



Appeal Decision

by Thomas Shields DipURP MA MRTPI

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

Decision date: 17 December 2021

Appeal Ref: APP/Z5060/X/20/3265405

Unit 9-10, Cromwell Centre, Coppem Road, Dagenham, RM8 1HJ

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 ("the Act") against a refusal to grant a certificate of lawful use or development (LDC).
 - The appeal is made by Mr Sukjinder Seyab against the decision of the London Borough of Barking and Dagenham Council
 - The application Ref: 20/02021/CLUP, dated 13 October 2020, was refused by notice dated 1 December 2020.
 - The application was made under section 192(1)(a) of the Act.
 - The use for which a LDC is sought is described as "Change of use from light industrial to Shisha Lounge".
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Decision

1. The appeal is dismissed.

Preliminary Matters

2. The application form refers only to Unit 9. However, the details and plans submitted with the application clarify that the appeal building occupies combined units 9-10. The Council determined the appeal on that basis and I have done the same. Given that internal layout plans were submitted, and the proposed future use had not yet commenced at the date of the application, it was unnecessary for me to carry out an internal inspection of the building.
3. The burden of proof for the purposes of obtaining a LDC lies with the applicant/appellant, and the standard of proof is on the balance of probabilities. The relevant date for ascertaining whether the proposed development would be lawful is the date of the application. Issues of planning merit are not relevant.

Reasons

4. On 1 September 2020, the Town and Country Planning (Use Classes) (Amendment) (England) Regulations 2020 came into force, amending the Town and Country Planning (Use Classes) Order 1987 (UCO). The UCO now includes a new Class E 'Commercial, business and service' use class which incorporates the previous shops (A1), financial and professional services (A2), restaurants and cafes (A3) and business (B1) use classes.
5. The appellant's case is that the existing use of the building, and the proposed shisha¹ use, both fall within Class E, Part A, of Schedule 2 of the UCO, such

¹ The appellant considers that the proposed use for "E-shisha" inside the building would not infringe the requirements of the Health Act 2006, upon which I make no comment.

that the change from the former to the latter would not be 'development' requiring planning permission by virtue of s55(2)(f) of the Act.

Proposed use

6. The appeal building sits within a uniform block of industrial units on Coppen Road and within a wider industrial estate area. The appellant disputes the Council's contention that it lies within a strategic industrial area, but no evidence which might confirm whether it does or not is before me.
7. The appellant states that the traditional wood or charcoal method for shisha smoking would not be used, relying instead on electronic modules for heating the flavoured tobacco. Internal booths would be created at ground floor level for the shisha smoking and smoke would be controlled via an internal ventilation system. There would be no outside smoking.
8. People would be able to stay on site as long as they wish, typically between 40 minutes and 2 hours, or longer. There would be 2 to 6 staff on site at any one time (subject to how busy it is) and the opening hours will be up to midnight.
9. The appellant argues that the use now falls within Class E(c)(iii):

“(c) for the provision of the following kinds of services principally to visiting members of the public -
(i) financial services,
(ii) professional services (other than health or medical services), or
(iii) any other services which it is appropriate to provide in a commercial, business or service locality”
10. However, I do not interpret Class E(c) in the same way as the appellant.
11. The use has not been specifically listed within Class E. Moreover, the type and range of services referred to in “any other services” in (c)(iii) is not open ended or unlimited. It is qualified by “the following kinds of services”. That must mean a similar *kind of service* to financial and professional services in c(i) and (ii) because they are the only “following kinds” of services mentioned in E(c). If that were not the case, such that “any other services” in (c)(iii) were completely unlimited, then the separate listing of financial and professional services in (c)(i) and (ii) would be superfluous and otiose. That cannot have been the intention of the drafting.
12. To my mind the proposed use as a shisha lounge is materially different in character to any of the uses listed in the previous use classes, including former Class A2 (now subsumed into Class E(c)), and would by itself have been a *sui generis*² use. No argument is made to the contrary. I reject the appellant's interpretation of Class E(c) for the reasons set out above, and hence it does not support the view that shisha smoking falls within Class E(c)(iii).
13. Following on from the above, I conclude that the proposed use as a shisha lounge would be a materially different character of land use to the uses encompassed in the “kinds of services” within Class E(c) and would be a *sui*

² A 'unique' use that does not fall within any particular Use Class

generis use, outside of any Use Class. However, even I am wrong on this point, in order to benefit from the provision within s55(2)(f) of the Act the existing use of the building must also fall within Class E. I turn to this next.

Existing use

14. The Council refer to the building's existing use for commercial printing, however no evidence of such use is provided. The appellant states³ that the printing business was a former use, it later being replaced by the existing use as an "MOT centre", and refers to the MOT office and storage area in the building. Also, that it formed part of the *Prestige MOT Centre* business occupying the adjoining unit.
15. There is very little supporting detail of the actual use and activities within the building at the date of the application. However, I have no reason to doubt the appellant's submissions. Accordingly, I find on the balance of probability that the existing use is as an MOT test centre.
16. The appellant argues that the existing use falls within Class E(g)(iii), which relates to use for:

"any industrial process, being a use, which can be carried out in any residential area without detriment to the amenity of that area by reason of noise, vibration, smell, fumes, smoke, soot, ash, dust or grit".
17. However, use as an MOT testing centre (hence, solely for *inspecting* and *testing* motor vehicles) is not an "*industrial process*" as defined in Article 2 of the UCO:-

"industrial process means a process for or incidental to any of the following purposes:-

 - (a) the making of any article or part of any article (including a ship or vessel, or a film, video or sound recording);
 - (b) the altering, repairing, maintaining, ornamenting, finishing, cleaning, washing, packing, canning, adapting for sale, breaking up or demolition of any article; or
 - (c) the getting, dressing or treatment of minerals; in the course of any trade or business other than agriculture, and other than a use carried out in or adjacent to a mine or quarry"...
18. Consequently, I find that the existing use as an MOT centre does not fall within Class E(g)(iii) because it is not an industrial process as defined. If the use also included vehicle repairs or maintenance it may possibly have been a mixed B1/B2 use or a *sui generis* use, although there is no evidence before me to indicate this is the case. However, even if that were the case there is no permitted change via the GPDO⁴ from such a mixed use or from a *sui generis* use to a use within Class E.

Conclusion

³ Appellant's Statement of Case and covering letter submitted with the application

⁴ Town and Country Planning (General Permitted Development) (England) Order 2015

19. Having regard to all of the evidence before me I am satisfied that use of the building as a shisha lounge would be substantially different in terms of its operational nature, character and effects than the existing use. As such, it would result in a material change of use and hence 'development' within s55(1) of the Act. Since, for the reasons set out earlier, neither use falls within Class E the change of use would not be excluded development within s55(2)(f). Given that no planning permission exists for the shisha use it would not be lawful.
20. For the reasons given above, I conclude on the evidence available to me now that the Council's refusal to grant a LDC in respect of the use of the building as a shisha lounge was well-founded, and that the appeal should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the Act.

Thomas Shields

INSPECTOR