



Appeal Decision

Site visit made on 2 March 2023

by Elaine Gray MA(Hons) MSc IHBC

an Inspector appointed by the Secretary of State

Decision date: 28 June 2023

Appeal Ref: APP/A5270/C/21/3287885

11 Royal Parade, Ealing, London W5 1ET

- The appeal is made under section 174 of the Town and Country Planning Act 1990 (TCPA90) as amended by the Planning and Compensation Act 1991.
 - The appeal is made by Mr Thavatheva Prashanth against an enforcement notice issued by the London Borough of Ealing Council.
 - The enforcement notice is dated 27 October 2021.
 - 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 restaurant, take away and shisha lounge (sui generis).
 - The requirements of the notice are: a) Cease the restaurant use element. b) Cease the takeaway use element. c) Cease the shisha lounge use element. d) Demolish in its entirety the rear extension; the area shown hatched on the plan attached to the notice. e) Remove all materials, furniture, fixtures, fittings, equipment and paraphernalia brought onto and attached to the property, which facilitate the unauthorised use. f) Remove all resultant debris.
 - The period for compliance with the requirements is three months.
 - The appeal is proceeding on the grounds set out in section 174(2)(a), (b), (c), (d), (f) and (g) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have been paid within the specified period, the application for planning permission deemed to have been made under section 177(5) of the Act as amended falls to be considered.
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Decision

1. It is directed that the enforcement notice be amended by:
 - The deletion from the requirements paragraph of the text 'a) Cease the restaurant use element.'; and
 - The deletion from the requirements paragraph of the text 'd) Demolish in its entirety the rear extension; the area shown hatched on the plan attached to the notice.', and its substitution with the text: 'd) Demolish the part of the rear extension shown hatched on the attached plan.'
2. The appeal is dismissed, the deemed planning application is refused, and the enforcement notice, as amended, is upheld.

Preliminary Matters

3. The appellant questions the accuracy of the enforcement notice plan with regard to the inclusion of the rear part of 10 Royal Parade, which adjoins the appeal site, within the bold black line. To understand the extent of the appeal site, I have referred to the documents that accompanied the planning

application, ref: 181526FUL (the 2018 application), for the rear covered dining area extension at the appeal site.

4. On my visit I saw that, moving through from the front section of the building, there is a narrow cooking area with toilets and a store to the left hand side. This layout corresponds with the existing site plan on Drawing number P-01 Rev B from the 2018 application. On the other side of the cooking area is an area marked 'Property No 10 Use' on the existing site plan.
5. From this middle section, one moves further back into the rear extension, which spans the rear plot of No 11 and what was the rear plot of No 10. At the very back of the plot, the 2018 plan shows a parking area for three cars and some bins. This area appears to correspond directly with the hatched area shown on the EN plan.
6. I note also that the red line boundary for the 2018 application, on the same drawing, includes an area almost identical to the black line on the notice plan. From the evidence before me, I am satisfied that the layout of the appeal site corresponds to the plans before me, in other words, both the notice plan and the 2018 plan that was submitted under the address '11 Royal Parade'. This evidence also confirms the extent of the planning unit that is the subject of the appeal, which is the starting point when considering an alleged material change of use.
7. The appellant is correct to say that there is no 'X' marked on the plan, as referred to in paragraph 2 of the notice. However, the notice correctly states the address of the appeal site, and the plan indicates the precise boundaries of the land to which it relates. From the appellant's representations to the appeal, it seems to me that he has adequately understood the extent of the enforcement notice. As a result, I am satisfied that no injustice has arisen as a result of the incorrect wording of paragraph 2. However, I agree to the Council's new wording for requirement (d), which makes the notice clearer.
8. The appeal was made on grounds (a), (b), (c), (f) and (g). In his statement of case, the appellant includes a 'hidden ground' (d), in relation to the mixed restaurant/shisha use. Although no application was made to add a ground (d) appeal in respect of these elements, I have considered it as such.

The appeal on ground (b)

9. The enforcement notice alleges a new mixed use of the appeal site including takeaway, restaurant and shisha lounge. Ground (b) is that the breach of control alleged in the enforcement notice has not occurred as a matter of fact. The onus of proof lies on the appellant.
10. From the evidence before me, and my observations on site, there appears to be little doubt that the restaurant use has occurred. With regard to the shisha use, the appellant confirms throughout his evidence that shisha smoking is part of the offer at the premises. The main parties disagree over the extent of that use, with the appellant stating that customers may only smoke shisha with a meal in the covered area at the back. Nonetheless, it is apparent that shisha smoking has occurred at the appeal site as a matter of fact.
11. In terms of the alleged takeaway use, the appellant argues that this element of the allegation has not occurred at No 11. He explains that he has a legal interest in Nos 9 and 10 Royal Parade, which adjoin the appeal site. He states

that No 10 has planning permission for a mixed use comprising a restaurant and takeaway, and that a takeaway service has been operating from No 10 only.

12. The appellant submits a sworn statement, dated 14 January 2022, in which he confirms that Nos 10 and 11 were shut for some months during the coronavirus pandemic lockdown. During these times, a takeaway service operated from No 10 in accordance with government guidelines. He states that No 11 is used primarily as a restaurant, with shisha smoking allowed in the rear section along with meals. He goes on to say that no takeaway service is provided from the premises at No 11.
13. A sworn statement is to be given significant weight, not least as it carries penalties for having knowingly provided false information. However, the appellant's comments on the takeaway service in this statement are couched in the present tense, in other words, reflecting the situation at the time of writing. Crucially, his sworn evidence stops short of saying that no takeaway service has ever operated from No 11.
14. Conversely, in support of their case, the Council produce an Instagram page showing that Just Eat and Uber Eats services are available at Tiger Bay. Similarly, the 'Lunch Offer' page shows that food is available via Just Eat, Uber Eats, and also Deliveroo. The page from Uber Eats specifies that their service is available from Tiger Bay Lounge at No 11 from 12 noon until 1am every day.
15. Within the Council's final comments, a Google page is provided referring to a 'wide selection of Lebanese food to have delivered to your door' from the menu at Tiger Bay. A Just Eat page gives prices for home delivery or collection, clearly and prominently stating the address of the service as '11 Royal Parade'.
16. The appellant's evidence needs to be sufficiently precise and unambiguous to demonstrate that, on balance of probabilities, the takeaway service alleged in the EN has not operated at or from No 11. Although he has had the opportunity to review the evidence submitted by the Council in their final comments, he has not made any comment on the Google or Just Eat pages referenced above.
17. Drawing these threads together, the weight of evidence points to all three elements of the alleged mixed use having occurred at the appeal site. The appeal on ground (b) therefore fails.

The appeal on ground (c)

18. Ground (c) is that the matters alleged in the notice do not constitute a breach of planning control. The appellant's evidence relates primarily to the restaurant and shisha uses, so I have focused on those elements in my consideration. This is a legal ground which relates only to the facts of the case and the relevant legal context. Again, the onus of proof lies on the appellant.

The restaurant use

19. In 2006, conditional permission, ref: P/2006/0264, was granted for the change of use of No 11 to a restaurant. This use appears to have been accepted as lawful in 2012 when permission for a mixed use comprising restaurant and shisha at No 11 was applied for and refused. The description of the development was 'Change of use of Restaurant (use class A3) to

Restaurant/Shisha Bar (use class Sui Generis) and retention of a single storey rear extension.’ This application followed an enforcement investigation that was opened in May 2012.

20. In 2018, planning permission, ref: 181526FUL, was granted for the covered rear dining area. A successful appeal, ref: APP/A5270/W/18/3205160, was brought against one of the imposed conditions. I note the Inspector’s statement, in that appeal decision, that the permission granted in 2006 was implemented. He does not elaborate on the reasons behind this statement, and there is no evidence that the lawfulness of the A3 use was brought into question at that time.
21. Despite the lengthy and involved planning history of the site, the Council now argue that, on closer investigation, the restaurant use is not lawful after all. Firstly, they argue that, in their words, it ‘seems’ that the 2006 permission was not implemented because the Baba Gurgur restaurant occupied Nos 10 and 11, rather than just No 11, which was the subject of the permission. However, the evidence indicates the opening of a restaurant at No 11 by 2008, and so it fell within the three year commencement period.
22. The Council make no argument in terms of lack of compliance with the conditions or with the approved plans of the 2006 permission. In other words, the evidence points, on balance of probability, to the commencement of an A3 use at the appeal site at No 11. Whether or not the A3 use at No 10 was lawful is beyond the scope of this appeal, but in my view, it would not in itself extinguish a lawfully implemented A3 use at No 11.
23. On the other hand, the Council argue that the subsequent unauthorised changes of use at No 11 have had the effect of extinguishing the 2006 permission, leaving the premises with no existing use rights.
24. It was held in *Panton and Farmer v SSETR & Vale of White Horse DC* [1999] JPL 461 that lawful use rights could only be lost by: evidence of abandonment; the formation of a new planning unit; or by being superseded by a further change of use.
25. The Council state that although no subsequent use has become lawful, subsequent material changes of use may extinguish a lawful change of use authorised by planning permission. However, the courts have held that the service of an enforcement notice would allow a landowner to revert to the previous lawful use through the provisions of s57(4).
26. I am mindful that the onus of proof lies on the appellant in a ground (c) appeal. His evidence is that planning permission for a restaurant use was obtained in 2006 and was implemented. Over the years, the Council have had every opportunity to investigate the lawfulness of this use, but have not questioned it until well over a decade later. They have produced little credible evidence to contradict the appellant’s case or make it less than probable. I am therefore satisfied that it is more likely than not that the restaurant use at No 11 is lawful. I have directed that the enforcement notice be amended accordingly.

The shisha lounge use

27. The appellant essentially takes a two-pronged approach to the status of the shisha use at No 11. On the one hand, he argues that the shisha use is so

- limited that it is ancillary to the restaurant use, and so does not amount to a material change of use of the appeal site.
28. However, he contradicts this stance by stating that the 2012 planning application was retrospective as the mixed use had already commenced. On that basis, he claims that the mixed use has now gained immunity from enforcement through the passage of time. I have considered this argument further under ground (d) below.
29. Returning then to the question of whether shisha smoking is ancillary, the appellant says that, in effect, it is no different to the smoking of cigarettes. He states that the restaurant use includes an approved smoking area at the back for which permission was granted in 2018. This area provides over 60 covers, of which only five or six are available for shisha smoking.
30. The decision notice for planning application, ref: 181526FUL, permits a single storey rear extension with a retractable roof. Condition 3 of that permission limited the use of the sheltered dining area to activities involving the consumption of food and/or drink. This condition was imposed in the interests of safeguarding the living conditions of surrounding residents.
31. The imposition of Condition 3 was appealed against, and that appeal was allowed. This was on the basis that Condition 4, which related to sound mitigation, served the same purpose as Condition 3, rendering it unnecessary. I note also the Inspector's further comments that the size of the proposed shelter went beyond what would be needed for the minor, incidental activity of smoking. That being the case, any use of the extension as a shisha bar would amount to a material change of use.
32. Cigarette and shisha smoking may both involve the inhaling of substances into one's lungs, but they are not the same activity for planning purposes due to some key differences. When a person smokes cigarettes, they usually purchase those cigarettes elsewhere and bring them to a restaurant premises as an activity incidental to eating and drinking.
33. By contrast, the consumption of shisha is advertised as a leisure activity that may be purchased alongside eating and drinking. The restaurant provides the shisha equipment and tobacco to customers for a charge. From that point of view, the activities are fundamentally different.
34. The Council have reproduced a significant number of pages from the online information and advertising for the site. This evidence shows that shisha is advertised as an integral element of the customer experience at the appeal site. It is not incidental to the offer at the business, in the way that cigarette smoking would be.
35. On the evidence before me, I am satisfied that a mixed use amounting to a material change of use has occurred at the appeal site.
36. The appeal on ground (c) therefore fails.

The appeal on ground (d)

37. Ground (d) is that, at the time the enforcement notice was issued, it was too late to take enforcement action against the matters stated in the notice. The main issue is whether or not the alleged material change of use has, on the

balance of probability, occurred for a continuous period of ten years or more prior to the date of issue of the enforcement notice. The material date is therefore 10 May 2012. The onus of proof lies on the appellant.

38. In May 2012, the Council visited the premises following complaints about a shisha lounge. They found a sign on the back gate advertising shisha. As noted above, an application was made and refused in 2012 for the change of use to a restaurant and shisha bar. The Council visited again in July 2013 and noted a large number of people in the shisha lounge.
39. It therefore appears that a shisha lounge use commenced in some capacity around May 2012. However, there is little documentation within the appellant's evidence to demonstrate that this use continued without a material break for ten years. It would be expected, for example, that he could provide evidence of advertising of the mixed use, statements or feedback from customers, or receipts for the consumable items needed for shisha smoking. Crucially, although the appellant has provided a sworn statement to the appeal, at no point does this document refer to a level of shisha use at No 11 that would amount to a mixed sui generis use spanning ten or more years.
40. I therefore conclude that the appeal under ground (d) is not supported by sufficient evidence from the appellant to demonstrate that, on the balance of probability, the land in question has been in continuous use as a restaurant and shisha smoking premises for a period of 10 years or more. It follows that, at the time the enforcement notice was issued, it was not too late for the Council to take enforcement action against the matters alleged within the notice.
41. As a result, the appeal under ground (d) must fail.

Ground (a) and the deemed planning application

Preliminary Matters

42. The appellant contends that as the extension at the very back of the plot is not specifically mentioned in the allegation, it should not form part of the development that is attacked. The Council state that it was constructed as part of the material change of use that is the subject of the enforcement notice, and facilitates it. On their visit of 30 September 2021, officers reported that this area appeared to be the main shisha coal preparation area, which suggests it is part and parcel of that use.
43. It was held in *Murfitt v SSE & East Cambridgeshire DC* [1980] JPL 598 that where an enforcement notice is issued in respect of a material change of use, and works were carried out to facilitate the new use, the notice may require that the works are removed in order that the site is restored to its previous condition and the breach is thereby remedied.
44. The appellant confirms that the hatched extension was built after the 2018 extension in a separate building operation. I note that he refers to it as a significant operational development, indicating a need for planning permission. He states that it provides a cover for refuse bin stores, which was needed to stop others from using his bins. He also refers to 'other operational facilities' which include 'storage for the restaurant use'. This explanation is unsatisfactorily vague, and the appellant does not dispute the Council's statement that the area was being used for shisha preparation.

45. In the absence of compelling evidence to the contrary, I find that the rear extension falls within the development attacked by the notice, for which permission is sought under ground (a).

Main Issues

46. The main issues are the effect of the development on:

- the living conditions of neighbouring occupants, with particular regard to noise and disturbance, and odours; and
- parking and highway safety in the area, including the provision of cycle parking.

Reasons

Living conditions

47. The appeal site is located within a parade of commercial premises, with residential accommodation on the floors above. Policy 7A of the Ealing Development Management Development Plan Document (DPD) seeks to protect the amenity of surrounding land users. To that end, developments that will cause emissions of any sort must take all reasonable steps to ameliorate these emissions, and must provide all necessary evidence of mitigation measures that is requested by the local planning authority.
48. The Council's concern relates firstly to odours arising from the shisha lounge element of the development. They say that significant quantities of charcoal are burned, and significant quantities of flavoured tobacco are consumed by customers. In order to comply with indoor smoking legislation, the dining area needs to remain open and ventilated. This has the effect that odours from shisha smoking and the burning charcoal may escape and be transmitted to the surrounding residences.
49. For the reasons outlined above, the inclusion of shisha smoking within the leisure offer of the premises at No 11 comprises a material change of use to a new sui generis use. That being the case, DPD Policy 7A requires the appellant to give evidence of mitigation measures to safeguard surrounding occupiers from the fumes and odours that arise from the new elements of the mixed use.
50. The Council also raise concerns over the noise of group conversations carrying, and disturbance from amplified music and the streaming of TV. They also refer to disturbance from comings and goings at the appeal site, including from those queuing to enter the premises, and those leaving under the influence of alcohol.
51. The Council's noise team have objected on grounds relating specifically to the operation of the premises at No 11, and the difficulty of containing noise within the open sided rear extension. I have also taken into account the detailed descriptions of the problems experienced that appear to relate directly to the appeal site.
52. In light of these concerns, DPD Policy 7A requires the appellant to show how any noise and disturbance arising from the operation of the new mixed use development are to be addressed. He states that sound insulation measures have been provided in line with condition 4 of the 2018 permission.

Nonetheless, the new development that is the subject of the appeal requires these matters to be considered afresh.

53. As the appellant has made a deemed planning application for a material change of use of the site, the onus is on him to provide the necessary information and evidence to show that the amenity of surrounding users will not be unacceptably harmed. However, he has provided little such evidence, and so I conclude that it has not satisfactorily demonstrated that the development complies with DPD Policy 7A.
54. It would be inappropriate to leave this matter to condition as, given the lack of detailed information, I cannot be certain that such a condition would meet the test of enforceability. The licencing regime is separate to the planning regime, and the existence of a licence does not remove the need for the development to meet the relevant planning policy requirements.

Cycle parking

55. Policy T5 of the London Plan (LP) indicates that developments should provide secure, integrated, convenient and accessible cycle parking facilities in line with minimum standards set out in Table 10.2. For sui generis developments, the standard should equate to the most relevant standard. In this case, the Council cite the requirement of 1 space per 175sqm (long stay) and 1 space per 40sqm (short stay).
56. The appeal site has a PTAL of 4, indicating good accessibility to public transport. It is immediately adjacent to the Hangar Lane tube station. However, although parking in the immediate area is limited, the Council report that many journeys are made to the site by car.
57. The 2018 permission allowed for some parking spaces at the back of the site. However, these have now been removed and replaced with the new enclosure at the very rear of the site. The loss of these spaces is contrary to LP Policy T2, insofar as it seeks to reduce car dominance. As it stands, there is no provision for cycle parking at the appeal site in connection with the new development. This is contrary to the requirements of LP Policy T5.
58. The appellant argues that the provision of parking is not critical due to the high accessibility of the site. There is no dispute that the appeal site benefits from good accessibility, but this factor in itself does not justify the setting aside of the LP requirements.
59. He goes on to say that LP policies are primarily applicable to strategic developments, and that their relevance to minor developments is limited. However, this position is not borne out within the wording of the relevant policy. On the contrary, it is clear that the development falls within the parameters of Table 10.2 of the LP.
60. I note the appellant's comment that the Council is seeking to impose cycle parking retrospectively. However, that is not the case. The appellant has made a deemed planning application for a material change of use of the appeal site, which engages LP Policy T5. I agree that, were I to allow the appeal, cycle parking provision could be provided at the very back of the site.
61. However, on the basis of the evidence before me, I conclude that the development unacceptably fails to accord with the requirements of LP Policy T5

with regard to cycle parking, and has led to a loss of car parking capacity, contrary to LP Policy T2. The fact that the DPD does not contain specific policies on transport has not led me to a different conclusion on this particular matter.

Other Matters

62. The development accords with the aims of the National Planning Policy Framework to support economic growth and employment, and to ensure the vitality of town centre locations. However, these factors have not led me to a different conclusion on the main issues above.

Conclusion on ground (a)

63. The appeal on ground (a) fails and the deemed planning application is refused.

The appeal on ground (f)

64. Ground (f) is that the steps required to comply with the requirements of the notice are excessive. The Council have clarified that the purpose of the enforcement notice is to remedy the breach of planning control.
65. Requirement (a) of the notice is to cease the restaurant use. As may be seen from my assessment of ground (c) above, I have found no compelling evidence that the restaurant use is not lawful. As a result, there is no need to consider this matter further under ground (f).
66. Requirement (b) is to cease the takeaway use. The appellant argues that this is superfluous as no takeaway service has occurred from the site, beyond allowing customers to take home their unfinished food in disposable containers. However, as may be seen from my assessment above, the appellant's evidence was not sufficient to establish that no takeaway service had at any time operated from No 11. That being the case, it would be inappropriate to remove this requirement from the notice.
67. I have already found that the shisha element of the use has amounted to a material change of use. That being the case, the cessation of that use under requirement (c) is commensurate with the purposes of the EN.
68. Requirement (d) is to remove the rear extension marked with cross hatching on the plan attached to the notice. As may be seen from my consideration above, I have found that this rear extension is part and parcel of and facilitates the unauthorised mixed use at No 11. Its removal is therefore not excessive.
69. Requirement (e) is to remove all fittings related to the unauthorised use. As there is no authorisation for any takeaway or shisha smoking uses at the site, requirement (e) refers only to those elements present at the site that enable these uses. This requirement is commensurate with the purpose of the notice and is therefore not excessive.
70. Taking into account the variations to the enforcement notice discussed above, I am satisfied that the remaining requirements are not excessive, and that there are no lesser steps that would achieve the remedy of the breach.
71. The appeal on ground (f) therefore fails.

The appeal on ground (g)

72. Ground (g) is that the time given to comply with the notice, in this case three months, is too short.
73. The requirement to cease the restaurant use, which would be the most onerous of the requirements, has been removed. That being the case, the remaining requirements relate only to the takeaway and shisha uses, and the rear extension. None of these steps are particularly complex, difficult, or time consuming. I therefore consider that three months is entirely reasonable to comply with the amended enforcement notice.
74. The appeal on ground (g) therefore fails.

Conclusion

75. The appeal is dismissed, the deemed planning application is refused, and the enforcement notice, as amended, is upheld.

Elaine Gray

INSPECTOR