DELEGATED DECISION REPORT

SMD/2023/0474 **Valid 21/09/2023**	**22 SORREL AVENUE** **UPPER TEAN**	**LAWFUL DEVELOPMENT CERTIFICATE FOR AN EXISTING USE OF LAND FOR RESIDENTIAL PURPOSES** **(CERTIFICATE OF LAWFULNESS - EXISTING)**

MAIN ISSUES

Whether or not the site has been used for residential purposes continually for over ten years.

DESCRIPTION OF SITE

The site adjoins the edge of (but is outside of) the development boundary of the village of Upper Tean, with the built up part of the village lying to the north-east. It is adjacent to a dwelling site on a modern housing estate. The land is currently being used as an extended private side garden area by the owners of the dwelling who also own the application site. The dwelling, front garden, back garden and end of the Sorrel Avenue cul-de-sac lie to the north-east. There are neighbouring residential properties to the east and north of the site. The site seems to form part of one long well mowed strip of grassland separating the housing estate from open farmland to the south-west and is fenced off from the farmland on one side and from the housing estate on the other. The applicant claims the site was purchased by the previous house owners from the owner of the farmland in 2006 and subsequently used for domestic purposes by the owner of the house.

The long sides of the site comprises a low-trimmed hedge, including the boundary between the site and the original dwelling plot. There is a timber field gate providing access from the driveway of the house into the site. The end boundaries of the plot, to the north-west and south-east are marked by timber fences. A paved patio area to the side of the house encroaches into the site. The remainder of the site is well trimmed lawn.

PROPOSAL

This is a Certificate of Existing Lawful Use application which seeks a certificate to confirm that the use of the site for residential purposes is lawful. There is no record of any planning permission being granted for the change of use of land and works so therefore this is deemed to be unauthorised as planning permission is required. However, Section 171B of the Town and Country Planning Act (as amended) states that unauthorised uses of land occurring for a period of at least ten years are immune from Enforcement Action and therefore the use and works would become lawful.

The onus is on the applicant to demonstrate/give evidence of the use having occurred continually for this length of time. If the Council does not have any evidence of its own to dispute the applicant's evidence, then, on the balance of probabilities if the Council considers the current use has continued uninterrupted for this period, the current use becomes lawful and a Certificate can be granted on that basis.

The relevant evidence provided by the applicant includes a sworn statement/statutory declaration from the previous owner of the property, dated 24.8.23, stating the following:

- The site was purchased by him in December 1996
- In April 2006 he purchased the land to the side from owner of the adjacent farmland
- The following month they removed the side boundary hedgerow separating the residential property from the newly acquired land, laid a side terrace area within the plot and installed side bi-folds to allow access onto the decking, which was replaced in 2017 by a paved patio.
- Also in May 2006, a new hedgerow was planted along the south-west boundary of the site, timber fences were added at each end, a lawn provided and fruit and ornamental trees were planted close to the west and east ends.
- The site has at varying times had paddling pools, goalposts, BBQs and trampolines added.
- Photo's provided between 2017 and 2020 show the use of the site as a residential garden and also include swings and slides used by wider family members.
- Since 2006 the site has been used and maintained as a garden and has never been used for any other purpose
- The property including site was sold to the applicants in July 2023

Another sworn statement/statutory declaration from the new owners of the property, the applicants, dated 25.8.23, states the following:

-The property was purchased by them in July 2023
-When visiting the property to inspect it before the sale, the site was in use as a garden area
-The sales particulars show the site being used as a garden
-The site has been used as a garden by the new owners since purchasing and they continue to do so.

A Planning Statement has been submitted by the agent which re-iterates some of the above information and argues the case for the grant of a certificate of lawfulness.

The applicant has also submitted aerial photo's from 2006, 2011, 2013, 2015, 2017, 2018 and 2021.

RELEVANT LOCAL AND NATIONAL PLANNING POLICIES

N/A

SITE HISTORY / RELEVANT PREVIOUS APPLICATIONS

No relevant previous applications.

CONSULTATIONS

Publicity

Site Notice expiry date: 31.10.23
Neighbour consultation period ends: 31.10.23
Press Advert: N/A

Public Comments

None.

Town / Parish Comments

The Parish Council acknowledge that the current Property owner is seeking confirmation that the use for residential purposes of a parcel of land forming part of their property as purchased by a previous owner and subsequently forming part of their conveyance is lawful and therefore immune from enforcement action by the Local Authority.

This application appears to be sound provided there are no local objections and it conforms with planning policies as defined in the Checkley Parish Council Regulation 16 Neighbourhood Development Plan and the Staffordshire Moorlands District Council Core Strategy and the National Planning Policy Framework.

OFFICER COMMENTS

In order to achieve a certificate of lawfulness for an unauthorised use of land, in this case, the use of part of a former agricultural field to the side of the applicants house for residential purposes, the applicant must demonstrate a continual uninterrupted use for a continual period of at least ten years. If the Council has no evidence of its own to refute the applicant's evidence then if it considers on the balance of probabilities the use did continually occur for this period, without the intervention of enforcement action where it was possible to do so, then the certificate of lawful use should be issued. This is because Section 171B of the Town and Country Planning Act (as amended) states that unauthorised uses of land occurring for a period of at least ten years are immune from Enforcement Action.

The Planning Encyclopaedia also states that where an applicant's case is that the time for enforcement action has expired, the decision-maker must start with the date of the valid application and then consider the 10-year period prior to that date (four years in the case of operational works).

The applicant has provided evidence in the form of a sworn signed statements from himself (and signed by a solicitor) as the new owner of the residential property and the application site and the previous owner who bought the property in 1996 and purchased the site from a farmer, to use as a garden for the house (in addition to the existing front and rear gardens that form part of the original property. Also included is photo's of the site in use as a residential garden between 2017 and 2020 and also a number of arial photo's through the years going back to 2006 (the year the site was purchased and allegedly was turned into a garden).

The case officer also undertook a site visit and took photographs, on 10th October 2023. This revealed a site which did not have any domestic paraphernalia or outdoor seating or play equipment but the large patio to the side of the house which is within the site was still present and very had the appearance of a well maintained domestic garden with well mowed lawn and trimmed hedges and ornamental and fruit trees intact.

The photo's provided by the previous owner show play equipment and other objects often found in connection with the domestic occupation of a house. The aerial photos going back to 2006 do provide better evidence as trampolines and large padding pools are visible and some form of decking or patio area is shown in all of the aerial photo's available which is consistent with the evidence provided in the sworn statements. The latest Google aerial images show a trampoline, lawn and patio.

However, the applicant has applied for a certificate to confirm the lawful use of the site for "residential purposes". I consider this to be a wide ranging, vague and imprecise definition which implies that the land is being lived on, which it clearly is not and has not been historically. The site is clearly not within residential curtilage, loosely defined as the land immediately around and connected to a dwelling and the site clearly was originally farmland before being purchased by the dwelling owner in 1996 and was physically separated from the dwelling plot.

The use of the land as a "garden" would be more precise and more accurately reflects the exact use of the land within the last ten years and the evidence put forward by applicant and I have been informed by the agent verbally that a certificate granted for this use i.e. a "garden" would be sufficient and acceptable.

The word 'garden' itself is not a term recognised, defined or referred to anywhere in the Act. The definition of 'Garden' in the Oxford English Dictionary (OED) is "a piece of ground used for growing flowers, fruit or vegetables". Additionally, the Collins English Dictionary defines garden as "an area of land normally planted with grass, trees, flower beds etc." or alternatively "an area of land used for the cultivation of ornamental plants, herbs, fruit, vegetables, trees etc." I accept that the use is in line with the OED definition of garden. There is sufficient evidence of tree, shrub and hedge planting and there is a constantly maintained lawn. However, it is worth noting that the OED gives a similar definition for 'horticulture', "the art or practice of garden cultivation and management". The dictionary definitions for both horticulture and garden or gardening are apparently interchangeable to the extent that officers are minded to conclude that the use of the land, where it is cultivated, enjoyed and tended to as a 'garden' in terms described above, amounts to 'horticulture'. The

purpose of mentioning this is because the site was formerly part of a field, an agricultural use and the term “agriculture” also includes “horticulture”. Therefore it would appear a material change of use of the site has not in fact occurred in this respect and the current “use” would in this respect therefore would have always have been deemed to be lawful and a certifcate could be granted in those terms..

There are other uses of the site over the last ten years more connected to the enjoyment of the land rather than a horticultural use. Uses of land such as for playing, enjoying, roaming, and relaxing, could be deemed to be connected to residential uses but these are relatively transient in nature, limited to good weather etc. and not sufficient to constitute a material change in the use of the land and thus an act of development. The evidence shows that childrens play equipment, trampolines and paddling pools have been placed there but this does not amount to “development” as these are moveable structures not fixed or installed into the ground. Therefore, these cannot be regarded as operational development and the evidence shows that they too have been transient and come and gone over time.

The only operational works that have been undertaken are the provision of a decking area over ten years ago replaced by a paved patio in 2017 and this is shown in aerial photographs from 2018. However, such development is used primarily for sitting out connected to enjoyment and relaxation referred to above. The area occupied by the original decking area and the extended area undertaken in 2017 would not amount to a material change of use. Furthermore, there is sufficient evidence in the aerial images that the works took place more than four years ago and therefore, under S171 and S191, these works also become lawful.

Such works would normally be deemed to be permitted development not requiring full planning permission if they were provided within the residential curtilage of a dwelling. However, the site cannot be deemed to be residential curtilage as it was clearly originally part of a field and not part of the original dwelling plot and still appears as a separate parcel of land with well defined boundaries separate from the original residential property. An informative will be added to state that the site, although now being deemed to be a residential garden, is not legally deemed to form part of the residential curtilage of the property. This would also mean the site cannot benefit from any domestic works under permitted development under Part 1 of the GDPO relating to works within a residential curtilage, such as outbuildings, further patio’s or a side extension to the house which encroaches within the site i.e. a full planning application would be required for these works.

CONCLUSION / PLANNING BALANCE

It would not be possible to grant a certificate of lawfulness for the use of land for “residential purposes”. However, the site can be deemed to be a garden, a horticultural use which does not amount to a material change of use of the former agricultural land as horticulture falls under the same legal definition as agriculture. In this respect the use of the site as a “garden” is lawful. Furthermore, notwithstanding that a material change of use of land has not occurred, on the balance of probabilities, it has been demonstrated that the application site has been used as a garden for a continual period of at least ten years and is still in use for this purpose. The Council has no evidence in which to contradict the applicant’s evidence. Other

uses such of the site more linked to the enjoyment of the garden, for the placing of a trampoline and play equipment for example, are ancillary to the garden use and as these are not fixed items, do not constitute development. The patio formation is development but was provided over four years ago and its use is also ancillary to the use described above, taking up only a relatively limited amount of a site primarily used as a "garden" with planted and grown vegetation/ a horticultural use. The patio is therefore also lawful. Therefore under S191 of the Town and Country Planning Act (as amended), the use of land and formation of a patio are immune from Enforcement Action and are therefore lawful under the above Act. A certificate of an existing lawful use can therefore be granted.

OFFICER RECOMMENDATION : **APPROVE THE GRANT OF A CERTIFICATE OF LAWFULNESS**

Case Officer: Chris Johnston
Recommendation Date: 21.11.23

X B.J. Haywood

Signed by: Ben Haywood

On behalf of Staffordshire Moorlands District Council