
Appeal Decision

Site visit made on 10 March 2017

by Anthony J Wharton BArch RIBA RIAS MRTPI

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

Decision date: 16 March 2017

Appeal Ref: APP/X5990/X/16/3157390

Al Hamra, 31-33 Shepherd Market, Mayfair, London W1J 7PT

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- 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 Al Hamra UK Limited against the decision of, the City of Westminster Council (the LPA).
 - The application, Ref: 16/05153/CLEUD, dated 2 May 2016, was refused by notice dated 9 August 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: Use of the premises as a Class A3 restaurant with ancillary shisha element.
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Decision

1. The appeal is dismissed.

Matters of clarification and background information

2. The application for the LDC relates to Nos 31-33, Shepherd Market only, which is authorised as a Class A3 restaurant use. Reference is made to another property in the Appellant's ownership, at No 52, which has a lawful Class A1 retail use. This property is being used in conjunction with the appeal premises as a restaurant and the shisha pipes used at both premises are stored in the basement of No 52.
 3. This is agreed to be the case. However, the matter before me relates only to what was, or was not, the lawful use of Nos 31-33 at the time of the LDC application. The storage of shisha pipes at No 52 (approximately 40), most of which are used at Nos 31-33, is material to the LDC application in that there is a link between storage of equipment and use of the premises. However, the planning status of No 52 is not part of the appeal before me and is a matter for the Appellant and the Council to resolve. I have, however, taken into account the relevance of the separate 'Z-Reports' for Nos 31-33 and No 52, and the fact that the storage of all shisha pipes is currently accommodated at no 52.
 4. The three storey plus basement appeal property (Nos 31-33) is located within the tightly laid-out Shepherds Market in the Mayfair Conservation Area (MCA). The area comprises a variety of properties in retail, restaurant, café, public house, residential and other uses within a historic and conservation area context. The ground floor of Nos 31-33 forms the main restaurant area (80 covers), with toilet facilities, kitchen and storage areas in the basement. This has been in existence as a restaurant since the 1980s.
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5. Along the northern frontage there is an outside covered seating area comprising 6 tables (24 covers). This is where the shisha smoking element (and any other smoking) takes place. It is indicated that there is residential accommodation on the upper floors. At the time of my site visit (a Friday lunchtime) the restaurant was approximately 75 % full and there were 3 customers smoking Shisha pipes at the outside table. I also noted drinks and some food being consumed at the outside tables.

6. A Shisha smoking use does not fall into any Use Class category and is a '*sui generis*' use. Whether a use is '*ancillary*' or '*incidental*' must be assessed in relation to the specific circumstances in each case. Whether or not a material change of use has taken place, is a matter of fact and degree. In considering whether a particular use is an '*ancillary*', '*incidental*' or '*additional use*', it is necessary to look at the overall nature of the use and to determine if it has any planning implications.

7. An appeal relating to a Certificate of Lawful Use or Development (LDC) is confined to the narrow remit of reviewing the LPA's reason for refusal and then deciding whether the decision is well-founded. The planning merits of the case do not fall to be considered and the relevant test relating to submitted evidence is '*the balance of probability*'. The question to be asked in this case, therefore, is whether or not the Appellant has shown that the use of the premises as a Class A3 restaurant with an '*ancillary Shisha element*' was lawful for planning purposes on the date of the application; 2 May 2016.

8. It is sometimes argued that only the evidence which was placed before the LPA at the time of application for a LDC should be considered. However, section 195 refers only to the refusal being '*well-founded*' or '*not well-founded*'. The courts have held that the Secretary of State (SOS) cannot be compelled to issue a certificate where he is of the opinion that one should not be granted.

9. However, conversely, it has also been held that, for a LPA to argue that the only evidence to be considered is what was placed before them at the time of the application, denies the purpose of the LDC procedure. In this case, therefore, in reaching my decision, I have taken into account all of the application and appeal submissions including the additional information submitted since the initial application and in relation to No 52. I am satisfied that in taking this course of action no injustice has been caused to the Council or the Appellant.

Reasons

10. It is clear from the submissions and the demonstration at my site visit, how the ordering and billing systems of Nos 31-33 and 52 operate. The daily billing completions (Z Reports) are separate for both premises. For the main restaurant the Shisha smoking sales are itemised separately from food and drink but, for No 52, they are included in the drinks/desserts elements of the bills. However, in any case, it is the main restaurant at Nos 31-33 for which the LDC is sought.

11. The Z Reports for Nos 31-33 indicate that, in terms of sales, the Shisha smoking element over a period from May 2016 to August 2016, accounted for 5.4% of eat-in sales and 4.96% of total sales. The figures submitted at the time of the application (for a 5 day period 23 to 26 May 2016) indicated Shisha smoking sales accounted for between 4.7% and 7.4% of total revenue. On the face of it, therefore, it is evident that value of the food and drink sales for the Z report periods far outweigh the Shisha smoking sales.

12. The Council had initially queried the number of till terminals and therefore questioned the accuracy of the Z Reports. However, again, from the demonstration during my site visit, I am satisfied that there is only one controlling till terminal in 31-33. I have no reason to question the Z report figures which indicate the Shisha smoking sales for the periods chosen. Also, other than the references (to Shisha smokers) regarding the planning officer's site visits, the Council has not provided any detailed survey figures of customers using the Shisha smoking facilities offered at the main restaurant.

13. However, other factors need to be taken into consideration in assessing whether or not a particular use is *ancillary*, *incidental* or *additional* to another, or whether the inclusion of a different component or use amounts to a material change of use. It is not simply a matter of quantum in terms of Shisha sales, since even a small difference in the nature of usage of an establishment can result in a material change of use. It is the nature of the new activity as a whole which must also be assessed to determine whether it raises issues which have, or could, lead to planning implications.

14. It is a fact that, although smoking can no longer be carried out within restaurants, public houses or cafes, many people who frequent such premises still like to smoke. It is usual, therefore, for food and drink establishments to provide an external smoking area. In this part of Mayfair I noted that this was a common provision and it is understandable and that many nearby restaurants provide such a facility for customers. During my visit around the area, although I have not been made aware of the planning status of the establishments, I noted cigarette and cigar smokers, as well as Shisha pipe smokers outside various restaurants.

15. However, Shisha smoking is different to the smoking of cigarettes or cigars outside such premises. The Shisha pipe normally has to be provided by the establishment and there is a necessary preparation element. In this case the pipes are stored and prepared in No 52 and then carried the short distance to the outside tables at Nos 31-33. I have noted that pipes could be stored at Nos 31-33, as suggested on behalf of the Appellant but, in relation to how a premises is used, it matters not where equipment is stored. What matters in this case is the nature of the activity and how the premises are used overall.

16. With Shisha smoking, premises are generally used in a specific manner. For restaurants, as well as regular diners smoking Shisha after their meal, there is a likelihood (as in this case) that people will turn up and congregate to specifically smoke Shisha with or without food, snacks or drinks. This is a distinctly different situation from establishments where customers simply leave a restaurant or public house for the time it takes to smoke a cigarette or cigar. In this case the availability of Shisha smoking is advertised by the restaurant and there is no dispute that customers can go to Nos 31-33 for Shisha smoking only. I acknowledge the points made about the provision of Shisha being expected by customers in this part of London and that some diners might simply go outside to smoke Shisha after a meal. However, the Z reports do not distinguish between diners who use the Shisha facility and those who might simply want to smoke Shisha with a drink and a snack outside. Nor do they indicate how many customers ordered Shisha only.

17. I have referred above to the fact that the Council had not provided any detailed surveys to indicate levels of usage. However, even on just the two occasions noted by the planning officer, 9 people out of 11 and 2 out of 3 at the

outside tables were smoking Shisha. During my visit 3 out of 4 people outside were smoking Shisha.

18. The Appellant's evidence submitted with the application and on appeal does not therefore, in my view, support the case that the Shisha smoking was, or is, incidental or ancillary to the use of the premises as an A3 restaurant use. On the facts before me and despite the Z- Reports, I consider that it is a separate and readily identifiable new use or component of the restaurant use rather than simply being ancillary or incidental to that use.

19. Taking into account the efforts that the Appellant company has gone to attract customers by advertising the Shisha facility; the fact that around 40 Shisha pipes are stored in the nearby No 52 (for use at Nos 31-33); that a promotional photograph shows Shisha pipes on all of the 6 external tables, it is my view that as a matter of fact and degree, and despite the low percentage of Shisha sales, the nature and character of Shisha usage at Nos 31-33 is not an ancillary or incidental use. Instead it is in part a Shisha smoking facility that goes hand in hand with the restaurant use resulting in a mixed A3 and sui-generis use.

20. I acknowledge that the number of Shisha pipes (around 40) is required in order to prevent cross-contamination of flavours. However, the fact is that even with a much smaller number of pipes, all 6 external tables could be readily available for shisha smoking alone. The photographic evidence indicates that this is possible and, despite the fact that the merits of the case are not being considered in the context of this LDC, this level of Shisha smoking at the premises could have planning implications within this part of the MCA.

21. In conclusion, therefore, on the basis of the evidence provided by and on behalf of the Appellant, I consider that the Council's decision not to issue a LDC was well-founded. I do not consider, on the balance of probabilities that it has been precisely or unambiguously shown that the Shisha smoking use at the appeal premises is ancillary to the restaurant use. The facility can be used as a separate service and there is no precise indication of the numbers of Shisha smokers at any given time. The appeal, therefore, fails and a LDC will not be issued.

Other Matters

22. In reaching my conclusion in this appeal I have taken into account all of the other matters raised by the Council and by the Appellant. These include the initial appeal statements and grounds of appeal; the other planning appeal decisions submitted and referred to; the established restaurant use; references to the Act and regulations relating to LDC applications; the statement sections on revenue consumption, products, equipment, area and capacity and character; the details within the 'woodswur' letter to the Council of 18 May 2016; the photographic submissions and the Appellant's final submissions dated 19 January 2017.

23. However, none of these carries sufficient weight to alter my conclusions and nor is any other factor of such significance so as to change my view that the Council's decision not to issue a LDC was well-founded.

Anthony J Wharton

Inspector