



Appeal Decision

by John Braithwaite BSc(Arch) BArch(Hons) RIBA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 19 July 2022

Appeal Ref: APP/T5150/C/19/3240000

11 Kilburn Bridge, London NW6 6HT

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended. The appeal is made by Mr Hashem Beik Mohammadi against an enforcement notice issued by London Borough of Brent.
 - The notice was issued on 18 September 2019.
 - The breach of planning control as alleged in the notice is the material change of use of the premises from a restaurant/bar to a mixed use as restaurant/bar/shisha café.
 - The requirements of the notice are 1. Cease the use of the premises as a shisha café; and 2. Remove all items associated with the shisha use, including the removal of the structure to the rear of the premises, all materials and debris associated with the structure, the chairs and tables contained under the structure, and all shisha pipes, tobacco, charcoal burners and any other items associated with the shisha use, including refuse and other paraphernalia.
 - The period for compliance with the requirements is 3 months.
 - The appeal is proceeding on the grounds set out in section 174(2)(a), (c), (f), (d) of the Town and Country Planning Act 1990 as amended.
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Decision

1. The appeal is dismissed.

Preliminary Matters

2. A site visit by the Inspector was scheduled for 1200 hours on Monday 11 July. The Appellant did not attend the site visit and he did not arrange for anyone else to attend in his place. The visit was therefore aborted as was a previous site visit by another Inspector scheduled for 9 June 2022. As indicated in a letter to the Appellant dated 16 May 2022 the Inspector will therefore make his decision based on the written representations made to him by both main parties.

Reasons

The ground (c) appeal

3. The lawful use of the appeal property, as set out in the alleged breach of planning control, is restaurant/bar. This use falls within Class E of the Town and Country Planning (Use Classes) Order 1987 as amended (the 1987 Order). A structure has been erected in the outdoor area at the rear of the restaurant/bar premises which is in use for shisha smoking. This is not disputed by the Appellant who maintains that the shisha use is ancillary to the lawful use and that, therefore, the material change of use alleged in the enforcement notice has not occurred.
4. For health regulation reasons the smoking of shisha must be undertaken in an outdoor area, unlike the restaurant/bar use which is wholly within the appeal premises. The two uses are mutually exclusive and are physically separate. More importantly, a shisha use does not fall within Class E of the 1987 Order and is

classified as a *sui generis* use. The shisha use is not ancillary to the restaurant/bar use. The material change of use alleged in the enforcement notice has therefore occurred. Planning permission has not been granted for the change of use and it is not permitted development. The ground (c) appeal therefore fails.

The ground (d) appeal

5. The ground (d) appeal relates to the structure that has been erected at the rear of the appeal premises. The Appellant maintains that the structure was erected more than ten years before the date of issue of the enforcement notice. He therefore claims that it is immune from enforcement action if it were to be considered to be operational development, and therefore subject to the four year rule, or if it were to be considered ancillary to the lawful use, and therefore subject to the ten year rule.

6. The outdoor area at the rear of the appeal property may have been occupied by canopies in the past, as evidenced by third parties, but clear and unambiguous aerial photographs submitted by the Council indicate that the current structure was erected sometime between 7 May 2018 and 29 June 2019. The enforcement notice is dated 18 September 2019. The structure was therefore erected less than four years before the date of issue of the notice and therefore fails both the four year and ten year rules. The ground (d) appeal therefore fails.

The ground (a) appeal

7. The main issues are; first, the effect of the shisha use on the amenities of occupants of nearby residential properties; and second, the effect of the erection of the structure on the character and appearance of the area.

The first issue – the amenities of occupants of nearby residential properties

8. Immediately to the west of the structure used for shisha smoking is a two storey residential building on Mallard Close and there are residential properties slightly further away on Brondesbury Villas. Noise nuisance caused by amplified music played within the structure is documented in evidence submitted by the Council. This evidence records music audible within nearby residential properties late into the evening at levels that were considered to be causing noise nuisance. The investigations carried out by the Council's Nuisance Control Team resulted in a Noise Nuisance Abatement Notice being served on the Appellant in January 2019.

9. On 22 March 2019 a Principal Nuisance Control Officer visited residential properties near to the appeal premises and witnessed noise from activities associated with the shisha use causing a statutory nuisance at those properties. This noise nuisance was occurring even after service of the Noise Nuisance Abatement Notice (NNAN) two months previously. The Council's records include 30 complaints against noise emanating from the appeal property by 13 complainants. Seven of the complaints were received before service of the NNAN, 16 were received after service of the NNAN and seven were received after a letter reminding the Appellant of the NNAN was sent on 14 February 2019.

10. The same Principal Nuisance Control Officer visited the appeal premises on 26 April 2019 to take photographs. In his witness statement of the same date, made under the requirements of the Criminal Justice Act 1967 and other legislation, it is stated that "During that visit Mr Mohammadi (the Appellant) advised me that he no longer provides live music for his customers and pointed out that he had removed the speakers".

11. Occupants of the nearest eight residential properties to the appeal premises, 1-8 Mallard Close, were notified of the appeal against issue of the enforcement notice on 14 May 2020. The restaurant/bar at the appeal premises will have been closed from late March 2020 as a result of COVID-19 lockdown measures but will have been open for business before that date. If noise disturbance had continued after the Appellant claimed he no longer provided live music then it is likely, if not certain, that the occupants of dwellings notified of the appeal would have submitted representations against the appeal, citing continuing noise nuisance. No such representations were submitted so it is reasonable to conclude that the Appellant did not provide live music after April 2019.

12. However, the structure virtually fills the outdoor area at the rear of the restaurant/bar and is within a few metres of outdoor amenity areas at the rear of residential properties on Mallard Close. The structure can accommodate about 50-60 people and use of the facility therefore has the potential to cause noise and disturbance at neighbouring residential properties even if music is not being played. This noise and disturbance could continue late into the night if not controlled by imposition of conditions to limit hours of use of the structure. But the lawful restaurant/bar use is open late into the evening and it would not be possible to limit hours of use of the structure without unduly affecting the lawful use.

13. The by-product of a shisha use is smoke, and this smoke can be pungent. The creation of pungent smells by large numbers of customers in such close proximity to residential properties has the potential to cause disturbance at those properties, in addition to that resulting from noise. In this regard, it is necessary to protect the residential amenities of properties rather than the amenities of current residents of those properties. Support for, or lack of objection to, the shisha use of the structure at the appeal premises by owners of local businesses is acknowledged but these businesses are not open at times when the shisha use is likely to cause disturbance.

14. Continued use of the structure at the rear of the restaurant/bar for shisha smoking has the potential to cause disturbance, through noise and smells, at nearby residential properties on Mallard Close, and conditions could not be imposed to adequately control this disturbance. The shisha use of the structure thus conflicts with policy DMP1 of Brent's Development Management Policies document.

The second issue – the character and appearance of the area

15. To the south-east of the structure is a wooded embankment to a railway line, to the south-west is the gable end of a residential building on Mallard Close and a fence and vegetation on the boundary to a rear amenity area, and to the north-west is a high fence. The structure is well screened and has no visual impact on any public spaces. The structure does not therefore have a significant adverse effect on the character and appearance of the area and does not, in this regard, conflict with policy DMP1 of Brent's Development Management Policies document.

Conclusion

16. The structure that has been erected for the shisha use does not harm the character and appearance of the area. However, and of overriding concern, is the potential harm that could be caused by the shisha use within the structure on the amenities of residents of nearby properties on Mallard Close. All matters mentioned in support of the appeal have been taken into account but they do not,

either individually or collectively, outweigh the overall conclusion that planning permission must be withheld. The ground (a) appeal thus fails.

The ground (f) appeal

17. The enforcement notice requires the cessation of the shisha use and the removal of all that supports and is associated with, including the structure, the unlawful use. These requirements are the minimum that is required to remedy the breach of planning control. The enforcement notice does not, as a matter of fact, require the cessation of the lawful restaurant/bar use. The requirements of the notice are not excessive and the ground (f) appeal therefore fails.

John Braithwaite

Inspector

