Planning Inspectorate

Appeal Decision

Hearing held on 14 January 2025

Site visit made on 14 January 2025

by M Bale BA (Hons) MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 07 February 2025

Appeal Ref: APP/A5840/C/24/3352468
Coco Grill and Lounge, Restaurant 2, 34A Shad Thames, London SE1 2YG

- The appeal is made under section 174 of the Town and Country Planning Act 1990 (as amended). The appeal is made by Mr Naz Choudhury, Dolce Leisure Group Ltd against an enforcement notice issued by the Council of the London Borough of Southwark.
- The notice was issued on 21 August 2024.
- The breach of planning control as alleged in the notice is: Without planning permission the material change of use of the land from Restaurant, (E Use Class) to a Sui Generis mixed use of Restaurant, Shisha Terrace and Live Music Venue, ("the Unauthorised Use").
- The requirements of the notice are to:
  1. Cease any use of the Land for the purpose of Shisha Smoking and any associated charcoal burning.
  2. Remove from the Land all shisha apparatus such as hookah pipes, bowls, charcoal braziers and shisha tobacco.
  3. Cease any use of the Land for the purpose of Live Music Performance including live disc jockey performances.
  4. Cease any amplification of sounds and music from inside the building.
  5. Cease any amplification of sounds and music from outside the building and remove all external loudspeakers and associated wiring including from the seating terrace to the front (north) of the building.
- The period for compliance with the requirements is: three months after the notice takes effect.
- The appeal is proceeding on the grounds set out in section 174(2)(a), (b) (c), 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: The appeal 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 in the Formal Decision.

Preliminary Matter

1. The appeal was made on grounds (a), (c) and (f). However, arguments were presented that suggested that the use might not include a 'live music venue'. If that were the case, it might be that the matters alleged in the Notice had not occurred. That would most appropriately be dealt with on ground (b). Relevant issues were included within a Statement of Common Ground ("SoCG") and discussed at the Hearing and, therefore, no injustice would arise if I were to also consider the appeal on ground (b).

The Enforcement Notice

2. An enforcement notice must inform the recipient with reasonable certainty what the breach of planning control is and what must be done to remedy it. If necessary, before determining the appeal, I have a duty to put the enforcement notice ("the Notice") in order. My powers under section 176(1)(a) of the Town and Country Planning Act 1990 as amended ("the 1990 Act") include to correct any defect, error or misdescription in the Notice or, under section 176(1)(b), to vary the terms of the Notice. In each case, the only test is whether the correction or variation would cause any injustice to the appellant or the local planning authority.

3. There is a minor typographical error in the alleged breach of planning control. "The Land" to which the Notice relates is defined at section 2 before being referred to throughout the Notice. A capital 'L' is missing from the reference in paragraph 3.1 and should be inserted for clarity. This would have no effect on the operation or purposes of the Notice and, so, would cause no injustice to either party.

4. The Notice is internally inconsistent because it alleges a mixed use but does not require the mixed use to cease. Instead, it requires the various components that are an addition to the previous use to cease. Therefore, it is necessary to correct the Notice to remove reference in the requirements to various parts of the mixed use and replace them with a simple requirement to cease the mixed use as a restaurant, shisha terrace and live music venue.

5. The SoCG proposes the rewording of the requirements to cease the mix use, namely by ceasing the use of the land for shisha smoking and performance of music by a DJ. While it is potentially helpful to set out precisely what the Council expects to happen, there is a risk that a requirement constructed in that way could interfere with lawful use rights by preventing any truly incidental uses taking place.

6. The Council accepted at the Hearing that those specific steps were not strictly necessary and it was sufficient for the Notice to simply state that the mixed use should cease. Any uses not falling within the previous lawful use would need to stop. The extent to which the other requirements go beyond that required to remedy the breach of planning control, are a matter for the ground (f) appeal.

7. Thus, solely for the purposes of getting the Notice in order, I shall delete requirements 1 and 3 (listed respectively as paragraphs 5.1 and 5.3 on the Notice) and replace them with a requirement to "Cease the mixed use of the Land as a Restaurant, Shisha Terrace and Live Music Venue".

8. These corrections would ensure that the inconsistencies were resolved, but the overall purpose of the Notice would remain. It would not materially affect the cases presented or the consideration of the appeal. Accordingly, no injustice would arise to either party. There will be a consequential renumbering of the requirements, which I will deal with in my Formal Decision.

Grounds (b) and (c)

9. Ground (b) is that the matters alleged in the Notice have not occurred. Ground (c) is that those matters, if they occurred, do not constitute a breach of planning control. In this case, insofar as it concerns the music element of the

alleged mixed use, there is some overlap in the consideration of these grounds, so I shall deal with them together. There is, however, no dispute that shisha smoking has occurred, so the issue with that is whether it constitutes a breach of planning control. That is only relevant to ground (c).

10. Coco Grill ("Coco"), is laid out as a restaurant. There are tables, clearly arranged for dining, inside and on an outdoor terrace. I am told there are around 100 covers indoors, and around 60 on the terrace. There is no space for dancing and no space for a stage that might, for example, allow a band or singer to perform. There is a table suitable for a DJ to position and control their own equipment. Connections are provided from there to the in-house speaker system.

11. On some nights a disc jockey ("DJ") mixes music that is broadcast through speakers in the internal and external areas. In the initial documents, there appeared to be some dispute as to whether this constituted 'live music' such that the premises were being used, in part, as a 'live music venue'. The SoCG confirms agreement between the main parties that it is unimportant whether the music is 'live' and proposes to delete that word from the alleged breach of planning control. I have no reason to disagree with that position.

12. It is not uncommon for restaurants to play background music. In some venues, that music may pre-recorded. In others it may be provided live, such as by a pianist. In either situation the type of music played can respond to the mood, or change the desired ambiance. That would not be the same as, say, a jazz club where there was an advertised performer, more akin to a concert setting.

13. At the appeal site, it seems that the role of the DJ is to influence the general ambiance and customers are more likely than not to have gone to dine while the DJ happened to be playing, rather than going specifically to watch a particular artist perform. It, therefore, aligns more with the pianist than the jazz club analogy.

14. However, while there have been only a small number of official complaints to the Council, neighbouring residents in the flats above have diarised numerous occasions when they have felt that music from the premises has been unbearably loud. At the Hearing, the appellant was unable to confirm whether music was played at such a volume that customers would have to shout across the table to their dining companions. My suggestion that this might be a fair test for whether music was 'background music' was not disputed by his representatives. On this basis, I conclude that the music played at Coco has, at least until recent interventions, regularly exceeded the volume of background music. As that has occurred, the appeal on ground (b) must fail.

15. I appreciate that an individual restaurant can decide the volume that they would like to play background music. It may also be that it is the character of the use rather than the severity of any impact that determines whether a material change of use has occurred. However, on the balance of probabilities, I find that, even if customers are primarily there to dine, a combination of a live DJ (whether or not that is 'live music') and the high volume of the music that exceeds that of 'background music' is indicative of a use that is materially different to that ordinarily found in a restaurant. That environment could reasonably be termed a 'music venue'.

16. As I understand it, the appeal site has been a restaurant for around 20 years, since the building was first built. It has always had an outdoor terrace where customers may dine and, if they wished, smoke cigarettes. That is a common feature of many restaurants, especially in river front locations such as this.

17. However, the smoking of shisha at Coco, whether during or after meal, or as a standalone pastime, is materially different to smoking a cigarette. This is because the shisha pipes are specially prepared to order from a menu, and they are frequently shared by a group as a specific social activity. I understand that they last for a significant duration, well in excess of a cigarette, and while some cigarette smokers may 'chain smoke' for a protracted period of time that still differs from the social sharing of a shisha pipe that has been specially prepared.

18. At my site visit, early on a Tuesday evening, my overwhelming impression was that Coco is a large, well-patronised restaurant, with a busy kitchen. Tables – inside and out – were arranged for dining rather than lounging. While some shisha smoking was occurring on the terrace, there were far more people inside than out. The appellant's position is that shisha smoking is wholly dependent upon the existence of the restaurant use, such that it is incidental or ancillary to the restaurant use.

19. Contrasted to some other locations, it may well be that this is not a place where people go primarily to smoke shisha. Indeed, I can see obvious differences between Coco and some of the other appeal decisions cited by the Council: For example, at Western Road, a smoking area at 'Bamboo Lounge' was laid out as a lounge and patrons could provide their own pipes, at Café Baku there was very limited food provision, at Temple Lounge, there was very limited internal seating. At Al Hamra, which, taken at face value, may be the most similar, especially in terms of proportion of sales, there is insufficient information in the Decision about the restaurant uses to allow a comparison to be drawn.

20. Rather, at Coco, most customers go to dine and either alongside, or afterwards, may share a shisha pipe. That is borne out by the appellant's undisputed estimate that only 5 percent of customers smoke without purchasing food. Shisha also forms only a small part of the turnover of the business and total number of sales. Nevertheless, clearly some people do smoke without purchasing food. Either way, that is a social activity undertaken separately, or additionally to any dining experience that they might also be experiencing. It is a very different product to food and drink, which is the ordinary fare of a restaurant and, on the time estimates given, it strikes me that it might take as long to smoke as to eat a meal.

21. The case of *Harrods Ltd v SSETR* [2001] EWHC Admin 600 clarifies that to be incidental (or ancillary as the case may be) to the primary use, there should objectively be a functional link between the activities and they must be activities ordinarily found alongside the primary use.

22. What is ordinary may not be static. Cultural norms may shift, such as through the evidenced increase in shisha smoking in southeast London generally. The appellant suggests that shisha smoking is a common accompaniment or finale to middle eastern, alcohol-free dining, much like a tiramisu may be a popular conclusion to an Italian meal. It demonstrates a link between eating and

smoking. A reputation for providing a good dessert (or, as the case may be, shisha) might be a reason people choose to go to a particular restaurant.

23. However, a good Italian desert or, as a further example, a vegan menu, is still food. Shisha is not. Moreover, however common it may be at middle eastern restaurants, I have no substantive evidence that shisha smoking occurs lawfully elsewhere at premises permitted solely for use as a restaurant. On this ground of appeal, the onus of proof is with the appellant and it has not been shown that it ordinarily occurs elsewhere in a similar form, as an incidental use.

24. The numbers of units of shisha sold, and the overall profit realised from them may be a small proportion of total sales, but that does not mean that the way that the site is used is not different to the previous use, other nearby restaurants, or restaurants ordinarily. Indeed, at the Hearing, the appellant explained that along this localised river frontage, the premises seek to provide something different to do – contributing to and showcasing diversity within multicultural London. It is clearly intended to be a different offer to the other restaurants. The number of shisha pipes sold may be small in total number compared to other large dedicated shisha lounges. However, an estimate that, on average, 30 shisha pipes were smoked per day at Coco, with greater numbers at weekends than during the week, is not an insignificant number given the length of time that it takes for each pipe to be consumed.

25. The restaurant use is clearly a primary one. The indoor space provides more accommodation than the terrace where shisha smoking occurs. Coco appears to have a reputation for good quality, exciting food. It has an attractive location and an inviting dining room. I have no doubt that some customers visit specifically to experience that.

26. However, materially different activities also go on here. That is both the music venue creating a specific ambiance, and the ability to purchase and smoke shisha which does not occur ordinarily at restaurants. This overall package is part of the offer and informs the use as a whole. The additional elements cannot, therefore, be categorised as being incidental (or ancillary) to the restaurant use. They are, together, the mixed use of the site as alleged in the Notice.

27. For the reasons given, on the balance of probabilities, the mixed use is materially different to the previous restaurant use. That has not been shown to be anything other than a sui generis use, outside Class E of the UCO within which the previous restaurant use fell. Such is development within the meaning of the 1990 Act that requires planning permission. None has been granted.

28. The matters alleged, therefore, constitute a breach of planning control and the appeal on ground (c) fails.

Ground (a)

29. Ground (a) is that planning permission should be granted for the matters alleged in the Notice. The main issues are the effect on the living conditions of nearby residents with regard to the potential for disturbance by noise and odour, and the effect on the health of nearby residents.

Noise

30. Shisha smoking is a year-round activity. The covered terrace at Coco is heated to facilitate smoking during colder weather. That means that the general activity level on the terrace is likely to be more intensive throughout the year, compared to other restaurants including those along the riverside, where outdoor dining is primarily a warm-weather activity. Nevertheless, the general sound of conversation, even when slightly elevated, has not been shown to be harmfully disruptive to neighbouring residents.

31. Rather, it was confirmed at the Hearing, that it is the music emanating from Coco that is said to cause harm. While there have been limited formal noise complaints made to the Council, that multiple neighbouring residents report very frequent disturbance from loud music, suggests that it is affecting their living conditions. The appellant's acoustic consultant does not seek to show that disruptive levels of music have not occurred, instead the focus is on providing mitigation to avoid such disturbance in the future. The Council accepts that suitable controls would avoid harm to living conditions.

32. In that regard, the Council seeks a two-limbed approach. The first would involve investigation of and, if necessary, upgrade to the building's fabric to reduce sound transmission. Alongside that, it seeks controls limiting the sound levels audible at sensitive locations. The required sound level is agreed by the parties, but the appellant argues that only the second limb is required.

33. The Council is concerned that the second limb is reliant on the behaviour of the site operator. It likens this to conditions of premises licenses, where operators can be prosecuted for a breach of condition and says that planning should be concerned with land use, so should focus on the suitability of the building for the use. That, it says, is what the first limb would secure.

34. However, the appellant has shown that sound limiters can be fitted to the amplification system such that levels do not breach the required standard. Indeed, since they were installed and calibrated at the end of October 2024, those neighbouring residents who appeared at the Hearing confirmed that they had not been disturbed by music.

35. Neighbouring residents explained how they have tried to resolve their noise concerns amicably in the past, but after periods of relative quiet, the volumes have tended to gradually increase again. They have little faith in a condition that imposed controls on sound levels.

36. Nevertheless, that previous pattern was in a situation where there was no control imposed by any regulatory regime. Moreover, I was told that altering the levels on the new limiters would require re-configuration by software on the consultant's computer, not stored at the premises. It is not akin to simply turning a volume knob, should the appellant seek to increase music volume. Changing the sound level is not impossible, but some considerable effort would be required.

37. It may be that carrying out upgrades to the acoustic performance of the building would make sound transmission less likely. However, the level of attenuation suggested by the Council is not based upon accepted standards for the proposed use, and it has not been justified by substantive evidence. Moreover, if there were upgrades, a 'behavioural' condition would still be

required because, even with a better performing building, volume could be set at a level where that insulation became ineffective in preventing harm.

38. I understand that it might be quicker to prosecute somebody for a breach of a premises license than a planning condition. However, similar evidence gathering is likely to be required. Especially as the second limb is required in any event, I see no reason why such a behavioural condition could not be enforced or would not provide adequate control.

39. How the appellant choses to comply with the condition is up to them. The sound limiters appear to be an obvious, practical solution. Building enhancements could still be explored if the required sound levels could not be met without them, or if they wanted higher volumes without breaching the stipulated level. However, for the above reasons, the ultimate sanction must lie in enforcement of the measured sound levels. Therefore, that is the only control required.

40. I, therefore, find that sound levels from the mixed use could be adequately controlled by a single condition limiting noise to a specified level, as measured at noise sensitive locations. Such would result in no conflict with Policies D13 and D14 of the London Plan 2021 ("LP") and Policy P56 of the Southwark Plan 2022 ("SP") that seek to ensure that development mitigates effects so as to avoid significant adverse noise impacts on occupiers and their quality of life.

Odour

41. Shisha smoking creates odour. As, by law, smoking takes place outdoors, then the odour would be dispersed into the air and diluted before reaching neighbouring properties. Nevertheless, I am told that it has been detectable both on the balconies of neighbouring flats and indoors when windows have been open. This is said to have been to the extent that windows have had to be kept shut, including during summer months, adversely affecting residents' enjoyment of their properties.

42. The appellant has commissioned an odour assessment ("OA") that concludes that odour disturbance would not be experienced to such a degree that it would adversely affect the living conditions of neighbouring residents. To inform its conclusions, the OA was based upon a site visit and sniff test, and a qualitative odour risk assessment. The site visit was carried out at a time early in the evening, when there were 3 shisha pipes in use. It was found that the odour was mostly faint and intermittent, although it was stronger at times and easily identifiable.

43. The risk assessment is based upon the 'source potential' and the effectiveness of the pathway to the receptor. The receptors, being dwellings, are accepted as being of high sensitivity, and the pathway effectiveness is high.

44. The OA suggests that there is a small odour source potential. This is based on guidance and the assessor's observations at the site visit, that characterise the odour from shisha as pleasant, and positive on the hedonic scale. It is also because the terrace is covered with a shelter constructed of linked umbrellas. The umbrellas would mean that the odour was first diluted in the covered dining area before being ventilated through the front and sides of the shelter. There would also be a predicted maximum of 20 shisha pipes in use any time.

45. However, it is not clear why the odour intensity arising from 20 pipes should be considered small. At the Hearing, the appellant's odour consultant said that 20 was a small number and he had applied previous experience and professional judgement. While I appreciate the consultant is experienced in his field, every site is likely to have different characteristics. I note that this particular shelter is closed on 2 sides, which might limit air circulation and dilution within the dining area compared to one that was, for example, open on three or four sides. Moreover, the judgement was also said to be based upon the observation that, during the site visit, he did not find the odour to be overwhelmingly adverse.

46. Herein seems to lie a fundamental flaw in the evidence. A sniff test, while an accepted methodology, is recommended by the Institute of Air Quality Management ("IAQM") to be undertaken on a minimum of three separate occasions. There was only one visit. Moreover, it was carried out at a time when shisha use at Coco was relatively low.

47. IAQM guidance, also accepted at the Hearing, indicates that even pleasant odours can become unpleasant when strong, or when exposure is frequent. Whether or not 20 pipes as an absolute number is small, no convincing explanation was given as to how it could be robustly concluded that over 6 times the number of pipes experienced would also produce a low intensity of odour, or indeed a pleasant aroma.

48. While shisha smoking is not an industrial process, the conclusion of the OA seems to be based largely on the observation of a pleasant aroma and low intensity within the dining area. The evidence does not show that either of those would necessarily be the case with more pipes. Moreover, the regularity with which neighbouring residents are likely to experience the odour, which can also influence the extent to which it is annoying or a nuisance, does not appear to have been robustly factored in.

49. I understand that there have been very few complaints made to the Council about odour, nor has the Council undertaken any odour modelling or assessment itself. Neighbouring residents attribute this to not realising it was a matter that they could complain about. Whether or not that is correct, I still have accounts from neighbours about the regular presence of strong shisha smells and the need to close windows and avoid balcony use to mitigate this. While that may be anecdotal, it has been experienced by multiple people and, for the above reasons, the appellant's evidence does not adequately bring those accounts into question.

50. I accept that in a restaurant use, diners could smoke cigarettes on the terrace. However, as previously noted, the smoking of shisha takes longer and, while some people may chain smoke cigarettes there is no substantive evidence that it would produce odour on a similar scale, or with such regularity as up to 20 shisha pipes. Even accounting for cigarettes having a negative value on the hedonic scale, I cannot find that the effects of shisha smoking would be comparable to cigarettes on an ordinary restaurant terrace.

51. I have considered whether I could impose a planning condition to limit the number of shisha pipes in use at any one time. However, I have no robust evidence on which to judge what might be a suitable number. While it would seem from the OA that 3 pipes might not give rise to a nuisance, I am not convinced that the assessment is wholly reliable, even at this level. Primarily

that is because it is based upon a single visit, but also because the frequency of odour disturbance, even at low intensity, and the effect that may have has not been clearly factored.

52. Therefore, I conclude that shisha smoking at Coco causes harm to the living conditions of neighbouring residents by reason of odour disturbance. Such results in a conflict with LP Policy D13 and SP Policy P56 that seek to ensure that new development avoids or mitigates against disturbance and nuisance and does not cause an unacceptable loss of amenity to present or future occupiers.

Health

53. Adverse effects to human health from smoking are widely understood. Passive smoking is also known to be harmful and the Council suggested that if smoke can be smelled then it, and associated harmful matter, is being inhaled.

54. However, while that may be the case, it is unclear whether the odours that can be detected from shisha smoking are linked to the toxins in the tobacco. I also have no particular information about the concentrations of smoke required to lead to adverse effects and, even if they are detectable due to their odour, whether any smoke present at the neighbouring flats would be at such a level that would harm the health of the occupiers. The research relied upon by the Council in this regard relates to effects on non-smokers from smoking indoors. It is not clear to what extent that can be translated to, already diluted, smoke drifting in or across balconies from elsewhere.

55. I appreciate that the adverse effects of passive smoking have been widely publicised and this could heighten people's response to concerns about exposure, including adverse effects on mental health from prolonged perceived exposure. However, there is no substantive evidence before me on which to conclude that shisha smoking at Coco adversely affects the health of neighbouring residents.

56. The Council's reasons for issuing the Notice have referred to SP Policy P65 concerning air quality. However, at the Hearing, the Council's officers explained that they were not concerned about effects on air quality generally. Nor were they suggesting that 'air quality neutral' standards needed to be met in connection with this use. Therefore, I find that Policy P65 is not directly relevant to the assessment of this use and the adverse effects experienced are more closely aligned with disturbance from odour, as considered above.

Other matters

57. The use provides employment opportunities, with jobs at various levels of skills and expertise. Planning policies seek to promote vitality and a vibrant day and night economy, and indeed, the Council confirmed at the Hearing that they would be supportive of the use in a different location. However, the benefits that may arise have not, in this case, been shown to outweigh the harm that I have identified to the living conditions of neighbouring residents at this site.

Conclusion on ground (a)

58. The Notice alleges a mixed use of restaurant, shisha terrace and music venue. For the above reasons, such a mixed use would have unacceptable effects on

living conditions by reason of disturbance from odour that cannot be avoided through the imposition of planning conditions. Planning permission should not, therefore, be granted for the matters alleged.

59. However, I have also been invited to consider whether any combination of the uses comprising the mixed use can be permitted. While my above findings suggest that the shisha use must cease, they also indicate that the 'music' element can be adequately controlled through planning conditions. Therefore, if the various components of the mixed use can be severed without forming an entirely different use, it may be possible to grant permission for part of the matters, namely a mixed use as a restaurant and music venue.

60. There appears to be no good reason why the shisha and music uses would be dependent upon one another. While, collectively, they create a certain product offer, they are distinctly different activities either of which can be paired separately or together with the restaurant use. Moreover, the effects from each are very different such that they can, and have, been distinguished in evidence by both the main and interested parties. Therefore, the components can be separately considered when deciding if a different mixed use, forming only part of the matters alleged, can be permitted, without causing injustice to any party.

61. The logical conclusion, therefore, is to refuse planning permission for the mixed use as a restaurant, shisha terrace and music venue but to grant planning permission instead for a mixed use as restaurant and music venue, subject to conditions limiting noise levels. That scenario would accord with the development plan.

62. That said, the Council's position that, ordinarily, premises are not permitted to play music outdoors was undisputed. While I note that the external speakers could be, and are currently, set to very low output levels, conditions agreed by the parties would not control sound reaching the neighbouring balconies. While the appellant has suggested a condition controlling sound levels from music playing on the terrace, I am not satisfied that the condition would be sufficiently precise to prevent audibility of music noise at neighbouring properties. In this context, I find that no music should be played externally.

63. At the Hearing, there was further discussion about the need to limit opening hours. It appears that due to late closing, with orders continuing until around 11.30, guests often linger in the vicinity until midnight, seemingly to await the arrival of the next day. The extent to which this occurs is unknown. It is also unclear whether it is linked to the whole mixed use alleged, just the shisha element, or simply the hours of operation.

64. Either way, it would seem necessary to impose control over opening hours to encourage earlier dispersal. At the Hearing, the appellant was amenable to this suggestion, and suggested no serving beyond 11 pm. To ensure enforceability, it would be more appropriate to control the times that customers can be on the premises, and in light of the appellant's suggestion of 11 pm for final orders, it would seem appropriate to impose a condition requiring the premises to be closed to customers by 11.30. Within the condition, I will impose a re-opening time of 9 am, as this is given as the maximum trading hours in the appellant's statement.

65. For the above reasons, I find that the appeal on ground (a) should succeed in part. I shall grant conditional planning permission for part of the matters, being the use as a restaurant and music venue, as set out in my Formal Decision.

66. As the appeal on ground (a) succeeds only in part, the Notice will be upheld. Planning permission will be granted for part of the matters, but the Notice will not be amended, such as to remove requirements relating to the music venue. This is because, if I did that, there would be a further planning permission granted as provided by S173(11) of the 1990 Act for the alleged use, insofar as it did not require that part of the use to cease. Such a permission would not have any planning conditions attached and so could lead to the adverse effects that the permission I shall grant seeks to mitigate.

67. Where there is conflict between the Notice and the planning permission, the appellant (or any future operator) can rely upon the provisions of S180(1) that where, after the service of an enforcement notice, planning permission is granted for any development carried out before the grant of that permission, the Notice shall cease to have effect as far as inconsistent with that permission. As the Notice will be upheld, it is necessary to go on to consider the appeal on ground (f).

Ground (f)

68. The purpose of the Notice is to remedy the breach of planning control. On that basis, insofar as it relates to this appeal, ground (f) is that the steps required to be taken, or the activities required by the Notice to cease, exceed that necessary to remedy the breach of planning control.

69. I have already found that the requirements of the Notice need to be corrected so as to target the mixed use alleged rather than the individual components of it. Requiring the mixed use to cease is, therefore, necessary to remedy the breach of planning control and no lesser step would achieve that.

70. Of the remaining requirements, it is necessary to remove the shisha apparatus and paraphernalia set out in the second requirement as that facilitates the breach of planning control, whether or not some smaller amount of shisha smoking could take place incidentally to the use as a restaurant.

71. However, the playing of background music is a common feature of restaurants. 'Amplified' is not a quantifiable term, and any music passed through some sort of electronic system will have been amplified to some degree, even if it is very quiet. The requirement to cease the amplification of all sounds and music, therefore, goes beyond that reasonably necessary to remedy the breach of planning control. As before, if the music reaches a high volume, that may be indicative of a material change of use.

72. I note that Coco does not serve alcohol and is, therefore, not subject to a premises licence. While such a licence might normally prevent the amplification of music outdoors, it is not a normal condition of restaurants in land use planning terms.

73. Nevertheless, it appears that the playing of music in all areas, including on the outdoor terrace is part of the overall product offer created by the mixed use as a restaurant, shisha terrace and music venue. Therefore, while the external speakers may not be development in their own right, I find that they facilitate

the breach of planning control and their removal is a necessary and reasonable step in order to remedy the breach.

74. With regard to the above, the appeal on ground (f) should succeed in part. I shall delete the requirements relating to the amplification of music.

Overall conclusion

75. There has been a material change of use of the Land to a mixed use of restaurant, shisha terrace and music venue. That is a breach of planning control and should not gain planning permission. However, subject to conditions controlling noise, permission can be granted for part of the matters that have been ongoing, namely a mixed use as a restaurant and music venue.

76. Procedurally, the Notice must stand, as corrected and varied. The corrected requirements are to cease the mixed use allege and that must include the requirement to cease the use as a music venue in order to prevent an unfettered permission being granted for that use pursuant to Section 173(11) of the 1990 Act. The requirements are also varied such that there is no need remove and cease the use of the indoor speakers as that is a reasonable and ordinary part of the lawful use, and not required to remedy the breach of planning control.

77. Notwithstanding the above, in practice, subject to compliance with the conditions set out in the Schedule to this Decision, live DJ performances can continue as part of a mixed use of the Land as a restaurant and music venue pursuant to the permission I am granting for part of the matters alleged on ground (a).

78. For the reasons given above I conclude that the appeal should succeed in part only, and I will grant planning permission for the use of the Land as a restaurant and music venue, but otherwise I will uphold the notice with corrections and variations and refuse to grant planning permission in respect of the matters in totality. 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 S180 of the 1990 Act.

Formal Decision

79. It is directed that the enforcement notice is corrected and varied by:

80. In Section 3 'The Alleged Breach of Planning Control', paragraph 3.1:

- Delete the word "land" and substitute it with the word "Land"; and
- Delete the word "live".

81. In Section 5 'What you are required to do'

- Paragraph 5.1: Delete of the text in in its entirety and substitute it with the words "Cease the use of the Land for the mixed use as a restaurant, shisha terrace and music venue";
- Delete Paragraph 5.3 in its entirety;
- Delete Paragraph 5.4 in its entirety; and

- Replace the paragraph number "5.5" with the number "5.3".

82. Subject to the corrections and variations, the appeal is allowed insofar as it relates to the material change of use of the Land to a mixed use of restaurant and music venue and planning permission is granted on the application deemed to have been made under section 177(5) of the 1990 Act, for the material change of use of the Land to a mixed use of restaurant and music venue, at the property known as Coco Grill and Lounge, Restaurant 2, 34A Shad Thames, London SE1 2YG, subject to the conditions in the attached schedule.

83. The appeal is dismissed and the enforcement notice is upheld insofar as it relates to the mixed use as alleged in the Notice and planning permission is refused in respect of the material change of use of the Land from Restaurant (E Use Class) to a Sui Generis mixed use of Restaurant, Shisha Terrace and Music Venue at Coco Grill and Lounge, Restaurant 2, 34A Shad Thames, London SE1 2YG on the application deemed to have been made under section 177(5) of the 1990 Act.

M Bale

INSPECTOR

Schedule

1. Noise from music played within the indoor area of the premises shall not exceed 27dB LAeq (5 minutes) when measured in any habitable room of any residential space in 32 and 34 Shad Thames, London SE1 2YL.

2. No amplified music shall be played externally or outdoors.

3. Customers shall only be permitted on the premises between the hours of 09.00 and 23.30.

APPEARANCES

FOR THE APPELLANT:

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Naz Choudhury – Appellant

Lee Montague BEng (Hons) MIOA – Acoustic Consultant

Bob Thomas BSc (Hons) PgDip MSC MIEnvSc MIAQN CSci – Odour Consultant

Jonathan Phillips BA (Hons) DipTP MA MRTPI – Planning Consultant

FOR THE LOCAL PLANNING AUTHORITY:

Claire Nevin – Counsel

Philip Ridley – Senior Planning Officer

Rebecca Harkes – Senior Public Health Programme Manager

Richard Earis – Principal Environmental Protection Officer

INTERESTED PARTIES:

Kathleen Ehrlich – Chair Shad Thames Residents Association

Andrew Evans

Ben Finn

Catherine Finn

Peter Johnson

Ella Sims

Mel Sims

DOCUMENTS SUBMITTED AT THE HEARING

HD1 – Statement of Common Ground between the appellant and the Council