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## Appeal Decisions

Inquiry Held on 15 May 2018

Site visit made on 15 May 2018

**by Katie Peerless DipArch RIBA**

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

**Decision date: 22 May 2018**

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### **3 Appeals at Hawthorns, Lymington Road, East End, Lymington SO41 5SY**

#### **Appeal A: APP/B9506/C/17/3184342**

#### **Appeal B: APP/B9506/C/17/3184343**

- 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 A Russell-Smith (Appeal A) and Mrs A Russell-Smith (Appeal B) against an enforcement notice issued by New Forest National Park Authority.
  - The enforcement notice, numbered 17/0026, was issued on 16 August 2017.
  - The breach of planning control as alleged in the notice is change of use of the land affected for residential purposes and the erection of two buildings shown in the approximate positions marked green on the plan attached to the enforcement notice.
  - The requirements of the notice are 1. Cease the use of the land affected for residential purposes. 2. Remove all residential items and paraphernalia, including caravans, from the land affected. 3. Demolish the two buildings shown in approximate positions marked green on the plan attached to the Notice to ground level. 4. Remove all resultant materials and debris arising from the land affected.
  - The period for compliance with the requirements is four months.
  - The appeal is proceeding on the grounds set out in section 174(2)(a) and (d) of the Town and Country Planning Act 1990 as amended.
  - The evidence to the Inquiry was given under oath.
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#### **Appeal C: APP/B9506/X/17/3184346**

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development (LDC).
  - The appeal is made by Mr and Mrs A Russell-Smith against the decision of New Forest National Park Authority (NPA).
  - The application Ref 17/00438 dated 22 May 2017, was refused by notice dated 19 July 2017
  - The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended.
  - The use for which a certificate of lawful use or development is sought is a residential garden.
  - The evidence to the Inquiry was given under oath.
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### **Decisions**

#### **Appeal A: APP/B9506/C/17/3184342**

#### **Appeal B: APP/B9506/C/17/3184343**

1. It is directed that the enforcement notice be varied by the deletion of paragraph 3.2, the words 'and 4' and respectively in the first sentence of paragraph 4 and the reference to policies DP12 and 5.3. Subject to these variations, the appeals are allowed and the enforcement notice, as varied, is quashed.

### **Appeal C: APP/B9506/X/17/3184346**

2. The appeal is allowed and attached to this decision is a certificate of lawful use or development describing the extent of the existing use which is considered to be lawful.

#### **Procedural matters**

3. Although an appeal was initially made on ground (a) (that planning permission should be granted for the development enforced against), this applied only to the 2 buildings on the site and these have now been removed. This ground of appeal has therefore now been withdrawn. In the light of this, the NPA asked that I vary the Notice to take account of this change. Although it is not strictly necessary to do so, I will make the changes for the avoidance of doubt.
4. At the Inquiry the appellants confirmed that they are not claiming that the land in question is necessarily part of the curtilage of Hawthorns, but rather that it has a residential use associated with that property, accrued over the passage of time. Therefore, they are relying on their appeal on ground (d) that is that the 10 year time limit for taking enforcement action against the alleged change of use to a residential garden has passed.

#### **Main Issues**

5. I consider the main issues in these appeals are:

On Appeals A & B: whether the land has been in continuous use for residential purposes associated with Hawthorns for a period of at least 10 years prior to the issue of the enforcement notice (EN) on 16 August 2017 and

On Appeal C: whether the land has been in continuous use for as a residential garden associated with Hawthorns for a period of at least 10 years prior to the date of the application i.e. 22 May 2017 or whether the NPA's refusal to grant a LDC was well founded.

#### **Site and surroundings**

6. The appeal site is a parcel of land adjacent to the garden of Hawthorns, a residential property that is the last in a short ribbon of development in the hamlet of East End. It lies within the New Forest National Park and there is open farmland immediately to the south. There has historically been a hedge or fence along the northern edge of the appeal site but there is presently no demarcation along its eastern boundary where it meets the area of garden agreed to be authorised.

#### **Reasons**

7. The land has, in the view of the appellants and the previous owner of Hawthorns, Dr Vincent, been used as a garden in association with the dwellinghouse for many years. Dr Vincent gave evidence that, prior to his purchase of Hawthorns in 1993, the property was occupied by tenants who also used the land as part of their garden. An email from those tenants has been submitted confirming this view<sup>1</sup>. Also, early Ordnance Survey (O.S.) maps of the area dating from 1969, 1970 and 1973 show the land to be within the residential unit of Hawthorns. Later plans from 1999/2000, showing the grazing and cropping proposals for the Pylewell Estate to the south, also include the appeal site to be within the boundaries of the land around Hawthorns at that time.

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<sup>1</sup> Inquiry document 1

8. Dr Vincent did not immediately buy the land at the same time as his purchase of Hawthorns but entered into an informal rental agreement with the vendor and used it in conjunction with his occupation of the property. He eventually purchased the plot in 2006/7 and his evidence was that initially he parked his Landrover, trailer and dinghy on it. The land had also been used for parking by the previous occupiers, as there was no other vehicular access to the house at Hawthorns at that time.
9. After Dr Vincent's purchase of the land it was sown with wildflowers for his wife to enjoy during her last illness and it was also used for other outdoor pursuits and enjoyment such as meetings of the Women's Institute, of which his wife was a member. Later, the land was fenced to keep the Dr Vincent's second wife's dog and puppy away from the road. It was also used for family pursuits such as the siting of a trampoline, camping and mini motor-biking by Dr Vincent's stepchildren. It continued to be used for overspill parking for the house and the storing of trailers and a dinghy.
10. Dr Vincent sold the house to the appellants in 2010 and they used the appeal site in a similar way, parking vehicles, caravans and trailers on it, using it for barbeques and parties and planting it with garden plants and shrubs. The NPA became concerned with the use when they realised that a caravan on the site was being used for residential purposes. This was during the time that the house at Hawthorns was being extended and the appellants moved out whilst the work was undertaken. The caravan has now been removed, as have the building materials that were stored on the site at the time.
11. The appellants' evidence serves to confirm that they have not subsequently used the land in any way that would be incompatible with a garden use. All the evidence from local residents submitted by the appellants in support of their version of events confirms this to be the case.
12. The NPA is relying on the fact that the activities that Dr Vincent and the appellants carried out on the land were intermittent and could equally have taken place on agricultural land. It therefore submits that it has not been demonstrated that a continuous material change of use has taken place for the requisite 10 years. It points to 'red line' plans for applications for planning permissions made in 1993, 1996, 2009 and 2014 that do not include the appeal site.
13. However, the site would not have been included in Dr Vincent's applications of 1993 and 1996 as he did not own the land at that time and the later applications may reflect the fact that there had been a division of the land ownership before it was all eventually sold to him. It seems to me likely that the reason the previous owner did not sell the whole of the land around Hawthorns to Dr Vincent in 1993 may well have been that she was hoping to retain the appeal site as a building plot. There had already been an application for such a scheme in 1984 that was refused planning permission but I have seen no evidence to indicate that there was any intervening agricultural use on the land between 1969, when the land is seen as being associated with Hawthorns with no demarcation between the areas surrounding the property, and the time it was sold to Dr Vincent.
14. The boundaries shown on the planning applications of 2009 and 2014 appear to relate to those used for the EN plan. It should be noted however that these are different again from the plans used in the 1996 and 1993 planning applications.

15. It is consequently unclear why it the NPA consider there has been a change in the area it considers had been in an agricultural use between 1996 and 2009 and the area shown on the EN plan, or why it is that the 2009 planning application plan, rather than any other, has been used to define the boundary between the alleged agricultural land and the authorised garden.
16. Nevertheless, for the reasons given above, I think it is clear that the land has been part of the garden of Hawthorns for well over the 10 years needed to establish a residential use and that this occurred even before it was purchased by either Dr Vincent or the appellants. I consider that there is no evidence to show that the site has ever, since 1969, been used otherwise than as part of the garden of Hawthorns and the fact that Hawthorns was divided into a freehold plot and the appeal site, which was retained by the owner at the time of its sale to Dr Vincent, did not bring about any material change to the residential use that had been established for many years.
17. Similarly, if the use of the land was residential at the time it was purchased by Dr Vincent, there is no claim that the activities carried out by him or the appellants would be considered as having brought about a material change to an agricultural or mixed use.
18. It is for the appellants to demonstrate their case on the balance of probabilities by submitting evidence that is sufficiently precise and unambiguous and, if the local planning authority has nothing of its own to contradict this or show it to be less than likely, then the appeals should succeed. The NPA's evidence is limited to information on contradictory plans included with planning applications all submitted well over 10 years after the property was shown as a single residential unit on O.S. maps. The NPA has submitted nothing to show there has been any authorised change of use of the land since that time to contradict the evidence of the appellants.
19. I therefore conclude that it has been demonstrated that the land in question has been in a residential use associated with the dwelling at Hawthorns for a period that has rendered it immune from enforcement action
20. For the reasons given above I conclude that appeals A and B should succeed on grounds (d). Accordingly the enforcement notice, as varied, will be quashed. I also conclude, on the evidence now available, that the Council's refusal to grant a certificate of lawful use or development in respect of the use of the land as a residential garden was not well-founded and that appeal C should also succeed. I will exercise the powers transferred to me under section 195(2) of the 1990 Act as amended.

*Katie Peerless*

**Inspector**

## **APPEARANCES**

### FOR THE APPELLANT:

Maggie Russell-Smith	Appellant
She called	
Stephen Vincent	Previous owner of appeal site
Andrew Russell-Smith	Appellant

### FOR THE LOCAL PLANNING AUTHORITY:

Julia Mutlow	Solicitor for New Forest NPA
She called	
Carly Cochrane BA MSc MRTPI	Planning Officer New Forest NPA

### INTERESTED PERSONS:

Fenella Kirkham	Neighbour
Mike Urwin	Neighbour
Pamela Keen	Sister of Mrs Russell-Smith

### DOCUMENTS

- 1 Email from Eliane Kim Brillet
- 2 Suggested revisions to enforcement notice
- 3 Notification letter for Appeal C and circulation list



## Plan

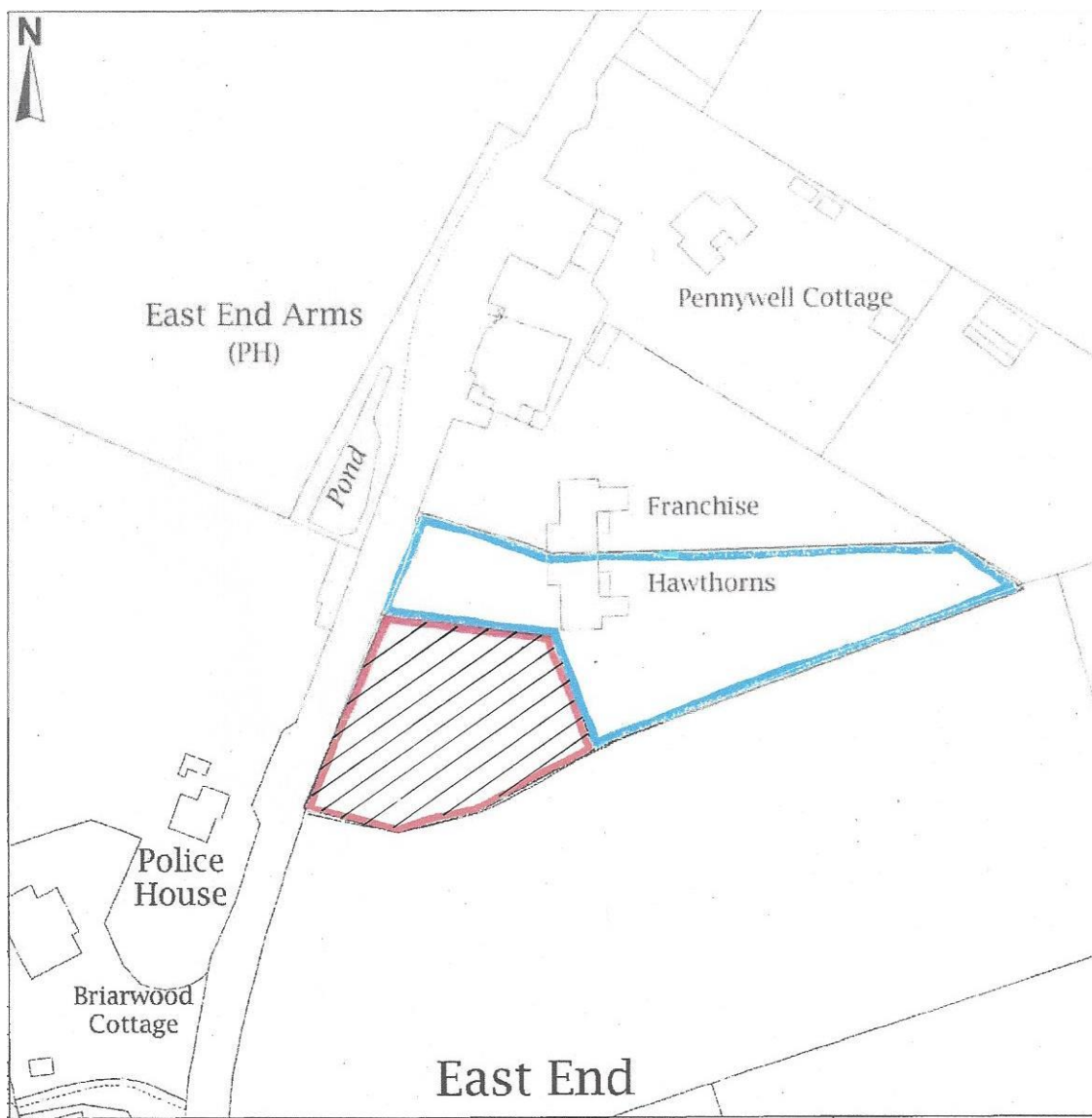
This is the plan referred to in the Lawful Development Certificate dated: 22 May 2018

by **Katie Peerless DipArch RIBA**

**Land at: Hawthorns, Lymington Road, East End, Lymington SO41 5SY**

**Reference: APP/X/B9506/X/17/3184346**

Scale: NTS





## Lawful Development Certificate

TOWN AND COUNTRY PLANNING ACT 1990: SECTION 191  
(as amended by Section 10 of the Planning and Compensation Act 1991)

TOWN AND COUNTRY PLANNING (DEVELOPMENT MANAGEMENT PROCEDURE) (ENGLAND)  
ORDER 2015: ARTICLE 39

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**IT IS HEREBY CERTIFIED** that on 22 May 2017 the use described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged red and hatched in black on the plan attached to this certificate, was lawful within the meaning of section 191(2) of the Town and Country Planning Act 1990 (as amended), for the following reason:

The land had been in a residential use for more than 10 years prior to the date of the application.

Signed

*Katie Peerless*

**Inspector**

Date: 22 May 2018

Reference: **APP/X/B9506/X/17/3184346**

### ***First Schedule***

Use as a residential garden in association with the dwelling at Hawthorns

### ***Second Schedule***

Land at Hawthorns, Lymington Road, East End, Lymington SO41 5SY

## NOTES

This certificate is issued solely for the purpose of Section 191 of the Town and Country Planning Act 1990 (as amended).

It certifies that the use /operations described in the First Schedule taking place on the land specified in the Second Schedule was /were lawful, on the certified date and, thus, was /were not liable to enforcement action, under section 172 of the 1990 Act, on that date.

This certificate applies only to the extent of the use /operations described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any use /operation which is materially different from that described, or which relates to any other land, may result in a breach of planning control which is liable to enforcement action by the local planning authority.