
Appeal Decision

Inquiry held on 7 February 2017

Site visit made on 8 February 2017

by Paul Freer BA (Hons) LLM MRTPI

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 20 February 2017

Appeal Ref: APP/Q9495/C/16/3155448

Land to the rear of Old Bank House, Ambleside, Cumbria

- 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 Mrs Jacqueline Langman against an enforcement notice issued by Lake District National Park Authority.
 - The enforcement notice was issued on 23 June 2016.
 - The breach of planning control as alleged in the notice is, without planning permission, material change of use of land to use for car parking.
 - The requirements of the notice are to permanently cease the use of the land for car parking.
 - The period for compliance with the requirements is one month.
 - The appeal is proceeding on the grounds set out in section 174(2) (d) of the Town and Country Planning Act 1990 as amended.
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Summary Decision: The appeal is allowed and the enforcement notice is quashed.

Procedural Matters

1. In its written evidence, the Lake District National Park Authority (Authority) raised the possibility that information previously provided by Mr Langman may have been an attempt to deliberately mislead the Authority about the intended use of the car park. If this was the case, the Authority considered that, in accordance with the findings of the Supreme Court in *SSCLG & Beesley v Welwyn Hatfield BC* [2011] UKSC 15 JPL 180, the appellant may not now be entitled to rely on immunity from enforcement. At the opening of the Inquiry, Miss Clutten, representing the Authority, explained that this matter was raised tentatively at that time and that any reliance on this point was subject to consideration of the oral evidence given by the appellant. In the event, having heard the evidence from the appellant, Miss Clutten indicated that the Authority did not intend to pursue this point and I heard no formal submissions on it.
2. The evidence was taken on oath by way of affirmation.

Reasons

3. The appeal on ground (d) is that, at the date on which the notice was issued, no enforcement action could be taken in respect of any breach of planning control that may be constituted by those matters. In order to succeed on this ground, the appellant must show that the use had been continuous for a period
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of ten years beginning with the date of the breach. In this case, the appellant must therefore show that use of the land as a car park has taken place without significant interruption since 23 June 2006. The test in this regard is the balance of probability and the burden of proof is on the appellant.

4. The land in question is located to the rear of Old Bank House, Ambleside. The latter fronts onto Lake Road but vehicular access to the land subject to the notice can only be gained through a narrow ginney that opens onto Kelsick Road. Immediately to the south of the appeal site is a car park associated with Lancaster House. This land is also accessed solely through the ginney that opens onto Kelsick Road and the appellant enjoys a right of way over that land. The car park to Lancaster House is at a higher ground level than the appeal site, such that this was generally referred to as the "upper car park" during the Inquiry. Conversely, the appeal site was generally referred to as the "lower car park" and, where appropriate, for ease of reference I will adopt that nomenclature in this decision.
5. The appellant purchased the land now subject to the enforcement notice in 2001, at which time it appears to have been used as a garden in association with Old Bank House. In June of that year, a planning application was submitted for the change of use of the garden to provide a car park and redesigned garden (Ref: 7/2001/5320). That application was subsequently withdrawn. In May 2003 a further application for a similar development was submitted (Ref: 7/2003/5311) but was also subsequently withdrawn. On the application form for both proposals the existing use of the land is described as a garden area, and on neither form was the application described as being retrospective. This is the only documentary evidence of the use of the land at that time, and indicates that the land was not used for car parking during that period.
6. The first reference to the use of the land for car parking is in the evidence of Mr Farran, the proprietor of the "Old Bank House Chocolate Shop" located in the ground floor of Old Bank House. In his statutory declaration, Mr Farran indicates that he has used the car park at the rear of Old Bank House continuously since 2004. In his oral evidence at the Inquiry, Mr Farran was positive in his recollection that he started parking on the land in 2003 or 2004, but could not give a precise date. To the best of his recollection, Mr Farran put the number of cars parked there at 4 or 5.
7. In her statutory declaration, Mrs Park states that she used the car park continuously between March 2005 and June 2010, that being the duration of her tenancy of the "Bizzy Lizzy Café" on Lake Road. However, in her oral evidence in relation to this period, Mrs Park explained that she would park in the upper car park if space was available and would only park in the land at the lower level if no spaces were available in the upper car park. The reason for this was that the land at the lower level was muddy, very overgrown and "awful", such that she would only park there when she had to.
8. This evidence is broadly consistent with that of Mr Cook, who is a Director of the company that purchased the upper car park in November 2003. In his written evidence, Mr Cook was positive in his recollection that from November 2003 onwards he and other employees of the company used the land subject to the enforcement notice for parking and as a turning area for vehicles. This evidence was re-stated at the Inquiry, his recollection being that he began

using the land for car parking in either 2003 or 2004. Mr Cook's description of the condition of the land at that time is different from that provided by Mrs Park, insofar as Mr Cook describes the land as being a little overgrown but not muddy underneath.

9. In reviewing the evidence for this period, it appears to me the land subject to the car park was used from 2003 for the occasional parking of vehicles when there were no spaces available in the upper car park. Although there is some variation in the description of the condition of the land at this time, there is consensus that it was overgrown to some degree. I also note the observation made by Mrs Park that there were only 2 or 3 spaces available at that time and that the number of spaces increased when the overgrowth was cleared. To my mind, this suggests that only a part of the land was being used for car parking, and even then only when no spaces were available in the upper car park. On that basis, whilst noting also that Mr Farran indicated that some 4 or 5 cars would be parked on the land, I am satisfied on the balance of probability that the breach of planning control alleged in the notice was not taking place across the whole of the appeal site in 2003, 2004 or 2005.
10. The significant change came in 2006. Photographs taken on 20 April 2006 clearly show that the overgrowth had been cleared and that a ramp down from the upper car park was in the process of being constructed. Further photographs taken on 5 May 2006 show that the ramp had been completed with the formation of retaining walls, and that retaining walls had been constructed to physically separate the land from the upper car park. The photographs also show that the land was in the process of being covered by slate chippings. The Expediency Report prepared by the Authority indicates that this operational development had been completed by 8 June 2006, but also states the land was not being used as a car park on that date.
11. The corollary of the above is that by 8 June 2006, and therefore some 10 years plus two weeks prior to the date on which the enforcement notice was issued, the whole of the land now subject to that notice was physically capable of being used as a car park. It therefore remains to consider whether it was so used without significant interruption throughout that period. It is convenient from this point on to refer to this land as the lower car park.
12. Evidence in support of the use of the lower car park is provided by Mr Cook, Mr Farran, Mrs Park and the appellant, Mrs Langman. In his closing submissions, Mr Garvey, representing the appellant, candidly ranked the evidence given by these witnesses in a hierarchy in terms of the weight that in his view ought to be afforded to them. I shall consider the evidence presented by these witnesses in the reverse order to the hierarchy indicated by Mr Garvey.
13. I note that Mrs Langman was not directly involved in the operation of the land and had visited the site only infrequently. This may explain some of the inaccuracies in her evidence. However, that does not alter the fact that her recollection of events, as set out in her statutory declaration, is inaccurate in respect of certain key dates. Moreover, two out of the four substantive paragraphs in her statutory declaration have subsequently been shown to be largely inaccurate. Consequently, whilst I am no doubt that Mrs Langman's evidence represented her genuine recollection of events, I am only able to afford that evidence limited weight.

14. By his own admission, Mr Cook was also an infrequent visitor to the site during this period, typically visiting his company's property at Lancaster House once a month or so. Nevertheless, although he would typically park his own car in the upper car park, Mr Cook indicated that he always witnessed cars parked on the lower car park when he did visit. I am satisfied from the own my site inspection that Mr Cook would have had a clear view of the lower car park from where he parked his own car and that, whilst his visit to the site were infrequent, his evidence does tend to support the proposition that the lower car park was used throughout the relevant period.
15. The evidence given by Mrs Park is relevant in this context only to the period between March 2005 and June 2010, at which time she relinquished tenancy of the "Bizzy Lizzy Café" and thereafter visited the site very infrequently. Nevertheless, Mrs Park explained that during that period she would drive to work at least five days per week throughout the year. I accept that Mrs Park's evidence was somewhat confused about where exactly she would park when she arrived, in terms of whether this was in the upper or lower car park. In any event, given the inter-visibility between the two car parks, I consider that Mrs Park was in a good position to know whether the lower car park was being used during this period, even if not by herself. I therefore found Mrs Park's evidence persuasive in terms of recording the use of the lower car park during this period.
16. As part of her evidence, Mrs Park explained that a window in the rear elevation of the building in which her café was located faces onto the appeal site, such that she could look into the car park during her working day. I was able to gain access into that building as part of my accompanied site visit and observed for myself that this window affords a clear view of the lower car park. This serves to reinforce my conclusion that Mrs Park was in a good position to know whether the lower car park was being used during this period.
17. Of the four witnesses that appeared for the appellant, Mr Farran was the only one to have direct knowledge of the use of the lower car park throughout the relevant period. In his oral evidence, Mr Farran confirmed that he would typically commute to work by car five days per week throughout the year, and was typically present between the hours of 09:30 and 18:00 each day. On other days, his wife and/or parents would work at the shop, and in addition three staff are employed there. All would park in the lower car park, and gain access to the shop from rear of the premises via the car park. In view of his long association with the site and that access to his shop entailed entry from the car park, I consider that Mr Farran is also in a good position to know whether the lower car park was being used during this period.
18. Further evidence that the lower car park has been used throughout the relevant period is provided by three aerial photographs submitted by the appellant. The first of these is dated June 2010. The resolution of this photograph is not particularly sharp, but it shows at least three and possibly five cars parked in the lower car park, albeit tree cover obscures part of the site. The other two photographs, taken in 2011 and 2104 respectively, show at least five cars present in the lower car park on each occasion, albeit on both photographs part of the site is again obscured by tree cover.
19. The essence of the Authority's case is that the use as a car park had not commenced on 23 August 2006. On that date, Mrs Birkett, then Monitoring &

Enforcement Assistant with the Authority, wrote to Mr Langman confirming that the Authority was not intending to take enforcement action in respect of the operational development that had taken place on the site. The letter then went on to indicate that, at the time of her site visits, the land was not being used for car parking but that if it should be so used, then enforcement action would be taken against that use. It emerged at the Inquiry that the visits referred to were those on 20 April 2006, 5 May 2006 and 8 June 2006, and that Mrs Birkett could not recall making any further visits at that time.

20. The site visits made on 20 April 2006 and 5 May 2006 were undertaken at a time when the operational development was not yet complete, and it is therefore not surprising that the car park was not being used at those times. Indeed, Mrs Park recalled that she was specifically requested not to use the car park whilst construction works were in progress. Moreover, both of those site visits pre-date 23 June 2006 and are therefore outside of the ten year period required to achieve immunity from enforcement action.
21. The site visit made on 8 June 2006 was also outside of the ten year period required to achieve immunity from enforcement action. I accept entirely that Mrs Birkett, as an experienced and professional planning officer investigating an alleged breach of planning control and aware of the planning history, would have been actively looking for evidence that a breach of planning control had occurred. I am equally certain that Mrs Birkett would have recorded the use of the land as a car park had it been occurring at that time. I also acknowledge that none of the witnesses for the appellant could explain why the land was not being used as a car park on that date.
22. Nevertheless, the fact remains that all of the occasions on which the land was observed by officers from the Authority at that time were outside of the ten year period required to achieve immunity from enforcement action. There is no record of any site visits being undertaken by officers from the Authority between 8 June 2006 and September 2012. It follows that, unlike the witnesses that appeared on behalf of the appellant, officers from the Authority have no direct knowledge of use of the land in that period.
23. In September 2012, the Authority received a complaint about use of the land as a car park and this was the catalyst for a further enforcement investigation. This is the only complaint received about car parking on the site during the relevant period. Given that the appeal site is surrounded and overlooked by several properties, I concur with the Authority that it may have been expected that use of the land for car parking would have generated more complaints than it has. However, there are many reasons why occupiers of properties do not complain about the use of land, including that a use does not cause them any disturbance or inconvenience. The lack of a significant number of complaints about the use of the appeal site for car parking is therefore not, in itself, a reliable indication that the use was not occurring.
24. The documentary evidence on which the Authority also relies all relates to the period outside of the ten year period required to achieve immunity from enforcement action. The property at Old Bank House is divided into two commercial and five residential tenancies, each of which hold a lease. The holder of each of these leases is entitled, as I understand it by 'gentleman's agreement', to park in the lower car park. Whilst I find it somewhat surprising that this right to use the lower car park is not formally embodied in the leases,

this lack of documentary evidence does not indicate that the land has not been used for car parking.

25. I acknowledge that there are some omissions, inconsistencies and inaccuracies in the appellant's evidence. In particular, and as Mr Garvey conceded, the appellant's evidence is "a little shaky" in terms of the start date. That said, I am mindful that the appellant paid a not insignificant sum of money to construct the ramp down from the upper car park and surface the area with slate chippings. It is common ground that this work was completed by 8 June 2006. To my mind, having spent that money with the express purpose of providing a usable car park, it is more likely than not that the use of the lower car park would have commenced shortly after it first became available for use. This would be consistent with the evidence of Mr Farran and Mrs Park, both of whom have direct knowledge of the use of the site in June 2006 and who indicate that the use of land for the car park has been continuous.

26. In summary, on the whole and looked at in the round, I find that the appellant's evidence is sufficiently precise and unambiguous to show that the use of the land as a car park has taken place without significant interruption since at least 23 June 2006. Furthermore, the Authority has provided no evidence to contradict that of the appellant in relation to the period after 23 June 2006, or to make the appellants' version of events less than probable. I therefore conclude that, on the balance of probability, the use of the land as a car park has taken place without significant interruption for a period in excess of ten years beginning with the date of the breach and as such no enforcement action could be taken in respect of that matter.

Conclusion

27. For the reasons given above, I conclude that the appeal should succeed. Accordingly, the enforcement notice will be quashed.

Formal Decision

28. The appeal is allowed, and the enforcement notice is quashed.

Paul Freer

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Mr Killian Garvey

Of Counsel, instructed by Mr
Harry Tonge, Steven Abbott
Associates LLP

He called:

Mrs Jacqueline Langman

Appellant

Mr Mark Farran

Proprietor, Old Bank House
Chocolate Shop, Ambleside

Mr William Cook

Oakthwaite, Thornbarrow Road,
Windermere

Mrs Elizabeth Park

Borwick Fold Farm, Crook,
Kendal

FOR THE LOCAL PLANNING AUTHORITY:

Miss Rebecca Clutten

Of Counsel, instructed by Ms
Julie Wood, Solicitor, Lake
District National Park Authority

She called:

Ms Felicity Thompson BA Hons, MCD, MRTPI

Compliance Planner

Ms Julie Birkett

Area Compliance Planner

DOCUMENTS SUBMITTED AT THE INQUIRY

- 1/ Photographs of the appeal site, dated (by hand) 20 April 2006.
- 2/ Photographs of the appeal site, dated (by hand) 5 May 2006.
- 3/ Full transcript of the judgment of the Supreme Court in *Welwyn Hatfield Borough Council v Secretary of State for Communities and Local Government and another* [2011] UKSC 15.

- 4/ Appeal Decision in respect of Inhams Field, Inhams Lane, Denmead, Winchester, Hants PO7 6LX, dated 28 June 2016 (APP/L1765/C/15/3133535).
- 5/ Opening submissions on behalf of the Lake District National Park Authority.
- 6/ Photographs of the appeal site, dated (automatically) 20 April 2006 and 5 May 2006.
- 7/ Aerial photographs of the appeal site dated 2010, 2011 and 2014, submitted by the appellant.