

SITE AND CONTEXT

The application site located at land to the west of 1B Broomhill, Port Talbot. The site measures approximately 226m² and has been built up into platforms on an otherwise steeply sloping site rising uphill towards the north. The site is bounded on the east side by the applicant's property, No. 1B Broomhill and to the south the rear gardens of residential properties along Gwar Y Caeau. To the north and west is open scrubland.

The site of development is located outside of the settlement limits as defined by Policy SC1 of the Neath Port Talbot Local Development Plan (2011 - 2026) (Adopted, January 2016) (hereafter LDP) and as reflected on the LDP Proposal Maps. The site is therefore considered to be in the countryside. The site is also located in the Margam Special Landscape Area (SLA) as defined by EN2/4 in the LDP.

It is also noted that the site is located on Open Access Land which the public have the right to roam under the Countryside Rights of Way Act.

DESCRIPTION OF DEVELOPMENT

This is a Certificate of Existing Lawful Development for the change of use of land to garden area and the carrying out of groundworks and retaining works to create terracing, the construction of steps and decking.

With regard to the groundworks an approximately 14.7m long retaining wall 1.3m high has been built along the southern boundary of the application site to create a raised platform. A 1m high fence has been erected along this boundary. Further retaining works have been constructed approximately 8.5m north of the first retaining wall and running broadly east to west to create an upper platform approximately 2.8m above the lower platform. A flight of stairs runs down between the platforms on the eastern end with varying sloped areas between the lower platform to part way up the retaining wall on the central and western end of the wall. This upper wall has been constructed in phases with approximately 10.5m at the eastern end constructed earlier and subject to this Lawful Development Certificate.

This upper platform has been extended westward by a further 7.5m with additional boundary treatment though this is outside this Lawful Development Certificate.

In support of the application the agent has provided the following information:

- Completed application forms
- Location plan and Site Block Plan
- Extracts from a 2015 and a 2018 Zoopla Listing
- Drawing A102 – Ground Sections
- Supporting Statement prepared by the agent
- Signed statement by the applicant Mr Rohan Herbert
- Signed statements by witnesses [REDACTED]
[REDACTED] (2 former residents and 2 Neighbours)

- Invoice from Wright Ways Contractor Ltd
- Letter from the current landowner indicating the intention to transfer the land to the applicant in the near future.

All plans / documents submitted in respect of this application can be viewed on the Councils online register.

PLANNING HISTORY

P2026/0103 - Retrospective application for the change of use of land to garden area the retention of groundworks to create terracing, a staircase, decking, 2.4m high boundary fence to north and three outbuildings. Refused 18/5/26

P2026/0311 - Certificate of Existing Lawful Development for the use of land as part of a domestic garden. Withdrawn 30/6/26

E2025/0258 - Encroachment in open countryside to extend residential curtilage and construction of detached outbuildings, decking and tiered garden area. Enforcement Notice served 21/5/26.

CONSULTATIONS

Ward Members notified

REPRESENTATIONS

There is no statutory requirement to consult third parties including parish councils or neighbours in respect of lawful development certificate applications. However, in this instance given that this application requests a decision on the lawfulness of an existing use the application has been publicised.

Neighbouring properties were consulted, and a site notice displayed – in response, 2 no. representations were received which can be summarised as follows.

- That no clearance or attempted use of the land was made until 2020.
- That between 2020 and 2022 parts of the land were cleared and there was a boundary dispute with land in the ownership of the representors being cleared.
- That by April 2022 the retaining works and steps on the land were largely completed.

REPORT

Planning Policies

Planning Policies are not relevant to applications under S191 of the Town and Country Planning Act 1990 (as amended).

ISSUES

The application seeks a Lawful Development Certificate under Section 191 of the Town and Country Planning Act 1990 to certify the lawfulness of an existing use on land. The determination of the application is on legal grounds only, any views on the planning merits of the case, or on whether the applicant has any private rights to carry out the operation, use or activity in question, is irrelevant.

Accordingly, this report concentrates solely on whether, based on the facts of the case and relevant Planning Law, the specified matter is or would be lawful.

In determining whether the residential use of the land is lawful, Section 171B (3) states that:

“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.”

As such it falls to be considered as to whether the use of the land in question for garden purposes has existed continuously for a period of ten years or more. The onus is upon the applicant to provide sufficient evidence to demonstrate this to the Council's satisfaction.

In determining whether development in the carrying out without planning permission of building, engineering, mining or other operations in, on, over or under land is lawful, Section 171B (1) states that:

“In the case of a breach of planning control in Wales, four years beginning with the date on which the operations were substantially completed.”

However, in *Murfitt v Secretary of State for the Environment*, the Divisional Court recognised that local planning authorities, when enforcing against a material change of use under section 87 of the Town and Country Planning Act 1971 ("the 1971 Act"), could require the removal of operational development connected to the change of use "for the purpose of restoring the land to its condition before the development took place." The decision in *Murfitt* recognises that the statutory power to require restoration of the land to its previous condition can, in some circumstances, include the removal of operational development that could not be enforced against on its own because of the four-year time limit in section 171B. This would be where the operational development was "part and parcel of, and integral to the change of use."

Whether the *Murfitt* principle is engaged in a particular case will always be a matter of fact and degree. But the principle itself must not be lost.

An enforcement notice was issued on 21/5/26 regarding the breach of planning control being the "change of use of land located outside settlement limits and within a special landscape area to garden area. And the carrying out of groundworks and retaining works to create terracing, the construction of a staircase, decking, 2.4-meter-high boundary fencing to the north and three outbuildings on the land."

The notice required the:

- 1) Cessation of the use of the land to the west of 1B Broomhill as garden area;

2) The removal all outbuildings, associated materials and paraphernalia from the land.

3) The removal of all the unauthorised retaining works and the restoration and reprofiling of the ground where necessary to stabilise the ground followed by re-seeding.

4) The installation of a defensible boundary (i.e. a close boarded fence or wall) to the west side of No 1B Broomhill no less than 1m high and a maximum of 2m high to define the original curtilage of No 1B Broomhill.

The notice relates to the land subject to this Certificate of Lawfulness application and additional land to the west and its serving is relevant as to the date it was issued being that date that immunity period would need to be calculated to. That is a demonstrated use of the land for the ten years preceding 21/5/26 for the change of use and for the four years preceding 21/5/26 for the operational development.

ASSESSMENT

Under section 191 of the Town and Country Planning Act 1990 ("TCPA 1990"), if a person wishes to ascertain whether any existing use of buildings (s) or other land is lawful, he/she may apply for a LDC. Section 191 of TCPA 1990 states a landowner making an application is required to prove that a use of the land is established for a continuous period of ten (10) years or more and is, therefore, lawful. By evidencing this, the applicant would be immune from enforcement action.

The onus of proof is firmly on the applicant is worth noting, the courts have held that the relevant test of the evidence on such matters is, "*on the balance of probabilities*".

In Gabbittas v Secretary of State for the Environment SE and Newham LBC [1985] JPL 630, the Court held that if the Council has no clear evidence of its own, or from others, to contradict or otherwise make the applicants version of events less than probable, there is no good reason to refuse the application. However, while an applicant's own evidence does not need to be corroborated by independent evidence, it must be credible and unchallenged by contradictory evidence from the authority or other parties.

For clarity, the area edged in red on the location plan and to which this application relates is referred to as the "land."

The applicant's evidence

The submitted supporting statement and accompanying documents sets out the applicant's case that the use of the land and the operational development upon it is lawful.

The supporting statement starts by describing the site and then putting forward a timeline and photographic evidence describing the applicant's version of events including:

- A Google Earth aerial 2015 photo claiming patio slabs and hard surfacing had been in place since April 2015 (2.1.3)
- A statement claiming an upper area of stone with a glasshouse since November 2021 (2.1.3)
- A retaining wall between levels since November 2020 (2.1.4)
- A cleared lower level from July 2020 (2.1.6)
- A lower retaining wall and fence on April 2022 (2.1.7)
- Fence posts near rear boundaries of Gwar Y Caeau (2.1.9)

Signed statements were also provided by witnesses [REDACTED] [REDACTED] Two of whom were former residents of 1B Broomhill, and two neighbours. An additional statement has also been provided by the applicant. These statements are summarised below.

The first statement is from [REDACTED] stating she had lived and visited 1B Broomhill between 1991 and 2018 and that the land was used “as a general garden space, including for the siting of a domestic greenhouse, a garden shed and a washing line, which was tied to one of the trees.”

The second statement is from [REDACTED] stating she had lived and visited 1B Broomhill between 1991 and 2018 and that the land was used “as a general garden space, including for the siting of a domestic greenhouse, a garden shed and a washing line, which was tied to one of the trees.”

The third statement is from [REDACTED] stating he has lived at 1A Broomhill since March 2018 when [REDACTED] was still resident at 1B Broomhill and that the land “had been used for some time for such things as potting plants, storage of garden materials and other domestic purposes and had a number of ornamental shrubs planted within it.”

The fourth statement is from [REDACTED] stating he has lived at 4 Broomhill since March 2004 when [REDACTED] was still resident at 1B Broomhill and “was fully aware that the” land “was used as part of their garden” and that this use continued after the applicant moved into 1B Broomhill.

The fifth statement is from the applicant Rohan Herbert stating that he has lived at the 1B Broomhill since 2018. He states that:

- At the time of purchase “the land was arranged on two tiers and contained a greenhouse, a garden shed, a washing line, various shrubs and landscaping.”
- That in 2018 the northern and western boundaries of the land were defined by wire stock proof netting and the southern boundary by a wooden fence.

The statement includes photographs stated to have been taken between 3rd July 2020 and April 2022 showing the progress of the land from a cleared and sloping site to the extension and construction of the platforms.

An invoice from Wright Ways Contractor Ltd dated 5/3/22 has also been submitted in evidence for the “construction of retaining wall and steps” and billed to Rohan Herbert of 1B Broomhill.

An extract from the real estate website Zoopla from 2015 has also been provided and noted in the supporting statement are parts of the 2015 and 2018 listings. The supporting statement draws attention to descriptions of the sale including:

“Tiered enclosed garden to the rear with mature planting, trees and shrubs. Balcony area giving elevated views over Swansea Bay. Pond, Storage sheds, Greenhouse, Steps leading to decked area.” (4.1.4) and

“Side and rear garden approximately one third of an acre of well maintained gardens set out in three tiers, briefly comprising of a variety of flowers/shrubs and a decked patio area.” (4.1.7)

A photograph included in the listing is also claimed to be taken from the land facing toward 1B Broomhill (4.1.5).

Considering the applicant's evidence

There are, therefore, two components to the application.

1. Demonstrate 4 years of operational development
2. Demonstrate a 10 year period of use as well as regularity of the use.

Point 1 – Operational Development

With regard to the operational development, being the carrying out of groundworks and retaining works to create terracing, the construction of steps and decking, figures 1 and 2 provide aerial photography shows a largely cleared site in 2020 and the works completed by 2023 indicating that the works were substantially completed between these dates.

The April 2022 date for the substantial completion of the retaining works, steps and decking, as given by the applicant, would also appear to be consistent with the other evidence submitted being the invoice supplied and the representations of the residents of 37 and 38 Gwar Y Caeau who refer to the clearance of the land from 2020 and that “by April 2022, retaining walls and steps had already been constructed.”

As such it is considered that the operational development had likely been substantially completed four years prior to 21/5/26. However, the application of the Murfitt principle will be discussed below following the consideration of the use of the land.

APGB - 2020 - 1B Broomhill, Port Talbot



Figure 1 - Aerial Photo dated 2020

APGB - 2023 - 1B Broomhill, Port Talbot



Figure 2 - Aerial Photo dated 2023

Point 2 – Use of Land

With regard to the use of the land, aerial photography provided to the council under the Aerial Photography Great Britain (APGB) agreement. Figures 3, 4, 5 and 6 show the land in the years 2006, 2009, 2014 and 2017. The land during these periods is clearly overgrown, low-level vegetation, with two larger trees on the eastern side of the land. None of the photos indicate any clearance or management of the site to be used as garden; any sign of boundary treatment to the northern or western boundaries and no indication of any outbuildings or garden paraphernalia to suggest the land was being used as a garden area.

APGB - 2006 - 1B Broomhill, Port Talbot



Figure 3 - Aerial Photo dated 2006

APGB - 2009 - 1B Broomhill, Port Talbot



Figure 4 - Aerial Photo dated 2009

APGB - 2014 - 1B Broomhill, Port Talbot



Figure 5 - Aerial Photo dated 2014

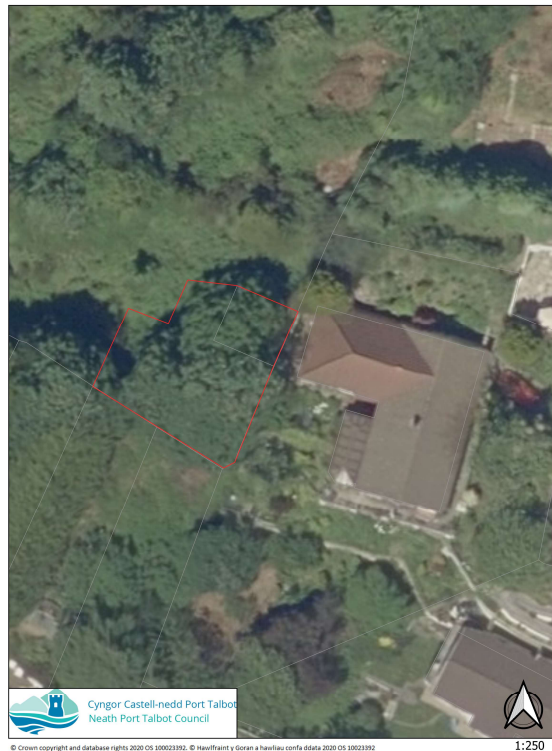


Figure 6 - Aerial Photo dated 2017

The first indication of activity in the officially supplied aerial photography is shown in figure 1 (above), where in 2020 the beginnings of the clearance of the land can be seen and what would appear to be an outbuilding in the northeast corner of land has been constructed. There is no sign that the cleared land is being used as garden area at this time with no sign of the land being enclosed; no indication of any planting or garden paraphernalia, and a clear boundary shown on the eastern edge of the land separating it from the curtilage of 1B Broomhill.

It is not until 2023 in the official aerial photo record as shown in figure 2 (above) that the land has the characteristics of a garden area with the terracing, steps, decking, planting and outbuildings much as they appear today.

Google Earth images can be less reliable to date accurately as they can be stitched together from multiple sources and are not verified from a supplier under the APGB agreement such as the Ordnance Survey. However, Google imagery is consistent with official sources, figure 7 shows the land overgrown with no indication of any clearance or management of the site to be used as garden; any sign of boundary treatment to the northern or western boundaries and no indication of any outbuildings or garden paraphernalia to suggest the land is being used as a garden area.



Figure 7 - Aerial Photo dated 2018 from Google Earth

Figures 8 and 9 further show the land clearance in aerial photographs taken in 2020 and 2021 respectively, and would appear to match the accounts given in the representations from Nos. 37 and 38 Gwar Y Caeau with regard to the land clearance and the boundary disputes arising at this time.



Figure 8 - Aerial Photo dated 2020 from Google Earth



Figure 9 - Aerial Photo dated 2021 from Google Earth

One Google Earth aerial image, figure 10, dated from 2015 does appear to show an area of possible development in the northeast corner of the land that may relate to the outbuilding that otherwise first appears in the 2020 images. The approximate extent of this land is shown on an Ordnance Survey plan in figure 11.



Figure 10 - Aerial Photo dated 2015 from Google Earth



Figure 11 - Ordnance Survey Plan showing the extent of the 2015 feature

As previously stated, the dates of Google Earth imagery can be unreliable, and the aerial imagery record suggests that this feature in figure 10 was only temporary and that imagery before and after this does not indicate a clear uninterrupted use. This small parcel may, however, explain the conflicting statements from the previous residents and [REDACTED] with those of the representors on Gwar Y Caeau, though does not fit the narrative provided by the applicant's statement or the supporting statement.

The statements of [REDACTED] refer to the use of the land as a general garden area and include the siting of a shed, greenhouse and washing line. These uses, on the face of it, may provide a case for the use of the land as garden area. However, evidence of these statements and alleged uses are expressed in fairly general terms and are not backed with any photographic evidence, are not wholly supported by other detailed documentary evidence such the aerial photography and competing neighbour representations. The statements do not provide a clear insight into precisely what happened on the land, where, and to what extent and is therefore open to wide interpretation. For example, the uses could have occurred on a sporadic and infrequent basis or be more limited in extent such as the area in figure 11.

The supporting statement draws attention to the Zoopla sales listings of 2015 and 2018 and the accompanying photos as evidence that the land formed part of the garden area during the sale of 1B Broomhill. In referencing the descriptions in the supporting statement:

“Tiered enclosed garden to the rear with mature planting, trees and shrubs. Balcony area giving elevated views over Swansea Bay. Pond, Storage sheds, Greenhouse, Steps leading to decked area.” (4.1.4) and

“Side and rear garden approximately one third of an acre of well maintained gardens set out in three tiers, briefly comprising of a variety of flowers/shrubs and a decked patio area.” (4.1.7)

These descriptions in 4.1.4 and 4.1.7 would adequately describe the original curtilage of 1B Broomhill without including the adjacent land, The original curtilage at the time including multiple tiers, mature planting, steps and decking.

Attention was also drawn to the “approximately one third of an acre” though it should be noted that this is given as a very rough calculation and was not provided as an accurate measurement and as could easily apply to the original curtilage of 1B Broomhill.

It should also be noted that the land adjacent to no. 1B Broomhill was never part of the land for sale as demonstrated by it being part of a much larger parcel of land that was not in the previous owner of No. 1B’s possession to sell, the land was not part of the sale to the applicant in 2018, and at the time of this application is still not in the applicant’s ownership.

The supporting statement draws attention to a photo included in the Zoopla listing (4.1.5) shown in figure 12 and claiming to have been taken on the adjacent land looking towards the curtilage of 1B Broomhill. However, this photo was taken from the lower decking within the original curtilage of 1B Broomhill and is facing away from the adjacent land. Figure 13 from the Zoopla listing gives additional context to where this photo was taken showing the arch in figure 12 in relation to the dwelling.



Figure 12 - Zoopla photo lower level facing east



Figure 13 - Zoopla photo from lower garden facing northeast

Figure 14 is a photo from the Zoopla listing taken from the lower deck of the original curtilage of 1B Broomhill facing northwest. The shadow of the arch in figures 12 and 13 can be seen on the decking, as can the canopy over the decking which is also within the original curtilage and can also be seen in the 2015 Google Earth imagery (figure 10) taken at the same approximate time of the Zoopla listing photos.

Also, clearly visible in figure 14 is the white boundary wall marking the original boundary of 1B Broomhill, and beyond it can be seen that the adjacent land is steeply sloping, is covered by vegetation and trees and shows no indication that the land has been developed or used as garden area.

Other photography on the Zoopla listing shows garden areas within the original curtilage of 1B Broomhill to the front (east) and south of the dwelling though none include the adjacent land or have been taken from there. This would be the case however if the adjacent land was not part of the sale and not being used as garden area.



Figure 14 - Zoopla photo from lower deck facing northwest

During a site visit, attention was drawn to concrete fenceposts to the south of the land. These however, would form part of the rear boundaries to the properties on Gwar Y Caeau and it would be expected that fenceposts would be located here to demarcate their property boundaries from the countryside.

An additional, loose, concrete fencepost was also shown to the west of the application land. However, this fencepost did not appear to lead to any others to have been part of a boundary and there was no other sign of a boundary line having been at this location. The site clearance activities as shown in figure 8 would also explain how a loose fence post could be relocated on the site. In any event, a boundary fence in itself would likely be permitted development under Part 2, Class A of the Town and Country Planning (General Permitted Development Order) 1995 and the presence of a boundary fence or the enclosure of land does not in itself constitute a change of use of the land.

Other sources were reviewed as to whether any gave any indication that the land was associated with 1B Broomhill or that the land was in use as a garden area. These include:

- Land registry plans show the land as part of a separate, larger parcel under separate ownership from that of 1B Broomhill.
- Historic Ordnance Survey plans showing a clear boundary between 1B Broomhill and the land.
- Council planning documents including the Local Development Plan and the previous Unitary Development Plan (UDP) showing the land outside of settlement limits.
- Natural Resources Wales mapping the land as open access land under the Countryside and Rights of Way Act.

Following advertising of the application, the LPA has received evidence from immediately adjacent residents which contradicts and makes the applicant's version of events less than probable, as opposed to supporting them. This includes statements to the effect that the land had not ever been used as garden area prior to the clearance 2020 and in general questioning the legitimacy of the supporting statements made within the evidence submission of the application, casting doubt on the applicant's version of events making it less probable and reliable.

As such, considering the evidence in its totality, it is considered that the land in question does not form part of the curtilage of the property and in respect of point 2 above the applicant has failed to satisfactorily demonstrate the 10 year period and regularity of the use.

Murfitt

As discussed above, the decision in *Murfitt* recognises that the statutory power to require restoration of the land to its previous condition can, in some circumstances, include the removal of operational development that could not be enforced against on its own because of the four-year time limit in section 171B. This would be where the operational development was "part and parcel of, and integral to the change of use."

While the operational development was probably substantially completed by April 2022, it has not been demonstrated that the land was used as a garden area for 10 years, nor that the land was of a suitable condition to be used as a garden area. The land prior to its clearance in 2020 was heavily overgrown and steeply sloping. The clearance, groundworks, retaining walls and steps were required to create flat usable platforms and the steps to enable the access of land, were part and parcel of, and integral to the subsequent change of use. As such, the operational development being the groundworks, retaining walls and stairs are considered enabling works to the use and would also therefore have to have been present for a continuous period of 10 years which has not been demonstrated.

CONCLUSION

The LPA as a matter of fact and degree is not satisfied that the application contains sufficient evidence to demonstrate that the land in question has for a continuous period of 10 years or more been used as garden area and are also of the view that the land does not form part of the curtilage to the application property. The operational development being the groundworks, retaining walls and stairs are considered enabling works to the use and would also therefore to have been present for a continuous period of 10 years which has not been demonstrated.

The use of the land and the operational development upon it is therefore considered to be unlawful.

As such, it is recommended to not issue the Certificate of Lawful Development.

RECOMMENDATION

Not issue Certificate of Lawful Development