The Planning Inspectorate

Appeal Decisions

Inquiry held on 7 – 10, 15 & 22 September & 22 October 2021
Site visits made on 7 & 23 September 2021

by L Perkins BSc (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 10 January 2022

Appeal A Ref: APP/U5360/C/19/3242430
Land at Brunswick and Columbia Wharf, 53-55 Laburnum Street, Hackney, London E9 7HA

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeal is made by Mr Russell Gray of Shiva Ltd against an enforcement notice issued by the Council of the London Borough of Hackney.
- The enforcement notice, numbered 2019/0278/ENF, was issued on 18 October 2019.
- The breach of planning control as alleged in the notice is: Without planning permission the erection of four (4) unauthorised structures at roof level, the installation of a platform and decking at roof level and the installation of fencing around the roof edge at 53 Laburnum Street.
- The requirements of the notice are:
  (1) Remove the unauthorised structure one (1) and the platform and decking on which it is located on top of from the roof of the building as located & labelled on the map in appendix 1 and photo shown in appendix 3.
  (2) Remove the unauthorised structure two (2) from the roof of the building as located & labelled on the map in appendix 1 and photo shown in appendix 3.
  (3) Remove the unauthorised structure three (3) from the roof of the building as located & labelled on the map in appendix 1 and photo shown in appendix 3.
  (4) Remove the unauthorised structure four (4) from the roof of the building as located & labelled on the map in appendix 1 and photo shown in appendix 3.
  (5) Remove the lathe and wood fence located on the front and side of 53 Laburnum Street at roof level as located and labelled "1" on the map in appendix 2.
  (6) Remove the bamboo fence located on the side of 53 Laburnum Street at roof level as located & labelled "2" on the map in appendix 2.
  (7) Remove the metal fence located on the side of 53 Laburnum Street at roof level as located & labelled "3" on the map in appendix 2.
  (8) Make good any damage resulting from compliance with the requirements of the notice.
  (9) Remove all materials, debris, waste and equipment resulting from compliance with the other requirements of the notice from the site and its premises.
- The period for compliance with the requirements is: One (1) month.
- The appeal is proceeding on the grounds set out in section 174(2)(a), (c), (f) and (g) of the Town and Country Planning Act 1990 as amended. Since an appeal has been brought on ground (a), an application for planning permission is deemed to have been made under section 177(5) of the Act.

Summary Decision: Appeal A succeeds in part and permission for that part is granted, but otherwise the appeal fails, and the enforcement notice is upheld as corrected and varied in the terms set out below in the Formal Decision.

Appeal B Ref: APP/U5360/C/20/3260019
The Regent's Canal and Brunswick and Columbia Wharf,
53-55 Laburnum Street, Hackney, London E2 8BD

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeal is made by Mr Russell Gray of Shiva Ltd against an enforcement notice issued by the Council of the London Borough of Hackney.
- The enforcement notice, numbered 2020/0244/ENF, was issued on 28 August 2020.
- The breach of planning control as alleged in the notice is: Without planning permission the material change of use of the land to a mixed use – (A3) Restaurant and bar, (D1) the display of art installations (D2) cinema; and use to host social gatherings / as an events space (Sui generis use).
- The requirements of the notice are:
  1. Cease the use of the land as a restaurant.
  2. Cease the use of the land as a bar.
  3. Cease the use of the land for the displaying of art installations.
  4. Cease the use of the land as a cinema.
  5. Cease the use of the land for social gatherings and as an events space.
  6. Remove all advertisements from the external elevations of the building associated with the unauthorised uses listed above.
  7. Removal all art installations, and any other structure facilitating the unauthorised use, from the roof of the building.
  8. Remove all art installations from the canal area (as per the attached plan).
  9. Remove all vessels and floating structure from the canal (as per the attached plan) which facilitate any of the unauthorised uses listed above.
- The period for compliance with the requirements is: One (1) month.
- The appeal is proceeding on the grounds set out in section 174(2)(a), (b), (c), (d) and (f) of the Town and Country Planning Act 1990 as amended. Since an appeal has been brought on ground (a), an application for planning permission is deemed to have been made under section 177(5) of the Act.

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

Preliminary Matters

1. All evidence at the Inquiry was given under oath save for that of Messrs Dyer, Froneman and Harper, as their evidence concerns matters of professional opinion on planning merits only. One of the appellant's witnesses, Thomas Randall-Page, did not appear at the Inquiry so his evidence has not been tested by cross-examination. Accordingly I ascribe his evidence less weight than that of the other witnesses.

2. In July 2020 The Council adopted the Hackney Local Plan 2033 (the Local Plan). This post-dates the issue of the notice in Appeal A but pre-dates the Statements of Case. So the parties have had the opportunity to address any relevant implications in their submissions.

3. Since the notices were issued the revised National Planning Policy Framework (the Framework) came into force, replacing a previous version of the Framework. In addition, a new version of the London Plan has been published. So the London Plan policies published in 2016, referred to in the notices, have been superseded by those in the London Plan 2021. Both main parties were given an opportunity to comment on any relevant implications of the above for these appeals and any relevant comments made have been taken into account in my reasoning.

4. There are 2 enforcement notices before me and whilst there are issues which are common to both, I must consider the notices separately and reach a decision on each.

5. In both appeals reference has been made to judicial review proceedings against a stop notice under section 183 and injunctions under section 187B. These matters are not before me in these appeals.

6. In my Formal Decisions below, I have corrected the post code for Appeal A, a typographical error in requirement 5 and an alleged misdescription of "bamboo" in requirement 6 of the notice in Appeal A. I have also deleted and a typographical error in requirement 7 of the notice in Appeal B.

Applications for Costs

7. At the Inquiry an application for costs was made by the Council of the London Borough of Hackney against Mr Russell Gray of Shiva Ltd. An application for costs was also made by Mr Russell Gray of Shiva Ltd against the Council of the London Borough of Hackney. These applications are the subject of separate Decisions.

Background

8. This is a novel case where both appeals concern what have been referred to as art installations. For Appeal A, photographs are included in the notice. I refer to Structure 1 as 'Potemkin', Structure 2 as 'Wikkelhouse' and Structure 3 as 'H-VAC', as these are the names given to these structures by their respective creators and is how the structures were generally identified during the Inquiry. For Appeal B, photographs are not included in the notice. It concerns art installations including those known as 'AirDraft' and 'Sharks!'.

9. With the exception of Wikkelhouse, each of the above was a winning entry in an annual design competition known as the Antepavilion Commission, established in 2017. The appellant is the owner of the appeal site and is the host and principal sponsor of the Antepavilion Commission. The appellant states that the commission promotes art, design and new initiatives in low-cost but craftsmanship-intensive, self-build architecture.

10. Potemkin was the winner of the 2019 Antepavilion Commission. It was a timber structure clad in coloured panels of painted canvas, designed (and used) to host film screenings and theatre productions on the roof of the appeal building. In addition to my accompanied site visits on the dates noted in the heading above, as stated at the Inquiry, I visited the site unaccompanied on 10 April 2021. Since then (and since both notices were issued) Potemkin has been entirely removed and replaced with 'All Along The Watchtower', a bamboo tensegrity installation, that Mr Dyer has referred to in his proof of evidence as 'Structure 5'. This is not directly referred to in either notice.

11. Wikkelhouse is a modular structure made from recycled cardboard and timber. It is said it was conceived as a lightweight, fast-build, in situ construction system for deployment in locations requiring emergency relief. It is sited on the roof of the appeal site. Internally it is laid out as a dwelling and the appellant states it has been used as office space and as living accommodation for winning teams of the Antepavilion Commission.

12. H-VAC was the winner of the Antepavilion Commission in 2017. It is a timber structure which was clad with recycled Tetra Pak shingles. It was a rooftop shelter designed to look like rooftop ducting and air handling plant. Its cladding has been removed and only parts of its frame remains.

13. AirDraft was the winner of the Antepavilion Commission in 2018. It is an inflatable performance space on a barge which has been moored to the appeal site, on the canal.

14. The 2020 Antepavilion competition invited proposals that referenced the Council's enforcement action against previous year's winners, ie Potemkin and H-VAC, which are subjects of Appeal A. In this context, it is said that the Antepavilion Commission particularly welcomed entries that responded to what is described as a tension between authoritarian governance of the built environment and aesthetic libertarianism.

15. 'Sharks!' was the winner of the Antepavilion Commission in 2020. It is a group of 5 full-scale fibreglass sharks intended to float in a breaching position in the canal adjacent to the appeal building. They are said to have been inspired by the Headington Shark of 1986, which is a full-scale fibreglass sculpture of a shark crashing into the roof of a terraced house.

16. The Headington Shark was refused retrospective planning permission by Oxford City Council and allowed on appeal[1]. As a consequence of the injunction proceedings noted above, the sharks have been removed from the canal adjacent to the appeal site. However, I saw them, unaccompanied on 10 April 2021 when they were being displayed in the City Road Basin, in the London Borough of Islington.

17. The appeal site is already subject to an enforcement notice from 2016, upheld on appeal[2], for an unauthorised structure known as the 'Beach House' and fencing comprised of reclaimed timber railway sleepers. Both are situated on a building which occupies the southwest corner of the appeal site, at roof level. At the time of my site visits this notice had yet to be complied with.

Reasons

The Appeal A Notice

18. Under the heading 'lack of precision and clarification of the notices', the appellant states that I should delete the bamboo fence (described in the notice) and add to Structure 4 and the platform "as modified". But there is no reason for me to do this. The allegations before me are those described in the notice, not any subsequently altered development and a misdescription of a fence as being constructed of 'bamboo' is easily corrected to omit this word.

19. It does not matter if the development (or any part of it) has been removed since the notice was issued either. This is because (with the exception of specified discreet elements of the ground (a) appeal) I must still consider the development as described in the notice, which in this case included clear labelled maps and photographs to describe what the notice is directed at. It is open to the appellant, if he wants the merits of a different development

[1] Ref APP/G3110/A/91/184337 dated 21 May 1992
[2] Ref APP/U5360/C/16/3149327 dated 7 April 2017

considered, to make a planning application for it and submit that to the Council.

20. Under the same heading, the appellant also states that this notice failed to identify that structures 1, 2 and 3 were art installations and that it should be amended to refer to them as such. But there is no need for this as it is clear what the notice is directed at.

21. The main issues in Appeal A are:

- whether the matters stated in the notice constitute a breach of planning control, ie the ground (c) appeal;

  and

- if the above ground of appeal is not successful, whether planning permission ought to be granted for the breach of planning control alleged, ie the ground (a) appeal;

  and

- if the above ground of appeal is not successful, whether the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by any such breach, ie the ground (f) appeal;

  and

- whether the period for compliance with the notice falls short of what should reasonably be allowed, ie the ground (g) appeal.

Appeal A Ground (c)

22. An appeal on ground (c) is that the matters stated in the notice do not constitute a breach of planning control. This may be because what is alleged complies with the terms and conditions of a planning permission[3] or because what is alleged is not 'development' as defined by section 55. In a ground (c) appeal the onus is on the appellant to make out their case to the standard of the balance of probabilities.

23. When the appeal was lodged the appellant's position on ground (c) was that the structures identified in this notice constitute permitted development if they constitute development at all. In closing submissions the appellant states that the ground (c) appeal could only be relevant to displays of art (ie Potemkin, Wikkelhouse and H-VAC) but that Potemkin has gone, H-VAC is partially dismantled and that this ground has more application to Appeal B. It does not matter that Potemkin has now gone, I must still consider it, and H-VAC, for the purposes of this ground (c) appeal. Taking into account the above, I have considered whether the matters alleged in the notice are development and whether they are permitted development.

[3] Including either an express grant of planning permission or a permission granted by, for example, The Town and Country Planning (General Permitted Development) (England) Order 2015 (the GPDO).

24. Case law has established 3 primary factors as decisive of what constitutes a 'building': size, permanence and physical attachment to the land. None of these factors are necessarily decisive and greater weight may be given to one over others in reaching a conclusion on whether a structure constitutes a building for the purposes of section 55 of the Act, and so is development.

25. I have considered these 3 factors for each of the matters alleged in this notice. From all of the information available to me I make the following observations. Each of the structures and the platform, decking and fencing were constructed on site, of multiple parts. As I have seen for myself or what is clear from the photographs attached to the notice, each of the structures is substantial in size. Each has remained in the same position since it was constructed, what is now some years ago, therefore displaying a degree of permanence.

26. H-VAC is bolted to the roof of the appeal building. Potemkin was also fixed to the appeal building and on the balance of probabilities, so is all the fencing, the platform and the decking. Wikkelhouse, whilst appearing to be free-standing, rests on its own weight on a platform fixed to the appeal building roof and Wikkelhouse is connected to services. Therefore, in my view, each of the matters alleged in this notice has resulted in physical change to the characteristics of the land. As a matter of fact and degree, each of the matters alleged in the notice is therefore a building operation for the purposes of section 55 of the Act and so each is development.

27. When the appeal was lodged the appellant stated that the structures identified in the notice are temporary moveable structures required in the 'operation' of the appeal site as an outdoor development and display space for non-commercial, self-build experimental structures. This wording indicates the appellant has relied on Schedule 2, Part 4, Class A (temporary buildings and uses) permitted development rights under the GPDO.

28. This Class allows the provision on land of buildings and moveable structures required temporarily in connection with and for the duration of operations being or to be carried out on, in under or over that land. But development is not permitted by the above Class if planning permission is required for those 'operations' but is not granted or deemed to be granted. There is no evidence that the 'operation' described by the appellant does not require planning permission or that it has planning permission.

29. In addition, Article 3(5) of the GPDO states that the permission granted by Schedule 2 does not apply if (a) in the case of permission granted in connection with an existing building, the building operations involved in the construction of that building are unlawful; (b) in the case of permission granted in connection with an existing use, that use is unlawful.

30. Development on the site which is subject to the aforementioned enforcement notice from 2016 is still in place, including at least parts of the railway sleeper fencing which I saw on my site visit. So the building operations involved in the construction of the appeal building are unlawful, and, the existing use is unlawful as I have found in Appeal B. The appellant therefore cannot rely on permitted development rights for this ground (c) appeal.

31. Considering all of the above points, on the balance of probabilities, each of the matters stated in the notice is development and no planning permissions exist. As such the appeal on ground (c) fails.

Appeal A Ground (a)

32. For the Appeal A ground (a) appeal, in considering whether planning permission ought to be granted for the appeal development, the main issues are:

    - the effect of the appeal development on the character and appearance of the area, including the Regent's Canal Conservation Area and the setting of neighbouring listed buildings[4]; and

    - the effect of the appeal development on the living conditions of neighbouring residents; and

    - if there is harm arising from the effects of the appeal development, whether the harm is outweighed by public benefits of the appeal development to justify a grant of planning permission.

33. Potemkin has been removed. On oath, the appellant said Potemkin was not going back up again and in closing submissions the appellant has said that no planning permission is sought under ground (a) for Potemkin. This is clear from the table included in the appellant's closing submissions. Based on this table, the same clearly applies for H-VAC and the roof level fence described in the notice as bamboo.

34. For each of the above 3 structures, I am satisfied that it is possible for them to be divorced from the other elements of the breach alleged in this notice. So I do not need to consider the merits of any of these 3 structures any further for the ground (a) appeal; the notice will be upheld in so far as it relates to these. However, this also means I cannot take into account any public benefits they may bring either.

Character and Appearance

35. Appeal A relates to a complex of buildings situated between Laburnum Street to the south and the Regent's Canal to the north. The complex is bounded to the west by Haggerston Road and to the east by a site known as Kent Wharf. Kent Wharf was redeveloped in the late 20th century with 3 and 4 storey housing on the canal edge and parking onto Laburnum Street. To the west, across Haggerston Road, is the timber-clad Bridge Academy, completed in around 2007. To the south of the appeal site, across Laburnum Street, is Haggerston Baths, built in 1904.

36. The appeal site is within the Regent's Canal Conservation Area and so, notwithstanding the appellant's concerns about reasons for its designation, there is a statutory duty upon me under section 72 of the Planning (Listed Buildings and Conservation Areas) Act 1990, to pay special attention to the desirability of preserving or enhancing the character or appearance of that area. The boundary of the conservation area runs around the west and south edges of the appeal site and includes the canal and Kent Wharf but excludes the Bridge Academy or Haggerston Baths.

37. The Council published a Conservation Area Appraisal in 2007. In summary, this describes the conservation area as a linear green corridor that runs the length of the canal within the borough. Some 19th and early 20th century warehouses

[4] Bearing in mind the statutory duties under sections 66 and 72 of the Planning (Listed Buildings and Conservation Areas) Act 1990.

and industrial buildings survive beside the canal, along with industrial elements such as bridges, lock gates, machinery and basins, all of which are visible remains of an industrial past. But the area is mixed in character, as it includes new housing development (such as Kent Wharf) as well as the above features.

38. The Council published a Conservation Area Review (CAR) in 2017. It states:

"Within the Regent's Canal Conservation Area, many of the surviving industrial buildings are distinctive late 19th or early 20th century structures. These buildings are not instantly recognisable as of architectural merit. They were constructed as workaday buildings that used industrial materials, and they have often subsequently been altered or extended in a pragmatic manner. Their charm lies in their inconspicuous, ad-hoc, utilitarian and functional aesthetic. These imperfect, cheap and sometimes shoddily built structures are often fragmented and devoid of their original uses as industry has moved away. They are notoriously difficult to successfully upgrade for new uses without major intervention, and they are therefore often seen as eyesores and development opportunities. It is this process of development that has degraded some areas of the conservation area."

39. In respect of the appeal site itself, the CAR states:

"The site could be described as 'semi derelict' and is comprised in principle of six distinct structures of varying quality and completeness, typical of the remains of the industrial buildings that once lined the Regent's Canal Conservation Area. The two earliest buildings are on the east of the site, and are late 19th century two storey industrial buildings, the better of which forms a yard to Laburnum Street and has cast iron windows and a pitched king post roof structure. Behind, facing directly onto the canal, is the slightly later two storey flat roof structure with loading doors, which is an integral part of the early build and faces directly onto the canal. On the western edge of the site, along Haggerston Road is a 20th century structure that is now in poor condition and is of little historic merit. In the centre of the site, there is a later, single storey infill structure that has a pitched roof and loading doors onto the canal.

The site contains the type of utilitarian buildings that have been amended over time to suit the former industrial uses and activities along the canal. An imaginative development that retains, upgrades and potentially finds new uses for the earliest buildings on the site, while sensitively developing the other parts of the site, could make a positive contribution to the conservation area. A full assessment of the existing building and a clear planning brief is recommended for this important site at the core of the conservation area."

40. The above descriptions are consistent with my observations at my site visits. Drawing the above together, I consider the significance of the conservation area is its industrial character and appearance, some of its surviving industrial buildings, its wharves and industrial canal side paraphernalia, together with the greenery that lines the sides of the canal. The earliest surviving industrial buildings on the appeal site contribute to this significance.

41. Wikkelhouse was designed as a pre-fabricated experimental dwelling. Indeed it has been used (according to the appellant) for what in my view constitutes residential purposes. Its porthole type windows are said to relate to canal boats and its timber cladding and glazed elevations are said to blend in with the neighbouring Bridge Academy. Whilst there may be some merit in this it may

also be purely coincidental. Sited, as it is, in a highly visible location, in my judgement it resembles a large shed on the roof and is an incongruous addition to the appeal building.

42. Structure 4 was built over a staircase on the west elevation that allowed access on to the roof. From the information available, it was a conspicuous and rudimentary monopitch roof structure made of corrugated sheeting. I appreciate that corrugated facing materials are used elsewhere on the appeal site. But as I could understand from my site visits, Structure 4 was not seen within the context of these other corrugated finishes and as such in my judgement it appeared as an incongruous shed-like structure on the roof in stark contrast with the brick finish elevation of the building below it. The appellant considers it would be possible to impose a condition on Structure 4 to modify it to as presently proposed. But in my view, this would be a different development for which a planning application would be required.

43. The roof level lath wood fence runs around 3 sides of the block on the southwest corner of the appeal site. It is broadly equivalent to an additional storey in height on top of the building. It is in a highly prominent location and is incongruous by reason of the material from which it is constructed, which is in stark contrast to the predominantly brick finish of the building on which it sits.

44. The appellant regards this fence as a 'green wall'. But in my view, it is simply a fence with some plants attached to it, rooted in pots or planters standing on the roof. In my view, this is a significant limitation of this structure and its potential to flourish as a green wall, as on-going maintenance would be likely to be required. According to the appellant, this 'green wall' was installed in 2016. But even now, 5 years later, it does not appear to be flourishing.

45. Since I first visited the site, additional plants appear to have been attached to this fence. However, at my most recent site inspection it was clear that a significant number of these are artificial. So I am not satisfied this fence has the ecological value of a green wall or that any reliance on artificial planting is consistent with the urban greening policies referred to by the appellant. In any event, there is no evidence that a fence of this type, or a green wall, at this level, is characteristic of this conservation area and so in my view, in this context, it is an incongruous treatment.

46. My attention has been drawn to a green wall approved at 'Arthaus' (Document 14). But this is not seen in the same context as the appeal site so I give it limited weight in my decision as an example of precedent. Moreover, from the information provided, the Arthaus green wall does not appear to be the same type of structure as the fence which is before me.

47. I have been invited to consider imposing the 'green wall' condition for Arthaus on the lath wood fence before me. But I am not satisfied this fence is capable of adaptation in the manner envisaged by this condition for the imposition of such a condition to be reasonable, without the fence becoming a materially different structure entirely, ie a different development which is outside the scope of this notice.

48. During the Inquiry the question of the maintenance of this fence as a green wall was debated. The appellant has expressed their willingness to enter into a planning obligation to ensure the maintenance of this fence as a green wall and

a draft obligation has been provided. But as I am not satisfied a green wall at this level is acceptable, I do not need to consider the proposed obligation any further.

49. My attention has been drawn to a previous planning permission[5] which included increasing the height of the parapet walls of this building on the site by 3.2m, a scheme the appellant describes as 'mimicking' the lower floors of the building. But I do not see that this permission justifies the lath fence before me as there is no evidence this permission remains extant as a fallback position and based on the information provided, I do not agree with the appellant that the 'green wall' before me is an aesthetically superior treatment.

50. The roof level metal fence around the edge of the appeal site includes an incongruous mixture of vertical, diagonal and horizontal railings. These are clearly seen from the surrounding highways and canal towpath and present a cluttered appearance to the canal-side and street scene. It is the appellant's position that the railings were 'previously allowed' and my attention has been drawn to a previous planning permission[6] in this regard, (Document 7). This included the erection of railings around the front, side and rear of the highest part of the building at the front of the appeal site.

51. From the information available, that permission was implemented (albeit not in respect of the railings) and so it would appear that it remains extant. However, the permitted railings were in a materially different position to those before me and were of a simpler and more consistent design. Moreover, the Council's report for that permission clearly indicates that those railings were to be set back from the parapet by 1100mm and would not be visible from street level. This set back is reflected in the associated drawings. Taking the above points into account I am not satisfied the railings before me were 'previously allowed' or that the previous permission justifies the metal fence before me.

52. From the information available to me, the platform and decking described in the notice[7] is not the same 'scaffold lattice beam' structure discussed in the Council's evidence and which supported an earlier installation entitled 'Flood House'[8]. The platform and decking before me have a relatively slim profile and in my view do not harm the character or appearance of the area, including the conservation area.

53. Considering the above points, I am not satisfied that Wikkelhouse, Structure 4, the lath wood fence or metal fence preserve the character or appearance of the area, including the conservation area. Instead, they constitute conspicuous clutter that harms the character and appearance of the area and degrade the significance of the conservation area. They do not constitute the sensitive development of the site, envisaged by the CAR and I give this issue considerable importance and weight in my decision.

54. Three statutorily listed buildings have been identified as within the setting of the appeal site. These are the aforementioned Haggerston Baths, Haggerston Bridge (over the canal to the northwest) and Queensbridge Road Bridge (over the canal to the northeast of the site). Each of these are grade II listed and so, in considering whether to grant planning permission for

[5] Ref 2016/1551 dated 14 July 2016
[6] Ref 2014/0709 dated 29 April 2014
[7] As shown in the photograph in Appendix Three attached to the notice
[8] As shown in the photograph in the appellant's Summary Grounds of Appeal

the appeal development, there is a statutory duty upon me to have special regard to the desirability of preserving these buildings or their settings or any features of special architectural or historic interest which they possess.

55. The glossary of the Framework defines the setting of a heritage asset as:

The surroundings in which a heritage asset is experienced. Its extent is not fixed and may change as the asset and its surroundings evolve. Elements of a setting may make a positive or negative contribution to the significance of an asset, may affect the ability to appreciate that significance or may be neutral.

56. For the reasons explained above, I do not need to consider the effect of Potemkin, H-VAC or the fence described as bamboo, on the setting of the listed buildings identified above.

57. From the information provided, the effect of the lath wood fence on the setting of the above listed buildings was considered in previous section 78 appeal decisions[9]. The Inspector in those cases concluded that the setting of the listed buildings in the vicinity of the site would be preserved. Having reviewed those decisions, I have no reason to reach a different conclusion in respect of the lath wood fence.

58. Haggerston Baths is described in the CAR as a landmark and fine example of a high status public building, which originated in the physical and social conditions of the 19th century. A notable feature of the south façade of the building is the central pedimented section. The north elevation to Laburnum Street is plainer. A later laundry addition exists on the west side of the building.

59. But Haggerston Baths is a considerable distance from the appeal developments I am asked to consider, ie Wikkelhouse, Structure 4, the platform and decking and the metal fence, all of which are situated away from the front of the appeal site which is opposite the rear of Haggerston Baths. As such, in my view, Haggerston Baths is not experienced in the same surroundings as any of these elements of the appeal development and so I am satisfied its setting is preserved by them.

60. I have the same view in respect of the Queensbridge Road Bridge, with its elegant elliptical arch over the canal. It is far enough away from Wikkelhouse, Structure 4, the platform and decking and the metal fence, so that its setting is preserved by their presence.

61. Haggerston Bridge and its elliptical arch is, in my view, mainly experienced from the canal and towpath and to a lesser extent from Haggerston Road. Structure 4 was too far away to affect its setting. As a relatively slim structure, the platform and decking, whilst very close to Haggerston Bridge, do not affect its setting. Despite its effect on the character and appearance of the area, I am satisfied that the metal fence, as a relatively sheer treatment raised up away from Haggerston Bridge, does not affect its setting either.

62. Wikkelhouse is clearly seen when approaching Haggerston Bridge on the towpath from the east. But from here Wikkelhouse is seen against a silhouette of existing larger buildings and it is reasonably well removed from Haggerston Bridge, being at a higher level and further to the south. In the approaches to

[9] APP/U5360/W/16/3155988 and APP/U5360/W/16/3160494 dated 7 April 2017.

Haggerston Bridge from the south and west, Wikkelhouse is generally not seen. When approaching Haggerston Bridge from the north, it is seen juxtaposed with the silhouette of existing larger buildings. Taking the above points into account I am satisfied that Wikkelhouse preserves the setting of Haggerston Bridge.

63. I conclude that whilst the appeal development does not harm the setting of neighbouring listed buildings, Wikkelhouse, Structure 4, the lath fence and metal fence do harm the character and appearance of the area, including the Regent's Canal Conservation Area.

Living Conditions

64. The notice states that the use of Potemkin as a rooftop theatre and cinema has the potential to damage the amenity of the surrounding residents of the surrounding area if the use extends late into the night and that such uses are unacceptable if not governed by appropriate conditions.

65. Potemkin has been removed, the appellant has said, on oath, that it is not going back up again and that they do not seek planning permission for it under ground (a). So I do not need to consider its effect on living conditions any further for the purposes of the ground (a) appeal in Appeal A and the notice will be upheld in this regard.

66. Moreover, the above effect is not attributed to any of the other structures that the notice is directed at. So I conclude the remaining appeal development in Appeal A does not harm the living conditions of neighbouring residents or conflict with Policy LP2 of the Local Plan in this regard.

Public Benefits

67. As I have found harm to the character and appearance of the area, including the conservation area, I must consider the public benefits of the appeal development.

68. Given the size and scale of the appeal developments I am asked to consider for this ground (a) appeal, within the context of the conservation area as a whole, I consider they cause less than substantial harm to this designated heritage asset. Nevertheless, any harm to its significance should require clear and convincing justification and in accordance with paragraph 202 of the Framework, I must weigh the harm against the public benefits of the appeal development.

69. As I am not asked to consider Potemkin, H-VAC or the fence described as bamboo for the ground (a) appeal, I cannot take into account any public benefits they may bring. So any public benefits before me may arise only from Wikkelhouse, Structure 4, the platform and decking, the lath wood fence and the metal fence. Of these, only Wikkelhouse has been identified by the appellant as an art installation.

70. On the appellant's own case, Wikkelhouse serves as ancillary office/living space for the Antepavilion project and is available for use by the winning teams. It is a prefabricated housing product: there is no evidence anything has been done such that Wikkelhouse should be reconsidered as an art installation. To my mind, this significantly undermines the appellant's public benefits case for Wikkelhouse. However innovative it may be, in my view, in this context it

resembles a large wood-clad shed on the roof of the appeal site. Furthermore, Wikkelhouse pre-dates the Antepavilion Commission. So in my view the benefits said to arise from the Antepavilion Commission cannot be attributed to Wikkelhouse. I am not satisfied the Bridge House development I have been referred to makes any difference, given it is not seen in the same context as the appeal site.

71. I have taken into account the aforementioned Headington Shark decision[10]. But that decision concerned a sculpture that was clearly intended to be incongruous in its context. I do not find it comparable to Wikkelhouse. In any event, an appeal decision from nearly 30 years ago, may have only limited relevance in the context of current planning policy.

72. I accept there is some public benefit in Wikkelhouse providing accommodation for artists but there is no evidence they cannot be accommodated elsewhere. There is no specific evidence of any public benefits arising from Structure 4, the lath wood fence or the metal fence. Whilst these and Wikkelhouse may all facilitate the use of the appeal site to some extent, I am not satisfied this is a public benefit of sufficient weight to justify a grant of planning permission for all elements of the appeal development before me in light of the harm identified above.

73. I conclude that the appeal development before me, ie Wikkelhouse, Structure 4, the lath wood fence and metal fence, harm the character and appearance of the area including the conservation area and, in this regard, they do not comply with Policies LP1 or LP3 of the Local Plan, Policy HC1 of the London Plan or the design and heritage policies of the Framework.

Other Matters

74. Submissions have been made in respect of human rights (including those of the appellant and artists) as incorporated by the Human Rights Act 1998. The rights cited are qualified rights rather than absolute rights. Having regard to the legitimate and well-established planning policy aims to protect the character and appearance of the area, in this case, I consider that greater weight attaches to the public interest. Dismissal of this ground (a) appeal is therefore necessary and proportionate and would not result in a violation of the human rights of the appellant or any artists.

75. The appellant states that the Council has failed to seek professional advice from Historic England. But there is no evidence this was necessary given the issues involved or the type of case concerned.

76. A substantial number of representations have been received in support of the appellant's case. But these generally relate to the use of the appeal site (which is the subject of Appeal B) or 'the temporary rooftop structures'. Given how long Wikkelhouse has been in situ, and bearing in mind case law on this issue, I am not satisfied that Wikkelhouse, or any of the other structures that I have been asked to consider under this ground (a) appeal, are genuinely 'temporary' in planning terms. Where the representations received relate to structures I have been asked to consider, I have addressed the substance of these representations elsewhere in this decision.

[10] Ref APP/G3110/A/91/184337 dated 21 May 1992

77. The use of public funds for the pursuit of this case, referred to in many of the representations received, is a matter for the Council rather than a matter for me to address in an appeal under section 174.

Conclusion on Ground (a)

78. Considering all of the above points, the appeal on ground (a) succeeds in respect of the platform and decking only but fails in all other respects.

Appeal A Ground (f)

79. Under section 173(4) of the 1990 Act, when serving an enforcement notice the Council may seek to (a) remedy the breach by making any development comply with the terms (including conditions and limitations) of any planning permission which has been granted in respect of the land, by discontinuing any use of the land or by restoring the land to its condition before the breach took place; or (b) remedy any injury to amenity which has been caused by the breach.

80. In this case, the requirements of the notice seek the removal of each element of the breach of planning control alleged in the notice. So it is clear that the purpose of the notice is to remedy the breach of planning control.

81. The appellant has drawn my attention to the planning permission[11] referred to in Document 7. But I do not consider this permission helps the appellant in respect of this ground (f) appeal as compliance with the permission's terms would not remedy the breach. This is because the roof access and railings that permission concerned were in materially different locations to Structure 4 and the metal fence before me and they were both of a materially different design.

82. Moreover, whilst the railings of that permission were not implemented, the roof access was and the permission did not extend to the provision of a second roof access, ie Structure 4. So I am not satisfied that permission may be regarded as including any of the appeal developments before me, even if planning conditions were to be relied on (although none have been suggested by the appellant for me to consider in this regard).

83. The Ahmed[12] case I have been referred to makes no difference to my conclusions on this ground and I am not obliged to vary the requirements of the notice to allow for a materially different development, including by way of planning conditions through ground (a).

84. I conclude no lesser steps have been suggested which would achieve the purpose of the notice, nor are there any which are obvious. As such, the appeal on ground (f) fails.

Appeal A Ground (g)

85. The appellant considers that the time period of 1 month to comply with the notice is too short and that carrying out the dismantling of structures simultaneously is not feasible. Given that Potemkin has gone, only part of H-VAC remains and the fence described as bamboo has gone, I am not satisfied that simultaneous dismantling of the remaining appeal developments is not feasible.

[11] Ref 2014/0709 dated 29 April 2014
[12] *Ahmed v SSCLG & Hackney* [2014] EWCA Civ 566

86. But sufficient time is required for the appellant to engage with the Council on a scheme for safe access to the roof (particularly in light of my findings on Appeal B) and I consider a period of 4 months, rather than the 6 months sought by the appellant, is what should reasonably be allowed for this. The appeal on ground (g) succeeds to this limited extent.

The Appeal B Notice

87. The notice alleges a material change of use to a mixed use but includes use classes in parentheses. As a mixed use is a sui-generis use that by definition has no use class, with the agreement of the main parties I have deleted these use classes from the allegation using my powers of correction under section 176 of the 1990 Act.

88. The appellant describes this notice as unacceptably uncertain and vague and refers to a 'clarification' of this notice as betraying its invalidity. A document dated 6 December 2020, entitled 'Clarification to Enforcement Notice', prepared by Mr O'Connor for the Council, states that the lawful use of the appeal site at the time this notice was issued was a B1 use and a C3 use (in respect of 2 residential dwellings). During the Inquiry, Mr O'Connor confirmed that by 'B1' he meant artists' studios and that the C3 use comprises 2 independent, self-contained dwellings. This is consistent with the appellant's case and so I have treated the C3 use in this way in this appeal.

89. An enforcement notice alleging a material change of use need not recite the previous use and so not stating the previous (or lawful) use does not render a notice invalid. However, at my site visits, it was obvious that the 2 dwellings referred to by Mr O'Connor exist (in No 53 at first floor level) and artists' studios exist in various locations across the appeal site. There is no evidence this was not the case when the notice was issued. The artists' studios are not acknowledged in the notice as a component of the mixed use alleged but clearly should be.

90. The appellant considers the 2 dwellings should be excluded from this notice. During the Inquiry Mr O'Connor said there is no risk in the 2 dwellings being incorporated and I agree, particularly given the parties agree that the 2 dwellings are lawful. No mechanism has been suggested by the appellant as to exactly how these 2 dwellings may be excluded from the wording of this notice as well as its associated plan which identifies the land to which the notice relates (bearing in mind the dwellings occupy part of the first floor of one of the buildings on the site).

91. So in light of the above, pursuant to section 176(1) of the 1990 Act, I have corrected the allegation and included the 2 dwellings as well as artists' studios. Having canvassed the views of the main parties on this point during the Inquiry, I am satisfied that correcting the notice in this way does not cause injustice to the appellant or the Council, as neither use is attacked by the requirements of the notice, both are agreed to be lawful and any implications for consideration of the planning unit may be dealt with separately.

92. The appellant states that the term 'social gatherings' should be deleted from this notice because it is too vague. But I consider it adequately captures what the evidence indicates has occurred on the land which has included parties as well as events. The appellant also states that the Council has not defined the meaning of 'art installations' and that the notice should be amended to take out

'internal' displays of art. I am satisfied that the term 'art installations' is clear and no better wording has been suggested by the appellant. I am also satisfied in this case that the display of art internally has become a primary use and is a breach of planning control and so there is no need for this to be taken out of the notice. Any lack of reasons for resisting 'internal' displays of art is a matter for the ground (a) appeal rather than a reason for me to find the notice invalid.

93. The appellant states the reference to a cinema and or the reference to a restaurant and bar should be deleted because it was / they were 'de minimis' and not enough to amount to a material change of use. But this is a matter for the ground (b) appeal which I consider below.

94. As originally drawn, the plan attached to the notice to identify the land to which this notice relates, included the entire width of the Regent's Canal contiguous with the appeal site. The appellant considers the canal should be excluded as they consider it comprises a separate planning unit. But it is clear from the evidence provided that at least one component of the mixed use complained of by the Council has occurred in the canal on vessels or floating structures moored to the appeal site via a pontoon occupied by the appellant, under his control and to which no one else has rights of access.

95. During the Inquiry the Council provided a revised plan (Document 4) with the appeal site more tightly drawn around the area occupied by the appellant's pontoons and moored vessels. Having canvassed the views of the main parties on this plan during the Inquiry, I am satisfied this revised plan accurately identifies the land where part of the mixed use is alleged to have occurred. So I will correct the notice by substituting this revised plan with the plan attached to the notice and I am satisfied that doing so will not cause injustice to the appellant or the Council.

96. So far as the planning unit is concerned, from my 2 inspections of the site, I consider the planning unit is all of the land and buildings identified by the revised plan (Document 4), including the area which has been occupied by the appellant's pontoons and moored vessels but excluding the 2 dwellings at first floor level in No 53. Whatever functional link these 2 dwellings may have or have had with the wider site, the Council identifies them as independent and self-contained and this reflects my observations at my site visits, notwithstanding that Mr Harley Gray apparently lives in one of them.

97. Having heard all the evidence, I am satisfied that subject to the above corrections this notice is drafted so as to tell the recipient what they have done wrong, what they must do to remedy it and that all statutory requirements set out in section 173 of the 1990 Act and the associated regulations[13] are satisfied.

98. The main issues in Appeal B are:

- whether the matters stated in the notice have occurred, ie the ground (b) appeal;

  and

[13] The Town and Country Planning (Enforcement Notices and Appeals) (England) Regulations 2002

- if the above ground of appeal is not successful, whether the matters stated in the notice constitute a breach of planning control, ie the ground (c) appeal;

  and

- if the above ground of appeal is not successful, whether it was too late for the Council to take enforcement action against the mixed use due to the time limit set out in section 171B(3) of the Act, ie the ground (d) appeal;

  and

- if the above ground of appeal is not successful, whether planning permission ought to be granted for the breach of planning control alleged, ie the ground (a) appeal;

  and

- if the above ground of appeal is not successful, whether the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by any such breach, ie the ground (f) appeal.

Appeal B Ground (b)

99. An appeal on ground (b) is that the matters stated in the notice have not occurred as a matter of fact. In a ground (b) appeal the onus is on the appellant to make out their case to the standard of the balance of probabilities.

100. It does not matter if the mixed use alleged (or any component of it) has ceased since the notice was issued, as the wording of section 174(2)(b) is that those matters "have not occurred", rather than "are not occurring".

101. The appellant relies on what they refer to as a legal principle of de minimis and says it should be applied for the purposes of allowing the ground (b) appeal. In particular, my attention has been drawn to the *Kwik Save* case[14]. But that case concerned whether a planning permission had been implemented. This is not the situation before me, so I am satisfied that case does not prevent me from finding that the matters stated in this notice have occurred.

102. The appellant states that the "restaurant and bar" was not there long enough to effect a material change of use. Taking into account that, on the appellant's own evidence, the restaurant had 30 covers, it was run by an external company invited to operate on the roof of the appeal site and that it operated during specified hours for 6 weeks on Thursdays to Sundays over the summer of 2020, in my judgement it was a primary component of the mixed use alleged.

103. I am particularly persuaded by the sworn witness testimony of Mr O'Connor. He said this component of the use could be seen and heard from the street when he attended the site. He also said that he witnessed people attending who said they were visiting "for a couple of beers", indicating that it was operating as both a bar and a restaurant.

[14] *Kwik Save Discount Group v Secretary of State for Wales & Others* [1981] JPL 198; 1981) 42 P. & C.R. 166

104. For the purposes of ground (b), it does not matter why the use was initiated or what objectives were fulfilled by doing so or how basic the operation was. It also does not matter if the use was "permanent" or not in the eyes of the appellant. Whilst the restaurant and bar use may have only ever have been intended as temporary, the use, which I consider was a primary component of the mixed use, occurred as a matter of fact. In my judgement, it was there long enough and resulted in a change in the character of the activities taking place so as to effect a material change of use.

105. Pursuant to ground (b), the appellant has invited me to find that it was the sharks installation that tipped the 'display of art installations' component of the mixed use into becoming a primary use. The appellant states that as the sharks had only been in the canal 6 days before being subject to an injunction (which resulted in their removal), this period was not long enough to be regarded as a primary use or amount to a material change of use. But I disagree.

106. In my judgement, this component of the mixed use began long before the sharks were installed and it had become a primary component of that use. This is evidenced by substantial art installations on the roof, which are attacked by requirement 7 of this notice as well as the art installation 'AirDraft', which is attacked by requirement 8 of this notice. Although it was the sharks that prompted a re-evaluation of the case by the Council, I do not accept that the display of art installations component of the mixed use only became a primary use when the sharks were installed.

107. I have taken into account the judgement of Mr Justice Murray[15] in this regard. But I do not see that the wording of this judgement constrains me from taking the view that the display of art installations had become a primary component of the mixed use before the sharks were installed. Just because the Council had not taken enforcement action against a material change of use until installation of the sharks began does not mean that a material change of use had not already occurred before that point. It strikes me the Council simply believed that their earlier operational development notice (ie Appeal A) would bring planning enforcement matters under control.

108. In respect of the cinema use, the appellant states that all films shown were architecture-based productions, shown in silence utilising Bluetooth headphones and that they were not commercial as they were only possible with funding from the Arts Council England. But none of these points affect my judgement as to whether this component of the mixed use alleged was a primary component of the use or not.

109. The appellant states the use of the premises as a cinema occurred 6 times in August/September 2019 as part of the Potemkin Theatre showcase fortnight of events. No information about ticket sales has been produced by the appellant. But from the evidence before me, promoters were seeking to sell 180 tickets per performance, it was advertised as available and the film 'Jaws' was shown as part of the opening of 'Sharks!' Taking these points into account, in my judgement, the cinema use was a primary component of the mixed use alleged as well.

[15] Appellant's Statement of Case, Appendix 10, page 486

110. The Council's report states that the Hoxton Docks[16] website identifies the site as a multi-purpose events and film venue and that the uses of the site are corporate events and staff nights, wedding receptions and parties, music events, product launches and presentations, outdoor events and fairs. Under cross-examination, Mr H Gray confirmed that the site had been used for corporate events, parties and music events. The use of the site to host social gatherings / as an events space has therefore, on the balance of probabilities, occurred as a matter of fact. I am not satisfied that these events and parties have been so infrequent to not be a primary use and even if they have been infrequent, in my judgment the off-site effects would likely be significant.

111. Based on all the evidence I have read and heard, the land to which this notice relates has accommodated a mixture of primary uses. It has accommodated a restaurant and bar, it has been used for the display of art installations, it has been used to show films, it has hosted social gatherings (including parties) and it has been used as an events space.

112. There is no evidence before me that the mixed use alleged (or any component of it) has to have been carried out for any specific period before it may be judged as more than de minimis.

113. Taking all of the above into account, I am satisfied on the balance of probabilities that this notice accurately recites the breach, that each component of the mixed use alleged was a primary use and so the matters stated in the notice have occurred. As such, the appeal on ground (b) fails.

Appeal B Ground (c)

114. An appeal on ground (c) is that the matters stated in the notice do not constitute a breach of planning control. This may be because what is alleged complies with the terms and conditions of an extant planning permission or because what is alleged is not 'development' as defined by section 55(1), for example because the change of use was not material. In a ground (c) appeal the onus is on the appellant to make out their case to the standard of the balance of probabilities.

115. There is no evidence that planning permission exists for the mixed use alleged. So I must determine whether the mixed use alleged is materially different from the baseline use. The Council's aforementioned 'clarification' document indicates the baseline use of the site is artists' studios and 2 independent, self-contained dwellings. Section 8 of the appellant's 6 September 2021 response to my Pre-Inquiry Note indicates the baseline use is 'artists' studios and display of art installations', (noting the appellant's view that the 2 dwellings should be excluded).

116. In my judgement, the mixed use alleged in this notice, that involved the introduction of a number of additional primary uses including a restaurant and bar, cinema and the hosting of social gatherings / use as an event space represents a significant difference in the character of the activities in the planning unit, defined above, when compared with either baseline. Therefore the change of use alleged is materially different to what has gone on before, as a matter of fact and degree and the ground (c) appeal fails.

[16] A name the appeal site has also been known as.

Appeal B Ground (d)

117. An appeal on ground (d) is that it was too late for the Council to take enforcement action due to the 10 year time limit set out in section 171B(3) of the 1990 Act. In a ground (d) appeal the onus is on the appellant to make out their case to the standard of the balance of probabilities.

118. As is clear from section 8 of the appellant's 6 September 2021 response to my Pre-Inquiry Note, the use the appellant considers is lawful for the purposes of section 191(2) (ie because the time for enforcement action has expired) is 'artists' studios and display of art installations'.

119. But for the purposes of this ground (d) appeal, having established above that the matters stated in the notice have occurred and having established above that those matters do constitute a breach of planning control, it is the mixed use alleged in the notice (as corrected) that the appellant must demonstrate is lawful, not another use. In other words, all of the primary uses of that mixed use must have occurred for a continuous period of 10 years or more, not some of them. That has not been demonstrated, on the balance of probabilities, since the appellant's case on ground (d) does not reflect the allegation in this notice. The appeal on ground (d) must therefore fail.

120. It is open to the appellant to make an application under section 191 of the Act for the alternative use they claim is lawful. But there is no obligation on me in this appeal to issue a certificate under section 191, particularly having found that the ground (d) appeal fails.

Appeal B Ground (a)

121. The table in the appellant's closing submissions indicates that deemed planning permission is not sought for some components of the mixed use. Whilst I may grant planning permission for all or part of the matters alleged where it is feasible to do so, I am not satisfied that it is possible to divorce all the separate components of the use given how the appeal site has been used and the way it is configured. So for the ground (a) appeal I have considered the mixed use only and not the separate components of it.

122. For the Appeal B ground (a) appeal, in considering whether planning permission ought to be granted for the appeal development, the main issues are:

- the effect of the appeal development on the character and appearance of the area, including the Regent's Canal Conservation Area and the setting of neighbouring listed buildings[17]; and
- the effect of the appeal development on the living conditions of neighbouring residents; and
- the effect on the vitality and viability of existing town centres; and
- if there is harm arising from the effects of the appeal development, whether the harm is outweighed by public benefits of the appeal development to justify a grant of planning permission.

[17] Bearing in mind the statutory duties under sections 66 and 72 of the Planning (Listed Buildings and Conservation Areas) Act 1990.

Character and Appearance

123. Appeal B relates to the same land as Appeal A but also includes part of the Regent's Canal that runs along the north side of the appeal buildings.

124. For the sake of clarity, the appeal development before me in Appeal B is the mixed use described in the breach of planning control alleged in the notice, as corrected. This should not be confused with the operational development described in the notice in Appeal A.

125. Whilst the display of art installations is clearly identified in the notice as part of the mixed use, granting permission for this mixed use will not grant planning permission for every art installation: it will depend on the facts pertaining to each installation and whether that installation constitutes development in its own right, as I have found is the case for Potemkin, Wikkelhouse and H-VAC, all of which have been displayed externally.

126. An art installation may be development in its own right for a number of reasons. It may be operational development by, for example, materially affecting the external appearance of the appeal building, or by being a building in its own right, or by being a material change in the use of the land, to, for example, include a dwelling, as other installations on the site appear to have been. Whether or not the above is the case for any art installed on the appeal site since the issue of the notices, or in the future, will be a matter for the Council.

127. There is no specific evidence the other components of the mixed use harm the character or appearance of the area, including the conservation area, or the setting of neighbouring listed buildings.

128. Recalling the aforementioned content of the CAR, an imaginative development that retains, upgrades and potentially finds new uses for the earliest buildings on the site, while sensitively developing the other parts of the site, could make a positive contribution to the conservation area. Considered in the round, I am satisfied that the mixed use before me fits the above description, particularly in that it provides a new use for the appeal site buildings in the Regent's Canal Conservation Area and it is separate from the operational development which is the subject of Appeal A.

129. I appreciate the Council's concerns about the effect of externally displayed art installations on the character and appearance of the area. But in my view the deemed planning application before me in Appeal B is for the use only and not any specific art installations, notwithstanding what is identified in the requirements of the notice.

130. Based on what has occurred in this case, ie experience of the use, externally displayed art installations generally require planning permission in their own right, particularly those on the roof, meaning the Council may retain control over them. Those that may not require planning permission in their own right, will in my view be unlikely to be harmful in terms of their likely effect on the character and appearance of the area, particularly when compared to boats or other vessels which may lawfully float on the canal or items which may lawfully be placed on a roof.

131. In any event, even art installations on the water may require planning permission in their own right, depending on the facts, such as, how they are

affixed to the land, if at all. So I am satisfied granting planning permission for the mixed use before me will not necessarily result in an uncontrolled proliferation of art installations that may harm the character and appearance of the area. The conditions suggested by the Council, prohibiting the display of art on the roof or on the canal, are in my view therefore unnecessary.

132. I conclude the appeal development does not harm the character or appearance of the area, preserves the character and appearance of the Regent's Canal Conservation Area and the setting of neighbouring listed buildings. As such, I find no conflict in this regard with Policies LP1 or LP3 of the Local Plan, or Policy HC1 of the London Plan or the Regent's Canal Conservation Area Appraisal 2007, identified in the notice.

Living Conditions

133. Similar to Appeal A, this notice refers to the cinema as having the potential to damage the amenity of the surrounding residents of the surrounding area if the use extends late into the night and that such uses are unacceptable if not governed by appropriate conditions. But there is no specific evidence that conditions cannot control this specific effect of the mixed use alleged.

134. The notice also states that the mixed use significantly disturbs the amenity of the area. Noise and disturbance are identified in the reasons for issuing the notice but it became apparent at the Inquiry during Mr O'Connor's evidence, that the Council's concern in respect of this main issue also extends to the safety and amenity of towpath users.

135. The mixed use has caused people to congregate on the canal towpath opposite the site, to view events occurring on the appeal site. An example of this is depicted in the introductory pages of the appellant's Statement of Case where there is an image with people filling the canal towpath opposite the site and a caption which states that in the summer of 2020 thousands of people enjoyed canal-side performances. The occurrence of this effect is supported by comments made in the representations received.

136. From my own observations during my visits to the site at different times of day, the canal towpath is narrow and heavily used by pedestrians, runners and cyclists, some travelling at speed. In my judgement, the mixed use, impedes public access along the towpath when people stop to view events occurring on the appeal site and this is dangerous. The effect may also occur when people stop to view art installations but to my mind there is a distinction to be drawn between static displays of art installations where people may stop for a moment and performances (which I consider constitute 'events' for the purposes of this notice) or film screenings where people may linger and be distracted from other users of the towpath with whom they may collide.

137. In closing submissions, the appellant states:

"… the appeals can… be allowed with a condition that prevents outdoor live artistic performances playing not with back to the canal but reaching outwards to a canal tow path audience. If there is such a concern over public safety, it can be adequately addressed by a condition."

138. Whilst I do not agree the above wording would prevent people congregating on the towpath, I am satisfied that a condition which prevents events, performances and film screenings from taking place outside is necessary to

avoid this harm as well as to protect the living conditions of neighbouring occupiers. I appreciate the appellant seeks a permission less restricted than this. But in my judgement the alternative before me is to refuse planning permission for this reason and so a condition to this effect is entirely necessary and justified and complies with all of the tests set out in paragraph 56 of the Framework.

139. It is also apparent from photographs in the evidence provided that doors on the canal-side elevation of the appeal site have been opened to show events/performances occurring inside the appeal buildings. For this reason, a condition is also necessary to ensure that no canal-side doors shall remain open during any events, performances or film screenings occurring on the appeal site and this is consistent with conditions suggested by the Council.

140. The above conditions would also, in my judgement, minimise the likelihood of complaints about noise and disturbance from the use, particularly late at night and if supported by a condition controlling the hours of operation of particular components of the use. The appellant envisages that there will be a 'night-time curfew' and specifically a 7pm curfew on rooftop use. In my judgement, these conditions are necessary for the non-residential components of the use for which the Council suggests restricted hours, in the interests of the living conditions of neighbouring occupiers.

141. My attention has been drawn to Policy LP38 of the Local Plan. Part A of this policy states that new evening and night-time economy uses will be primarily located in the Borough's designated centres and that the use should be of a size and type that reflects the role and function of the centre including the Central Activities Zone. Part B of this policy states that proposals for uses that would result in the diversification of the evening and night-time economy will be supported.

142. Part C of Policy LP38 states that proposals for evening and night time economy uses will be permitted if (i) there is no negative impact on the amenity of adjoining or adjacent residential accommodation and non-residential uses, such as through noise disturbance, cooking smells, anti-social behaviour, and highway safety; and (ii) there are no negative cumulative impacts resulting from the proposed use in relation to the number, capacity and location of other night-time economy uses in the area.

143. The Council considers the appeal development to be in conflict with Policy LP38 and refers to complaints having been received. It is no surprise to me that the use in an unregulated form may give rise to complaints and harm to residents' living conditions. But I am satisfied that such harm may be mitigated with the use properly controlled by the aforementioned conditions.

144. My attention has been drawn to complaints regarding anti-social behaviour. But limited evidence has been provided in this regard and so in my view this is not a good enough reason to resist the mixed use, providing it is properly controlled by planning conditions and given there are other means by which such behaviour may be managed.

145. I have considered the effect of the mixed use on the living conditions of occupants of the 2 (lawful) dwellings that exist on the first floor of the appeal site. I saw on my site visits that externally, by reason of the layout and arrangement of the appeal site, each of these flats have at least some

defensible space to separate them from the other activities which have occurred on the site, either by a change in levels or external boundary treatments or both.

146. The Council has suggested the imposition of a condition relating to soundproofing. Because of the proximity of the 2 dwellings on the site to the rest of the site and as (on the appellant's own evidence) music has accompanied some components of the use, I am satisfied such a condition is necessary and I see no reason why a condition to this effect may not be imposed.

147. The above condition is imposed to ensure that the required details are submitted, approved and implemented so as to make the development acceptable in planning terms. There is a strict timetable for compliance because permission is being granted retrospectively, and it is not possible to use a negatively-worded condition to secure the approval and implementation of this matter before the development takes place. The condition will ensure that the development can be enforced against if the requirements are not met.

148. In the absence of any further specific evidence in respect of this main issue, I am satisfied that, subject to the imposition of conditions to control the matters identified, the appeal development would not harm the living conditions of neighbouring residents and that there would be no conflict with Policy LP2 of the Local Plan in this regard.

Vitality and Viability

149. In respect of this main issue, the notice states that the mixed use is large and that it is located outside of a town centre harming the vitality and viability of the existing centres and that it has placed a night-time use in a residential area. Specific attention has been drawn to Policies LP10, LP32, LP38 and LP52 of the Local Plan.

150. Regarding the issue of night-time use, I have dealt with this under the living conditions heading above and so I do not consider this, or Policy LP38, any further. Whilst the notice lists Policy LP52 as a policy the appeal development is contrary to, nothing in the reasons for issuing this notice or the Council's evidence reflects the subject matter of Policy LP52. So I consider this policy weighs neither in favour of nor against the appeal development.

151. Part A of Policy LP10 states that new major development of arts, culture and entertainment facilities must be located within the Central Activities Zone, and major and district centre locations. Part B of Policy LP10 states that smaller scale proposals will be permitted in areas that are accessible by public transport and walking and cycling routes by those that are likely to use the facility.

152. There is disagreement between the parties over the compatibility of the mixed use with Policy LP10. The Council does not accept that the use falls within 'small scale' and having visited the site I agree. I acknowledge the conflict with part A of this policy. But it is not clear from the Council's case what specific harm arises from the appeal development before me in this regard.

153. Part A of Policy LP32 states that the Council will plan to deliver 34,000sqm of new retail and leisure floorspace by 2033 and that new retail and leisure

development should be located within designated centres which are specified in the policy. There is no evidence the appeal site is within any of these centres.

154. Part B of Policy LP32 states that development of retail (all A classes) and/or leisure uses over 200sqm outside of the town centres listed in part (A) of this policy (excluding the Central Activities Zone) will not be permitted unless it can be demonstrated that there is no suitable premises available in the designated centres and that there would be no harm to the vitality and viability of these centres.

155. Neither of the above have been demonstrated for the purposes of this policy, which I am satisfied is applicable given the size of the appeal site and the mix of uses involved. I have no reason to think otherwise. I acknowledge the conflict with this policy. But it is not clear from the Council's case what specific harm arises from the appeal development before me in this regard.

156. I conclude there is a lack of evidence of any harmful effect of this mixed use on the vitality and viability of existing town centres. Whilst there is conflict with Policies LP10 and LP32 I do not find that harm arises from this conflict.

Public Benefits

157. Subject to the imposition of the conditions that I have found are necessary, mentioned elsewhere in this decision, I have not found harm arising from the appeal development in Appeal B, so I do not need to go on to consider public benefits for Appeal B to justify a grant of planning permission for the use.

Other Matters

158. Mr O'Connor, in his proof of evidence, identified that the appeal development results in the loss of employment floorspace. At the Inquiry, Mr O'Connor confirmed that if the allegation were corrected to include artists' studios then the issue of a loss of employment floorspace falls away. So having corrected the notice in this regard, there is no need for me to consider this matter any further.

159. Representations received object to the mixed use for reasons which include noise from construction work and deliveries, music late at night during events, a loss of privacy from people being on the rooftop and what is referred to as 'visual and aural nuisance'. There are other means by which noise from construction work may be controlled and limited details of the specific issue with deliveries has been provided to justify a refusal of planning permission or to assist me with the imposition of a condition in this regard.

160. I am imposing conditions that I am satisfied will address music late at night during events and having been on the rooftop, I am satisfied that any loss of privacy is not significant, as the appeal site is far enough away from neighbouring dwellings, or screened from them, such that good levels of privacy are maintained.

Conclusion on Ground (a)

161. I have not found harm arising from the effect of the appeal development on the character and appearance of the area, living conditions or on the vitality and viability of existing town centres. So I am satisfied that, subject to the imposition of planning conditions, the mixed use before me is acceptable in

planning terms and facilitates the re-use of buildings in a conservation area. I consider this outweighs the conflict with Policies LP10 and LP32, bearing in mind this is a novel case and land use policies cannot possibly envisage every land use imaginable.

162. However, granting permission for the mixed use before me does not indicate the acceptability of any single component of that mixed use operating at a greater scale. Different considerations would apply if the use were other than as described in the allegation (as corrected).

163. Furthermore, granting planning permission for the mixed use does not mean I am granting permission for anything referred to in the requirements of the notice that would require separate planning permission as these do not form part of the deemed planning application, derived from the description of the alleged breach, which is simply for the use of land and not operational development. It also does not mean separate planning permission will not be required for any future art installations. A failure to obtain planning permission for future art installations (where it is required), may result in further enforcement action by the Council.

164. I appreciate this permission may not give the appellant what he wants (such as a 'sculpture garden' type permission, as described in the evidence). But the use is all that is before me in Appeal B and I have no power to direct that future art installations displayed externally do not require permission in their own right, taking into account the provisions of section 55 of the 1990 Act.

165. I have considered what conditions need to be imposed, in addition to those I have already referred to above. The Council has suggested a condition that the development operate in accordance with details which have not been specified. As this is a deemed planning application, there are no plans or drawings outside that which form part of the notice and so this condition is imprecise and unnecessary so I have not imposed it.

166. Given the sui generis nature of the use, a condition suggested by the Council to restrict permitted development rights to change the use, is not necessary in this case either.

167. The Council has not suggested a condition which restricts the hours of operation of the restaurant and bar component of the mixed use. But such a condition is necessary in the interests of the living conditions of neighbouring occupiers. This approach is consistent with an earlier appeal[18] that my attention has been drawn to and, in my view, the hours should be consistent with the other hours-restricted non-residential components of the mixed use.

168. A condition prohibiting any artwork, art installations or any performance being displayed, projected on to or visible on any of the external walls, gates doors or windows of the premises has been suggested by the Council. It is said this is in the interests of the conservation area and the amenities of users of the towpath and surrounding highway network. But I have said above that conditions are necessary to prevent events, performances and film screenings from taking place outside and to ensure that no canal-side doors remain open during these. I have also said above that externally displayed art installations generally require planning permission in their own right and that those that

[18] APP/U5360/A/04/1150239 dated 3 February 2005

may not will in my view be unlikely to be harmful. So I am not satisfied this further condition is necessary, particularly bearing in mind that there is a distinction to be drawn between static art installations and performances, events and film screenings.

169. A condition has been suggested by the Council to control the hours of deliveries and dispatches by boat via doors on the canal side. But there is no evidence harm results from any such activity in this case and so I am not satisfied a condition to this effect is necessary in light of the other conditions that I have already said are.

170. The Council has also suggested conditions relating to cycle storage, waste storage, external lighting and management plans for public access and anti-social behaviour. But I am not satisfied there is sufficient evidence that any of these are necessary, particularly taking into account the other conditions I am imposing and the size and layout of the site and the fact that there are other means to address light pollution and anti-social behaviour. It makes no difference whether any of these are 'standard' conditions for the Council or whether they have been agreed by the appellant.

171. Further conditions have been suggested by the Council relating to deliveries. But at the Inquiry Mr O'Connor said that these were not addressing a harm 'per se' so I am not satisfied they are necessary and I have not imposed them.

172. Considering all of the above points, the appeal on ground (a) succeeds.

Conclusion

Appeal A

173. For the reasons given above I conclude that Appeal A should succeed in part only, and I will grant planning permission for the installation of a platform and decking at roof level but otherwise I will uphold the notice with corrections and a variation and refuse to grant planning permission in respect of the erection of four (4) unauthorised structures at roof level, and the installation of fencing around the roof edge at 53 Laburnum Street. The requirements of the notice will cease to have effect so far as inconsistent with the planning permission which I will grant by virtue of section 180 of the 1990 Act.

Appeal B

174. For the reasons given above, I conclude that the Appeal B succeeds on ground (a). I shall grant planning permission for the use as described in the notice as corrected. The appeal on ground (f) does not fall to be considered.

Formal Decision

Appeal A

175. It is directed that the enforcement notice is corrected by:

- the deletion of post code "E9 7HA" and its substitution with "E2 8BD" in the land to which the notice relates in paragraph 2 of the notice;
- the deletion of "lathe" and its substitution with "lath" in requirement 5 in paragraph 5 of the notice; and

- the deletion of the word "bamboo" in requirement (6) in paragraph 5 of the notice.

176. It is directed that the enforcement notice is varied by:

- the deletion of 1 month as the period for compliance and its substitution with 4 months.

177. Subject to the corrections and variation, Appeal A is allowed insofar as it relates to the installation of a platform and decking at roof level and planning permission is granted on the application deemed to have been made under section 177(5) of the 1990 Act as amended for the installation of a platform and decking at roof level, on Land at Brunswick and Columbia Wharf, 53-55 Laburnum Street, Hackney, London E2 8BD.

178. Appeal A is dismissed and the enforcement notice is upheld as corrected and varied insofar as it relates to the erection of four (4) unauthorised structures at roof level, and the installation of fencing around the roof edge at 53 Laburnum Street, and planning permission is refused in respect of the erection of four (4) unauthorised structures at roof level, and the installation of fencing around the roof edge at 53 Laburnum Street on Land at Brunswick and Columbia Wharf, 53-55 Laburnum Street, Hackney, London E2 8BD on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Appeal B

179. It is directed that the enforcement notice is corrected by:

- the deletion of the breach of planning control alleged in paragraph 3 of the notice and its substitution with "Without planning permission the material change of use of the land from a mixed use as 2 dwellings and artists' studios to a mixed use comprising: 2 dwellings, artists' studios, a restaurant and bar, the display of art installations, a cinema, and to host social gatherings / as an events space (sui generis use)."

- the deletion of "Removal" and its substitution with "Remove" in requirement 7 in paragraph 5 of the notice; and

- the deletion of the plan attached to the notice and its substitution with the plan attached to this decision.

180. Subject to the above corrections, Appeal B is allowed, the enforcement notice is quashed and planning permission is granted on the application deemed to have been made under section 177(5) of the 1990 Act as amended for the development already carried out, namely: "Without planning permission the material change of use of the land from a mixed use as 2 dwellings and artists' studios to a mixed use comprising: 2 dwellings, artists' studios, a restaurant and bar, the display of art installations; a cinema; and to host social gatherings / as an events space (sui generis use); at The Regent's Canal and Brunswick and Columbia Wharf, 53-55 Laburnum Street, Hackney, London E2 8BD, as shown on the substituted plan attached to this decision and subject to the conditions set out in the Schedule of Conditions attached to this decision.

L Perkins

INSPECTOR

Schedule of Conditions for Appeal B

1) No events, performances or film screenings shall take place outside.

2) No canal-side doors shall remain open during any events, performances or film screenings.

3) The non-residential parts of the premises shall only be open for customers between the following hours: 1000 to 2200 Monday to Saturday and 1000 to 1700 on Sundays and Bank Holidays.

4) The non-residential parts of the roof top terrace shall not be used outside the following hours: 0800 to 1900.

5) Unless within 9 months of the date of this decision a scheme of soundproofing for the benefit of the 2 on-site dwellings at first floor level, is submitted in writing to the local planning authority for approval, and unless the approved scheme is implemented within 6 months of the local planning authority's approval, the use of the site shall cease until such time as a scheme is approved and implemented.

   If no scheme in accordance with this condition is approved within 11 months of the date of this decision, the use of the site shall cease until such time as a scheme approved by the local planning authority is implemented.

   Upon implementation of the approved scheme specified in this condition, that scheme shall thereafter be retained.

   In the event of a legal challenge to this decision, or to a decision made pursuant to the procedure set out in this condition, the operation of the time limits specified in this condition will be suspended until that legal challenge has been finally determined.

APPEARANCES

FOR THE APPELLANT:

Stephen Cottle He called	Barrister, Garden Court Chambers
Matthew Butcher	Associate Professor of Architecture at the Bartlett School, University College London
Ignus Froneman B.Arch.Stud ACIfA IHBC	Director, Cogent Heritage
Harley Gray	Events, bar, restaurant, cinema, noise complaints
Russell Gray	Company Secretary of Shiva Ltd, Appellant
Phin Harper	Chief Executive of Open City, Member of Critics' Circle
Caroline Rolf	Former Director of Art House Foundation

FOR THE LOCAL PLANNING AUTHORITY:

Wayne Beglan He called	Barrister, Cornerstone Barristers
Adam Dyer BA (Hons), MSc	Conservation and Design Officer, London Borough of Hackney
Patrick O'Connor BA (Hons), MSc	Planning Enforcement Team Leader, London Borough of Hackney

INTERESTED PERSONS:

Jaimie Shorten	Architect and creator of Sharks!
Monika Paradowska	Local Resident

DOCUMENTS SUBMITTED DURING THE INQUIRY

1 Appellant's Opening Statement
2 Council's Summary Opening Observations
3 Council's Amended Allegation for the 2020 Enforcement Notice
4 Council's Amended Plan for the 2020 Enforcement Notice
5 Council's Rationale for 2 Notices
6 London Plan Policies
7 Planning Permission 2014/0709 dated 29 April 2014 including officer report and drawings
8 Regent's Canal Conservation Area Review 2017 extract
9 Council's Draft Application for Costs
10 *Safe Rottingdean Ltd v Brighton and Hove City Council* [2019] EWHC 2632 (Admin)
11 *R (Ocado) v Islington LBC* [2021] EWHC 1509 (Admin)
12 Patrick O'Connor Executive Summary Proof of Evidence
13 Appellant's Suggested Conditions
14 Planning Permission 2015/4278 dated 26 October 2016 and associated photographs
15 Council's Proposed Schedule of Conditions
16 Council's Application for Costs
17 Appellant's Costs Application
18 Council's Closing Submissions
19 Appellant's Closing Submissions, including:
- Draft Statement of Common Ground
- Local Plan Policies LP46, LP47, LP48, LP49, LP50
- London Plan Policy G5
- NBS Guide to Façade Greening (Part Two)
- *Malster v Ipswich Borough Council* [2001] EWHC Admin 711
- *Sunday Times v UK* [1979-80] 2 EHRR 245
- *Buxton v Cambridge City Council* [2021] EWHC 2028 (Admin)
- Seasonal occupancy condition – breach of condition JPL 2004, Oct, 1396-1405
- *Dill v SSCLG & Stratford-on-Avon DC* [2020] UKSC 20
- *City and County Bramshill Ltd v SSHCLG* [2021] EWCA Civ 320
- *Kwik-Save Discount Group Ltd v SSW & Others* [1981] JPL 198
- *Ahmed v SSCLG & Hackney LBC* [2014] EWCA Civ 566
- *Burdle & Williams v SSE & New Forest RDC* [1972] 1 WLR 1207
- *Harrods Ltd v SSETR & Kensington and Chelsea RBC* [2002] JPL 1258

20 Appellant's Response to the Council's Costs Application

The Planning Inspectorate

Plan

This is the plan referred to in my decision dated: 10 January 2022

by L Perkins BSc (Hons) DipTP MRTPI

Land at: The Regent's Canal and Brunswick and Columbia Wharf, 53-55 Laburnum Street, Hackney, London E2 8BD

Reference: APP/U5360/C/20/3260019

Scale: Not to scale