



Appeal Decision

Site visits made on 17 and 18 August 2023

by D Hartley BA(Hons) MTP MBA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 24th AUGUST 2023

Appeal Ref: APP/M4510/C/23/3318728

Land at 500 Westgate Road, Newcastle upon Tyne, NE4 9BL shown edged with a red line on the attached plan ("the Premises")

- 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 Mr Kamran Ahmed against an enforcement notice issued by Newcastle-upon-Tyne City Council.
 - The enforcement notice was issued on 13 February 2023.
 - 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 comprising restaurant/café and shisha lounge (Sui Generis use); and the erection of a timber and plastic extension to the front of the Premises.
 - The requirements of the notice are i) remove the timber and plastic structure from the front elevation of the Premises in its entirety including all fixtures and fittings; ii) remove from the Premises all waste, materials, equipment and debris including that arising from compliance with the above; iii) cease the mixed use as a restaurant/café and shisha lounge, and iv) remove from the Premises all items that relate to the unauthorised use, including the seating, tables, shisha pipes and shisha tobacco.
 - The period for compliance with the requirements is three months.
 - The appeal is proceeding on the grounds set out in section 174(2) (a), (c), (f) and (g) of the Town and Country Planning Act 1990 as amended (the 1990 Act).
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Decision

1. It is directed that the enforcement notice be varied by deleting all of the words in paragraph 5.1 and replacing them with '*Remove the timber and plastic structure from the front elevation of the Premises in its entirety including all fixtures and fittings and to restore the land to its condition before the breach took place*'. Subject to this variation, the appeal is dismissed and 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.

Preliminary Matters

2. I visited the site on an unaccompanied basis during the evening of 17 August 2023 at about 19.50 hours. At this time, there was one group of people smoking shisha in the appeal front extension. The front door was wide open and there appeared to be a sweet odour in the air when walking past the premises. I also visited the site during the daytime of 18 August 2023 at 09.30 hours, on an accompanied basis, which afforded me the opportunity to also see inside the premises.

Reasons

Ground (c) appeal

3. The appeal made on ground (c) is that the matters alleged do not constitute a breach of planning control. The appellant does not dispute the fact that the extension to the front of the building is operational development requiring planning permission.
4. The claim made by the appellant under ground (c) is that when the enforcement notice was issued a material change of use of the appeal building, including the extension, to a mixed use including specifically use as a '*shisha lounge*', either did not amount to development requiring planning permission as it was incidental and/or ancillary to the lawful use of the building, or that such a use falls within use class E of The Town and Country Planning (Use Classes) Order 1987 (as amended) (UCO), i.e., the lawful use of the premises, and so by virtue of s55(2)(f) of the 1990 Act did not amount to development requiring planning permission.
5. There appears to be no dispute between the parties that prior to the mixed-use taking place, the premises were lawfully an A2 office use. The local planning authority (LPA) has submitted Google Street View images of the property in use in 2020 by a company known as 'Octopus Property' which, according to the signage, was involved in sales and lettings, property management and mortgages.
6. The UCO has been amended such that the former A2 office use class now falls within use Class E. Class E of the UCO includes a restaurant/café use. The appellant asserts that smoking shisha would be a '*recreational use*' and hence would fall within use Class E which includes '*indoor sport, recreation or fitness*'. I do not find that smoking shisha is an indoor sport, recreation or fitness activity. It therefore does not fall within Class E of the UCO. Hence, it could not be said that development had not occurred owing to s.55(2)(f) of the 1990 Act.
7. The onus is on the appellant to make their case under ground (c). However, there is very little evidence from him to support his contention that the shisha lounge use was no more than an incidental or ancillary activity in association with use of the premises as a café/restaurant.
8. The appellant does not dispute that smoking shisha has taken place from the premises. The evidence indicates that the premises have been advertised on-line for shisha lounge purposes as well as a café/restaurant. While it may be the case that some customers have had a meal and then used the premises as a shisha lounge, it is equally very likely that some have attended the premises simply to undertake shisha smoking.
9. The appellant provides little if any evidence about the above matters, but it is noteworthy that web-site details, as provided by the LPA, includes advertising for '*The Mirage Shisha*' and '*Mirage Lounge – an authentic shisha lounge and cafe*'. Gallery images display individuals smoking shisha and as a separate activity to eating and drinking. The appellant does not dispute the comments made by the LPA that on 20 December 2022 Northumbria Police '*informed the Planning Enforcement Officer that she and another officer had driven past The Mirage Café front entrance at 18.06 and witnessed four males at a table with a shisha pipe and a further male at another table on his own with a shisha pipe*'.

10. Shisha smoking has very different environmental consequences when compared to use of a property as a café/restaurant. Indeed, it normally gives off pungent odours and can be associated with more customer comings and goings and activity, particularly late at night and into the early morning. I find that use of the premises for shisha smoking, often combined with live sporting events or stand-up acts, has the potential for increased noise and disturbance for occupants of nearby surrounding properties as well as disturbance from odours. In addition to the above, shisha smoking requires the use of very specific equipment. Indeed, normally a specially prepared tobacco (sometimes in different flavours) is heated to produce smoke which bubbles through a bowl of water and into a long hose-like pipe to be breathed in. These are shisha pipes that have a mouthpiece fitted to inhale the smoke. On my site visit, I noticed a significant number shisha equipment stored to the side of the bar area.
11. While separate regulations require shisha smoking to take place in an outdoor or unenclosed area, it is noteworthy that the evidence is that shisha smoking has taken place within the building itself, including the front extension that is the subject of this appeal.
12. The Council's evidence in the form of checks of the business on 24 October 2022 indicates that while the web site was advertising the sale of food and drink, it was also advertising a shisha bar that was open until 03.00 hours. While I do not have specific and detailed reports from Northumbria Police in 2022, it is noteworthy that there were three instances of anti-social behaviour in the area in 2022.
13. On the evidence that is before me, I find that when the enforcement notice was issued, the premises were being used as a mixed shisha lounge and café/restaurant use. I find that the site is a single planning unit in single occupation, from where the appellant runs one business. In addition, the evidence indicates that the business is run so that customers can eat a meal without smoking shisha or vice versa.
14. There is no evidence that either use was/is ancillary or incidental to the other. On the evidence that is before me, I find that the smoking of shisha has materially changed the character of the activity associated with the former Class E use. It is not entirely clear from the evidence if the smoking of shisha post-dated first use of the premises as a café/restaurant, or whether it took place as part of a mixed café/restaurant and shisha lounge use. Whether the last use of the premises was an office or a café/restaurant use, I find that use of the premises as a shisha lounge in conjunction with a café/restaurant use has materially changed the character of the activity at the premises. The mixed use is comprised of two primary uses, a café/restaurant and shisha lounge, neither of which is incidental to the other.
15. In conclusion, and, on the evidence available to me, I find that the shisha lounge use has not taken place based on being incidental or ancillary to use of the premises for lawful use class E purposes. I do not agree with the appellant that the shisha lounge use falls within use Class E. As a matter of fact and degree, I find that a mixed café/restaurant and shisha lounge use had taken place when the enforcement notice was issued. This is a sui generis mixed use. The breach of planning control therefore constitutes a material change of use of

the premises and is development requiring planning permission. Therefore, the ground (c) appeal fails.

Ground (a) appeal and the deemed planning application

Main Issues

16. The appeal is made under ground (a) which is that planning permission ought to be granted in respect of the breach of planning control alleged in the notice. I have considered the reasons for issuing the enforcement notice and the main issues are the effect of the development on i) the character and appearance of the area, and (ii) the living conditions of the occupiers of nearby residential properties in respect of noise, disturbance, odour and anti-social behaviour.

Character and appearance

17. The appeal building fronts a busy street known as Westgate Road, also a bus route, which leads into the City. Most of the properties along this main road are commercial, although there are some dwellinghouses relatively close by in Auden Grove and Lewis Drive to the north. The LPA also states that there are '*flats and residential streets across Westgate Road to the south*'. On my site visit, the main parties agreed that this related to first floor accommodation above 'Subway' and 'Chaiiwala' immediately opposite the site. There are also residential properties in Keldane Gardens to the south.
18. While there is the odd exception such as 'Icestone' which is a standalone building, the prevailing pattern of development in this part of Westgate Road comprises buildings set well back from the street in a linear form with open forecourts. This is particularly the case where there are individual blocks buildings containing separate commercial units. The extension, which is the subject of this appeal, owing to its position and scale, materially departs from this distinctive and positive pattern of development to the extent that it looks materially out of place in the street-scene. To the passer-by it is experienced as a jarring and incongruous addition within this well-planned urban landscape.
19. I agree with the appellant that buildings in the area include a mix of materials albeit that brick is the predominant building material. In the context of the immediate area, I do not find that the materials used in the extension are in themselves unacceptable. However, to the extent that they are materially different to the original building and the rest of the units within the wider building block, it does nevertheless draw even greater attention to what is an out of keeping extension from the point of view of departing from the prevailing pattern of development.
20. I therefore find that from an operational development point of view, the extension has caused material harm to the character and appearance of the area. In this regard, I conclude that it does not accord with the design requirements of policy DM20 of the Newcastle upon Tyne Development and Allocations Plan 2015-2030 (D&A Plan), policy CS15 of the Core Strategy and Urban Core Plan for Gateshead and Newcastle upon Tyne 2010-2030 (CS) and chapter 12 of the National Planning Policy Framework 2021 (the Framework).

Living conditions

21. The LPA does not dispute that the property could lawfully be used for a use falling within Class E of the UCO. Consequently, the evidence is that the

building could lawfully be used for a café/restaurant use. Such a use would of course give rise to some vehicular and pedestrian comings and goings and activity. Furthermore, the LPA does not dispute the appellant's comment that there are no restrictions in place (i.e., planning conditions) relating to use of the premises for a Class E use.

22. It is a requirement of separate regulations that the smoking of shisha should not take place in an enclosed space. The appellant does not dispute that the smoking of shisha takes place in the wider premises and the evidence from Northumbria Police is that patrons have specifically been seen doing it in the front extension.
23. On my site visit, I was able to see that a significant part of the front extension roof was capable of being opened. I am not certain whether this would meet the requirements of separate regulations, but in order to ensure acceptable ventilation when shisha was being smoked, and potentially to comply with separate regulations, I find that it would likely be necessary for the roof to be open when the smoking of shisha takes place.
24. The by-product of a shisha use is smoke, and this smoke can be very pungent. While residential properties are not immediately next to the appeal property, there are some that are close enough that occupants may experience disturbance from shisha odours arising from the need for improved ventilation and the opening of the roof of the extension and/or front door. This would particularly be the case for those residents to the north (i.e., those living in Auden Grove and Lewis Drive) of the appeal building who may be subject to odours travelling in their direction owing to the direction of the wind which is likely to often come from the southwest.
25. In the absence of any specific detail from the appellant about how shisha smoking would reasonably be controlled, I cannot conclude with any reasonable certainty that the existing use of the building for the smoking of shisha is acceptable. While this may be a matter that is controlled as part of separate regulations, it is nevertheless of direct relevance to the consideration of the planning merits of the ground (a) appeal.
26. Given my comments about the roof, I consider that it is more likely than not that there would also be potential for greater noise break out from the building when shisha smoking was taking place. I acknowledge that Westgate Road is a busy thoroughfare with some associated noise associated with traffic and activity. Nonetheless, the proximity of residential properties is such that noise may be noticeable and audible from these buildings when shisha is being smoked and the roof is open. Indeed, the evidence is that live sporting events and stand-up acts take place from the premises. This, coupled with the seating capacity of the venue, has the potential to generate unacceptable levels of noise and disturbance for nearby occupiers of residential properties.
27. There is evidence that shisha smoking has occurred late at night and into the early morning. It is likely, albeit not entirely certain, that this has coincided with late night and early morning social events as advertised on the appellant's web site. I recognise that the evidence does indicate that it would be possible to lawfully use the building as a café/restaurant on an unrestricted hours of use basis. Nevertheless, and based on the evidence before me, I do not find that it is likely that many patrons would likely attend the premises very late at night or into the early morning to simply have a bite to eat. Furthermore, I find that

it is likely that the turnover of customers, and hence comings and goings in the locality, would likely be greater from those that attend the premises to smoke shisha rather than having a meal.

28. I accept that the evidence from Northumbria Police does not include detailed reports. However, I have no reason to doubt that the three anti-social '*partying events*' did take place '*at the premises*'. Northumbria Police has responded specifically in terms of the appeal and hence it is likely that the anti-social behaviour was directly associated with use of the premises as a café/restaurant and shisha lounge. While there is nothing to suggest that the anti-social behaviour was directly associated with smoking shisha, it does suggest that the nature of the mixed use as alleged in the enforcement notice is one that has already given rise to acts of anti-social behaviour. In the absence of anything specific from the appellant about how instances of anti-social behaviour might be prevented, this is a matter which weighs against granting planning permission.
29. I have considered whether it would be possible to impose conditions to ensure an acceptable mixed café/restaurant and shisha lounge use. The appellant has suggested the possibility of a condition that restricts, in percentage table/seat terms, the numbers that would be able to smoke shisha. I do not find that such a condition would be enforceable and, in any event, even small numbers smoking shisha has the potential to cause harm to the living conditions of the occupiers of nearby residential properties given the need for adequate ventilation arising from a requirement for smoking to take place in an unenclosed space.
30. Given the need for ventilation arising from the mixed use of the premises, there is also potential for noise break out from the extension in terms of a combination of a gathering of a significant number of individuals (whether eating/drinking and/or smoking shisha) and any live entertainment or amplified noise associated with the mixed use. In the absence of noise survey information to the contrary, there is potential for some noise disturbance for nearby occupants of residential properties. This is a matter that goes to the heart of the acceptability of the breach of planning control and hence is not a matter that could be left to the imposition of conditional control.
31. It might be possible to control potential noise and disturbance from the mixed use arising from comings and goings late at night, and potential anti-social behaviour, by imposing an hours of use time restriction. However, prior to considering this, and also for the reasons outlined above, it would be necessary to consider a detailed noise report, including potential mitigation measures. This level of detail/information is not before me. I therefore cannot conclude, with any certainty, that use of the premises without the extension would be suitable for the mixed café/restaurant and shisha lounge use, without causing material harm to the occupiers of surrounding properties.
32. Furthermore, and, in any event, I cannot conclude that use of the premises, without the front extension, for smoking shisha would be acceptable from the point of view of meeting all other associated regulations, such as fire, safety and health considerations, and, importantly, a need to ensure that such an activity takes place within an unenclosed space. The appellant asserts that I could impose a condition which would permit 'ancillary or incidental' shisha smoking. However, it is not clear what the appellant means in terms of

ancillary or incidental shisha smoking. I do not find that a condition in these terms would be precise or enforceable or, in any event, that smoking shisha inside the main part of the building without evidence of adequate ventilation, and on an unenclosed basis, would result in a healthy/safe internal environment for all customers.

33. For the above reasons, I find that the evidence is that the breach of planning control causes, or has the potential to cause, material harm to the living conditions of the occupiers of nearby residential properties in terms of noise, disturbance, and odour, and without clear and enforceable mitigation and prevention controls in place, there is scope for the mixed use to lead to anti-social activities. For the reasons outlined, I do not find that the imposition of conditions would address the harm that has been caused by the breach of planning control.
34. I therefore conclude that the development does not accord with the amenity and health requirements of policy DM23 of the D&A Plan, policy CS14 of the CS and paragraph 130(f) of the Framework.

Other considerations

35. The public sector equality duty (PSED) set out under s149(1) of the Equality Act 2010 is that a public authority must, in the exercise of its functions, have due regard to the need to eliminate discrimination, harassment, victimisation and any other prohibited conduct; and advance equality of opportunity, and foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
36. It is true generally, and in this case, that shisha cafés are used by members of the ethnic minority communities and people of the Islamic faith who do not drink alcohol. The protected characteristics of race and religion are engaged.
37. I do not doubt that the appeal shisha lounge is a valued facility where members of the local community can socialise in accordance with their culture to smoke shisha. However, in this case, and given my conclusions on the main issues, I find that a refusal of planning permission is a proportionate and necessary approach to the legitimate aim of ensuring that the character and appearance of the area is protected, that anti-social behaviour is prevented, and that the living conditions of the occupiers of nearby residential properties are safeguarded.
38. It is not the case that a refusal of planning permission would mean that the premises could not be used as a café/restaurant in accordance with the undisputed lawful Class E use of the property. Hence, a refusal of planning permission would not mean that the premises would not be capable of still being a place to gather socially. In this case, the planning harm identified is of such weight that it outweighs the cultural value associated with using the premises for smoking shisha.
39. The appellant has referred me to examples of other appeal decisions which have included a similar mixed use. In respect of the ground (a) appeal, the examples are not directly analogous, and, in any event, I have determined this appeal on its individual planning merits.
40. I acknowledge that the breach of planning control seeks to make more efficient use of the building and that there are some economic and cultural benefits

associated with use of the building in accordance with the breach of planning control. Nonetheless, these matters need to be weighed against the clear planning harm caused. None of the above matters, either in isolation or collectively, are sufficient to alter or outweigh my conclusions on the main issues.

Planning balance and conclusion

41. The structure that has been erected to the front of the premises causes material harm to the character and appearance of the area. Furthermore, there is potential for harm to be caused to the living conditions of the occupiers of nearby residential properties from noise, disturbance and odour. In addition, the evidence is that the mixed use has resulted in some anti-social behaviour in the area and the appellant has provided no reasonable information or details to control the prevention of any such activities taking place in the future. I find that that the extent of the harm above is such that it outweighs the cultural value associated with use of the premises for smoking shisha having regard to the PSED.
42. I conclude that the development would not accord with the development plan for the area taken as a whole and there are no identified material considerations that indicate the decision should be made other than in accordance with the development plan. Therefore, the ground (a) appeal fails.

Ground (f) appeal

43. The appeal made under ground (f) is that the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary to remedy any breach of planning control or to remedy any injury to amenity which has been caused by any such a breach.
44. The purpose of the notice is to remedy the breach of planning control by removing the extension and ceasing the mixed use. These are not in themselves, therefore, excessive requirements.
45. As part of the ground (f) appeal, the appellant has suggested that conditions could be imposed about incidental/ancillary shisha smoking use and controlling the percentage of seats/tables used for shisha smoking purposes. These are matters that I have addressed as part of the ground (a) appeal and, for the reasons outlined, the requirements of the enforcement notice are not excessive.
46. As part of the ground (f) appeal, the LPA has asked me to consider including '*and to restore the land to its condition before the breach took place*' at the end of paragraph 5.1 of the notice. I shall accordingly vary the requirements of the notice and in doing so do not find that this would lead to any injustice for the main parties. This would suitably remedy the breach of planning control relating to the extension in so far as ensuring that the original building frontage at ground floor level was returned to its condition prior to the unauthorised operational development taking place.
47. To the extent that I have varied the requirements of the notice, I conclude that the ground (f) appeal succeeds.

Ground (g) appeal

48. The appeal made on ground (g) is that the period specified in the notice in accordance with s173(9) falls short of what should reasonably be allowed. The compliance period in the notice is 3 months.
49. The appellant claims that a compliance period of between 9 and 12 months is needed as it is difficult to get builders in and to source materials. While it may be sometimes difficult to source a contractor or materials, there is no reasonable evidence before me that it would not be possible at all to ensure compliance with the requirements of the notice. In this regard, I find that a period of 3 months is reasonable. It is noteworthy, however, that the LPA has specifically referred to s.173(A)(1) of the 1990 Act which states that the LPA may *'waive or relax any requirement of such a notice and, in particular, may extend any period specified in accordance with section 173(9)'*.
50. For the above reasons, I conclude that the ground (g) appeal fails.

Conclusion

51. For the reasons given above, I conclude that the appeal should not succeed. I shall uphold the enforcement notice with a variation and refuse to grant planning permission on the deemed application.

D Hartley

INSPECTOR