



Appeal Decision

Site visit made on 8 December 2021

by Stephen Hawkins MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 16th December 2021

Appeal Ref: APP/Z1775/C/21/3278616

2 Sea View Road, Portsmouth PO6 1EN

- 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 Zelda Worboys-Bishop against an enforcement notice issued by Portsmouth City Council.
- The enforcement notice was issued on 17 June 2021.
- The breach of planning control as alleged in the notice is without planning permission, the installation of a raised patio area leading from a single storey rear extension located in the rear garden of the property.
- The requirements of the notice are: 1) Starting from below the first step out from the bi-fold doors of the extension, remove the raised patio and steps providing access to the rear garden and re-profile the land to that which reduces the ground level to those site levels in existence prior to the undertaking of the unapproved development. 2) Provide a set of steps no greater than 1 m wide at an angle of no less than 42 degrees positioned centrally leading from the retained first step out from the bi-fold doors of the extension down to the rear garden. 3) Erect and retain thereafter a 1.8 m high screen (measured from the top of the retained first step) of obscured glass at the length of the eastern end of the retained first step and provide a 1 m high balustrade across the width of the retained first step, that terminates either side of the steps, as required by step 2 of the notice. 4) Remove the raised patio area that runs around the extension to the eastern side elevation leading to the access door on the ground floor on the east facing elevation and re-profile ground level to this point to those site levels in existence prior to the undertaking of the unapproved development. 5) Provide a set of steps no greater than 1 m wide at an angle of no less than 42 degrees to ground level as specified in step 4 of this notice, leading from the access door on the east facing elevation to the rear garden. 6) Remove from the land all associated building materials, rubble and fixtures and fittings arising from compliance with the notice.
- The period for compliance with the requirements is six months.
- The appeal is proceeding on the grounds set out in section 174(2)(a), (e) and (f) of the Town and Country Planning Act 1990 as amended.

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

Preliminary Matters

1. The scope of an enforcement notice is limited by s173(4)(a) and (b) of the Act. Where planning permission has not been granted for the development, the power is simply to restore the land to its condition before the breach took place. There is no power to require the appellant to undertake works which would result in an improvement over the previous condition of the land. Relevant case law confirms that steps to be taken to remedy an injury to

amenity should not impose more onerous requirements than to restore the land to its condition before the breach took place¹.

2. The notice alleges the unauthorised installation of a raised patio at the rear of an extended bungalow. The requirements in paragraph 5 at (1) and (4) seek removal of the patio, with the exception of a part adjacent to bi-fold doors in the rear elevation of the bungalow. In paragraph 5 at (2), (3) and (5), the notice also requires the construction of steps, a balustrade and a screen following removal of most of the patio. There were no equivalent steps, or a balustrade and screen at the site prior to constructing the patio. Constructing the steps, balustrade and screen would not make the patio comply with the terms of a planning permission, as no such permission exists. Therefore, the notice requirements at (2), (3) and (5) clearly exceed what is necessary to restore the site to its pre-breach condition. After seeking comments from both main parties, I shall use the powers in s176(1) of the Act to correct the notice by deleting the above requirements. Such corrections are necessary so that the requirements are within the scope of the powers in s173(4)(a) and (b) of the Act. There would be no injustice to the appellant or the Council.
3. Paragraph 2 of the notice states the address of the land to which it relates. The location plan attached to the notice shows the land concerned edged in red, with a title box stating the same address as in paragraph 2. Therefore, whilst a different address is erroneously referenced in the annex to the notice, the appellant could never have been in any real doubt over the exact address that the notice affected. By correcting the error in the annex, I am also satisfied that there would be no injustice.
4. Following the above corrections, the remaining notice requirements (1) and (4) would not remedy the breach, as the appeal site would not be restored to its condition prior to the breach taking place. Nor would those requirements remedy the injury to amenity, as there would be no screen between the retained part of the patio and adjoining residential property. Moreover, as a consequence of under-enforcement, following compliance with the corrected notice the remaining portion of patio would benefit from a deemed unconditional planning permission, having regard to the effect of s173(11) of the Act. This cannot have been an outcome that the Council intended.
5. The Council's suggested that requirement (1) is varied, so that the patio had to be totally removed. However, this would put the appellant in a worse position than if they had not made an appeal and simply complied with the notice as issued. Although the appellant would no longer have to erect steps and a screen, they would also not be able to retain the portion of patio and the bi-fold doors in the extension could no longer be used to provide external access. Consequently, I cannot vary requirement (1) as set out above, as there would be injustice to the appellant.
6. The Council were afforded an opportunity to withdraw the notice. This would have enabled the service of a fresh enforcement notice containing requirements which properly reflect the scope of the powers in the Act. As the notice has not been withdrawn however, the appeal has to be determined on the basis of the notice as corrected. In respect of the ground (a) appeal, the unintended consequences of the "fallback" position following compliance with

¹ *Bath CC v SSE & Grosvenor Hotel (Bath) Ltd* [1983] JPL 737.

the corrected notice-i.e., a portion of the patio remaining in situ, will therefore be an important material consideration.

7. The revised National Planning Policy Framework (the Framework) came into force during the course of the appeal. The main parties have had opportunity to comment on the implications of the Framework in respect of the ground (a) appeal and I have taken it into account in my decision.

Ground (e) appeal

8. The ground of appeal is that copies of the notice were not properly served on everyone with an interest in the site. It is for the appellant to prove their case in this respect, the relevant test of the evidence being on the balance of probability.
9. I am given to understand that the copy of the notice served on the appellant's spouse, who is a joint owner of the site, misquoted his surname. Also, I understand that whilst a copy of the notice was served on the Clydesdale Bank, the appellant's mortgage company is Virgin Money. However, there was no suggestion that the appellant's spouse did not receive their copy of the notice. Moreover, it is unlikely that the appellant did not make their spouse aware of the notice having been served. The copy of the notice addressed to the Clydesdale Bank was served by recorded delivery on the same address as that used by Virgin Money in mortgage correspondence with the appellant. I am given to understand that Virgin Money and the Clydesdale Bank are part of the same banking business. As the Council confirmed that what was served on the Clydesdale Bank had not been returned, there is no sound reason to think that the mortgage company did not receive a copy of the notice. Also, there is no firm evidence which might indicate that the notice copies were served other than in accordance with one or other of the methods specified in s329(1) of the Act. Although it might be good practice to serve a Planning Contravention Notice (PCN) prior to taking enforcement action, it is not always required. Moreover, I am not convinced that serving a PCN would have entirely avoided the issues identified by the appellant.
10. Accordingly, in my view copies of the notice have been served on the owner and the occupier of the site and on any other person having such an interest, being an interest which is materially affected by the notice, as required by s172(2) of the Act. It follows that the appellant has been unable to show to the required standard that copies of the notice were not properly served.
11. In any event, s176(5) of the Act provides for disregarding a failure of service of copies of a notice where persons do not suffer substantial prejudice as a result. The appellant was able to make full arguments during the course of these proceedings as to why their appeal should be allowed. Misquoting the name of the appellant's spouse did not prevent the latter from also lodging an appeal if they had wished to do so. Similarly, a change in name of the mortgage company did not prevent that company from making an appeal, had they so desired. Therefore, neither the appellant, their spouse nor the mortgage company has suffered prejudice. There was no suggestion that any other person may have been prejudiced. As a result, even if there had been a failure by the Council in terms of service of copies of the notice, I would have concluded that it should be disregarded in this case.
12. For the above reasons, the ground (e) appeal fails.

Ground (a) appeal

Main Issue

13. The main issue in this appeal is the effect of the raised patio on the living conditions of occupiers of adjoining residential property, having regard to privacy.

Reasons

Living conditions

14. The appeal bungalow is situated in a plot which is quite narrow for the area, with a long rear garden in which ground levels fall away towards the rear boundary. The rear garden is flanked on both sides by the rear gardens of residential properties in adjoining streets.
15. A single storey extension spans almost the entire width of the bungalow's rear elevation. The patio is of a similar width to the extension and projects outwards into the rear garden. The patio surface is finished in granite tiles. The highest part of the surface is at a similar level to that of the floor in the extension. The patio surface level then reduces by a series of steps to a wider levelled area, down to the level of the rear garden.
16. In dismissing a previous appeal², an Inspector noted that they had been able to look directly from the patio over the existing east side boundary fence and across neighbouring gardens, including directly over the rear garden of No 25 Portsdown Avenue (No 25) and that this had "*unquestionably resulted in additional levels of overlooking from the rear garden of No 2 and a subsequent loss of privacy to these neighbouring occupiers*".
17. Since the previous appeal was determined the appellant has installed a row of timber planters containing tall, maturing bamboo plants, to form a screen along part of the east edge of the patio adjacent to the boundary with No 25. When standing on the higher parts of the patio, I obtained only limited views over the rear garden of No 25 due to the length, height and thickness of the boundary planting. I also saw that the solid timber fencing on the east boundary minimises the potential for any overlooking from the lower parts of the patio.
18. Be that as it may, I am not convinced that on its own, the boundary planting provides an effective, durable, permanent screen. The plants may fail or become diseased or damaged over time. In particular, given the elevated hillside location of the site it is entirely possible that wind damage will occur. Moreover, as the planters do not appear to be permanently affixed to the patio there is little obvious reason why they could not be moved. In either instance, the level of screening that the boundary planting currently provides is likely to be significantly reduced or even lost entirely. Similar conclusions apply in relation to maturing planting in the rear garden of No 25.
19. Nonetheless, the "fallback" position is that a portion of the patio, where it is most raised in relation to ground levels at No 25, would still remain following compliance with the corrected notice. It is entirely possible that the occupiers of the bungalow would continue to use this remaining portion as a patio area. In that eventuality, there would be nothing to prevent them from directly

² Appeal Ref: APP/Z1775/D/18/3213330.

overlooking No 25's rear garden. The level of overlooking and consequent loss of privacy that occupiers of No 25 would experience would be significantly worse than if the patio were to be retained as built but screened more effectively from the adjoining property. This weighs significantly in favour of granting permission for the patio, subject to provision of a more permanent form of screening to augment the existing planting. Such a screen, if offset from the boundary and softened by the existing planting, would not necessarily loom tall over No 25's rear garden. It would not need to be as tall as the boundary planting or taller than the screen the Council had sought to be provided in the notice as issued. There is no sound reason why an appropriate permanent boundary screen cannot be part of the development in the ground (a) appeal. Installation of the boundary planting together with the "fallback" of a portion of the patio being retained represent material changes in circumstances since the previous appeal.

20. Due to the above factors, subject to attaching a suitable planning condition to secure the provision and retention of appropriate permanent boundary screening I conclude that the patio does not unacceptably erode the level of privacy that occupiers of No 25 could otherwise reasonably expect to enjoy in their rear garden. By protecting amenity and providing a good standard of living environment for neighbouring occupiers, the patio therefore accords with criterion in Policy PCS23 of the Portsmouth Core Strategy. In addition, by providing a high standard of amenity for existing users the patio achieves a well-designed place consistent with the Framework.

Conditions

21. I shall attach a condition requiring a scheme to be submitted to the Council for approval in respect of the provision of further screening between the raised patio and the rear garden of 25 Portsdown Avenue and implementation of the approved scheme within the period specified. This condition is necessary for the reasons set out in paragraph 19. The condition is drafted in the form set out below because, unlike an application for planning permission for development yet to commence, in the case of a retrospective grant of permission it is not possible to use a negatively worded condition precedent to secure the implementation of the required scheme, because the development has already taken place. The purpose and effect of the condition is therefore to ensure that the patio granted planning permission may only remain if the appellant complies with its requirements. Therefore, in my view the requirements of the condition are both proportionate and reasonable.

Conclusion

22. For the reasons set out above, the patio accords with the Development Plan when taken as a whole and is consistent with the Framework. Accordingly, I conclude that the appeal should succeed on ground (a) and planning permission will be granted. The appeal on ground (f) does not therefore need to be considered.

Formal Decision

23. It is directed that the enforcement notice be corrected by:

- Deleting steps 2, 3 and 5 in paragraph 5.
- Renumbering "step 4" in paragraph 5 to "step 2".

- Renumbering “step 6” in paragraph 5 to “step 3”.
- On page 5 in the first and second lines of the annex substituting the words “125 Fawcett Road, Portsmouth PO4 0DF” with “2 Sea View Road, Portsmouth PO6 1EN”

Subject to these corrections the appeal is allowed, the enforcement notice is quashed and planning permission is granted on the application deemed to have been made under section 177(5) of the 1990 Act as amended for the development already carried out, namely for the installation of a raised patio area leading from a single storey rear extension located in the rear garden of the property on land at 2 Sea View Road, Portsmouth PO6 1EN, subject to the condition in the attached Schedule.

Stephen Hawkins

INSPECTOR

CONDITION SCHEDULE

- 1) Unless within 1 month of the date of this decision a scheme for the installation of a permanent screen between the raised patio and the rear garden of 25 Portsdown Avenue of a height no greater than 1.8 m, which includes retention of the existing boundary planting, is submitted in writing to the Local Planning Authority for approval, and unless the approved scheme is implemented within 3 months of the Local Planning Authority's approval, the raised patio area hereby approved shall be removed until such time as a scheme is approved and implemented.

If no scheme in accordance with this condition is approved within 3 months of the date of this decision, the raised patio area shall be removed until such time as a scheme approved by the Local Planning Authority is implemented.

Upon implementation of the approved scheme for a permanent screen specified in this condition, the scheme shall thereafter be maintained in accordance with the approved details.

In the event of a legal challenge to this decision, or to a decision made pursuant to the procedure set out in this condition, the operation of the time limits specified in this condition will be suspended until that legal challenge has been finally determined.