Appendix 16

Wipperman v Barking London Borough Council (1966) 17 P&CR 225 at 229

Wipperman & Buckingham v Barking LBC

Queen's Bench Division—Divisional Court | November 5, 1965 | (1966) 17 P. & C.R. 225

*225 Wipperman and Another v Barking London Borough Council

Positive/Neutral Judicial Consideration

Court
Divisional Court

Judgment Date
5 November 1965

Report Citation
(1966) 17 P. & C.R. 225

Queen's Bench Division—Divisional Court

Lord Parker C.J. , Ashworth and Widgery JJ.

November 5, 1965

Development—Material change of use—Composite use of land—Two dissimilar uses—Storage of building materials and car-breaking—Use for car-breaking discontinued—Whole of land used for storage of building materials—Whether a material change of use—Duty of Minister in relation to his Inspector's report— Town and Country Planning Act 1962 (10 & 11 Eliz. 2, c. 38), s. 12 .

From 1958 to 1961 a quarter of an acre of land was used for the storage of a small quantity of fencing, building materials were also stored thereon in Nissen huts and the occupier, who was engaged in building and fencing work, lived on the site in a caravan. For a short period during 1961 and 1962, although the land continued to be used for the storage of fencing, it was also used for car-breaking and the storage of car parts, but the car-breaking was discontinued in June 1962, when the appellants entered into possession of the land. Since that date, the entire site had been used for the storage of materials and the accommodation of vehicles used in the appellants' business of building conservatories. In 1964, the local planning authority served on the appellants, as occupiers, an enforcement notice reciting that there had been a material change of use of the land from a use for agricultural purposes to a use for the storage of materials employed in the manufacture of conservatories and requiring them, *inter alia* , to cease using the land for its present purpose and restore it to its original condition.

The appellants appealed to the Minister, who, after an inquiry, rejected the inspector's finding that there had been no material change in the nature of the use of the land since 1962 since the storage activity had continued throughout the material period, including that during which the car-breaking had been carried on. The Minister concluded that the use of the land for a caravan and the change from that use to the industrial use of car-breaking were material changes of use; further, that the uses to which the land had been put immediately prior to the appellants' occupation were two dissimilar purposes, and that the change from both uses to one of them exclusively could not have been effected without causing a change in the character of the use of the land which was a material change of use involving development. He accordingly upheld the enforcement notice.

Held , (1) that it was immaterial whether the two uses carried on prior to the appellants' occupation were disposed over separate parts of the land or so intermingled as to occupy the entire site, since the contrast between the use of the land at that time and its present use depended upon the use of the land as a whole.

(2) That where there was a composite use of land for more than one component activity, the cessation of one of the component activities would not by itself amount to a material change of use, but that there could be a material change of use if one

component use had absorbed the entire site to the exclusion of the other, and whether there was or not was a question of fact and degree.

(3) That the two activities for which the land had been used prior to June 1962 were not ancillary the one to the other, but two dissimilar *226 uses, and since, on the evidence, the use of the land for car-breaking had ceased and the whole of the land was now used exclusively for storage purposes in connection with the appellants' business, there had been a change in the character of the use of the land as a whole which the Minister was entitled to find was a material change of use.

APPEAL from a decision of the Minister of Housing and Local Government.

The facts sufficiently appear from the judgment of Widgery J.

Representation

A. E. Holdsworth for the appellant occupiers.
Alan Fletcher for the respondent local planning authority.

Lord Parker C.J.

Widgery J. will give the first judgment.

Widgery J.

This matter comes before the court as an appeal, under section 180 of the Town and Country Planning Act 1962 , against a decision of the Minister of Housing and Local Government taken under that Act in regard to land adjoining Rose Cottage, Collier Row Road, Chadwell Heath, Essex. The land in question is a site occupying some quarter of an acre, and is presently owned and occupied by the appellants, Edward Frederick Wipperman and Richard Alfred Buckingham, who trade as Five Star Conservatories.

They went into occupation of the land in June 1962; they were originally lessees, and, as I understand it, have subsequently acquired the freehold. When they went in they proceeded to use the land for the purpose of their business, their business being described as building conservatories and extensions to houses. The use to which they had put this site following their entry into occupation in 1962 was as a store for materials used in connection with the business and accommodation for ten vehicles which were similarly used in connection with that business. Upon their entering into occupation and proceeding to use the land in the way in which I have described, they were served with an enforcement notice under the Act by the local planning authority, then the Dagenham Borough Council, now the respondents, the Barking London Borough Council.

The enforcement notice, dated June 17, 1964, was served on June 20, 1964. It recited that the appellants were the occupiers of the land, and that

> It appears to the Mayor, Aldermen and Burgesses of the borough of Dagenham in the county of Essex acting by the council of the said borough (hereinafter called “the council”) that development of the land, namely, a material change in the use of the land from use for agricultural purposes to use for the storage of materials employed in the manufacture of conservatories and the erection of

> office and storage buildings in *227 connection therewith, has been carried out within the period of four years immediately prior to the day after the date of service of this notice.

The notice went on to require the occupiers to restore the land to its condition prior to the carrying out of that development, and in the specification of steps to be taken, these words were used: "Cease using the land for the purpose of storage of materials employed in the manufacture of conservatories and vacate and remove the office and storage buildings erected in connection therewith."

On receipt of the enforcement notice the occupiers in due time appealed to the Minister against the enforcement notice. It is unnecessary to go into all the grounds which originally appear to have been canvassed in the course of this appeal, and it can be said straight away that no complaint is now made in regard to this enforcement notice so far as it relates to the unauthorised erection of buildings. The issue with which Mr. Holdsworth, appearing for the occupiers, is concerned in this court is whether or not the enforcement notice as upheld by the Minister should have been effective in regard to the use of the land. Again one can shorten the matter, I think, by saying that the real issue in regard to the use of the land here is the familiar one of whether the present use which is applied to the land by the occupiers, and of which complaint is made, is materially different from a former use so as to amount to development, under section 12 of the Town and Country Planning Act 1962 . Furthermore, of course, arises the question whether any such material change, if it occurred, occurred within the four-year period within which an enforcement notice must be served.

Following the lodging of the occupiers' appeal to the Minister, an inquiry was held under one of the Minister's inspectors, and it is quite clear from the evidence adduced at that inquiry that the material planning history of this land falls into three phases. The first phase covers the period from 1958 to 1961, and the inspector's findings of fact in regard to that period were that a small quantity of fencing materials was stored in the open on the land. Further, he found that during the same period a gentleman called Hutson lived on the site in a caravan, and that he and his father were engaged in building and fencing works as sub-contractors. There was also evidence that until 1961 builders' materials were stored on the site in Nissen huts there situate, so that, in phase 1, one has, and I put it in neutral terms, three material activities upon this land, the storage of a small quantity of fencing materials in the open, the storing of building materials in Nissen huts, and the presence of the caravan which was used by Hutson. Phase 2 of *228 the history of this land was the period 1961 to 1962, and the inspector in his findings of fact described the use of the land during that period in this way: "From late 1961 to early 1962 the site was used for car-breaking and the storage of parts of cars; materials used in the building and fencing businesses remained on the land."

I read that as meaning that the material used in the building and fencing business which remained on the land remained on the land to the same degree as they had been present prior to the introduction of the car-breaking business. Phase 3 of the land dates from the occupation of the land by the present occupiers, since when they have used the land for the purposes of their business and the storage of their vehicles.

The matter having appeared to the inspector factually in those terms, he went on to express conclusions with regard to those facts. He said:

> The legal implications of the above facts are matters for consideration by the Minister and his legal advisers but it appears to me that the erection of the buildings on this land constituted development and that this development took place in the four-year period. I am not, however, satisfied that there has been a material change in the use of this land during the relevant period. There has been an increase in the intensity of the use but the nature of the present use is not materially different from

> that which obtained up to 1962. From 1961 to 1962 there was an additional use, that of breaking up cars, but the previous use was not abandoned during that period.

So the inspector took the view that the proper interpretation of his own findings of primary facts was that no material change of use had occurred.

When the Minister received that report and reached his conclusions upon it, he took a different view from his inspector on that last aspect of the matter. I think I should read paragraph 4 of his decision letter:

> The evidence given at the inquiry and the inspector's conclusions and recommendations have been considered. The evidence shows that from 1958 until 1961 the appeal land, a quarter of an acre in extent, was used for the stationing of a residential caravan and that building and fencing materials were stored on the land at the same time. From late 1961 until early 1962 the appeal site was used for car-breaking and the storage of parts, building materials and fencing. The evidence does not clearly establish the use of the land prior to 1958. It is clear that in the period between 1958 and 1962 a miscellany of uses were carried on at the appeal site each different from the other. The use of part of the land as a caravan site was a material change of use requiring planning permission as was the change from that use or a storage use to the industrial use of the land for car-breaking. It is accepted that materials were stored on the land during this period but this storage use during this period cannot, because of the other different use carried on at the same time, be considered to be the predominant use of the whole site. In evidence on behalf of the occupiers it was stated that the land was cleared of materials in 1962. The inspector has found as a fact that the use of ***229** the land prior to the occupiers' occupation was for car-breaking and the storage of a small quantity of fencing materials and building materials. It is considered that if the small amount of storage use of the land amounted to a significant use the land must have been used for two purposes concurrently when car-breaking was also carried on. It is considered that these two uses of land are dissimilar and in no way ancillary to each other and that the change from both uses to one of them exclusively could not have been effected without causing a change in the character of the use of the land as a whole. It is considered that a material change of use involving development requiring planning permission occurred when the occupiers began using the whole of the site in 1962 for the storage of materials, including ten vehicles used in connection with their business.

Accordingly the Minister took the view that planning permission was required, and upheld the enforcement notice.

Before considering in any detail the objections which Mr. Holdsworth raises to that decision, it is, I think, convenient just to consider what the proper approach was to the problem which faced the Minister. One had here a site comprising a quarter of an acre; it has not been disputed before this court that that was the planning unit to which the question of material change of use or not had to be applied. The question for the Minister upon the evidence adduced at the inquiry was whether, when one looked at the use of that land before 1962 and compared it with the use of the land immediately following the occupiers' entry, there was a material change of use for the purposes of the planning legislation.

The evidence does not disclose how the two uses carried on in phase 2 from 1961 to 1962 were disposed over the face of the land. But in my judgment it really matters not whether anyone visiting the land at that time could have pointed to one corner which was used for car-breaking and another which was used for storage, or whether in fact the two activities were so mingled together that they occupied the entirety of the site. It seems to me not to matter which of those two would have been apparent to the eye upon a visit in 1961, and whichever was the position then apparent, the contrast has to be drawn between that use of the land as a whole and the use pursued by the occupiers. The evidence shows that the car-breaking use had ceased.

It seems clear to me that if nothing had occurred following the occupiers' entry except the suspension of the car-breaking use, the storage use being maintained at its former intensity, no question of a material change of use could be said to have arisen. Merely to cease one of the component activities in a composite use of the land would not by itself, in my judgment, ever amount to a material change of use. But what has happened here, according to the evidence, is not merely a cessation of the car-breaking activity but ***230** the use of the land as a whole for storage, in other words, as the Minister has pointed out in his letter, one now has the entirety of the land used for one of the two component uses to which the land was formerly subjected.

In my judgment, as a matter of law, there can be a material change of use if one component is allowed to absorb the entire site to the exclusion of the other, but whether or not there is a material change of use is a matter of fact and degree. If the car-breaking business had been so trifling as to be almost *de minimis* , I would have thought as a matter of fact and degree that for the area formerly used for car-breaking to be taken over for storage could not amount to a material change of the use of the land as a whole. But whether or not in the circumstances of the particular case there was a material change of use would be essentially a question of fact and degree.

Mr. Holdsworth complains about two sentences from the paragraph to which I have already referred, and I would turn to them. The Minister said: “It is considered that if the small amount of storage use of the land amounted to a significant use the land must have been used for two purposes concurrently when car-breaking was also carried on.” I pause there to say that no criticism was made of that sentence. Then he continues: “It is considered that these two uses of land are dissimilar and in no way ancillary to each other and that the change from both uses to one of them exclusively could not have been effected without causing a change in the character of the use of the land as a whole.”

Mr. Holdsworth's complaint about that sentence is that he submits it is a statement of law; he submits that the Minister misdirected himself so as to think as a matter of law that if there were formerly two components of the use there must necessarily be a change of use when one of those components disappears. If I took the view that the Minister was making such a statement as a matter of law, I would agree with Mr. Holdsworth that it would be an incorrect statement, but in my judgment this sentence, properly understood in the context of the letter, is not a proposition of law at all but is merely remarking that where there are two dissimilar uses in the former composite use, the fact that one is discontinued and the other is followed exclusively does produce a change of character of the use of the land as a whole. The reference there is not a formal reference to a material change, but a statement of fact that a change in the character of the use of the land as a whole occurred.

Then in the next sentence, as I read this decision, the Minister is applying that principle to the facts of this case, and is saying on ***231** the facts of this case that he considers that a material change of use involving development requiring planning permission did occur when the occupiers began the business activities to which I have already referred.

In other words, having accepted that some change in the character of the use is inevitable here, he is then going on to find as a fact that it was in the circumstances a material change; he is saying as a matter of degree that this is material for the purposes of the planning legislation.

It seems to me quite impossible to say that that was a conclusion which the Minister could not reach upon the inspector's findings of primary fact and, as had been laid down in this court several times already, it is not only the right but the duty of the Minister to disagree with the inspector on matters of opinion if he thinks it proper. Once it is recognised that the Minister is referring to the facts of this case and not to a supposed proposition of law in the paragraph to which I have referred, it seems to me that the argument against the validity of his decision goes. Accordingly in my judgment this appeal should be dismissed.

Ashworth J.

I agree.

Lord Parker C.J.

I also agree.

Representation

Solicitors— Hunt & Hunt ; Sharpe, Pritchard & Co. for K. E. Lauder, Town Clerk, Barking London Borough Council.

Order

[Reported by Mrs. E. M. Wellwood, Barrister-at-Law.]

Appeal dismissed. ***232**

