



Appeal Decision

Site visits made on 17 and 18 July 2020

by M Cryan BA(Hons) DipTP MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 3 December 2020

Appeal Ref: APP/B4215/W/20/3248525 98 Wilmslow Road, Manchester M14 5AL

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission under section 73 of the Town and Country Planning Act 1990 for the development of land without complying with conditions subject to which a previous planning permission was granted.
- The appeal is made by Mr Shahid Ali of Polish and Glow Ltd against the decision of Manchester City Council.
- The application Ref 125252/JO/2019, dated 23 October 2019, was refused by notice dated 23 December 2019.
- The application sought planning permission for a change of use from former exhaust/tyre fitting centre (Class B2) to café (Class A3) with associated elevational alterations, waste storage, cycle storage and car parking without complying with conditions attached to planning permission Ref 118025/FO/2017, dated 11 June 2018.
- The conditions in dispute are Nos 2, 5 and 7 which state that:
 - 2) *The development hereby approved shall be carried out in accordance with the following drawings and documents:*
 - T698 P001 Location Plan
 - T698 P002 Existing Site Plan
 - T698 P008 Proposed Site Plan
 - T698 P016 Proposed Ground Floor
 - T698 P017 Proposed Elevations
 - Crime Impact Assessment 2016/0813/CIS/02
 - Planning Noise Impact Assessment by dBx Acoustics re 18022 dated 29/3/18
 - 5) *No part of the site shall be used other than in accordance with the approved drawings; there shall be no areas used for the smoking of shisha, either inside or outside the building, and none of the areas outside the building including the car park shall be used as external seating areas.*
 - 7) *The premises shall not be open outside the following hours:*
 - 10am to 10.30pm Monday to Thursday,
 - 10am to 11.30pm Friday and Saturday, and
 - 11am to 10pm on a Sunday.
- The reasons given for the conditions are:
 - 2) *To ensure that the development is carried out in accordance with the approved plans. Pursuant to policies SP1 and DM1 of the Core Strategy.*
 - 5) *For the avoidance of doubt and to safeguard the amenities of the occupiers of nearby properties, pursuant to policies SP1 and DM1 of the Core Strategy.*
 - 7) *In interests of residential amenity in order to reduce potential noise and general disturbance in accordance with saved policy DC26 of the Unitary Development Plan for the City of Manchester and policies SP1 and DM1 of the Core Strategy.*

Decision

1. The appeal is dismissed.

Procedural Matters

2. In line with the appellant's request to view the site and its surroundings on a Friday or Saturday night, I carried out a site visit at approximately 23.15 on a Friday evening, as well as a follow-up visit the next afternoon.
3. The application was made on the basis that the proposed development had not taken place – in other words, the conditions of the original permission were being complied with. On my evening visit I saw that chairs and tables were in use under large umbrellas on the appeal site's front forecourt, and as my site visit drew to a close shortly before midnight these were still occupied by several groups of customers. Notwithstanding these observations, there is no evidence which suggests that any of the disputed conditions may have been breached before the application which is the subject of this appeal was submitted. I have therefore determined the appeal having regard to the provisions of Section 73 of the Town and Country Planning Act 1990 as applied for rather than Section 73A, although in this case there is no practical difference for my consideration of the appeal.

Background and Main Issues

4. The appeal site is a large single storey building with an external forecourt at the corner of Wilmslow Road and Grandale Street. It is within the Rusholme district centre and the 'Curry Mile', a part of Manchester which is well-known for its restaurants and the associated vibrant night-time economy. The premises were previously an exhaust and tyre fitting centre, which under the original planning permission Ref 118025/FO/2017 have been converted to a café within Use Class A3.
5. The appellant seeks to vary three of the conditions attached to the original permission. This would amend the approved plans to allow for the creation of an outside seating area, remove the restriction on the smoking of shisha, and change the premises' permitted opening hours to allow it to operate from 10.00 to 23.30 from Monday to Thursday, from 10.00 to 00.30 the following morning on Fridays and Saturdays, and from 10.00 to 23.00 on Sundays.
6. On the basis of all the information before me, I consider that the main issue is whether or not the disputed conditions are necessary and reasonable in all other respects, having regard to the effect the creation of an outdoor seating area, later opening hours, and the smoking of shisha would have on the living conditions of nearby residents in respect of noise disturbance and odour.

Reasons

7. Wilmslow Road in the vicinity of the appeal site is predominantly commercial in nature, and contains the core of shops, bars, cafes and restaurants making up the 'Curry Mile'. Many of the buildings on Wilmslow Road have residential accommodation above the ground floor commercial units. Grandale Street runs off Wilmslow Road at the side of the appeal site. It has a small number of commercial premises which are mainly concentrated near to the Wilmslow Road end but for the most part it is a residential street which, with its connected streets, makes up an area of dense terraced housing. I therefore do not accept the appellant's assertion that '*there are no residential units directly, or even closely proximate*' to the appeal site. On the contrary, there is considerable potential for uses in the area in general, and on the appeal site in

particular, to cause noise and other disturbance which may have a detrimental impact on nearby residents' living conditions.

Outdoor seating

8. At the time of my site visits there were fewer pedestrians using Wilmslow Road near the appeal site than I had seen on previous occasions at similar times of day, presumably as a consequence of the fairly stringent Covid-19 restrictions in place in Manchester at the time. However, there were still individuals, couples and groups coming and going, and the road was still busy with traffic, including buses, cars and taxis loading and unloading passengers. There was therefore considerable background noise, particularly on Wilmslow Road itself, as a result of the various activities in the area.
9. A Noise Impact Assessment (NIA) submitted with the original planning application indicated that the dominant sources of noise affecting the appeal site and surrounding sensitive receptors were road vehicles using Wilmslow Road and noise from pedestrians. Furthermore, it found that background noise levels in the vicinity of the appeal site were higher on Friday and Saturday evenings than during the daytime, primarily as a result of the high levels of pedestrian activity associated with the cafés and restaurants in the area. This finding is credible in the light of my own observations at the time of my Friday evening site visit, when in spite of the Covid-19 restrictions in place many of the cafés and restaurants in the area, although not all, appeared to be doing reasonably brisk business.
10. The appellant submitted an updated NIA in support of the current proposal, based on no more than 70 customers using the front forecourt. It indicated that noise reaching the nearest property on Grandale Street (No 1) from the raised voices of patrons seated at the front of the premises would be below both the daytime and night-time background noise levels. Clearly, calculating the noise which would arise from conversations around outside tables cannot be an exact science, and the statement in the NIA that there would only ever be, at most, half of the customers talking at any one time might be considered optimistic by anyone who has ever observed a large group having a heated discussion over a meal or a drink. Nonetheless, based on both the evidence of the NIA and my own observations on my site visits, it seems to me that the noise arising purely from customers seated in the area which the appellant wishes to use for outside tables would be unlikely, on its own, to cause a significant disturbance to nearby residents. This would require the use of the forecourt to be strictly controlled by a condition to ensure that the number of customers did not exceed the maximum set out in the NIA.
11. However, the use of an external seating area would have other knock-on effects which would make further contributions to increased levels of noise. Firstly, it would significantly increase the number of customers which the premises as whole would be able to accommodate. There would consequently be an increase in the overall noise made by customers arriving and leaving the premises, whether they intended to sit inside the café or outside, and this could not be contained within the appeal site. Secondly, I saw on my site visit that Grandale Street and its connected streets were heavily used for car parking, with associated noise disturbance from people walking to and from their vehicles, as well as from engine noise. This too would be likely to be increased as a result of the proposal. Thirdly, based on my experience of

external seating areas in general, there would be likely to be an increase in people lingering in or near the seating area while they were arriving at or leaving the premises, as well as increased movements of customers back and forth between the inside and outside of the building. This last consideration in particular would make monitoring compliance with any condition imposed to limit the number of people using the outside seating area practically impossible. All of these factors would be likely to result in increased noise disturbance to nearby residents which has not been assessed in an NIA, and which could not realistically be controlled by the use of other conditions.

12. The appellant's statement drew my attention to other premises within the Rusholme district centre with outdoor seating areas, albeit in general terms rather than pointing to specific examples. At the time of my site visit I saw that several bars, cafés and restaurants nearby have outdoor seating areas, including a particular concentration on the west side of Wilmslow Road a short distance north of the appeal site. However, none of those has a forecourt as large as that of the appeal site, and all face onto Wilmslow Road. As a consequence, they would be likely to generate less noise overall than the appeal site, and any noise arising from them would be directed towards and heard within the context of the main road through the district centre rather than the side streets. None appears to be directly comparable to the situation in this appeal.
13. I therefore conclude that the restriction on outdoor seating imposed by conditions 2 and 5 together is necessary to prevent unacceptable harm to the living conditions of nearby residents arising from noise disturbance, and thus to ensure that the approved scheme complies with Policies SP1 and DM1 of the 2012 Manchester Core Strategy (the MCS). Together these policies seek, among other things, to ensure that development makes a positive contribution to the wellbeing of residents, and does not lead to unacceptable adverse effects on amenity arising from noise.

Extended opening hours

14. As has already been established, the appeal site is in a busy centre which is a popular destination particularly for late night eating. It is inevitable that there will be some 'spillage' of activity and noise from Wilmslow Road, the focus of the centre, into the surrounding streets. As a result, people living nearby will necessarily expect and be prepared for some degree of disturbance from the activities within the centre. All the same, they are entitled to expect a reasonable standard of amenity including, in primarily residential streets, quieter conditions for relaxation and sleeping later in the evening.
15. The appeal premises appear to be very large by comparison with most other entertainment and hospitality venues within the nearby area. They could potentially attract a significant number of customers late at night. At the beginning of my evening site visit, at around 23.15 on a Friday, Grandale Street was busy with cars being parked or driven away, and groups of pedestrians coming and going, with a commensurate level of noise. At the end of my site visit, shortly before midnight, I walked along Grandale Street again. By that time much of the activity within the street had wound down, and as a result it was much quieter even than three quarters of an hour earlier. It is presumably the appellant's hope and intention that later opening hours would result in increased numbers of customers visiting the premises. This would also

mean that the noise disturbance I have described above would continue later into the night. This would significantly jeopardise the chances of residents of Grandale Street enjoying a reasonable degree of peace and quiet at these times.

16. The planning application referred to four other premises nearby where late-night opening had recently been permitted by the Council¹. I do not know the full circumstances in which each of the other examples came to be permitted, but I saw each of the sites at the time of my site visit. All are much smaller premises, and therefore likely to attract fewer customers, than the appeal site. All also have frontages entirely on Wilmslow Road itself, so none are on corner sites with a long boundary to a predominantly residential side street. Consequently, none of the four examples appears to be directly comparable to the proposal now before me.
17. I therefore conclude that the control on opening hours imposed by condition 7 is necessary to prevent unacceptable harm to the living conditions of nearby residents arising from noise disturbance, and thus to ensure that the approved scheme complies with Policy SP1 of the MCS and saved Policy DC26 of the Manchester Unitary Development Plan (the UDP). Together these policies seek, among other things, to ensure that development does not lead to unacceptable adverse effects on amenity arising from noise.
18. The appellant has pointed out that the saved UDP policy was adopted in 1995, and therefore suggests that it should be considered out of date for the purposes of determining this appeal. No substantive argument, other than its age, is provided as to why I should take this course. Paragraph 213 of the National Planning Policy Framework (the Framework) states that '*existing policies should not be considered out-of-date simply because they were adopted or made prior to the publication of this Framework. Due weight should be given to them, according to their degree of consistency with this Framework (the closer the policies in the plan to the policies in the Framework, the greater the weight that may be given)*'. In this case, saved Policy DC26 of the UDP seeks to ensure that development does not have an unacceptably harmful noise impact on people living in the city. This is highly consistent with the Framework, in particular the requirement of paragraph 127 that developments should create places which have '*a high standard of amenity for existing and future users*'. I am not therefore persuaded by the appellant's argument on this point, and I give saved Policy DC26 full weight in determining this appeal.

Smoking of shisha

19. The 2018 planning permission allows the use of the premises as a 'café (Class A3)'. The reason given for the imposition of Condition 5 on the original permission, specifically that part of it preventing any part of the site being used for smoking shisha, is to protect neighbours' living conditions.
20. As smoking in enclosed public places has been prohibited for some years, any shisha smoking permitted on the site would have to take place on the forecourt. While there are no residential premises immediately adjoining the

¹ 104828/FO/2014/S1 at 120 Wilmslow Road, takeaway (A5) permitted to open until midnight seven days a week; 114443/FO/2016 at 88 Wilmslow Road, café/restaurant (A3) permitted to open until midnight seven days a week; 120666/FO/2018 at 179 Wilmslow Road, café/takeaway (A3/A5) permitted to open until 02.00 seven days a week; 120947/FO/2018 at 130 Wilmslow Road, café/restaurant (A3) permitted to open until 00.30 following Friday and Saturday nights

forecourt, those on the other side of Grandale Street are only a short distance away. Smoke and odours from the shisha smoking would drift towards them, and clearly although not everyone would be likely to find it unpleasant, in general terms it would be detrimental to the occupiers' reasonable enjoyment of their homes. This would be exacerbated in the summer months when windows would be more likely to be open, and for longer periods, than at other times of the year.

21. At certain points in his statement the appellant seeks to emphasise that smoking shisha is very similar to using other tobacco products such as cigarettes, cigars and pipes, in that all are legal activities often carried out alongside social eating or drinking. At other times, he emphasises that smoking shisha differs significantly from other tobacco use, for example in that shisha would be smoked among a group of friends over *'at least a small handful of hours'*. It is quite true that other of course that smoking shisha is a legal (and for many people desirable) social activity, and that other tobacco smoking can take place on the appeal site. However, on the basis of the evidence before me and my own observations on my site visit and elsewhere I tend towards the view that smoking shisha has several significantly different characteristics from other common forms of smoking tobacco.
22. Firstly, smoking shisha is advertised and promoted as a specific product or activity and part of a business's 'offer' in a way which other smoking is not. Secondly, the paraphernalia for smoking shisha (pipes, tobacco, charcoal brazier etc) is almost exclusively maintained and supplied (for a charge) by the establishment in a way which is not the case with cigarettes. Thirdly, as the appellant has pointed out, smoking shisha tends to be a much slower, longer and more group-based social activity than other forms of smoking. Based on my site visit observations of premises nearby as well as other general experience, where shisha smoking is available a significant proportion of the clientele appears to take part, often as the main purpose of their visit to the establishment.
23. The 'slow and social' drawn out nature of the activity means that a group smoking shisha would be likely to produce more smoke, and over a longer period, than would be the case with other forms of smoking. There would therefore be likely to be a detrimental effect on neighbours' living conditions even if smoking shisha was taking place at a level which might be considered ancillary to the premises' main use as a café. I therefore consider that were shisha smoking to be permitted on the appeal site it would cause unacceptable harm to nearby residents' living conditions arising from odours over and above any which might stem from other tobacco use.
24. The Council's officer report referred to local councillors' suggestion that the operator of the appeal site wants it to become a shisha café, as well as their concerns about the *'many issues caused by shisha cafés'* in the area which are alleged to include waste, noise and late night antisocial behaviour. However, the proposal before me is not for the use of the premises as a shisha café or similar, which would be a material change of use beyond the scope of this appeal. Neither the Council's decision notice nor its statement of case suggests that the problems highlighted by the councillors would arise specifically from shisha smoking being permitted. I therefore agree with the appellant that there is no substantive evidence that the proposal would contribute to a negative perception of the Rusholme district centre. However, a lack of harm in this

regard would not outweigh the other harm I have found. At the same time, the appellant's observations in respect of the harm to health in general arising from the sale or consumption of alcohol and fast food do not lend weight to his arguments in favour of allowing shisha smoking in this case.

25. The appellant has drawn my attention to various other appeal decisions in the surrounding area and elsewhere. I note the Inspector's findings in decisions relating to 119 Wilmslow Road (APP/B4215/C/18/3212030) and 72 Wilmslow Road (APP/B4215/W/18/3217729) that the shisha cafés proposed in each of those cases would not be harmful to the character, vitality and viability of Rusholme district centre. However, as I have already described, the proposal before me is not for a change of use to a shisha café, and the main issues in those appeals are not part of the dispute in this appeal. The decision in respect of No 119, as well as an appeal decision in respect of a site in Birmingham (APP/P4605/C/11/2150281) also addressed the issue of the legality of shisha smoking and the control of smoking under other legislation, but again this does not form part of the disputed matters in this appeal. None of these decisions adds weight to the appellant's arguments in respect of the potential detrimental impact of shisha smoke on nearby residents' living conditions.
26. I note that my findings on this matter are consistent with those of the Inspector in an appeal relating to the former Huntsman Inn at 130 Wilmslow Road (APP/B4215/W/19/3226481) to which the Council drew my attention. While there are differences between the layout of the two sites, the Inspector in that case also concluded that removing a condition preventing shisha smoking would be harmful to the living conditions of the occupiers of terraced houses a short distance away on Claremont Road.
27. I conclude that the restriction on smoking shisha imposed by condition 5 is necessary to prevent unacceptable harm to the living conditions of nearby residents arising from odours, and thus to ensure that the approved scheme complies with Policies SP1 and DM1 of the MCS. Together these policies seek, among other things, to ensure that development makes a positive contribution to the wellbeing of residents, and does not lead to unacceptable adverse effects on amenity arising from odours.

Other Matters

28. The appellant also drew my attention to an appeal decision in respect of the use of 75 Wilmslow Road as a hot food takeaway (A5) and a retail unit (A1) (APP/P4605/C/19/3223499). As this was decision was provided without further comment, it is not clear to me what lesson I was invited to draw from it. However, the site in that case has different characteristics to this one, and the proposal was for different uses to those now before me. That decision does not therefore lend weight to the appellant's case on any of the main issues in this appeal.
29. The appellant raised a variety of other matters in his statement, including observations on the Council's general approach to applications involving shisha smoking, and suggestions that the Council failed to consider the cultural (and multicultural) aspects of shisha. However, no substantive evidence was provided for these assertions, and it is clear that the Rusholme centre as a whole provides a variety of activities drawn from and catering for a wide variety of cultural backgrounds. The appellant also recognised the tension between the late-night activities within the 'Curry Mile', the combined aims of

the development plan aims and other uses in the surrounding area. In reaching my decision I also acknowledge these tensions and the need to strike a balance between competing uses and activities in the area. However, none of the other matters raised alters my overall conclusion in respect of this appeal.

Conclusion

30. I have found that the removal of the three disputed conditions would cause material harm to the living conditions of nearby residents in respect of disturbance from noise and odour arising from the development. The conditions are therefore necessary and relevant to planning. Having regard to the tests set out in paragraph 55 of the Framework, I also consider that they are relevant to the development, enforceable, precise and reasonable in all other respects.
31. I therefore conclude that the appeal should be dismissed.

M Cryan

Inspector