurant (Use Class A3). The 2010 DAS again stated that 'currently, the premises are closed'. It included an undated photograph of the premises with the Moktar sign in place, alongside the plan showing the Moktar sign on the existing and proposed front views of the building – but that could not on its own show any active use.
47. The report on the 2010 application referred to an objection 'to the smoking shelter' and indicated that the Council had concerns about the '*size, scale and appearance...and the principle of the use*' of this structure. Given the DAS and Moktar sign, the Council should have understood that the site was (to be) used for smoking shisha. However, the report did not mention shisha or other smoking activity of any kind. It did not describe any existing use of the site at all.

The Extension and the Zoopla Listings

48. It seems that work on the extension commenced before the 2009 application was made. The appellant told the inquiry that, although he did not secure permission for the extension or shisha lounge use, his reason for instructing NB was to apply for outside [smoking] space to comply with the smoking ban. The Council was alerted that 'something out the back' had been built on 10 November 2009.

49. The extension was included in but then withdrawn from the 2010 application, as confirmed in the 2010 DAS. The officer's report stated that '*a large shelter in the rear yard*' had been '*removed from this application and...enforcement officers will be notified that the structure does not have planning permission*'. Permission was granted subject to conditions, including no. 4 that '*there shall be no public use of the space to the rear of the building and the A3 use shall be contained internally within the ground floor unit*'.
50. There is no evidence that the Council followed up its threat of enforcement action, but then the extension was not complete when discovered. Photographs on the 2009 application file, which are undated but were likely taken on a contemporaneous Council site visit, suggest that the shelter then comprised columns on the western side connected by steel joists to plywood panels on the eastern site boundary¹⁶. There was no roof as such; the extension was only half covered with blue plastic sheeting or a tarpaulin fixed to the plywood.
51. The appellant said in paragraphs 18 and 30 of MD1 that '*in 2010 we made the structure into a full sized canopy which remains the same to this day...in 2010 we refurbished the canopy, before that we had additional tents...*' He reiterated at the inquiry that the extension was built in 2010 – and I accept that the shell of the structure probably has remained the same since.
52. However, a Google Earth aerial photograph shows that, on 27 June 2010, the extension looked as did in 2009: a skeleton covered in part by tarpaulin. Aerial photographs taken on 14 February and 19 March 2011 are poor quality but seem to show the extension in the same state. The earliest photograph of the extension with a grey felt roof – which resembles the existing grey felt roof – is one taken for Google Street View in June 2012.
53. The Council submitted copies of archive documents suggesting that the building was advertised for sale on Zoopla. The documents say '*Previously listed for sale on 14th Feb 2012*'; NW told the inquiry that the re-advertisement was in August 2012. The appellant could only recall telling a friend with contacts that he would sell the building for a good price, but he did not deny that it was listed¹⁷.
54. The Zoopla particulars included undated photographs of the extension when it was still in shell form but had beams as well as joists – and no tarpaulin was in place. Since Google Street View shows the extension completed in June 2012, the Zoopla photographs were out of date by the time of the August 2012 listing. However, I asked at the inquiry whether it should be expected that the Zoopla photographs reflected how the extension was, more or less, in February 2012, on the basis that sales particulars normally show property as is.
55. The appellant's response was that the photographs must show the extension being **re**-roofed, since wires can be seen on the structure which would not have been left out in the rain. The wires look randomly draped rather than pre-installed but a greater concern is that the appellant made no mention of any re-roofing in his witness statements; by contrast, he said '*in 2010 we made the structure into a full sized canopy which remains the same to this day*'. He could not tell the inquiry when the roof was replaced or how long this took.
56. It was put to the inquiry that the premises must have been refurbished sometime after 2010 because the yard is not now paved as it was in 2009. But the Zoopla photographs show the 2009 paving stones, albeit with some missing. The 2009

¹⁶ There had been no boundary treatment between the yards at the back of the appeal site and 164 Church Road.

¹⁷ The Zoopla documents refer to the estate agents as being at an address which was not their registered address in 2012, but the documents do not say 'registered address'.

application, Zoopla and Google Earth photographs together undermine the claim that any functional roof was fitted in 2010 and later removed and replaced.

57. Furthermore, the other Zoopla photographs show the Moktar sign and a roller shutter down over the building, and the front part of the ground floor unit as being refurbished or used for the storage. Again, these photographs are undated, but Google Street View images show works were underway in the front part of the premises in June 2012¹⁸. Business Rates (BR) file notes from 20 February 2013 refer to *'a Google map search...updated in June 2012 [which] shows a shisha café called "Moktar"... [and] shows that builders are there and works are ongoing'*.

*Business Rates*¹⁹

58. The Council's Assistant BR Manager stated by email that the appellant had three periods of exemption from liability for BR in respect of the premises during the relevant ten years. The first and longest period of exemption, between 1 April 2009 and 24 June 2013, was 'due to an inspection by the Council's inspector'. There is no evidence regarding the first 18 months of that exemption, but it already seems probable that the alleged mixed use was not taking place when the 2009 and 2010 applications were under consideration. The 2009 enforcement investigation related to 'conversion' rather than actual use.
59. On 21 October 2010, the BR file notes state: *'opened [account] as the previous [ratepayer] has gone away and [?] isn't responding to any letters...property is empty'*. The property was inspected and seen as closed on 8 November 2010 and 21 March 2011. Other file notes record, with reference to the relevant order, that the appellant was made bankrupt on 6 August 2010, and the final meeting of the appellant's creditors, after he had paid them, was not until 14 February 2012²⁰.
60. BR officers found on 8 March and 17 May 2012 that the 'Moktar Shisha Café Lebanese Cuisine' was open in the evening. On 24 August and 20 December 2012 and 21 February 2013, however, they found that the premises were closed or that *'shutters [were] down (during the day at least)'*. BR noted on 27 February 2013 that *'all recovery channels are exhausted'*. On 3 April 2013, the property was found with shutters down, and *'neighbours confirm is always closed'*.
61. At the inquiry, the appellant did not mention and was not questioned on the matter of bankruptcy. However, he did say that there were periods when he did not pay rates and that was partly because business was slow, and he had no money²¹. The shisha lounge/café was run for a while by a different manager and company²² – but the bankruptcy order could explain the BR liability exemption and the delays to completing the extension and/or the listing of property for sale.
62. The appellant was exempted from liability for BR again for two shorter periods in 2014. None of the BR evidence for those times could assist the appellant, and it is not necessary for me to consider whether the alleged use ceased then.

*Environmental Health*²³

63. An Environmental Health (EH) officer visited the site on 26 August 2009 and *'found the premises has been boarded up. Spoke to builders on site and informed*

¹⁸ The Zoopla and Google Street View photographs must have been taken at different times as different vans are shown parked on the road in front of the site.

¹⁹ Appendix 12 to NW's proof

²⁰ File notes 12 January and 9 March 2012

²¹ There was also the delay in the appellant being registered as the freeholder with the Land Registry.

²² See, for example, paragraph 5 of MD1.

²³ Appendix 5 to NW's proof

that the business has been closed for a month now... This note fits with the 2009 planning statement that the premises was and had been closed, and the evidence that the extension was begun before the application was made. The builder thought that *'...a new internet café will be opened in a month's time'*.

64. At a visit on 6 July 2012, an EH officer noted that the shop had *'now changed to Shisha café and restaurant'* [my emphasis]; whether that was because they had not noticed the Moktar sign before, or the sign had changed in the past month is unknown²⁴. However, when the officer was unable to access the premises, they spoke to a nearby food business operator who had heard the *'shop will be opening in 1 month'* – and that is consistent with the Google Street View images of works taking place to the front area in June 2012.
65. The EH officer made this visit on 6 July 2012 after the appellant had made no response to *'warning letter [previously delivered] by hand'*. That phrase implies that some activity had taken place which the Council felt the need to 'warn' about. I could speculate that there had been smoking and/or cooking odour, and/or customer noise²⁵, but not that such would be evidence of both components of the alleged mixed taking place in the lead up to 6 July 2012.
66. The roller shutter was down when EH visited the premises on 3 September 2012. A nearby food business operator told the officer that *'workmen have stopped coming to the premises over two months ago...the owner of the Shisha Café has run out of money and unable to complete his business'*. Again, this fits with the front area being refurbished in June 2012.
67. EH found that the premises was not open on 24 January 2013. I accept the appellant's evidence that there was an Islamic holiday on that date²⁶ and the alleged use would never have been open. However, EH also found the site closed with the 'outside signboard' removed in May 2013.

Facebook

68. The Council submitted a screenshot from the Facebook page for 'Momtaz Shisha Neasden' which shows that a 'pre-opening party' was held on 11 November 2013. The appellant did not remember this event at the inquiry but guessed it might have been held when he changed the name of the business – and I agree that is more than likely, not least because his exemption from business rates liability ended in June 2013, and it is known that he changed the food offer and branding of the premises from time to time. The Facebook post includes photographs of the shisha lounge/café in use, and I am not clear if they were taken before or during the event. It does not show that the use was not 'opened' until November 2013.

The Appellant's Evidence

69. As noted above, the appellant was clear in his written evidence only that the shisha lounge/café use had continued since 2004. He said in paragraph 48 of MD1 that *'the principle activity to date is shisha smoking with food and drink of various types served over the years as ancillary. At no time as the premises been operated formally with what could be described as a restaurant'*. He said much the same in paragraphs 3 and 13 of MD1 – while his agent for this appeal, Mr

²⁴ Google Street View photographs show that new fascia sign, which gave the business name 'Momtaz' was in place in September 2014. The premises was called 'Bagel City' though still clearly a shisha lounge/café, between at least August 2016 to June 2017; it had been re-named 'Salim Kitchen' by March 2019.

²⁵ The Council prosecuted the appeal shisha lounge for a breach of smoking regulations but not until 2016/17. It is also possible that the warning letter concerned construction noise or waste, or something else entirely.

²⁶ Inquiry document 10

Chivers (DC), asserted in his proof only that 'the sui generis Shisha lounge/café use has been in operation for more than 10 years'.

70. The appellant also said in MD1 that he made the 'full size canopy' in 2010 and 'at that time *'we changed the food menu to burgers and chips or scampi and chips and some Lebanese food'*. When asked at the inquiry how the premises was used *'when the bigger canopy was built in 2010'*, he said the *'internal space was turned into a proper restaurant and the external was for shisha and food and drink'*.
71. The appellant also said that he had had food 'since day 1' and that became more important after the smoking ban. Nonetheless, his evidence suggests that the 'proper restaurant' only came into being after the extension was built to house the shisha lounge/café. If that was in 2010, then on the appellant's own account, the mixed use commenced less than ten years before the notice was issued. He has not shown, however, that the mixed use began even then.
72. In paragraphs 30-32 of MD1, the appellant described the 2010 works and said *'on receipt of planning permission the business did not change at all, it still remained shisha smoking // Almost 3 years had lapsed and we had not progressed with any kind of conversion due to lack of funds...'* I see no other way to read that text than as describing the period after the 2010 permission was granted.
73. Indeed, the appellant's account of the conversion being delayed is consistent with his candour at the inquiry that he faced financial problems over the years and there were times when he had no money. He had to deal with 'persistent water leaks' into the ground floor of the building. He found it difficult to establish the restaurant use, hence the type of food served, and signage being changed from time to time.
74. Paragraph 32 of MD1 is also consistent with the photographic evidence of the extension not being complete until after March 2011 and the ground floor unit not being refurbished until June 2012 – almost three years after EH saw builders on site in August 2009. The appellant told the inquiry that the premises may have been empty when it was being 'refurbished' or if there was a leak or a holiday.
75. I find it implausible that the extension was completed in or re-roofed after 2010, unless by that latter term the appellant meant replacing the blue tarpaulin. But even if I am wrong on that, he said in MD2 that the front of the downstairs may have been closed to the street between businesses for refurbishment and that might be why NB and the Council thought the premises unused for up to two years. When the front of the building was not in use, it is improbable that the premises as a whole was in the alleged mixed use.

The Appellant's Witnesses

76. Two witnesses produced written statements and spoke on behalf of the appellant at the inquiry. Mr Kyriacou (CK) has only been going to the appeal 'shisha café' since 2011, not for ten years, but his evidence is still important because the Council contests the appellant's version of events for the time around 2011.
77. CK stated that he goes to the site on average once a week, and in the past went more often. While he does not often eat on the premises himself, he has always been aware of food being available, mainly snacks and burgers served in the shisha lounge. He recalled the premises being shut for refurbishment once but just for two or three weeks; he could not remember when this was.
78. Mr Salem (SAS) is a longer-standing customer of the appeal shisha lounge/café. He started going there, on average five times a week, when the use commenced

in 2005; at that time, he lived within a few minutes' walk of the site. In 2008, he changed address but continued to visit three or times per week until 2012, when he moved again and dropped his visits to once or twice per week.

79. SAS said that before the smoking ban, he would smoke at the 'back' of the site and occasionally eat something first at the front. He remembered the provision of a 'small tented area' where people could smoke – he thought this was installed because of the smoking ban in 2007. There was a television under the canopy but customers who only wanted to watch football or eat did so at the front of the site; there would be an average of 10-12 people with SAS in the smoking area.
80. SAS said that next change on the site was when the 'small tent' at the back became a 'larger space' – and this was after his 2008 move. He said that while the extension was being built, the small canopy was still on the site for people to smoke in. The aerial, 2009 or Zoopla photographs do not appear to show gazebos under the incomplete extension, but I accept SAS's evidence since canopies or marquees can be readily assembled and taken down by their nature.
81. SAS told the inquiry that he recalled no other major change on the site except for the 'small area' being no longer needed. When he was visiting the site three or four times per week between 2008 and 2012, he undertook the same activities as he had done since 2005: he would sit at the back to smoke shisha and perhaps also eat, while spending time with friends to talk or watch televised football matches. Food was always available, although the type was changed at times – and it was served at the front because some customers wished to eat away from smoke. He would sometimes visit the premises to eat and not smoke.
82. I have had regard to the written evidence of witnesses who could not attend the inquiry. SEJ works as an estate agent and has been instructed by the appellant to rent out the upper floor flats on the site since 2004. They said that the ground floor of the building was being used as a shisha café as long as they had been visiting the premises. This statement does not clearly reference any mixed use and gives insufficient detail to support the claimed ten years of continuous use.
83. Witness statements were made by previous employees at the shisha lounge, one of whom still visits as a customer, plus other users of the site, including a person who lives 'literally across the road'. The appellant submitted a customer survey where people volunteered their name, address, signature and how many years they had been coming to the shisha lounge; many said ten years or more. Again, however, there is no detail in any of these documents to show that the mixed use took place without significant interruption. The same is true of the letters from business associates of the appellant, including his accountants and suppliers.

Questions on the 2010 Permission and Deliberate Concealment

84. I find, on the balance of probabilities, that the premises has never been used solely as a restaurant, and the 2010 permission expired unimplemented on 12 March 2013; this makes no difference to the outcome of ground (d). It is curious that the appellant assumed before the inquiry that A3 was the lawful use, since the permission could never have been implemented had the alleged mixed use taken place from prior to 4 June 2008. However, the reverse does not apply; non-implementation is not enough to show ten years of continuous use.
85. In his proof of evidence for the Council, MLW stated that: *'If the Inspector is persuaded that the LPA's contemporaneous documents and the documents submitted by the Appellant himself in the process of submitting planning applications do not accurately represent the use of the Premises at that time, it is*

the LPA's case that deliberate concealment has occurred which prevents the Appellant from reliance on s171B of the 1990 Act'.

86. MLW's evidence was not tested since he did not appear at the inquiry. NW did not make the same claim and the Council did not pursue this argument at the inquiry. I find that there was no deliberate concealment of the use or 'positive deception in matters integral to the planning process...[which] was directly intended to and did undermine the regular operation of that process'²⁷. It is more likely that the 2009 and 2010 applications were properly prepared, and the alleged mixed use was not taking place at that time.

Conclusion on Ground (d)

87. I heard discussion as to how customers could have accessed the premises if and when roller shutters were down at the front. The appellant suggested that BR and EH officers may have seen shutters down because they visited too early in the day; alternatively, shutters were down in the evening for security reasons, but customers could ring to be let in – or they were sometimes able to access the site via the gate to Conley Road. Evidence of the shutters being down could not, on its own, lead me to reject the appellant's version of events.
88. There is witness evidence that a shisha lounge/café use (at least) commenced in 2004 and was not ceased for any extended period. The appellant, SAS and CK were clear on those points and their sworn evidence carries significant weight – but it was peppered with memory failings and wholly lacking in detail. That finding is not to discredit those individuals; anyone may find it difficult recall years gone by. However, it follows that recourse to the documentary evidence is needed to understand what probably took place.
89. There is no precise or unambiguous evidence that the sale of food and drink was anything more than incidental to the use of the premises as a shisha café prior to or for some time after the material date. SAS may have been right that shisha was smoked under a retained marquee while the extension was being built, but neither he nor others described the operation of a mixed use with a distinct restaurant element prior to June 2012; the availability of hot food is not the same thing, and is not made so by SAS choosing to eat but not smoke on occasion.
90. It has not been shown how the mixed use could have taken place when the appellant was pursuing the 2009 and 2010 applications, and the extension was not complete, and the front area was used for storage or being renovated. It was put for the appellant that '*periods of ordinary refurbishment do not "stop the clock" on a relevant period under s171B*'²⁸ – but that is not correct. Such periods may not stop the clock, but the test is still as set out in *Thurrock*: whether the Council could have taken enforcement action against the breach at any time.
91. It might be fair to describe the 2012 refitting of the front area as 'ordinary refurbishment' but I would not use that term for the construction of the large rear extension²⁹. The appellant said in MD1 that he 'refurbished' the canopy in 2010, and I can accept that he may have meant 'built' – but there was nothing in MD1, MD2 or the oral evidence of CK or SAS that could be read as an allusion to re-roofing. I prefer the Google Earth evidence that the extension was in shell form in June 2010 and February and March 2011 to the claim that the extension had a roof which was worthy of the name in 2010 and replaced later.

²⁷ *Welwyn Hatfield BC V SSCLG & Beesley* [2011] UKSC 15

²⁸ Inquiry document 17

²⁹ The ordinary meaning of 'refurbish' as given in the Oxford English Dictionary is 'renovate and redecorate'.

92. The 2009 and 2010 planning files, and the Zoopla, Google Earth and Google Street View photographs suggest that there was no 'proper restaurant' between August 2009 and June 2012. This was probably the time when the appellant did '*not progress with any kind of conversion due to lack of funds*³⁰. He may have a bad memory, but his written evidence is plausible in pointing to the use being in as a shisha lounge/café alone between 2004 and 2012 – except for the few months when it was in a mixed use with a grocery shop.
93. It is in that light that the BR and EH evidence should be viewed. The appellant rightly suggested that this appeal should not fail on the basis of hearsay and I would not make any decision simply on the basis of unverified notes of officer conversations with nearby business operators. However, the BR and EH records have the benefit of being contemporaneous; they should be treated as reliable if and where they are consistent with other evidence.
94. I conclude that the appellant has not been demonstrated that, at the date when the notice was issued, on the balance of probabilities, the alleged mixed use had taken place without significant interruption for a continuous ten year period, such that the Council could have taken enforcement action at any time. It was not too late for the Council to enforce and so the appeal fails on ground (d).

THE APPEAL ON GROUND (A) AND THE DEEMED PLANNING APPLICATION

Preliminary Matters

95. Since I find it likely that the 2010 permission has expired, and although not invited by any party to do so, I shall correct the notice and thus the description of development for which permission is sought so as to delete the reference to the existing A3 use. This correction will cause no injustice because it is not necessary for an enforcement notice to specify what a material change of use is from. Since the notice does not require the restaurant use to cease, and I have decided to allow the appeal on ground (a), it is not necessary to determine the lawful use.
96. The appellant cannot rely on conditions imposed on the 2010 permission as a means of mitigating the effects of the mixed use. However, he would be able to use the building and yard lawfully as a restaurant if this ground (a) appeal does not succeed, because the notice does not require the restaurant element of the mixed use to cease³¹. The Council did not object to the use of the premises as a restaurant after questioning whether the 2010 permission had been implemented.
97. If ground (a) fails and the notice is upheld, the appellant would be likely to use or sell the site for use as a restaurant. That is a realistic 'fallback position' although, subject to ground (f), the extension would have to be demolished.

Main Issues

98. Following the inquiry, I consider that there are three main issues:
- Whether the shisha lounge/café use, as part of the appeal mixed use, is acceptable in principle in this location;
 - The effect of the use on the living conditions of nearby residential occupiers, with regard to noise and disturbance, smoke and odour, and waste;

³⁰ NW suggested that the inquiry that the appellant might have delayed finishing the extension because of the threat of enforcement action.

³¹ S173(11) of the TCPA90 provides that where an enforcement notice in respect of any breach of planning control could have required any activity to cease, but does not do so, and all the requirements of the notice have been complied with, then, so far as the notice did not so require, planning permission shall be treated as having been granted by virtue of s73A in respect of development consisting of the carrying out of the activities.

- Whether planning permission ought to be granted for the extension.

Reasons

Whether the Use is Acceptable in Principle in this Location

99. The enforcement notice was issued for the sole reason of harm to the amenity of nearby residential occupiers. However, I heard discussion on the principle of the use at the inquiry – and it was claimed in the Council’s statement of case and closing submissions that the appeal use ‘is out of character with its surroundings’.
100. Although not exactly the same as any other use, I find that shisha lounge/cafés share characteristics with other types of café or restaurant, public houses and nightclubs, in that customers attend to consume a product on the premises in company. Most shisha cafés are places for people to gather and sit with friends to relax and perhaps enjoy food and/or music or other entertainment; one difference from a pub is that shisha is consumed, and alcohol usually is not.
101. There are no bars or pubs in the immediate vicinity of the site, but it does not follow that such uses, or shisha cafés, would be unacceptable in principle. Policy DMP2 of the London Borough of Brent Local Plan Development Management Policies (LPDMP) permits non-retail uses in town centres subject to criteria which are not said to be breached. The only policy which makes express reference to shisha is LPDMP Policy DMP3, and the Council does not claim conflict with the provision that: *‘Shisha cafés will only be permitted outside 400 metres of a secondary school or further education establishment entrance/exit point’*.
102. Since the parties agree that Policy DMP2 is relevant, it must follow that the Church End Local Centre would meet the definition of a ‘town centre’ for the purposes of the National Planning Policy Framework (the Framework). It expects planning decisions to support the role that town centres play at the heart of local communities – and that ‘main town centre uses’ including restaurants, bars, pubs and nightclubs are to be located in town centres in the first instance.
103. At the inquiry, I asked NW where a shisha lounge/café would be allowed ‘if not here’. He answered that the uses tends to take place in more isolated or noisier places such as detached former public houses, or industrial or business areas. He made that claim without reference to planning policy, and it is not consistent with the local or national policies cited.
104. NW agreed that his objection is not ‘in principle’ but based on the late night nature of the use; that is of course pertinent to living conditions, but there are cafés and takeaways nearby which are likely to stay open late. The Council placed no planning policy before me to preclude night uses from local centres, although it is not usual for these to include flats above shops. I conclude that the shisha lounge/café use, as part of the appeal mixed use, is not unacceptable in principle but compatible with the location of the site within the Church End local centre, in accordance with LPDMP Policies DMP2 and DMP3, and with the Framework.

Living Conditions

Planning Policy

105. LPDMP Policy DMP1 states that development will be acceptable provided that it, amongst other matters, is of a location, use, concentration, siting, layout, scale and design to provide high levels of external amenity, and does not unacceptably increase exposure to noise, smells, waste, other pollution or general disturbance.

106. Policy 7.15 of the London Plan (2016) requires development to avoid adverse noise impacts on health and quality of life; mitigate and minimise potential adverse impacts of noise; and, where it is not possible to achieve separation of noise sensitive development and noise sources, control and mitigate any potential adverse effects through the application of good acoustic design principles.
107. The Framework expects that new development creates places which promote health and well-being, with a high standard of amenity for existing and future users; and is appropriate for its location with regard to the likely effects (including cumulative effects) of pollution on health and living conditions. Decision-makers should seek to mitigate and minimise potential adverse impacts resulting from noise from new development, and avoid noise giving rise to significant adverse impacts on health and the quality of life.
108. Advice in the Planning Practice Guidance (PPG) on planning and noise is described as relevant below. It refers to the Noise Policy Statement for England (NPSE) produced by the Department for the Environment, Food and Rural Affairs (Defra).

The Council's Concerns

109. As noted above, the enforcement notice does not require the restaurant element of the mixed use to cease. The Council's concerns are that the shisha lounge/café element takes place in the rear extension and, since that is open-sided, noise and smoke can escape and harm the living conditions of nearby residential occupiers.
110. I have found that shisha lounge/café's are comparable to pubs and other sociable night-time uses – which often have 'beer gardens' or outside seating areas that are equally if more unenclosed than the extension and used for congregation and smoking. In part for that reason, however, I would expect any proposal to put the appeal site into use as a bar or restaurant to be just as carefully scrutinised.
111. The appellant said that the appeal shisha lounge/café attracts 40-50 customers 'on a good day'. From my site inspection, I would say the extension has capacity for around 40, and the restaurant can a smaller number of customers. I would not expect each shisha customer to smoke their own pipe, since those are normally shared – and the seating in the extension includes sofas plus moveable tables and chairs, allowing customers to smoke and socialise in groups.
112. There are five heaters in the extension³², enabling the shisha lounge/café to stay open into the evening and through the year. The appellant does not have alcohol or music licences, but the Facebook post described above included a photograph of a customer playing an oud, and a video of an individual being applauded while dancing on a table. There are five televisions, and I understand that customers sometimes play cards, backgammon or dominoes.
113. The appellant has opened the premises between 12.00 and 01.00-02.00 hours or later. However, he has asked for this appeal to be considered on the basis of a condition allowing for opening hours between 08.00 and 01.00 hours on Fridays and Saturdays, and 08.00 and 24.00 on all other days³³. The Council proposed earlier closing times as discussed below.

The Relationship between the Appeal Site and the Nearby Residential Properties

114. It looks from a dormer window at 160 Church Road and rooflights at nos. 162A and 164 that there are flats on three floors above and to each side of the site. The Council confirmed that there are five flats at no. 160, four at no. 162A and

³² The televisions can be removed – and are each night for security reasons – but not moved around.

³³ The appellant wants to start opening in the morning to offer breakfast in the restaurant.

six at no. 164. The dwellings are thus likely to be small, but it cannot be assumed that none are occupied by families with children. The appellant owns the flats in the appeal building, and some occupiers are his employees, but they are as entitled as their neighbours to expect reasonable living conditions in their homes.

115. Upper floor flats in the terrace have main windows facing Church Road and their occupiers will be likely to hear noise until late hours from pedestrian and vehicular activity; the road itself and the local centre are busy into the evening, and there are parking spaces as well as hot food takeaways close to the site. PPG paragraph 30-011-20190722 states that noise impacts may be partially offset if residents have access to a relatively quiet facade with habitable room windows. Thus, noise at the front of the flats could not justify harm from such at the back³⁴.
116. The flats above the premises are accessed by an external staircase at the rear. The part of the appeal extension which adjoins the building is uncovered at the top as well as side – but this gap in the roof is over the area used for preparation and service rather than that for the smoking of shisha. The base of the staircase to the flats is about level with this uncovered part of the extension.
117. As noted above, the building was enlarged in the past at ground and upper floor levels. The rear-facing elevation of the first floor addition contains the entrance to the flats and a bathroom window³⁵. There is a main window on the original rear elevation at second floor level, and there may be others on the side wall of the addition, but these are set back from the shisha lounge/café and close to a flue installed pursuant to the 2010 permission³⁶. A rooflight on the building may serve a habitable room, but it is small and well above the extension.
118. There is a first floor extension at 160 Church Road which is roughly the same depth as that on the appeal building. It contains a large rear-facing window which is close to the site boundary but partly screened by a fence, presumably erected to stop overlooking from the external staircase on the appeal building. There are large dormer windows on nos. 160 and 158 Church Road; at no. 164 there are main windows on the original rear elevation and the side wall of an upper floor extension, and there is a rooflight. These windows are all some metres from the site, and those at no. 164 are on the enclosed side of the shisha lounge/café.
119. The nearest residential properties on Conley Road are dwellinghouses on the opposite side of the street. They are thus separated from the shisha lounge by the highway and the enclosed storage area at the back of the extension.

The Approach to Measuring Noise

120. RC carried out a noise survey for the appellant with regard to the Institute of Acoustics' Good Practice Guide on the Control of Noise from Pubs and Clubs (GPG) and 'working draft annexe on criteria and measurement guidelines'³⁷. RC sought to assess whether there was any breach of GPG criteria A3 and A5.
121. Criterion A3 advises that if noise levels produced due the general use of [pub] gardens and play areas regularly exceeds 55 decibels (db) LAeq 5 min outside a

³⁴ The only commercial use to the rear is the adjacent car repair workshop at 36 Conley Road where customers are seen by appointment. There is no evidence of night-time car repair activity.

³⁵ A bathroom 'is not considered noise-sensitive'. Bathroom windows may of course be left open, but noise coming in through such would be expected to lessen before reaching any habitable room.

³⁶ The duct would not have been installed with the benefit of the 2010 permission, since the restaurant use permitted did not commence, and indeed Google Street View photographs show different ducts since 2010. Even so, the duct is as shown on the approved plan.

³⁷ The GPG refers to World Health Organisation guidance plus Planning Policy Guidance 24, replaced by the PPG.

noise-sensitive property, when measured at least 3.5m from a building façade, this may indicate that unacceptable disturbance is occurring. LAeq 5 min describes equalised five minute logarithmic average levels of recorded continuous noise.

122. GPG criterion A5 is: if noise from rowdy behaviour regularly produces LAmax f levels in excess of 70db 1m outside windows of a noise-sensitive property between 23.00 and 07.00 hours, this may be an indication that unacceptable disturbance could occur or is occurring³⁸. LAmax f refers to maximum, not any equalised average noise level recorded, and so is an appropriate way to record spikes in noise. The period of 23.00 to 07.00 hours is considered as 'night-time' or when most people would reasonably wish to sleep.
123. The Council noted that the GPG does not encompass shisha lounge/cafés, but I agree with the appellant that the main types of noise liable to cause harm to living conditions will be the same from such uses and pubs: people talking, laughing, screaming and shouting; music, television or other entertainment; the movement or furniture or other paraphernalia; and comings and goings. There is no standard way to assess pub and club noise, but MW agreed at the inquiry that he would probably use the GPG if carrying out a similar survey³⁹.
124. British Standard 8233:2014 requires that noise is no higher than LAeq 1 hour 35 dB inside bedrooms or living rooms on average for the 16 hours between 07.00 and 23.00, and LAeq 1 hour 30 dB on average over the eight-hour night-time period; such levels are plainly lower than those set out in criteria A3 and A5. However, noise from pubs and shisha cafés tends to fluctuate; LAeq 1 hour readings would not show if a use caused sudden or sporadic disturbance during the 60 minute period, and the average of those readings would not show if there was unacceptable disturbance over the eight or 16 hour periods.
125. RC surveyed the site on Wednesday 2 and Friday 4 October; employees did the same for him on Tuesday 8 October 2019. They all used NTi and Svantek sound metres and a Svantek calibrator. I have no reason to be concerned that different surveyors worked on different nights, or that the equipment was inappropriate.
126. Sound levels were recorded periodically on Church Road, Conley Road and within the shisha lounge/café, and continuously by the habitable room window that is closest to the site – at 164 Church Road. Since that is outside the site, the sound meter was placed 'level with the neighbouring façade' such that levels of noise recorded would have been, if anything, higher than those outside of the windows.
127. The surveys were started mid-evening, between 20.45 and 21.30 hours, when the shisha lounge/café would be busy, and nearby occupiers would be more likely to want to relax. The surveys were ended at 01.30 hours or 30 minutes after closing time; it does not matter that the appellant did not stay open later on those nights, since he proposes to close at or before 01.00.
128. The Council expressed concern that RC did not detail or consider 'the construction composition or sound attenuating capacities' of the extension, but I would assume that this open-sided structure has no noise-insulating properties worth speaking of, and that will only matter if the result is unacceptable disturbance. The consultants did not measure noise inside the extension so that there could be

³⁸ PPG paragraph 30-006-20190722 notes that '*people tend to be more sensitive to noise at night as they are trying to sleep [and] there is less background noise*'.

³⁹ *Noise from Pubs and Clubs: Report for Defra* produced in 2005 by Hepworth Acoustics and the University of Salford noted that noise from pubs and clubs is assessed using a variety of different schemes and there is no strong evidence that one rating scheme is preferable; appended to MW's proof.

meaningful contrast with that outside, but such recordings would have served no purpose, since the question is simply what was heard by nearby occupiers.

129. I find that the appellant's noise assessment was based on the best available guidance and carried out properly. I shall not speculate as to whether or how the presence of the consultants served to change customer behaviour. However, I shall treat the survey results with caution, since they were recorded when no music was played in the shisha lounge/café, and the televisions were 'turned down fully'. Moreover, deciding whether noise causes unacceptable harm for the purpose of any planning appeal normally involves an element of judgment.

The Noise Survey Findings

130. On 2 October 2019, recorded sound levels outside the nearest habitable windows exceeded LAeq 5 min 55db, although not 58db, between 21.30 and 22.00 hours. At that time, customers were watching a 'high profile' televised football match⁴⁰. After 22.00, noise levels were below LAeq 5 min 55dB until the end of the night, except in one unexplained five minute reading of <58dB at around 23.00; that was the only breach unaccounted for. RC told the inquiry that he saw some 25-30 customers in the shisha lounge/café on 2 October.
131. LAeq 5 min did not exceed 55db at all on 4 October, although when RC took a photograph, there were only about 15 customers in the shisha lounge/café. The LAeq 5 min figure went above 55dB twice on 8 October: when the noise equipment was being set up, and when a flat occupier returned home and slammed their front door. Customer numbers are not known for that night.
132. To this extent, the survey shows noise levels did not 'regularly' exceed 55dB and criterion A3 is met. Criterion A5 was also met in that RC found no 'regular' breach of the LMax 70db limit after 23.00 hours on any night⁴¹.

Other Noise Evidence

133. EH received a complaint on 29 June 2015 that the customers of 'Momtaz Shisha Café' generate 'unruly and disruptive' noise by 'arguing and...screaming' in Conley Road. After following up the call, EH received an email on 10 July 2015, almost certainly from the same complainant, that 'noise and nuisance is occurring in the street...they pour out of the café screaming shouting...'
134. The 10 July 2015 email described the appellant's customers in pejorative terms, but I shall set that to one side. As NW said at the inquiry, there is often some basis to most complaints and those before me may show that nearby residents experienced disturbance. However, the complaints cannot show that there was unacceptable harm, because no action was taken against the appellant and EH did not refer the matter to the planning department.
135. The only other complaint relied upon by the Council was made by telephone at 00.58 on 14 September 2018, and their concern was 'disturbance from jazz music and voices'. They were unable to say where the noise was from, but EH recorded an address of '154 Church Road, restaurant next door'. EH visited and heard 'low voices and sounds like low volume TV outside some several doors down. Nuisance unlikely. Annoyance possible'.
136. Jazz is not played at the shisha café – and it is not explicit from EH records that the officer heard low voices, television and possible annoyance from the appeal

⁴⁰ Liverpool FC 4 – 3 FC Red Bull Salzburg, UEFA Champions' League group stage match.

⁴¹ I accept RC's professional judgment but regret that he did not provide LMax 7 readings for me to consider the regularity of any breaches for myself.

site. I will assume for the sake of argument that he did, since it is 'several doors down' from no. 154. But the only action taken by EH at this time was to ask the then shisha lounge manager whether any activities *could* cause disturbance and, *if so*, to take any measures necessary to reduce the noise.

137. The Council noted in its closing submissions that on 15 May 2018, after the enforcement investigation into the appeal use was begun, 'further complaints were received'. That claim is cross-referenced with the Enforcement Officer's delegated report, which does indeed include the information '*15-05-18 – further complaints on use...*' However, it gives no details as to the number of complaints, or whether any came from local residents, or what was complained about⁴².
138. To assist the inquiry, MW parked on Conley Road outside the site on Sunday 5 January 2020 between 00.05 and 00.10, and again between 01.12 and 01.26 hours. He heard loud talking at a level that '*would constitute annoyance and would likely detrimentally affect neighbouring and nearby residents with open windows*'. He also heard '*several repetitive loud bangs*' at 01.23.
139. The appellant explained that the bangs were probably not caused by shisha preparation, as MW thought – but that does not alter what was heard. Given the hour, it seems possible that some banging noise was made during the cleaning of the grill or the clearing away of pipes, furniture and/or televisions – and if that is right, similar sounds could be made every night. MW certainly heard 'loud talking' again when he made another visit at 00.20 on Monday 6 January 2020.
140. I heard sounds of conversation and furniture being moved when I stood outside the site gate on the evening of 29 January. The noise then was low enough to become inaudible as soon as I moved away from the property – and I was actively listening for it – but this was only at about 20.00. RC found that '*no noise was subjectively audible from the shisha lounge*' from outside the houses on the opposite side of Conley Road, but they are further from the site than the flats.

My Assessment on Noise

141. The Council suggests that '*complaints have not been continuous because the use has not been continuous*' but their enforcement investigation began on the back of EH's investigation of smoking offences at the site in November 2016, more than three years before the inquiry. The mixed use has taken place without permission and not subject to conditions for long enough for any serious noise problem to have emerged.
142. It is obvious from its open-sided design that noise will escape from the extension. I agree with MW that the noise survey shows that '*sounds created within the [extension] do transmit...because the resulting noise has been measured in close proximity to the nearest noise sensitive residential units*'. However, the survey also showed that measured noise levels were, for the most part, below that likely to cause unacceptable disturbance.
143. On at least two nights of the survey, the shisha lounge/café was not used to capacity, but then the evidence from the Council does not show that the use has caused unacceptable noise harm. I would not expect the Council to give details that might serve to identify complainants, and I find the complaints described credible – but they are so slight in numbers and content that they could not justify a refusal of permission for a use which has taken place for so long.

⁴² Appendix 13 to NW's proof

144. CK and SAS told the inquiry that they have never needed to shout in order to be heard when conversing with friends on the premises. Looking at the evidence in the round, I find that 'routine' activities taking place within the shisha lounge/café in the evening – the hubbub of conversation, the preparation and service of shisha, drinks and food, even the playing and movement of televisions – have not caused and should not cause unacceptable levels of noise in nearby dwellings.
145. From the evidence and the proximity of the flats at nos. 160-164 to the site, I also consider that allowing the use to operate with no restrictions on opening hours or entertainment would lead to general noise levels and sudden outbursts of noise so as to cause unacceptable disturbance when nearby occupiers have reasonable expectation of sleep. However, these risks of harm can be redressed by imposing conditions to limit opening hours and control the emission of noise.
146. The Council suggested that use should be required to close at 21.00 hours from Sunday to Thursday, and at 22.00 hours on Fridays and Saturdays; in my view, that would make it too difficult for the appellant to run his business and thus be unreasonable. However, I also find that the appellant's suggested times of 24.00 and 00.01 would be too late to prevent unacceptable harm, and would not be consistent with his reliance on the use being comparable to a local pub.
147. The PPG advises that for developments likely to generate noise, mitigation can be achieved by using conditions to restrict activities at certain times, differentiating as appropriate between times of day, such as evenings and late at night⁴³. I find it necessary to require that the premises closes at 23.00 hours from Sunday to Thursday and at 24.00 hours on Fridays and Saturdays. The condition would be reasonable because the appellant told the inquiry that he reduces staff numbers and removes the televisions at 23.00, and both CK and SAS said that they tend to leave the shisha lounge at around 23.00-23.30.
148. A condition which requires noise to be 'inaudible' at nearby dwellings, or kept below some specified level, would be unreasonably onerous, if not unenforceable. The appellant's suggested alternative condition, to prevent the playing of music or television after 22.00 would be more workable and achieve the same aim of preventing unacceptable disturbance.
149. 22.00 is later than 20.30, when the appellant has been muting his televisions to date – but the survey shows that does not stop customers responding loudly to broadcasts. It would be unreasonable and unnecessary to require that entertainment stops at 20.30, or even 21.00 as the Council suggested. A condition that music and television are not played after 22.00 would suffice to ensure that noise from the shisha lounge/café subsides before night-time or when most nearby occupiers would reasonably expect to sleep.
150. However, the appellant's suggested condition related to 'music, television, public address system or any other amplified sound'. So far as I am aware, there is no system in the premises for amplifying sound. Again, given the proximity of nearby dwellings, and to give clarity to any future operator, I shall require that no music or television is played after 22.00 and there is no amplified sound at any time.
151. It is undisputed that the use could give rise to unacceptable noise if customers could come and go from the premises via the back gate. The sounds of customers talking or moving parked cars in Conley Road would be liable to disturb occupiers

⁴³ PPG paragraph 30-010-20190722

of the flats above and dwellings opposite⁴⁴. However, this risk of harm can be overcome by imposing a condition to prevent non-emergency access via the gate.

152. PPG paragraph 30-003-20190722 expects account to be taken of the acoustic environment and whether or not an adverse or a significant adverse effect is occurring or likely to occur, and a good standard of amenity can be achieved. In line with the explanatory note of the NPSE, this assessment should include identifying whether the overall effect of the noise exposure is or would be above or below the significant observed adverse effect level (SOAEL) and lowest observed adverse effect level (LOAEL) for the situation.
153. The LOAEL is the level of noise exposure above which adverse effects on health and quality of life can be detected; the SOAEL is the level above which significant adverse effects on health and quality of life occur. The level should be considered with regard not only to any value of noise exposure but also factors such as the number, duration and time of day of noise occurrences.
154. I find that the appeal mixed use causes an 'observed adverse effect level' that is above 'lowest' but probably not above 'significant' – and which in any event can be mitigated by imposing the conditions described so that a good standard of amenity can be achieved in nearby dwellings.

Effects of Smoke on Nearby Occupiers

155. As discussed at the inquiry, shisha is essentially flavoured and perfumed tobacco. While I note below the cultural value of shisha cafés, I would be surprised if *any* person breathing the fumes from such a use without choice in their home did not find this unacceptably intrusive as well as harmful to health.
156. The Council has referred me to a complaint received by EH on 6 December 2018 that *'there's frequently smoke coming into our building from next door, which often leaves me feeling very sick from the smell'*. An EH officer visited the site on 17 December 2018 and observed *'smoke from outside shisha area at rear depending on weather'* – but they decided not to investigate whether this would be statutory smoke nuisance.
157. The EH officer also noted that 'planning aware since 2016' and yet the reasons for issuing the enforcement notice did not refer to harm from smoke or odour. In their proofs, MLW and NW described complaints of 'smoke and smell nuisance' or that the use would result in smoke being transmitted to neighbouring premises – but neither of them showed how there might be unacceptable planning harm.
158. I noticed no smoke or odour from the shisha lounge/café on Conley Road during my evening inspection, although the premises was undoubtedly in use. There is no reference to smoke or odour in MW's notes of his visits on 5 and 6 January 2020. I find that occupiers of the houses on the opposite side of Conley Road would not suffer unacceptable harm in that regard.
159. I also find that, notwithstanding the complaint to EH, there is insufficient evidence of unacceptable harm to occupiers of the flats. With the nearest part of the shisha lounge/café being the preparation and service area, shisha fumes should dissipate sufficiently into the atmosphere before reaching main flat windows so that smoke, the smell of smoke and health impacts are reduced to an acceptable level.
160. The PPG advises that conditions should be tailored to tackle specific problems, rather than standardised or used to impose broad unnecessary controls. It is not

⁴⁴ At his visit on 5 January 2020, MW saw someone leave the site via the back gate, but I do not know whether they were a customer or resident.

necessary and would be unreasonable to impose a condition requiring any measure to reduce odour, or that no odour is olfactible at nearby dwellings.

161. The appeal, of course, concerns a restaurant as well as shisha lounge/café, and indeed shisha customers can eat food cooked on the premises. Any grant of permission for a new restaurant or café is normally subject to a condition requiring the installation of some sort of fume extraction system designed to the Council's satisfaction. The 2010 permission was indeed granted subject to condition no. 3 that 'an extract fan unit and duct' should be installed and maintained in accordance with details that were submitted with the application.
162. That condition does not bite, but I have noted that a flue already projects up at the back of the building; it is connected to ducts in the front kitchen area, the kitchen/storeroom in the middle area and over the shisha charcoal grill. The Council has not suggested that the fume extraction system is objectionable in any respect, and so it is not necessary to impose a condition requiring the submission and approval of a new fume extraction system⁴⁵.

Noise, Smoke and Fencing

163. The occupiers of the flats above the premises have to walk past the open side of the extension when passing between the staircase and the gate to Conley Road. That part of the site, however, is not in residential use⁴⁶. The occupiers should not make so many trips per day as to experience unacceptable harm from noise or smoke when passing the shisha lounge/café. The flats above no. 160 are accessed from Church Road, and so their occupiers will encounter noise and fumes outside of their homes from late night uses and parked cars.
164. It would therefore be unnecessary to impose a condition requiring that some sort of fence or barrier is erected along the open side of the extension – and I shall also say that such a requirement would be unreasonable, since any structure which serves to reduce emissions of noise or smoke would serve to make the extension more enclosed and unusable for the purpose of a shisha lounge/café.

Waste

165. The enforcement notice suggests that waste from the appeal use is harmful to the living conditions to nearby residents. However, the Council has given little evidence as to how or why this harm might arise, particularly when the notice does not require the restaurant use to cease. I would generally expect food waste to require more careful storage and frequent collection than the charcoal dust and foil waste arising from the sale and smoking of shisha.
166. NW stated in his proof that *'while the unauthorised use may not generate more waste than any other business, its operation within a structure covering the entire premises...results in limited space for servicing with waste spilling out into the street as a consequence'*. He submitted an undated photograph of two commercial bins and fly-tipped rubbish outside of the site on Conley Road.
167. The appellant told the inquiry that the litter shown in the photograph was left by a nearby resident; I do not know if that is true, but the rubbish appeared to largely comprise building materials and associated packaging, rather than day-to-day restaurant or shisha lounge/café waste.

⁴⁵ Such a condition would also be unworkable, since it would have to be worded with some sanction for non-compliance, and the sanction would have to be that the shisha lounge/café use is ceased. It would be wrong to require cessation of the restaurant use, since the enforcement notice contains no such requirement – but the only reason to require a fume extraction system would be to deal with cooking smells.

⁴⁶ Whatever the lawful use of the site may be, the yard was used for parking before the smoking ban.

168. The appellant said that the commercial bins were his but stolen and not replaced. It may thus be academic to say that I see no problem with commercial bins being placed on the Conley Road pavement for collection; the operator of the car repair workshop doubtless does the same. The 2010 DAS stated that the then proposed restaurant would be served by two wheeled waste bins and recycling boxes placed in the back yard – and that would still be feasible because there is space for bins in the enclosed storage area at the rear of the site. NW is right that the extension covers the yard, but not that this means limited space for servicing.
169. Be that as it may, the appellant now keeps a black wheelie bin inside the middle area of the appeal building, perhaps so that it is more secure and/or accessible to shisha lounge/café and restaurant staff. In any event, the Council did not object to this arrangement, nor to the fact that it may mean the bin is emptied from Church Road, as will be the bins belonging to nearby businesses in this local centre. The appellant has a contract with a commercial waste collection operator.
170. The complaint made to EH on 10 July 2015 included that customers of the shisha café drop litter, but that is outside of the appellant's control. To my knowledge, the use has generated no other waste-related complaints. I find that the living conditions of nearby occupiers have not been unacceptably harmed through any aspect of waste storage or management. The 2010 permission was granted subject to a condition requiring compliance with the plans, but not the approval of some waste management scheme. I see no need for such a condition in this case.

Other Matters and Conclusion on Living Conditions

171. As noted, the premises (minus extension) could be used lawfully as a restaurant if this appeal is dismissed and the notice is upheld. I would not expect restaurant customers to congregate in the yard in such numbers or so often as to generally cause the same amount of noise, let alone smoke, as the appeal shisha cafe. However, the fallback position would still create real potential for disturbance given that there would be no planning restrictions on restaurant activities in the yard or opening hours – and that adds weight to my view that the appeal mixed use would be acceptable subject to the conditions described above.
172. The Council has submitted appeal decisions where the Inspectors refused to grant planning permission for shisha bars close to residential properties⁴⁷. I accept that the decisions letters on their face concern comparable appeals, with one relating to a different shisha bar in Brent that could accommodate about 40 customers and was located on a high street with flats above the premises.
173. However, the Inspector in that case noted that 'numerous and various noise-related complaints' had been received by EH⁴⁸. Other decision letters referred to Noise and Odour Abatement notices served on the subject shisha bar⁴⁹ and 'comments that have been made by third parties'⁵⁰. Against that, none of the decision letters described any findings from a noise survey.
174. I must consider the current case on its merits and, since there is clearly different evidence before me, I am not bound to reach the same conclusion on living conditions as did my colleagues in those appeals. Moreover, the appellant has referred to another appeal and planning applications where shisha lounge/café were approved in locations said to be similar to this. The Council did not dispute the bare facts given by appellant of those cases.

⁴⁷ Appendices 6 and 11 to NW's proof

⁴⁸ Appeal decision (ref: APP/T5150/C/17/3169610) dated 1 November 2017, paragraph 25

⁴⁹ Appeal decision (ref: APP/A5270/C/13/2207566) dated 24 September 2014, paragraph 17

⁵⁰ Appeal decision (ref: APP/T5150/C/16/3154909) dated 15 December 2016, paragraph 19

175. I conclude that, subject to the conditions described, the mixed use would cause no unacceptable harm to the living conditions of nearby residential occupiers in terms of noise and disturbance, smoke and odour or waste. It would not conflict with LPDMP Policy DMP1, London Plan Policy 7.15, the Framework or PPG.

The Extension

176. As noted above, the Council's 2010 report objected to not only the principle of the use, but also the size, scale and appearance of the extension. However, it was not then complete, and the extension was not mentioned in the allegation or reasons for issuing the enforcement notice. During discussion at the inquiry as to whether the extension is or could be made subject to ground (a), the Council did not describe any planning reason or policy as to why it should not be permitted.
177. MW stated, however, that the extension is not sufficiently unenclosed to be legally used under Building Regulations for smoking shisha. I defer to his knowledge and deduce that allowing the appeal might not end the appellant's troubles. He may need to modify the extension, and in so doing avoid risk of unacceptably increased noise or smoke emissions, and perhaps apply for planning permission for the works, in order to avoid prosecution for a breach of smoking regulations.
178. The former manager of the shisha lounge/café was convicted in April 2017 for such a breach after EH found evidence of smoking in enclosed premises. The appellant confirmed in MD1, as did NW in his proof, that the prosecution related to the extension being 'enclosed'. However, the only contemporaneous evidence seems to be photographs which show plastic sheeting over (part of) the open side of the extension⁵¹. It is not clear that the structure was as open in April 2017 as it is now. Either way, the Council has not, to my knowledge, prosecuted or attempted to prosecute for further smoking offences since that date, although the mixed use has taken place and been subject to planning enforcement.
179. I could not require that the extension is modified, because conditions must be relevant to planning and not used to control matters that are subject to other primary legislation; moreover, there is no information before me as to the required extent or design of the works. Nonetheless, I am satisfied that planning permission should be granted for the extension, because it has not been shown to cause any unacceptable harm in planning terms as it stands.

Other Matters

180. The appellant and DC described in their written and oral evidence that people with Middle Eastern, Asian and North African heritage form a significant proportion of the local community. The appeal shisha lounge/café is a valued facility where they can socialise in accordance with their culture to smoke shisha, and not drink alcohol. I do not dispute, as NW did, the cultural benefits of the service. I also note that the appellant currently employs six people at the premises.
181. However, the appellant has a fallback position of using the site as a restaurant. The social and economic benefits of the use carry weight in favour of the appeal but are not so significant as to be decisive.

Conclusion

182. I conclude that the appeal mixed use is acceptable in principle in this location and, subject to conditions, would cause no unacceptable harm to the living conditions of nearby occupiers. There is no conflict with LPDMP Policies DMP1,

⁵¹ Appendix 5 to NW's proof

DMP3 or DMP4, or with LP Policy 7.15. It follows that planning permission ought to be granted for the mixed use, and I find the same for the extension. It is not necessary to consider whether to grant temporary permission, the appellant's secondary position as set out in his statement of case.

183. The public sector equality duty (PSED) set out under s149(1) of the Equality Act 2010 is that a public authority must, in the exercise of its functions, have due regard to the need to eliminate discrimination, harassment, victimisation and any other prohibited conduct; and advance equality of opportunity, and foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
184. I have no remit or inclination to address whether the Council complied with the PSED in the exercise of any planning or EH functions, but I am bound by the duty myself. It is true generally, and in this case, that shisha cafés are owned and used by members of the ethnic minority communities described above and people of the Islamic faith who do not drink alcohol. The protected characteristics of race and religion are engaged.
185. The appeal use must be considered acceptable in principle in this local centre location on a fair and equitable application of planning policies. I have found that, subject to conditions, the use would cause no unacceptable planning harm and give rise to social and economic benefits. A refusal of permission would therefore fail to advance equality of opportunity or foster good relations between persons who share and do not share the relevant protected characteristics.
186. The aims of the PSED add weight to my conclusion that the appeal on ground (a) should succeed, planning permission ought to be granted for the development alleged in the enforcement notice as corrected, and the enforcement notice should be quashed. The ground (f) and (g) appeals do not fall to be considered.

Conditions

187. The Framework expects that planning conditions are kept to a minimum and only imposed where they are necessary, relevant to planning and to the development to be permitted, enforceable, precise and reasonable in all other respects.
188. In order to protect the living conditions of nearby residential occupiers, it is necessary and reasonable to restrict the opening hours of the restaurant and shisha lounge/café to between 08.00 and 24.00 on Fridays and Saturdays and 08.00 and 23.00 all other days; to require that no music or television is played after 22.00 each day and there is no amplified sound at any time; and that, except for in an emergency, there shall be no means of entry to or exit from the restaurant and shisha lounge/café other than from Church Road.
189. It is not necessary to impose conditions requiring that noise is not audible at nearby dwellings or does not exceed any particular level; smoke is not olfactory at nearby dwellings; a fence or barrier is erected alongside the extension; or that the appellant submits any scheme for fume extraction or waste management.

Formal Decision

190. It is directed that enforcement notice is corrected by:

- Deleting the text of Schedule 1 and substituting 'THE LAND OR PREMISES AFFECTED – The ground floor and rear yard at 162/162A Church Road, London, NW10 9NH ("the premises" – shown outlined bold in BLACK on the attached plan).'

- Deleting the text of Schedule 2 and substituting: 'THE ALLEGED BREACH OF PLANNING CONTROL – Without planning permission, the making of a material change of use of the premises to a mixed use comprising a restaurant use and a shisha lounge/café use, and the construction of a single storey rear extension to facilitate the change of use ("the unauthorised change of use").'

191. Subject to the corrections, the appeal is allowed, the enforcement notice is quashed and planning permission is granted on the application deemed to have been made under s177(5) of the TCPA90 as amended for the development already carried out, namely the making of a material change of use of the premises to a mixed use comprising a restaurant use and a shisha lounge/café use, and the construction of a single storey rear extension to facilitate the change of use at the ground floor and rear yard at 162/162A Church Road, London, NW10 9NH as shown on the plan attached to the notice and subject to following conditions:

- (1) The mixed use comprising a restaurant use and shisha lounge/café use hereby permitted shall take place between 08.00 and 23.00 hours on Sundays, Mondays, Tuesdays, Wednesdays and Thursdays, and between 08.00 and 24.00 hours on Fridays and Saturdays only.
- (2) Televisions and music may be played in the premises between 08.00 and 22.00 hours only; no public address system or amplified sound may be played at any time.
- (3) Except in the case of emergency, there shall be no means of entry to or exit from the restaurant and shisha lounge/café other than from Church Road.

Jean Russell

INSPECTOR

APPEARANCES AT AND EVIDENCE TO THE INQUIRY

APPEARANCES

For the Appellant

Mr Scott Stemp of Counsel, instructed by Bruno Haine of Andrew Storch Solicitors

He called:

Mr Rob Cant MIOA	The appellant's acoustic consultant
Mr Constantinos Kyriacou	Friend of the appellant, customer of the appeal shisha lounge/café and technology consultant
Mr Saeed Abdi Salem	Friend of the appellant, customer of the appeal shisha lounge/café and letting agent
Mr Mohammed Dilbany	The appellant
Mr David Chivers BSc DipTP MRTPI	The appellant's planning consultant, Director of Planning Design Partnership Ltd

For the Local Planning Authority

Mr Thomas Wicks Director of Enforcement Services Ltd, instructed by the Chief Planner of the Council of the London Borough of Brent

He called:

Mr Martin Wood BSc (Hons)	Principal Nuisance Control Officer, the Council of the London Borough of Brent
Mr Nigel Wicks BTP LPC MRTPI	Director of Enforcement Services Ltd

DOCUMENTS

- 1 The Council's letter of notification of the dates of the inquiry for 15-17 October 2019, and the list of those notified.
- 2 Two signed, dated and annotated witness statements of Mr Dilbany, plus signed, and dated witness statements of Messrs Kyriacou, Salem and el Jawahri
- 3 Signed and dated Statement of Common Ground
- 4 Proof of evidence of Mr Cant, including noise impact assessment of a shisha lounge/café
- 5 Proof of evidence of Mr Martin Wood
- 6 Additional statement by Mr Martin Wood dated 6 January 2020
- 7 Proof of evidence of Mr Nigel Wicks
- 8 The Council's letter of notification of the dates of the inquiry for 28-30 January 2020, and the list of those notified.
- 9 Copies of Policies DMP3 and DMP4 of the London Borough of Brent Local Plan Development Management Policies document (LPDMP)
- 10 Ministry of Justice report regarding Religious Festival Dates for 2013
- 11 Opening submissions on behalf of the appellant
- 12 Appeal decision (ref: APP/T5150/C/18/3217639) dated 2 September 2019
- 13 List of the Council's suggested conditions, annotated by the appellant
- 14 Table of the Council's suggestions and appellant's comments on conditions
- 15 Planning Enforcement (ref: E/09/0769) Initial Site Visit form recording visit to the site on 9 November 2009 plus related documents
- 16 Closing submissions on behalf of the Council
- 17 Closing submissions on behalf of the appellant
- 18 Costs application on behalf of the Council
- 19 Costs application on behalf of the appellant

- 20 The Council's response to the appellant's costs application
- 21 The appellant's response to the Council's costs application
- 22 The Council's final comments on their application for costs
- 23 The appellant's final comments on his application for costs

PHOTOGRAPHS

- P1 Bundle of Google Street View photographs (reproduced in Appendix 18 to Mr Wicks' proof).
- P2 Stills from CCTV footage of activity outside the appeal site in Church Road

Documents 1-4 and photographs P1 were submitted when the inquiry opened on 15 October 2019.

Documents 5-7 were submitted during the adjournment.

Documents 8-17 and photographs P2 were submitted during the resumed inquiry of 28-30 January 2020.

Documents 18-23 were submitted after the inquiry closed by agreement.