The Planning Inspectorate

Appeal Decision

Site visit made on 18 September 2023

by Andrew Walker MSc BSc(Hons) BA(Hons) BA PgDip MCIEH CEnvH JP

an Inspector appointed by the Secretary of State

Decision date: 19th October 2023

Appeal Ref: APP/U5930/C/22/3292987
34 Church Lane, Leytonstone, London E11 1HG

- 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 E11 Cafe Ltd against an enforcement notice issued by the Council of the London Borough of Waltham Forest.
- The enforcement notice, numbered 502100, was issued on 17 January 2022.
- The breach of planning control as alleged in the notice is:
  Without planning permission, the material change of use of the Land from a café (Use Class E) to a mixed composite use comprising a shisha lounge (Use Class Sui Generis) and a café together with the associated development to erect a single storey rear extension with a retractable to facilitate the change of use.
- The requirements of the notice are to:
  1. Cease the use of the property as a Shisha Lounge (Use Class Sui Generis).
  2. Remove all associated paraphernalia associated with the sale and consumption of shisha at the property.
  3. Demolish and remove the single storey rear extension as shown in appendix A).
  4. Remove from the property all associated debris resulting from compliance with the above steps.
- The period for compliance with the requirements is 3 months.
- The appeal is proceeding on the grounds set out in section 174(2) (a) (b) (f) of the Town and Country Planning Act 1990 as amended. Since an appeal on ground (a) has been made the application for planning permission deemed to have been made under section 177(5) of the Act as amended falls to be considered.

Decision

1. It is directed that the enforcement notice be corrected by:

   - adding the word 'roof' after the word 'retractable' in Section 3; and
   - replacing the sentence 'Cease the use of the property as a Shisha Lounge (Use Class Sui Generis)' in Section 5.1 with 'Cease the use of the property as a mixed composite use comprising a shisha lounge (Use Class Sui Generis) and a café'.

2. Subject to the corrections, 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.

The enforcement notice

3. The word 'roof' has clearly been omitted when drafting the allegation as it only makes sense when that word is included. It is clear from the submissions that the parties have taken the allegation to refer to such, and so I am using my powers of correction to include it without any injustice being caused to them.

4. I am also correcting the notice so that the requirement requiring the unauthorised use to cease (Section 5.1) is the same as the unauthorised use alleged (Section 3). This puts the notice in order so that it is legally correct. Doing so causes no injustice to any party, as the correction meets the objective of the Council in targeting the unlawful use and the appellant is clear in the grounds of appeal (and deemed planning application) that it is the mixed use including the shisha component which is the thrust of the enforcement action.

Ground (b)

5. For an appeal to succeed under this ground, the burden of proof is with the appellant to demonstrate on the balance of probabilities that the matters stated in the notice have not in fact occurred.

6. In essence, the appellant says that a single storey extension has not been erected and that free-standing pergolas have been placed in the garden.

7. On my site visit I found that a room has been constructed, with walls and a roof, as an addition to the property and directly adjoining it with no open intervening gap. It fills the space where the rear garden used to exist and consists of a variety of building elements including brick walling, timber boarding, glazing, metal shutters, metal supports, and corrugated plastic roofing. I have no doubt at all that, by any reasonable and common-sense assessment, this operational development can be accurately described as an extension. As a matter of fact and degree, I find that to be the case.

8. Accordingly, the ground (b) appeal does not succeed.

Ground (a) and the deemed planning application (DPA)

Main issues

9. The main issues (which are the same as the reasons given in the notice for its issue) are:

    - the effect of the extension on the character and appearance of the area and host building; and
    - the effect of the appeal development on the living conditions of neighbouring occupiers, particularly as regards odour and noise.

Reasons

Character and appearance

10. The appeal property is situated in a prominent corner location where Church Lane meets Harrington Road. The prevailing character is one of openness at that junction facilitated by wide areas of pedestrianisation and public landscaping works (including large flower beds and tree planting) as part of the open public space situated within the locale of Leytonstone Underground Station close-by.

11. The extensive mass of the appeal extension totally fills the rear garden of the appeal property, an area which had previously contributed to the general character of openness at the corner location. While there had been a brick wall and gates serving as a boundary treatment to the garden, the new extension is considerably taller at over 3m in height along its length and the expanse of

heavy built form within this context is dominant and overbearing within the streetscene. Accordingly, it causes significant harm to the open character and appearance of the area. For similar reasons, the extension significantly harms the character and appearance of the host property as its scale and imposing visual dominance causes it to appear as a markedly non-subservient addition to the main structure.

12. For these reasons, the development is in conflict with Policy CS15 of the Waltham Forest Local Plan – Core Strategy (2012) (CS) and Policy DM29 of the Waltham Forest Development Management Policies (2013) (DMP) which together seek to ensure that developments are of high-quality design and protect local character and appearance.

Living conditions of neighbours

13. Shisha pipe use commonly creates a somewhat distinctive sweet, smoky odour which was present in the appeal extension on my site visit notwithstanding that I did not observe anybody smoking at that time.

14. I note from the Council's appeal statement and photographs that officers have observed 30-40 shisha pipes within the premises, and it is the breach of planning control as set out in the notice – with shisha lounge use as a substantial primary activity rather than being ancillary to café use – for which the appellant is seeking planning permission.

15. Accordingly, and as I have seen no details of a ventilation system which might successfully deal with the matter, there is a potential for the smoke associated with a number of pipes to accumulate within the premises including within the heavily seated extension. There are large areas of the extension's roof which are retractable, which when retracted would release odours very close to the upper floor windows of residential flats above the commercial premises. This would cause a significant and adverse impact on the occupiers' living conditions.

16. Further, the proximity of the windows of the nearby residential receptors to the open roof of the extension[1] would also expose them to unacceptable levels of noise from customers within. While I am mindful that customers may have used the rear garden in association with the pre-development use of the site, there are features of the appeal development – such as the presence of a number of television screens within the new extension, as seen in operation on my site visit – which in my view increases potential for noise disturbance.

17. For these reasons, the development is in conflict with Policies CS13 and CS15 of the CS and Policy D14 of the London Plan (2021) which together seek to ensure that developments are well-designed, prevent noise disturbance and protect health.

Other Matter

18. The appellant says that a benefit of the development is that it produces a modern, desirable venue appealing to all sections of the community. However, it has not been explained how it achieves this and no associated evidence has been provided. Accordingly, I give this factor very limited weight.

[1] and possibly even when closed as the roof coverings appear to be of relatively lightweight and uninsulated design.

Ground (a) and DPA Conclusion

19. The development does not comply with the development plan as a whole, and there are no other considerations which outweigh this finding. There are no conditions which would make the development acceptable.

20. Accordingly, the ground (a) appeal does not succeed and I will not grant planning permission.

Ground (f)

21. For success under this ground, I must be satisfied on the balance of probabilities that the requirements of the notice are excessive in achieving its purpose.

22. The appellant has not clearly or adequately explained why it is considered that the requirements are excessive, nor have any lesser steps been put forward as an alternative to those specified in the notice. The submissions under this ground request 'an application for the Shisha (Sui Generis Class Use) facility on offer at the premises'. However, the application for the mixed use comprising a shisha lounge and café has been considered (and refused) in this Decision under the ground (a) appeal.

23. The requirements of the notice (subject to my correction) do no more than seek to cease the unauthorised use and restore the land to its condition before the breach of planning control. They are accordingly not excessive and the ground (f) appeal does not succeed.

Conclusion

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

Andrew Walker

INSPECTOR