



Appeal Decision

Inquiry Held on 1 June 2017

Site visit made on 1 June 2017.

by Stephen Brown MA(Cantab) DipArch RIBA

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

Decision date: 04 August 2017

Appeal Ref: APP/X5990/X/16/3153284

Café Baku, 22-24 Lansdowne Row, London W1J 8QL

- 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 Global Food and Beverage (UK) Management Services Ltd against the decision of City of Westminster Council.
 - The application ref. 16/01307/CLEUD, dated 15 February 2016, was refused by notice dated 22 April 2016.
 - The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended.
 - The development for which a certificate of lawful use or development is sought is the continued use of the site as a sandwich bar and café with ancillary shisha smoking.
-

Decision

1. The appeal is dismissed.

Preliminary matters

2. Evidence at the Inquiry was taken under oath or solemn affirmation.
3. For purposes of clarity, I should explain that in an appeal under section 195 of the Town and Country Planning Act 1990 as amended (the Act), which relates to an application for a lawful development certificate, the planning merits of the existing use are not relevant, and they are not therefore an issue for me to consider. My decision rests on the facts of the case, and on relevant planning law and judicial authority. The burden of proof rests with the appellant to show that on the balance of probabilities the claimed use was lawful at the time of the LDC application.
4. The appellant indicated that there is evidence of shisha smoking taking place on the appeal site since at least May 2005, and thus a potential argument that this use may have become immune from enforcement action. However, it was made clear that this argument would not be pursued as part of these proceedings.
5. Notwithstanding the description given at application stage, it was agreed between the parties that the proposal seeks to establish the lawful use of the site as:

'The use of basement and ground floors as a sandwich bar/café with ancillary shisha smoking, where shisha is only served with a platter of food'

(sui generis), with outdoor seating for the placing of 12 tables, 26 chairs, and two patio heaters in an area measuring 1.6m x 15.0m.'

That is the basis on which I have determined the appeal.

Background

6. Café Baku is situated on the western side of Lansdowne Place, a short pedestrian way running between Berkeley Street to the east and Fitzmaurice Place to the west. The premises subject of the appeal are the ground floor and basement of nos. 22 and 24, and include the outdoor seating area comprising 12 tables and 26 chairs on the public highway to the front.
7. Planning permission for the continued use of the premises as a *sui generis* sandwich bar/café, and use of the public highway outside no. 22 Lansdowne Row for placing 5 tables and 10 chairs on an area measuring 1.5 metres X 5 metres, was granted in 2008¹. Various subsequent permissions were granted to vary the opening hours, and a series of temporary permissions to allow the placing of 12 tables and 26 chairs and two patio heaters on an area measuring 1.6 metres X 15.0 metres.
8. Uses in the street are mixed, with mainly Class A1 (retail) and Class A3 (café/restaurant) at ground floor and basement levels, with predominantly offices and hotel accommodation on upper floors.
9. I saw that internally on the ground floor there are 8 tables, in 4 pairs, ranged along a bench seat at the back of the quite shallow space, with a separate chair to each table facing the bench seat. The tables were laid out with cutlery and glasses. At one end of the space is a compact servery area with a bar, tea and coffee making machines, a sink, glassware and bottle storage, and cold drinks cabinets. Food comes from the basement preparation area below via a dumb waiter. At the other end of the space I saw shisha pipes stored on shelves, and an enclosed storage area with more pipes, packets of tobacco, and charcoal. A stair leads down to the basement, with more shisha pipes stored along its flanks. In the basement are customers' WCs, and the food preparation area. This latter space is narrow and contains minimal equipment – I saw 2 ovens, fridges, and a small area of preparation surface.
10. Following complaints from members of the public in November and December 2014, the Council wrote to the appellants on 14 January 2015 notifying them of various breaches of planning control. These were breach of a planning condition restricting items that could be placed on the pavement to tables, chairs, and patio heaters², the installation of a canvas screen on the western side of the forecourt, and a material change of use from a *sui generis* sandwich bar/café to a *sui generis* sandwich bar/café/shisha use. Warning was given that enforcement action might ensue, including issue of a breach of condition notice. The appellant was advised to remedy the breach within one month of the date of the letter.

Reasons

11. The main issue in a LDC appeal determination is whether the Council's decision to refuse the application was well-founded. In that regard the principal

¹ Decision notice ref. 07/08172/FULL, dated 28 April 2008.

² Condition 6 of planning permission ref. 13/05058/TCH, dated 26 March 2014.

question in this case is whether shisha smoking has caused a material change to the permitted use of the premises, as would be indicated by a change to the character of that use.

12. The appellant says that Café Baku is a successful café/sandwich bar that caters rather uniquely to the Azerbaijani – or ‘Azeri’ – community on London. The appellant argues that the use for which the LDC is sought is no different in character from the use for which planning permission has already been granted, with shisha smoking a part of the café use. It is argued that in this respect it is no different from smoking cigarettes or cigars, which – since the smoking ban – routinely takes place at cafés and restaurants that have the benefit of use of an outdoor space. No different environmental effect is demonstrable, and there is no material difference. Furthermore, shisha is not sold on its own but is integral to the ‘Azeri experience’, which includes a platter of food and/or a drink. Shisha smoking makes up a very small proportion of the trade in terms of the range of items on sale, the total sales, staff time expended, the area of seating in such use, and the quantity of tobacco delivered as compared with other goods.
13. The Council maintain that shisha smoking is not incidental or ancillary to the principal use as a sandwich bar/café, but has become a separate use within a composite planning use as a sandwich bar/café/shisha smoking establishment. This is mainly on the basis that shisha smoking is not ordinarily incidental to the primary use. Shisha smoking is the principal reason that a significant number of customers use the premises, and a significant proportion of the revenue derives from shisha.
14. In my opinion shisha smoking differs from other forms of tobacco smoking – and indeed electronic cigarettes – in a number of ways. It entails use of special equipment that is stored by the establishment – principally shisha pipes and a charcoal brazier; this equipment is effectively hired by customers, and prepared for use by waiters. This differs from other forms of smoking, which do not require special equipment, and are generally portable for the smoker. Smoking of cigarettes, cigars etc. can be carried on in any place where it is lawful, and there is no need to visit a particular place offering a special service.
15. While smoking of cigarettes or cigars may often be associated with eating and/or drinking it is very much subordinate to those activities, in that people’s main purpose would be to go out for a meal or a drink, and perhaps smoke as well. However, they would be unlikely to have a main purpose of going out to smoke. Shisha smoking on the other hand appears to me to be very much a social activity in itself, usually longer lasting than – for instance – a cigarette, sometimes with pipes being shared, and with food often comprising little more than a snack. It is notable that Café Baku limits customers to 1 hour per shisha at peak hours.
16. Nevertheless, it is very much a matter of fact and degree as to whether a particular activity has become pervasive to the extent that it changes the character of the principal use. Regarding shisha sales at Café Baku as compared with other trade, the accountant certified sales report for the period from March 2016 to the end of February 2017 shows that the average price for a ‘head’ of shisha was approximately £25, and about the same amount for a platter of baklava and fruit. This is consistent with the menu, which lists a ‘grapefruit head’ shisha with one food platter at a price of £50, with other

flavours of shisha at £60 or £70 a 'head'. This is listed as 'the Azeri experience'.

17. Given that shisha is always served with a food platter, the proportion of the total revenue attributable to shisha sales should take both shisha and food platter sales together. The sales reports for 2016/17 show that shisha sales account for approximately 40% of the total revenue, and platters approximately 38%, giving a combined total of about 78%. This compares with a proportion of about 69.6% of revenue in the year to March 2015.
18. The apparent discrepancy between the 2014/15 sales records and the 2016/17 records was explained by the appellant as arising from a different accounting procedure, in that prior to 2015 the food platter accompanying the shisha was included as a 'freebie', whereas subsequently the platters were ascribed half of the cost of the shisha. The appellant conceded that the food platter could be ascribed no more than £16 of the total 'Azeri experience'.
19. In terms of the space available for shisha smoking, the outdoor seating amounts to some 52% of the total covers. At the time of my visit – at about 1700 on a reasonably warm Thursday afternoon – I saw 11 customers sitting outside, with 4 shisha pipes in progress – some of which were clearly shared. There was no-one sitting in the interior. The Council officer records that 3 visits to the appeal premises were made in 2016 and 2017. On two of those occasions there were very few people inside, but on each occasion there were significant numbers outside, ranging from 7 and 21 customers. A significant number of these were smoking shisha pipes. Furthermore, 2 of the 7 staff in attendance have the duties of preparing and lighting the pipes, and maintaining the supply of lighted charcoal. I note also that the low tables with dropped leaves set out on the pavement are particularly suited to shisha smoking, as compared with the tables and seating inside, which are more attuned to conventional dining.
20. In terms of the high proportion of revenue deriving from shisha sales, it appears to me that this has come to be a predominant aspect of the business. This is supported by the occasional observations of the proportion of customers observed to be smoking shisha, or in associated groups. The relatively limited number of food items on the menu, the minimal kitchen facilities, the presence of staff carrying out quite specialised shisha duties, and the promotion of the 'Azeri experience' give further indication that shisha smoking has become an integral part of the establishment's offer, quite over and above what might be considered as a normal ancillary or incidental use. As a matter of fact and degree I consider shisha smoking has become an identifiable separate element in the mixed use of these premises.
21. Nevertheless, there is also the question of whether shisha smoking has planning consequences that differentiate it from, for instance, other forms of smoking. The Council argue there are impacts upon air quality, odour, noise, and the character and appearance of the premises.
22. It is clear that shisha smoking generates a quite distinctive smell, and that significant quantities of charcoal are burned in the brazier standing in the public domain – the appellant estimated about 10 kilograms per day. These are matters that might affect air quality, and possibly give rise to concerns about odours. I note that complaints have been made about the burning of charcoal, the smell of shisha smoke, as well as noise and disturbance.

23. The manner of use of the premises, with customers necessarily sitting outside in order to smoke, often for quite long periods - is somewhat different from a normal café type use, where customers may smoke outside, but usually for short periods. This may affect the character or appearance of the area, and possibly generate noise at times when peace and quiet might be expected. These are all matters that go to the merits of the use, and whether they have positive or negative consequences is not for consideration in a s.195 appeal. Nevertheless, I consider they should be considered in planning terms, and subject to proper scrutiny, as would occur in consideration of a planning application.
24. I conclude that on the balance of probabilities shisha smoking has become a distinctly separate activity from those that would be considered as normally ancillary or incidental to the lawful sandwich bar/café use of the appeal premises. As a result a new *sui generis* mixed use as a sandwich bar/café/shisha smoking establishment has been created. This is a material change of use for which no planning permission has been granted.
25. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of the use of the basement and ground floors of nos. 22-24 Lansdowne Row, London W1J 8QL as a sandwich bar/café with ancillary shisha smoking, where shisha is only served with a platter of food (*sui generis*), with outdoor seating for the placing of 12 tables, 26 chairs, and two patio heaters in an area measuring 1.6m x 15.0m 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.

Stephen Brown

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Cain Ormondroyd	Of Counsel, instructed by Jonathan Phillips.
He called:	
Jonathan Phillips MRTPI	Chartered Town Planner, Group Partner of Bidwells LLP.
François Durnez	Operations Manager Café Baku.

FOR THE LOCAL PLANNING AUTHORITY:

Charles Streeten	of Counsel, instructed by, Westminster City Council Legal Services.
He called:	
Mark Hollington MA (Oxon) MSc MRTPI	Area Planning Officer Westminster City Council.

DOCUMENTS

- 1 Attendance list.
- 2 The Council's letter of notification of the appeal, dated 5 May 2017.
- 3 Statement of Common Ground.
- 4 Appendices to Mr Phillips' proof of evidence.
- 5 Appendices to Mr Durnez's proof of evidence.
- 6 Appendices to Mr Hollington's proof of evidence.
- 7 Mr Hollington's rebuttal proof and appendices.
- 8 Complaint received by the Council in November 2014.
- 9 Café Baku menu submitted with the 2015 LDC application.
- 10 Bundle of legal authorities.

PLANS

- A Plan of the area with locations of residential properties.