



Appeal Decision

Inquiry Held on 25 June 2024

Site visit made on 18 July 2024

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

an Inspector appointed by the Secretary of State

Decision date: 22nd July 2024

Appeal Ref: APP/A5270/C/21/3266240

40 Bideford Avenue, Perivale, Ealing UB6 7PY

- 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 Ali Al-Najafi (NAI Lounge Ltd) against an enforcement notice issued by the Council of the London Borough of Ealing.
- The enforcement notice, numbered 20EN0992(1), was issued on 4 December 2020.
- The breach of planning control as alleged in the notice is:
Without planning permission: The material change of use of the premises to a composite use, comprising a café and mixed use restaurant and shisha lounge (marked with an 'X' on the plan attached to the notice); AND
The erection of a side and rear extension (hatched in black on the plan attached to the notice); AND
The erection of 2 rear retractable canopies (each marked with a 'Y' on the plan attached to the notice).
- The requirements of the notice are to:
A. Cease the café use element;
B. Cease the restaurant use element;
C. Cease the shisha lounge use element;
D. Remove from the land all items that relate to the unauthorised use, including the seating, tables, shisha pipes, heaters, shisha tobacco, planters, televisions, coffee machines and the counter/service areas;
E. Remove the kitchen facilities, worktops and drainage connections from the premises;
F. Remove any internal partitions that facilitate the unauthorised use of the premises;
G. Remove the side and rear extensions in their entirety;
H. Remove the 2 rear retractable canopies in their entirety; and
I. Remove all resultant debris.
- The periods for compliance are 3 months (requirements A-C) and 6 months (requirements D-I).
- The appeal is proceeding on the grounds set out in section 174(2) (a) (b) (c) (f) of the Town and Country Planning Act 1990 as amended (the Act). 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.
- This decision supersedes that issued on 17 February 2022 ('the initial appeal decision'). That decision on the appeal was remitted for re-hearing and determination by order of the High Court.

Decision

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

- In Section 3, replacing the words 'composite use, comprising a café and mixed use restaurant and shisha lounge' with 'mixed use as a restaurant/café and shisha lounge';

- In Section 5, replacing requirement A by 'Cease the mixed use as a restaurant/café and shisha lounge';
 - In Section 5, deleting requirements B and C; and
 - In Section 5, deleting 's' from the end of the word 'actions' and '-C' so that it reads 'You are required to complete action A within three months and actions 'D-I' within six months from the date this notice takes effect.'
2. Subject to these corrections, the appeal is dismissed and the enforcement notice is upheld. Planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Application for costs

3. At the Inquiry, an application for costs was made by the Council of the London Borough of Ealing against Mr Ali Al-Najafi (NAI Lounge Ltd). This application is the subject of a separate Decision.

Procedural Matters

4. The appellant did not attend the Inquiry. No list of witnesses or proofs of evidence had been provided, and indeed there had been a lack of engagement by the appellant with the appeal process for some months¹.
5. Accordingly, having first sought the views of the only party attending the event (the Council, who also made its costs application), I closed the Inquiry and the appeal has been determined on the basis of written representations thereto received and an unaccompanied site visit.
6. Inspector Savage issued the initial appeal decision. My task is to redetermine the case rather than to simply review those earlier findings. However, the initial appeal decision is capable of being a material consideration and throughout this Decision I refer to it widely, giving reasons for differences in findings where they occur.

Ground (b)

7. For success on ground (b), the burden of proof is upon the appellant to demonstrate (on the balance of probabilities) that the matters stated in the notice said to constitute the breach of planning control have not in fact occurred.
8. The appellant does not dispute the erection of the alleged extensions and canopies, and neither does he dispute a use comprising onsite service and consumption of food, drink and smoked shisha pipes. Therefore, I agree with Inspector Savage – and for the same reasons - that ground (b) must fail.

Ground (c)

9. For an appeal to succeed on ground (c), the burden of proof is upon the appellant to demonstrate (on the balance of probabilities) that matters stated in the notice do not constitute a breach of planning control.

¹ The Council sets out in its own proof of evidence that the appellant company ceased operations at the appeal site in mid-2023 and that the site has been empty and shuttered since then. The canopies which the notice required to be removed have been removed (though the extensions remain).

10. It seems uncontroversial between the main parties that the allegation is more appropriately and clearly expressed as material change of use to a 'mixed use as a restaurant/café and shisha lounge'. I am therefore correcting to the notice to that effect, with corrections also made to the mirroring steps requiring cessation of the unauthorised use, with no injustice caused to the parties. Rather, the appellant's case is that the alleged use is not a breach of planning control as it is argued that the lawful use is as a restaurant/café and the extent of shisha smoking is so limited as to be ancillary to that use or *de minimis*.
11. Even were I satisfied that the lawful use of the premises was as a restaurant/café (and I will address that matter presently), I agree with the findings of Inspector Savage (and her reasoning) - as set out in the paragraphs below - that use as a shisha smoking lounge was to an extent that was more than subsidiary to the restaurant/café use (and not ancillary to it):

The venue is advertised on Facebook as a 'restaurant and shisha lounge' and is described on Google as 'a restaurant and non-alcoholic shisha/hookah lounge'. A photograph of the premises, dated August 2019, show shisha pipes present at a number of tables, most likely being used by the patrons. Numerous reviews have been provided, many of which make reference to shisha. Officers of the Council visited the site on 24 October 2019 and observed 33 shisha pipes in operation, with a further 38 shisha pipes stored in a stock room.

The appellant has provided a letter from a company acting on its behalf as accountants and tax advisors. It is stated that the revenue generated from shisha represents 8% of the total income of the company between 2018 and 2020. However, a further statement, provided by the appellant's accountant, confirms that the records and information supplied by the appellant records only total turnover which includes sales from all categories, with no break down to show proceeds in respect of shisha or other products.

The accountant states they are unable to confirm or verify the percentage, which was given to them by the appellant. The lack of detail of the revenue received makes it very hard to understand how the percentages have been arrived at. Particularly since adverts for the premises, provided by the Council, advertise shisha and food for a single price. It seems likely, therefore, that 8% is an underestimate of the income generated by shisha, particularly given the number of shisha pipes stored at the premises and the prevalence of pipes in use during the Council's visit on 24 October 2019.

The appellant has drawn my attention to a Council inspection on 17 September 2019 at 16:45, which states 'while nobody was smoking at the time of the inspection'. The appellant submits that this supports its case that the business is a restaurant and café with ancillary shisha serving. However, this may be reflective of the time and day that the officer visited, rather than an indication that levels of shisha smoking are limited. Indeed, business days and hours are stated to be '5pm – could change when restaurant opens', which suggests the restaurant was not open at the time of the visit. It seems unlikely to me that the appellant would choose to invest in so many pipes, if use by patrons was so limited.

I accept that prior to the change in the law regarding smoking in internal venues, smoking was a common feature in restaurants, cafes, pubs and other locations. However, tobacco would have typically been purchased off-site, and was not a main reason for attending the venue. Shisha, on the other hand, is

generally sold at the venue, with patrons paying for it. A shisha menu for the appeal venue, sets out prices for the various flavours of shisha, with premium flavours costing up to £20. This, in my view, does not indicate an ancillary use, but a primary use, for which customers attend the venue.

12. In any respect, I am not satisfied that the lawful use of the premises is as a restaurant/café. The building operated as a bank until around 2014/2015. Moreover, the prior approval granted in 2016² in respect to a change of use to a restaurant/café was not implemented: on the basis of everything I have read, the actual change of use from the outset was to the use constituting the breach of planning control in the appeal before me - a mixed use as a restaurant/café and shisha lounge (which is a *sui generis* use). The prior approval has therefore lapsed due to the time limits set down under the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended).
13. Similarly, I find that planning permission 166127FUL³ (which effectively approved restaurant use, and in fact conditioned approval only for that use) also lapsed (on 20 January 2020). I consider, for the same reasons as above, that unlawful *sui generis* use occurred from the outset of that permission and, further, that the operational development authorised was not what was built. Instead, by way of a single building operation, a materially different and therefore unlawful development with enclosed sides (rather than open sides, as in the approved plans) was constructed. The materiality of the difference has been well-expressed in the Council's proof: '...external walls all around the boundary cannot be considered immaterial as they affect the visual appearance of the building, increase its bulk and dramatically increase its enclosed footprint; indeed they increase the total footprint as the rear extension now has a larger area (full width) beyond the more limited area permitted. Fundamentally, this is now a building with a wraparound extension rather than a building with an outdoor seating area and canopy'. For these reasons, I disagree with Inspector Savage in her finding that 166127FUL was 'kept alive' by beginning works of operational development: as a matter of fact and degree, in my judgment what was commenced (and completed) was materially different to that approved and therefore could not have begun it.
14. Accordingly, the appellant has not demonstrated on the balance of probabilities that any matter stated in the notice allegation is not a breach of planning control. Therefore, the ground (c) appeal does not succeed.

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

Main Issues

15. There being no current dispute between the parties as to character and appearance, the main issues are the effect of the development upon:
- the living conditions of nearby occupiers (particularly as regards odour, noise and disturbance);
 - highway safety through any increase in parking demand; and
 - the integrity of the Strategic Industrial Location.

² Ref 164980PAA3

³ 'Construction of ground floor side and rear rigid external canopy extensions to provide outdoor restaurant seating areas'; 20 January 2017.

Reasons

Living conditions of nearby occupiers

16. I find that I am in agreement with Inspector Savage on this issue, and agree with her findings and reasoning as set out in the paragraphs below.

The appeal site comprises a brick building which is located on the edge of an industrial area, which is separated from a residential area by a train line. Although the units above the appeal premises have previously been converted to flats, there is an enforcement notice in force requiring the residential use to cease, with a compliance period of 3 months. While the notice has been appealed, it was upheld on 19 June 2020.

The Council state that the notice has not been complied with and that the freeholder has a history of reconfiguration of its residential properties in an attempt to comply with enforcement notices without cessation of residential use and that it is unlikely that residential use will cease in the short term⁴. However, it would be open to the Council to take action in the event that a further breach of planning control occurred, and I have no reason to believe that a residential use of the upper floors would be lawful. It seems probable, therefore, that the residential properties most likely to be affected are the properties the other side of the railway bridge, along Bideford Avenue.

A noise assessment has been provided by the appellant in support of the appeal. It is stated that noise readings were taken at the front at rear of the unit, with LAeq, LMax, LA10 and LA90 measurements taken. While definitions for these terms are provided within the report, actual readings are not. LAeq is estimated to be 60dB, however, it is not clear how this has been arrived at.

The time period over which the assessment was carried out did not extend beyond 23:00. There is some ambiguity in the opening times of the premises. The Council advise the opening times for the café are 9am to 4pm and for the restaurant and shisha lounge, 4pm until 1am. Closing times are identified on the Google page as '1am' and 'happy hour lunch deals', including shisha, are advertised between '12-4pm'. It is reasonable to expect an assessment to consider both background noise levels and noise arising from the use across the hours it is actually open.

The selection of 9 December, which was a Wednesday, is also unusual. I would expect an assessment to be carried out over a number of days, including the weekend, when the venue is likely to be busier. Moreover, it is not clear what the levels of occupancy in the building were when the assessment was carried out, or whether these are typical of the site. Although the assessment concludes that the cumulative noise emission levels are expected to have a low impact on the surrounding units, I find the methodology used in the assessment is far from clear. Consequently, the conclusions drawn may not be reflective of effect of noise typically generated by the use.

Potential sources of noise from the premises include music, TV and customers chatting, both whilst in the venue and whilst leaving it. The seating area is substantial and so I consider the potential noise that could be generated by the appeal site is considerable. While the appeal site is separated from properties along Bideford Avenue by a railway bridge, which itself will generate noise, it

⁴ The Council's Inquiry proof of evidence says that these flats are currently unoccupied.

has not been demonstrated that noise arising from the venue would not cause harm to living conditions.

Furthermore, I consider it highly likely that visitors to the appeal site would choose to park their vehicles along Bideford Avenue, close to residential properties. This is likely to lead to noise and disturbance when people leave the venue, particularly early in the morning, when residents are likely to be trying to sleep. This is likely to harm living conditions. Although a restaurant use is likely to generate noise, hours of operation are, in my view, less likely to extend into the early hours of the morning. I have considered whether it would be appropriate to impose a condition to restrict hours of opening. However, since I am not persuaded the noise assessment carried out was sufficiently robust, I cannot be sure what hours would be appropriate.

The smoking of shisha also generates odours which may be perceptible off site. I have no information regarding the likely off-site impacts and so I cannot be sure that it would not cause harm to living conditions of nearby residents. Furthermore, although occupants of the industrial estate would not expect to enjoy the same level of amenity as in their home, workers may be present regularly for extended periods as part of their place of work and may find the odour unpleasant.

17. Thus, for the reasons given above, it has not been demonstrated that the development does not have an adverse effect on living conditions of nearby occupiers. As such, it is contrary to Policy 7A of the Ealing Development Management Development Plan Document (2013), which seeks to ensure that development does not erode the amenity of surrounding uses, Policy 1.1 of the Ealing Development (Core) Strategy 2026 and Policy D3 of the London Plan 2021 which seeks to improve air quality and noise levels.

Highway Safety

18. Parking within the industrial estate is very limited, as is parking upon the appeal site (given that the extensions have removed the parking previously available to the rear of the property). I give significant weight to the Council's evidence that, during site inspections, all legal parking spaces were in use with cars illegally parked on single and double yellow lines. I place the same weight on evidence that forecourts near the site have been improperly occupied by vehicles and that neighbouring businesses have reported increased congestion and difficulties in making and receiving deliveries as a result of shisha business parking. On my site visit, the immediate locality was heavily congested with parked vehicles with a number located upon – and obstructing – footways.
19. To the south, through the railway bridge, is a residential area. The Council has received complaints from the residents in this area relating to shisha parking. While subject to a daytime Controlled Parking Zone (CPZ), the evening operation of the mixed use shisha lounge and café/restaurant creates a likelihood of vehicles being parked in the neighbouring residential streets when customers are unable to find parking within the industrial estate.
20. While Inspector Savage concluded on this main issue that no additional harm would be caused over and above use as a restaurant/café⁵, in coming to my own conclusion I give significant weight to her own findings that there are

⁵ Which she considered relevant to her own reasoning, particularly as she found planning permission 166127FUL to be extant (an issue upon which I have reached a different conclusion, for the reasons I have given)

particular additional parking demands through the mixed use of the appeal development. In those findings, she reasoned it highly likely that visitors to the appeal site would choose to park their vehicles in residential areas and that restaurant opening hours of operation would be less likely to extend late into the night and into the early morning.

21. For these reasons, I find that the appeal development results in an increased need for parking in an area that already faces parking pressures, to the detriment of highway safety. As such, it is contrary to Policies T1, T2, T4 and T6 of the London Plan 2021 and Policy 3.2 of the Ealing Development (Core) Strategy 2026.

Strategic Industrial Location (SIL)

22. While I accept that local employees and other users of the SIL can make use of the development, should they wish to do so, I consider that the above impacts caused through additional generated noise, odour, disturbance, traffic and parking are likely to adversely affect the ability of businesses to operate in the SIL. In that regard, I differ from Inspector Savage in her overall conclusion on this main issue but am mindful that my finding is consistent with her own identification of local impacts, including upon occupants/users of the estate.
23. For these reasons the development is in conflict with Policies 1.1(c) and 3.2 of the Ealing Development (Core) Strategy 2026 and Policies E4 and E5 of the London Plan 2021 which together seek to safeguard employment land and protect the integrity of the SIL.

Conclusion on ground (a) and the DPA

24. The appeal development does not comply with the development plan as a whole and there are no other considerations which outweigh that finding. Unlike Inspector Savage, I will not grant planning permission in part. There is no good reason to separate the operational development from the material change of use. The two are integral elements of the same development, with the operational development creating a substantial enclosed premises with large, covered seating areas with the capacity to accommodate a significant number of visitors to the site. The extensions and canopies thereby increase the scale of use possible, in all weathers, and thereby through their existence contribute to the harms which make the development unacceptable. Further, there are no conditions I could reasonably impose to make it acceptable. Accordingly, ground (a) does not succeed and I will not grant planning permission in whole or part.

Ground (f)

25. For an appeal to succeed on this ground, I must be satisfied that the notice requirements are excessive in achieving its purpose. It is clear to me from the way the notice is drafted that its purpose is to remedy the breach of planning control through the cessation of unauthorised use, the removal of facilitating items and works to restore the land to its condition before the breach took place.
26. On the basis of the evidence, before the breach of planning control it appears that the property comprised a bank. A bank would not ordinarily contain the items and facilities required to be removed by the notice – including the kitchen facilities etc of which removal was not required by Inspector Savage,

partly supported by her own finding that planning permission 166127FUL is extant (and with which I disagree).

27. Were the property once again used as a bank – and the law is clear that the notice cannot require a particular use be undertaken – then it would at that point be possible to change use the property to another commercial, business and service use⁶ without development occurring under the Act. However, I have seen nothing to lead me to conclude that the property will return to use as a bank.
28. Therefore, for these reasons, there is no loss of existing lawful use rights⁷ and the notice requirements are both legitimate and in excess.
29. Accordingly, ground (f) does not succeed.

Conclusion

30. 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 deemed application.

Andrew Walker

INSPECTOR

⁶ Class E of the Town and Country Planning (Use Classes) Order 1987 as amended.

⁷ *Mansi v Elstree RDC* [1964] 16 P&CR 153

APPEARANCES

FOR THE APPELLANT: None

FOR THE LOCAL PLANNING AUTHORITY: Roderick Morton, instructed by the Council of the London Borough of Ealing

INTERESTED PERSONS: None