
Appeal Decisions

Site visit made on 22 November 2016

by D H Brier BA MA MRTPI

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

Decision date: 15 December 2016

Dahab, 41 Burnt Oak Broadway, Edgware, HA8 5JZ

- The appeals are made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
 - The appeals are made by Mr Mahmoud Ismail against 2 enforcement notices issued by the Council of the London Borough of Brent.
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Appeal A Ref: APP/T5150/C/16/3154909

- The enforcement notice was issued on 13 June 2016.
- The breach of planning control as alleged in the notice is the material change of use of the premises from an A3 restaurant to a mixed use as an A3 restaurant and a sui-generis shisha lounge/cafe.
- The requirements of the notice are:
 1. Cease the use of the premises as a shisha café/shisha lounge.
 2. Remove all equipment and materials associated with the unauthorised use from the premises, including the removal of all tables, chairs, canopies and/or umbrellas, shisha pipes, tobacco and coal.
- The period for compliance with the requirements is one month.
- The appeal is proceeding on the grounds set out in section 174(2) (b) and (c) of the Town and Country Planning Act 1990 as amended.

Summary of Decision: The appeal is dismissed.

Appeal B Ref: APP/T5150/C/16/3149020

- The enforcement notice was issued on 19 March 2016.
- The breach of planning control as alleged in the notice is the erection of a single storey rear timber extension with associated raised decking.
- The requirements of the notice are:
 1. Demolish the unauthorised development.
 2. Remove all debris and items arising from the demolition and remove all materials associated with the unauthorised development from the premises.
- The period for compliance with the requirements is one month.
- The appeal is proceeding on the grounds set out in section 174(2) (a), (b) and (c) of the Town and Country Planning Act 1990 as amended.

Summary of Decision: The appeal is dismissed.

Appeals A and B - Appeals on Grounds (b) and (c)

Preamble

1. As the appeals on these 2 grounds appear to be closely inter-related in this instance, I deal with them jointly. In order for the ground (b) appeals to
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succeed, it has to be shown that the matters alleged in the notices have not occurred as a matter of fact. In the case of ground (c) it has to be shown that the matters alleged in the notices do not constitute breaches of planning control. Grounds (b) and (c) are legal grounds of appeal. As such, they are distinct from any planning merits and the Courts have held that the onus on proving them lies with the appellant.

The Appeals Site

2. No.41 Burnt Oak Broadway is a 3 storey property. The front part of its ground floor is a restaurant. Attached to the rear of the restaurant, and linked to it by an internal door, is a single storey rectangular shaped structure. It occupies most of the land at the back of the building and is in the order of 15m long and 4m wide. The structure has timber walls, punctuated by openings covered by translucent sheeting which can be rolled up. Instead of a conventional roof, cover is provided by 2 large fabric umbrellas which are supported by posts bolted into the floor. The space inside the structure was laid out with tables and chairs and several hookah pipes were in evidence. In addition, I saw a good number of other hookah pipes in a store room.

Appeal A

3. The Council's contention that a shisha café/lounge use is being carried out at the premises has not been called into question. Rather, the appellant's case on both grounds is that there has been no change of use because the use is still the same, the 'back area' has always been a relaxation lounge for cold drinks and dessert, non-nicotine tobacco has merely been added as an extra like any other add-on on the menu.
4. The Council acknowledge that the restaurant use is authorised and I accept that there are certain similarities between a shisha café/lounge and a restaurant use in that both provide facilities where customers can relax in convivial surroundings. However it is illegal to smoke within a restaurant.
5. The use of the 'back area' for relaxation as described, and the provision of an area for customers to smoke in front of the premises, are activities that seem to me to have been either incidental to, or part and parcel of, the restaurant use. Shisha cafés and lounges, on the other hand, are premises where a key, if not main, focus of the activity is, as the name suggests, a facility whereby customers meet and smoke flavoured tobacco, burnt using coal or charcoal, passed through a water vessel, and inhaled through a hookah pipe.
6. Like a restaurant, a shisha café/lounge may well involve the consumption of food and beverages, but the main purpose is the facility to enable shisha to be smoked, with smoking materials and equipment being provided expressly for that purpose. In short, the activity that defines a shisha café/lounge is that customers smoke through hookah pipes. To my mind, this is markedly different in nature from the activities that characterise a restaurant.
7. Class A3 of the Town and Country (Use Classes Order) 1987 (UCO) expressly covers restaurant and café use for the sale of food and drink, but the wording of the UCO does not extend to include any other activities. Therefore the smoking of shisha is not included within Use Class A3. No claim has been made that the use in question is incidental or ancillary to the A3 use and I do not consider this is the case.

8. I accept that some restaurant customers may take a break to smoke a cigarette outside whilst taking a meal. To my mind though, smoking itself is not *functionally* related to eating and drinking and perhaps more significantly it does not lie at the heart of the activity in the way shisha smoking does. I acknowledge that the scale of the activity is not necessarily a determining factor in this respect. However, as the use in question appears to have necessitated the erection of a sizeable new structure in order to accommodate it, I regard this as a weighty indicator that the disputed use is not ancillary to the A3 use.
9. The foregoing factors lead me to conclude that, as a matter of fact and degree, the character of the use in question is materially different from an A3 restaurant use. As I see it, the use amounts to a separate main use in its own right (a 'sui generis' use) and, as such, requires planning permission. In the apparent absence of any such permission, I find there has been a breach of planning control.

Appeal B

10. The premise underlying Appeal B is that there has not been any breach of planning control, the structure is temporary and can be removed at any time. The structure in question appeared to me to be a fairly basic form of construction and its removal could probably be effected relatively quickly. However, it still remains the case that a single storey extension has been erected as the notice alleges. I find it difficult therefore to conclude anything other than the matters alleged in the notice have occurred as a matter of fact.
11. Other than the basic nature of the structure there is nothing that suggests that it is a temporary expedient or that its presence on the land was intended to be fleeting. I am mindful that under Part 4 Class A of Schedule 2 of The Town and Country Planning (General Permitted Development) (England) Order 2015 (GPDO) certain buildings and temporary structures are 'permitted development', but the circumstances set out in Class A do not apply here. No such claim has been made, nor is it claimed that the structure does not constitute a building. In the light of this, I consider the structure constitutes development for which planning permission is required, and, in the apparent absence of any such permission, there has been a breach of planning control.

Overall

12. In the light of the foregoing, the appeals on grounds (b) and (c) fail.

Appeal B – Appeal on Ground (a) and the Deemed Application

13. I consider there are 2 main issues. Firstly, whether the character and appearance of the area would be adversely affected and, secondly, whether the living conditions of nearby residents would be adversely affected.
14. Planning policies for the area are contained in the Council's Unitary Development Plan (UDP). Policy BE2 states that development should make a positive contribution to the character of an area, an approach echoed in Policy BE9 which is headed 'Architectural Quality'. Policy SH10 states that food and drink uses should not adversely affect the amenity of residential occupiers. And while Policy SH16 provides for non-retail uses in local shopping centres, one of the considerations is that a satisfactory residential environment can be provided. Policy EP2, headed 'Noise and Vibration', indicates that such

development will not be permitted where it would harm existing noise sensitive development such as housing.

15. On the first issue, the building in question is not visible from Burnt Oak Broadway, and the appearance of the rear elevation of the main body of No.141 is somewhat unprepossessing. Be that as it may, my impression was that the form and appearance of the structure in question is very rudimentary and basic. Even allowing for the rather undistinguished and somewhat eclectic visual quality of its surrounds, the structure looks very stark and utilitarian to the extent that, rather than making a positive contribution to the locality, its presence has adversely affected the character and appearance of the area. As such, I find it contrary to UDP Policies BE2 and SH2.
16. Turning to the second issue, at the site inspection it was confirmed that there is living accommodation above the restaurant and, judging by the presence of curtains at the windows, it seems likely that the same applies to the upper floors of other properties in the same parade as No.41. In addition, close to hand to the north and south respectively there is a block of flats, Staburn Court, and a pair of semi-detached houses at the eastern end of Limesdale Gardens. My impression was that the area surrounding the rear of the premises is a typical quiet residential area, and there is a sharp contrast between it and the hustle and bustle evident in Burnt Oak Broadway.
17. My site inspection took place around noon. At that time there were no customers in the structure. In my experience, shisha cafes/lounges tend to operate primarily in the evenings, at times when local residents ought reasonably to be able to enjoy a period of relative peace and quiet.
18. Due to its basic nature, the structure, with its fabric 'ceiling' and timber walls with openings appeared to me to offer little in the way of soundproofing. I have not been advised how many customers the shisha café/lounge attracts. But, given the size of the structure, together with the not insignificant number of hookah pipes I saw, my impression was an appreciable number of people – the Council's figure of 30 has not been challenged- could be probably be accommodated in it.
19. In these circumstances, even though customers' conversation may be good natured rather than boisterous, this, together with things such as car doors being shut and vehicles arriving and departing, are likely to prove disturbing to local residents. Indeed, this appears to be borne out by the comments that have been made by third parties.
20. All this leads me to conclude that the use would have an unacceptably adverse effect upon the living conditions of nearby residents. In the light of my findings regarding the nature of the use, it could be argued that UDP Policy SH10 does not apply as it does not expressly encompass shisha cafes/lounges. However, as good neighbourliness is a valid yardstick for assessing the effect of development, the main thrust of this policy and the objectives that underpin this policy are valid considerations to which I attach a good deal of weight. Moreover, as well as being contrary to these matters, for the reasons given above, I also find the development in question conflicts with UDP Policies SH16 and EP2.
21. The structure takes up most of the land at the rear of the premises to the extent that there is insufficient space for on-site servicing and parking as UDP

Policy PS9 requires. Although there is nothing that shows that this has caused any highway safety problems to date, I see this as another disadvantage that adds to my concern. I have taken all the other matters raised into account, but none are sufficient to outweigh the considerations that have led me to my conclusions.

22. In the light of the foregoing, the appeal on ground (a) fails and planning permission will not be granted on the deemed application.

Formal Decisions

Appeal A Ref: APP/T5150/C/16/3154909

23. I dismiss the appeal and uphold the enforcement notice.

Appeal B Ref: APP/T5150/C/16/3149020

24. I dismiss the appeal and uphold the enforcement notice. I refuse to grant planning permission on the application deemed to have been made under section 177(5) of the 1990 Act.

D H Brier

Inspector