
Appeal Decision

Site visit made on 8 October 2019

by Anthony J Wharton BArch RIBA RIASI

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

Decision date: 30 October 2019

Appeal Ref: APP/X5990/C/18/3214186

Moulin Rouge, 63 Park Road, London NW1 6XU

- 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 Mr Haithem Alwaeli against an enforcement notice EN issued by the City of Westminster Council.
- The enforcement notice was issued on 13 September 2018.
- The breach of planning control as alleged in the notice is as follows: change of use of the ground floor, basement and front forecourt of the property from a Class A1 retail use to a mixed use comprising elements of retail, café/restaurant and shisha smoking (sui generis use).
- The requirements of the notice are as follows:
 - (i) Cease the use of the basement, ground floor and front forecourt of the property for mixed use purposes comprising elements of retail, café/restaurant and shisha smoking (sui generis use).
 - (ii) Remove from the property all shisha, shisha smoking pipes and all other paraphernalia associated with the shisha smoking element of the business and
 - (iii) Remove from the property (both internally and from the front forecourt) all but 8 tables and 16 chairs. The industrial tabletops shall have an area no greater than 0.5 square metres.
- The period for compliance with the requirements is 1 month.
- The appeal is proceeding on ground (d) only as set out in section 174(2) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have not been paid within the specified period, the application for planning permission deemed to have been made under section 177(5) of the Act as amended has lapsed.

Costs Applications: An application for an award of Costs has been made by the Council of the City of Westminster against Mr Haithem Alwaeli. On behalf of the appellant, Mr Haithem Alwaeli, a costs application has also been made against Westminster City Council. These are the subject of separate decisions.

Decision

1. The appeal is dismissed. See formal decision below.

Matters of clarification and background information

Matters of clarification

2. As indicated above, the notice alleges a change of use of the ground floor, basement and front forecourt of the property from a Class A1 retail use (sandwich shop with some hot food sales) to a mixed use comprising elements of retail, café/restaurant and shisha smoking use. This is a 'Sui Generis' use. In other words this is a mixed use which does not fall into any specific use class of the Use Classes Order 1987. The notice does not simply allege a change of use to a Class A3 use. Nor does it require the retail use with ancillary food sales (on the premises) to cease.

3. From the appellant's submissions it would appear that this is not fully understood, since the arguments essentially only relate back to the contention that the former sandwich A1 retail use has been a cafe/restaurant Class A3 use for over 10 years. There is no evidence to indicate that the full mix of uses has been taking place for over ten years and in particular the Shisha Smoking use. Irrespective of the Shisha Smoking use, the Council's submissions are that the Class C3 restaurant use has gradually built up over the years. It is considered that the turning point, when the lawful retail Class A1 use changed to the alleged mixed use, occurred as a matter of fact and degree in 2017. Later in May 2018, it became apparent to the Council that the unit was being used for Shisha Smoking purposes as well as for the café and café A3 restaurant uses. A complaint about the Shisha Smoking had been made in November 2017.

4. I am only empowered to deal with the enforcement notice as issued on ground (d) and in relation to the allegation as set out above. This means that, under this ground of appeal, I must consider whether or not the full mixed (Sui Generis) use had been carried out for a full ten-year period prior to the date the notice was issued. This includes the Shisha Smoking use. It is on this basis that I must consider the appeal. However, in doing so I have taken into the account the appellant's contention that the Class A3 use has been carried out for over 10 years. The planning merits of the case do not fall to be considered and I cannot consider whether or not planning permission should be granted for the Sui Generis use (including the Shisha Smoking use) currently being carried out at the premises.

5. I have taken into account the report on the use and ownership of the land outside of the entrance to 61 Park Road and the references to the City of Westminster Act 1999. From the submissions it is evident that the LPA does not own the forecourt land and I have noted the appellant's argument that the '*delegated powers*' of the Council should not, therefore, be relevant in this instance. However, irrespective of the land ownership situation, any alleged change of use (COU) of land is a planning matter and the LPA is entitled to take enforcement action against any use of land within the City of Westminster, where it is considered that a breach of planning control has occurred.

6. In this case the premises has been used in the past as a Class A1 retail use with an ancillary use for the sale of some hot food on the premises. On the basis of how the unit has been operating since 2017, and the intensification of café/restaurant use combined with the Shisha Smoking, the Council considers that there has been a breach of planning control and considered it expedient to issue the notice.

The property and the planning history

7. The property is a ground floor unit with a basement level and forms part of a large residential block which has other uses at ground floor/street level. These uses include professional services other retail uses and a Class C3 restaurant use. The Council indicates that there have been various other enforcement investigations dating back to 1999. At that time it would appear that the appeal premises had been in retail use predominantly as a sandwich bar.

8. In November 2003 it was confirmed by the then operator that the premises was still in use as a Class A1 sandwich bar with an ancillary hot food use. In May 2012 the Council investigated an alleged change of use (COU) from Class A1 retail to Class A3 café/restaurant. However, the case was closed when it was confirmed by the then operator that all hot food at that time was prepared off the premises. The Council reported that no Shisha smoking was then taking place at the premises and considered that the sale of hot food on the premises was ancillary to the retail sandwich shop use.

9. However, because the food sales had appeared to intensify, in January 2017 a Planning Contravention Notice (PCN) was issued. In answer to section 5 it was indicated that the ground floor was being used for the sale of food and drink and that the basement was used for storage. Sections 6, 7 and 8 indicated that hot food was sold comprising soup, toast and pasta; that none of the food was cooked on the premises and that there was only one microwave oven and a toaster for heating the food. It was stated that only around 10% of customers consumed drinks and food on the premises. Thus again it was contended that food and drink sales on the premises was an ancillary use to the lawful retail use.

10. A license application for the sale of alcohol was issued in 2007. The Council's records indicate that this was for the sale of alcohol off the premises and was not a license for a café or restaurant, even though the premises was operating as the 'Moulin Rouge café' at that time. The license was suspended in April 2014 due to non-payment of fees and License Enforcement Officers were informed that alcohol was not being sold at the premises.

11. At the time of my visit, the only customers were taking hot drinks at one of the outside forecourt tables. On the forecourt there were 3 tables and 6 chairs. Inside the unit the sandwich/food display cabinet was sited at the front on the right hand side. The tabling/seating in the rest of the ground floor was made up of 6 tables, 10 chairs and a sofa. There were other items being stored there and I also noted two Shisha Pipes close to the entrance door.

12. In the basement there was a large kitchen workbench/preparation table; a sink unit; a large commercial micro-wave oven; a multi-ring electric cooking hob; a refrigerator and a chest-freezer containing, amongst other things, some uncooked vegetables. There was a total of around 50 Shisha Pipes stored in the basement, as well as various plastic containers of different flavoured Shisha tobacco.

The appeal on ground (d)

The gist of the case for the appellant

13. On behalf of the appellant it is stated that the Council is attempting to stop all uses of the premises and not just the Shisha Smoking. It is argued that a Class A3 restaurant use has been occurring for a 10 year period, dating back to on, or before, 13 September 2008. In support of this contention a signed declaration is provided by a nearby resident who states that hot food had been served at the premises since 1984. The fact that an alcohol license had been issued in 2007 is also relied upon.

14. Google street view photography from 2008, 20012 and 2015 is submitted and shows that the unit 'Moulin Rouge' unit served sandwiches and 'cappuccinos' in 2008. On behalf of the appellant the report relating to the City of Westminster Act; the ownership of the forecourt and Land Registration Rules 2003 was submitted. Part 3 of the Act is set out in detail and reference is made to exemptions which are not considered to be street trading for the purposes of the Act. Because the forecourt land is private land it is argued that the Act does not apply to the forecourt and, therefore, that the Council's delegated powers cannot apply. I have already dealt with that point above.

The gist of the case for the Council

15. The Council relies on, amongst other things, the cases of '*Wakelin v SSE*' and '*Cheshire CC v SSE 91971*'). In doing so it is argued that there has been a material change of use (COU) of the premises (from Class A1 to Class A3) within the last 10 years; that this COU has occurred gradually; that the '*turning point*' of this change occurred in 2017 and that the use then was demonstrably a materially different use

from the predominantly retail use taking place in 2012. The Council analyses the character of usage in 2003, 2012 and at the current time and these are set out in detail in the Officer's report.

16. It is stressed that prior to 1999 the premises was primarily a retail shop and that a small number of tables and chairs were placed on the forecourt. A PCN was issued which indicated that, as well as the retail use, there was an ancillary use of the serving of food for consumption on the premises. The percentages given were 17% as a total of hot food sales with 2% consumed on the premises and 15% off the premises. Between 2011 and 2012 Council inspections revealed an increase in the number of chairs and tables but these were reduced in number and it was accepted that the primary use was still Class A1 retail. At that time the Council found no evidence of Shisha smoking.

17. The Council indicates that in November 2017 there had been a complaint that the premises was in use as a Class A3 and Shisha smoking café/restaurant. It is also indicated that the food menu had increased considerably; that there were tables and chairs inside as well as outside and that there were now advertisements for breakfasts. A further PCN was issued in February 2018 and the owner stated that they believed that the premises was operating as a Class A1 retail unit with ancillary hot food sales. The figure given was 5% for consumption of food on the premises.

18. The Shisha smoking part of the mixed use was first noted by the Council in May 2018. At that time the number of tables and chairs had increased; customer wi-fi had been introduced; a television was provided and the menu for food to be consumed on the premises had been significantly expanded. On the basis of the '*Cheshire*' and '*Wakelin*' cases, the Council contends that the materiality of the changes in the use of the premises are significantly different now to 2012 and that the COU raises environmental and amenity considerations.

19. Based on the character and nature of the significantly increased café/restaurant use associated with Shisha smoking the Council contends that there has been a harmful effect on residential amenity. The Shisha smoking has spread into the neighbouring property forecourt and is the subject of a separate enforcement notice. The evidence now indicates that the current use has resulted in harm to amenity (living conditions) that did not occur during the previous retail use.

Assessment

20. In a ground (d) appeal the onus is on an appellant to conclusively show that the Council was precluded from taking enforcement action for the breach of control alleged to have taken place and as set out in the enforcement notice. That is, the change of use of the ground floor, basement and front forecourt of the property from a Class A1 retail use (with ancillary hot food sales on the premises) to a mixed use comprising elements of retail, café/restaurant and shisha smoking (Sui Generis use).

21. Clearly, part of the current use has not occurred for a ten-year period. The Shisha Smoking use had only been noted by the Council in May 2018, although there had been a complaint about the use in November 2017. The appellant's arguments are limited to the submitted statement and the matters related to licensing and land ownership. Irrespective of the Shisha Smoking element these arguments fall well short of showing that the ground floor, basement and front forecourt of the premises have been used for a Class A3 café/restaurant use as specified in the notice since 13 September 2008. I acknowledge that there is evidence of some hot food sales for consumption on the premises dating back to the year 2000. However, this was minimal in that hot food consumed on the premises amounted to only 2% and was clearly ancillary to the lawful retail use of the premises.

22. In 2011 and 2012 the Council's investigations clearly show that the predominant use at that time was still retail and that any 'dine-in' trade was still ancillary to the lawful retail use. Their inspections in November 2017 and 2018, however, showed a gradual intensification of the café/restaurant uses and then the Shisha smoking appears to have commenced sometime during 2017. There is no evidence of Shisha smoking dating back to 2011/2012 let alone to 2008. The full mixed use as alleged in the notice could not possibly, therefore, have been occurring since September 2008 and according to the information supplied in the PCNs, neither could a café or restaurant Class A3 use .

23. I accept that the submitted statement indicates that hot food has been sold for consumption on the premises since 1984. However, based on the history of the premises and all of the appeal submissions, this can only have been on the basis that the food sales were ancillary to the lawful Class A1 retail use. The PCNs, completed by the then operator, confirmed this to be the case and contradict the contention that the mixed use has occurred for the relevant 10 year period. The predominant use up to 2017 must, therefore, have been retail with ancillary sales of food and drink as a retail unit selling, amongst other things sandwiches.

24. The evidence also shows that the hot food sales gradually increased in intensity between 2011/2012 and 2017. Having considered this evidence in detail it is my view that, as a matter of fact and degree, the retail use with ancillary hot food provision has materially changed to the mixed use alleged in the notice. I agree with the Council's case that this materiality of change occurred in or around 2017.

25. It follows that what is alleged in the notice cannot possibly have been occurring for the relevant 10 year period. Irrespective of the Shisha Smoking use, on the basis of all of the evidence, including the PCN information, even the café/restaurant use could not have been operating for this period of time at the same intensity as it was operating when the notice was issued. It follows that the Council was not precluded from taking enforcement action and the appeal must fail on ground (d).

Other Matters

26. In reaching my conclusions I have taken into account all of the other submissions made by the appellant, the Council and interested persons (occupants of the flats above). These include the full planning history; the initial appeal documents; the detailed statements and reports; the Planning Contravention Notice submissions; the photographic evidence; the final comments; examples of Cafes in Egypt; the petition by supporters of the appellant dated October 2018 and all of the other submissions by interested persons. However, none of these carries sufficient weight to alter my conclusions on the ground (d) appeal and nor is any other factor of such significance so as to change my decision.

27. For the avoidance of doubt the enforcement notice only requires that the unauthorised Sui Generis mixed use (that is, the Class A3 café/restaurant and Shisha Smoking uses) should cease. It does not preclude the appellant from reverting back to the lawful A1 retail use with ancillary hot food sales (for consumption on the premises) and it allows a total 8 tables and 16 chairs to remain on the premises, including the area at the front forecourt.

Formal decision

28. The appeal is dismissed and the enforcement notice is upheld.

Anthony J Wharton

Inspector