The Planning Inspectorate

Appeal Decision

Hearing Held on 7 December 2022
Site visit made on 7 December 2022

by D Fleming BA (Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 11 January 2023

Appeals Refs: APP/B1550/C/21/3287628 and APP/B1550/C/21/3287629
Land adjacent 94 Eastwood Rise, Leigh-on-Sea, Essex SS9 5BU

- The appeals are made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeals are made by Mr Bradford Bines and Mrs Vikki Bines against an enforcement notice issued by Rochford District Council.
- The enforcement notice was issued on 25 October 2021.
- The breach of planning control as alleged in the notice is without planning permission, the material change of use of land from open grass verge to use as domestic garden (the grass verge is shown hatched on the attached plan) and erection of a 1.8 metre high close boarded timber fence adjacent to the highway and enclosing the land, shown in the approximate position marked by XXX from point A to B shown on the attached plan.
- The requirements of the notice are
  1. Cease the use of the land shown hatched on the attached plan as domestic garden.
  2. Remove the 1.8 metre high close boarded timber fence posts shown in the approximate position marked by XXX and labelled A to B and associated concrete posts and gravel boards.
  3. Remove any domestic paraphernalia from this land.
  4. Reinstate the original domestic curtilage boundary by erecting a means of enclosure in the position shown marked by 0000s and labelled C to D.
  5. Remove from the site, all resultant material, debris and waste arising from compliance with the above steps and infill the holes where the concrete posts have been removed.
  6. Replant the shrubs, trees and grass on the verge and return the land to its condition before the development occurred within the current planting season.
- The period for compliance with the requirements is 8 weeks.
- The appeals are proceeding on the grounds set out in section 174(2)(a), (c), (f) and (g) of the Town and Country Planning Act 1990 as amended.

Decision

1. The appeals are 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 Town and Country Planning Act 1990, as amended, for the development already carried out, namely the material change of use to use as domestic garden of the land at Woodstock, 94 Eastwood Rise, Leigh-on-Sea, Essex SS9 5BU, referred to in the notice.

Application for costs

2. At the Hearing an application for costs was made by the appellants against the Council. This application is the subject of a separate Decision.

Background

3. The appeal concerns a strip of land running alongside a dwelling situated on the south east corner of the road junction comprising Eastwood Rise and Nore Road (east and west). Photographs from the parties show it was planted with shrubs and a tree before the development took place. These have now been removed and the space has been enclosed by timber fencing and forms part of the garden of 94 Eastwood Rise.

Procedural Matters

4. The description of development is incorrect in that the photographs show the enclosed land was not previously an open grass verge. Rather the land was planted with a tree and various shrubs. It is open to me to correct the allegation to put the notice in order but this can only be done provided there is no injustice to either party.

5. I find omitting any reference to the appearance of the land prior to the material change of use would not be fatal to the allegation. Deleting the words "from open grass verge" would not cause any injustice as it is clear from the appellants' submissions that they have not been misled by the incorrect framing of the allegation.

6. The Council have framed the allegation as two separate acts of development and refer to two separate time periods under section 171B of the Town and Country Planning Act 1990. The framing of the allegation is important as this forms the description of development for any subsequent appeals on ground (a) and the deemed planning application and has implications for any ground (f) appeal against the requirements of the notice.

7. In this case it has not been set out in the allegation that the fence facilitates the material change of use. Reference to this is only found in the reasons for issuing the notice. If it had been stated in the allegation, this would have enabled the Council to rely on *Murfitt*[1]. This case established that an enforcement notice directed at a use can require the removal of ancillary operational development intended to facilitate the unlawful use. Whereas with two separate allegations the *Mansi*[2] principle is in play. The Courts in this case established that enforcement notices should not be worded to prohibit lawful development. As such, although invited otherwise by the Council, in this appeal I attach limited weight to *Murfitt.*

8. At the Hearing the Council submitted details from two previous planning applications namely reference F/0445/97/ROC and F/0629/97/ROC in response to my pre-Hearing query over the status of the land. I will refer to these in my subsequent discussions.

The ground (c) appeal

9. Under a ground (c) appeal the onus of proof is on the appellant to show that there has not been a breach of planning control. In this case the appellants have lodged a ground (c) appeal only in respect of the fence. They submit that the fence is lawful as it benefits from permitted development (PD) rights set out in the Town and Country Planning (General Permitted Development)

[1] Murfitt v SSE [1980] JPL 598
[2] Mansi v Elstree RDC [1964] 16 P and CR 153

(England) Order 2015, Schedule 2, Part 2, Class A (the GPDO). In particular, they rely on their submission that the fence is not adjacent to a highway.

10. The meaning of development is set out in section 55(1) of the Town and Country Planning Act 1990 and includes the carrying out of building operations in, on or over land. Section 55(1A) confirms that such operations include operations normally undertaken by persons carrying out a business as a builder. I find the erection of the fence amounts to an operation of development as defined by section 55(1), having regard to its height, construction and extent.

11. In some circumstances operational development can be PD under the provisions of the GPDO. Schedule 2, Part 2, Class A states that the erection, construction, maintenance, improvement or alteration of a gate, fence, wall or other means of enclosure is PD subject to various criteria. Development is not permitted if the height of the gate, fence, wall or means of enclosure erected or constructed adjacent to a highway used by vehicular traffic would exceed 1 metre above ground level.

12. The fence is 1.8m high and is situated adjacent to Nore Road East, a cul-de-sac (NRE). At the Hearing the Council conceded that NRE is not a highway for the purposes of the GPDO. As such, the 1 metre height limit does not apply to the appellants' fence. Initially, the Council had relied on the definition of a highway set out in the Highway Act 1980 (HA). However, neither the GPDO nor the HA contain a complete definition of a highway. As such, it is necessary to turn to case law.

13. The Courts have held that a highway is a defined route over which the public can pass and repass without hindrance or charge. The use must be "as of right" meaning without force, secrecy or permission. The public right to pass and repass as of right may be limited to a particular class of user or mode of transport.

14. The appellants' copies of letters and minutes from Nore Road residents' group dating back to 2002 demonstrate that NRE is a private road maintained by the residents; that a gate was erected across the road and closed one day a year to maintain the private status; and a sign was erected to inform passers-by that the road was private. This situation has not changed by the recent removal of the gate in July 2022. In addition, Essex County Highways Department confirmed on 5 November 2021 that their records show NRE is a private road, not a highway.

15. The appellants' position is challenged by a local resident with reference to a previous County Court judgement[3]. The Court was asked to determine three issues, namely who owned the strip of land, if the land was not adversely possessed, whether the adult residents of NRE enjoyed rights of way over it and whether there had been trespass. The purpose of the litigation was not to establish whether NRE was a private road or not. References by the Judge to the status of the road are in passing or by way of summarising evidence from witnesses. Overall, I find that the judgement does not assist the local resident in this appeal and I have given it limited weight.

[3] Southend County Court Case No. DOOSS461 dated 22 July 2020

16. I am therefore satisfied that for the purposes of establishing whether the fence is PD, it has been demonstrated that NRE is not a highway. The fence is therefore lawful as all other criteria set out in Class A are either met or are not applicable. The appeals on ground (c) succeed. As such, the deemed planning application now only relates to the material change of use.

The ground (a) appeal and the deemed planning application

Main Issue

17. The main issue is the effect of the material change of use on the character and appearance of the area.

Reasons

18. The residential development in the area comprises a variety of detached dwellings developed incrementally over time but laid out in a regular pattern with generous front and rear gardens. Eastwood Rise is the principal north-south road in the area along which there are several crossroad junctions with other roads running east-west, including Nore Road. North of the Sandhill Road crossroad, the appearance of Eastwood Rise changes. There is no longer a defined pavement either side of the road as it is replaced with informal planted verges. These vary in appearance due to the height and spread of the trees and shrubs planted by the various residents. These sometimes extend alongside the flank boundaries of the properties at a crossroads junction such as at Sandhills Road, but not in every case. The effect of these planted areas is to create a very attractive residential environment.

19. It is apparent from the reasons for issuing the notice that the Council have two areas of concern. The first relates to the effect of the fencing on the character and appearance of the area but this no longer falls to be considered due to the success of the ground (c) appeals. This leaves the effect of the new use on the character and appearance of the area.

20. However, the Council were unable to explain whether there is any harm arising from the new use, other than stating in the reasons for issuing the notice that it is inappropriate. The officer report which dealt with the previous retrospective application for the development stated at paragraph 5 "residential type development in principle is considered acceptable in this location" and at paragraph 22 "[the] change of use to a domestic garden would be appropriate for the residential area and would not give rise to a degree of disturbance that would be out of character for the context of the area." There was no further elaboration on harm arising from the use *per se* put forward at the Hearing.

21. I believe this is because there is only limited harm caused by the new use in that one immature tree was removed, contrary to the Council's objectives set out in Policy DM25 to preserve trees. Whether the use is acceptable turns on the nature of the use and does not turn on operational development. There is a distinction. If the appellants had just removed their side fencing and made use of the planted strip of land as part of their rear garden, but open to the public, it is unlikely that this would have raised any concerns. This would be similar to the way most front gardens are used; they are open to view by the public but they are also semi-private. It was the erection of the fencing that led to the complaints, not the private use of the strip of land as a garden.

22. I note that the land is owned by the appellants and there is no legal requirement such as a planning condition or a section 106 legal agreement to keep it open and planted for the benefit of the public. This was established at the Hearing during the examination of the submitted planning application documents.

23. Reference F/0629/97/ROC is a planning approval for the erection of two houses at the far eastern end of NRE in 1999. The Council no longer has either any records of any details submitted to discharge the landscaping condition or any information as to where the landscaping was to take place. Application reference F/0445/97/ROC concerns a planning approval for housing along Nore Road West but the Council confirmed it would no longer be relying on this document. The Council also confirmed that it had no records from the time when planning permission was granted to erect 94 Eastwood Rise.

24. A local resident submitted that when he moved in to NRE, the strip of land originally contained a path but this was subsequently replaced with planting. On what basis that occurred unfortunately is not known as the Council no longer retain any documents that would assist. It appears that the public have enjoyed the benefits of the planted strip for many years only by virtue of the actions and circumstances of the previous owner of the property and his gardener who planted it and maintained it.

25. I therefore find that the material change of use has maintained the character and appearance of the area, which is residential with generous front and rear gardens. As such, I conclude there is no conflict with Policy CP1 of Rochford District Council Local Development Framework Core Strategy Adopted Version December 2011 and Policy DM1 Rochford District Council Local Development Framework Development Management Plan adopted 16 December 2014. This is the case insofar as these policies are applicable for development comprising a material change of use.

26. Part (iv) of Policy DM1 requires the retention of trees, woodland and other landscape features in accordance with Policies DM25 and DM26. However, the other landscape features listed in Policy DM26 do not exist at the appeal site. In addition, the removal of one tree from the land is insufficient to conclude that, on balance, the new use as domestic garden is unacceptable.

27. The policies relied upon by the Council largely relate to operational development and seek to achieve high quality design. These policies are up to date in that they reflect the objectives of the National Planning Policy Framework for good design and as such are consistent with it. Accordingly, I apportion substantial weight to them.

28. The Council also rely on Supplementary Planning Document 2, Housing Design, January 2007, paragraph 16. This seeks to resist the enclosure of grass verges. However, it has not been shown that the strip of land was planned and laid out as an amenity area for public benefit and therefore the Council's objectives for these areas do not fall to be considered in this case.

29. The appeals on ground (a) therefore succeed. The material change of use has occurred; no conditions have been suggested by the parties to regulate the use and I see no reason to do so either.

Conclusion

30. For the reasons given above, I conclude that the appeals should succeed on ground (a) and planning permission will be granted. The appeals on grounds (f) and (g) do not therefore need to be considered.

D Fleming

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

M Henderson	Of Counsel, instructed by A Fleming, Solicitor, BTMK Solicitors Limited
B Bines	The appellant

FOR THE LOCAL PLANNING AUTHORITY:

T Masuku	Team Leader Planning Enforcement
K Fowler	Senior Planning Officer

INTERESTED PERSONS:

M Stillwell	Local Resident

DOCUMENTS

Copy of applications:	F/0445/97/ROC and F/0629/97/ROC