



Appeal Decision

Site visit made on 13 June 2023

by R Merrett Bsc(Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 5 July 2023

Appeal Ref: APP/A5270/C/21/3288320

189A Brent Crescent, Park Royal, London NW10 7XR

- 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 appeal is made by Miss Ayaan Abdille against an enforcement notice issued by the Council of the London Borough of Ealing.
- The enforcement notice, numbered 21 EN0800(1), was issued on 18 October 2021.
- The breach of planning control as alleged in the notice is Material change of use of the premises to use as a shisha lounge and construction of a rear extension in the position hatched on the attached plan.
- The requirements of the notice are 1. Cease the use of the premises as shisha lounge; 2. Remove from the land all furniture, fixtures, fittings, equipment and paraphernalia brought onto and attached to the property, that facilitate the unauthorised use; and 3. Remove the rear extension in its entirety and all debris from the land.
- The period for compliance with the requirements is one month.
- The appeal is made on the grounds set out in section 174(2)(a), (f) and (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.

Summary of Decision: The appeal is dismissed and the enforcement is upheld with a correction and variation in the terms set out below in the Formal Decision.

Procedural Matters

1. The appellant says the Council has incorrectly identified all of the premises as a shisha lounge. They say only the rear extension is used as a shisha lounge, with the remainder of the site being in industrial use. I have dealt with this issue below as a 'hidden' appeal on ground (b). This is regarded as a 'legal ground' of appeal and in such cases the onus rests with the appellant to demonstrate their case on the balance of probability.
2. The Council suggests that reference, within the second requirement at Schedule 5 of the notice, to items "attached" to the property is superfluous, because the requirement to remove items is not confined to those that are attached. It says that the wording could be amended, to delete specific reference to attachment, without causing injustice. I note that the appellant has not taken issue with this point and I agree that no injustice would be caused by correcting the notice in this way.

The appeal on ground (b)

3. The appeal is that the alleged development has not occurred as a matter of fact, for the reason set out in the paragraph above. The key date for this assessment is the time the notice was issued.
4. The appeal site, is somewhat irregularly shaped, and comprises the rear portion of a long rectangular building, together with a narrow extension to its rear elevation. It also includes the access, from Brent Crescent, to those areas, formed by a long, narrow and partially covered alleyway, between the sides of two buildings.
5. The appellant's case is that the shisha lounge is contained entirely within the rear extension. However, it is undisputed access to the rear extension is gained via the alleyway and foyer adjacent to a kitchen area. The foyer and kitchen areas are both within the main body of the building, outside the extension. In addition, having regard to the Council's evidence, there are undisputed photographs of the kitchen and server area, providing food and drink. If not associated with, and ancillary to, the alleged shisha use, the appellant does not provide an alternative explanation as to the purpose of these areas.
6. Furthermore, the Council refers in its statement to the presence of chairs and a makeshift stage within the rear part of the existing industrial building, which it says appear to be associated with the shisha use. I noted from my visit this part of the building may be accessed directly from the rear extension or via the foyer, with access appearing to be controlled by the appellant via security doors. In the absence of a counter explanation from the appellant, on the balance of probability, I agree this part of the building was also being utilised in connection with the alleged unauthorised use.
7. These areas are all outside the physical extension to the rear elevation of the main building. I noted, during my visit, the rear part of the main building appears to be fitted out with shelving and used for the storage of various boxed items, possibly as a warehouse and not necessarily connected with the alleged unauthorised use; also the kitchen and server area appeared to be disused (the appellant confirms within their statement that the kitchen area has been removed). Notwithstanding this, as set out above I must have regard to the situation at the time the notice was issued, rather than what may have changed in the meantime. On the balance of probability the alleged change of use occurred as a matter of fact. The ground (b) appeal fails.

The appeal on ground (a)

8. The ground (a) appeal is that planning permission should be granted for the alleged unauthorised use of land, together with the rear extension. Together these developments form the deemed planning application.

Main Issues

9. The main issues are the effect of the development on (i) industrial floorspace capacity; (ii) parking pressure and highway safety in the locality and (iii) the living and working conditions of occupiers of nearby premises, having particular regard to noise disturbance and odour.

Reasons

Industrial Floorspace

10. The Council's industrial land strategy is set out within Policies E4, E5 and E7 of the London Plan 2021 (LP); Policies 1.1(c) and 3.2 of the Council's Development Strategy 2026 Development Plan Document, adopted 2012 (DS) and within the Mayor's Land for Industry and Transport SPG (2012). Together these policies seek to promote business by maintaining sufficient land, including in strategic industrial locations such as this one along the A40 corridor; through regeneration and intensification of industrial land use and by avoiding compromising industrial space.
11. It is undisputed the appeal site falls within a designated Strategic Industrial Location. It is surrounded by intensively developed industrial land along Brent Crescent. The proposed shisha use would not be regarded as industrial in nature and would not therefore be compatible with the aforementioned industrial land strategy.
12. The appellant argues they propose to restrict the shisha use to the rear extension and as such it would not result in the loss of any industrial building space. However, I do not agree with this interpretation for the following reason. Access to the rear extension would continue to be via the main building, through an existing foyer area. Notwithstanding there is an alternative loading bay door serving the rear of the industrial building, the prospect of sharing access with the shisha use (via the foyer area) may still serve to compromise use of and access to industrial space there, whether for physical or security reasons or both. Accordingly, this would potentially reduce the attractiveness of the site as a whole (excluding the rear extension) to future industrial users, even if it is physically possible to continue using only part of the appeal site, subject to the notice, for warehousing purposes, as at present.
13. It would appear that the proposed use would provide a small number of jobs. However, I have not been provided with any evidence of an absence of industrial compliant demand in relation to the appeal site, which might have even greater employment potential.
14. The development would potentially compromise availability of, and therefore harm, industrial floorspace capacity in this location. It would therefore be in conflict with the Council's industrial land strategy, as described above, and with the aforementioned policies. I am not persuaded, from the information before me, that such harm would be outweighed by any benefits to those working nearby from the development as an ancillary facility.

Parking Pressure and Highway Safety

15. It was evident from my visit the appeal site is within a busy area, with many vehicles passing along Brent Crescent. On-street parking appears to be at a premium, with restrictions on part of the highway and a shortage of free space in places where there is not a risk of obstructing access to other premises.
16. I note that the appeal site is within reasonable walking distance of the underground station at Hanger Lane. However, there is nothing to persuade me that the development would not lead to a significant influx of parking demand along Brent Crescent, including vehicles dropping off and collecting

patrons, potentially at times when nearby businesses remain operational. This could result in difficulty and inconvenience gaining access to those nearby premises. I am not persuaded, from the information before me, this impact could be mitigated through the provision of (practical) on-site car parking spaces, within the narrow alleyway leading to the building.

17. I conclude the development would result in additional parking pressure and inconvenience. As such it would conflict with Policies T1, T2, T4 and T6 of the LP and with Policy 3.2 of the DS insofar as they seek to mitigate the impact on London's transport network, reduce the dominance of vehicles on London's streets and manage parking demand to ensure adequate provision for efficient deliveries and servicing. Notwithstanding this, the argument it would result in harm to highway and pedestrian safety, in the context of what is already a very busy environment, is not compelling.
18. Policy T5, amongst other things, is concerned with the provision of adequate cycle parking. Had I been minded to grant planning permission, I consider this would have been achievable through a planning condition.
19. The appellant has drawn my attention to a previous unsuccessful appeal at the same site¹. They say the Inspector, in that case, did not raise concerns with regard to parking and highway safety. However, it would appear this was not a main issue between the parties in that case, and accordingly was not a matter on which the Inspector's decision turned.

Living and Working Conditions

20. As set out above the appeal site is located within a densely developed industrial location. The nearest residential properties are likely to be those located to the north on Queensbury Road. These houses are separated from the site by a buffer consisting of amenity open space and the River Brent, which passes immediately to the rear of the site.
21. The appellant confirms the shisha use would operate between 11am and 2am. Consequently it would result in clientele movement patterns during the evening and later at night. It is also likely to be associated with the playing of amplified music, and would certainly generate distinctive odours.
22. The appellant, as part of their evidence, refers to the extension being covered to ensure that noise is contained; also to it not being located adjacent to any noise-sensitive uses. However, I observed during my visit, the rear extension has been constructed with a gap between the top of the rear elevation wall and the roof, presumably for ventilation purposes. From the information before me I am unable to discount the design would not sufficiently attenuate the playing of amplified music, such that it would result in disturbance to nearby residents, and potentially also to users of nearby industrial premises. Indeed, although it appears there were no objections raised by surrounding and nearby occupiers in relation to a recently refused planning application involving the same site², it is undisputed that a complaint was made in September 2019 in relation to the playing of loud amplified music.

¹ Appeal ref APP/A5270/W/21/3266634

² Planning application reference 216577FUL (refused 17 January 2022) – including for part change of use to shisha lounge.

23. Referring to the aforementioned previous appeal, the appellant says the Inspector did not challenge the appellant's case that the proposal would not impact on the living conditions of neighbouring occupiers or residential properties, situated further away. However, the proposal in that case was for a restaurant / café. The shisha use would be likely to result in clientele movement patterns and attendance later at night, compared with a café / restaurant, thus distinguishing these activities. The Inspector's position in that case does not therefore weigh in favour of the present appeal.
24. I am not persuaded that nearby businesses, or local residents because of their separation from the site, would be adversely affected by noise specifically associated with the comings and goings and congregation of clientele. Neither do I consider the extension would be near enough to the users of nearby premises or to local residents to result in harm arising from odours associated with the use.
25. However, drawing the above considerations together, I cannot rule out that the development would result in harm to the living and working conditions of occupiers of nearby premises, having particular regard to internally generated noise disturbance. Accordingly there would be conflict with Policy 1.1 of the DS; Policies D3 and D13 of the LP and Policy 7A of the Ealing Development Management Development Plan Document 2013 (DPD) insofar as they seek to protect amenity, including by the mitigation and management of noise nuisance. The lack of objections, cited by the appellant, to a recent planning application and in relation to the alleged development does not equate to an absence of amenity harm. Furthermore, I must consider the impact of the development over its lifetime, during which time the occupation of surrounding properties may inevitably change.

Other Matters

26. The appellant makes the point that a restaurant use was previously permitted by the Council at the nearby premises, at 187 Brent Crescent³. However, in that case, the restaurant use (not a shisha lounge) was considered to complement rather than compromise the industrial use of the building (in that case a car showroom), and is also undisputed to have been approved under the previous London Plan. The associated alterations were differently designed to the rear extension currently being considered. The development was also approved with earlier opening hours, and involved the provision of a relatively large number of dedicated off-street parking spaces. Accordingly, there are key differences distinguishing the development in that case from this one. That planning permission does not therefore weigh in favour of the current appeal.
27. The Council refers in its statement to the rear extension being poorly designed and constructed with unsuitable materials. The extension is well screened by the density and mass of surrounding existing industrial buildings. It is also separated from the nearest residential properties to the rear by a significant buffer of green space, including a screen of dense boundary vegetation adjacent to the River Brent. Whilst it is possible to gain a fleeting glimpse of the side elevation of the structure, from an adjacent car park, the structure is not at all prominent, viewed from the public domain. I do not therefore concur with the Council's view that the structure would be unacceptable on visual amenity grounds. Consequently I do not find conflict with Policy D3 of the LP

³ Planning permission reference 182857FUL – dated 8 August 2018.

or with Policy 7B of the DPD, which seek to promote high quality design, having regard to the surrounding context. This, however, does not overcome the harm that I have found above.

The appeal on ground (f)

28. The ground of appeal is that the steps required by the notice to be taken are excessive. With regard to the unauthorised change of use and rear extension the objectives of the notice are to discontinue the use of the land and to restore the land to its condition before the breach took place. It follows that the purpose of the notice is to remedy the breach of planning control.
29. The appellant's case is that it would be sufficient simply for the shisha use to cease and that the Council do not object to the extension on design grounds, which is therefore acceptable in principle.
30. Given that the purpose of the notice is to remedy the breach of planning control, this can be achieved by discontinuance of the use of the land and its restoration to the condition it was in before the breach took place, having regard to s173(4) of the Act. The requirement to remove various items that facilitate the unauthorised development would also reasonably fall within the scope of the notice purpose. To require these measures does not, therefore, exceed what is necessary and, in the absence of evidence that the extension could be utilised lawfully for any industrial use of the site, the appeal on this ground must fail.

The appeal on ground (g)

31. The appeal on ground (g) is that the time given to comply with the notice is too short. I am mindful of the importance of striking a balance between enforcement that is intended to be remedial rather than punitive, whilst maintaining public confidence in the planning system.
32. The appellant has requested that the compliance period be extended to 9 months in order to meet the various requirements, and to enable alternative premises to be found.
33. I have considered the Council's argument that the extension would be relatively easy to demolish because of its simple design and construction. Nevertheless I accept that arranging for it to be removed, and removing the various requisite items, may reasonably take longer than the one-month compliance period allowed. I consider that extending the compliance period to three months would be a proportionate measure, whilst also having regard to human rights considerations and the stated objective of finding alternative suitable premises. The ground (g) appeal therefore succeeds to this extent.

Conclusion

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

Formal Decision

35. It is directed that the enforcement notice be corrected by the deletion of the words "and attached to" within paragraph 2 of Schedule 5.
36. It is directed that the enforcement notice be varied by the deletion of the words "ONE month" in Schedule 5, and the substitution of the words "THREE months" instead.
37. Subject to the correction and variation, 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.

R. Merrett

INSPECTOR