CASE OFFICER'S REPORT

Application Reference:	**PL/2023/09366**
Description	**CLE Use of agricultural land as domestic garden incidental to the dwellinghouse** **Coombe Hill, Middle Coombe, Donhead St Mary, Shaftesbury, SP7 9LX**
Date of Inspection:	N/A
Date site notice posted:	6/12/23
Publicity Expiry:	3/1/24

POLICIES

Town and Country Planning Act 1990 as amended ("the 1990 Act")

APPLICATION DETAILS

The applicants seek a Lawful Development Certificate pursuant to Section 171B (3) and 191 (1) (a) of the 1990 Act for use of the land as domestic garden, over the 10 year period without any enforcement action against the use of land. The application form states that the CLE is sought for:

Use of agricultural land as domestic garden incidental to the enjoyment of the dwellinghouse. The extent of the land is shown on the plans and photos submitted with the application, with additional information and description given in the Statutory Declaration, Exhibits and Planning Statement submitted with the application.





LEGAL ISSUES

Section 191 allows a person to make a formal application for a certificate of lawful existing use ("CLE") to determine whether an unauthorised development has become lawful through the passage of time, and can be continued without the need for planning permission.

Obtaining a CLE will have the effect of proving that the development is lawful, and protect the development from enforcement action.

The onus is on the applicant to prove the case by supplying sufficient clear and precise evidence to satisfy the Authority that a CLE - the test to be applied to that evidence is the 'balance of probability'.

The application is assessed purely on the evidence; the planning merits of the development are irrelevant.

RELEVANT TIME LIMIT

Taking into consideration the relevant time period for enforcement action in respect of breaches of planning control, Section 171 B of the 1990 Act specifies these time-limits as follows:

(1) Where there has been a breach of planning control consisting in the carrying out without planning permission of building, engineering, mining or other operations in, on, over or under land, no enforcement action may be taken after the end of the period of four years beginning with the date on which the operations were substantially completed.

(2) Where there has been a breach of planning control consisting in the change of use of any building to use as a single dwelling house, no enforcement action may be taken after the end of the period of four years beginning with the date of the breach.

(3) In the case of any other breach of planning control, no enforcement action may be taken after the end of the period of ten years beginning with the date of the breach.

(4) The preceding subsections do not prevent -

(a)the service of a breach of condition notice in respect of any breach of planning control if an enforcement notice in respect of the breach is in effect; or

(b)taking further enforcement action in respect of any breach of planning control if, during the period of four years ending with that action being taken, the local planning authority have taken or purported to take enforcement action in respect of that breach.

CONSULTATION RESPONSES

Parish Council – No objection
Neighbour consultees/notification responses – None

SITE HISTORY

S/2008/0721 Change of use of agricultural land to facilitate the creation of a tennis court & erection of chain link fencing Refuse
17/01944/FUL The proposed re-modelling of an existing detached chalet bungalow to form a two-storey dwelling AC
15/08289/FUL Use of part ground floor and whole of first floor of existing outbuilding as ancillary accommodation (retrospective) AC

Enforcement history - None

EVIDENCE SUBMITTED IN SUPPORT OF THE APPLICATION

1. Application form, Planning Statement and Supplemental Planning Statement by STEPHEN GRAESER PLANNING

2. Submitted drawings including Exhibit LDE-B-1 - Site Plan dated 9th October 2023 (above) and 227-02.

3. Photographs of the land from Jan 2009 and June 2011:

January 2009



June 2011



4. 2006, 2009, 2013 Aerial Photography

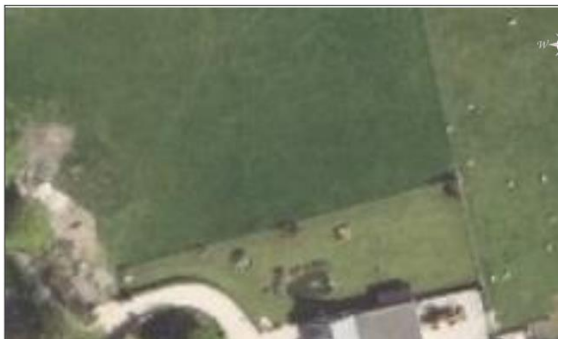
Aerial Image 03-06-2006



Aerial Image 08-10-2009



Aerial Image 26-05-2013



5. Statutory declaration of L D Erlanger-Bertrand and aerial photographs Exhibit LDE-B-3 and Exhibit LDE-B-2 dated 9th October 2023.

Exhibit LDE-B-2 - Aerial Photo (2017)



Exhibit LDE-B-3 - Aerial Photo (2020)



My wife and I purchased Coombe Hill in September 2016, a property comprising the dwellinghouse and a separate outbuilding converted to an annex which are together set within an extensive garden of some 0.3ha in area. The property also includes 2 paddocks which, in total, comprise an area of some 1.2ha.

I attach to this Declaration Exhibit LD'E-B-1, a site plan identifying:

- The existing dwellinghouse, annex and garden (outlined in red).
- The 2 paddocks (outlined in blue).
- The line of the 'Original Garden Boundary' (black dashed line).
- The 'Additional Garden Land' (stippled) which, to the best of my knowledge, resulted from a change of use from agriculture to garden at some time between May 2005 and October 2009.

Since taking ownership of Coombe Hill, I and my family have always used the land outlined in red on Exhibit LD'E-B-1 as a dwellinghouse, annex and garden incidental to the enjoyment of the dwellinghouse.

I attach to this Declaration Exhibit LD'E-B-2, an Aerial Image (taken on 26-03-2017) which shows the northern boundary fence of the garden and the Additional Garden Land having seamlessly blended in with the other lawn at Coombe Hill.

In June 2017 my wife and I decided that the fence forming the northern boundary between the garden and the paddock obstructed the views across the valley and hills to the north, therefore we took down the fence. We continued to maintain the lawn previously enclosed by the fence and continued to use that area (shown stippled on Exhibit LD'E-B-1) as garden incidental to the enjoyment of the dwellinghouse.

I attach to this Declaration Exhibit LD'E-B-3, an Aerial Image (taken on 01-06-2020) which shows the land with the northern boundary fence removed. The Image also shows that the formerly enclosed area has been mown in the same manner as the other lawn at Coombe Hill and has continued to be used as garden incidental to the enjoyment of the dwellinghouse.

This Declaration verifies, during my tenure of the property, the continual and un-interrupted use of the Additional Garden Land at Coombe Hill, Middle Coombe, Donhead St Mary, Wilts SP7 9LX incidental to the enjoyment of the dwellinghouse.

6. Photograph of the land 29 September 2023:



7. Google Maps Jan 2024



CONSIDERATION OF EVIDENCE

The applicant seeks a Lawful Development Certificate for the use of the land (Site plan submitted) as a domestic garden. For a certificate of lawfulness to be issued the applicant would have to provide evidence that, on the balance of probabilities, the land had been used for this purpose for a continuous period of ten years (i.e. not less than the time limit for immunity from enforcement action prescribed under Section 171B (3) (Time Limits) of the 1990 Act whereby the time limit for taking enforcement action had expired).

The application seeks *confirmation that the land outlined in red on Location Plan 227-01 and Site Plan 227-02 submitted with this application has been continuously used as a garden incidental to the use of the dwellinghouse for a period in excess of 10 years prior to the date of this application.*

To explain their evidence, the applicant states:

The Site Plan 227-02 depicts the subject matter of this CLEUD application which has arisen through the removal of the 'Original Garden Boundary' (black dashed line), the enclosure of agricultural land [the 'Additional Garden Land' (stippled)] and the change of use of that enclosed land to garden incidental to the enjoyment of the dwellinghouse.

The Aerial Image (taken on 03-06-2006) submitted with this application shows the extent and boundaries of the garden at Coome Hill at that time and identifies the Original Garden Boundary to the north.

The Aerial Image (taken on 08-10-2009) submitted with this application clearly shows that the northern boundary fence has been moved some 4.5m in a northerly direction, a new fence has been erected along this boundary and the Additional Garden Land thus enclosed being used as garden incidental to the enjoyment of the dwellinghouse.

When compared to the rougher 'paddock' grass to the north and east the 08-10-2009 Aerial Image clearly shows that the grass of the Additional Garden Land is cut short, albeit that the colour of the grass is different to that of the remainder of the lawn at the property. Furthermore, due to the different colour of the grass, the 08-10-2009 Aerial Image clearly shows the line of the Original Garden Boundary.

The Image taken in January 2009 shows the drive flanked by stone walls on either side, with the access into the paddock to the left and the dwarf stone wall on the left surmounted by a post and rail fence. This post and rail fence then continues to form the line of the Original Garden Boundary, as seen on the Aerial Image taken on 03-06-2006.

The Image taken in June 2011 shows the post and rail fence having been removed, a young laurel hedge planted behind the dwarf wall and a new post and rail fence (yellow arrow) erected to enclose agricultural land within the garden of the dwellinghouse. The new post and rail fence forms the new northern boundary of the garden by enclosing the Additional Garden Land.

The Aerial Image (taken on 26-05-2013) shows the situation at that time and that the Additional Garden Land continues to be used incidental to the enjoyment of the dwellinghouse, the colour of the mown grass being of similar appearance to the remainder of the lawn at the property.

The Statutory Declaration of Mr D'Erlanger-Bretrand and Exhibits provides additional evidence confirming, during his tenure from September 2016, the ongoing and continuous use of the Additional Garden Land incidental to the enjoyment of the dwellinghouse at Coombe Hill.

Exhibit LD'E-B-3 provided by Mr D'Erlanger-Bretrand shows that, despite the removal of the northern boundary fence, the grass of the Additional Garden Land continues to be mown as a

lawn, is of similar appearance to the remainder of the lawn at the property and that the Additional Garden Land continues to be used incidental to the enjoyment of the dwellinghouse.

In June 2017 my wife and I decided that the fence forming the northern boundary between the garden and the paddock obstructed the views across the valley and hills to the north, therefore we took down the fence. We continued to maintain the lawn previously enclosed by the fence and continued to use that area (shown stippled on Exhibit LD'E-B-1) as garden incidental to the enjoyment of the dwellinghouse.


2013

On 26 October 2023 Mr A Simpson (the applicant) obtained ownership of and, with his family, moved into and occupied Coombe Hill. Since that time Mr Simpson and his family have continued to use the Additional Garden Land as garden incidental to the enjoyment of the dwellinghouse at Coombe Hill. The evidence and photography is consistent with the statutory declaration submitted with the application.

ANALYSIS

On the application form, the commencement date is given as 1/5/2005 but aerial photo demonstrates that the change took place after June 2006:

Aerial Image 03-06-2006



Aerial Image 08-10-2009



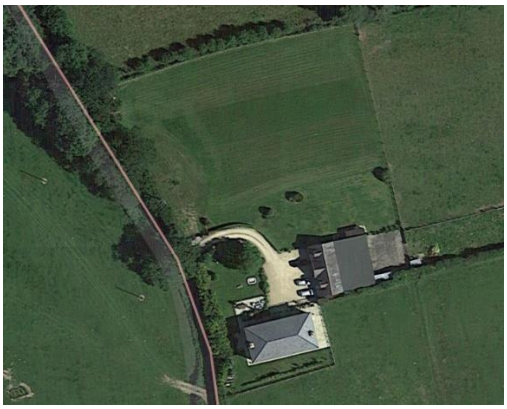
Therefore, the evidence for the garden extension clearly supports a **start date of 8/10/2009**. This is confirmed as correct in the applicant's Supplemental Statement.

Moving forward in time, the 2020 exhibit photo now shows a wavy line to the lawn, which does not follow the clear fence line established by the other photos:

Exhibit LDE-B-3 - Aerial Photo (2020)



By 2023/24, this line has completely disappeared and the land appears to be managed in exactly the same way as the adjacent paddock:



2024 (google)

The supporting statement says:

> *3.14 On 26 October 2023 Mr A Simpson (the applicant) obtained ownership of and, with his family, moved into and occupied Coombe Hill.*
>
> *3.15 Since that time Mr Simpson and his family have continued to use the Additional Garden Land as garden incidental to the enjoyment of the dwellinghouse at Coombe Hill.*

The applicant was asked to submit a Supplemental Statement to account for the period 2020 to the application date of 30/10/23. The applicant stated: *In terms of your view that there is a 'gap' between the latest (01-06-2020) aerial image submitted with the application (Statutory Declaration Exhibit LD'E-B-3) and the present day I wish to comment as follows:*

The 2013 aerial image submitted with the application and the 2017 aerial image (Statutory Declaration Exhibit LD'E-B-3) shows the fence enclosing the Additional Garden Land starting (at its western end) from a point some 4.5m north of the access drive, running across the field to a point just north of a shrub inside of the eastern boundary fence. In doing so the fence encloses some more shrubs.

On the 2024 Google aerial image reproduced below (which, I suggest, was taken in the Autumn of 2023 and which was not available when I submitted the application) I have added the approximate line of the former fence, which encloses the 3 remaining shrubs within the Additional Garden Land.

Whilst the Google 2024 aerial image appears to show similarities between the grass cutting within the field and within the Additional Garden Land I do not consider this to be conclusive, especially as such an image cannot be enlarged without losing the necessary definition to confirm or rebut any assertion that the grass sward is the same or is different.

The photograph below [taken by myself on 29 September 2023 from a point at the western end of the yellow line superimposed on the Google Aerial Image above and looking along the line towards the east] clearly shows the different (rough sward) grass within the field to the left of the photo and the tightly mown lawn of the Additional Garden Land north (left) of and surrounding the shrubs. This tightly mown area of lawn is the same as the 'authorised' lawn between the shrubs and the building in the centre right of the photo.





I am of the view that this photo confirms the continuous change of use of the Additional Garden Land over the 'gap' period from 01-06-2020 to the present day and confirms the statement made in the Statutory Declaration that the former owner has used the Additional Garden Land continually and un-interrupted incidental to the enjoyment of the dwellinghouse until he sold the property to the applicant on 26-10-2023.

In the Planning Statement (3.14-3.15) I confirm on behalf of the applicant that, since he took ownership of the property, he has also used the Additional Garden Land incidental to the enjoyment of the dwellinghouse.

I therefore contend that there has been continuous and un-interrupted use of the Additional Garden Land incidental to the enjoyment of the dwellinghouse since 08-10-2009 to the date of the application (30-10-2023) and that the land has been continuously used in this same manner since that date.

Therefore, on the balance of probabilities, the applicant has submitted sufficient evidence to show that the strip of land has been incorporated into the domestic garden as mown garden lawn for more than 10 years prior to the date of the application and the use has taken place continuously for at least 10 years between 2009 to 2023. It is likely that the land was in this condition on the date of the application in October 2023 and the LPA has no evidence to successfully challenge this assertion.

CONCLUSION

Taking into consideration the evidence put forward by the applicant in support of their application, the aerial photography, and that there is no available contrary evidence held by or submitted to the Council, it is considered the applicant has adequately demonstrated, clearly and precisely on the balance of probabilities, that the existing lawful use is of the land is used a domestic garden for Coombe Hill and that this use has taken place for a continuous ten year period from the date of the application to 2009.

A certificate should therefore be issued.