



Appeal Decision

Site visit made on 18 May 2022

by S A Hanson BA(Hons) BTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 23 June 2022

Appeal Ref: APP/R5510/C/21/3267723

870 Uxbridge Road, Hayes UB4 0RR

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended. The appeal is made by Hunterz Lounge Limited against an enforcement notice issued by London Borough of Hillingdon.
 - The notice was issued on 16 December 2020.
 - 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 restaurant and café and for the storage and smoking of shisha pipes (sui generis use).
 - The requirements of the notice are to: (i) Cease the use of the Premises for the storage and smoking of shisha. (ii) Remove from the Premises all shisha pipes, equipment and paraphernalia used in association with the smoking of shisha. (iii) Remove from the land all debris, items, fixtures and fittings, plant and machinery resulting from compliance with points (i) and (ii) above.
 - The period for compliance with the requirements is: Three (3) calendar months.
 - The appeal is proceeding on the grounds set out in section 174(2)(a), (c), (g) of the Town and Country Planning Act 1990 as amended. Since an appeal has been brought on ground (a), an application for planning permission is deemed to have been made under section 177(5) of the Act.
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Decision

1. 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.

Preliminary Matters

2. Planning application ref: 29607/APP/2016/4258 was refused on 28 March 2017 and ref: 29607/APP/2018/3783 was refused on 17 December 2018 for a single storey rear canopy extension and single storey rear canopy to provide a sheltered seating area for a cafe/takeaway and shisha area. An appeal against the latter refusal to grant planning permission was dismissed on 21 June 2019 ref: APP/R5510/W/19/3222068.
3. A further enforcement notice issued on 16 December 2020 for 'the unauthorised erection of single storey rear canopy extension' was not appealed. Its requirements sought the demolition and removal of the rear canopy within three months from the date the notice took effect. At the time of my visit, the notice appeared not to have been complied with.
4. Since the appeal was lodged, the London Plan 2021 has been published. The appellant has provided me with a copy of the plan and has referred to several policies in their statement. The council will have had the opportunity to

comment on the implications of these referenced policies through the appeal process and therefore I shall take them into consideration in my decision.

The appeal on ground (c)

5. This legal ground of appeal is that the matters alleged in the enforcement notice do not constitute a breach of planning control. The appellant must show why their appeal on this ground should succeed, the applicable test of the evidence being the balance of probability. As this ground is only concerned with matters of fact and law, the consideration of planning merits is not relevant. The issue to be addressed under this ground of appeal is whether there has been a material change in the use of the land to the use that is alleged.
6. The allegation refers to a mixed use as a restaurant and café and for the storage and smoking of shisha pipes. Whilst shisha is clearly available, the appellant states that it is ancillary to the main use of the site as a restaurant. 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.
7. The characteristics of a restaurant/café use would include the comings and goings of customers during the day and evening to enjoy meals and drinks at the premises or to take-away. I am told that the only usable access for customers is via the front door on Uxbridge Road. Customers coming to the premises do so to eat and drink. Those wishing to smoke cigarettes, which they would bring with them, would do so outside the premises. Whilst there is a small area to the front of the building that could provide an outdoor area to smoke, there appeared to be no dedicated space to the rear. The nature of cigarette smoking is a transient activity and to an extent, would likely be dictated by the weather. It would also be likely that as a restaurant/café, customers would not gather in large groups outside to smoke or to remain there for long periods of time, generating noise outside the building. Furthermore, the restaurant would have operated in an enclosed space. In this respect, the levels of noise and disturbance to residential areas to the rear would have been limited.
8. The appellant describes the shisha smoking as part of a 'whole package of night-time offering at the premises' which includes food, drink, shisha, fun and entertainment. The menu provided as part of the evidence for the appeal is titled 'Hunterz Lounge Shisha Bar and Restaurant' and the signage on the front of the premises advertises the venue as a 'shisha bar grill'. It displays a large selection of hot food and drink. No information regarding shisha has been provided. However, they estimate that the takings from shisha smoking constitute circa 20% of the overall takings. I have not been provided with any evidence of sales data or revenue generated to support this statement. Nevertheless, the figure is not insignificant and suggests to me that shisha is an important element to the business as whole.
9. The addition of shisha smoking involves the storage and preparation of specialist equipment. A room at the premises containing a significant number of hookahs, pipes and pots of various shisha flavours is dedicated to this activity. The smoking of shisha is sociable and is a leisurely pursuit that, unlike smoking cigarettes, takes more time. Furthermore, it is an activity that is advertised as being offered at the venue and it may bring customers in purely to partake.

10. To facilitate the smoking of shisha, the restaurant/café provides what is essentially a covered outdoor space due to laws concerning smoking in internal venues. The area is furnished with chairs, banquettes and tables and there are heaters and TV screens. Photographs provided by the appellant show a busy environment where people are eating and drinking and there are hookahs on most tables. The works to provide a rear canopy extension and sheltered seating area for the restaurant/café and shisha area have previously been refused by the council and on appeal due mainly to the noise and disturbance generated by the mixed use on nearby residents.
11. Overall, the set-up is significantly different from the use of the premises as a restaurant/café, and I consider that the way in which customers use the venue to be materially different. I am therefore in no doubt that the commencement of the mixed use would have resulted in the material change of use of the premises. The ground (c) appeal therefore fails.

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

Main Issue

12. This is the effect of the development on the living conditions of occupants of neighbouring properties with particular regard to noise and disturbance.

Reasons

13. The appeal site is a ground floor commercial unit at the end of a row of local shops within the Uxbridge Road/Hayes Secondary Shopping Area, which is a 'minor centre'¹ in the Borough. Above are residential units over two floors which are accessed from the rear of the row of shops via steps which lead to a raised walkway. Adjoining the appeal site directly to the east is a three storey office block. Uxbridge Road is predominantly commercial and retail on the ground floor with residential occupying the floors above. Opposite the appeal site is a large area of public open space. The area beyond the appeal site to the rear is predominantly residential.
14. To the rear of the appeal property, the single storey element of the building extends outwards, beyond the rear elevation and walkway of the residential floors above. There are several small commercial single storey units within this area to the rear of the row of shops and these appear to provide a mixture of work-units and storage space. To the east of the site is a two storey residential block that sits above and is surrounded by a large private parking area. Immediately to the rear of the appeal site on its northern boundary is a sizeable two-storey development that provides sheltered accommodation for older residents.
15. Inside the appeal property, the area to the rear is laid out with tables and chairs and is clearly available for eating, drinking and smoking shisha. The seating area is large, and I am told there is room for 60 covers. There is ventilation in the form of openings within the structure which will allow smoke to disperse. However, these openings will also allow for the noise generated inside the appeal site to be experienced beyond the premises. Potential sources of noise from the premises include music, TV and customers conversing.

¹ Table 3.1 Town Centre Hierarchy – Local Plan Part 2 – Development Management Policies

16. The appellant argues that the addition of shisha smoking has a limited impact on noise and disturbance over and above the existing restaurant/café use and would be little different from its use as purely a restaurant. However, the smoking of shisha is a communal activity, and its popularity is likely to draw more people to the premises, spending more time in the venue than would likely be spent enjoying a meal and a drink.
17. Being below windows serving residential occupants within the upper levels of the appeal building and its neighbours, and with this area also in close proximity to the residential properties within Legion House and the sheltered housing for older residents, this is likely to cause disturbance. These residential properties together would be able to accommodate a fairly significant number of people who would be affected by the use. It seems to me that the levels of conversation and activity could generate a considerable amount of noise, and that this would be likely to carry beyond the confines of the building, given the open nature of the seating area. If the appeal site was used solely as a restaurant, it would be unlikely that the premises would require the ventilation to such an extent and the premises would be more or less fully enclosed. This would undoubtedly affect the level of noise escaping from the building and dispersing into the wider environment.
18. Such activity at the appeal site extending through the evening and into the night, when background noise levels are likely to be lower, and when nearby residents would reasonably expect a certain degree of peace and quiet and to sleep is likely to be materially harmful to the living conditions of the neighbours. I acknowledge that Uxbridge Road is a busy road, and that some nearby commercial uses may add to background noise and activity. However, the surrounding area to the rear of the site, from where the noise will generate, is predominantly residential by nature, and during my visit I experienced far lower levels of traffic and noise around the rear part of the site.
19. The appellant has highlighted policies within the London Plan 2021 (LP21) and the 'Culture and the night-time economy Supplementary Planning Guidance'² which support an inclusive multicultural society and promote a range of uses that meet the needs of Londoners. The LP21 classifies Hayes as a district town centre with a low commercial growth potential and a night-time economy classification NT3, an 'area with more than local significance'. These areas are generally characterised as places which draw visitors from other parts of London and tend to feature smaller venues and premises.
20. I have had full regard to the policies that have been brought to my attention. These display a clear commitment to recognise and promote London as a diverse city. However, from my reading of the London Borough of Hillingdon Local Plan Part 2 Development Management Policies (January 2020) (the LPDMP) policies referred to by the council and the LP21 policies referred to by the appellant, such development should be in appropriate locations and minimise negative impacts on the amenity of neighbouring residents³.
21. Conditions have been suggested by the appellant to restrict the hours to between 1100 and 2300 Monday to Sunday for shisha smoking on the premises and for amplified or other music played on the premises to be kept to a level so as not be audible at the boundary with any neighbouring residential property.

² Published by the Greater London Authority dated November 2017

³ Policy SD7 of the LP21

However, the proposed condition has not been supported by evidence that such restrictions would be workable and would achieve suitable living conditions for nearby neighbours.

22. In the absence of convincing evidence to the contrary, I consider that the appeal development poses significant harm to the living conditions of the occupants of residential properties close to the appeal site. This is by reason of noise and disturbance. Policy DMTC 4 of the LPDMP states that proposals for restaurants and hot food takeaways, drinking establishments, night clubs, amusement centres and other similar uses will only be supported provided that, amongst other things, they would not cause unacceptable disturbance or loss of amenity to nearby properties by reason of noise, odour, emissions, safety and security, refuse, parking or traffic congestion.
23. I consider that the development conflicts with Policy DMTC 4 of the LPDMP and the general underlying principles of the LP21 which includes requirements to demonstrate appropriate management strategies and mitigation measures to reduce negative impacts on the quality of life of local residents. Whilst the council also refer to Policy DMEI 14 of the LPDMP, this policy refers to national air quality objectives for pollutants. However, the council has not given this matter as a reason for issuing the notice. In coming to my conclusion, I have also had regard to Policies DMTC1, DMTC2 and DMTC3 of the LPDMP to which the appellant has referred. These policies relate generally to appropriate uses within the different town centres. The council has not suggested that the appeal development conflicts with these policies, and I would concur.

Other Matters

24. The appellant has provided an appeal decision relating to a case in Ilford where planning permission was sought for a shisha smoking lounge with an ancillary A3 use. The premises is described as being close to residential properties. I also note that an acoustic report was provided that demonstrated that noise levels were considered not to be problematic. Nevertheless, whilst there may be similarities in the setting, I note the venue is described as 'small'. Although each case should be determined on its own merits, in the absence of the full circumstances of the case, I am not able to find any meaningful comparisons between the example appeal decision and the appeal before me.

Conclusion on ground (a) and the deemed planning application

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

The appeal on ground (g)

26. The appeal on ground (g) is that the period specified in the notice falls short of what should be reasonably allowed. The appellant argues that 3 months is too short a period and six months should be given to allow for the sale/disposal of the equipment and paraphernalia to limit the appellant's costs.
27. The notice requires the cessation of the storage and smoking of shisha at the appeal site and to remove the associated equipment and paraphernalia. Whilst the appellant considers it will take up to six months to sell/dispose of the shisha equipment and paraphernalia, the requirement is to only remove them

from the premises. I therefore consider that three months is a reasonable amount of time to comply with the notice.

28. Accordingly, the appeal on ground (g) fails.

S A Hanson

INSPECTOR