



Appeal Decision

Hearing Held on 10 January 2023

Site visit made on 10 January 2023

by Andrew Walker MSc BSc(Hons) BA(Hons) BA PgDip MCIEH CEnvH JP

an Inspector appointed by the Secretary of State

Decision date: 6 February 2023

Appeal Ref: APP/A5270/C/21/3285033

129A Broadway, West Ealing, London W13 9BE

- The appeal was made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
 - The appeal was made by Mr Medhi Resaee (Oud Lounge Limited) against an enforcement notice issued by the Council of the London Borough of Ealing.
 - The enforcement notice, numbered 21EN0322(1), was issued on 16 September 2021.
 - The breach of planning control as alleged in the notice is without planning permission, the material change of use of the land to use as a shisha lounge.
 - The requirements of the notice are to:
 1. Cease the use of the premises as a shisha lounge;
 2. Remove from the land all items that relate to the unauthorised use, including the seating, tables, shisha pipes, heaters, shisha tobacco, planters, televisions, coffee machines, juicing machines and the counter/service areas;
 3. Remove the kitchen facilities, worktops and related drainage connections from the premises; and
 4. Remove all resultant debris.
 - The period for compliance with the requirements is 3 months.
 - The appeal is proceeding on the grounds set out in section 174(2) (a) (b) (f) of the Town and Country Planning Act 1990 as amended. Since an appeal on ground (a) has been made, the application for planning permission deemed to have been made under section 177(5) of the Act as amended (the Act) falls to be considered.
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Decision

1. 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.

Costs Applications

2. Costs applications were made at the hearing by the main parties against each-other. These are the subject of separate Decisions.

Procedural Matter

3. At the hearing, the appellant confirmed that his correct full name is Mr Mehdi Rezaee Nejad.

Ground (b)

4. For an appeal to succeed under this ground, the burden of proof is on the appellant to satisfy me on the balance of probabilities that matters stated in the notice have not occurred as a matter of fact.

5. Therefore, in the appeal before me, the appellant must demonstrate to the required standard of proof that the use of the premises had not materially changed to that of a shisha lounge at any time prior to the issue of the notice on 16 September 2021.
6. Even without the countering evidence of the Council, the appellant has not met the required standard of proof in his own submissions. The sales accounts submitted – purporting to evidence that shisha sales were ancillary to the sale of food and drink – are marked ‘Show data from 19 Nov 2021 – 19 Dec 2021’. They clearly do not relate to any period before 16 September 2021, and therefore I consider them to have no evidential value towards demonstrating the use of the land prior to the issue of the notice. Further, I am satisfied from the evidence of the Council food safety officers who visited the premises on 4 September 2021 (and who observed a number of people smoking shisha without any food being consumed) that the menu submitted by the appellant with the appeal – showing various food options – was not in place at that time. Instead, the officers left the premises following their enquiries with a different menu (showing shisha and drinks only). It seems to me that it is part of the specialist role of these officers to investigate whether the sale of food was being undertaken, and I find it very unlikely that they allegedly ignored the ‘QR’ menu of food items that the appellant now says that he pointed out to them on that visit. That unlikely assertion is further undermined by the appellant’s own business registration application to the Council on 6 May 2021, explicitly stating that the business would not serve meals. The registration was never updated, and I note that the appellant made declarations on the form that the information was correct and that he understood his obligation to notify the Council of any significant changes to the business activity within 28 days.
7. The Council has also adduced evidence which further makes the appellant’s version of events less likely. In particular, I place significant weight on the evidence of the planning officer who visited the site during renovation on 7 December 2020 and recorded in notes that the appellant told him (while pointing out the lack of a kitchen) that the premises were to become a shisha lounge serving shisha and drinks but no hot food. Further, and reinforcing all of the Council’s evidence that the premises were in use as a shisha lounge, the licence agreement applying from 2 December 2020 states that the landlord licences the licensee to “enter upon and occupy the property for the purpose of a Shisha Lounge in connection with the running of his business”.
8. Therefore, taking all of the evidence together, I am not satisfied on the balance of probabilities that the matters stated in the notice have not occurred. Accordingly the ground (b) appeal does not succeed.

Ground (a) and the deemed planning application (DPA)

Procedural Matter

9. While I understand the thrust of the Council’s legal arguments in its opening statement about the use of the site after the issue of the notice (albeit without explicit or detailed reference to authorities), my task is to consider whether planning permission ought to be granted for the breach of planning control constituted by the matters stated in the notice. That is the material change of use of the land to use as a shisha lounge (from an unspecified previous use).

Main Issues

10. The main issues in the ground (a) appeal are the effect of the development on:

- the living conditions of neighbouring residential occupiers; and
- highway safety.

Reasons

Living conditions of neighbours

11. Notwithstanding the 'fallback' position available to the appellant by reason of a recent planning permission¹ authorising a single storey front extension and change of use to a café (Use Class E(b)), it is an intrinsic characteristic of use as a shisha lounge that the structure be significantly more open than the 'fallback' scheme. Under smokefree legislation, shisha and other smoking areas must not be 'substantially enclosed'. To achieve this, at least 50% of the wall areas must be open.
12. The shisha lounge is intimately related to the residential flat under which it is located, which is separately tenanted and not related to the shisha operation. In my judgement, and notwithstanding the neighbour consultation said to have been carried out by the appellant², the current and future occupiers of that flat are likely to suffer significant harms to their living conditions from the adverse impacts of noise and shisha odours emanating from the very close and necessarily open structure of the appeal premises. I have not seen sufficient details of mitigation (whether by ventilation system, the 'air curtains' mentioned³ or other) to satisfactorily assuage these concerns, and doubt in these circumstances that it would be effective given the required penetrability of the structure. I do not accept that shisha odours, as argued by the appellant, would be masked at this near receptor by any other odours emitted from any other commercial premises. Similar harm would be caused, for the same reasons and which are reinforced by complaints, to the living conditions of neighbours living close to the appeal premises across the road/junction on Coldershaw Road. These houses, separated by a greater distance from other leisure and hospitality activities on Broadway, would be subject to the above unacceptable adverse impacts due to the extent to which the appeal premises (albeit nominally located in Broadway) extends towards the residential area.
13. Such impacts would be particularly pronounced in the evening and late night⁴, when residents would largely expect to rest, although due to the factors I have described there are no conditions I could reasonably impose (such as those restricting opening hours) which could make the development acceptable.
14. For all of the above reasons, the appeal development would be in conflict with Policy 7A of the Ealing Development Management Development Plan Document (2013) (DPD), Policy D3 of the London Plan (2021) (LP) and Policy 1.1 of Ealing's Development Strategy 2026 Development Plan Document (2012) (CS).

¹ 217207FUL; 18 May 2022. Condition 5 prohibits the sale or consumption of shisha.

² The appellant told me as a matter of fact at the hearing that he had written online reviews of the premises himself which had purported to have been from customers. Accordingly, I give very limited weight to the 'statements' he has submitted of neighbours supporting the development who did not attend the hearing. Further, I have seen evidence from nearby residents opposed to the development confirming they were not so consulted.

³ Said - without detail or supporting evidence - to "...nullify the noise of conversation and direct smoke mainly through the ventilation system." (Para 59 of the Appellant's Final Comments and mentioned at the hearing).

⁴ The appellant proposed a condition which would allow the premises to operate until midnight 7 days per week.

Highway safety

15. The officer report in recommending approval of the 'fallback' development as a café (permitted to operate to midnight 7 days per week) said:

The applicant notes within their Design and Access Statement that the site has a PTAL Score of 4, which suggests a high degree of public transport accessibility, likely owing to its proximity to high frequency bus services on Uxbridge Road/Broadway and the West Ealing Crossrail Station.

It concluded that the café, operating late into the evening as in the appeal development, would not generate a significant amount of private vehicle trips.

16. I have no particular reason to disagree with the Council's conclusion, nor to find that impact would be materially different in respect to the appeal development. Therefore, taking the approved 'fallback' scheme into account, I do not find that the appeal development would cause an unacceptable impact on highway safety through increased parking stress (nor would that issue cause detriment to living conditions). Accordingly I find no conflict with Policies T1, T2, T4 and T6 of the LP or Policy 3.2 of the CS.

Other Matters

17. The appellant suggests that the development makes effective use of the previously developed land of the earlier garage, and creates employment in a highly sustainable retail location which fits in with the large local retail offer. However these benefits are tempered by the relatively small level of employment that the business could provide and the deadening effect upon the area of commercial premises that would be closed for the earlier part of the day. These considerations together do not outweigh the harm caused by the development upon the living conditions of neighbours and the resultant conflict with the development plan.

Conclusion on ground (a) and the DPA

18. The appeal development does not comply with the development plan as a whole, and there are no other considerations which outweigh that finding.
19. Accordingly, ground (a) fails and I will not grant planning permission.

Ground (f)

20. For an appeal to be successful under this ground, I must be satisfied that the requirements of the notice are excessive in achieving its purpose.
21. It is clear to me from the way the notice has been drafted that its purpose is to remedy the breach of planning control. To achieve that purpose, it properly requires the discontinuation of use as an unauthorised shisha lounge and the removal of works which facilitate that use. Those requirements are not excessive.
22. Further, I am satisfied from the evidence including photographs taken by Council officers that is both lawful and appropriate to require removal of the items and facilities as specified in steps 2 and 3 of the requirements since they were part and parcel of the material change of use of the premises to a shisha lounge. This would not of course prevent the implementation of the 'fallback' scheme under the approval that has been obtained.

23. The appellant says that lesser steps would be sufficient to remedy the breach, such as controls on opening hours and what is offered for consumption. However, as I have explained in dealing with ground (a), there are no conditions I could reasonably impose in granting planning permission for the matter stated in the notice which would cause it to be acceptable.
24. For these reasons, the notice requirements are not excessive and the ground (f) appeal fails.

Conclusion

25. 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.

Andrew Walker

INSPECTOR

APPEARANCES

FOR THE APPELLANT: Mr Mehdi Rezaee Nejad (Appellant)

FOR THE LOCAL PLANNING AUTHORITY: Mr Roderick Morton (Solicitor, Ivy Legal);
Ms Ingrid Smith (Ivy Legal)

INTERESTED PERSONS: Mr Will Walden (Neighbour)

DOCUMENTS submitted at the hearing

- 1 Email from Nicholas Kingsley-Smith to Council (4 January 2023)
- 2 Council opening statement
- 3 Council costs application
- 4 Content of email from Joel Holland Turner (Senior Planning Officer) to 'Elie' (no date visible)