The Planning Inspectorate

Appeal Decisions

Site visit made on 3 September 2020

by Nick Fagan BSc (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 26 October 2020

Appeal A Ref: APP/L1765/C/20/3248934
Land to rear of 5 & 6 Hillside, Kitnocks Hill, Curdridge, Hampshire SO32 2HJ

- 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 W G Atkinson against an enforcement notice issued by Winchester City Council.
- The enforcement notice was issued on 3 March 2020.
- The breach of planning control as alleged in the notice is without planning permission the material change of use of the Land from agriculture to residential amenity land.
- The requirements of the notice are:
  1. Permanently cease the use of the land as residential amenity land including the domestic use of the shed/garden room.
  2. Remove all domestic items including but not limited to the washing line, the table, chairs, the picnic bench and the BBQ.
  3. Break up the patios and hardstanding and remove the resultant materials from the land.
  4. Remove the lighting from the land.
- The period for compliance with the requirements is 3 calendar months for each of the above steps 1-4.
- The appeal is proceeding on the grounds set out in section 174(2) (a), (c), (d) and (g) of the Town and Country Planning Act 1990 as amended.

Appeal B Ref: APP/L1765/W/20/3247907
Land to rear of 5 & 6 Hillside, Kitnocks Hill, Curdridge, Hampshire SO32 2HJ

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
- The appeal is made by Mr W G Atkinson against the decision of Winchester City Council.
- The application Ref 19/02468/FUL, dated 6 November 2019, was refused by notice dated 19 February 2020.
- The development proposed is use of land as residential garden.

Decisions

1. It is directed that the enforcement notice is corrected by the substitution of the plan attached to it with the plan below. Subject to this correction Appeal A 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 the material change of use of land from agriculture to residential garden as shown on the plan attached to this decision below and subject to the following condition:

1) Details of any external lighting to light the application site shall be submitted in writing to the Local Planning Authority (LPA) within two months of the date of this permission. No external lighting shall be located within the application site without the prior written permission of the LPA. Any permitted external lighting shall be installed strictly in accordance with the agreed details.

2. Appeal B is dismissed.

Application for costs

An application for costs was made by the appellant against the Council. This application is the subject of a separate Decision.

Preliminary Matter

3. The appellant indicates that one of the Council's enforcement officers, on a visit to the site in February 2019, advised him that either planning permission was not required for the use of the land as a garden or that it was not expedient to initiate enforcement action. Consequent to this, the appellant is essentially arguing that the Council is estopped from taking any enforcement action now.

4. There is no written evidence of this conversation. Apparently, another enforcement officer suggested in an email of 5 March 2020 that the enforcement officer who had visited in February 2019 had simply suggested that he could not see a problem with the garden extension at the time. However, even assuming that this is what he said, that does not amount to a formal decision of the Council, which is certainly not estopped from serving the Notice.

Reasons

Appeal A

Ground (c)

5. Ground (c) is that the matters specified in the Notice do not constitute a breach of planning control. The onus is upon the appellants to demonstrate, on the balance of probability, that the matters do not constitute such a breach.

6. The appeal site, the Land identified on the plan attached to the Notice, comprises a rectangular piece of land to the rear of 5 & 6 Hillside, an unsurfaced cul-de-sac running north east off the main road, the A334. This land rises gently to the north west. It extends from an approximately straight line that comprises most of the northern boundaries of the houses on Hillside to the rear boundaries of two houses on Lockhams Road (Hazel Mount and Fieldfare), a distance of about 200m. The south west boundary comprises a high dense mature hedge, the north east boundary a post and rail fence.

7. Most of the Land is behind No 6, albeit it is accessed from No 5's original rear garden and owned by the appellant, who lives with his family at No 5. There is an L-shaped shed running most of the length of No 6's rear boundary with a narrow patio adjoining it, which the appellant uses for garden storage and apparently on occasions for social gatherings with his friends. This shed severely restricts inter-visibility between the appeal Land and No 6's rear garden although there remains views of it from No 6's rear first floor windows.

8. Near this shed is a greenhouse, a washing stand, and some raised planting beds enclosing a small separate patio area on which is situated a wooden picnic bench. This south easterly part of the Land is fenced off from the rest of the Land by a post and rail fence and five-bar timber gate. This is the land that was subject to the recent refused Lawful Development Consent (LDC) application for use as a residential garden, in effect an extension to No 5's rear garden[1], albeit the Council does not contest that the operational development of the shed and patios et cetera on this land has all occurred more than 4 years before the Notice was issued. There is no doubt that this part of the Land is currently being used as an extension to No 5's rear garden.

9. The appellant's case is that the whole of the Land is and has been used as a residential garden since the original house was built on Lockhams Road in the 1920s. His evidence to support this stance derives from a declaration by a local man whose childhood home in the 1960s/70s was a house called Riceen (now Fieldfare) on Lockhams Road. The Council submits a declaration from this man's mother, who confirms her son's declaration and that her parents lived in the next-door house at Holmcott (now called Hazel Mount). She confirms that the two houses had separate rear gardens but that the appeal site comprised a communal garden shared by both houses within the wider family's ownership, on which her father and then her husband cultivated fruit and vegetables. She says that her grandfather built the original house on Lockhams Road in the 1920s – which was subsequently extended and converted into the two separate dwellings. She confirms that she sold the appeal site to the appellant and his wife in 2010.

10. I acknowledge this detailed history of the use of the Land up to 2010, and the appellant's declaration as set out in the LDC application that it has, according to him, been continuously used as an extension to No 5's garden since his purchase of it that year. However, that LDC application was refused and was not appealed. I note that the appellant had owned the LDC application land for less than 10 years in August 2019 when the application was submitted. More fundamentally and as set out above, the LDC land only comprises a small part (about an eighth) of the Land in the enforcement notice (the Notice).

11. In terms of the Land the subject of the Notice, I acknowledge the declarations from the previous owner and her son that they perceive it to have been used as a garden jointly by members of their wider family living in Riceen and Holmcott. However, the son refers to *"enjoying the garden as part of a family holding"*. The mother talks in her declaration about the common practice at the time of the father of the house growing fruit and vegetables for the family. She attaches photographs of that practice on the site with her declaration.

12. However, it appears from these photos that the scale of such fruit and vegetable growing amounted to an agricultural use. It is not necessary for such activity to comprise a commercial agricultural holding for it to be classified as agriculture. Section 336 of the Act defines agriculture amongst other things as horticulture, fruit growing, and the use of land for grazing. Photo 4, for example, shows the mother's husband sitting on a tractor with a plough and newly ploughed land next to him. Photo 5 shows a horse grazing on the land. Horse grazing does not normally take place within residential gardens. Photo 6 shows the land overgrown. I consider these photos demonstrate that, on the

[1] 19/01696/LDC Refused 15 October 2019

balance of probability, the Land was used for agriculture rather than as a residential garden at the time.

13. These photos demonstrate that when the Land was let to the then neighbours at No 6 from the early/mid 1990s it was almost certainly being used for agriculture. It was then used by them to graze horses, an agricultural use. Apart from the previous owning family's declarations – which I discount for the above reasons – there is no evidence to demonstrate that there has been any material change of use of all the appeal Land from agriculture to use as a garden/residential amenity land. The fact that some of it is mown as a lawn and probably has been since 2010 does not change its use. In any case, the northern part of it closest to the rear boundaries of the houses on Lockhams Road contains an orchard of apple trees associated with the agricultural use of the land, which appears to have been there for many years.

14. The Council has submitted a copy of the location plan attached to the 2002 permission that sought to demolish and replace Riceen and Holmcott with two new houses. It is clear from this plan that the appeal site was not included within the red line of that application. Land Registry documents including a map of Riceen/Fieldfare record that the appeal site was not part of its site when sold in 2006, nor part of Holmcott/Hazel Mount when that was sold in 2005. The red line plan of Riceen attached to the permission for a rear extension in 2005 does not include the appeal site either. This further demonstrates that it was not part of either of these houses' residential gardens at the time.

15. Section 55 (1) of the Act sets out that development means operational development or the making of any material change in the use of any buildings or other land. The Land the subject of the Notice or at least the vast majority of it has not, for the above reasons, changed its use from agriculture to use as a garden/residential amenity land. The ground (c) appeal is partially successful in that the majority of the Land – all of it north west of the post and rail fence adjacent to the greenhouse – has not changed its use from agriculture to residential garden for the reasons explained above. But that part of it south east of the fence and abutting No 5 and 6's original rear gardens has changed its use to an extension of No 5's garden and so ground (c) must therefore fail.

16. In view of this it is necessary to amend the plan attached to the Notice. Section 2 of the Notice refers to the Land shown edged red on the plan attached to it. Consequent to my finding that only the land nearest to No 5's original rear garden south east of the post and rail fence has changed its use to garden land, I substitute the original Notice plan for the one below, which shows the red line around this smaller piece of land. This is the location plan that accompanied the refused CLU application.

Ground (d)

17. Ground (d) is that, at the date when the notice was issued, no enforcement action could be taken in respect of any breach of planning control which may be constituted by those matters. Again, the onus is on the appellants to show, on the balance of probability, that at the date when the notice was issued no enforcement action could be taken.

18. Where there has been a breach of planning control consisting of a material change of use, Section 171B(3) of the Act makes clear that no enforcement

action may be taken after the end of the period of 10 years beginning with the date of the breach. It is necessary, therefore, for the appellant to demonstrate, on the balance of probability, that all the Land has been used as a garden for a continuous period of 10 years prior to the service of the Notice.

19. The appellant bought the Land in July 2010 and claims that it has been used since then as an extension to his garden, including by him extending the shed, and installing the greenhouse, planting beds, patio and lighting and this is confirmed by the declarations of friends, relations and an electrician who worked on the operational developments that have occurred on the lower south eastern part of the site. He also says that the previous owners of No 6 used it as an extension to their garden on an informal basis until they moved away in May 2010.

20. Simply as a matter of fact, even if the whole of the Land had been used by the appellant as an extension to his garden from July 2010, that would be at least 4 months short of 10 years. As regards its use by the neighbours at No 6, it would seem more than likely that they used it to graze their pony or ponies as set out in the above declarations, which does not show it was used as their residential garden.

21. More importantly, as set out above, the mere fact that the lower part of the Land was mown as a lawn by the appellant since July 2010 does not materially alter its use, and the northern part of it simply remained as an orchard. There has been no change of use of the whole of the Land within the last 10 years, albeit there certainly has been a change in the use of that part of it south east of the gate and post and rail fence within the last 10 years.

22. For these reasons I conclude, on the balance of probability, that the Land has not been used as a garden/residential amenity land for at least 10 years prior to the issue of the Notice. The ground (d) appeal consequently fails.

23. The appellant argues under this ground that the operational development (the extension to the shed and patio et cetera) took place more than 4 years prior to the issue of the Notice. The Council does not dispute that. But it is irrelevant to the use of the Land as residential garden.

The Deemed Planning Application under Ground (a) and Appeal B

24. Ground (a) is that, in respect of any breach of planning control which may be constituted by the matters stated in the notice, planning permission ought to be granted. Given my findings under ground (c) and the need therefore to cut the Notice plan back, the site area for the deemed planning application now covers a much smaller area of land. However, I consider below the merits of the land covered by the application under Appeal B. Whilst that still does not cover all the land originally attacked in the Notice, it is a greater area than that covered by the corrected plan at the end of this decision. The appellant will understand from my reasoning under Appeal B why the much larger area would not have been granted planning permission anyway. In these circumstances, I am satisfied that the correction to the EN plan and the consequent impact of that on the deemed planning application, will not cause injustice to either side.

25. The site in Appeal B, the refused planning application, comprises about half the Land the subject of the Notice. It includes the smaller site the subject of the CLU application and what is effectively a mown lawn up to the southern edge of

the apple orchard. The mown lawn retains an open and rural appearance. The appellant argues that using the land as residential garden, in effect an extension to No 5's rear garden, would cause no harm and would, on the contrary, enhance the site's biodiversity and landscape by the implementation of a new planting scheme including new trees and a new native hedge to its north east boundary. And that, consequent to this, it would comply with relevant development plan policies: Policy MTRA4 (Development in the Countryside) of the Winchester District Local Plan Part 1 (the Joint Core Strategy or JCS) and Policy DM23 (Rural Character) of the Local Plan Part 2 (the Development Management and Site Allocations DPD or DMDPD).

26. He quotes at length other permissions granted by the Council or allowed at appeal for similar extensions to gardens in the countryside, including some since Policies MTRA4 and DM23 have been adopted, citing the prime importance of consistency in decision making. In citing these examples, he draws my attention to the fact, which I acknowledge, that there are no wide public views of the site or adjoining land from either Hillside itself or Lockhams Road nor from any public rights of way.

27. I accept that the lack of such public views of the sites were considered as relevant in many of these other decisions, and that they are a consideration in this appeal also. But the lack of a site's prominence from public roads, footpaths or bridleways is not the only consideration. The site is viewed by neighbouring residents, who are also affected by its use. Neighbours have complained about light spillage from floodlights, from noise arising from socialising on the site and harm to the open and rural character of the area.

28. From my site visit I note that the land to the west appears to be an agricultural field being used to graze a horse. The land to the east has been mown in a similar fashion to the appeal site and appears to be being used for golf practice; the upper north west part of it is being used as a fenced vegetable garden. Whilst neither of these adjacent sites are being used for commercial agricultural production it nonetheless appears that they are distinctly separate from the adjacent gardens on both Hillside and Lockhams Road. They are not residential gardens and neither is the appeal land, apart from that small section to the south east of the post and rail fence.

29. I note that the proposed landscaping plan includes a pond with stepping stones accessing it. I appreciate that this would not have a significant adverse effect on the character of the area, but it is indicative of the sort of thing that would be likely to happen in a domestic garden. This and other similar features (such as sheds, patios, fountains, tables, barbecues and the like) would undoubtedly domesticate the land in the sense that they would detract from its wider rural character. The land is part of the open countryside, albeit that it is not in commercial agricultural production, and its open rural character and appearance should be preserved. The only part of the site which is domesticated in this way currently is that part of it to the south east of the post and rail fence.

30. A condition could be attached to any permission restricting permitted development (PD) rights under Classes E and F of Part 1, Schedule 2 of the GPDO[2]. But such restrictions would not be reasonable; the appellant should not be restricted in the use of his garden in the way the government considers

[2] The Town and Country Planning (General Permitted Development) Order 2015

such use to be reasonable. I acknowledge that the tree and hedge planting set out in the landscape plan would benefit the site's biodiversity, but such new planting could be done without necessitating the change of use of the land to a domestic garden.

31. The appellant quotes paragraph 7.30 of the JCS, albeit he is actually referring to paragraph 6.30. This says, inter alia, that development in the countryside will be limited to that which has an essential need to be located there, including certain types of recreational uses. On this basis he argues that the types of development listed in JCS Policy MTRA4 are merely examples of the types of development that will be allowed in the countryside; in particular, gardens should be allowed because they are open recreational uses associated with quiet enjoyment of the countryside.

32. I disagree. Policy MTRA4 clearly states that in the countryside – in which the site is undeniably located – the Council will only permit four types of development, as set out in four bullet points. The last three bullet points refer to the reuse or redevelopment of rural buildings or small-scale sites for tourist accommodation and are not relevant here. The first bullet point refers to development which has an operational need for a countryside location, such as agriculture, horticulture or forestry. Domestic gardens are not one of these uses and the fact that parts of the countryside contain houses with gardens does not indicate that they are. Policy MTRA4 is clear. It states that the Council will only permit the types of development in the four bullet points and residential gardens are not mentioned in any of these four bullets. The proposal is therefore contrary to Policy MTRA4.

33. DMDPD Policy DM23 states that outside settlement boundaries (as this site is), development proposals will be permitted where they do not have an unacceptable effect on the rural character of the area, by means of visual intrusion, the destruction of rural assets or by impacts on the environment's tranquillity. In terms of visual impact this can include cumulative impact that may occur as a result of the main proposal. In terms of tranquillity this includes adverse impacts due to noise or lighting.

34. As set out above, I do not consider the attachment of a condition limiting PD rights to be reasonable. The government has determined that householders should have a general right to install buildings or enclosures and hard standings incidental to the enjoyment of their dwellings. Such a condition would remove such rights, which would effectively negate the appellant's reasonable use of his garden. Given the open and rural character and appearance of the land I consider that its use as a garden could and in all likelihood would result in a harmful change to such character by the introduction of inappropriate domestic residential features of the type I refer to above, which indicates that permission should be withheld. Such an adverse impact on the Land's character would not comply with Policy DM23.

35. All the above comments regarding the adverse impact of a change of use of the Appeal B land would also apply to the rest of the Land set out in the original Notice, the orchard to the north of the Appeal B land. This is because the orchard has an even more rural appearance than the open lawn area in Appeal B and is further away from No 5 itself, such that its use as a garden extension to No 5 would be even more uncharacteristic of the area and inappropriate.

36. However, that does not apply to that eighth of the site south east of the post

and rail fence, on which the appellant has erected an extension to the stable/shed, a greenhouse, a washing line, a table and benches, and installed two patios, all more than four years ago. I accept that the Notice seeks removal of these domestic items as well as the breaking up of the patios and removal of the resultant materials from the land. But it cannot secure the removal of the shed or its extension. Whilst I accept that this smaller developed part of the site has led to objections from neighbours on grounds of adverse impacts from noise and external lighting, the former is unlikely to be significant and if it was could be tackled by environmental health legislation and the latter can be successfully addressed by a condition requiring details of such lighting to be agreed in writing with the Council and implemented accordingly, as I set out above.

37. The use of this part of the site closest to the backs of Nos 5 and 6's rear garden would not have any significant impact on the character or appearance of the rural area, unlike the wider site to the north west. Its use as a small extension to No 5's garden would be proportionate and reasonable in all the circumstances.

38. I have taken account of the LPA and appeal decisions mentioned by the appellant including specifically those decisions subject to Policies MTRA4 and DM23 when they were made. I accept that neither of these Policies specifically mentions the change of use of land to residential gardens. But I explain why the likely change in the character of the Appeal B land and larger site, but not the smaller site adjoining No 5 and 6's existing gardens, would harm the open and rural character and appearance of the area, which is the principal concern in all such decisions.

39. For these reasons I conclude that only that part of the Land closest to No 5 south east of the post and rail fence – the land the subject of the refused CLU application – should be granted planning permission. Consequently, Appeal A succeeds on ground (a) and the Notice, with its corrected plan below, should be quashed. Appeal B is dismissed for the above reasons.

Conclusion

40. For the reasons given above, I conclude that Appeal A succeeds on ground (a) and the Notice is quashed. I shall grant planning permission for change of use of the land from agriculture to residential garden as described in the Notice as corrected. The appeal on ground (g) does not therefore fall to be considered. Appeal B is dismissed for the above reasons.

Nick Fagan

INSPECTOR

The Planning Inspectorate

Plan

This is the plan referred to in my decision dated:26 October 2020

by Nick Fagan BSc (Hons) DipTP MRTPI

Land at: Land to rear of 5 & 6 Hillside, Kitnocks Hill, Curdridge, Hampshire SO32 2HJ

Reference: APP/L1765/C/20/3248934

Scale: Not To Scale