



Appeal Decision

Site visit made on 10 July 2019

by **B.S.Rogers BA(Hons) DipTP MRTPI**

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

Decision date: 5 August 2019

Appeal Ref: APP/B4215/C/18/3212030

Al Qaza Shisha and Coffee, 119 Wilmslow Road, Manchester, M14 5AN

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeal is made by Western Dell Limited against an enforcement notice issued by Manchester City Council.
- The enforcement notice was issued on 17 August 2018.
- The breach of planning control as alleged in the notice is the material change of use from a restaurant (A3) with flat above (C3) to a shisha smoking place (Sui Generis) and the erection of an external staircase and entrance to first floor level.
- The requirements of the notice are i. cease the use of the land as a shisha smoking place and remove all pipes, tobacco and associated paraphernalia; ii. Remove the external staircase shown on the attached photograph ENF/01 and return the property to its condition before the breach took place, indicated on the attached plan numbered 500638.010; iii. Remove all building materials, rubble and waste arising from carrying out the above steps.
- The period for compliance with the requirements is seven days.
- The appeal is proceeding on the grounds set out in section 174(2) (a), (b), (c), (d), (f) & (g) of the Town and Country Planning Act 1990 as amended.

Summary of Decision: The appeal is allowed and the enforcement notice is quashed.

Preliminary matter

1. It has been brought to my attention that the red line on the plan attached to the notice does not enclose the area within which the staircase is located. However, there is a photograph of the staircase attached to the notice and there appears to be little doubt in the minds of the appellants as to what is intended to be enforced against. I can therefore correct the plan without injustice to the parties.

The appeal on ground (b)

2. By appealing on this ground, the appellants are arguing that whatever is alleged in the notice has not taken place. However, it is plain that shisha smoking takes place at the premises. The appellants' statement acknowledges this, the business name indicates such a use, the Council's evidence indicates such a use and I saw a large number of shisha pipes in the premises. The use as a shisha smoking place has occurred as a matter of fact and the appeal on ground (b) fails.

The appeal on ground (c)

3. The appellants argue that there has not been a breach of planning control as the use for shisha smoking is so similar in character to the authorised use as a restaurant (A3) that no material change of use has taken place. However, I do not need to consider that point under ground (c) as the appellants have not addressed the fact that the planning unit of the shisha smoking use enforced against extends to both the ground and first floors of the premises. The Council indicates that the authorised use of the first floor is as a flat (C3), a matter not disputed with any convincing evidence by the appellants. Planning permission is required for the material change of use from a flat to shisha smoking use. It is also required for the erection of the external staircase – there are no permitted development rights for such building operations. Accordingly, the appeal on ground (c) fails.

The appeal on ground (d)

4. Even if the external staircase is treated as a separate operational development, rather than as part of the material change of use, the appellants would have to demonstrate it had been substantially completed more than 4 years prior to the date of the notice, ie by 17 August 2014. The Google Streetview image provided by the Council shows no sign of the staircase in August 2014 and no contrary evidence is provided by the appellants to indicate a date of construction prior to the relevant date.
5. Turning to the shisha use, six statutory declarations have been provided, each saying that the individual signatory had visited the premises since January 2008 and had witnessed “that customer (sic) have been consuming food, non-alcoholic drinks and shisha”. The declarations are in a virtually identical format. They do not indicate when, or how often, the signatories visited the premises and whether the observations related to the ground or first floor. They therefore lack the necessary precision to lend significant support to the appellants’ case.
6. The Council has pointed to the lack of any advertising of shisha use and the lack of any evidence such as receipts and invoices for shisha paraphernalia from the relevant period. It seems unlikely that a business would not have access to such records. The onus is on the appellants to demonstrate, on the balance of probability, that the use has been operating continuously for more than 10 years and this they have clearly failed to do. The appeal on ground (d) fails.

The appeal on ground (a) and the deemed application

7. The main issues are the impact of the development i. on the vitality of Rusholme District Centre; ii. on the living conditions of neighbouring residents; iii. on the supply of dwellings in the area; and iv. on the health and wellbeing of staff and visitors.

Impact on Rusholme District Centre

8. Core Strategy Policies seek to achieve high quality neighbourhoods and also to support the character, vitality and viability of district centres. Policy C10 is supportive of leisure and the evening economy which does not diminish the role of the shopping area.

9. The appeal property is situated within Manchester's famous 'curry mile' which contains a high proportion of restaurants amongst other uses, including a substantial number of retail uses. The overall impression is of a vibrant economy. In the vicinity of the appeal site are several shisha smoking uses. A number of these are said by the Council to be unauthorised but planning permission was granted on appeal in April 2019 for a mixed use of restaurant and shisha café opposite the appeal site at 72 Wilmslow Road (Ref: APP/B4215/W/18/3217729).
10. The development plan seeks a balanced mix of uses in the area. The authorised use of the ground floor of the appeal premises is as a restaurant and so there has been no loss of a retail use. The appeal decisions referred to by the Council appear to indicate that shisha smoking has normally been treated as a *sui generis* use, not falling into any use class. Nevertheless, there is food and drink on offer at the appeal premises, apparently incidental to the shisha smoking, and the use as a shisha café appears consistent with the distinctive café feel of the locality, complementing the mix of food, drink and shisha uses in the immediate area.
11. The Council has referred to the negative perception of shisha use and to its engendering a fear of crime, which would diminish the attractiveness of the locality. However, I have been provided with little evidence of such an adverse impact. Whether shisha establishment are unlicensed or otherwise in breach of the law is for the relevant enforcement agencies to pursue.
12. In conclusion, the proposal would not harm the overall character, vitality and viability of Rusholme District Centre and would not be in conflict with the relevant policies of the Development Plan which support a balanced evening and night time economy in the area.

Living conditions

13. Turning to the impact on the living conditions of nearby residents, there appear to be flats on the upper floors of the building to the north, no.117, albeit that they are currently vacant. This building is separated from the appeal premises by an alleyway. Some of the upper floors of the buildings on the opposite side of the road also appear to be in residential use. I can understand that, where shisha smoking is carried out in a partly open area, both the noise from customers and the distinctive odours from the shisha pipes are capable of causing disturbance to neighbouring residents. However, in this case, the use is entirely contained within the building and the impact is unlikely to be significantly greater than from the authorised restaurant use.
14. The bringing into use of the upper floor has greatly increased the capacity of the premises but the additional comings and goings of customers are in my view unlikely to be significant in the context of the acknowledged late night 'vibrancy' of the locality. Although some nearby premises have opening hours limited by planning conditions, it appears that many in the area do not. The external staircase appears to be for emergency egress only and, as such, any disturbance from its use would only be likely in exceptional circumstances.

Loss of Housing

15. Policy SP1 encourages the provision of diverse housing around district centres. The appellants have not disputed that the authorised use of the first floor is as

a flat. However, I have no information as to when it was last put to such use or as to the type/size of the flat. In such a busy location, with much late night activity, it would be unlikely to be suitable for family accommodation. I saw during my site visit that there was a bedsit with en-suite facilities at the rear of the first floor. In such a position, and with no independent access, it would only be suitable for use by a member of staff. Nonetheless, it provides useable living accommodation and, as such, there appears to be no serious conflict with Policy SP1.

Health

16. The National Planning Policy Guidance promotes healthy and safe communities. On the question of the health of customers and staff, there can be little doubt that smoking is not conducive to good health. Depending on the type of food sold, the appellants submit that the same consideration might apply to the authorised restaurant use. However, shisha smoking is not an unlawful activity. Whether it can be undertaken indoors, in an enclosed space, as at the appeal premises, is not for me to decide as it is not the role of the planning system to duplicate or impose more stringent controls on activities regulated under other legislation, such as the 2006 Health Act.
17. In conclusion, the development does not conflict with the aims of the development plan. Whilst I have some concern on the issue of health, that appears to me to be a matter more appropriately dealt with under the relevant legislation and control.
18. I have taken all other matters into account, including the claimed lack of waste storage. However, although the capacity of the premises has been greatly enlarged, the primary use for shisha smoking would not appear to generate significant additional waste, compared to the authorised restaurant use. I have seen no suggestion that planning conditions should be imposed. None of the matters raised is of sufficient weight to alter my conclusions on the main issues.

The appeal on grounds (f) & (g)

19. In the light of the above conclusion, there is no need to go on to consider these matters.

Formal Decision

20. It is directed that the enforcement notice be corrected by the deletion of the words "edged red" and the substitution of the words "edged and cross hatched black" in part 2 of the notice, and by the substitution of the plan annexed to this decision for the plan attached to the enforcement notice. Subject to these corrections, the appeal is allowed and the enforcement notice is quashed. Planning permission is granted on the application deemed to have been made under section 177(5) of the 1990 Act, as amended, for the development already carried out namely the use of land at 119 Wilmslow Road, Manchester, M14 5AN as a shisha smoking place and the erection of an external staircase and entrance to first floor level.

B.S. Rogers

Inspector



Plan

This is the plan referred to in my decision dated: 5 August 2019

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Land at: 119 Wilmslow Road, Manchester, M14 5AN

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Scale: nts

