

Appeal Decision

Site visit made on 19 October 2021

by M Madge DipTP, MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 10/11/2021

Appeal Ref: APP/N4720/X/21/3274993

Briaden, Underwood Drive, Rawdon, Leeds LS19 6LA

- 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 J Kilmartin against the decision of Leeds City Council.
 - The application Ref 21/00840/CLE, dated 23 January 2021, was refused by notice dated 26 March 2021.
 - 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 use of part of field as garden to dwellinghouse (resubmission of application 20/04304/CLE).
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Application for costs

1. An application for costs was made by Mr J Kilmartin against Leeds City Council. This application is the subject of a separate Decision.

Decision

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

Preliminary matter

3. At my site visit the original garden boundary was identified as being in a different location to that shown on the plans submitted with the appeal. The topography of the land is such that I have no reason to doubt that the plans are correct, and I shall proceed on that basis.

Main issue

4. The main issue is whether the Council's refusal to issue a LDC is well founded. This turns on whether the appellant can show that the use of part of the adjoining field as garden to the dwellinghouse was lawful on the date of the application. The onus of proof is on the appellant to show, on the balance of probability, that the use of part of the adjoining field as garden to the dwellinghouse began on or before 1 February 2011, which is the material date. The use should be shown to have continued without material interruption for 10 years thereafter, so as to be immune from enforcement. Any continuous 10-year period is relevant.

Reasons

5. Sworn evidence is provided by the appellant, the previous owner of Briaden, the previous owner's 2 children, and the occupier of the adjoining property. A

series of aerial photographic images, dated from 2002 up to 2019, is also provided.

6. There is no dispute that the land was formerly part of the adjoining field or that the previous owner purchased the land and erected fencing to separate the land from the field in approximately 2003. Whether the land is used as garden to the dwellinghouse is in dispute.
7. Where the use of land is determinative, it is necessary to first identify the extent of the planning unit. The Courts held in *Burdle*¹ that the planning unit is usually the unit of occupation, unless a smaller area can be identified which, as a matter of fact and degree, is physically separate and distinct, and occupied for different and unrelated purposes. The concept of physical and functional separation is key, and Bridge J suggested 3 broad categories of distinction:
 - a) Where it is possible to recognise a single main purpose of the occupier's use of his land to which activities are incidental or ancillary, the whole unit of occupation should be considered.
 - b) Even though the occupier carries on a variety of activities and it is not possible to say that one is incidental or ancillary to another, the entire unit of occupation should be considered.
 - c) Where there are 2 or more physically separate and distinct uses, occupied as a single unit but for substantially different and unrelated purposes, each area used for a different main purpose (together with its incidental and ancillary activities) ought to be considered a separate planning unit.
8. The land is laid to grass and has a significant downward slope away from what was the original rear boundary of Briaden's garden. While I saw that there is a low-level fence along the top of the slope, this does not create 2 separate parcels of land. The area to the front, sides and rear of the dwelling remains one continuous piece and the single main purpose of the use of this area is for ancillary residential purposes. The use of the land is incidental or ancillary to the occupation of the dwellinghouse. The lack of formal landscaping and different maintenance regime does not prevent the land from being garden incidental or ancillary to the residential use of the property.
9. Briaden has one primary use and the land is used for purposes ancillary and incidental to that use as a single dwellinghouse. There is no means of physical separation between the land edged red and that edged blue on the accompanying plans. For these reasons, I find the land edged red and blue on the submitted plans is one planning unit.
10. The previous owner's sworn evidence confirms that her use of the land since its purchase in 2003 was as garden to Briaden. The evidence of her children and the neighbour also confirms that the land has only been used for purposes incidental to the residential occupation of Briaden. The appellant also describes his use of the land as garden since he purchased the property in 2019.
11. The appellant has shown that the land stopped being part of the adjoining field and was incorporated into Briaden's planning unit more than 10 years before the material date. They have also shown that the single main purpose of the

¹ *Burdle v Secretary of State for the Environment* [1972] 1 WLR 1207 (Div Court)

occupier's use of the land is as residential garden, incidental and ancillary to the residential occupation of Briaden. A different maintenance regime for the land or lack of landscaping does not change its single main purpose. The use as residential garden has continued throughout the relevant 10-year period and continues to this day. There is no substantive evidence to contradict the appellant's version of events.

Conclusion

12. For the reasons given above, the Council's refusal to issue the LDC was not well founded. The appeal shall succeed, and I will exercise the powers available to me under s195(2) of the 1990 Act to grant a certificate of lawful use in the terms attached to this decision.

M Madge

INSPECTOR

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

IT IS HEREBY CERTIFIED that on 1 February 2021 the use described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged in red 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:

No enforcement action could have been taken in respect of the use because the time for enforcement action had expired and it did not constitute a contravention of any of the requirements of any enforcement notice then in force.

Signed

M Madge
INSPECTOR

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First Schedule

The use of the land as garden to the dwellinghouse (Briaden).

Second Schedule

Land at Briaden, Underwood Drive, Rawdon, Leeds LS19 6LA

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 described in the First Schedule taking place on the land specified in the Second Schedule was lawful, on the certified date and, thus, was 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 described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any use 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.



Plan

This is the plan referred to in the Lawful Development Certificate dated: 10/11/2021

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Not to Scale

