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**Report of 26 October 2011**

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**Alleged Unauthorised Development****Ryarsh**  
Downs**11/00198/UNAUTU****567465 158462**Location: Land Rear Of Houses On London Road Ryarsh West Malling  
Kent

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**1. Purpose of Report:**

- 1.1 To report a breach of planning control consisting of, without planning permission, a material change of use from agricultural land to land for use as private residential gardens having a domestic character, the erection of fences to facilitate the change of use and the installation of a child's climbing frame and slide directly associated with the unauthorised domestic use of the land.

**2. The Site:**

- 2.1 The site comprises an area of land containing about 0.21 hectares situated to the rear of three pairs of semi detached houses (Three Oaks, Oakhurst, Glenville, Langdale, Fernleigh and Eastry) on the south side of the A20 London Road, Ryarsh opposite Callis Court Nurseries. The land is called The Old Pear Orchard by the owner. The northern boundary of the land abuts the southern boundary of the long-established rear gardens of these houses. The land is about 37 metres wide, 35 metres long on the western side and 82 metres on the eastern side. The land is bounded on the west side by the curtilage of Holmesdale and on the east side by the curtilage of 2 London Road. The southern boundary abuts a track that provides vehicular access to the land from London Road and to the rear gardens of five houses to the west. This track is also a public right of way (MR136) to Ryarsh Lane, West Malling. Beyond the track is open agricultural land behind a tall hedge.

**3. History:**

- 3.1 TM/11/01873/FL                      Refused                      08.09.2011  
Change of use of land from agriculture to private garden through incorporation into six domestic curtilages.

**4. Alleged Unauthorised Development:**

- 4.1 The land with an area of about 0.21 hectares believed to have historically been an orchard, but more recently rough grass land, has been subdivided into seven plots by the erection of post and rail fences within the original field boundaries. Two of these plots are single plots the same width as the adjoining garden and two are double width plots where two of the adjoining owners have elected not to take on responsibility for the additional land. In those two cases, the resultant domestic garden area becomes "L-shaped". All of these plots are occupied under a lease from

the land owner, by the owners of Three Oaks, Oakhurst, Glenville and Fernleigh and used as extensions to the domestic gardens of these four residential properties. However, all the plots remain in single ownership. The seventh plot runs along the southern boundary and includes a field gate to the track adjacent to the southern boundary. This has been retained by the owner and allows controlled vehicular access to all plots. Whether overgrown or cultivated, the whole land has been subdivided into garden sized plots and now has the general appearance and character of enclosed domestic gardens rather than allotments or agricultural land.

- 4.2 Plot 1 to the rear of Three Oaks is the most westerly plot and has no visible fence between the plot and the rear garden of the house. This plot is unkempt and covered in long grass and weeds with new trees planted adjacent to the plot's southern boundary fence with the access strip. Even though this land is unkempt, it still has the appearance and character of an overgrown enclosed back garden which has no visible boundary to differentiate between the private residential garden and agricultural use.
- 4.3 Plot 2 is to the rear of Oakhurst and has no visible fence between the rear garden and the plot. This plot is also covered in long grass with new trees planted in scattered locations over the plot. Even though this land is unkempt, it still has the appearance and character of an overgrown enclosed back garden which has no visible boundary to differentiate between the private residential garden and agricultural use.
- 4.4 Plots 3 and 4 are to the rear of Glenville and Langdale. There is a continuous 1.8 metre high panel fence between the rear garden of Langdale and the plot. The fence to the rear garden of Glenville is about 1.2 metres high panel fence and one panel has been removed to allow direct access from the garden to the plot. There is a large children's climbing frame and slide structure on a base of wood chippings approximately in the middle of the plot about ten metres from the boundary of the garden. There is a small cultivated garden on the western side. Some trees have been planted on this plot and a small dustbin style garden incinerator is usually left on the land. The grass is mown short. A large pile of what is believed to be turf scrapings is situated on the southern part of the plot and has become overgrown with long grass. Overall, these plots have the appearance and character of a residential garden.
- 4.5 Plots 5 and 6 are the most easterly plot to the rear of Fernleigh and Eastry. There is no visible fence between the rear garden of Fernleigh and the plot. There is a picket fence on the rear boundary of Eastry with an additional low picket fence enclosing an area of land immediately to the rear of Eastry. It is understood that this is to maintain the privacy of the rear garden to Eastry. There are a number of cultivated vegetable plots on the northern part of this plot to the rear of Fernleigh and the rest of the land is closely mown in the style of a garden lawn. Overall these plots have the appearance and character of a residential garden.

- 4.6 These activities, whilst different from plot to plot have visibly changed the character and use of the land as a whole and amount to a material change of use from agricultural land to use as private residential gardens with a domestic appearance and character. The erection of the fences has facilitated this change of use and the installation of a child's climbing frame and slide adds to the domestic appearance and character of the current use.
- 4.7 The climbing frame is of a size that would be expected to need to be fixed to the ground in some way. It is not permitted development because it is not within the lawful curtilage of a dwellinghouse. The fences constitute permitted development, but they have been erected solely to separate the plots and have therefore facilitated the unauthorised change of use. The cases of *Murfitt v. Secretary of State for the Environment and East Cambridge District Council* (Divisional Court of Queens Bench, Waller L.J. and Stephen Brown J., May 6, 1980) and *Somak Travel Ltd v. Secretary of State for the Environment and London Borough of Brent* (Queens Bench Division, Stuart-Smith J., May 20 1987) established the principle that operations that have taken place to facilitate an unauthorised change of use can be required to be removed even if they may be immune from enforcement action, are permitted development or are not development at all.

## **5. Determining Issues:**

- 5.1 The site is situated within the Metropolitan Green Belt. Case law and appeal decisions have established that the use of agricultural land as domestic garden comprises a material change of use. Paragraph 3.12 of PPG2 states that "the making of material changes in the use of land are inappropriate development unless they maintain openness and do not conflict with the purposes of including land in the MGB". It is considered that this unauthorised change in use of the land will not maintain openness and if unchallenged will allow for the provision of ornamental vegetation, the positioning of domestic paraphernalia (including garden furniture, washing lines, hard-standings, children's play equipment and toys) and potentially outbuildings which are ancillary to the dwellinghouse, on land which was formally open and did not contain any such items. A sizeable item of children's play equipment has already been placed on plots 3 and 4.
- 5.2 It is considered that the change of use does not assist in safeguarding the countryside from encroachment and would thereby conflict with one of the purposes of including land in the Green Belt. Accordingly, the unauthorised material change of use comprises inappropriate development within the MGB. Paragraph 3.2 of PPG2 states that "inappropriate development is, by definition, harmful to the Green Belt", whilst paragraph 1.4 states that "the most important attribute of Green Belts is the openness".
- 5.3 The site is relatively well screened within the wider landscape by existing mature vegetation located on the boundaries of fields and adjacent gardens. However, direct views of the site are available from the PROW which runs along the southern

boundary of the land. It is considered that the sub-division of the land with fences and the positioning of domestic paraphernalia do appear incongruous and cause definitional and actual harm to the openness of the Metropolitan Green Belt.

- 5.4 The unauthorised use is contrary to the advice provided in PPG2 and Policies CP3 and CP14 of the Tonbridge and Malling Borough Core Strategy in terms of inappropriate development and harming the openness of the MGB and is also contrary to the advice given in PPG2 and Policy CP24 of the Tonbridge and Malling Borough Core Strategy and Policy SQ1 of the Managing Development and the Environment Development Plan Document in respect of visual amenity and the rural character of the area.
- 5.5 Retrospective planning application TM/11/01873/FL was refused permission on 8 September 2011 because the unauthorised use is contrary to adopted Development Plan policy and national planning guidance. The applicant did not show any very special circumstances to justify inappropriate development in support of this application.
- 5.6 In all the circumstances, it is appropriate to take enforcement action to secure the discontinuance of this unauthorised use of the land and the restoration of the land to a condition fit for the purposes of an agricultural use. This will need to include securing the removal of the children's play equipment and the fences even if, taken in isolation, they may not be in breach of planning control because, as discussed above, works which facilitate an unauthorised change of use can be required to be removed even if they are permitted development or are not defined as "development" at all.

## 6. Recommendation:

An Enforcement Notice **be issued** as set out below and copies **be served** on all interested parties.

The Notice to take effect not less than 28 days from the date of service, subject to:

- The concurrence of the Chief Solicitor, he being authorised to amend the wording of the Enforcement Notice as may be necessary.
- In the event of an appeal against the Notice the Secretary of State and the appellant to be advised that the Local Planning Authority is not prepared to grant planning permission for the development the subject of the Enforcement Notice.

## 6.2 Breach Of Planning Control Alleged

Without planning permission, a material change of use from agricultural land to land for use as private residential gardens having a domestic character, the erection of fences to facilitate the change of use and the installation of a child's climbing frame and slide directly associated with the unauthorised domestic use of the land.

## Reasons For Issuing The Notice

It appears to the council that this breach of planning control has occurred within the last ten years. The site lies in the Metropolitan Green Belt where there is strong presumption against permitting inappropriate development, as defined in Planning Policy Guidance Note 2: Green Belts. The unauthorised change of use of the land from agriculture to land used for private gardens together with the erection of fences to facilitate this unauthorised use and the installation of a child's climbing frame and slide directly associated with this unauthorised domestic use of the land, comprises inappropriate development which is harmful to the openness and amenities of the Metropolitan Green Belt and is therefore contrary to Tonbridge and Malling Borough Core Strategy Policy CP3 and the national guidance provided in Planning Policy Guidance Note 2. The unauthorised change of use together with the fences, climbing frame and slide associated with the unauthorised change of use are visually intrusive which is detrimental to the local distinctiveness of the rural character of the area and visual amenity of the Metropolitan Green Belt, especially as may be experienced by users of the Public Right of Way adjacent to the southern boundary of the land. The unauthorised change of use and associated operations are contrary to Tonbridge and Malling Borough Core Strategy Policies CP1, CP3 and CP24, Tonbridge and Malling Borough Managing Development and the Environment Development Plan Document Policy SQ1 and the guidance provided in PPG2: Green Belts. Retrospective planning application TM/11/01873/FL for the change of use of the land from agriculture to private garden through incorporation into six domestic curtilages was refused planning permission because the unauthorised use is contrary to adopted Development Plan policy and national planning guidance and because the imposition of planning conditions could not overcome these objections. The Enforcement Notice is necessary to alleviate the nuisance and detriment to amenity resulting from the unauthorised development.

## Requirement

1. Permanently stop using the land as domestic garden
2. Remove all fences within the original boundaries of the land as shown edged black and hatched black on the plan attached to the Enforcement Notice.
3. Permanently remove the child's climbing frame and slide from the land.
4. Reinstate the land to a condition fit for the purposes of an agricultural use.

## Period For Compliance

Three calendar months from the date when the Notice takes effect.

Contact: Gordon Hogben

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**SUPPLEMENTARY REPORTS**AREA 2 PLANNING COMMITTEE  
2011

DATED 26 October

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**Ryarsh                    11/00198/UNAUTU                    567465 158462**  
**Downs****Land Rear Of Houses On London Road Ryarsh West Malling Kent**

One of the occupiers of the land has written as follows:

“We are writing to you with regards to the enforcement notice that you are considering issuing. All parties with interests adjoining the land have spoken and thought that it may help if we explain our intentions of use.

Our intended use of the land is to create additional area for growing vegetables, wild flower & grass meadow, planting fruit trees. I understand some of the issues stated in your letter were caused by the children’s climbing frame, if this is in breach of any law we can remove it from the land immediately as it is not a permanent structure. Seeing as the land is known as the pear orchard, we would like to plant some fruit trees including pear trees near the public pathway to obtain some historical substance. The land has been unused and overgrown for over 10 years and now has very restricted access to the plot due to overgrown trees, bushes and other property modifications. This means that it is very difficult for the land owner or a farmer to drive a tractor or other machinery into the plot to maintain the grass, weeds, especially the horsetail weed which is spreading rapidly and is poisonous if eaten by animals.

I also think that it is worth mentioning that the two plots adjacent to the pear orchard have gardens extending all the way back to the public footpath at the rear. So maybe at some point in the past the other properties have been granted permission to extend their gardens? If permission for change of use is granted it would mean that the lie of the land would flow from garden to garden and would help blend the current step in the landscape plan.

We understand that the view whilst walking along the public path would change, but we feel it would be for the better as the land will be maintained and looked after on a regular basis, with each tenant investing in trees and wild flowers to enhance the appearance from the footpath. If the change of use of the land is agreed it would have an amazing impact on the lives of all prospective tenants and their families future, allowing for sustainable living through growth of our own fruit and vegetables whilst educating our children where food comes from and how to grow vegetables, an enhanced community spirit of sharing crops between neighbours and the enjoyment of seeing families and children socialising together. It seems such a shame that only one negative appeal can have such a huge impact on so many people’s livelihoods. We would be extremely grateful if you would reconsider the application.”

DPTL comment: Planning permission has not been granted to extend the gardens of either of the properties adjoining the western or eastern boundaries of this site. The current extent of both properties are as shown on the 1963 edition of the Ordnance Survey map and appear to be contemporary with the respective houses. The five houses to the west of this land all have gardens that extend to the PROW, but are of differing sizes due to the diverging angle of the PROW away from the rear of the affected properties. Prior to the submission of application TM/11/01873/FL, it was informally and without prejudice suggested to the applicant that the use of a smaller area approximately in line with the end of the garden adjoining the western boundary may be supportable. However the application submitted applied to the change of use of the whole of the land.

**RECOMMENDATION REMAINS UNCHANGED**

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