

Appeal Decision

Site inspection on 24 February 2022

by Graham Self MA MSc FRTPI

Inspector appointed by the Secretary of State

Decision date: 3 March 2022

Appeal Reference: APP/B1740/C/21/3286060

Site at: 5 Furzedale Park, Hythe SO45 3HQ

- The appeal is made by Mr Barry Newbould under Section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against an enforcement notice issued by New Forest District Council.
- The notice was dated 29 September 2021.
- The breach of planning control alleged in the notice is: "Without planning permission:
 - a) the change of use of the land shown hatched blue on Plan 2 attached to this Notice from open amenity land to use as a residential garden.
 - b) The erection of a fence between points A-B-C-D as shown on Plan 2 attached to this Notice."
- The requirements of the notice are:
 - "(i) Cease the use of the land shown hatched blue on Plan 2 as part of the garden of 5 Furzedale Park.
 - (ii) Remove from the land the fence, including posts, concrete bases and other forms of support as shown between points A-B-C-D on Plan 2.
 - (iii) Re-establish a boundary on the pre-existing line between the garden and the amenity land in accordance with the requirements of the Town and Country Planning (General Permitted Development) Order 2015, Schedule 2, Part 2, Class A."
- The periods for compliance specified in the notice are: four weeks for steps (i) and (ii) above and twelve weeks for step (iii).
- The appeal was made on grounds (a), (b), (c), (f) and (g) as set out in Section 174(2) of the 1990 Act. The application for planning permission deemed to have been made under Section 177(5) also falls to be considered.

Summary of Decision: The enforcement notice is corrected and varied. The appeal is dismissed and the enforcement notice as corrected and varied is upheld. The overall effect is to remove the alleged change of use from the notice so that it applies only to the fence.

Format of Decision

1. In this decision the grounds of appeal are taken in logical, not alphabetical, order. This is because issues relating to planning permission only become potentially relevant after considering whether what is alleged has occurred and whether it constitutes development requiring planning permission.

Costs

2. An application for an award of costs has been made on behalf of the appellant. This application is the subject of a separate decision.

Appeal Site and Enforcement Notice

3. The appeal site occupies a corner location at the junction between Furzedale Park and Furzedale Gardens. The fence referred to in the enforcement notice is constructed with concrete posts and timber panels and is about 1.8 metres in height. Inside the fence most of the land between the fence and the house is grassed. About eight young deciduous trees, which were not in leaf at the time of my inspection but appear to be fruit trees, are spaced roughly parallel to and close to the inside of the fence.
4. As defined in Section 55 of the 1990 Act, there are two main types of "development". One is "operational development", which includes erecting a structure; the other is making a material change of use of land. The enforcement notice subject to this appeal is directed at both types, but as recorded below, that does not apply to all the grounds of appeal.
5. I can understand why the council have used the words "residential garden" to describe the alleged use of the land involved in this appeal, but this is a contradictory label without proper meaning for planning purposes and as an enforcement allegation it is an unsatisfactory description. A "residential garden" (referring here to a garden attached by layout, ownership and occupation to a house) is a residential use, and what is really being alleged in the enforcement notice is a material change of use to residential use. In these circumstances I have a duty to correct the notice, so I shall do so.

Grounds (b) and (c)

6. I consider these grounds together as there is overlap between some of the issues raised. It is clear from the appeal statements that grounds (b) and (c) of the appeal relate only to the "use" part of the allegation - the operational development (the fencing) is not a matter of dispute here, as the appellant accepts that the erection of the fencing required planning permission. Ground (b) is a claim that what is alleged has not occurred as a matter of fact. Under ground (c) it is claimed that the matters alleged in the enforcement notice did not constitute a breach of planning control.
7. The evidence about the planning history of this estate shows that outline planning permissions were granted starting in the 1950s, followed by what appears to have been effectively a "reserved matters" application and a scheme of landscaping. The evidence indicates to me that the area at the side of the house which became Number 5 Furzedale Park was intended to be turfed by the contractor and then maintained by the purchaser, but was to be separated from the garden area behind the house and kept open as part of an "open-plan" layout for this part of the estate.
8. For many years the area enclosed by the disputed fencing and hatched blue on the enforcement notice plan was an open, grassed piece of land not physically separated from the adjacent highway. This appears to have been in accordance with a condition attached to one of the planning permissions for the development of the Furzedale Park estate. The situation which has now arisen might have been simpler if the council had issued a breach of condition notice under Section 187A of the 1990 Act (against which types of notice there is no right of appeal). But no such notice has been issued, apparently because of problems finding or reproducing full details of an old planning permission.

9. The blue-hatched area has evidently been within the same unit of occupation as the house at Number 5 ever since the house was built, and this area has been owned, occupied and maintained by the owner-occupiers of the house. Until the trees were planted, maintenance appears to have mostly involved mowing or trimming the grass cover. Visually, the disputed area has contributed to the open quality of the street scene and in that respect has functioned as a public amenity, in line with the apparent aim of the conditional planning permission. But when considering its *use* for the purposes of planning law this area has been part of the same "planning unit" as the house and the rest of the house plot, and as such has been in residential use for more than 50 years. (This point is irrespective of any "curtilage" considerations, which is a separate matter on which I make no comment or finding.¹).
10. A supplementary point on this matter is that the requirements of the notice refer to "the use as part of the garden" of Number 5. I comment further on the requirements when considering ground (f) below, but observe at this stage that if the allegation were to remain as "residential garden", the related requirement should have paralleled this description and required cessation of "residential garden" use. The inconsistency in the notice as worded by the council suggests a degree of confusion about exactly what use - or more accurately what material change of use - was being enforced against.
11. Many front or side gardens attached to residential properties could be regarded as having a public amenity function because they are part of a street scene. That does not mean that such land has a public amenity "use". The residential use of the disputed area of land was permitted by means of the series of planning permissions for the development of the estate, and the "open amenity" function of the land was only achieved by attaching a condition to one of the permissions. But as explained above the enforcement notice subject to this appeal is not directed at a breach of condition.
12. It may help to explain my interpretation of what has happened here by referring to something comparable. Where, say, a planning permission is granted for a dwelling in a rural area subject to an agricultural occupancy condition (ie specifying that the dwelling shall only be occupied by a person employed in the locality in agriculture), and the dwelling later becomes occupied by someone not so employed, a breach of development control occurs. But the breach is not because of a change of use to residential use, since the house remains in residential use. The breach is because of failure to comply with the agricultural occupancy condition.
13. In summary I find that the area hatched blue on the enforcement notice plan is in residential use, so a change of use of this land to residential use has occurred, and ground (b) of the appeal relating to the use (as corrected) does not succeed. But the change to residential use occurred many years ago when the house at Number 5 was built and first occupied following a planning permission, and did not constitute a breach of planning control for the reasons explained above; therefore this part of the appeal succeeds on ground (c). For the sake of clarity and simplicity and so that the requirements are matched with the allegation for

¹ *Curtilage* and *planning unit* are different concepts. It is not unusual to have situations where parts of the plots or gardens of houses are outside the curtilage of the house, whilst the "planning unit" as a whole is in residential use.

legal reasons,² I shall delete the reference to the use from the allegation as well as from the requirements of the notice.

Ground (a) and Deemed Application

14. Under Ground (a), planning permission is sought for the matters stated in the enforcement notice. This ground of appeal, together with the application for planning permission deemed to have been made under Section 177(5) of the 1990 Act, originally covered two aspects - the operational development (erection of the fence) and the material change of use. Given my finding on ground (c) on the "use" part of the allegation, only the fence now remains to be considered under ground (a).
15. Changes have obviously occurred throughout the Furzedale Park estate since it was first developed; but the part of the estate in the vicinity of the appeal site has retained most of its open layout, and this particularly applies to the dwellings grouped around the short cul-de-sac (Furzedale Gardens) next to the appeal site. Because of the site's corner location and the pattern of nearby development the disputed fence is in a prominent position, not only in views from Furzedale Gardens but also in longer views from the main access road serving the rest of the estate. The fence gives the local scene a more enclosed appearance and takes away some of the area's spacious, open quality.
16. I have mentioned changes which have occurred over time. I saw examples in the locality where fences have been erected or hedging planted bordering front or side gardens and also the rear gardens of houses in Nelson Court which back on to Furzedale Park. In a location on the edge of the estate (next to a public footpath which provides access to an area of woodland) the garden of a house is bordered by fencing similar in height to that at the appeal site; this fencing appears to have been in place for quite a long time and may well now be "immune" from enforcement.
17. The council's case is weakened by the existence of some of the fences in this area which have apparently not been subject to enforcement action. But most of these other fences do not have such prominent positions as the fencing at the appeal site. As shown in photographs submitted for the appellant, many of the fences elsewhere are set well back from the road and have their appearance softened by planting. The hedges generally have a less severe and less "urban" appearance than the fence subject to this appeal.
18. Bearing those points in mind I do not consider that the presence of fences or other boundary features in the area has set a precedent which should now be followed. Moreover, if the existence of some structures which detract from the area's openness were to be accepted as a compelling "precedent" argument for permitting the development subject to this appeal, it would be difficult or impossible for the planning authority to prevent the erection of enclosing structures along neighbouring open frontages in Furzedale Gardens, causing a considerable and cumulative loss of the area's remaining spacious quality.
19. One of the issues raised by the council, albeit at a late stage in the enforcement process, concerned highway safety and the obstruction to visibility caused by the fence, part of which is next to the driveway to a neighbouring property. Visibility

² The legal point here concerns Section 177(5) of the 1990 Act under which where an enforcement notice "under-enforces" by specifying in its allegation something not matched in its requirements, planning permission is deemed to be granted for the matter involved. Such permission is unconditional, and this could cause legal complications if in future breach of condition action were to be pursued.

of or from the driveway along the road carriageway is adequate given the likely low speed of vehicle traffic at this point, but I am more concerned about visibility along the footway³. In my judgment the fence has increased the potential for accidents, for example if a right-hand-drive vehicle were to be reversed out of the driveway at the same time as a young child was walking or running along the footway from the east or being pushed in a pram. However, the "angled" corner layout of the fence helps to provide a basic standard of visibility, but the fence has created a safety hazard which did not previously exist. On balance, taking account of the small amount of vehicular traffic likely to be generated by the single dwelling served by the driveway, I find that highway safety concerns are not by themselves so strong as to justify refusing planning permission.

20. Planning policies provide arguments both for and against the appeal. The most relevant policy is probably Policy ENV3 of the Local Plan which sets out various criteria against which development proposals are to be judged. Aspects of national policy and of the Hythe and Dibden Neighbourhood Plan also have some bearing. In my judgment the fence does not respect the area's character, does not add to the quality of the area, and does not respond to local character or distinctiveness; so the development conflicts with several aims of local and national policies.
21. I can understand why Mr Newboulton has wanted to improve the privacy and security of the land at the side of his house, and it seems that some local residents have no objection to the fence. Those are not compelling points in favour of permitting the development, especially bearing in mind that the council's enforcement action evidently followed a complaint about the fence.
22. In reaching my decision I have taken into account all the other matters raised in the written representations on which I have not specifically commented, including the history leading to the enforcement proceedings. I conclude that planning permission should not be granted for the erection of the disputed fencing.

Grounds (f) and (g)

23. Ground (f) relates to the requirements of the notice. Ground (g) concerns the period for compliance. The outcome of the ground (c) appeal relating to the "use" means that ground (f) and (g) now only concern the fence.
24. Step (i) of the requirements requiring cessation of "the use of the land shown hatched blue on Plan 2 as part of the garden of 5 Furzedale Park" is unsatisfactory because "use of land as part of the garden" is not a proper or correct description of the use of the land for planning purposes; but anyway, in view of my finding above about the use of the area hatched blue, step (i) of the requirements requiring cessation of the use of this land ceases to apply, so I am deleting it.
25. Given the refusal of retrospective planning permission for the erection of the fence between the points labelled A-B-C-D on the relevant enforcement notice plan, the requirement to remove it is logical and reasonable. I do not see good reason for changing this part of the requirements.
26. The same does not apply to step (iii) of the specified requirements. The requirement to "re-establish a boundary" is imprecise - this step mentions the General Permitted Development Order but it does not tell recipients of the notice precisely enough what they have to do to comply. It would also be more

³ I use the term "footway" to avoid any confusion when referring to what is often called the "pavement", because the latter term can have different meanings.

reasonable to leave it to the appellant whether he wants to enclose his land behind the house or leave it open. I am therefore deleting this requirement. The related compliance period specified for this step will become redundant, so is also being deleted.

27. The four-week compliance period for the removal of the fence, including posts and bases, would normally be reasonable; but because recent weather conditions have caused considerable damage to fences around the country and resulted in high demand for fencing contractors, some time may be needed to engage a contractor to carry out this work. With that in mind I have decided to extend the compliance period to eight weeks (which will now run from the date of this decision).
28. I conclude that grounds (f) and (g) of the appeal partly succeed, to the extent described above.

Formal Decision

29. I direct that the enforcement notice be corrected and varied in the following ways:
- (i) by deleting sub-paragraph (a) of the text describing the alleged breach of planning control, leaving the text of sub-paragraph (b) as the only sub-paragraph.
 - (ii) by deleting sub-paragraphs (i) and (iii) of Section (5) of the notice specifying the requirements, leaving the text of sub-paragraph (ii) as an unnumbered sub-paragraph setting out the requirements.
 - (iii) by deleting all of the text in Section (6) of the notice specifying the time for compliance and substituting "eight weeks".
30. Subject to the correction and variations above, I dismiss the appeal, uphold the enforcement notice as corrected and varied, and refuse to grant planning permission on the application deemed to have been made under Section 177(5) of the 1990 Act as amended.

G F Self

Inspector