
Appeal Decision

Site visit made on 17 January 2017

by Paul Freer BA (Hons) LLM MRTPI

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

Decision date: 15 March 2017

Appeal Ref: APP/P4605/X/16/3155458

531 Moseley Road, Balsall Heath, Birmingham B12 9BU

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development (LDC).
 - The appeal is made by Mr Yusef Arman against the decision of Birmingham City Council.
 - The application Ref 2016/01705/PA, dated 25 May 2016, was refused by notice dated 28 July 2016.
 - The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended.
 - The use for which a certificate of lawful use or development is sought is described as a first floor sheesha facility at rear.
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Summary Decision: the appeal is dismissed.

Procedural Matter

1. The use for which a certificate of lawful use or development is sought is described on the application form as a "sheesha facility". The Council have adopted that same term on the formal Decision Notice. However, this same use is variously described elsewhere in the appeal documentation as a "sheesha lounge", "Shisha facility", "Shisha lounge" and a "Shisha area". I am satisfied that these various terms all refer to the same use and have adopted the description given on the application form for the purposes of my Decision.

Reasons

2. Section 191(4) of the Town and Country Planning Act 1990 (1990 Act) indicates that if, on an application under that section, the local planning authority are provided with information satisfying them of the lawfulness at the time of application of the use, operations or other matter described in the application, or that description as modified by the local planning authority or a description substituted by them, they shall issue a certificate to that effect; and in any other case shall refuse the application. My decision is therefore based on the facts of the case and judicial authority. For the avoidance of doubt, this means that the planning merits of the proposed development are not relevant to this appeal and the main issue is whether the Council's decision to refuse to grant a Certificate of Lawful Use or Development (LDC) was well founded. In this respect, the burden of proof is firmly on the appellant to show that, on the balance of probability, the proposed development would have been lawful at the time the application was made to the Council.
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3. This appeal concerns the use of part of the first floor of the property as a sheesha facility. In order to succeed, the appellant must demonstrate that this use has been ongoing continuously and without significant interruption for a period of ten years at the time of the application. In this case, the relevant date would be 25 May 2006, that being ten years before the date on which the application was submitted according to the date on the application form.
4. The essence of the appellant's case is that the consumption of tobacco, whether by smoking cigarettes or hookah pipes, is regulated by The Smoke-free (Premises and Enforcement) Regulations 2006 and that since coming into force those Regulations prohibit the smoking in enclosed premises. The appellant therefore contends that smoking on the premises has since that time taken place, and indeed since 2004, at the rear of the premises in area generally referred to as a "smoking balcony". The appellant has provided a total of three Statements of Truth in support of that contention.
5. The Statement of Truth submitted by Mr Ismail Hussein indicates that he has worked at the appeal premises as a chef since 2012 but, for a period of 6 years prior to that, attended the premises on a social basis. This covers a period from 2006 and Mr Hussein recalls using the smoking balcony on those occasions. Mr Hussein also confirms that this smoking balcony now is now part of the appeal premises.
6. The Statement of Truth submitted by Mr Amin Ahmed indicates that he has been a regular customer at the appeal premises since 2012 and that he has a close friend who lived at the rear of premises prior to that. Mr Ahmed indicates that the balcony at the appeal premises was used as a legal smoking area from 2004 to 2012 but does not indicate that the balcony was so used thereafter. Moreover, the statement submitted by Mr Ahmed is also short on detail, particularly in terms of whether, and if so how often, he visited his friend residing at the appeal premises.
7. The Statement of Truth submitted by Mr Idris Ahmad explains that the "shisha area" at the rear of the premises was used as a smoking shelter between 2004 and 2012. Mr Ahmad goes on to explain that this same area was then separated as a shisha lounge, with shisha pipes in place of cigarette smoking. However, Mr Ahmad only indicates that he has been resident in the area for 12 years and does not explain how came to have knowledge of the appeal premises or became aware of the dates referred to in his statement.
8. Whilst this evidence might appear on first sight to suggest that the area now used as a sheesha facility has been used as an area for smoking tobacco products continuously since 2006, all three Statements of Truth share the characteristic of being short on detail. In particular, the dates provided are somewhat vague, the location of the smoking balcony is not precisely identified and the source of the information is not clearly explained. Moreover, the three Statements of Truth are not mutually supportive: in particular, the Statement of Truth submitted by Mr Amin Ahmed makes no reference to the use continuing after 2012.
9. It is also significant that, whilst described as being Statements of Truth, the statements submitted in support of the appellant's case are not sworn affidavits. This restricts the weight that I can attach to this evidence such that, when the lack of detail is also taken into account, I only afford the appellant's evidence limited weight.

10. The Council explains that a planning assessment of the appeal premises was undertaken in February 2012 as part of consideration of a planning application for a change of use of the first floor of Nos. 533 and 535 Moseley Road to form a seating area in connection with the existing restaurant at the appeal premises (Council Ref: 2012/00350/PA). A photograph taken at that time, dated 15 February 2012, clearly shows the rear elevation of the current appeal premises.
11. That photograph shows that the timber enclosure in which the existing sheesha facility is located, and which is identified on the submitted drawings and referred to in the Design & Access Statement, was not present at that time. This unequivocal photographic evidence throws the evidence submitted by the appellant into question, particularly insofar as it relates to the period prior to 2012. There is no evidence before me to indicate that the existing enclosure replaced a previous structure or, if it did, to explain why that previous structure was not captured in the Council's photograph. At the very least, the absence of any structure in the Council's photograph indicates that the use as a sheesha facility was not taking place in February 2012, such that the use as a sheesha facility has not taken place without interruption since 2006.
12. This is therefore not a situation where the local planning authority has no evidence of its own to contradict that of the appellant or make his version of events less than probable. On the contrary, I find that the appellant's evidence is not sufficiently precise to counter the unequivocal photographic evidence produced by the Council. Accordingly, I conclude that, on the balance of probability, the use of part of the first floor of the property as a sheesha facility has not taken place continuously for a period of ten years.
13. I have reached this conclusion partly on the basis of photographic evidence that shows that the area claimed to have been used as a sheesha facility could not have existed prior to February 2012, at least not in its current form. Consequently, there is no need for me to reach a conclusion as to whether the sheesha facility is a materially different use from an area used for the consumption of other forms of tobacco, and I make no attempt to do so.
14. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of use of part of the first floor of the property as a sheesha facility was well founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

Formal Decision

15. The appeal is dismissed.

Paul Freer

INSPECTOR