



Appeal Decision

Site visit made on 4 February 2020

by R Satheesan BSc PGCert MSc MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 02 March 2020

Appeal Ref: APP/T5150/C/19/3235015

164 High Road, London NW10 2PB

- 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 Yusif Aljarrah against an enforcement notice issued by the Council of the London Borough of Brent.
 - The enforcement notice was issued on 05 July 2019.
 - The breach of planning control as alleged in the notice is without planning permission the unauthorised change of use of the premises to a shisha cafe/lounge and the erection of a structure and canopy to the rear of the premises.
 - The requirements of the notice are:
 - STEP 1 Cease the use of the premises as a shisha café/lounge.
 - STEP 2 Demolish the structure and canopy to the rear of the premises, and remove all associated debris and materials associated with the structure and canopy and the use as a shisha café/lounge.
 - STEP 3 Remove all items associated with the shisha café/lounge, including the removal of all shisha pipes, tobacco, chairs, tables, charcoal burners and any other items associated with the shisha use, including refuse and other paraphernalia.
 - The period for compliance with the requirements is 1 week.
 - The appeal is proceeding on the grounds set out in section 174(2) (a) and (g) of the Town and Country Planning Act 1990 as amended. Since an appeal has been brought on ground (a), an application for planning permission is deemed to have been made under section 177(5) of the Act.
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Decision

1. It is directed that the enforcement notice be:
 - varied by deleting the words "1 week after this notice takes effect." within section 5 (Time for Compliance) and its replacement with "1 week after this notice takes effect for Step 1 listed above, and 3 months after this notice takes effect for Steps 2 and 3 listed above".
2. Subject to this variation, the appeal is dismissed, and the enforcement notice is upheld, and planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Preliminary Matters

3. The site visit procedure was altered from an accompanied site visit to an access required site visit, as the appellant was not present when I arrived at the appeal site during the pre-arranged time and date. However, the appellant's agent confirmed that access could be provided by the builders working on site.

Both parties were subsequently written to explaining the change in procedure. As such the appeal will be determined on this basis, and on the photographic evidence submitted by both parties.

Ground (a) appeal and the Deemed Planning Application

Main Issue

4. The main issues are:

- the effect of the shisha café/lounge use on the living conditions of nearby residential occupiers, with particular regard to noise, disturbance, smoke and smells; and
- the effect of the smoking shelter and retractable canopy structure at the rear of the premises on the character and appearance of the host building and the area.

Reasons

Living conditions of the neighbouring occupiers – noise, disturbance, smoke and smells

5. The appeal site relates to the ground floor commercial unit located in a three storey mid terraced property. Prior to the Shisha lounge use, the evidence indicates that the site was used as a café/restaurant (Class A3 use). The surrounding area comprises a mix of commercial and residential uses at ground floor level with predominantly residential uses on the upper floors above commercial units.
6. The appellant states that the Shisha Café/lounge would operate from 11:00 to 00:00 Monday to Thursday and Sunday and from 11:00 to 00:30 on Friday and Saturday. The appellant further states that the Council has not provided any compelling evidence to substantiate their claim that the use results in harm to the living conditions of nearby residential occupiers with regards to noise, disturbance, smoke and smells. However, significant amount of detailed evidence has been submitted by the Council, which includes witness statements from the Council's Nuisance Control and Licensing Teams, and complaints received from neighbouring residential occupiers demonstrating that the use has resulted in a significant number of complaints in relation to harm caused to the living conditions of neighbouring occupiers.
7. The smoking shelter and retractable canopy structure at the rear of the appeal site, where the shisha use takes place is located in close proximity to neighbouring residential properties on the upper floors on High Road in addition of nearby residential uses at ground floor level. When the Shisha use is in operation, the canopy structure would need to be open in order to comply with legislation, introduced on the 1 July 2007, which makes it illegal to smoke in all public enclosed or substantially enclosed areas.
8. Noise and disturbance associated with the Shisha lounge/café use includes loud music playing and customers conversing whilst smoking Shisha, within the smoking shelter and retractable canopy structure, often for quite long periods. This is somewhat different from a normal café/restaurant type use, where customers may smoke outside, but usually for short periods. The hours proposed means that the usage occurs late in the evenings and at night, with

the high likelihood of noise and general disturbance being generated from the appeal site at times when peace and quiet would be expected. Furthermore, it is clear that shisha smoking generates a quite distinctive aroma. Noise, smell and smoke generated from the use of the premises would be particularly noticeable during summer months when neighbouring residents are likely to have windows open for ventilation. I also note that a large number of complaints have been made about noise and general disturbance from the current Shisha use.

9. I therefore consider that the use of the premises as a Shisha Lounge/cafe, in such close proximity to neighbouring residential properties, would result in significant noise and disturbance, smoke and smells to neighbouring occupiers.
10. I note that the appellant would be willing to accept conditions, restricting hours of operation to those outlined above and preventing amplified music from being played within the smoking shelter and retractable canopy structure. However, given the close proximity of the use to neighbouring residential occupiers, I do not consider that these conditions would be sufficient to prevent noise, smell and smoke entering neighbouring properties.
11. The appellant also refers to the fallback position of the former use of the premises as a café/restaurant which they state is unrestricted in respect of opening hours. I also appreciate that there are other nearby commercial units, with similarly late opening hours. However, there is no evidence before me which suggests that the former café/restaurant Class A3 use, or other existing nearby commercial uses have generated complaints with regards to noise, disturbance, smell and smoke. In contrast, the current use has generated a significant number of complaints, and in this respect is more intrusive and harmful to the living conditions on neighbouring occupiers. Therefore, I do not consider the fallback position lends support for the Shisha lounge/café.
12. I therefore conclude that the Shisha café/lounge harms the living conditions of nearby residential occupiers with regards to noise, disturbance, smoke and smells. Accordingly, the change of use conflicts with Policy DMP 1 of the London Borough of Brent Local Plan Development Management Policies, 2016 (LP), which amongst other things states that development will be acceptable provided it is: a) of a location, use, concentration, siting, layout, scale, type, density, materials, detailing and design that provides high levels of internal and external amenity and complements the locality; g) not unacceptably increasing exposure to flood risk, noise, dust, contamination, smells, waste, light, other forms of pollution and general disturbance.

Character and appearance

13. The smoking shelter and retractable canopy structure occupies a significant proportion of the rear yard of this mid terraced building. Although not visually prominent, the unauthorised development has substantially eroded the extent of undeveloped space associated with this mid terraced terrace building, which has created a cramped and an uncomfortable relationship with the host building and the adjoining properties. I note that the smoking shelter and retractable canopy structure is not widely visible within the wider public realm, however, its presence is clearly apparent and in close proximity of the surrounding commercial and residential uses. Furthermore, the materials used in the construction of the development are of poor quality and fail to integrate satisfactorily with this existing traditional building and the locality.

14. Therefore, despite its position away from any public views, the effect of the development diminishes unacceptably the character and appearance of the host building and the surrounding area. The development is therefore contrary to Policy DMP 1 of the London Borough of Brent Local Plan Development Management Policies, 2016 (LP), which amongst other things, states that development will be acceptable provided it is of a location, use, concentration, siting, layout, scale, type, density, materials, detailing and design that provides high levels of internal and external amenity and complements the locality.

Other matters

15. I appreciate that the shisha café does not fall within 400 metres of a secondary school or further education establishment entrance/exit point, and therefore there is no conflict with Policy DMP3 of the LP. However, lack of conflict with regards to this does not outweigh my conclusions on the two main issues outlined above.
16. In support of the appeal, reference has also been made to another appeal decision¹ in Stratford for a Shisha lounge. However, in that particular case, the Inspector stated that "The use does not have such a close relationship with its residential neighbours as, say, a restaurant or bar within of parade of shops with residential above would have". However, the current appeal site has residential uses on the upper floors, above the Shisha lounge/café on High Road. I also note the current appeal site also contains residential uses at ground floor level nearby to the rear of the site and on High Road. As such, the site circumstances of the site at Stratford are materially different to the current appeal site. Therefore, reference to this other appeal decision does not lend support for the current appeal, which has been assessed on its own merits.

Conclusion on Ground (a) and the Deemed Planning Application

17. For the reasons given and with regard to all other matters raised, I conclude that the appeal on ground (a) should fail and the deemed planning application should be refused.

Appeal on ground (g)

18. This ground of appeal is that the time given to comply with the notice is too short. The Council has given a one week compliance period. The appellant has requested a period of 12 months, in order to make the necessary arrangements to lay off staff, inform suppliers and wind the business down.
19. I have identified under ground (a) that the development results in harm to both the living conditions of neighbouring occupiers, with regard to noise, disturbance, smoke and smells, and to the character and appearance of the host building and the surrounding area. As such, the 12 months requested by the appellant to comply with the notice is disproportionately excessive to complete the requirements.
20. However, the time for completing the requirements should be what is reasonably considered necessary to complete the requirements. The requirements of the notice seek:

Step 1) cessation of the use;

¹ Appeal reference: APP/G5750/C/16/3152946, at Land north of 15-21 Leytonstone Road, Stratford, London E15 1JA, dated 4 November 2016.

Step 2) demolition of the structure and canopy; and

Step 3) removal of all items associated with that use.

21. The cessation of the use within one week seems reasonable and proportionate, in light of the harm identified above under ground (a). However, for steps 2 and 3, I consider that 3 months would strike a more reasonable and proportionate balance in these circumstances in order to obtain quotations, appoint a contractor and carry out the works. I shall therefore extend the period for compliance for steps 2 and 3 only from one week to three months.
22. To this extent, the ground (g) appeal succeeds and I will vary the notice accordingly.

Conclusion

23. For the reasons given above, I conclude that the appeal should not succeed. I shall uphold the enforcement notice with variations and refuse to grant planning permission on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

R Satheesan

INSPECTOR