

Appeal Decision

Site visit made on 26 February 2024

by Andrew Walker MSc BSc(Hons) BA(Hons) BA PgDip MCIEH CEnvH JP

an Inspector appointed by the Secretary of State

Decision date: 19th March 2024

Appeal Ref: APP/J2210/X/22/3297713

Damian Cottage, Tyler Hill Road, Tyler Hill CT2 9LU

- 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 Mrs Patricia Hulks against the decision of Canterbury City Council.
 - The application Ref CA/21/01533, dated 15 June 2021, was refused by notice dated 15 November 2021.
 - The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended (the Act).
 - The use for which a LDC is sought is use as domestic 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 considered to be lawful.

Main Issue

2. The main issue in this appeal is whether or not the refusal of the LDC application by the Council was well-founded.

Reasons

3. Section 191(2) of the Act provides that uses are lawful at any time if no enforcement action may then be taken in respect of them, including because the time for enforcement action has expired. Section 171B(3) of the Act provides that, as regards the change of use constituting the appeal development (from agricultural use to use as a domestic/residential garden), no enforcement action may be taken after the end of the period of 10 years beginning with the date of the breach. Accordingly, as the application for the LDC was made on 15 June 2021, the appellant must show with sufficiently precise and unambiguous evidence and to the required standard of proof (the balance of probabilities) that the land has been continuously in use as a domestic garden since at least 15 June 2011 (the relevant date)¹.
4. I found on my site visit that the land (essentially a grassed area planted sparsely with fruit trees and including a garden pond, sheds and raised vegetable beds) was in use as a residential garden as part the curtilage of the intimately associated dwelling known as Damian Cottage (notwithstanding the land being joined to the dwelling's pre-existing smaller garden by access points through a small hedge and across a ditch). I have no good reason to find that it was not so in use at the time of the application.

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

5. The appellant purchased the land in September 2010, according to land registry documents, and it is her case that she promptly created the above extension to the cottage's garden and has used it as such ever since. That case is very well supported by photographic evidence and evidence from independent third parties², as well as a (sufficiently precise and unambiguous) detailed chronology ('synopsis') from the appellant setting out how the land has been used since her acquisition of it.
6. In particular, I place considerable weight on the photographs apparently taken on 24 April 2011 which demonstrate that the garden was already in use with new fruit trees present in the foreground (consistent with the synopsis stating the first such trees were planted in late 2010). Further, it can be seen that the boundary fence separating the pre-existing garden from the appeal site has been removed and the pond liner is present as if ready to be installed (again consistent with the synopsis which states it was installed in Spring 2011). A number of further photographs provide evidence of use as a garden over the 10 year relevant period, including Google Earth aerial photographs (I do not agree with the Council that the 2011 imagery is largely the same as that of 2008; the latter shows a clearly distinct undeveloped agricultural field whereas the former shows indications of a change of use upon land that has been separated off from the field – including what appears to be the new sheds associated with the garden use).
7. The Council places emphasis on the contents of historic planning application documents³ but it has not submitted into this appeal any of the documents as evidence for me to consider. Consequently, there is no such evidence before me to contradict the appellant's version of events or make it less than probable.
8. For the reasons I have set out, I am satisfied on the balance of probabilities through the receipt of sufficiently precise and unambiguous evidence that the use of the land as a domestic garden had occurred continuously for a period of more than 10 years on the date of application for the LDC. Therefore, immunity has been acquired and the use is lawful.

Conclusion

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

Andrew Walker

INSPECTOR

² Including the overlooking neighbours at 9 Sunnymead. I place significant weight on this independent corroborating evidence, being from witnesses living in plain sight of the land since before the relevant date.

³ CA/11/00416; CA/20/00320

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 15 June 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:

The time for enforcement action has expired.

Signed

Andrew Walker
Inspector

Date: 19th March 2024
Reference: APP/J2210/X/22/3297713

First Schedule

Domestic garden

Second Schedule

Land at Damian Cottage, Tyler Hill Road, Tyler Hill CT2 9LU

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: 19th March 2024

by **Andrew Walker MSc BSc(Hons) BA(Hons) BA PgDip MCIEH CEnvH JP**

Land at: Damian Cottage, Tyler Hill Road, Tyler Hill CT2 9LU

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Scale: Do not scale

