



Appeal Decision

Site visit made on 27 July 2021

by Stephen Hawkins MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 13th August 2021

Appeal Ref: APP/C1760/C/21/3273610

Land at 1 Pinewood Close, Romsey, Hampshire SO51 7TN

- 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 Mr Richard Verrier against an enforcement notice issued by Test Valley Borough Council.
- The enforcement notice was issued on 16 March 2021.
- The breach of planning control as alleged in the notice is without planning permission the making of a material change in use in respect of that part of the land shown cross-hatched red on an attached plan to use for residential purposes incidental to the enjoyment of the dwelling at No 1 Pinewood Close.
- The requirements of the notice are: 1) Cease the use of the land shown cross-hatched red for residential purposes incidental to the enjoyment of the dwelling at No 1 Pinewood Close. 2) Demolish the picket fence on the eastern, southern and western boundaries of the land shown cross-hatched red and to remove from the land all resultant materials. 3) Dig up the hedge shown in the position shown by a dotted black line on the notice plan and to remove from the land all resultant plant material and debris.
- 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) and (f) of the Town and Country Planning Act 1990 as amended.

Summary of Decision: The appeal is allowed and the enforcement notice is quashed.

Ground (b) appeal

1. The ground of appeal is that what has been alleged in the enforcement notice has not occurred as a matter of fact. The onus is on the appellant to show why their appeal on this ground should succeed, the relevant test of the evidence being on the balance of probability.
2. The appeal property contains an end of terrace dwelling which probably originated during the 1960s as part of a planned residential estate. The property is located adjacent to residential road junctions, the front, side and rear elevations of the dwelling each facing towards a different road.
3. This appeal concerns a grassy strip of land which runs alongside the dwelling and its front and rear gardens, adjacent to an estate distributor road (Winterbourne Road). I am given to understand that until recently, no means of enclosure separated the strip from Winterbourne Road and adjoining roadside open space. Picket fencing around 1 m high has been erected adjacent to Winterbourne Road, set back around 0.6 m from the carriageway edge. The fencing also extends along two other boundaries of the strip, up to a brick wall and fence which form the boundaries with the front and rear gardens

of the dwelling. Additionally, a hedge made up of some evergreen but largely deciduous tree species has been planted along the inner side of most of the new fencing and a few maturing trees have been removed.

4. The Council's case is that the erection of fencing and planting a hedge, together with removing part of the front garden fence, has resulted in a material change in the use of the strip to use for residential purposes incidental to the enjoyment of the dwelling. The concept of a material change of use is not defined in law and is a question of fact and degree in every case. For a material change of use to have taken place, there needs to be some significant difference in the activities from what has gone on previously. When assessing whether a material change of use has occurred it is first necessary to determine the relevant planning unit. The accepted tests for doing so are set out in relevant case law and starting with the unit of occupation, turn on the concept of physical and functional separation¹.
5. Prior to the strip being acquired by the appellant in January 2019, I understand that it had been maintained by the Council as part of roadside open space in the immediate and wider vicinity. Based on the available evidence, it seems to me highly likely therefore that the lawful use of the strip is not for residential purposes. The strip is now occupied as part of the same unit as the dwelling and its gardens. Even so, the unit of occupation would generally be the same as the planning unit in a situation where it is not possible to recognise other than a single main purpose of the occupier's use of their land, to which secondary activities are incidental or ancillary. Accordingly, if in this appeal the unit of occupation is to be regarded as one planning unit, an absence of physical and functional separation between the strip and the dwelling and its gardens might reasonably be expected.
6. As noted above, there is a wall and fence between the strip and the front and rear gardens of the dwelling. There is no means of accessing the strip directly from the dwelling or its gardens; the strip is accessed separately by a pedestrian gate adjacent to a public path. As a result, the strip is physically separate from the rest of the appellant's unit of occupation. Although the appellant might at one stage have intended to remove the wall between the strip and the rear garden, that has not occurred to date. Also, whilst part of the fence between the strip and the front garden was removed in June 2020, it had been replaced by the time the Council visited again in November of that year and remains in situ. Therefore, physical factors do not indicate that the strip has been used as part of the appellant's residential garden.
7. There is little significant difference in the activity taking place on the strip compared with what had occurred previously. Apart from the new hedge planting and fencing, the strip is still almost entirely laid to grass. The grass appears to be maintained in a manner not dissimilar to that of the adjoining areas of roadside open space. The grass does not have a more closely mown, 'manicured' appearance similar to that of the lawn in the appellant's rear garden or those in nearby gardens. Moreover, the strip does not contain any ornamental planting beds, paths and patios, domestic paraphernalia or other similar features that might normally be regarded as incidences of a residential use. These factors suggest that the strip is not managed in a manner consistent with a residential garden. This distinguishes the use of the strip

¹ *Burdle and Williams v SSE and New Forest DC* [1972] 1 WLR 1207.

from the front and rear gardens of the dwelling. A small quantity of green waste was present on part of the strip when I visited. This and any intermittent storage previously occurring, including the small number of items present on part of the strip shown in the Council's January 2021 photographs, is unlikely to be more than *de minimis*. In any event, such storage is not consistent with a residential use. The above all leads me to conclude that the use of the strip is not residential in character. As a result, there is also little to indicate that the use of the strip is related functionally to the use of the dwelling and its gardens.

8. Erecting fencing can in some instances be regarded as integral to and facilitating a material change of use to residential purposes even where, as in this case, such works on their own would otherwise be 'permitted development'². However, by itself the existence of such fencing is by no means conclusive of such a use, as land can be enclosed for many reasons. Also, as the planting of a hedge is not limited to a domestic context, it is not an indicator of a use for residential purposes. In addition, removal of the pre-existing trees is not an indicator of a residential use; there could be any number of reasons why trees are removed, including their age or condition. Therefore, none of these factors, either individually or cumulatively, are decisive of a change in the character of the use of the strip to one of a residential use annexed to the dwelling and its gardens.
9. Accordingly, based on the available evidence and as a matter of fact and degree I find that the strip is separate, physically and functionally, from the dwelling and its gardens and it does not form part of the same planning unit. My findings in this respect are consistent with relevant case law, which observes that it may frequently occur within a single unit of occupation that two or more physically separate and distinct areas are occupied for substantially different and unrelated purposes; in such a case, each area used for a different main purpose ought to be considered as a separate planning unit³.
10. Therefore, the available evidence indicates that, on the balance of probability, the strip has not been used for residential purposes incidental to the enjoyment of the dwelling. It follows that the appellant has been able to show that the allegation in the notice has not in fact occurred and their ground (b) appeal succeeds.

Conclusion

11. For the reasons given above, I conclude that the appeal should succeed on ground (b). The enforcement notice will be quashed. In these circumstances, the appeal on grounds (a) and (f) and the application for planning permission deemed to have been made under section 177(5) of the 1990 Act do not fall to be considered.

Formal Decision

12. The appeal is allowed and the enforcement notice is quashed.

Stephen Hawkins INSPECTOR

² By the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) Article 3, Schedule 2, Part 2 Class A, paragraph A.1 (a) (ii).

³ See footnote 1.