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## Appeal Decision

Site visit made on 13 September 2023

**by M Bale BA (Hons) MA MRTPI**

**an Inspector appointed by the Secretary of State**

**Decision date: 28 September 2023**

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### **Appeal Ref: APP/T5150/C/22/3305805**

#### **45 Blackbird Hill, London NW9 8RS**

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended. The appeal is made by Mr Ali Jama of Bar Ubah Cafe Ltd against an enforcement notice issued by the Council of the London Borough of Brent.
- The notice, numbered E/22/0297, was issued on 27 July 2022.
- The breach of planning control as alleged in the notice is: Without planning permission, the material change of use of the premises to a shisha café ("the unauthorised change of use") AND Without planning permission, the erection of a canopy extension to the rear ("the unauthorised development").
- The requirements of the notice are:
  - Step 1: Cease the use of the premises as a shisha café.
  - Step 2: Demolish the canopy extension to the rear of the premises.
  - Step 3: Remove all items, materials and equipment, associated with the unauthorised use, from the premises.
  - Step 4: Remove all items, debris, materials and equipment, associated with the unauthorised development, from the premises.
- The period for compliance with the requirements is 1 month after the notice takes effect.
- 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. 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 notice is upheld**

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### **The Notice**

1. The appellant has raised a number of procedural matters that question the validity of the enforcement notice (the Notice). To be valid, an enforcement notice must inform the recipient with reasonable certainty what the breach of planning control is and what must be done to remedy it.
2. The first matter raised by the appellant is that the Notice does not specify the use from which the premises is alleged to have changed. I acknowledge that this, and any fallback position may be relevant to certain grounds of appeal. However, an enforcement notice need not recite the previous use of land to which it relates and so I find that the Notice is not defective for this reason.
3. The Notice does not clearly specify its purpose. However, having regard to the allegations and corresponding requirements, its recipient would have reasonable certainty that the purpose of the Notice is to remedy the breach of planning control. Therefore, I find that the Notice is not defective for this reason. Whether the requirements go beyond what is necessary to remedy the breach of planning control is a matter that I consider under the ground (f) appeal.

4. Similarly, the Notice gives a period for compliance with the requirements and, therefore, complies with section 173(9) of the Town and Country Planning Act 1990 as amended (the 1990 Act). Whether or not that period falls short of what should reasonably be allowed is a matter I consider under ground (g).
5. Finally, Schedule 3 of the Notice includes reference to a number of policies of the development plan and states why the Council believes there to be a conflict with them. Having regard to this, I am satisfied that the Notice complies with section 173(10) of the 1990 Act and Regulation 4(a) of the Town and Country Planning (Enforcement Notices and Appeals) (England) Regulations 2002 that requires an enforcement notice to specify the reasons why the local planning authority consider it expedient to issue the notice.
6. Having regard to all of the above, I have not identified any defects, errors or misdescriptions in the Notice, such that it is necessary for me to consider whether to exercise my powers under section 176(1) of the 1990 Act to correct or vary the Notice.

### **Ground (c)**

7. For success under ground (c), it must be shown that the matters alleged in the Notice do not constitute a breach of planning control. The burden of proof is on the appellant.
8. The Notice alleges a new primary use. The appellant does not dispute that the premises has been used as a café, nor that smoking of shisha takes place. Rather, in this case, the appellant contends that, prior to the shisha café activities at the premises, it was and continues to be used as a restaurant/café, that this is the lawful use of the premises, and that the shisha café activities now taking place have not resulted in a material change from this use.
9. There is dispute as to both the previous use of the premises as well as its lawful use, contingent on which historic permissions have been implemented or whether there have been other intervening uses since the last authorised use. Having regard to this, I will first consider whether the use as a shisha café is materially different to that of a restaurant/café. In the event that it is not, I will go on to consider whether or not a restaurant/café is the lawful use of the premises.
10. There is no detailed evidence as to how the restaurant/café use took place at this site. In the absence of that, I would expect such an establishment to provide facilities for people to sit to eat and drink comfortably, with a choice of food and beverages for purchase and facilities for preparing the same.
11. The internal area is considerably larger than the outdoor rear yard. At the time of my site visit, it contained bench seating, but very few tables. In one corner was a small servery area with a microwave oven, coffee machine, a small selection of tea bags, some chilled cans of soft drinks, and half an open bottle of milk. On the counter was a small cabinet of the type often used for display of food items for sale, but it contained no food.
12. Beyond this, was a separate area that appeared to have been fitted out at some point as a commercial kitchen. However, there was no indication of any food or significant food preparation facilities and the area, instead, appeared to be being used for the cleaning and storage of shisha pipes and related equipment.

13. Outside is further bench seating, again with limited tables, under a retractable canopy. That the canopy has been erected in breach of planning control is not disputed under this ground of appeal. The appellant indicates that there are only 6 covers available for shisha smoking, but there was no clearly designated area and the courtyard could easily accommodate more than this. I have no detailed evidence as to precisely how frequently or intensively the area has been used.
14. I understand that people may choose to smoke shisha alongside the consumption of food and drink and in that way it may be little different to the use of tobacco products in other café-style settings. Nevertheless, while the appellant has indicated that snacks or drink must be purchased alongside shisha, the stark absence of any obvious food to order, limited choice of drinks and lack of tables inside the premises leads me to conclude that customers would not likely visit the premises with the primary intention of eating or drinking, as might be expected at a restaurant or café. There is no substantive evidence that the situation I observed has been particularly different in the past. In this scenario, the fact that a greater amount of floorspace is available indoors, where it is illegal to smoke, has little bearing on the way that the premises is, or has been, actually used.
15. Therefore, I find that the main reason for customers to visit the premises would be to smoke shisha and the use as a shisha café has become a new primary use of the premises. It has not been shown to be ancillary or incidental to a restaurant/café, or indeed any other use. The appeal under ground (c) should, therefore, fail and there is no need to go on to consider what the lawful use of the premises might actually be. Any available fallback to such a lawful use is not relevant under this ground.
16. For these reasons it is clear that there has been a breach of planning control in respect of the matters alleged in the Notice. Accordingly, the appeal under ground (c) fails.

### **Ground (a)**

17. In considering whether planning permission should be granted, the main issues are the effect on the character and appearance of the area and the living conditions of neighbouring residents, with particular regard to noise and disturbance.

#### *Character and appearance*

18. The site is the ground floor of a mid-terraced building within a shopping parade with a predominantly commercial character. Blackbird Hill, as it passes the site, is a wide, busy road with significant activity. The appellant has indicated that the establishment is a vital recreation facility, but the need for it has not been substantiated by detailed evidence. Nevertheless, in this context, a use that facilitates socialisation within the community would compliment the mix of uses within the locality.
19. To the rear of the site, an unpaved service lane gives access to the various units fronting Blackbird Hill. There is a wide variety of boundary treatments, extensions, outbuildings and structures in this location, resulting in a somewhat ad-hoc and cluttered appearance.

20. The retractable canopy protrudes above the boundary wall and is, therefore, visible from public locations on Birchen Grove. However, these views are confined to the area immediately around the service road and are seen in the context of the myriad of other structures and buildings on and around the rear of the terrace. The canopy is a solid structure of permanent metal construction and the Council's assertions that it is poor quality have not been substantiated by detailed evidence.
21. For these reasons, I find that those matters stated in the Notice do not harm the character and appearance of the area and accord with those parts of Policy DMP1 of the Brent Local Plan 2022 (LP) that seek to ensure that development complements its locality. The Council has alleged conflict with Policy D4 of the London Plan 2021, but this appears to primarily set out procedures for ensuring the delivery of high quality design and so I find no conflict with it.

### *Living conditions*

22. While there is considerable noise and activity to the front of the appeal site, the area around the service lane is notably more peaceful. In this location, traffic noise is audible but it is not intrusive and during my site visit, I heard talking emanating from the appeal site while standing some distance away in the lane. Such would likely occur to a greater extent when the premises were busier, irrespective of whether music was licensed to be played, alcohol sold or not as is currently the case.
23. To some extent, upper floor residential properties are set away from the outdoor seating area, separated by a large expanse of flat roof and also exposed to road noise from the front. However, I cannot be certain that their rear rooms would not be affected. Furthermore, on the opposite side of the service lane are large residential properties with extensive gardens, side on to the rear of Blackbird Hill. Their set-back from the main road and position behind the terrace is likely to protect them further from traffic and other ambient noise on Blackbird Hill. At the site visit, I noted another property in the terrace that appeared to have kitchen extract equipment installed at the rear that would likely generate some noise, but it did not have outdoor seating. To my visual inspection, there did not appear to be other premises in the locality that provided obvious outdoor areas for multiple people to congregate, so the shisha café use would introduce this type of noise into the area.
24. The Council's evidence about noise and disturbance emanating from the property predates its enforced temporary closure and relates to the way it was used at that time. However, in light of my observations above, intrusive noise emissions remain likely and no substantive evidence has been provided by the appellant to demonstrate that, relative to background levels, they do not occur.
25. I understand that the appeal site has historically had uses that could have generated noise and disturbance from people talking. Indeed, it may have been necessary for such establishments to provide outdoor areas for people to smoke, although the extent of any historic outdoor seating has not been demonstrated. Nevertheless, the use as a shisha café, from legal necessity under smoking legislation, requires the primary activity to take place outdoors. Therefore, considerably greater activity is likely to take place in the rear area than it has in the past. The provision of the retractable canopy further facilitates this at all hours and in most weather conditions.

26. It may be that planning conditions could be used to control the hours of operation, and the appellant has suggested that it currently operates until midnight. However, in the absence of any particular evidence about background noise levels and emissions, I cannot be certain that at this time, which is beyond that which some people may expect relative quiet in a residential area, the use would not cause unacceptable noise and disturbance. More stringent conditions with shorter opening hours would similarly not be based upon evidence and may be unreasonable insofar as they unacceptably constrained business operations.
27. I note that the Council has raised concerns about effects on health and smoke disturbance. However, while a strong smell of shisha had been identified at the premises, the evidence does not go so far as to explain how or where this, or any smoke emissions, were causing any particular harm beyond the premises. Therefore, the Council's concerns around health and smoke have not been substantiated. Nevertheless, a lack of effect in this regard would be a neutral factor and so my findings about noise and disturbance are determinative in this issue.
28. I, therefore, find that the continued use of the premises as a shisha café would cause unacceptable harm to the living conditions of neighbouring residents, contrary to those parts of LP Policy DMP1 that seek to ensure that development does not unacceptably increase exposure to noise and general disturbance.

*Conclusion under ground (a)*

29. While I have found no harm to the character and appearance of the area, the continued use would result in harm to the living conditions of neighbouring residents. Such leads to conflict with LP Policy DMP1 and the development plan when each are read as a whole. No material considerations have been presented that demonstrate that a decision should be taken otherwise than in accordance with the development plan and, therefore, planning permission should not be granted for the matters stated in the Notice. Accordingly, the appeal under ground (a) fails.

**Ground (f)**

30. As I have noted above, the Notice seeks to remedy the breaches of planning control and the steps required to remedy those breaches are directly targeted at them. For the appeal to succeed on this ground, I must be satisfied that the steps required to comply with the Notice exceed what is necessary to remedy the breaches alleged.
31. While it may be that some of the items, materials and equipment at the site associated with the unauthorised use could be used in connection with other suitable uses of the site, there is no particular suggestion that they were not brought onto the site in connection with the unauthorised use. Therefore, it is reasonable that they are removed in order to remedy the breach. That would not prejudice any reintroduction of similar facilities that may be required in connection with a future lawful use of the premises.
32. Similarly, while the canopy could be used in connection with other uses, and may be a statutory requirement in connection with allowing smoking of cigarettes and the like alongside those uses, there is no substantive evidence that it would exist, were it not for the unauthorised use. In addition, I have

found that harm arises from the way that it encourages additional people to congregate outdoors. Importantly, the Notice requires the breach to be remedied and that can only be achieved by the removal of the canopy.

33. No alternative or lesser steps have been suggested to achieve the purpose of remedying any element of the breaches in this case and, having regard to both the nature of the breach and the requirements of the notice, no other steps that would achieve this purpose are obvious to me. Therefore, I find that the steps required to be taken by the Notice do not exceed what is necessary to remedy the breach of planning control and the ground (f) appeal fails.

### **Ground (g)**

34. An appeal on ground (g) is that the period specified in the notice falls short of what should reasonably be allowed. The Notice specifies a period of 1 month from the date it takes effect.
35. There is no substantive evidence that it would take longer than the 1 month specified to physically undertake the required steps. I understand that the appellant wishes to continue trading, keeping 4 other people employed, and would need to find alternative premises for this. However, while I acknowledge that a break between premises may cause some short-term hardship for the appellant and others, the extent of this has not been set out and nor has a pressing need for the business to continue in its current form in this locality. I, therefore, attribute limited weight to these matters.
36. In the event that the premises can be lawfully used as a restaurant/café, the steps required to comply with the Notice would not be onerous and would not preclude such business activities. This is because in terms of uses, the Notice only seeks to prevent use as a shisha café.
37. Given the need to remedy the harm to the living conditions of neighbouring residents, I find that the time specified does not fall short of what should reasonably be allowed. Therefore, the appeal under ground (g) fails.

### **Formal decision**

38. 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.

*M Bale*

INSPECTOR