MANCHESTER CITY COUNCIL

Julie Roscoe
Director of Planning, Building Control and Licensing

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14 OCTOBER 2024

TOWN AND COUNTRY PLANNING ACT 1990 (AS AMENDED)
98 Wilmslow Road, Manchester, M14 5AL

On 14 October 2024, in an appeal decision made by the Secretary of State (refs. APP/B4215/C/23/3320680 and APP/B4215/C/23/3320691), planning permission was granted on the applications deemed to have been made under section 177(5) of the 1990 Act (as amended) for the change of use of the premises from a former exhaust/tyre fitting centre (Class B2) to café (Class A3) with associated elevational alterations, waste storage, cycle storage and car parking at Land at 198 Wilmslow Road, Manchester, M14 5AL, but subject to the other conditions attached to that permission and the following new conditions:

5) No part of the site shall be used other than in accordance with the approved drawings; there shall be no smoking of shisha outside other than under the canopy, and none of the areas outside the building including the car park shall be used as external seating areas.

7) The premises shall not be open outside the hours of 11:00 to 23:30 each day, including bank and public holidays.

The Planning Inspectorate

Appeal Decisions

Hearing held on 17 September 2024

Site visit made on 16 and 17 September 2024

by A Walker MPlan MRTPI

an Inspector appointed by the Secretary of State

Decision date: 14 October 2024

Appeal A Ref: APP/B4215/C/23/3320680
Appeal B Ref: APP/B4215/C/23/3320691
Land at 198 Wilmslow Road, Manchester M14 5AL

- The appeal is made under section 174 of the Town and Country Planning Act 1990 (as amended). The appeal is made by Mr Ibrahim Mirza on behalf of A Road Ltd and Mr Arsalan Ali against an enforcement notice issued by Manchester City Council.
- The enforcement notice was issued on 17 March 2023.
- The breach of planning control as alleged in the notice is failure to comply with conditions imposed on a planning permission ref 118025/FO/2017 granted on 11 June 2018.
- The development to which the permission relates is: Change of use from former exhaust/tyre fitting centre (Class B2) to café (Class A3) with associated elevational alterations, waste storage, cycle storage and car parking.
- The conditions in question are nos 2, 5 and 7 which state that:

  2) The development hereby approved shall be carried out in accordance with the following drawings and documents:
  T698 P001 Location Plan
  T698 P002 Existing Site Plan
  118025/FO/2017 Page 3 of 7
  T698 P008 Proposed Site Plan
  T698 P016 Proposed Ground Floor
  T698 P017 Proposed Elevations
  Crime Impact Assessment 2016/0813/CIS/02
  Planning Noise Impact Assessment by dBx Acoustics re 18022 dated 29/3/18

  5) No part of the site shall be used other than in accordance with the approved drawings; there shall be no areas used for the smoking of shisha, either inside or outside the building, and none of the areas outside the building including the car park shall be used as external seating areas.

  7) The premises shall not be open outside the following hours:
  10am to 10.30pm Monday to Thursday,
  10am to 11.30pm Friday and Saturday, and
  11am to 10pm on a Sunday.
  Reason - In interests of residential amenity in order to reduce potential noise and general disturbance in accordance with saved policy DC26 of the Unitary Development Plan for the City of Manchester and policies SP1 and DM1 of the Core Strategy.
- The notice alleges that the conditions have not been complied with in that the smoking of shisha is taking place inside and outside the building, the area to the front of the building is being used as an external seating area and the premises is opening beyond the permitted hours.
- The requirements of the notice are to:

  1. a) Permanently cease the use of any part of the premises, inside and outside, for the smoking of shisha.
  b) Remove from the land all shisha pipes, tobacco, and associated paraphernalia.

2. a) Permanently cease the use of the areas outside the building for seating.
   b) Remove from the land all seating and tables, planters, timber structures, etc., make good the land and implement the car parking and vehicular access arrangements serving the development, including demarcation of parking spaces, in full accordance with the approved drawing 'T698 P008 - Proposed Site Plan', which is attached to this notice.
3. Permanently cease to open the premises outside the following hours:
   10am to 10.30pm Monday to Thursday,
   10am to 11.30pm Friday and Saturday, and
   11am to 10pm on a Sunday.

- The period for compliance with the requirements is three months.
- The appeal is proceeding on the grounds set out in section 174(2)(a), (c), (f) and (g) 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.

Appeal C Ref: APP/B4215/C/23/3320681
Appeal D Ref: APP/B4215/C/23/3320690
98 Wilmslow Road, Manchester, M14 5AL

- The appeal is made under section 174 of the Town and Country Planning Act 1990 (as amended). The appeal is made by Mr Ibrahim Mirza on behalf of A Road Ltd and Mr Arsalan Ali against an enforcement notice issued by Manchester City Council.
- The notice was issued on 16 March 2023.
- The breach of planning control as alleged in the notice is without planning permission, the erection of a canopy extension to the front and a close-boarded timber fence to the side at Land at 98 Wilmslow Road, Manchester, M14 5AL.
- The requirements of the notice are to:
  1. Dismantle and remove the canopy extension, making good the front elevation and the forecourt using materials that are similar to the existing.
  2. Remove the close-boarded timber fence, returning the boundary wall to its condition before the breach took place.
  3. Remove all building materials, rubble, waste, etc. arising from carrying out the above steps.
- The period for compliance with the requirements is three months.
- The appeal is proceeding on the grounds set out in section 174(2)(a), (f) and (g) 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.

Decision

Appeals A and B

1. The appeals are allowed in part and the enforcement notice is upheld. In accordance with section 177(1)(b) and section 177(4) of the 1990 Act as amended, condition Nos 5 and 7 attached to the planning permission dated 11 June 2018, ref 118025/FO/2017 are discharged and the conditions below are substituted.

2. Planning permission is granted on the applications deemed to have been made under section 177(5) of the 1990 Act (as amended) for the change of use from former exhaust/tyre fitting centre (Class B2) to café (Class A3) with associated elevational alterations, waste storage, cycle storage and car parking at Land at 198 Wilmslow Road, Manchester M14 5AL but subject to the other conditions attached to that permission and the following new conditions:

5) No part of the site shall be used other than in accordance with the approved drawings; there shall be no smoking of shisha outside other than under the canopy, and none of the areas outside the building including the car park shall be used as external seating areas.

7) The premises shall not be open outside the hours of 11:00 to 23:30 each day, including bank and public holidays.

Appeal C and D

3. The appeals are allowed insofar as they relate to the canopy and close-boarded timber fence as shown on drawing numbers 23/19-03 Rev.D and 23/19-04 Rev.A and planning permission is granted on the applications deemed to have been made under section 177(5) of the 1990 Act (as amended), for the canopy and close-boarded timber fence at 98 Wilmslow Road, Manchester, M14 5AL and subject to the following condition:

   1) Unless within three months of the date of this decision, the canopy and close-boarded timber fence has been altered to accord with the proposed floor plan and elevations shown on drawing numbers 23/19-03 Rev.D and 23/19-04 Rev.A (the approved drawings) the canopy shall be dismantled and removed, making good the front elevation and the forecourt using materials that are similar to the existing; the close-boarded timber fence shall be removed, returning the boundary wall to its condition before the breach took place; and all building materials, rubble, waste, etc. arising from carrying out these works shall be removed.

   In the event of a legal challenge to this decision, or to a decision made pursuant to the procedure set out in this condition, the operation of the time limits specified in this condition will be suspended until that legal challenge has been finally determined.

4. The appeals are dismissed and the enforcement notice is upheld as insofar as it relates to the canopy and close-boarded timber fence as built and planning permission is refused in respect of the canopy and close-boarded timber fence as built at 98 Wilmslow Road, Manchester, M14 5AL on the applications deemed to have been made under section 177(5) of the 1990 Act (as amended).

Application for Costs

5. An application for costs is made by Manchester City Council against Mr Ibrahim Mirza on behalf of A Road Ltd and Mr Arsalan Ali in relation to Appeals A and B. This application is the subject of a separate Decision.

Preliminary Matter

6. Section 177(1)(a) of the Town and Country Planning Act 1990 (the Act) only allows the grant of planning permission in respect of matters stated in the enforcement notice as constituting a breach of planning control "whether in relation to the whole or any part of those matters".

7. The appellant requests that under the ground (a) appeals I consider three options. All of the options include varying condition 7 to allow the opening

hours to between 11:00 to 23:30 7 days a week, including bank and public holidays.

8. Option 1 is for the café to accommodate up to 230 people with 180 indoors and 50 under the canopy for shisha smoking. The layout of the canopy would be altered to include a cycle store and bin/recycling store. The fence would be reduced in length and painted Graphite Grey to match the retained canopy structure. I note that the fence has already been reduced to reflect that proposed in Option 1.

9. The alleged matters in paragraph 3 of the breach of condition notice (BOC notice) do not refer to the erection of the canopy and fence, or any other operational development. Therefore, the proposed change to the layout of the canopy and the fence do not relate to the matters stated in the BOC notice constituting a breach of planning control, either in whole or in part. Accordingly, I cannot consider Option 1 under the ground (a) appeals pertaining to Appeals A and B. Nevertheless, the enforcement notice (the notice) pertaining to Appeals C and D alleges the erection of a canopy extension to the front and a close-boarded timber fence to the side. Therefore, Option 1 can be considered under the ground (a) appeals pertaining to Appeals C and D.

10. Option 2 is for shisha smoking indoors only and the installation of roof grilles and extract grilles in the building. The canopy and fence would be removed entirely and there would be no outdoor seating.

11. The installation of roof grilles and extract grilles in the building would be operational development. This does not relate to the matters stated in neither the BOC notice nor the notice constituting a breach of planning control, either in whole or in part. Accordingly, I cannot consider the installation of roof grilles and extract grilles as part of any of the deemed planning applications as to do so would go beyond the provisions of s177(1)(a).

12. Option 3 is for shisha smoking indoors without ventilation/extraction grilles as proposed in Option 2. This option would result in compliance with the notice and therefore does not fall to be considered under the ground (a) appeal for Appeals C and D. However, it does relate to the matters alleged in the BOC notice, effectively seeking the variation of conditions 5 and 7. Therefore, Option 1 can be considered under the ground (a) appeals pertaining to Appeals C and D.

13. The appellants confirm that none of the options include seating in the forecourt area of the appeal site. This would be returned to parking spaces as per the approved drawings under planning permission 118025/FO/2017.

14. Accordingly, I am satisfied that the consideration of Option 1 under the ground (a) appeals relating to Appeals C and D and Option 3 under the ground (a) appeals relating to Appeals A and B are permissible under s177(1)(a).

15. In addition to the accompanied site visit held on 17 September, I carried out an unaccompanied site visit on 16 September at approximately 22:30 hrs.

Appeals A and B - The ground (c) appeal

16. The appeal on ground (c) is whether, on the balance of probabilities, the matters alleged in the notice do not constitute a breach of planning control.

17. The appellants' case under the ground (c) appeal is that a material change of use has not occurred. However, the BOC notice makes no reference to a material change of use taking place. The alleged matters are that conditions have been breached. S171A(1) of the Act states 'For the purposes of this Act—(a) carrying out development without the required planning permission; or (b) failing to comply with any condition or limitation subject to which planning permission has been granted, constitutes a breach of planning control.' The breach of a condition subject to which planning permission has been granted is, by definition, a breach of planning control. As the BOC notice relates to the breach of conditions, the ground (c) appeal must fail.

The ground (a) appeals and the deemed planning application

Main Issue

18. The main issue in respect of all of the appeals is the effect of the development of the living conditions of the occupants of neighbouring residential properties with regard to noise and disturbance and odour. In addition, with regard to Appeals C and D, the main issues include the effect of the development on the character and appearance of the area.

Noise and Disturbance

19. A noise impact assessment was carried out by Apex Acoustics on 28 July 2023. An addendum to this report was prepared on 20 March 2024 to take into account 5 Grandale Street being in use as a residential property, albeit without planning permission.

20. The assessment identified the nearest sensitive receptors to the appeal property as being 7 and 13 Grandale Street and 5 and 13 Grandale Street in respect of the addendum. Even in the event that No 5 is in lawful residential use, with all three options, the development would likely have a low impact. The Council does not dispute the findings of the noise impact assessment.

21. The Council's concern is the effect the noise and disturbance generated by the comings and goings of customers has on the living conditions of neighbouring residents. The assessment does not measure these effects. I note there is no guidance on assessing such effects. Nevertheless, customers conversing loudly when exiting and perhaps loitering around the property and car engines idling/starting whilst picking up/dropping off customers could potentially cause significant noise and disturbance to the extent that it would disturb neighbouring residents, particularly late at night.

22. Notwithstanding the above, the Rusholme & Moss Side Resident Parking Scheme significantly restricts parking along many of the nearby roads to permit holders only from 7.00am till midnight. There are a limited number of non-permit parking spaces on both sides of the road between 1 and 9 Grandale Street for approximately 10 cars. These are for a maximum 3 hour stay with no return within 3 hours.

23. As a consequence of the parking restrictions, unless customers are able to use a parking space within the appeal site or one of the limited number of 3 hour stay spaces on Grandale Street, they would have to park some distance away to find an unrestricted space. The result of this is that customers exiting the property would likely disperse along the numerous streets to find their car rather than congregate in a large crowd in a more confined area. Whilst some customers may be parked on Grandale Street, there are numerous other businesses in the area that have opening hours up to and later than 23:30. The customers for these businesses would also likely use these spaces. Therefore, it is unlikely the 10 available non-permit spaces would all be used by customers of the appeal site, thus limiting the effect noise from customers of the appeal site would have on neighbouring residents. In addition, the properties adjacent to these parking spaces (Nos 5 and 7) are both on first floor level, reducing the effect customers walking past their properties would have with regard to noise.

24. In addition to the above, the appeal site is located within a mixed use area comprising various food outlets, residential properties and commercial uses. Having visited the site in the late evening on a weekday, it has a vibrant night-time economy where one would expect there to be some degree of nighttime activity and noise associated with it. There are numerous other cafes, restaurants and takeaways within the vicinity of the appeal site that are open as late as, and even later than, the opening hours proposed. Most notably, the restaurant at 1 Grandale Street, recently granted planning permission in 2023[1], has the same opening hours as those proposed. I acknowledge this is a significantly smaller property than the appeal property. Nevertheless, there are many other properties within the vicinity that have late opening hours. I do not consider the proposed extension of the opening hours would result in significant disturbance to neighbouring residents.

25. I find therefore, the proposed opening hours would not have an unacceptably harmful effect on the living conditions of the occupants of nearby residential properties, with regard to noise and disturbance. As such, it complies with Policies SP1, DM1 and EN1 of the Manchester City Council Manchester Core Strategy 2012, which seek to ensure development is of a high quality and protects residential amenity. It also accords with the design objectives of the National Planning Policy Framework.

Odour

26. An odour appraisal was carried out by Michael Bull and Associates and an addendum to this report was prepared on 20 March 2024 to take into account the potential for 5 Grandale Street to be a residential property, for the same reason as the addendum to the noise impact assessment.

27. The Council's concern regarding odour relates to customers smoking shisha outside on the forecourt area. However, none of the three options propose smoking outside on the forecourt. The Council do not dispute the findings of the odour appraisal. Based on the evidence before me and my own observations on site, I find no reason to conclude otherwise.

[1] Council Ref 135822/FO/2022

28. I find therefore, the proposed smoking of shisha inside the building and under the canopy area would not cause unacceptable harm to the living condition of the occupants of neighbouring residential properties, with regard to odour. As such, it complies with Policies SP1, DM1 and EN1 of the Manchester City Council Manchester Core Strategy 2012, which seek to ensure development is of a high quality and protects residential amenity. It also accords with the design objectives of the National Planning Policy Framework.

Appeals C and D – Character and Appearance

29. Wilmslow Road is a vibrant, mixed use road comprising properties of varying designs ranging between one and three storeys in height. Buildings typically front directly on to the footway, although the parade of terrace properties to the north of the appeal site is set back with many having outdoor seating and canopies over the footway. The materials and colours used in the canopies and signage of existing properties on the road make a positive contribution to the vibrant character and appearance of the area.

30. The canopy on the appeal property extends the full width of the front elevation of the building. The roof sections are all retractable and the windows can be raised up and down. When the roof sections and windows are fully closed, the structure has the appearance of a solid conservatory, rather than a canopy.

31. Nevertheless, its scale and proportions are sympathetic to the existing building. Moreover, due to the significant set back position of the building from the highway and the adjoining property to the north and adjacent properties on the corner of Grandale Street, the canopy is not visible along much of Wilmslow Road. When it does come into view when travelling along the road, due to its set back position, its single-storey height and dark grey colouring, the canopy does not appear prominent or dominant within the streetscene. Indeed, it is sympathetic to the commercial context of the site and Wilmslow Road.

32. With regard to the fence, this now extends approximately two thirds of the length of the boundary wall between the front elevation of the building and the front of the site. The first section is effectively read as a side wall to the canopy. The section closest to the road is lower in height, albeit still rising above head height. Nevertheless, the fence reads as a natural step up in height from the brick wall boundary, with each section rising proportionately in height.

33. The fence is set back from the road junction and only the section closest to the road is seen when approaching in a southerly direction along Wilmslow Road. On approach in a northerly direction, it only becomes visible when close to the junction with Grandale Street due to its significant set back position. Therefore, its effect on the streetscene of Wilmslow Road is very limited. When travelling along Grandale Street in a westerly direction, the southern flank elevation of the appeal building abuts the footway. This elevation is a blank brick wall, far higher than the fence. The steeped design of the fence makes it appear as a sympathetic transition between the flank elevation and the lower brick wall boundary.

34. With regard to the visibility of the canopy and the fence from neighbouring residential properties, they would only been seen at oblique angles from first floor windows and would not be seen as incongruous or intrusive.

35. I find therefore that the proposed alterations to the canopy and fence would not have an unacceptably harmful effect of the character and appearance of the area. As such, they comply with Policies SP1, DM1 and EN1 of the Manchester City Council Manchester Core Strategy 2012, which seek to ensure development is of a high quality and protects and enhances the built environment. They also accord with the design objectives of the National Planning Policy Framework.

Other Matters

36. The appellant seeks to vary condition 5 to omit the restriction of shisha smoking indoors. Both parties accept that smoking indoors is controlled under separate legislation, ie the Health Act 2006. The restriction of shisha smoking indoors under condition 5 is not necessary as this is already controlled under this other legislation. The fact that smoking indoors is potentially breaking the law has no bearing on my consideration of the planning merits of the appeals. Consequently, I shall vary condition 5 to omit the reference to shisha smoking indoors.

37. I have had regard to the two previous appeals relating to variation of conditions 2, 5 and 7. I note that in both appeals, the Inspectors found there would be harm to the living conditions of neighbouring residents. However, the proposals that were the subject of the previous appeals were different to the proposals before me. The proposal the subject of appeal 3229095 was for later opening hours the currently proposed. The proposal the subject of appeal 3248525 was for an outdoor seating area, the removal of the restriction on shisha smoking and changes to the opening hours. Moreover, the situation pertaining to the neighbouring residential properties has since changed as 1 Grandale Street is no longer in residential occupation. Consequently, whilst there are similarities between the current appeals and the previous two appeals, there are sufficient differences between the proposals and the nearest sensitive receptors that allow me to make a different decision without conflict with the previous Inspectors' findings.

Appeals A and B - Conclusion

38. I have found the proposed variation of conditions 5 and 7 in respect of Option 1 would not have an unacceptable harmful effect on the living conditions of the occupants of the neighbouring residential properties, with regard to noise and disturbance and odour.

39. With regard to the alleged breach of condition 2, there is no dispute that the forecourt area of the site has been used for outdoor seating, contrary to the approved drawings set out in condition 2. None of the proposed options include outdoor seating in the forecourt area. As options 1 and 2 cannot be considered under Appeals A and B, condition 2 shall not be varied.

40. For the reasons given above, I conclude that Appeals A and B should succeed in part only. I shall discharge conditions 5 and 7 which are subject to the notice, and grant planning permission on the application deemed to have been made for the change of use from former exhaust/tyre fitting centre (Class B2) to café (Class A3) with associated elevational alterations, waste storage, cycle storage and car parking previously permitted without complying with the condition enforced against but subject to new conditions as described above,

but otherwise I will uphold the notice and refuse to grant planning permission in respect of condition 2. The requirements of the notice will cease to have effect so far as inconsistent with the planning permission which I will grant by virtue of section 180 of the 1990 Act (as amended).

41. The appeals on grounds (f) and (g) do not fall to be considered.

Appeals C and D - Conclusion

42. I have found the proposed canopy and fence under option 1 would not have an unacceptable harmful effect on the living conditions of the occupants of the neighbouring residential properties, with regard to noise and disturbance and odour nor on the character and appearance of the area.

43. For the reasons given above I conclude that Appeals C and D should succeed in part only, and I will grant planning permission for the canopy and close-boarded timber fence as set out in option 1, but otherwise I will uphold the notice and refuse to grant planning permission in respect of the other part of the matters. The requirements of the notice will cease to have effect so far as inconsistent with the planning permission which I will grant by virtue of section 180 of the 1990 Act (as amended).

44. Given the success on the ground (a) appeals there is no need to go on to consider the ground (f) appeals.

Appeals C and D - The ground (g) appeals

45. I shall impose a condition regarding the planning permission the subject of Appeals C and D to ensure the approved option 1 scheme is carried out. As the notice will not be quashed, the failure to carry out the approved scheme within the specified time could result in the requirements of the notice being enforced. I have set the period of time to carry out the approved scheme at three months from the date of this decision. In the event the condition is not complied with, I must determine the ground (g) appeal. Given the lightweight construction of the canopy and the limited differences between what has been built and what is proposed under option 1, I find 3 months is reasonable to carry out the required works, be them the works to comply with the condition or the works to comply with the requirements of the notice. The ground (g) appeal therefore fails.

A Walker

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Darren Pomfrets	Chartered Surveyor, agent for the appellant
David Hardy	Partner, CMS
Jonathon Ward	Associate, CMS
John Meehan	Associate Director, Axis Consultants
Phil Wooliscroft	Partner, Eddisons
Michale Bull	Director, Michael Bull and Associates
Luis Pereira	Senior Acoustics Engineer, Apex Acoustics

FOR THE LOCAL PLANNING AUTHORITY:

Ian Ponter	Counsel for Manchester City Council
Matthew Kilsby	Senior Development Compliance Officer, Manchester City Council
Adam Neil	Senior Development Compliance Manager, Manchester City Council
Azra Furheen	Senior Solicitor, Manchester City Council

INTERESTED PARTIES:

Anne Tucker	Local resident
Jill Lovecy	Councillor, Rusholme ward
Rabnawaz Akbar	Councillor, Rusholme ward

HEARING DOCUMENTS:

1. Two photographs taken Friday 13 September, submitted by the Council

2. Signed statement of common ground for appeals A and B, submitted by the appellant

3. Signed statement of common ground for appeals C and D, submitted by the appellant

4. Costs rebuttal, submitted by the appellant