



Appeal Decision

Site visit made on 11 April 2022

by J Moss BSc (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 24th MAY 2022

Appeal Ref: APP/B1740/X/21/3278351

Land at 5 Greenbanks Close, Milford on Sea SO41 0SQ

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended against a refusal to grant a certificate of lawful use or development (LDC).
 - The appeal is made by Mr and Mrs Allery against the decision of New Forest District Council.
 - The application ref 20/11262, dated 12 November 2020, was refused by notice dated 22 January 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 the use of land as residential garden.
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Decision

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

Application for Costs

2. An application for costs was made by Mr and Mrs Allery against the New Forest District Council. This application is the subject of a separate decision.

Preliminary Matters

3. The use for which the LDC subject of this appeal was sought is described in part 5 of the LDC forms as 'land in use as a residential garden'. However, the decision notice refers to the 'change of use of land to private garden'. Having regard to the matter for which the LDC is sought, I have described it above as the use of land as residential garden, which is consistent with the description on the LDC forms.

Main Issue

4. Section 191(4) of The Town and Country Planning Act 1990 as amended (the 1990 Act) indicates that if, on an application under that section, the local planning authority are provided with information satisfying them of the lawfulness at the time of the application of the use, operation or other matter described in the application, or that description as modified by the local planning authority or a description substituted by them, they shall issue a certificate to that effect; and in any other case shall refuse the application. My decision is, therefore, based on the facts of the case and judicial authority.
5. I note that representations have been made that, in part, comment on the appropriateness of the use and suggest that a precedent for similar development would be set if the LDC were granted. For the avoidance of

doubt, the planning merits of the matter subject of this appeal are not relevant to my determination. The main issue is whether the Council's decision to refuse to grant a LDC was well founded. The burden of proof is on the appellants, and the test of the evidence is the balance of probabilities.

6. The LDC is sought in respect of an area of the appeal site identified on the plan submitted with the LDC application, which is to the west of the dwelling occupying the appeal site. Having regard to the evidence submitted in this case, the main consideration is whether or not the use of this area of the appeal site as residential garden associated with the dwelling at 5 Greenbanks Close was lawful at the time the LDC application was made.
7. With regard to the relevant time period, the parties have both referred to a period of 10 years, as specified in section 171B(3) of the 1990 Act. As the LDC application was made on 12 November 2020, the relevant date 10 years prior to this is 12 November 2010.
8. If the Council has no evidence itself, nor any from others, to contradict or otherwise make the appellants' version of events less than probable, there is no good reason to dismiss the appeal and refuse to grant the LDC, provided the appellants' evidence alone is sufficiently precise and unambiguous.

Reasons

9. The evidence submitted by the appellants shows that the land in question, referred to as their back garden, forms part of a freehold parcel of land with the remainder of the appeal site¹. The appeal site was purchased in March 2016 by the appellants. Since that time the appellants suggest that they have planted and maintained their back garden to provide 'a pleasing and rewarding setting for their enjoyment and pride'. Mr Allery provides a statutory declaration in which he states that he and his wife have used all of their land as their garden, including that to the rear of their property, for over 14 years.
10. Mr Allery's statutory declaration is corroborated by the letter from Mrs Allery in which she expands upon the works that her and her husband have undertaken to the land and how they have used it. The use of the land suggested by the appellants during the relevant period is also corroborated by letters from third parties who have been acquaintances of the appellants since before their purchase of the appeal site. Letters from two garden contractors have also been provided, setting out the hard landscaping works undertaken to the land and garden maintenance service provided.
11. The layout of the appeal site is somewhat unusual. The private garden serving the property is located adjacent to the driveway and parking area to the front of the dwelling. The land in question is regarded as being to the rear of the property, but is fairly open to the pedestrian only path adjacent to No 5 and No 6 Greenbanks Close. Nevertheless, having viewed the land in question I note that it has the appearance of a well maintained residential garden. I noted mature shrubs and trees, as well as established areas of planting. There were also domestic type garden ornaments and a bench for sitting. Its appearance is consistent with the appellants' account of how they have use and maintain the land in question.

¹ HM Land Registry title number HP468417

12. I do not consider the appellants' evidence to be vague and imprecise, as suggested by the Council. Rather it provides corroborative evidence of the uninterrupted use of the land since the appellants purchase of No 5.
13. Whilst the Council suggest that there is no patio/seating area, I observed a decorative bench on the land and also noted the steps down from the patio doors in the rear elevation of the dwelling, providing direct access from the dwelling onto the land. The appellants' photographs demonstrate that this was in place in May 2007.
14. I note the evidence of a number of interested parties, that they have rarely seen anyone use the land, which casts a degree of doubt on the appellants' account of their use of the land. However, the appellants say that their enjoyment of the land comes from gardening it and it providing pleasant views from their property. If they do not regularly use the land for sitting out or hosting guests at their property, this is understandable in view of the open nature of the land. Indeed, the appellants' evidence does not suggest that the land is used in this way. The property has the benefit of more private areas of garden that are likely to be more suitable for such socialising. Whilst the land is to the rear of the property and adjacent only to a footpath, rather than a vehicular highway, it has the character of a more traditional front garden, which are often well maintained, but are rarely used in the same way, or as often as a traditional, more private rear garden because they are often open to public views.
15. That the fence along the boundary of this land with the footpath was only erected in December 2018 is not decisive in this case, particularly as the appellants evidence of their use of the land pre dates the erection of this enclosure.
16. I have had regard to the evidence of the planning history for the site and surrounding estates, and note the conditions of the planning permissions that have been brought to my attention. I also note the limitations stated on the conveyance provided by an interested party. The conveyance may well prohibit the erection of enclosures, and I can see that the erection of enclosures, buildings and structures, as well as planting is also prohibited by condition in some parts of the estate. Notwithstanding the Council's view, that this condition cannot now be enforced if breached, neither of these limitations prevent the use of the land in question as residential garden.
17. I acknowledge that the intended use of the land when the property was first erected may have been as public open space, referred to as 'amenity land' in the evidence, and that such open areas are a feature of the estates around Greenbanks Close. Indeed, I saw such land opposite the appeal site and elsewhere in the surrounding area. Whilst I have seen reference to the relevant part of the appeal site recorded as amenity land, I note the suggestion that the land in question is not owned in the same way as the land subject of this appeal, which is as part of the freehold of the appeal site. Nevertheless, the land subject of this appeal may well have been used as amenity land in this way prior to the appellants' purchase of it. This does not, however, cast sufficient doubt on the evidence of the appellants, that since their purchase of the property they have used the land as residential garden associated with No

5. Furthermore, I have not been provided with any other type of evidence sufficient to demonstrate that a LDC should not be granted in this case.
18. Having regard to all of the above, I find the appellants' evidence to be sufficiently precise and unambiguous. In particular, the statutory declaration carries significant weight in this case, in view of the sanctions that could be imposed should it contain false or misleading evidence. There is no evidence before me that is sufficient to contradict or otherwise make the appellants' version of events less than probable. There is, therefore, no good reason to dismiss the appeal and refuse to grant the LDC. Accordingly, I conclude that the appellants have demonstrated that, on the balance of probability, the use of the land as residential garden has been continuous for a period in excess of 10 years and was lawful on the date the application was made.

Conclusion

19. For the reasons given above, I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of the use of land as residential garden was not well-founded and that the appeal should succeed. I will exercise accordingly the powers transferred to me in section 195(2) of the 1990 Act.

J Moss

INSPECTOR



The Planning Inspectorate

Lawful Development Certificate

APPEAL REFERENCE: APP/B1740/X/21/3278351

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 12 November 2020 the use described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged in red and hatched in green 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:

It has been demonstrated that, on the balance of probability, the use of the land hatched green on the plan as residential garden associated with 5 Greenbanks Close has been continuous for a period in excess of ten years and was lawful on the date the application was made.

Signed

J Moss

Date: 24th MAY 2022

First Schedule

The use of the land as residential garden.

Second Schedule

Land at 5 Greenbanks Close, Milford on Sea SO41 0SQ.

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: **24th MAY 2022**

by J Moss BSc (Hons) DipTP MRTPI

Land at: 5 Greenbanks Close, Milford on Sea SO41 0SQ

Reference: **APP/B1740/X/21/3278351**

Scale: Not to scale.

