



Appeal Decision

Site visit made on 7 September 2020

by Zoë Franks Solicitor

an Inspector appointed by the Secretary of State

Decision date: 15th October 2020

Appeal Ref: APP/U5930/C/19/3242508
234 Chingford Road, London, E17 5AL

- 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 Saad Miah against an enforcement notice issued by the Council of the London Borough of Waltham Forest.
 - The enforcement notice, numbered 084879, was issued on 8 November 2019.
 - The breach of planning control as alleged in the notice is without planning permission, the material change of use of the land from café/restaurant (use class A3) to an unauthorised mixed composite use comprising a shisha lounge and café (Sui Generis).
 - The requirements of the notice are 1. Cease the use of the land as a shisha lounge including the sale and consumption of shisha on the Land; 2. Remove all material, equipment and paraphernalia brought onto the Land to facilitate the shisha lounge element of the mixed composite use including, but not limited to, the removal of all shisha pipes, shisha tobacco, charcoal; and 3. Remove all resulting fixtures and fittings, materials and general detritus from the Land following compliance with step 1 – 2 above.
 - The period for compliance with the requirements is one month.
 - The appeal is proceeding on the grounds set out in section 174(2)(b) of the Town and Country Planning Act 1990 as amended.
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Decision

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

Grounds (b) and (c)

2. The appeal has been brought on ground (b), that the matters alleged in the notice have not occurred, in this case that includes the use as a shisha lounge. The appellant accepts that the activity of shisha smoking occurs at the property but argue that it is ancillary to the existing lawful use as a café. The correct ground of appeal is therefore under ground (c), that the matters alleged in the notice do not constitute a breach of planning control and the appellant must show that there has not been a material change of use to a mixed use as shisha lounge and café.
3. The planning unit in this case is the whole of the ground floor property at 234 Chingford Road which is occupied and run as one business which provides food, non-alcoholic drinks and shisha smoking. The business which trades as C9 Inn has not been operating from the premises for more than 10 years and its existing permitted use is as a café/restaurant under use class A3 of the Town and Country Planning (Use Classes) Order 1987 (as amended). Shisha smoking cannot by law take place inside an enclosed or substantially enclosed

public space. The property has always had an outdoor area at the back but this was significantly renovated in 2015 when the appellant undertook drainage works and installed a covered decked area which is now used as an extension to the tabled area used by customers. The external seating area, on the raised patio and covered decked area, is substantially larger than the indoor seating area of the business.

4. The appellant has submitted a letter from his accountant which states that the profit from the shisha element of the business was between 12 and 16% during the period of February 2016 to March 2019. Based on these figures, this use is clearly not de minimis and it is therefore necessary to consider whether shisha smoking can be considered to be ancillary to the café use, or whether there has in fact been a material change of use. An ancillary use must be subsidiary to the primary use and it is useful to consider whether the two uses are functionally related.
5. Shisha smoking is not ordinarily incidental to an A3 café use and is different in nature to a usual café/restaurant use as it must take place in a non-enclosed space and it does not necessarily involve eating or drinking. It is also usual for it to take more than an hour, longer than many visits to a café establishment. These characteristics mean that a use as a shisha lounge to any significant extent is materially different from a normal A3 use as there is likely to be increased disturbance to neighbours due to its necessarily outdoor nature. Whilst it is possible that some extremely limited element of shisha smoking could be considered as an incidental or ancillary use to an existing A3 use this does not appear to be the case here. I have also considered the appeal decision submitted in relation to 1 Harlington Road, but whether there is a material change of use of land is a matter of fact and degree and I do not have the full details regarding that matter. It is clear that many customers do not come to the premises to smoke shisha. But on the appellant's own evidence in this case regarding the proportion of sales attributable to shisha smoking, along with the Council's evidence regarding the two site inspections, both of which took place after 10pm when many customers were seen smoking shisha, I am satisfied that on balance that the shisha use has gone beyond an ancillary use and is an integral part of the business. There has been a material change of use of the planning unit to a new sui generis mixed use of café/restaurant and shisha lounge without planning permission and the appeal on ground (c) must fail.
6. Notwithstanding the Council's statement that the rear structure was erected to facilitate the change of use, the notice does not require the removal of the rear structure. The breach will be remedied by the ceasing of the sale and consumption of shisha on the land and the removal of shisha pipes, shisha tobacco, and charcoal and all other material, equipment and paraphernalia associated with that use as required by the notice .

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INSPECTOR