

**ROYAL BOROUGH
OF
KENSINGTON & CHELSEA**

DOCUMENT SEPARATOR

DOCUMENT TYPE:

APPEAL DECISION



APPD



Appeal Decision

Inquiry held on 7 January 2003

by **David Harrison BA DipTP MRTPI**

an Inspector appointed by the First Secretary of State

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Date

31 JAN 2003

Appeal Ref: APP/K5600/C/02/1092634

Land at the rear of 250 Kings Road, London SW3

- 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 the Royal Brompton and Harefield NHS Trust against an enforcement notice issued by the Council of the Royal Borough of Kensington & Chelsea.
- The Council's reference is DPS/DCSW/E/99/5262/AM and the notice was issued on 27 March 2002.
- The breach of planning control as alleged in the notice is without planning permission, the making of a material change of use of the land from car parking ancillary to the use of the adjacent buildings, to a paying car park available for use by the general public.
- The requirements of the notice are (i) Cease the use of the land as a paying public car park, and (ii) Remove any associated notices and signage from the land.
- The period for compliance with the requirements is two months.
- The appeal is proceeding on the grounds set out in section 174(2) [a] [b] [d] [f] and [g] of the 1990 Act.

Summary of Decision: The appeal is allowed, the notice is quashed and planning permission is granted in the terms set out in the Formal Decision below.

Procedural matters

1. At the opening of the inquiry I was told that the Council and the appellant had reached an agreement whereby planning permission could be granted on the deemed application the subject of the ground (a) appeal, subject to conditions, and in association with a unilateral undertaking made by the appellant under Section 106 of the 1990 Act (as amended by the 1991 Act). The witnesses for both main parties were not formally called to give evidence, but they participated in the discussion of planning conditions. The evidence on ground (b) and ground (d) was not subject to cross-examination, with both parties relying on submissions.

Site description and background to the appeal

2. No.250 King's Road is a former workhouse on the corner of Sydney Street. There are two buildings. Block A fronts King's Road and Block B is set behind it with a frontage to Sydney Street. The appeal site lies to the north of Block B, with access from Sydney Street. The two buildings currently house a variety of uses including shops, small offices, consulting rooms and restaurants. The car park is on two levels, the higher (western) part being approached via a ramp. There are no marked spaces, the site being operated on a "valet parking" system. The Council estimates that it could accommodate between 40 and 45 cars. The car park is largely screened from Sydney Street by public toilets. To the north is a farmers market and garden centre and to the west are Dovehouse Green, an area of open space, and Thamesbrook, which provides accommodation for the elderly. The site lies within the Royal Hospital Conservation Area.

The appeal on ground (d)

3. The site appears to have been used for car parking over a long period, but the Council maintains that in recent years this has been ancillary to the use of Blocks A and B, rather than being available to the general public as a paying car park.
4. For the appeal to succeed the appellant must demonstrate that on the balance of probabilities the use of the site as a public car park began more than 10 years before the notice was issued, i.e. before 27 March 1992, and has continued since that time without significant interruption. Both parties agreed that in the light of the case of *Thurrock BC v SSETR & Holding* [COA 27.2.02] this was the correct approach, and any previous period of use for the same purpose would not strengthen the appellant's case.
5. In its written submissions the Council argued that the material change of use from car parking ancillary to the use of Blocks A and B took place in 1998. However, at the inquiry it was accepted by the Council that on 3 December 1993 the appeal site was leased to Union Car Parks (UCP) for use as a paying public car park, and the use has continued since that time, having been taken over by National Car Parks Ltd (NCP). The terms of the lease ran from November 1993. I need to consider the evidence for the same use having operated between March 1992 and November 1993, a period of some 19 months.
6. The only evidence relating to the use of the site during this period is a Statutory Declaration made by Laura Barker, who has been employed by the NHS Trust since 1987. She describes visiting the car parking area on a number of occasions during the last 10 years. She recalls visiting Block B in around 1995, when it was empty, but the car park was in use. She states "I am aware that prior to the car parking use being regularised by a lease to UCP in 1993 a couple of youths had tried to charge for parking there. I was not personally involved in dealing with the trespassers but can recall that the trespassers were evicted before the lease was granted to UCP."
7. The Council produced no contrary evidence relating to this early part of the 10-year period. The appellant's advocate accepted that the evidence about the use in the early part of the 10-year period was limited in its coverage, but argued that it was quite sensible to infer that the alleged unauthorised use was going on during the whole of the 10-year period.
8. On the evidence before me it is not possible to be certain about the way in which the site was being used between March 1992 and November 1993. There is no evidence to suggest that there was any connection between the use of the car park and the use of Building A or Building B. It is quite possible that uncontrolled general public parking took place throughout this period, and that the two trespassers took advantage of the situation for what appears to have been a short period. However, the onus is on the appellant to prove the case, and I do not have enough evidence to conclude that on the balance of probabilities the use as a car park available to the general public continued throughout the relevant 10-year period. The use is not immune from enforcement action due to the passage of time, and the appeal on ground (d) therefore fails.

The appeal on ground (b)

9. The appellant's case that the alleged material change of use has not occurred as a matter of fact relies on the same evidence, and it was accepted that if the ground (d) appeal failed

then the ground (b) appeal must also fail. I have concluded that the alleged unauthorised use has occurred as a matter of fact, and the appeal on ground (b) therefore fails.

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The appeal on ground (a)

Planning policy

10. Section 72 of the Planning (Listed Buildings and Conservation Areas) Act 1990 places a duty on decision makers, when considering development in a conservation area, to pay special attention to the desirability of preserving or enhancing the character or appearance of that area. This may be achieved where a development has a neutral effect rather than a harmful effect.
11. Section 54A of the 1990 Act states that where, in making a determination under the planning Acts, regard is to be had to the development plan, the determination shall be in accordance with the plan unless material considerations indicate otherwise. The statutory development plan is the Council's Unitary Development Plan (UDP) which was adopted in May 2002.
12. The reasons for issuing the notice state that the use as a public car park is detrimental to the character and appearance of the Royal Hospital Conservation Area and would result in the establishment of a permanent additional public car park with unrestricted use contrary to the provisions of the UDP. At the inquiry the Council conceded that the use as a paying public car park had a neutral effect on the conservation area, as the site was previously used for parking and the visual effect would be the same. Any advertisements could be dealt with under the relevant regulations.
13. The Council's remaining concern was that the car park was being used as a paying public car park as opposed to providing ancillary parking in association with the use of Building A and Building B. Policy TR37 of the UDP seeks to resist the provision of additional public car parks. Policy TR38 seeks to control the management of new public off-street car parks in order to discourage their use by commuters.

Main issue

14. The Council's concern is that if this site was approved as a car park without any restrictions it could be used by commuters, a pattern of use which is actively discouraged as part of the overall transport strategy for the Borough. In the light of the unilateral undertaking made by the owner and the occupier of the site the main issue is whether if appropriate planning conditions were to be imposed planning permission could be granted without conflict with the aims of the development plan.

Reasons

15. The appellant and the operator of the car park (NCP) have entered into a unilateral undertaking that becomes effective if planning permission is granted. The undertaking was not formally completed until 13 January 2003, after the close of the inquiry, but a draft was available at the inquiry. It covers two points of concern to the Council. Firstly, that the prices charged for the parking of vehicles on the application site shall not be less than the prices charged by the Council in relation to Council owned public car parks in the area. Secondly, that spaces for at least 11 vehicles shall be provided on the application site and made available for short-term parking only for periods not exceeding six hours in any one

24 hour period to deter the use of these spaces for commuter parking. This undertaking has overcome the Council's main concern that the car park could be available for general commuter parking and subject to other conditions, which I consider below, the Council withdrew its opposition to the grant of planning permission on the deemed application. In my view the undertaking is consistent with the advice in Circular 1/97 *Planning Obligations*.

16. Four conditions were agreed by the main parties. Another was put forward as a result of representations made on behalf of the Sydney Street Resident's Association who were represented at the inquiry. I will consider them in the light of the advice in Circular 11/95 *The Use of Conditions in Planning Permissions*.
17. The first is that the consent should be for a period of five years. The site is included in an area that is proposed to be redeveloped, and discussions are currently taking place between the Council and the developers. It is therefore appropriate to limit the duration of the permission, and the main parties are in the best position to judge how long this should be. The second condition requires the provision of two car parking spaces for disabled drivers. The third condition requires the submission of a layout plan for the car park which shall include a dedicated loading and unloading space for use in association with Building B. It seems reasonable that the layout should also indicate the position of the two spaces for the disabled and the 11 short-term spaces referred to in the section 106 unilateral undertaking. The fourth condition is based on my own suggestion, that the dilapidated chainlink fence alongside the footpath along the northern boundary of the site should be repaired and maintained, as it detracts from the appearance of the locality in my view.
18. The Sydney Street Residents Association requested that the car park should be closed at 2000 in order to protect the residential amenities of the occupants of the flats on the opposite side of Sydney Street and in the Thamesbrook old peoples' accommodation in Dovehouse Street. The appellant agreed to closure at 2200, but from what I saw on my visit there is no reason to suppose that evening use would have any impact on the occupiers of the flats over and above that generated by general traffic in Sydney Street, and Thamesbrook is sufficiently far away from the rear boundary to be unaffected in my view. I do not intend to limit the hours during which the car park may be used, as there is no justification for this.

Conclusions

19. Provided these four conditions are imposed, approval of the deemed application would not conflict with the aims of the development plan. For the reasons given above and having regard to all other matters raised, I consider that the appeal should succeed on ground (a) and planning permission will be granted subject to conditions. The appeal does not therefore need to be considered on grounds (f) and (g).

Formal Decision

20. In exercise of the powers transferred to me, I allow the appeal and direct that the enforcement notice be quashed. I grant planning permission on the application deemed to have been made under section 177(5) of the Act as amended for the development already carried out, namely the use of land at the rear of 250 Kings Road, as shown on the plan attached to the notice, as a paying car park for use by the general public, subject to the following conditions:

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- 1) The use hereby permitted shall be discontinued within 5 years of the date of this approval.
- 2) Provision shall be made for two disabled driver car parking spaces which shall be available for such use at all times when the car park is open to the public.
- 3) The layout of the car park, which shall include a dedicated loading and unloading space, two spaces for disabled drivers and 11 spaces which are available for a maximum of 6 hours in any 24 hour period, shall be submitted within three months of the date of this decision and agreed in writing by the local planning authority. The car park, including the dedicated loading and unloading space, the spaces for disabled drivers and the short-term spaces shall be laid out in accordance with the approved scheme within two months of the date of the approval and retained for those purposes thereafter.
- 4) Within three months of the date of this decision the fence on the northern boundary of the car park shall be repaired and thereafter maintained.

Information

21. A separate note is attached setting out the circumstances in which the validity of this decision may be challenged by making an application to the High Court.
22. This decision does not convey any approval or consent that may be required under any enactment, by-law, order or regulation other than section 57 of the Town and Country Planning Act 1990. An applicant for any approval required by a condition attached to this permission has a statutory right of appeal to the Secretary of State if that approval is refused or granted conditionally or if the authority fails to give notice of its decision within the prescribed period.
23. Attention is drawn to the provisions of section 74 of the Planning (Listed Buildings and Conservation Areas) Act 1990 which requires consent to be obtained prior to the demolition of buildings in a conservation area.


David Hamson

Inspector

APPEARANCES

FOR THE APPELLANT:

Tim Mould Of Counsel
He called:
Steven Walters BSc DipTP ATIS REAL Weatheralls
MRTPI



FOR THE LOCAL PLANNING AUTHORITY:

Stephen Morgan Of Counsel
He called:
Andrew Marx BA Senior Planning Enforcement Officer with the Borough
Council
Bill Mount BSc MPhil Leader of the Transport and Road Safety Group with the
MICE Borough Council

INTERESTED PERSONS:

Peter Huntington Sydney Street Residents Association, 49 Sydney Street,
London SW3 6PX
Joan Hayes 225 Cranmer Court, London SW3

DOCUMENTS

- Document 1 List of persons present at the inquiry
- Document 2 Council's notification letter
- Document 3 Appendices 1-24 to Mr Walters' proof (except Appendices 6 and 15)
- Document 4 Appendices 6 and 15 to Mr Walters' proof
- Document 5 Statutory Declaration of Laura Barker, Royal Brompton and Harefield NHS
Trust
- Document 6 Draft unilateral undertaking by the Royal Brompton and Harefield NHS Trust
and National Car Parks Ltd
- Document 7 Appendices to Mr Marx's proof
- Document 8 Appendices to Mr Mount's proof
- Document 9 List of conditions agreed between the main parties
- Document 10 Completed unilateral undertaking by the Royal Brompton and Harefield NHS
Trust and National Car Parks Ltd dated 13 January 2003

PLANS

Plan A Plan attached to the enforcement notice