



Appeal Decision

Inquiry Held on 9 November 2021

Site visit made on 9 November 2021

by Roy Merrett Bsc(Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 5th January 2022

Appeal Ref: APP/A5270/C/19/3242921

Premises known as 5 Central Parade, 1-4 Western Avenue, Perivale, Middlesex UB6 8TF

- 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 Ali Akab, Afendi Baghdad Ltd, against an enforcement notice issued by the Council of the London Borough of Ealing.
- The enforcement notice was issued on 7 November 2019.
- The breach of planning control as alleged in the notice is Without planning permission, the material change of use of the premises to a mixed use as a nightclub and shisha lounge.
- The requirements of the notice are 1. Cease the use of the premises as a nightclub; 2. Cease the use of the premises as a shisha lounge; 3. Remove the bar, seating booths and paraphernalia that facilitate the mixed use of the premises as a nightclub and shisha lounge; 4. Remove all shisha pipes, charcoal and miscellaneous items associated with the mixed use of the premises as a nightclub and shisha lounge; and 5. Remove all resultant debris.
- The period for compliance with the requirements is 3 months.
- The appeal is made on the grounds set out in section 174(2) (a), (b), (c) and (d) of the Town and Country Planning Act 1990 as amended.
- This decision supersedes that issued on 18 November 2020. That decision on the appeal was remitted for re-hearing and determination by consent order of the High Court.

Summary of Decision: The appeal succeeds in part and the enforcement notice is upheld with variations in the terms set out below in the Formal Decision.

Preliminary Matters

1. The original appeal decision was challenged under s289 of the Act. The consent Order of the High Court confirmed that the previous decision letter contained errors of law in that i) it failed to consider whether the baseline for the material change of use alleged by the enforcement notice was an established mixed use as contended by the appellant, rather than the restaurant / café (Use Class A3) use contended by the Council and ii) it failed to consider whether the requirements of the enforcement notice needed to be amended to protect the alleged lawful nightclub use. The Court ordered that the matter be remitted for redetermination in accordance with these findings.
2. On this basis the focus of my approach will be to address the shortcomings in the previous decision letter as identified by the High Court. Accordingly I consider that it would not be appropriate for me to re-consider aspects of the previous appeal decision that have not been challenged. As such there is no

need for me to re-examine the findings of the previous Inspector in relation to the appeals made on grounds (b), (d) and (a), none of which succeeded. The appellant confirmed at the Inquiry that he does not take issue with this approach.

3. The High Court Order asks the question whether the previous mixed use contended by the appellant, one that involves restaurant, nightclub and late-night entertainment uses, should have formed the baseline against which the materiality of the alleged breach was assessed. It therefore raises the question did the alleged breach actually amount to a breach of planning control. Clearly this is relevant to the appellant's ground (c) appeal.
4. To answer this question I need to establish whether the restaurant and nightclub mixed use relied on was, on the balance of probability, the previous lawful use of the premises, having become immune from enforcement through the passage of time. Regardless of my findings in this respect, I then need to go on to establish whether the change to the alleged use was material.
5. If I find that a material change of use has occurred, such that the ground (c) appeal fails, this would then invoke the second criticism of the High Court, namely that the previous decision failed to consider whether requirements of the enforcement notice needed to be amended to protect the alleged lawful nightclub use. This, in effect, raises the matter of a hidden ground (f) appeal from the appellant, namely that the steps required by the notice to be taken, exceed what is necessary to remedy any breach of planning control.

The appeal on ground (c)

6. The ground (c) appeal is that there has not been a breach of planning control.

The question of the previous lawful use of the premises

7. The appellant's statement claims that the previous lawful use of the premises was as a restaurant / bar / nightclub and late-night entertainment venue. His closing submissions to the Inquiry, refine the interpretation of the previous lawful use, referring to the key point on which the appeal was remitted for re-determination being the question of whether the mixed use as restaurant and nightclub had become immune from enforcement¹. For the avoidance of doubt, consistent with the views of the previous Inspector, I also consider the bar and late-night entertainment referred to to be conducive / part and parcel with its use as a nightclub. I therefore need to identify whether the restaurant and nightclub mixed use was lawful.
8. The appellant's evidence included statements from a number of witnesses who appeared at the Inquiry and gave evidence under oath. These individuals included two of the previous owners of Al Afendi spanning the period 2003 – 2011; a previous employee over the period 2003 – 2006, who worked as an assistant chef, and two regular customers, one who claimed to have attended the venue usually twice a week since 2000². Evidence in the form of statutory declarations was provided by three further witnesses, one of whom claims to have been a regular customer of the club since 2000, generally visiting up to twice a month. These witnesses spoke of food and beverages being available

¹ Appellant Closing Submissions para. 1.

² This witness accepted at the Inquiry that he thought the venue had closed temporarily during periods of Ramadan.

- on the premises and late-night live music and performances being played and carried out there, together with socialising and dancing. They do not refer to having witnessed the smoking of shisha on the premises.
9. Given that any person who lies about information given under oath, or as part of a sworn statement, could be prosecuted for the crime of perjury, and if convicted may have to pay significant fines or be sentenced to time in prison, I give these forms of evidence significant weight.
 10. The Council referred in its evidence to various occasions in 2007, 2008, 2012, 2014 and from 2016 when it received and / or investigated reports of loud amplified music coming from the premises in the early hours of the morning; also that it witnessed live performances and security arrangements in place on some of these occasions. I consider this helps to corroborate the witness accounts as to the nightclub use. I am also persuaded by the appellant's point that the absence of complaint records over the period 2009 – 2011 does not necessarily mean that the nightclub was no longer operating, but rather that it could indicate that the premises were being run in a more responsible way, following the change of ownership during this time. That witness accounts of opening hours may not have matched up with licensed opening times does not mean that the claimed opening times did not actually occur.
 11. The Council also referred to a police report that followed an alleged serious criminal incident associated with the premises in November 2014. The report sought the suspension of the premises licence to allow various matters to be addressed. However no formal records were provided by the Council to indicate that any long-term formal closure of the property had occurred by way of response. Records do suggest that the premises were closed voluntarily for a three-week period in 2015 in order to address various health and safety matters. However I am not persuaded that temporary closure for such a relatively short period of time would amount to the abandonment of the use. I also concur with the appellant that a failure to file accounts in 2016 and the commencement of strike off proceedings in April 2017 did not mean that Afendi ceased to trade at this time³.
 12. The Council has provided a series of Google Street View images which show the signage in place at the front of the premises at different times. In July 2008 the fascia sign describes the premises as a restaurant. Between at least July 2012 and March 2019 the signage is shown to have changed and refers to a restaurant, club and shisha lounge, albeit that a temporary banner covering the fascia sign referring to the premises as a 'Banquet Hall' appears in July 2017 and February 2018. By August 2021 the signage in place refers to the premises as a 'Restaurant and Lounge'.
 13. At the Inquiry the evidence of one of the previous owner's was that the change of the aforementioned restaurant sign occurred shortly after he became the owner in 2009. It seems to me this does not mean the nightclub use only began at this time, because of the sworn evidence given and also because the aforementioned investigations by the Council suggest that the nightclub use was happening before then. The Council also referred to a letter from Hodders law firm in January 2008, in relation to a premises licence at the appeal site, not identifying the use as a nightclub. However this does not equate to the nightclub use not existing and notably the body of the letter refers to

³ Council POE Appendix 28 refers to compulsory strike-off action being discontinued in July 2017.

- representations being made on grounds of potential public nuisance. This would not be inconsistent with the existence of a nightclub.
14. A second witness explained that the purpose of the temporary banner sign was in recognition of the cultural or religious sensitivities of clientele at Afendi, depending on the occasion. I have no reason to doubt this explanation. Notwithstanding this it seems to me that the content of the signage on the front of the building serves to corroborate the evidence of witnesses that the nightclub and restaurant uses had continued over a long period of time.
 15. Furthermore a Certificate of Lawfulness was granted in relation to the existing use of the ground floor of the premises as a café in January 1994⁴. I note that the Council was previously of the view that the authorised use of the premises was as a restaurant / café. This further supports the position that the restaurant use, in particular, has been operational for a long time.
 16. The Council's evidence refers to inspections of the premises being made by its licensing enforcement and environmental health teams, in August and October 2018 and in April 2019. It is apparent from the site inspection notes and records presented that at each of these times a kitchen was not found to be present at the site.
 17. A retrospective planning application was submitted to the Council, dated 16 July 2018⁵ for various works which included a single storey extension to the side / rear of the premises. The existing plans show the kitchen area to have been removed as part of an internal reconfiguration of the premises. It seems to me that this corroborates the Council's evidence of the absence of a kitchen during the aforementioned site visits. The Council says that the kitchen was removed in 2018⁶, which appears to be corroborated by a sequence of aerial photographs provided in its statement⁷ and site visit photographs⁸ suggesting that the extension and revised configuration of the premises were finalised after May 2018. Indeed the retrospective planning application form refers to the work having been commenced on 16 May 2018.
 18. Although it was evident from my site visit that a kitchen facility has since been restored, though in a different position alongside the bar at the front of the premises, on the balance of probability there appears to have been a significant break between the original kitchen being lost and the new one being provided. I have taken into consideration that the sworn evidence of witnesses is that that they have always been able to eat a meal at the premises and have always considered a restaurant to be there. However the witnesses do not specifically say that they recall seeing a kitchen every time they were in attendance.
 19. The provision of food at the premises does not equate to that food actually being cooked or prepared there. Therefore the provision of food at the premises for customers is not incompatible with the absence of a kitchen there. I concur with the view taken by the previous Inspector that, on the balance of probability, any food offer prior to the issue of the notice was simply ancillary to the nightclub.

⁴ Ref 02957/3.

⁵ Ref 183342FUL.

⁶ Council POE para. 6.59.

⁷ Council statement para. 7.12.

⁸ Council POE Appendix 15 – photographs dated June 2018.

20. I am mindful that company information records provided state that Afendi Club Limited was formally dissolved in March 2018. However it is also apparent that the appellant, in the name of the company Afendi Baghdad Ltd, became liable for business rates on the premises earlier than this, in June 2017. There is nothing to persuade me that the formal dissolution of 'Afendi Club Limited', in itself, marked the end of the restaurant and nightclub use. However, on the balance of the evidence I reach the view that the primary restaurant use ceased, and therefore specifically the mixed nightclub and restaurant use ceased, probably around May 2018 following the removal of the kitchen from the premises.
21. Notwithstanding this, when drawing all the above considerations together, I conclude, on the balance of probability, that the premises had gained lawfulness as a mixed use of restaurant and nightclub, having operated as such without interruption for at least a ten-year period prior to the kitchen being removed in 2018. This is therefore the baseline against which the mixed use as alleged in the enforcement notice must be assessed.
22. The Council's position is that the nature of mixed uses within the premises have been more fluid than simply a stable combination of restaurant and nightclub. It sets out that material changes, and thus fresh chapters in the planning history of the site have been more nuanced, referring to the transition from a café to restaurant use, the emergence of a private party venue and the replacement of the restaurant and nightclub use, for a period of time, with a banqueting hall.
23. However, the fact that a café was certified as the lawful use of the premises several years ago is not inconsistent with the witnesses' sworn evidence referring to a longstanding restaurant. Also a change of use from café to restaurant would not necessarily be material, with both uses previously being categorised within the A3 Use Class⁹.
24. In addition it seems to me unlikely that a private party venue, involving late night entertainment activities, would differ materially in terms of character to that of a nightclub. The Council appeared to accept this during cross examination. Furthermore the temporary and occasional description of the venue as a banqueting hall, for reasons of cultural sensitivity only, as described above, without resulting in the loss of continuity of the restaurant and nightclub uses, seems to me to be a plausible explanation. I am not therefore persuaded that the Council's evidence in this regard, including the claim that opening hours have fluctuated and the nature of the food offer has changed, is strong enough to contradict that presented by the appellant's witnesses.
25. I acknowledge that the restaurant and nightclub use is not the undisputed alleged use in the notice, and it is important for me to reach a view as to when that use commenced in relation to the loss of the restaurant use.
26. Evidence has been provided by the Council of shisha being smoked inside the premises in early August 2018¹⁰. The same evidence also appears to show live music, singing and dancing taking place. A letter of complaint, from around the same time, also refers to indoor smoking of shisha¹¹. Furthermore, officer

⁹ The Town and Country Planning (Use Classes) Order 1987.

¹⁰ Council POE Appendix 24 - You Tube video.

¹¹ Council POE Appendix 19.

notes relating to a site visit undertaken by the Council in April 2019 refer to a number of shisha pipes in use and the presence of various shisha paraphernalia in storage and awaiting use. Live music was also observed there at this time. An undisputed screen shot taken from the Afendi website in June 2020 refers, amongst other things, to a shisha lounge offer.

27. Whilst the Council's witness stated at the Inquiry she considered the primary shisha use to have begun as early as 2014, this contrasts with her proof of evidence, which was more equivocal regarding the timing of the change, having depicted the shisha use as an ancillary use for a period of time. I do not consider that the Council was able to provide a robust explanation for this change in position. Furthermore if the use of shisha at the premises had resulted in a material change of use at that time, with adverse environmental consequences for nearby residents, when also considering the noise related complaints referred to earlier, then the Council might have been expected to initiate enforcements proceedings earlier than it did.
28. I am not provided with any evidence to persuade me that the smoking of shisha was a primary use of the premises prior to August 2018. This is despite the wording of signage to the front of the building and the existence of an external smoking area. The aforementioned retrospective planning application, dated 16 July 2018, for various works stated that the work had not been completed at that time. This weighs in favour of the notion that the use which followed the mixed nightclub and restaurant use commenced after this date.
29. The Council has set out the fact that the appellant does not challenge the previous Inspector's finding on the ground (b) appeal, namely that a material change of use to nightclub and shisha lounge has occurred, undermines the credibility of witness evidence that they have not observed shisha smoking on the premises. However it seems realistic to conclude that witnesses may simply not have seen shisha smoking at the times when they were in attendance; particularly if this was focused, as an ancillary activity, on separate external parts of the premises, prior to the extension being implemented in 2018.
30. The above leads me to the conclusion that on the balance of probability the loss of the restaurant as a primary use followed by the emergence of shisha smoking as a primary use occurred over a relatively short period of time in 2018, and that this material change of use was focused on and facilitated by the extension and reconfiguration of the premises at this time. As such there was a change of use of the premises from a mixed use of nightclub and restaurant to a mixed use of nightclub and shisha lounge.

Did the use as alleged amount to a material change of use?

31. For a material change of use to have occurred there must be some significant difference in the character of the activities from what has gone on previously as a matter of fact and degree. Off-site effects may be highly relevant to whether there has been a material change of use or not. At the Inquiry the Council referred to the materiality of the loss of the restaurant use and arrival of the shisha smoking use.
32. It seems to me that the distinctive characteristics of a restaurant use would include the comings and goings of clientele in the late afternoon and evening, deliveries of unprepared food to the premises, smells within the premises

associated with the preparation of hot food and the potential visibility and audibility outside of equipment associated with the extraction of cooking odours.

33. In terms of shisha smoking, this would involve the storage and preparation of specialist equipment. It would possibly result in clientele movement patterns later at night, when compared with a restaurant, which might therefore be more likely to give rise to noise disturbance to nearby residents (residents are undisputed to live in close proximity, above the nearby ground floor commercial premises and the appeal site itself). It would certainly generate distinctive odours, particularly when being smoked inside the building. The opening of windows and doors in order to ventilate the building would be likely to result in the transmission of shisha fumes, noticed by nearby residential occupiers.
34. I therefore consider that because of their inherent attributes, even when taking into account the continuity of the nightclub element, the character and appearance of a nightclub / restaurant would be materially different to that of a nightclub / shisha lounge. I am therefore in no doubt that the commencement of the nightclub / shisha lounge use would have resulted in the material change of use of the premises. The ground (c) appeal therefore fails.

The appeal on ground (f)

35. The ground of appeal is that the steps required by the notice to be taken are excessive. With regard to the unauthorised change of use the objectives of the notice are to discontinue the use of the land and to restore the land to its condition before the breach took place.
36. As set out above, I have found the nightclub and restaurant elements to constitute the previous lawful use of the premises. In accordance with the provisions of s57(4) of the Act, given that I have found, on the balance of probability, there has not been an intervening unlawful use, it would be possible for that previous mixed use to be resumed without the need for planning permission. Therefore any requirements that interfere with or require the lawful nightclub element to cease, in its own right, would be excessive and should be omitted.
37. Accordingly the notice should be varied in terms of requiring the nightclub and shisha lounge to cease as a mixed-use entity, rather than requiring the nightclub to cease in its own right. Furthermore because the bar and seating booths, present in the venue, help to facilitate the lawful nightclub / restaurant use, I also find that it would be excessive to require their removal. The notice should therefore also be amended to omit this requirement. The ground (f) appeal therefore succeeds to this extent.
38. However, because any shisha related equipment kept on the premises would assist in facilitating the unauthorised mixed use, I am not persuaded that the 'step 4' requirement, to secure its removal, would be excessive. I therefore make no amendment to this specific requirement.

Conclusion

39. For the reasons given above, I conclude that the requirements of the notice are excessive to remedy the breach of planning control. I shall vary the

enforcement notice prior to upholding it. The appeal on ground (f) succeeds to that extent.

Formal Decision

40. It is directed that the enforcement notice be varied by:

The deletion of the following wording in paragraph 5 "1. Cease the use of the premises as a nightclub;" and "2. Cease the use of the premises as a shisha lounge;" and "3. Remove the bar, seating booths and paraphernalia that facilitate the mixed use of the premises as a nightclub and shisha lounge;" and

By substituting the following wording instead "1. Cease the use of the premises as a mixed-use as a nightclub and shisha lounge;" and

By renumbering requirements "4." and "5." as "2." and "3." respectively.

41. Subject to the variations the appeal is dismissed, and the enforcement notice is upheld. Planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Roy Merrett

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Paul Brown QC of Counsel

He called:

Aaron Daniels Sam

Hussein Wali Suleman

William Gerald Gardner

Ali Abdul Sahib Altememi

Habib Ali-Ojaili (appeared by video-link)

FOR THE LOCAL PLANNING AUTHORITY:

Roderick Morton (Solicitor – Ivy Legal Limited)

He called:

Ingrid Smith – Senior Planning Enforcement Officer

Documents Submitted following the Inquiry:

1. Council's and Appellant's Closing submissions.