



Appeal Decision

Site visit made on 23 November 2021

by Stephen Hawkins MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 14th December 2021

Appeal Ref: APP/B1740/C/21/3279279

Land at 15 Furzedale Park, Hythe, Southampton SO45 3HU

- 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 Thomas Bennett against an enforcement notice issued by New Forest District Council.
- The enforcement notice was issued on 25 June 2021.
- The breach of planning control as alleged in the notice is without planning permission: (a) the change of use of the part of the land to the south of a line between point A and point C on the plan accompanying the enforcement notice from amenity land to use as residential parking for 15 Furzedale Park; (b) the erection of a double detached garage in the approximate position hatched blue on the plan; (c) the laying of a hardstanding in the approximate position shown coloured yellow on the plan, and; (d) the erection of a close-boarded fence varying in height along the boundary between 15 Furzedale Park and 8 Pinewood Drive and along the frontage to Pinewood Drive itself between points A and B on the plan.
- The requirements of the notice are: 1. Permanently cease the use of the area occupied by the garage and hardstanding for the purposes of vehicle parking. 2. Dismantle and remove from the land all parts of the detached garage shown in blue on the plan. 3. Remove from the land all hard surfacing including any resultant materials as shown yellow on the plan. 4. Remove from the land the fence, including all component parts, between points A and B on the plan. 5. Re-seed the land with grass and plant native plant species.
- The period for compliance with the requirements is: 1-one day. 2 and 3-three months. 4-four months.
- The appeal is proceeding on the grounds set out in section 174(2)(c) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have not been paid within the specified period, the appeal on ground (a) and the application for planning permission deemed to have been made under section 177(5) of the Act as amended have lapsed.

Summary of Decision: The appeal is allowed following correction of the enforcement notice in the terms set out below in the Formal Decision.

Preliminary Matters

1. The plan attached to the enforcement notice is inaccurate, as all of the land to which the notice relates is not within the area edged in red. An accurate plan has been provided by the Council. Accordingly, using the power in s176(1) of the Act I shall correct the notice to replace the inaccurate plan, with consequential corrections being made to paragraphs 2, 3 and 5. No injustice would be caused.
2. The notice alleges that a material change of use has occurred, as well as operational development. At s171B(3), the Act provides that the relevant time

limit for taking enforcement action where there has been a breach of planning control consisting of a material change of use is ten years beginning with the date of the breach. However, the notice refers to the alleged breaches as having occurred within the last four years. I shall therefore correct the notice further, to refer to both time limits. The notice would not be more onerous and there is no ground (d) appeal. Therefore, the above corrections would also not cause injustice.

Ground (c) appeal

3. The ground of appeal is that the matters alleged in the notice do not constitute a breach of planning control. The appellant must show why their appeal should succeed, the relevant test of the evidence being on the balance of probability.
4. The appeal site contains an enlarged semi-detached dwelling. The dwelling occupies a corner plot adjacent to a road junction. The front elevation of the dwelling faces a local distributor road, the side elevation being parallel to a cul-de-sac. The site is located on a planned residential estate which originated during the 1960s and incorporates an 'open plan' layout similar to other residential developments from that era.
5. The allegation of a material change of use concerns the use for residential purposes (parking) of an area of land between the side elevation of the dwelling and the cul-de-sac. 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 occurred, there needs to be some significant difference in the character of the activities from what has gone on previously. The starting point for ascertaining whether a material change of use has occurred is the planning unit. The accepted tests for establishing the relevant planning unit are set out in case law. Generally, but not exclusively, the whole unit of occupation will be determinative of the planning unit, unless a smaller unit can be identified in which a use which is separate, both physically and functionally, is taking place¹.
6. Prior to the matters alleged in the notice occurring, the land at the side of the dwelling is highly likely to have contributed to the visual amenity of the estate. However, that does not mean that its use was ever other than for residential purposes. The available evidence shows that the side land has been in a single ownership with the dwelling and the rest of the site, over many years. It is highly likely that the side land has been used and maintained by the occupiers of the site as part of their residential garden and as vehicular access to the original garage, since the dwelling was built. The evidence supports the view that the side land was not at any stage owned separately from the site or maintained communally as part of an open space.
7. There is also no suggestion of any previous association between the side land and other residential property, or that the side land previously formed part of nearby highway verges. Although a boundary treatment is shown between the rear garden and the side land on a layout drawing pre-dating the granting of planning approval for the estate², that is not definitive of the use of the two areas for unrelated purposes. Moreover, no physical boundary between the side land and the front garden of the dwelling is shown on the above layout

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

² Council Ref: NFR 12994.

- drawing and none exists. Consequently, the likelihood is that the site, including the side land, has continually been in one unit of occupation.
8. The side land is shaded and hatched on the above layout drawing. However, the front garden of the dwelling and the front gardens of other dwellings throughout the estate are also shown in a similar fashion. Therefore, the layout drawing does not only denote communal open space. Nothing in the estate planning approval requires the side land to be kept as open space. A subsequent layout drawing for the estate indicates that the side land, along with the front garden of this and other dwellings, would be maintained by the purchasers of the individual plots. This is distinct from open space and highway verges within the estate, which are shown as to be maintained communally. Therefore, the above matters do not support the authorised use of the side land being other than for residential purposes.
 9. Consequently, as a matter of fact and degree and on the balance of probability, the use of the side land has been and remains for purposes integral to the primary use of the site for residential purposes, forming part and parcel of the same residential planning unit as the dwelling. It is unlikely that the side land has ever been separate, either physically or in terms of its function, from the rest of the site. None of the available evidence shows that there has been a definable change in the character of the activities taking place on the side land. Therefore, in my opinion there has been no material change of use at the site.
 10. The notice goes on to allege the unauthorised erection of a detached double garage on part of the side land, a hardstanding laid on the remainder and fencing erected adjacent to the highway and neighbouring residential property. Carrying out the above works has involved building operations amounting to development as defined in s55(1) of the Act. The effect of s57(1) of the Act is that development requires planning permission.
 11. The GPDO³ at Article 3, Schedule 2, Part 1, grants planning permission for certain development within the curtilage of a dwelling. The available evidence is that the side land serves the dwelling in a reasonably useful way and that it has continually been used for such purposes as part and parcel of the same ownership as the rest of the site. It is not unusual for the curtilage to coincide with the planning unit, particularly in the case of a dwelling and garden plot on a residential estate. Whilst the side land was not previously fenced in, neither is the front garden of the dwelling. In any event, absence of enclosure is not determinative of a curtilage. Therefore, in my view, as a matter of fact and degree, the side land forms part of the curtilage of the dwelling.
 12. The garage appears to be used for purposes associated with the occupation of the dwelling. As a result, it can reasonably be regarded as being required for a purpose incidental to the enjoyment of the dwelling. The garage does not exceed the relevant size, height and locational limitations in Part 1, Class E paragraph E.1 of the GPDO. The hardstanding appears to be used for parking vehicles associated with the occupation of the dwelling, so could also reasonably be regarded as required for a purpose incidental to the enjoyment of the dwelling. The fencing does not exceed the 1 m height limit in the GPDO Part 2, Class A paragraph A.1 (a) (ii) where it is adjacent to the highway, or the 2 m height limit in paragraph A.1 (b) elsewhere. As a result, it is highly

³ The Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended).

likely that the operations are granted planning permission by the GPDO Part 1, Classes E and F and Part 2, Class A.

13. However, the Council referred to condition 10 of the planning approval for the estate, which restricts development "on land within the area hatched green on the plan" without the consent of the Local Planning Authority that would otherwise be permitted by a Development Order. The Council argued, in respect of the fence, that it would not benefit from the permitted development rights referred to above since it would be contrary to condition 10. Article 3(4) of the GPDO confirms that "Nothing in this Order permits development contrary to any condition imposed by any planning permission granted or deemed to be granted under Part 3 of the Act otherwise than by this Order."
14. Neither party could provide a copy of the coloured drawing identifying the green hatched area, which is necessary to understand the area of land to which condition 10 relates. Nevertheless, the appellant asserted that condition 10 is unlikely to apply to the side land. This is largely on the basis of the estate having been laid out in a manner which is significantly at variance with the layout drawing pre-dating the grant of planning approval. As built, the estate is laid out in a similar fashion to that shown on the subsequent layout drawing, which post-dates the planning approval by over a year. The changes in the layout have included building over areas of land shown shaded and hatched on the earlier drawing. No hatched areas are shown on the subsequent layout drawing. For conditions attached to a planning approval to 'bite', development must have been undertaken materially in accordance with the drawings to which that approval relates. To my mind, it seems more probable than not, for the above reasons, that the side land is not caught by condition 10, in which case the restriction on permitted development in Article 3(4) of the GPDO does not apply.
15. Accordingly, I conclude that, as a matter of fact and degree and on the balance of probability, there has been no material change of use, whilst the building operations are granted planning permission by the GPDO. As the appellant has therefore shown that the matters alleged in the notice do not constitute a breach of planning control, the ground (c) appeal succeeds.

Conclusion

16. On the balance of probability, the appeal on ground (c) should succeed in respect of those matters which, following the correction of the notice, are stated as constituting the breach of planning control. The enforcement notice will be corrected and quashed.

Formal Decision

17. It is directed that the enforcement notice be corrected by:
 - Substitution of the plan attached to the enforcement notice by the plan attached to this decision.
 - Substitution of the words "edged red" by the words "edged black" in paragraph 2.
 - Substitution of the words "hatched blue" by the words "shown in cross hatching" in paragraph 3 (b).

- Substitution of the words “coloured yellow” by the words “covered in dots” in paragraph 3 (c).
- Substitution of the first sentence in paragraph 4 with: “It appears to the Council that the above breaches of planning control have occurred within the last four and ten years.”
- Substitution of the words “shown in blue” by the words “shown in cross hatching” in paragraph 5, step 2.
- Substitution of the words “shown highlighted in yellow” with the words “shown covered in dots” in paragraph 5, step 3.

Subject to the corrections, the appeal is allowed and the enforcement notice is quashed.

Stephen Hawkins

INSPECTOR



The Planning Inspectorate

Plan

This is the plan referred to in my decision dated: 14th December 2021

Stephen Hawkins MA MRTPI

Land at: 15 Furzedale Park, Hythe, Southampton SO45 3HU

Reference: APP/B1740/C/21/3279279

Scale: Not to scale

