



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: 17 November 2021

Appeal Ref: APP/W4705/X/21/3278267

11 Moss Brook Court, Burley in Wharfedale LS29 7RZ

- 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 Adam Lewis against the decision of City of Bradford Metropolitan District Council.
 - The application Ref 21/00646/CLE dated 9 February 2021, was refused by notice dated 21 May 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 is sought is use of land as garden.
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Decision

1. 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

2. It is not necessary for the description of the use applied for to include details of who carried out the activity or the date when the activity began. For precision, I shall amend the description accordingly.

Reasons

3. The **main issue** is whether the Council's refusal to issue an LDC is well founded. This turns on whether the appellant can show that the use of the land as garden 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 as garden began on or before 9 February 2011, which is the material date. The use also has to be shown to have continued without significant interruption for 10 years, so as to be immune from enforcement. Any continuous 10-year period is relevant.
4. In *Gabbittas*¹ it was held that if the local planning authority has no evidence of its own, or from others, to contradict or otherwise make the appellant's version of events less than probable, there is no good reason to refuse to grant an LDC. That is provided the appellant's evidence alone is sufficiently precise and unambiguous.
5. Where the use of land is determinative, it is necessary to identify the extent of the planning unit. In *Burdle*² it was held that the planning unit is usually the unit of occupation, unless a smaller area can be identified which, as a matter of

¹ *Gabbittas v SSE & Newham LBC* [1985] JPL 630

² *Burdle v Secretary of State for the Environment* [1972] 1 WLR 1207 (Div Court)

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:

- i. Where it is possible to recognize 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.
 - ii. 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.
 - iii. 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.
6. There is no dispute that 11 Moss Brook Court is used for residential purposes. The former owner's sworn evidence states that the land was "*fully used as part of my garden for the house at no. 11 throughout my ownership of the property*". Ownership is not necessarily a factor in identifying the extent of the planning unit, or land use. However, in this case the land is separated from the adjoining agricultural land by established hedgerows and is separated from the undisputed garden land to No 11 by stone walls and wooden gates. Ownership in this case establishes a functional connection to the use of No 11.
7. The land is predominantly laid to grass, with several timber buildings upon it and a variety of domestic paraphernalia, including outdoor seating and table, children's play equipment and decking. The land has a similar appearance to that which is the undisputed garden land. While the land may be physically separated from the undisputed garden land by the wall and gates, it is occupied for similar and related residential purposes. The land therefore forms part of a single planning unit with the dwellinghouse at No 11.
8. The former owner's period of occupation is identified as 30 July 2001 to 22 May 2017, a period of over 10 years. This sworn evidence goes on to list activities that the land was used for. There is no dispute that all the activities listed could be incidental or ancillary to the residential occupation of No 11. While the aerial images suggest that areas within the land may have been subjected to different maintenance regimes at different times over the various years, they do not show that the land has been put to any use that is clearly not garden.
9. Furthermore, it is not uncommon for residential gardens to be divided into different areas by means of walls, fences, planting or other features. The physical separation of these two areas does not of itself show that the land has been put to agricultural use or some other materially different use to that of the undisputed land.
10. The description of development on planning application 11/05477/FUL was "*extension to dwelling and to domestic garage and change of use of part of paddock to form garden curtilage*". The Council claim that this shows that the land was not garden at the time of that planning application being made. However, the appellant claims that other documents within that application submission refer to the regularisation of the use of the land which had been

occurring for some 9 years. I have not been provided with copies of that application's documentation to verify either party's stance. Furthermore, curtilage is not a use of land. I therefore find this evidence neither ways in favour nor against the use of the land.

11. The appellant's evidence shows that the material change of use from agriculture to garden, incidental and ancillary to the residential occupation of No 11 occurred in mid-2001. It has also been shown, on the balance of probability, that the use continued throughout the former owner's occupation of the land, which established more than 10 years continuous use. There has been no significant interruption of that use as the appellant has continued to use the land for purposes incidental and ancillary to the residential occupation of No 11. The frequency and intensity of the use of the land by successive householders does not change the fact that the land is used as garden, incidental and ancillary to the residential occupation of No 11. The appellant's evidence is therefore sufficiently precise and unambiguous.
12. For the reasons given above, the 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 Act³ to grant a certificate of lawful use in the terms attached to this decision.

M Madge

INSPECTOR

³ Town and Country Planning Act 1990 as amended

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 9 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

Date 17 November 2021

Reference: APP/W4705/X/21/3278267

First Schedule

Use of land as garden

Second Schedule

Land at 11 Moss Brook Court, Burley in Wharfedale LS29 7RZ

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.



Plan

This is the plan referred to in the Lawful Development Certificate dated: 17 November 2021

by M Madge DipTP, MA MRTPI

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Not to Scale

