



Appeal Decision

by Graham Dudley BA (Hons) Arch Dip Cons AA RIBA

an Inspector appointed by the Secretary of State

Decision date: 20 November 2023

Appeal Ref: APP/U5930/X/23/3321092

63 High Street, LONDON, E17 7AD

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended, against a failure to grant a certificate of lawful use or development (LDC).
 - The appeal is made by Mr Ansar Mahmood against Waltham Forest London Borough Council.
 - The application ref 222615, dated 6 September 2022.
 - The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended.
 - The use for which a certificate of lawful use or development is sought is use of premises as a mixed-use comprising restaurant/café and shisha garden (Use Class Sui Generis).
-

Decision

1. The appeal is allowed and attached to this decision is a certificate of lawful use or development describing the existing use which is found to be lawful.

Preliminary Matters

2. An application for costs was made by the appellant which is the subject of a separate decision.
3. The appellant wants to confirm that the resumption of the shisha use is lawful. Section 192 is for proposed uses so this is to be considered under Section 191 1(a) as to whether or not the use has continued for a period of 10 years or more and has not been abandoned.

Reasons

4. Ansar Mahmood has produced a statutory declaration, noting that the mixed use of the premises started in July 2007 and that the use was not abandoned. There is also a timeline showing restaurant use started in September 2009 and that the shisha use was removed to the rear garden. It is also noted that the business has been successfully running for 12 years since its opening on 01 September 2005.
5. I accept that there is some contradiction between the commencement dates given, but this was a long time ago. However, it is also definite that the shisha use was in operation in March 2006. The Watford Gazette article is plain evidence of the use occurring at that time. It could not have been known then that support for such use taking place would be needed in the future.
6. In August 2007 there was a visit to view the rear area by Environmental Services, in relation to smoking. A further letter in September agrees that smoking outside complies with smoke free legislation. I accept that this does not refer directly to shisha use, but it is clear that there was some form of smoking and given that shisha use had commenced by 2006, I consider that this is probable.

7. The Council's planning enforcement team noted that a case was opened on 14/10/2013 regarding an allegation of a large shisha area at the rear of the premises. It was noted by enforcement officers as closed due to a Google map indication that the Arabian Nights shisha bar had been permanently closed. To my mind this is not an adequate way to establish whether the shisha bar use alleged was occurring or not. A visit in these cases is essential as dates of Google map information are not always known, information can go out of date and sometimes it is hard to see appropriate detail. The fact that there was an allegation of shisha use provides some support for the appellant's claim that shisha use was occurring in the garden.
8. There is a fire incident report for a fire that occurred on 14 June 2017. Insurance for the building continued with evidence of this for 2017 to 2018. Rent was also paid at this time. I acknowledge that this report does not refer to shisha use in the garden, but that does not mean the use was not there, just that it was not recorded and, in any case, at this time the 10 years of continuous use had been established.
9. There are also letters of support, but I attach little weight to these as they are not sworn statements. I also note the Zurich insurance of is for cafés and restaurants, but I also attach little weight to this as a smoking area would not necessarily have been identified.
10. Overall, I conclude that the shisha use probably started around September 2005, but in any case it was definitely in operation by March 2006. The appellant's evidence is that the use continued successfully for 12 years. In June 2017 there was a fire at the premises that interrupted the use of the overall business. Even if the commencement of the use is taken as March 2006, it still gained 10 years' use before June 2017. The only matter that needs to be considered is whether subsequent to that the use was abandoned.
11. The concept of abandonment applies if a building or land 'remains unused for a considerable time, in such circumstances that a reasonable man might conclude that the previous use had been abandoned. This is determined by looking at the period of non-use, the physical condition of the land or building, whether there has been any other use and the owner's intention as to whether to suspend the use or cease it permanently.
12. The use of the restaurant part ceased in 2017 and did not recommence until 2020, although it is noted that the shisha use continued until 2019 as the shisha garden was unaffected by the fire, but there is little evidence for this. With Covid occurring in March that year the restaurant closed again. A closure of over 2 years is a considerable period.
13. The physical condition of the building after a fire would be likely to make use difficult until repairs are completed, and investigations and insurance would take considerable time. Clearly it was not possible for the restaurant use to continue after the fire, until renovations were complete. Covid was also a relevant interruption as this affected restaurants to a major extent.
14. There is no evidence of any intervening use.
15. The interruption to use was clearly because of the fire. Then the damage was repaired, the restaurant was purchased by the appellant and the previous use continued when Covid allowed. I consider that the owner's intention was not to

abandon the building's use. The interruption to use was clearly caused by the fire and without that there is no evidence the use would have stopped apart from the understandable interruption for Covid. Making arrangements for the fire damage to be rectified also explains the time the period of non-use.

Conclusion

16. For the reasons given above, notwithstanding the Council's failure to grant a certificate of lawful use or development, I conclude, on the evidence now available, in respect of use of the premises as a mixed-use comprising restaurant/café and shisha garden (Use Class Sui Generis), that the appeal should succeed, and a certificate of lawful use or development issued. I will exercise the powers transferred to me under section 195(2) of the 1990 Act as amended.

Graham Dudley BA (Hons) Arch Dip Cons AA RIBA

INSPECTOR

Lawful Development Certificate

TOWN AND COUNTRY PLANNING ACT 1990: SECTION 191
(as amended by Section 10 of the Planning and Compensation Act 1991)

TOWN AND COUNTRY PLANNING (DEVELOPMENT MANAGEMENT PROCEDURE) (ENGLAND)
ORDER 2015: ARTICLE 39

IT IS HEREBY CERTIFIED that on 6 September 2022 the use described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and identified by a red line on the attached plan was lawful within the meaning of section 191(2) of the Town and Country Planning Act 1990 (as amended), for the following reason:

It has been demonstrated on the balance of probability, that the use commenced in 2006 and continued for a period of 10 years, and subsequently was not abandoned.

Signed

Graham Dudley
Inspector

Date: 20 November 2023
Reference: APP/U5930/X/23/3321092

First Schedule

Use of premises as a mixed-use comprising restaurant/café and shisha garden (Use Class Sui Generis).

Second Schedule

Land at 63 High Street, LONDON, E17 7AD

IMPORTANT NOTES – SEE OVER

NOTES

This certificate is issued solely for the purpose of Section 191 of the Town and Country Planning Act 1990 (as amended).

It certifies that the use described in the First Schedule taking place on the land specified in the Second Schedule was lawful, on the certified date and, thus, was not liable to enforcement action, under section 172 of the 1990 Act, on that date.

This certificate applies only to the extent of the use described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any use which is materially different from that described, or which relates to any other land, may result in a breach of planning control which is liable to enforcement action by the local planning authority.

Plan

This is the plan referred to in the Lawful Development Certificate dated: 20 November 2023

by Graham Dudley BA (Hons) Arch Dip Cons AA RIBA

Land at: 63 High Street, LONDON, E17 7AD

Reference: APP/U5930/X/23/3321092

Scale: Not to Scale

