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## Appeal Decision

Site visit made on 26 January 2022

**by Felicity Thompson BA(Hons) MCD, MRTPI**

**an Inspector appointed by the Secretary of State**

**Decision date: 04 March 2022**

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**Appeal Ref: APP/B4215/C/21/3284746**

**Land at 130 Wilmslow Road, Manchester M14 5AH**

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended.
  - The appeal is made by Mr Saheeb Hussain against an enforcement notice issued by Manchester City Council.
  - The enforcement notice was issued on 14 September 2021.
  - The breach of planning control as alleged in the notice is:  
On 17 December 2018, planning permission was granted for the change of use of the premises from a public house to restaurant together with the erection of a two-storey extension to rear and elevational alterations including front canopy (ref. 120947/FO/2018). The permission was subject to conditions, as detailed in the attached decision notice.  
Condition 13 states:  
No part of the premises shall be used for the smoking of shisha at any time and none of the areas outside the building, including to the rear, shall be used as an external seating area or for use by patrons of the premises.  
It appears to the Council that the planning permission has been implemented in breach of this condition, in that the smoking of shisha is taking place on the premises.
  - The requirements of the notice are to:
    1. Permanently cease the use of any part of the premises for the smoking of shisha.
    2. Remove from the land all shisha pipes, tobacco and associated paraphernalia.
  - The period for compliance with the requirements is seven days.
  - The appeal is proceeding on the grounds set out in section 174(2)(a) and (g) of the Town and Country Planning Act 1990 as amended.
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### Decision

1. It is directed that the enforcement notice is varied by the deletion of seven days and the substitution of one month as the period for compliance in section six of the enforcement notice.
2. Subject to this variation the appeal is dismissed, 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 Manchester City Council against Mr Saheeb Hussain. This application is the subject of a separate Decision.

### Preliminary Matters

4. Planning permission was granted for the change of use from a public house (Class A1) to restaurant (Class A3) together with the erection of a two-storey

extension to the rear and elevational alterations including a front canopy. Condition 2 on the permission is a plans condition.

5. As approved the plans show a two-storey extension to the rear with a flat roof and glazed openings. As built, the extension is unglazed on the ground and first floor northern elevations, with the ground and first floor seating areas being used as a restaurant and shisha lounge.
6. The appellant's case on ground (a) is made based on a development which would include the ground floor northern and western elevations of the extension being unglazed and only the ground floor seating area being used as a restaurant/shisha lounge. It would also include an extension to the approved wall along the northern elevation.
7. In the appellant's submission it is clear at paragraph 6.1.2 that they are seeking, along with physical changes, approval for the change of use from a restaurant to a restaurant/shisha lounge (*sui generis*).
8. However, when an enforcement notice is issued under section 171A(1)(b) to allege that there has been a breach of one or more conditions imposed on a planning permission, the deemed planning application is to carry out the development subject to the planning permission without complying with the condition(s) being enforced against. In such cases it is not open to me to review any of the other conditions imposed on the original planning permission.
9. Therefore, my decision is confined to an assessment of condition 13 and the planning permission granted, I cannot consider the merits of an alternative development. Whether the development has been carried out in accordance with the approved planning permission is a matter for the Council away from this appeal.
10. There are essentially two parts to the condition, that which prevents the smoking of shisha anywhere on the premises and that which precludes the use of any external areas by customers. The breach identified in the notice relates to the use for shisha smoking and the appellant's evidence seeks to demonstrate that this should be permitted inside the building as built/proposed. They do not appear to suggest that the part relating to the use of outside areas should be deleted.

### **The appeal on ground (a) and the deemed planning application**

11. The main issue is the effect of the development on the living conditions of nearby residents with particular regard to noise and disturbance and odours.

#### *Reasons*

12. The nearest dwellings are located to the rear on Claremont Road. Whilst I acknowledge that they are located close to a busy commercial environment, they are set back from the main areas of activity and are nonetheless entitled to some reasonable peace and enjoyment, particularly later into the evening.
13. I have had regard to the appellant's Noise Impact and Odour Assessments however, these are based upon the development as carried and proposed to be carried out. There is no assessment of the approved scheme, nor do they appear to include an assessment regarding the use of the external areas.

Consequently, it appears to me that there is no material difference between the scheme considered by the previous Inspector<sup>1</sup> and that subject of the appeal.

14. It seems unlikely to me that smoking inside the approved building would result in harm to the living conditions of residents by way of noise and disturbance and odours. However, since smoking in enclosed public spaces is prohibited, in my view the smoking of shisha would most likely take place in the open/semi-open area to the rear of the site, as the previous Inspector found.
15. Should shisha smoking occur in the areas outside to the rear of the building, I consider, in the absence of contrary evidence, that there is a reasonable prospect harm would be caused to the living conditions of those nearest residents by reason of odours, particularly in the summer months when residents are more likely to be in their gardens and have windows open. Furthermore, as found by the previous Inspector, there is a reasonable prospect of a significant nuisance arising from the noise and general activity of people gathered outside the building.
16. I have had regard to the appeal decisions referred to by the appellant, where similar conditions have been considered, and I concur that it is not the role of the planning system to duplicate or to impose more stringent controls on activities regulated under other legislation. However, in this case the condition is not unreasonable since it is illegal in any event to smoke in an enclosed public space, and it is necessary since it would prevent customers smoking shisha outside the premises.
17. Overall, I conclude that condition 13 is reasonable and necessary to prevent unacceptable harm to the living conditions of nearby residents arising from noise and disturbance and odours. Therefore, it accords with Policies DC10 and DC26 of the UDP<sup>2</sup> and Policies SP1 and DM1 of the Core Strategy<sup>3</sup> and the National Planning Policy Framework, insofar as they aim to protect amenity.

#### *Other Matters*

18. The appellant provided copies of a number of appeal decisions relating to premises on Wilmslow Road. That concerning no.72 is not comparable since the main issue related to the effect on the character, vitality and viability of the district centre. In that relating to no.98 the Inspector found a similar condition to be necessary, similarly at no.108 harm was found in respect of the shisha use and the appeal was dismissed. Whilst that at no.119 was allowed, it is noted that the use was contained entirely within the building, so it is not comparable to this case. Accordingly, these decisions do not provide an argument to justify the appeal development.
19. I acknowledge the Parking Statement however I do not consider this directly relevant to the main issue in this case and it is therefore a matter of neutral weight.
20. The appellant's misgivings about the Council's approach to the enforcement of shisha smoking are separate matters which have no bearing on the planning merits of the development.

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<sup>1</sup> Appeal Decision APP/B4215/W/19/3226481

<sup>2</sup> The Manchester Plan The Unitary Development Plan for the City of Manchester Adopted 21 July 1995

<sup>3</sup> Manchester's Local Development Framework Core Strategy Development Plan Document Adopted 11th July 2012

### **The appeal on ground (g)**

21. An appeal on ground (g) is that the period for compliance with the notice falls short of what is reasonable. The appellant stated that to comply with the requirements would be costly and would require specialist contractors to remove fixed gas and electrical appliances. They consider a more reasonable time period to be three months.
22. In cases involving business uses, it is necessary to weigh the interests of the business, its employees and customers against the harm caused by the activities the subject of the notice.
23. The appellant has provided little explanation however, it seems based on the submissions, that the smoking of shisha is an integral part of the business and the requirement to cease this use would have an impact on the business.
24. No significant physical works are required to comply with the requirements and the use could cease within this short period of time. However, looking at the case in the round, the requirements to cease the use and remove the associated equipment within seven days would place a disproportionate burden on the appellant.
25. A period of one month would be a proportionate response to the breach of planning control and would achieve an appropriate balance between the need to bring this harmful development to an end and the interests of the appellant. To this extent, the appeal on ground (g) succeeds.

### **Conclusion**

26. For the reasons given above, I conclude that the appeal should not succeed. I shall uphold the enforcement notice with a variation and refuse to grant planning permission on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

*Felicity Thompson*

INSPECTOR