



Appeal Decisions

Site visit made on 26 February 2025

by **David Jones BSc (Hons) MPlan MRTPI**

an Inspector appointed by the Secretary of State

Decision date: 16 April 2025

Appeal A Ref: APP/B4215/C/24/3338867

3-5 Park Crescent, Manchester M14 5DU

- The appeal is made under section 174 of the Town and Country Planning Act 1990 (as amended). The appeal is made by Mr Hiwa Zada (Sahara Lounge) against an enforcement notice issued by Manchester City Council.
 - The notice was issued on 7 February 2024.
 - The breach of planning control as alleged in the notice is the material change of use of the ground floor to a shisha smoking place (Sui Generis).
 - The requirements of the notice are:
 1. Cease the use as a shisha smoking place (Sui Generis)
 2. Remove all shisha pipes, tobacco and associated paraphernalia from the land.
 - The period for compliance with the requirements is: Three months.
 - The appeal is proceeding on the grounds set out in section 174(2)(a) and (c) 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.
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Appeal B Ref: APP/B4215/W/24/3337185

181-183 Wilmslow Road, Manchester M14 5AP

- The appeal is made under section 78 of the Town and Country Planning Act 1990 (as amended) against a refusal to grant planning permission.
 - The appeal is made by Mr Hiwa Zada against the decision of Manchester City Council.
 - The application Ref is 137016/FO/2023.
 - The development proposed is the change of use from a café (Class E) to a café/shisha establishment (Sui Generis).
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Decisions

Appeal A

1. The appeal is dismissed and the enforcement notice is upheld.

Appeal B

2. The appeal is dismissed.

Preliminary Matters

3. The revised National Planning Policy Framework ("the Framework") was published on 12 December 2024. I have considered the changes and as they are not material to the appeal development, further comments by the parties were not sought. I have, however, determined the appeals having regard to the revised Framework.
4. Appeal A was originally made on ground (a) only. However, within the appeal submissions the appellant contends that the breach of planning control stated in the notice may not constitute a breach of planning control. As such, I consider that there is a hidden ground (c) appeal. As the Council has had sight of the points raised by the

appellant and has responded to them, I am satisfied that no injustice would be caused by me taking the approach that the appeal is also proceeding on ground (c).

5. In relation to Appeal B, I have taken the description of development from the Council's decision notice as it more succinctly and accurately describes the development. The appellant has confirmed that the description used is acceptable.
6. Despite the slight difference between the breach of planning control alleged in Appeal A and the description of development in Appeal B, both appeals essentially relate to the same development which has already commenced on site. Similarly, despite the differing addresses given, it is clear from the submitted plans and documentation that Appeals A and B both relate to the same premises.

Appeal A on 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 falls on the appellant and the relevant test is on the balance of probabilities.
8. There is no dispute that the lawful use of the appeal premises is that of a restaurant/café falling within Class E, Part A, of Schedule 2 of the Town and Country Planning (Use Classes) Order 1987 (as amended) ("the UCO"). The appellant contends that the use of the premises as a shisha smoking place is not materially different from the previous lawful use, or alternatively, that shisha smoking should be considered "indoor recreation" and therefore falling within Class E(d) of the UCO, which refers to the use for all or any of the following purposes:

"for indoor sport, recreation or fitness, not involving motorised vehicles or firearms, or use as a swimming pool or skating rink, principally to visiting members of the public".
9. I will first consider whether the use of the premises as a shisha smoking place is materially different to that of a restaurant/café. There is no detailed evidence as to how the restaurant/café operated at the appeal site. Nevertheless, I would expect such an establishment to provide facilities for people to eat and drink comfortably, with a choice of food and beverages for purchase and facilities on site for their preparation.
10. At the time of my visit the internal area at ground floor level was laid out in a similar fashion to a bar, with plenty of tables and chairs available and tv's showing sport. Further seating was also available at basement level. In one corner of the ground floor was a small serving area, which included a counter, coffee making facilities, and ice creams. Beyond this there was a separate area which was modest in size and predominantly used for the storage of shisha pipes, with approximately 20-25 present at the time of my visit. There was no indication of any significant amount of food being stored or prepared in this area, or elsewhere on the premises.
11. Whilst it was clear that food and drink were available to purchase, there is no substantive evidence to show that the choice of food and drink available was anything other than limited. The evidence before me therefore indicates that the main reason for customers to visit the premises would be to smoke shisha.
12. The appellant has provided very little information about the shisha smoking activities themselves. Nevertheless, it is my understanding that it is essentially

smoking a heated flavoured tobacco through a device consisting of a bowl, water-filled base and a hose or pipe.

13. In my view, smoking shisha, as a physical activity, is not functionally related to eating and drinking. The smoking of a shisha pipe can take some time, and I find it likely that it will generate smells which differ from a restaurant/café and are particular to the shisha smoking use. I also acknowledge that restaurant/café customers may occasionally smoke cigarettes, however those customers would typically bring their own cigarettes to the premises and would spend far less time partaking in that activity. In my view, the smoking of shisha by customers attending the premises specifically for that purpose is a significantly different one in terms of scale and nature.
14. When taking into account the nature of the activity as set out above, along with the physical size of the appeal premises and its capacity for hosting shisha customers, I conclude that it is materially different to that of a restaurant/café.
15. In terms of the appellant's claim that shisha smoking can be considered "indoor recreation", I disagree. Whilst I do not dispute that customers would likely attend the shisha premises for "recreational" purposes, the same could be said for those attending a public house for a drink or carrying out many other activities in their own time. In my judgement Class E(d) is clearly aimed at indoor sporting, leisure, and fitness activities, such as a gymnasium or an indoor 5-a-side football pitch. To my mind the use as a shisha smoking place is materially different to any uses that would fall under Class E(d), or indeed any other limb of Class E, Part A of Schedule 2 of the UCO, and is instead a "sui generis"¹ use as alleged in the enforcement notice.
16. For the reasons set out above, I consider that the appellant has failed to show that the use of the premises as a shisha smoking place is not materially different to that of a restaurant/café. It is therefore apparent that the commencement of the shisha smoking use has resulted in a material change of use of the premises. It thereby constitutes the carrying out of development without planning permission, and hence is a breach of planning control. Accordingly, the appeal on ground (c) fails.

Appeal A on ground (a) – the deemed planning application, and Appeal B

17. In considering whether planning permission should be granted, the main issue in respect of both appeals is the effect of the development on the living conditions of neighbouring residents, with particular regard to noise, disturbance, and odour.

Living Conditions

18. In the immediate vicinity of the appeal site is Wilmslow Road, which is largely commercial in nature with an array of shops, bars, cafes and restaurants that make up what is known as the "Curry Mile", an area well known for its vibrant night-time economy. The appeal property itself is accessed via Park Crescent, which runs from Wilmslow Road to a roundabout which, along with its connecting streets, is for the most part made up of residential properties.
19. The appeal property, along with other buildings on Wilmslow Road, has residential accommodation above the ground floor level. Its location on Park Crescent also

¹ A "unique" use that does not fall within any particular Use Class

results in it being closer to neighbouring residential properties, including Hamilton Lodge, than many of the other commercial premises found on Wilmslow Road.

20. The Council considers that the levels of noise and disturbance arising from the shisha smoking use causes unacceptable harm to the living conditions of occupiers of neighbouring residential properties. Given the proximity of several residential units, there is clearly the potential for the use of the premises to have an impact upon residents living conditions. Whilst I acknowledge that their location in a busy urban setting, near to Rusholme District Centre, means that there will be a certain level of noise and disturbance expected, this does not preclude residential occupiers from being entitled to a reasonable standard of amenity.
21. The Council accepts that the smoking of shisha inside the premises will not result in undue harm to nearby residents. Given that planning conditions could restrict the opening hours and require the submission and implementation of a scheme for the extraction of any fumes and odours, I find no reason to disagree with this view.
22. However, the Council refer to the Health Act 2006 which prohibits smoking in an enclosed public space. In an attempt to overcome this matter, the Council say that the large sliding doors on the front elevation are opened, resulting in noise and odours emanating from the premises. It is further considered that patrons may congregate on the pavement outside the premises, which would further exacerbate any harmful impacts.
23. Given that the lawful use of the appeal site is a restaurant/café I consider it unlikely that the shisha smoking use would result in any significant increase in footfall, or associated comings and goings. I also acknowledge that the restaurant/café use could have generated noise and disturbance from people talking in the premises. Indeed, it may have been necessary for the previous restaurant/café to provide outdoor areas for people to smoke or sit, although I have been provided with no evidence to demonstrate any historic external seating area.
24. The appellant refers to a previous appeal decision at 119 Wilmslow Road² and contends that the legality of shisha smoking and whether it can take place indoors, in an enclosed space, is controlled by other legislation and is not for determination in these appeals. Whilst I agree that it is not for me to determine whether shisha smoking at the appeal premises would be breaking the law, it is important for me to understand how the use functions at the premises so I can give consideration to the planning merits of the appeals and assess any impacts.
25. Very little information has been provided to detail the shisha smoking activities that take place, or to rebut the Council's concerns regarding the sliding doors being left open and/or patrons congregating externally. In the absence of any evidence to the contrary, it is reasonable to assume that the shisha smoking use would often necessitate the sliding doors being open. I accept that, particularly during the summer months, a restaurant/café may also have chosen to have the sliding doors open. Nevertheless, in my view those occasions would have been far less frequent than the shisha smoking use, where patrons are more likely to choose to have the doors open later into the evening or outside of the summer months.
26. Consequently, when considering the nature of the shisha smoking use and the proximity of nearby residential properties, I consider that it has the potential for

² APP/B4215/C/18/3212030

noise and odour to emanate from the premises at levels which exceed those from the previous restaurant/café use. In the absence of any particular evidence or impact assessments regarding noise levels and odours that emanate from the premises, I cannot be certain that the use does not unacceptably harm the living conditions of occupiers of nearby residential properties, by way of noise and disturbance, or odour emanating from the premises.

27. I note the third-party representation from the neighbouring pharmacy which sets out that, in his view, the shisha smoking use has not resulted in an increase in noise levels. This though is contradicted by two other third-parties who highlight noise disturbance as an issue. The representation from the pharmacy also states that a noise impact assessment (NIA) was undertaken, however no NIA has been provided as part of these appeals.
28. Finally, the Council raised concerns regarding the use of the car parking spaces to the front of the property by patrons of the premises, with particular reference to noise and disturbance arising from the slamming of car doors, the starting of engines, and the playing of car radios. However, I find no reason why these car parking spaces would not be available and used by patrons of the premises if it was operating lawfully as a restaurant/café. Indeed, even if the premises was vacant, given the proximity to Wilmslow Road, I find it highly probable that the parking spaces would be utilised by patrons of other nearby businesses. I therefore see no reason why the use of the car parking spaces by patrons of the appeal premises would result in any greater level of noise and disturbance.
29. I therefore find that the continued use of the premises as a shisha smoking place would cause unacceptable harm to the living conditions of occupiers of neighbouring residential properties. The development is therefore contrary to Policies SP1 and DM1 of the Manchester Core Strategy Development Plan Document (CS) (adopted July 2012) and saved Policy DC26 of the Unitary Development Plan for the City of Manchester (UDP) (adopted July 1995). Together these policies seek, amongst other things, to ensure that developments make a positive contribution to the health, safety and wellbeing of residents, and do not lead to unacceptable adverse effects on amenity including from noise and odours.
30. The appellant has questioned whether the development plan policies are out of date for the purposes of determining the appeals, and in particular highlights saved Policy DC26 of the UDP. No substantive argument, other than its age given its adoption in 1995, has been provided to explain why the policy is out of date.
31. Paragraph 232 of the Framework states that existing policies should not be considered out of date simply because they were adopted or made prior to the publication of the Framework. It further sets out that due weight should be given to them, according to their degree of consistency with the Framework. Policy DC26 of the UDP seeks to ensure that developments do not have an unacceptably harmful noise impact on people living and working in the City. I find this to be highly consistent with paragraph 135 f) of the Framework which states that planning policies and decisions should create places that have a *“high standard of amenity for existing and future users”*. I am therefore not persuaded by the appellant’s argument, and I find that saved Policy DC26 is not out of date. I have therefore given the policy full weight in determining these appeals.

32. Whilst DC26 is an important policy in the determination of this appeal, there are other policies such as Policy DM1 of the CS which are just as important for the purposes of paragraph 11 d) of the Framework. Therefore, even if I had concluded that saved Policy DC26 was out of date, the “basket” of policies as a whole for the determination of the appeals are not out of date. Accordingly, paragraph 11 d) is not engaged.

Conclusion on Appeal A on ground (a), and Appeal B

33. For the reasons set out above the development causes harm to the living conditions of occupiers of neighbouring residential properties, and conflicts with the development plan when read as a whole. Material considerations, including the approach of the Framework, do not indicate that a decision should be taken other than in accordance with that plan. Having considered all matters raised, I therefore conclude that Appeal A on ground (a) should be dismissed, and planning permission be refused on the deemed planning application. For the same reasons, Appeal B is also dismissed.

Other Matters

34. In the appellants appeal submissions reference is made to several shisha smoking places in the vicinity of the appeal site. The Council though contend that many of these premises have now ceased trading, with only 72 and 119 Wilmslow Road being authorised. In any event, the existence of other shisha smoking places does not overcome the harm identified or justify the appeal development, which I have determined on its own merits.

Conclusion

35. Having considered all of the matters raised, I conclude that Appeal A does not succeed. I have upheld the enforcement notice and refuse to grant planning permission on the deemed application.
36. For the reasons given above, I conclude that Appeal B should be dismissed.

David Jones

INSPECTOR