



Appeal Decision

Site visit made on 3 August 2020

by R Satheesan BSc PGCert MSc MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 20 August 2020

Appeal Ref: APP/A5270/C/20/3244934

Unit 2, Logic House, Belvue Road, Northolt, Middlesex UB5 5QJ

- 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 Alex Reed on behalf of Wish Lounge Limited against an enforcement notice issued by the Council of the London Borough of Ealing.
 - The enforcement notice was issued on 11 December 2019.
 - The breach of planning control as alleged in the notice is "Without planning permission: The erection of a raised platform to the front and side of the premises, the erection of a retractable canopy extension to the front and side of the premises and the material change of use of the premises to a shisha lounge".
 - The requirements of the notice are:
 - A. Cease the use of the premises as a shisha lounge;
 - B. Remove the front and side retractable canopy extensions;
 - C. Remove the raised platforms from the front and side of the premises;
 - D. Remove from the land all items that related to the unauthorised shisha use, including the seating, tables, shisha pipes, heaters, planters, televisions, kitchen equipment, coffee machine and the counter/service area; and
 - E. Remove all resultant debris from the site.
 - The period for compliance with the requirements is three months.
 - The appeal is proceeding on the grounds set out in section 174(2) (a), (b), (f) 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 "You are required to complete these actions within three months from the date this notice takes effect." within section 5 (What you are required to do) and its replacement with "You are required to complete these actions within three months from the date this notice takes effect for step A listed above, and five months from the date this notice takes effect for steps B, C, D and E 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.

Application for costs

3. An application for costs was made by the London Borough of Ealing against Mr Alex Reed on behalf of Wish Lounge Limited. This application is the subject of a separate Decision.

The appeal on ground (b)

4. To succeed on this ground, the onus is upon the appellant to demonstrate on the balance of probabilities that the allegation has not occurred as a matter of fact. The pertinent date is the date of the issue of the enforcement notice.
5. The appellant considers that the alleged description of the material change of use is incorrect and states that the business is operating as a café falling within Use Class C3. It is claimed that the business, located within a Strategic Industrial Location (SIL), serves customers who are working in the industrial estate, and is busy at lunchtimes for sandwiches and paninis and throughout the day for coffees, teas, snacks and smoothies/juices, as well as shisha. It is further stated that they do not serve a wider catchment and would not survive as a business that offered shisha exclusively or primarily. Whilst shisha smoking is served at the premises, the appellant states that it is not their primary product.
6. In an attempt to demonstrate this the appellant provides a sales breakdown for a sample week in October 2019. The appellant states that this illustrates that that shisha represents only 15% of sales by volume, similar, to the number of bottles of still and sparkling water sold, and that the largest volume of sales was for food and coffee/tea. Furthermore, the sales data also shows that the premises sold sandwiches, salads and desserts. However, no reason has been provided to explain why the sales data from that particular week has been submitted, rather than any other week, and why they consider that that week's data provides an accurate reflection of the nature of the business in terms of sales.
7. In addition, the sales data provides only an indication of the volume of the orders made and not the total revenue received from each individual item. In my mind, the total revenue received from Shisha would provide a more accurate picture of the nature of the business. For instance, with regards to the items mentioned in the sales figures, the menu provided by the appellant shows that the cost of a bottle of water or soft drink is £3, a tea is £3.50, and a coffee is £4.00. In terms of food the price of a salad is £6, and a panini or bagel is £6.50. In contrast the price of an Al Fakher Shisha is £18, and the premium shisha is £23 with extras ranging from £5 to £12. It is therefore clear from these prices that the total revenue received from Shisha smoking is likely to be significantly greater than that indicated in the appellant's breakdown of sales which only accounts for volume.
8. Shisha smoking is very much a social activity in itself, usually longer lasting than other forms of smoking such as cigarettes or cigars and is often ordered with a small snack or drink. In this respect Shisha smoking would become the main purpose for going out, whereas smoking of cigarettes or cigars may often be associated with eating and/or drinking but 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. I therefore find the shisha smoking activity

- to be an important part of the overall operation of the premises and not an activity which is ancillary to the café.
9. Given it is likely that shisha smoking is often served with food/drinks, in my opinion, the proportion of the total revenue attributable to shisha sales should take into account shisha, food and drink sold together to a customer, rather than list these items separately independent of one another. As such the evidence submitted by the appellant is unclear with regards to total sales/revenue which can be attributed to the Shisha smoking. For all of the aforementioned reasons only limited weight can be given to the sales information provided by the appellant.
 10. Furthermore, the appellant accepts that the first three pages of the menu (the hot food sections) submitted are not used because the business is new, and the kitchen was not operational when the notice was served. He also states that the business was not opening in the morning because cooking facilities were not ready. Even if it was the appellant's intention to open a café, as he has suggested, this does not detract from the evidence before me, at the pertinent date, which is when the notice was served. Therefore, only limited evidence has been put forward in support of the appellant's claim that the business is operating as a café.
 11. However, the Council state that during an Officer site inspection on 8 October 2019 at 20:30, it was clear that the main business was a Shisha lounge with ancillary desserts and hot/cold drinks. The Council state that there were 19 patrons in small groups smoking shisha and that no hot food was being served. Photographs from the Council's inspection also show part of the shisha storeroom, containing shisha equipment, the full menu, the serving counter and the outside seating located under the retractable canopy area to the side of the unit. The photograph of the menu taken at the time, illustrates that there were no salads or sandwiches on sale, and that management has also advised the Officer that there was no intention of operating the business as an eatery.
 12. The lack of hot food sales was also reflected in Wish Lounge's Facebook page which advertises the business as a 'Hookah Lounge', serving shisha, desserts and drinks. I also note this website stated that the hours of use are 14:00 to 01:00, which was similar to the operating hours stated on Wish Lounge's website at the time of service of notice, which were 14:00 to 01:00 Sunday to Thursday and 14:00 to 02:00 Friday to Saturday. These are unusually late opening hours for what the appellant describes as a café intended to serve the workers of the SIL and are more akin to a Shisha Lounge or bar. Indeed, such hours of use, would miss the breakfast crowd in its entirety and the majority of lunch time sales.
 13. The Council also state that they have received complaints¹ that the business is operating until 03:00 to 04:00 hours and that in addition to the late operating hours, these complaints also refer to the sale of shisha, loud amplified music and antisocial behaviour.
 14. In addition, another website, Jobs Today² advertises the premises as a 'Dessert/Shisha Lounge' with a "young and friendly environment".

¹ Council ref: 20SR00043 and 20SR00053

² An employment website

Furthermore, the Council have submitted a significant number of online reviews from customers on google and Wish Lounge's Instagram page, a large number of which refers to the premises as a Shisha venue and also referring to the lack of food available to order. A number of these reviews appears to have been made before the enforcement notice was served. This is further corroborated by an opening night online review that confirms that Shisha was being sold when the business first opened.

15. Screenshots of adverts advertising a number of special events have also been submitted by the Council which includes events for Halloween, New Years, Valentine's day, sporting events such as boxing fights and Arabian Nights, every Sunday nights. Again, such events taking place in the evenings is highly unusual for a café which seeks to serve workers of the SIL and would be more typical of an evening/night time use such as a Shisha Lounge.
16. In addition, the low chairs and tables laid out within the raised decking and retractable canopy area to the front and side of the premises are particularly suited to shisha smoking, as compared with the tables and seating inside, which are more attuned to conventional dining. I also note that the floorspace attributed to the low chairs and tables in this outside area under the retractable canopy represents a significant part of the floor space of the overall customer seating area.
17. Turning to the operational development, no evidence has been submitted to demonstrate that the appellant has not erected the raised platform to the front and side of the premises and the retractable canopy extension to the front and side of the premises has been submitted. On the contrary, the Council's evidence, includes photographs of the site prior to the development, which shows that these structures were not in existence, prior to the opening of the business.
18. As such, compelling evidence has been provided by the Council, which demonstrates as a matter of fact and degree and on the balance of probability that the development as alleged has taken place when the notice was served. Information submitted which relates to after the Notice was served is irrelevant to this ground b) appeal. If there has been a subsequent further material change of use of the premises since the notice was served this is not a matter for me to consider and is beyond the remit of this appeal.
19. Accordingly, the appeal on ground (b) must fail.

Ground (a) appeal and the Deemed Planning Application (DPA)

Main Issues

20. The main issues are the effect of the change of use and development upon:

- The function and operation of the designated Strategic Industrial Location (SIL);
- the character and appearance of the industrial building and the area;
- The adequacy of parking provision to serve the shisha lounge use, and the effect of any lack of provision on the amenity of the area and highway safety.

Preliminary

21. The Council have referred to the draft New London Plan (DLP). However, as these policies have yet to be adopted, and there is no evidence before me which allows me to make any judgement regarding the extent of unresolved objections, I cannot give them full weight at this time save to acknowledge that they appear not to significantly alter the policies referred to in the extant London Plan.

The function and operation of the SIL

22. The appeal site is located within the SIL. Policy 1.1(c) of the London Borough of Ealing's Development Strategy Development Plan Document, 2012 (Development Strategy) seeks to promote business and enterprise by securing the stock of employment land, encouraging regeneration and renewal and being responsive to market demands. The policy further states that, for industrial and warehousing businesses, we will seek to protect its position as one of London's premier locations. Policy 3.2 of the Development Strategy seeks to retain and attract new business development along the A40 Corridor by maintaining a sufficient supply of industrial land, and encouraging sustainable, commercial development and improvements to access and amenity.
23. These policies and aims are supported by Policy 2.17 of the London Plan 2016 (LP), which states that Borough's should promote, manage and where appropriate protect SILs as London's main reservoir of industrial capacity. The Policy further states that "Development proposals within or adjacent to SILs should not compromise the integrity or effectiveness of these locations in accommodating industrial type activities".
24. The appellant refers to Policy 2.17 of the LP which also allows small scale 'walk to' services for industrial occupiers such as workplace crèches or cafes and considers that the appeal site is a café serving the SIL. However, as the appeal fails on ground b) the DPA is for a shisha lounge. As such, I cannot take into consideration the planning merits of a café use put forward by the appellant.
25. The current unauthorised use of the appeal site results in the loss of industrial capacity within the SIL and prevents the site from being used for industrial purposes. Furthermore, I am not convinced that the use of the premises as a shisha lounge serves workers of the SIL or that it is a complementary and useful addition to the functioning of the SIL. My view on this are supported by the operating hours stated on Wish Lounge's website at the time when the notice was served, which were 14:00 to 01:00 Sunday to Thursday and 14:00 to 02:00 Friday to Saturday. Such late night, evening and weekend use is likely to attract patrons from further away than the SIL itself. The Shisha lounge is thereby likely to be a destination rather than a complimentary use for the SIL.
26. The appellant refers to the previous use of the site as a boxing gym and considers that the current unauthorised change of use does not result in any loss of industrial floorspace. However, I have been provided with no substantive evidence to demonstrate that this previous use was the lawful use of the site. Indeed, a companies house record illustrates that Tayfun Boxing Limited had its registered office at the site, but it was only incorporated in June 2013. Based on this, the former use of the site for non-industrial uses was not

immune from enforcement action. Therefore, the former use of the site as a boxing gym does not lend support for the current unauthorised change of use.

27. The use of the premises as a Shisha Lounge is not directly connected to the needs of industry and business. Nor does it support the continued functioning of the SIL as an industrial and commercial area.
28. I therefore conclude that the change of use and development results in unacceptable harm to the function and operation of the designated SIL, in conflict with Policy 2.17 of the LP, and Policies 1.1(c) and 3.2 of the Development Strategy, which seek the aforementioned aims. The Enforcement Notice also refers to policy 3.3 of the Development Strategy. However, since this policy relates specifically to the Park Royal industrial estate, it is not relevant to this appeal.

Character and appearance

29. The appeal site relates to a ground floor single storey unit, which forms part of a larger industrial building with industrial/commercial uses at ground floor level. The unauthorised development comprises the erection of a raised platform together with the erection of a retractable canopy extension to the front and side of the premises, in connection with the material change of use of the premises to a shisha lounge.
30. The appeal site is located within an industrial estate comprising a mix of building types and sizes. Nonetheless, the neighbouring units within the same building, with the street block, have relatively straightforward designs that, despite some differences, are in general harmony with each other in terms of their size, and industrial character and appearance.
31. The evidence submitted indicates that prior to the recent additions of the raised decking and retractable canopy (the subject of this appeal), the appeal site, had not been extended to the front and side of the property. In contrast, the current unauthorised development, as built extends the previously undeveloped space around unit, such that the development extends close to the road used by vehicular traffic. None of the other units within the subject industrial building have extended to the front of the building, similar to the unauthorised development. As such, I consider that the unauthorised development represents a visually discordant and incongruous feature within the street scene.
32. Despite its single storey height, the overall scale of the development is such that it forms a prominent feature which is at odds with the character and appearance of the adjacent industrial building and the SIL, of which it forms part. As such, I consider that the development results in the appeal site having a harmful appearance on the neighbouring units and SIL generally.
33. Consequently, I conclude that the proposed development causes material harm to the character and appearance of the industrial building and the area, and therefore is contrary to Policies 2.17, 7.4 and 7.6 of the LP, Policy 7.4 of the London Borough of Ealing Development Management Development Plan Document, 2013 (DMDP) and Policies 1.1(c) and 3.2 of the Development Strategy. Amongst other things, these require that new development complement the existing street sequence, patterns of development and scale; that buildings and streets should provide a high quality design response

that has regard to the pattern and grain of the existing spaces and streets in orientation, scale, proportion and mass; and that development within or adjacent to SILs should not compromise the integrity or effectiveness of these locations in accommodating industrial type activities.

Parking provision

34. Policy 6.3 of the LP states that Development proposals should ensure that impacts on transport capacity and the transport network, at both a corridor and local level, are fully assessed. Development should not adversely affect safety on the transport network. Amongst other things, Policy 3.2 seeks to Safeguard Employment Land Along the A40 Corridor and improve access. Whilst not specifically referred to in the notice the Council's appeal statement also refers to Policy 6.13 of the LP which requires an appropriate balance should be struck between promoting new development and preventing excessive car parking.
35. The Council states that the raised platforms to the front of the premises has resulted in the loss of 4 parking spaces used in connection with this unit. It is also claimed that the area to the side of the premises had the capacity to park 4 vehicles or provide a large storage area for an industrial use. Whilst it is unclear how 4 vehicles could park to the side of the premises and enter and exit the site independently, I observed during my site visit, that most other units within the SIL comprised parking spaces directly in front of those units. In this respect, the current raised decking and retractable canopies has removed this facility from the current appeal site.
36. To consider whether the unauthorised change of use and development is acceptable with no off-street parking spaces it is necessary to review the current on-street parking stress in the area. Incidences of parking stress may lead to increased competition for scarce spaces resulting in unnecessary travel with drivers searching for available spaces, with attention diverted to somewhere to park rather than on road conditions. Parking stress may also lead to obstructive parking to the detriment of the free flow of traffic. Nearby neighbouring residents may, for example, have to park further away from their house and there may be the potential for increased noise and disturbance arising from cars driving around searching for spaces and manoeuvring into spaces. Consequently, it is necessary to assess whether any increased demand for on-street parking arising from the current appeal could be safely accommodated without detriment to the living conditions of nearby residential occupiers situated close to the SIL or highway safety.
37. The Council have raised an objection that parking pressure in the industrial area is already high and consider therefore that the unauthorised development with no allocated off-street parking would exacerbate this problem. I also noted during my site visit, which included a walk around the area, between 11:45 - 12:45 on a weekday, that there was a very high occupancy of parked vehicles within the SIL, with relatively few spaces available. Furthermore, the Shisha Lounge is of a reasonable size with seating provided both inside and outside, within the raised decked area. In this respect the unauthorised changed of use and development would be likely to generate additional on-street parking demand in the vicinity of the site, in an area which already suffers from on-street car parking stress, to the further detriment of the living conditions of nearby residential occupiers adjacent to the SIL, and highway safety. My views on this are supported by the fact that the site has a public transport

accessibility level (PTAL) of 3, indicating only 'moderate' accessibility by public transport.

38. Whilst the appellant states that the 4 parking spaces to the front of the building were formerly used as loading bays, no evidence has been submitted to demonstrate this, or that these former bays could not be converted and used for general parking in connection with the appeal unit. The appellant also contends that they still have 4 parking spaces along the frontage, next to the raised decking. However, no further details of off-street parking associated with the Shisha Lounge have been provided (for e.g. plans), and I was unable to see any clearly marked out parking spaces or signs for staff and visitors during my site visit.
39. The appellant refers to the previous use of the site as a boxing gym and considers that the current use would not result any increase in parking pressure in the vicinity of the site than this former use. However, limited details of the former boxing gym use have been provided. As such I do not know what the exact circumstances of that business were or the effect it would have had on local parking conditions and the highway network. Furthermore, no evidence has been submitted to demonstrate that this previous use was the lawful use of the site.
40. The appellant also states that if the premises were to be used for an industrial use, the demand for parking and associated vehicle movements would be greater and therefore it is unlikely that the current use generates greater demand for parking than such a use. However, the Council's evidence indicates when the notice was served, that the Shisha Lounge operated from 14:00 to 01:00 Sunday to Thursday and 14:00 to 02:00 Friday to Saturday, which extends beyond the hours of use of most other industrial businesses within the SIL. Therefore, the use of the premises as a Shisha Lounge operates in the evening, late at night, and on weekends including Sundays, at a time when most other businesses would be expected to be closed, and when most residents, in the nearby residential area, would be expected to be at home. As such the resulting impact of the current use as a Shisha Lounge is likely to have differing impacts on parking pressure, the amenity of the area and highway safety than an industrial type use.
41. The appellant also considers that the hours of use of the premises could be controlled by condition. However, I not been provided with any suggested hours of use and no substantive evidence has been submitted to demonstrate that the Shisha Lounge use, would not have a harmful effect on on-street parking and on the local highway network.
42. In addition, the appellant suggests that the front decked area could be removed to provide additional parking spaces. However, insufficient evidence has been submitted to demonstrate that this area would provide sufficient parking to cater for patrons of the Shisha Lounge, particularly given the overall size of the Shisha lounge, its location in an area with only moderate public transport accessibility³ and its late evening and night hours of use, where many customers would be more expected to arrive by private car.
43. Taking into account the relevant policies, the location of the development in an area with moderate access to public transport accessibility, the nature of

³ PTAL 3 Score.

Shisha Lounge use, including its hours of use, combined with the loss of parking spaces to the front of the premises, it has not been demonstrated that the unauthorised change of use and development has not resulted in an increased need for parking in area that already has limited availability.

44. I therefore conclude that the unauthorised change of use of the site and development, with no additional off-street parking spaces, leads to additional on-street parking in the local area, to the detriment of the living conditions of neighbouring occupiers and highway safety, contrary to Policy 6.3 of the LP and Policy 3.2 of the Council's Development Strategy, which seek the aforementioned aims.

Other Matters

45. The appellant states that the business is popular among workers for lunch and meetings and provides catering services to local businesses. It is also stated that he is installing a kitchen in the premises to provide hot food. However, I do not consider that these benefits outweigh the harms identified above under the three main issues. Nor do I consider that the concerns identified above could be addressed by conditions which include reducing the capacity of the venue or limiting the Shisha Lounge to 'walk to' services to local businesses only. In particular, it is unclear how a Shisha lounge can be considered to be a 'walk to' services, bearing in mind the nature of the business and that it operates during the evenings, late night and weekends when many businesses within the SIL are likely to be closed.

Conclusion on Ground (a) and the Deemed Planning Application

46. 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.

The appeal on Ground (f)

47. The appeal on this ground is "that the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary to remedy any breach of planning control which may be constituted by those matters (i.e. the matters alleged in the notice) or, as the case may be, to remedy any injury to amenity which has been caused by any such breach".
48. The enforcement notice requires the use of the premises as a shisha lounge to cease, together with the removal of the retractable canopy extensions and the raised platforms. Therefore, the purpose of the notice is to remedy the breach of planning control rather than only remedy any injury to amenity.
49. The appellant considers that the alleged change of use does not harm the function SIL and that the operational development does not cause harm to the character and appearance of the area. However, the appellant states that if only one element is found to be acceptable, then it is requested that the requirements of the notice are varied so that the remedy relates only to that part of the development that is found to be unacceptable.
50. However, under the ground a) appeal, I have found that both the change of use and the operational development is unacceptable, and therefore it is not therefore excessive to require the use of the premises as a Shisha lounge to cease and the unauthorised development to be demolished.

51. There are no lesser steps drawn to my attention or any obvious alternative that would remedy the breach of planning control which is the purpose of the notice.

52. Therefore, the appeal on ground (f) fails.

The appeal on Ground (g)

53. This ground of appeal is that the time given to comply with the notice is too short. The Council has given a 3 months compliance period. The appellant has requested a period of 6 months, in order to make the necessary arrangements which include obtaining quotes from builders, who may be booked up in advance.

54. I have identified under ground (a) that the development results in unacceptable harm to the function and operation of the designated SIL, to the character and appearance of the host building and the surrounding area, and leads to additional on-street parking in the local area, to the detriment of the living conditions of neighbouring occupiers and highway safety. As such, the 6 months requested by the appellant to comply with the notice is disproportionately excessive to complete the requirements.

55. However, the time for completing the requirements should be what is reasonably considered necessary to complete the requirements. The requirements of the notice seek to:

- a. Cease the use of the premises as a shisha lounge;
- b. Remove the front and side retractable canopy extensions;
- c. Remove the raised platforms from the front and side of the premises;
- d. Remove from the land all items that related to the unauthorised shisha use, including the seating, tables, shisha pipes, heaters, planters, televisions, kitchen equipment, coffee machine and the counter/service area; and
- e. Remove all resultant debris from the site.

56. The cessation of the use within 3 months seems reasonable and proportionate, in light of the harm identified above under ground (a). However, for steps b, c, d and e, I consider that 5 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 b, c, d and e only from 3 months to 5 months.

57. To this extent, the ground (g) appeal succeeds and I will vary the notice accordingly.

Conclusion

58. 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