



Appeal Decision

Inquiry held on 30 January 2024

Site visit made on 30 January 2024

by D Boffin BSc (Hons), DipTP, MRTPI, DipBldg Cons (RICS), IHBC

an Inspector appointed by the Secretary of State

Decision date: 18/03/2024

Appeal Ref: APP/A5270/C/23/3330255

**Land Adjacent to 42 Bideford Avenue, Perivale, Wembley, Middlesex
HA0 3AU**

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended (the 1990 Act). The appeal is made by Mr Shariq Jawed of Fortytwo restaurant & lounge against an enforcement notice issued by the Council of the London Borough of Ealing.
- The notice was issued on 23 August 2023.
- The breach of planning control as alleged in the notice is without planning permission the material change of use of premises to a shisha lounge.
- The requirements of the notice are:
 1. Cease the use of the premises as a shisha lounge;
 2. Remove from the land all items that relate to the unauthorised use, including the seating, tables, shisha pipes, heaters, shisha tobacco and televisions; and
 3. Remove all resulting rubbish and debris from the land.
- The period for compliance with the requirements is: 3 months.
- The appeal is proceeding on the grounds set out in section 174(2)(b), (c), (d) of the 1990 Act.

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

Applications for costs

1. An application for costs was made by the Council of the London Borough of Ealing against Mr Shariq Jawed. This application for costs is the subject of a separate decision.

Preliminary Matters

2. The Inquiry commenced on the 30 January 2024 and was programmed to last for 3 days. However, all the oral evidence was heard on that day and the additional 2 days were not required. All the oral evidence given to the Inquiry was given by sworn affirmation. I undertook an unaccompanied site visit on the 30 January 2024.
3. The evidence before me cites the impact of the development on parking facilities, vehicular traffic and noise and disturbance. However, an appeal on ground (a) has not been made. Therefore, the planning merits of the case before me are not relevant to my decision as that decision rests on the facts of the case, on relevant planning law and judicial authority. Furthermore, I am not empowered to consider whether planning permission should be granted for the development.

4. The appellant has submitted evidence in relation to a relative's medical condition but I do not consider that I need to refer to the details of that condition.

The Notice

5. On an appeal any defect, error, or misdescription in an enforcement notice (EN) may be corrected using the powers available in section 176(1)(a) of the 1990 Act, or the terms may be varied, where the correction or variation will not cause injustice to the appellant or local planning authority. The scope of an EN is limited by section 173(4)(a) and (b) of the 1990 Act. Requirement 2 within section 5 of the EN requires the removal of all items that relate to the unauthorised use and it goes onto list a number of items.
6. However, I have found below that the previous lawful use of the premises is, more likely than not, as a restaurant/takeaway. The courts have held that the service of an enforcement notice would allow a landowner to revert to the previous lawful use through the provisions of section 57(4) of the 1990 Act. Even though the tables, chairs, televisions and heaters may be different to those at the premises prior to the breach occurring, examples of those items are visible on the photographic evidence, and they could facilitate that previous lawful use. Consequently, removing those items would, in my judgment, be excessive. I therefore intend to delete the words 'seating, tables, heaters, televisions' from requirement 2. As the requirement would remove the items that facilitate the unauthorised use I can vary the terms of the EN without injustice to both main parties.

The ground (b) appeal

7. To succeed on this ground, the onus is upon the appellant to show on the balance of probabilities that the allegation has not occurred as a matter of fact. The appellant's representations refer to the effect of the development on parking facilities, vehicular traffic and noise and disturbance rather than whether the development as alleged has occurred as a matter of fact. Within the ground (c) appeal it is stated that the primary focus remains on serving food rather than shisha and this is a point that is relevant to the ground (b) appeal. At the Inquiry the appellant stated that it has always been his intention to serve food and that he had numerous issues with hiring and keeping chefs. He also hired a catering company from Milton Keynes who were going to provide the food but this appeared to have been after the EN was issued. Moreover, the food registration process had been initiated prior to the Inquiry opening¹. The appellant also cited his email correspondence² with the Council with regards to his compliance with the EN in that '*currently, our establishment is solely engaged in food trading*'.
8. Nevertheless, this ground of appeal as set out in section 174(2)(b) of the 1990 Act is worded in the past tense, and the question is whether the breach had occurred by the date of issue of the notice. It is clear from the evidence and the appellant's own comments that shisha pipes were stored within, and that shisha smoking had occurred within, the premises as a matter of fact prior to the issue of the notice. I note that due to his family circumstances and his relative's medical condition that the appellant had difficulties in setting up and

¹ Doc 1

² Doc 2

effectively running his business. In addition, he has stated that 3 chefs were employed but not retained and that he has always intended to provide food at the premises. The name of a limited company registered at the appeal site, with the appellant as its director, is Fortytwo Lounge Limited. There is no reference to a restaurant in its name but the information logged at Companies House states that the nature of the business is a licensed restaurant. The limited company was incorporated on the 6 February 2023.

9. It may have been a coincidence that food was not being served on the occasions that officers from the Council visited the premises between February 2023 and the date the EN was issued. Furthermore, some cooking equipment may have been available to be used between those dates. However, the photographic evidence and the Council's officers' notes indicate that the kitchen was not being used to prepare food at the times of their visits. At those visits the officers noted that the appellant stated he was contemplating serving food in the future. Nonetheless, there is little evidence to indicate that between February 2023 and 23 August 2023 a restaurant/takeaway was operating at the premises. The kitchen does not appear to have been capable of being used for commercial purposes, there was no food being cooked in the kitchen and there were no visible food menus when the Council's officers visited the site, and no details of any offsite catering company supplying food for use at the premises have been submitted.
10. Consequently, the evidence before me indicates that it is more likely than not that the premises was being used for the primary purpose of a shisha lounge immediately prior to the EN being issued. Therefore, the appeal on ground (b) must fail.

The ground (c) appeal

11. The appeal on ground (c) argues that the matters alleged in the enforcement notice do not constitute a breach of planning control. In this legal ground of appeal, the onus is on the appellant to establish his case on the balance of probability. A breach of planning control is defined at section 171A(1)(a) of the 1990 Act to include the carrying out of "development" without the required planning permission, and "development" includes the making of a material change of use. For a material change of use to have occurred there must be some significant difference in the character of the activities from the previous lawful use of the premises as a matter of fact and degree. Off-site effects may be highly relevant to whether there has been a material change of use or not. As such, I first need to consider what is the previous lawful use of the appeal site.
12. The Council has provided a copy of a draft EN relating to the '*unauthorised change of use of the site from an industrial unit (B2 use class) to restaurant/takeaway use (A3/A5) and the unauthorised construction of a single storey canopy extension to the front of the property premises known as Yasmin Café, 42 Bideford Avenue....*' The supplied copy is not dated nor signed. A planning application was submitted in 2010 for the '*retention of café and shopfront*'. The application form indicates that the use started on 9 March 2009. The planning application was refused on 26 January 2011 and the description on the decision notice is '*continued use of industrial unit (B2 Use Class) as restaurant/takeaway (A5 Use Class) and altered shop front.*' The Officer Report associated with that planning application states the planning

application was a resubmission of a previous application that had been refused but the canopy had been removed from the latest application. It also states that an EN has already been served.

13. In any case, on 8 December 2021 planning permission was granted on appeal³ for the 'use of industrial land (B2 Use Class) as a restaurant/takeaway (A5 Use Class) and an altered shopfront on land adjoining 42 Bideford Avenue. The application site for that planning permission only covers part of the site attacked by the current EN. There is no dispute that the shopfront approved as part of the application was never installed. The Council's evidence states that *'it is debateable whether the permission was implemented'*. Yet it is clearly apparent that the use as a restaurant/takeaway had begun before planning permission was granted on appeal. The canopy attacked by the previous EN appears to have been removed and other structures have replaced it. The existing structure adjoining the pavement is not attacked by the current EN.
14. Furthermore, there is no dispute that a restaurant/takeaway use was operating between a date in 2009 until at least 2020 at this site. Whilst the application site for the planning permission only covered part of the appeal site the google street view images submitted by the Council indicate that the forecourt area, adjacent to the pavement, had tables and chairs on it in 2009, 2012, 2014 and then the structures enclosed that forecourt area. As such, the appeal site appears to have been the unit of occupation associated with the restaurant/takeaway use.
15. There is no dispute that there has been an element of shisha smoking at the premises prior to the alleged breach occurring. The Council's submitted photographs⁴ show shisha pipes within the premises in September 2020 and September 2021. Nevertheless, the evidence before me indicates that a restaurant/takeaway use was still being operated from the premises. It is not clear if the shisha smoking was ancillary to the restaurant/takeaway use or whether it constituted a mixed use with the restaurant/takeaway use at those times. I also heard at the Inquiry that when the premises was called Yasmin it was one of the first venues to offer shisha smoking. However, I also heard that it was renowned for its Lebanese food. In any case, there is little to indicate specifically when the shisha smoking commenced, the continuity of that activity and how it operated and/or was associated with each restaurant/takeaway use.
16. As a result, based on the evidence before me I am satisfied that it is more likely than not that a restaurant/takeaway use is the previous lawful use of the appeal site. This is the baseline against which to assess whether a material change of use has occurred at the appeal site.
17. The appellant's case is that the primary use of the premises has remained as a restaurant, that the smoking area for shisha enthusiasts is ancillary to the restaurant use and that a material change of use has not occurred. Yet, I have found within the ground (b) appeal that it is more likely than not that the premises was being used for the primary purpose of a shisha lounge immediately prior to the EN being issued.

³ APP/A5270/A/11/2156805

⁴ Appendices 10 & 13

18. There is little evidence before me to indicate the specific operating activities of the restaurant/takeaway use prior to the alleged breach. In my experience, the distinctive characteristics of a restaurant/takeaway use would include the comings and goings of clientele at mealtimes such as breakfast, lunch and dinner, deliveries of unprepared food to the premises, smells within the premises associated with the preparation of hot food and the potential visibility and audibility outside of equipment associated with the extraction of cooking odours.
19. In terms of the shisha lounge, this appears to involve the storage and preparation of specialist equipment. Hot and cold drinks can be ordered and bought. The appellant explained at the Inquiry that he normally opens the premises at around 15:00 or 13:00 and that it closes sometimes at 01:00 but normally between 23:00 and 00:00. It therefore appears that it results in clientele movement patterns later at night, when compared with the restaurant/takeaway use, which might therefore be more likely to give rise to noise disturbance to nearby residents. It would certainly generate distinctive odours, particularly when being smoked inside the structure that is on the forecourt area. The removal of coverings over openings in that structure to ventilate it would be likely to result in the transmission of shisha fumes that would be noticeable by nearby residents.
20. I therefore consider that the appellant has failed to show that the inherent attributes of the shisha lounge are not materially different to that of the restaurant/takeaway use. In my judgment for the reasons given above it is more likely than not, on the balance of probabilities, that the commencement of the shisha lounge use has resulted in the material change of use of the premises. The ground (c) appeal therefore fails.

The ground (d) appeal

21. The ground of appeal is that at the date when the notice was issued, no enforcement action could be taken in respect of any breach of planning control. In order to succeed on this ground, in accordance with section 171B(3) of the 1990 Act, it would be necessary for the appellant to show, on the balance of probability, that the alleged material change of use to a shisha lounge had commenced at least ten years before the notice was issued, that is by 23 August 2013, and had continued in such use over a ten-year period. It must be shown that there has not been any significant interruption in the use, in order to demonstrate the necessary continuity.
22. The appellant has stated that the premises has operated as a venue offering shisha for the last 10 years, dating back to 2010. As stated within the ground (c) appeal there is no dispute that there has been an element of shisha smoking at the premises prior to the alleged breach occurring. However, it is not clear if the shisha smoking was ancillary to the restaurant/takeaway use or whether it constituted a mixed use with the restaurant/takeaway use in 2020/2021. In any case, the alleged material change of use is to a shisha lounge.
23. When the Council's officers visited the premises on the 31 March 2022 the premises were closed and no access was obtained. The photograph dated September 2022⁵ indicates that there was no signage visible at the premises.

⁵ Appendix 6 of Council's PoE

In February and August 2023 Council officers visited the premises again and at those times the premises was being used for the smoking of shisha pipes and no restaurant/takeaway use was apparent. There has been no further evidence presented to persuade me, on the balance of probability, that the alleged use has continued on the site prior to 23 August 2023 and for a minimum period of ten years, in accordance with the requisite immunity period. Indeed, the appellant's oral evidence and the Council's evidence indicates the existence of a restaurant/takeaway use at the appeal premises prior to 2023. The ground (d) appeal therefore fails.

Conclusion

24. For the reasons given above, I conclude that the appeal should not succeed. I shall uphold the enforcement notice with a variation.

Formal Decision

25. It is directed that the enforcement notice is varied by:

- the deletion of the words '*seating, tables, heaters, televisions*' from requirement 2.

Subject to the variation, the appeal is dismissed and the enforcement notice is upheld.

D Boffin

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Mr Shariq Jawed	Appellant
Mr Sajid Mustafa	Factual Witness

FOR THE LOCAL PLANNING AUTHORITY:

Mr Roderick Morton	Solicitor instructed by the Council of the London Borough of Ealing
Mr Neill Whittaker	Planning Enforcement Officer

DOCUMENTS SUBMITTED AT THE INQUIRY

Doc 1 – Messages – Food Registration

Doc 2 – Email Correspondence – October 2023