



Appeal Decision

Site visit made on 10 November 2022

by Thomas Shields MA DipURP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 23 March 2023

Appeal Ref: APP/W5780/C/21/3275301
492 High Road, Ilford, IG1 1UE

- 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 Act").
- The appeal is made by Mr Israr Mustafa (Paprika Ventures Limited) against an enforcement notice issued by the Council of the London Borough of Redbridge.
- The enforcement notice was issued on 19 April 2021.
- The breach of planning control alleged in the notice is without planning permission, the change of use of the property from restaurant (Class E(b)) to a shisha café and restaurant (*sui generis*).
- The requirements of the enforcement notice are:
 - (i) Cease the unauthorised use of the land as a shisha cafe;
 - (ii) Remove all equipment facilitating the unauthorised use, including shisha pipes, tobacco and the signage that relates to the shisha cafe from the land;
 - (iii) Remove all resulting materials, rubble and debris in compliance with steps (i) and (ii).
- 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) and (f) of the Act. 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.

Summary of Decision: The appeal is allowed, the enforcement notice is quashed and planning permission is granted in the terms set out below in the Formal Decision.

Appeal site, background and preliminary matters

1. Since 2017 two planning permissions have been granted. The first permitting the change of use of the premises at ground floor level from an industrial use to a restaurant, the second to allow the former rear workshop/open area to be used for the restaurant use. Hence, the whole of the appeal site at No.492 at ground floor level benefits from restaurant use.
2. A change of use from one use to another use does not necessarily constitute development, unless it is a "material" one, as set out at section 55 of the Act. It is clear from the Council's evidence¹ they consider the change of use to be a "material" one, being a mixed use of shisha café and restaurant, and the notice allegation has been interpreted the same way by the appellant.
3. As such, no injustice would arise from my correcting the description of the alleged breach accordingly to include the words "material" and "mixed use" and at ground floor level only, so that the development is properly described. I will therefore do so using powers available to me under s176(1) of the Act.

¹ Council's Statement of Case, para,4.18

4. The red line drawn on the enforcement notice plan does not extend to include the whole of the appeal site occupied by the mixed use. It is more accurately shown on the appellant's submitted location plan, and which accords with what I saw during my visit. No injustice would arise by my correcting the notice by replacing the existing plan with one which shows the whole of the appeal site correctly drawn. I will therefore do so using powers available to me under s176(1) of the Act.

Appeal on ground (c)

5. The appeal on ground (c) argues that the matters alleged in the enforcement notice (as corrected) do not constitute a breach of planning control. In this legal ground of appeal the onus is on the appellant to establish his case on the balance of probability.
6. A breach of planning control is defined at s 171A(1)(a) of the Act to include the carrying out of "development" without the required planning permission, and "development" includes the making of a material change of use. The issue in this case therefore is whether the introduction of the shisha activity has resulted in a material change in the character of the use of the land from the lawful use as a restaurant.
7. As I saw during my visit to the premises, and as described in the parties' submissions, the shisha activity takes place in the rear area of the appeal site, which has a retractable roof.
8. The essential features of shisha smoking are that a brazier of charcoal produces smoke in the shisha pipe from tobacco leaves flavoured with various fruits, flavourings and molasses. The smoke is water-filtered by being passed and bubbled through the pipe via the smoking tube, resulting in it producing a taste in the smoker's mouth.
9. Contrary to the appellant's view, I consider there are some significant differences between shisha smoking and cigarette smoking at the appeal site. Cigarette smokers would typically take their own cigarettes to a restaurant, and no specialist equipment stored and provided by the establishment is required for smoking cigarettes. No preparation by staff is required. Also, cigarette smoking would not normally be advertised, promoted or regarded as a specialist activity with a separate charge being made. In contrast, the brazier, shisha pipes and shisha tobacco are stored on the premises and would need to be prepared for each customer, and the shisha smoking facility is advertised and promoted as a specific product for which a charge is made. As such, I consider smoking shisha by customers on the premises is a significantly different one in scale and nature to customers who might smoke cigarettes during or after a meal.
10. Smoking shisha, as a physical activity, is not functionally related to eating and drinking. Having regard to the physical size of the shisha area and its capacity for hosting shisha customers, together with the nature of the activity I have previously described, I conclude that the introduction of its use results in a material change of use to the mixed use as set out in the (corrected) notice. It thereby constitutes the carrying out of development without planning permission and hence is a breach of planning control. Consequently, the appeal on ground (c) fails.

11. Although the shisha activity had stopped by the time the notice was issued, there is no dispute that it had occurred. Consequently, had an appeal on ground (b) been lodged it would have failed.

Appeal on ground (a)/deemed planning application

12. The ground of appeal is that planning permission ought to be granted for the alleged breach of planning control as set out in the notice.

Main Issues

13. The main issues are whether the mixed use as a shisha café and restaurant is in a suitable location, and the effect of the use upon the living conditions of local residents with particular regard to noise and disturbance.

Reasons

14. Policy LP11, part 2(a) and (d), of the Redbridge Local Plan (2018) seeks to resist the proliferation and overconcentration of shisha bars in the borough by requiring them to be located within the borough's town centres and resisting proposals that have a significant impact on residential amenity including as a result of noise.
15. On a full reading of Policy LP11 it seems to me, as regard to location, that its purpose is to restrict proposals for new separate units of shisha bars to within defined town centres (Metropolitan, District and Local). However, the deemed application for planning permission before me is not for a shisha bar use as a stand-alone unit or use, it is for a mixed use as shisha café and restaurant. Consequently, I find no material conflict with Policy LP11 in terms of the location of the appeal site.
16. Given that shisha can only lawfully take place in the rear open area it would in terms of its floorspace be a very small element of the mixed use relative to the restaurant dining area, which would remain as the predominant element. The appellant states that some customers might have shisha after they have finished their meals in the main restaurant dining room, or alternatively have their meals while in the shisha area. I saw for myself that would be possible due to the internal layout of the premises allowing such customer movements. There is no evidence before me of two separate planning units having been formed or proposed, and the deemed application is for the mixed use of the whole of the ground floor.
17. The Council argue that the shisha area can be accessed separately from the alleyway to the side of the building and so would lead to an increase in footfall, negatively impacting on neighbouring amenity. However, since the use of the premises would be for the mixed use, I consider it unlikely that there would be any significant increase in footfall in the alleyway over and above any footfall resulting from the current permitted use. Moreover, the Council has not referred to any complaints of noise in the alleyway from neighbours while the shisha use was operating.
18. Additionally, I see no reason why the rear open area would result in any greater level of noise and disturbance from shisha smoking than would arise from its permitted use for alfresco dining. Furthermore, the Council does not dispute the findings of the appellant's noise assessment submitted in support of the appeal.

19. Taking account of the existing lawful use as a restaurant, with an openable rear area, and having regard to other evidence before me, I find the use to be in a suitable location, and which would not result in any significant harm to the living conditions of nearby occupiers by way of noise and disturbance. As such, there would be no material conflict with the requirements of Policy LP11.

Conditions

20. The Council were invited to submit any planning conditions they considered might be necessary to impose if the appeal were successful and planning permission granted, but they declined to do so. In this regard I am aware that controls in terms of hours of opening and noise emissions exist under licensing and other legislation. Hence, given the Council's position on this matter, I will not impose any planning conditions.

Conclusion

21. I conclude overall that the mixed use operates in a suitable location and does not result in any significant harm to the living conditions of local residents with regard to noise and disturbance. It thus accords with the requirements of Policy LP11 of the Redbridge Local Plan (2018). As such, the appeal on ground (a)/deemed application succeeds and the notice will be quashed. In these circumstances the appeal on ground (f) does not fall to be considered.

FORMAL DECISION

22. It is directed that the enforcement notice be corrected by:
- in the header title deleting "Operational Development" and substituting instead the words "Material Change of Use";
 - in Section 2 after the word "at" inserting the words "ground floor level";
 - in Section 3 inserting the word "material" in front of the word "change";
 - in Section 3 inserting the words "mixed use" in front of the word "shisha"; and
 - removing the plan attached to the notice and replacing it with the revised plan attached in the annex to this Decision.
23. Subject to the corrections the appeal is allowed, the enforcement notice is quashed and planning permission is granted on the application deemed to have been made under section 177(5) of the Act for the development already carried out, namely the material change of use to a mixed use as a shisha café and restaurant as shown on the plan attached to the notice.

Thomas Shields

INSPECTOR

Annex

Enforcement Notice Plan

