



**Application No:** 09NP0043

**Proposed Development:** APPLICATION FOR A LAWFUL DEVELOPMENT CERTIFICATE FOR AN EXISTING USE of land as garden; and for LAWFUL DEVELOPMENT for a section of fence at The Badger, Swindon, Sharperton, Morpeth, Northumberland, NE65 7AP

**Applicant Name:** Dr W Pickering

**Agent Name:** Richard Buxton (Solicitors)

## 1. Proposal and Site

1.1 The Badger is a detached dwelling house at Swindon, which is a small hamlet on the B6431 road from Rothbury to Elsdon, approximately 1km west of Hepple, at the junction with the minor road to Holystone.

1.2 This application has two parts: first, the areas of land to the east and north of The Badger, alongside the burn and the land that extends as far as the boundary annotated on the attached plan "1999 garden boundary". A certificate of lawful existing use is sought for these pieces of land on the grounds that the use of this land as a domestic garden began more than 10 years before the date of this application.

1.3 The second element is the section of fence annotated "2003 fence" for which a certificate of lawful existing development is sought. This is claimed on the basis that the fence was substantially completed more than 4 years before the date of the application. It is also claimed that the fence is "permitted development". This "2003 fence" forms the current fence line to the north of the property.

1.4 Significantly the application does not include the change of use of the parcel of land that is beyond the line of the "1999 fence" and enclosed by the "2003 fence".

1.5 A number of supporting documents labeled AA to P have been submitted in support of the application. These are assessed in section 5 of the report.

1.6 The land is within the Coquetdale and Holystone Site of Nature Conservation Importance, which is a local level of nature conservation designation.

1.7 Additional information received 9<sup>th</sup> November 2009.

1.7.1 Additional photos labelled Q, R and S have been submitted showing the land which is enclosed by the "1999 fence". Photos T, U, V and W show the "2003 fence", which is the current fence line. Photos X and Y were taken this summer; picture Y is a similar view to picture W, taken some years apart.

## 2. Planning Policy

2.1 Not applicable to an application for a Certificate of Lawfulness.

## 3. Planning History

3.1 85/A/227 Construction of rear extension. Approved with conditions 26/07/85  
86/A/269 Construction of domestic garage. Approved with conditions 11/07/86



90/A/291 Erection of 2 detached bungalows on land adjacent to Grasslees Cottage, Swindon. Refused 17/07/90 - Appeal Dismissed 25/04/91

98/NP/20 Construction of storage building. Refused 21/07/98

07NP0011 Construction of garden shed. Refused 15/05/07

**08NP0018 retrospective application for change of use from agricultural land to domestic garden at The Badger. Refused 18/06/08 – appeal dismissed 24/02/09**

08NP0019 construction of garden shed – refused 29/07/08

#### 4. Consultations/Representations

4.1 Hepple Parish Council: No response

4.2 Northumberland County Council Planning: No response

4.3 NNPA Area Operations Manager: No response

4.4 NNPA Archaeologist: No response

4.5 NNPA Ecologist: The Phase 1 [survey] from 1992 shows the whole parcel as semi-improved grassland, but the polygon takes in the cottages as well.

4.6 NNPA Landscape and Recreation Manager: No information relating to the site and the date of the change of use.

4.7 Public Response: Three letters of representation were received from residents neighbouring the site relating to the application as submitted. Two further letters from the same residents have been received in relation to the further information received on 9<sup>th</sup> November. Their letters are appended in full. To summarise, they object on the following grounds:

- The applicant has withheld material information about the history of the site and its planning status
- The ten years required to obtain a certificate of lawful use have not elapsed because The National Park Authority refused the planning application for the change of use of the land in June 2008. This action was taken a full year before the minimum 10 years has elapsed – the 1999 enclosure was fenced in March of that year - therefore the Certificate should not be granted
- The documentation provided in support of the application is imprecise, ambiguous and inaccurate; the invoices for the fencing cannot be definitely related to the garden fences, as the applicant has had new fencing erected elsewhere on land in his ownership
- The 2003 section of garden extension is not eligible to be considered for a Lawful Development Certificate because it was only turned into garden land in 2003, and therefore the 10 years required for it to be eligible for a LDC have not elapsed.
- Plan 2, Document E, submitted in support of the application, is undated, but is based on a pre-1933 map, which does not show Grasslees cottage built in that year, replacing the “Kennel”.



- According to the applicant's supporting statement the fence line was moved north in 2002 before being moved further out to its present position in 2003. The 2002 fence is referred to by reference to document L, but it is not shown.
- The date and location of the photographs submitted as "AA" are not proven
- Documents A – F are not relevant to the application, but rather are concerned with land ownership
- Document G cannot be related to the land that is the subject of the application
- Photograph H cannot be definitively related to the land in question
- Documents I, J1 and J2 do not accurately depict the subject which they purport to portray, therefore they should not be admissible as evidence
- Documents K, L and M, invoices for the fencing, cannot be definitively related to the land that is the subject of the application – but rather relate to tree planting along the B6431 and Holystone roads.
- Documents N and O, OS maps produced in 2007, contain features from various dates and do not prove the 1999 fence line of the garden.
- Document P cannot be definitively related to the land that is the subject of the application
- A plan submitted with application ref.98NP20 in April 1998 (for the construction of a storage building) contradicts a plan submitted by the applicant in March 2009 (before this application was submitted) showing the sequence of the garden's enlargement.
- A photo in the file for application ref.98NP20 from 1998 shows the fence line in its original position – again contradicting the plan submitted by the applicant in March 2009 (not part of this application)
- The application for a shed in 1998 was rejected (in July 1998) because the applicant had not sufficiently demonstrated an agricultural need for the proposed building - the neighbour contends that the officials at the time therefore must have found no evidence of any garden or horticultural activity on this land at that time
- The photos J1 and J2 (purporting to show the 1999 garden boundary, and developed in July 1999) were taken within a year of the refusal of planning application ref.98NP20 – it would not have been possible for the garden to have been created within this timescale, particularly as the owner did not permanently live there
- On the balance of probability the evidence does not sufficiently justify granting the Certificate
- Given the planning history of the site enforcement action should now be taken



New points raised in response to information received 9<sup>th</sup> November 2009:

- The legal planning process at local and national level has already declared the garden to be unlawful; on at least 7 occasions the applicant has attempted to seek authority to develop upon the land that is the subject of this application, and all have been rejected or dismissed
- Even if the fence is “permitted development” and has been there for more than 4 years, this does not authorise the change of use
- The photos offer no evidence of the actual position of the fence
- The fenced off area contains rough grass, mostly uncut and tree planting – normal features of agricultural land, which do not necessarily constitute a change of use
- The applicant has not informed the Land Registry of any of the changes to boundaries, fence lines
- The land is subject to restrictive covenants that have not been declared in the application for a Certificate of Lawfulness
- The Rural Land Register - updated July 2009 and subject to the 2008 DEFRA funded satellite digital mapping survey - does not show the “2003 fence line” – it is claimed this is a very recent structure, possibly less than 12 months old, and that another fence line was in existence when the survey was undertaken
- The additional photos cannot be accurately dated – it would be easy to get a contact sheet printed today - the contact sheet does not give the date the pictures were taken but rather the date they were developed. These pictures are therefore inadmissible as evidence

**5. Assessment**

- 5.1 Section 191 of the Town and Country Planning Act 1990 (as amended) advises that uses are lawful where no enforcement may be taken in relation to a breach of planning control. Section 171B of the Act and Annex 2 of DOE Circular 10/97 states that the relevant periods are 10 years for development including the change of use of land (ie. from agricultural land to use as a domestic garden), and 4 years for building and other operational development (ie. the fence). The four/ten year periods for the purposes of lawfulness are only suspended by the serving of an enforcement notice, and not by the refusal of planning permission. The relevant test which the Authority must apply in the consideration of this application is “the balance of probability”.
- 5.2 To obtain a Certificate of Lawfulness for the Existing Use of the land identified in the submitted plan, the applicant needs to demonstrate that the land which is the subject of the application has been used as a garden continuously for at least 10 years. To obtain a Lawful Development Certificate for the 2003 section of fence the applicant needs to demonstrate that it has been in that position for at least 4 years. The applicant also claims that the fence by itself is “permitted development”.



- 5.3 The evidence submitted to support the applicant's claims is as follows, together with an assessment of the extent to which each element supports the application:
- 5.3.1 AA: Two photos dated 1984 and 2008 which it is claimed show the stream corridor to the east of The Badger, with cattle in 1984 and with maturing trees and bushes in 2008. The 2008 picture is considered to show the land in question – the garden ornament being a distinguishing feature which has been observed by officers on this land at the present time. The earlier photo cannot be categorically linked with the land in question. Photos AA do not therefore prove that the change of use of this land occurred more than 10 years ago.
- 5.3.2 A, B, C, D, E: letter dated 6.2.85 from Holystone Estates Ltd regarding the sale of the parcel of land to the east of the cottage comprising the stream corridor; and the conveyance and related plans. The conveyance requires fencing of same. A change in ownership does not necessarily mean that a change of use of the land would have occurred at this time. A requirement to fence the land would not necessarily result in a change of use. It is considered that some other corroboration should be provided by the applicant. This item does not by itself therefore support the application.
- 5.3.3 F: letter from solicitors dated 12.3.90 regarding the purchase of two pieces of land in March 1990 and which makes reference to the earlier purchase of land (referred to in items A – E) in July 1985. Without a plan accompanying this letter it is unclear to which land the 1990 purchase relates.
- 5.3.4 G: invoice for fencing dated 20.6.85. The invoice cannot be categorically related to a particular section of fencing. In any event fencing in itself does not necessarily mean that a change of use of the enclosed land has occurred.
- 5.3.5 H: Photo dated 29.6.86 which it is claimed show the land purchased in 1985, enclosed by a post and rail fence and closely mown grass. The applicant states that the lady on the left is his mother, and that she died later that same year, which underlines the date. The shape of the land with the tree shaded stream corridor to the right and the fence line visible in the background would fit with the land identified in the purchase documents A – E above. The applicant submits that a pale patch at the furthest end of the enclosed land indicates the position of the septic tank. This is shown in this position on plans submitted with an application submitted in 1998 (ref.98NP20). Although this land has subsequently been planted with trees and bushes, the mown lawn shown in the photo, including stripes that would suggest a domestic lawn mower, would be considered sufficient to demonstrate a change of use from agricultural land to garden. This photo together with the purchase documents A – E above would be considered sufficient to prove that this particular parcel of land, to the east of The Badger and alongside the stream, has been used as garden for at least 10 years. This does not constitute all of the land applied for however.
- 5.3.6 I: evidence of date of processing of photos J1 and J2 on 28.7.99. This is an index print bearing the date 28/07/99 and the name of the photographic shop where the film was developed. Two of the photographs, 1A and 8A are the photographs submitted as items J1 and J2. Taken at face value, this appears to validate J1 and J2 as dating from the summer of 1999.



- 5.3.7 J1 and J2: pictures showing fence line enclosing land to the north of The Badger in 1999. This is not the fence line today. Comparison with the position of the telegraph pole against recent photos of the site show a different fence line than today. These photos, J1 and J2, do sufficiently demonstrate that that was the position of the fence on 28.7.99. Its presence for more than 10 years can therefore be proven. Crucially however, what is not clear from these photos is whether there has been a change of use of the land so enclosed by the 1999 fence in July 1999. In this respect these photos do not categorically demonstrate that a change of use has occurred to domestic garden in respect of this piece of land to the north of The Badger.
- 5.3.8 K: invoice for fencing dated 15.3.99. It is not possible to relate this invoice to the parcel of land to the north of The Badger, as shown in photos J1 and J2.
- 5.3.9 L: invoice for fencing dated 2.3.02. The applicant states that the 1999 fence line to the north of the property was again extended north in 2002. It is not possible however to relate this invoice to a particular section of fence. In any event this fence is no longer there, and the land that was enclosed by it (beyond the 1999 fence line) is not the subject of the application. This item is therefore strictly speaking irrelevant to the application.
- 5.3.9 M: invoice for fencing dated 15.3.03. The applicant states that this invoice relates to the current fence line to the north of The Badger. It is not possible to categorically relate this invoice to this section of fence.
- 5.3.10 N: OS maps of garden showing extended garden boundary. The date on the OS map (N) indicates it was produced in 2007. This map shows the position of the 1999 fence line. Importantly, the presence of the fence does not necessarily mean that there has been a change of use of the land enclosed by it.
- 5.3.11 O: OS map showing the area of land relating to the change of use element of the application, and the development (the 2003 fence) element.
- 5.3.12 P: photo of mature garden shrub. The applicant states that this is within the "1999" area of garden. It is not possible to relate this picture to this piece of land.
- 5.3.13 Reference to Google Earth maps show an image dating from 1999/2000. The image shows the 1999 fenceline, however it is not clear enough to establish whether a change of use of the land to the north of The Badger has occurred by this date.
- 5.3.14 Q: evidence of date of processing of photos R and S on 28.7.99. This is an index print bearing the date 28/07/99 and the name of the photographic shop where the film was developed. Two of the photographs, 6A and 7A are the photographs submitted as items R and S. Taken at face value, this appears to validate R and S as dating from the summer of 1999.
- 5.3.15 R and S: 2 very similar photos showing the fence line enclosing land to the north of The Badger in 1999 (this is not the fence line today). These photos, R and S, show at least 8 plants which appear to be newly planted inside of tree/plant guards, and a swathe of grass that has been cut around these plants. The grass in the left of the picture is uncut, and appears similar to the hayfield on the other side of the fence that has just been cut and baled in the photo. The date of the photos indicates that the plants were put in more than 10 years ago. Whether this planting and the grass



cutting is sufficient to constitute a change of use to garden is crucial to the determination of this application. On balance, it is considered that this does show a change of use because a distinction may be drawn between the agricultural use of the land beyond the fence as a hayfield, and planting on a domestic scale and in a layout that may suggest a boundary screen or backdrop of shrubs, bushes or trees that would form a visual screen at the foot of a garden. This is a very finely balanced view however, and it is not considered to prove a change of use “beyond all reasonable doubt”. It is not possible to ascertain from these 2 photos what species of plant have been planted here, and whether the type of plant would be more indicative of a garden or of species typical of any field hedgerow or copse. This photo would however suggest “on the balance of probability” that a change of use had occurred to domestic garden in respect of this piece of land to the north of The Badger enclosed by the “1999 fence” i.e. more than ten years ago.

- 5.3.16 T and U: evidence of processing of photos V and W respectively. These are index prints both bearing the dates 2.6.03, again by Robertsons of Gosforth.
- 5.3.17 V and W show the “2003” fence (which is the current fence), and the date of the photo would suggest that it was there in 2003, i.e. more than 4 years ago, and therefore support the element of the application for the certificate of lawfulness for the operational development, i.e. the fence.
- 5.3.18 X and Y: photos taken in the summer of 2009 showing the current fence line. The applicant contends that comparison with photos V and W indicates that this is the same fence. The small enclosure within the most recent fence line may be seen in photos W, from 2003, and X, taken this summer. This has been a small rabbit proofed vegetable plot.

Other issues raised in representations:

- 5.3.14 The ten years required for a Certificate of Lawfulness is not cut off by the decision in 2008 to refuse planning permission for the change of use of the land. Only a formal enforcement notice would “stop the clock”.
- 5.3.15 The plan submitted by the applicant in March 2009 (before this application was submitted) showing the sequence of the garden’s enlargement is not to scale, it is diagrammatic, and it does not form part of this application.
- 5.3.16 The planning history of the site has no bearing on the determination of this application, which turns solely on the evidence submitted in support of the claims being made.
- 5.3.17 The Land Registry keeps records of ownership and not uses of land. Any covenants relating to the land are not relevant to planning or an application for a Certificate of Lawfulness.
- 5.3.18 The information relating to the Rural Land Register submitted by a neighbouring resident would appear to show the older (1999) fence line around The Badger. The neighbour states that this map is based on a 2008 survey, thus disputing that the current fence has been in place for more than 4 years. Whether this fence has been there for 4 years or not, is not crucial however, because it is a fact that the fence in



itself is “permitted development” anyway under Schedule 2, Part 2 of the Town and Country Planning (General Permitted Development) Order 1995.

- 5.3.19 The authenticity of the contact sheets is accepted. The level of authenticity that has to be proven for a Certificate of Lawfulness is not as high as in a court of law. Whilst they might not be accepted as admissible evidence in a criminal case, it is considered that they are sufficient to show the date that the photos were developed. In this regard the Authority should have regard to central government advice contained in Circular 10/97 which states: *The Courts have held.....that the applicant's own evidence does not need to be corroborated by independent evidence in order to be accepted. If the LPA have no evidence of their own, or from others, to contradict or otherwise make the applicant's version of events less than probable, there is no good reason to refuse the application, provided the applicants own evidence alone is sufficiently precise and unambiguous to justify the grant of a certificate on the 'balance of probability'.*
- 5.3.20 Whilst the objectors to the application have raised a number of issues in relation to the veracity of the evidence put forward by the applicant, there are other factors that lend credibility to the dating of the photographs. In relation to photograph W (which the applicant maintains dates from the summer 2002), showing the fence on its current alignment, it is noticeable that fairly large tree shown in photograph Y (summer 2009) is absent. The amount of growth evident in the 2009 photo must suggest that photograph W dates from several years ago, probably from as long ago as 2002.
- 5.3.21 Other evidence that can be used to test, up to certain point, the veracity of the applicant's photos are the aerial photographic records. The position of the 2002/03 boundary is corroborated by the aerial photograph on Google Earth which can be used to view the situation in December 2003, and which clearly shows the fence line in its current northmost position. It is also noticeable on this aerial photograph that remnants of the 1999 boundary are still visible, although ‘greening over’. By the later photograph which can be viewed on Google Earth (which appears to date from 2006) all trace of the 1999 fence line has disappeared. It is not of course possible to say that the 2003 photograph establishes that the land within the 1999 boundary was in garden use ten years ago, but it weighs in favour of the ‘balance of probability’ being that it was.

## **6. Conclusion**

- 6.1 Documents A – E and H are considered sufficient to demonstrate that the land to the east of the property, purchased in 1985, was enclosed and a change of use of this piece of land to domestic garden had occurred in 1999. The case for the application, as far as it relates to this part of the land, is considered to be proven.
- 6.2 Documents I and J1 and J2 demonstrate that the fence line shown on the submitted plan annotated as the “1999 fence line” to the north of the property was in existence in 1999. Documents Q, R and S received on 9<sup>th</sup> November 2009 do now show enough of the land enclosed to satisfactorily prove that a change of use to garden has occurred in respect of this piece of land. Photo P cannot be categorically related to this land, and the maturity of the planting is not accurate enough evidence to demonstrate a change of use for more than 10 years. The invoices for the fencing



work cannot be related categorically to any particular sections of fence line. Nevertheless I, J1 and J2, together with Q, R and S are considered sufficient to prove on the balance of probability that there was a change of use of this piece of land to the north of The Badger more than 10 years ago. The application is therefore recommended for approval.

- 6.3 The “2003 fence” would by itself be considered to constitute “permitted development” under Part 2 Class A of The Town and Country Planning (General Permitted Development) Order 1995. The application does not actually include the change of use to garden of the land enclosed by the “2003 fence line”. This land therefore remains unauthorised for use as garden land. It is important to bear in mind that the fact that a fence may itself be permitted development does not authorise a change of use. Also a requirement in an enforcement notice to return the land to agricultural use can require the removal of the fencing, notwithstanding the fact that the fence is permitted development. However, the application seeks confirmation that the fence has been in existence for a period in excess of four years and given that the balance of probability is that it has, the Certificate of Lawfulness that is issued should acknowledge this.
- 6.4 It must be stressed that this is very much an “on balance” recommendation. The crux piece of evidence is considered to be photo R. On the balance of probability it is considered that the evidence submitted does show that a change of use to garden of *all* of the land which is the subject of this application (ie. that to the east purchased in 1985 *and* the land to the north of The Badger, beyond the original garden boundary and enclosed by the 1999 fence line – not the current/2003 fence line) did occur more than 10 years ago. Therefore the application should be granted.

### **RECOMMENDATION**

#### **That the Certificate of Lawfulness for an existing use be granted for:**

- A. Site: land as shown on the attached plan, submitted with the application ref.09NP0043  
For: change of use of land from agricultural to domestic garden (Use Class C3); and
- B. Fence erected on the line shown on the attached plan (the ‘2003 fence’).

#### **Contact Officer:**

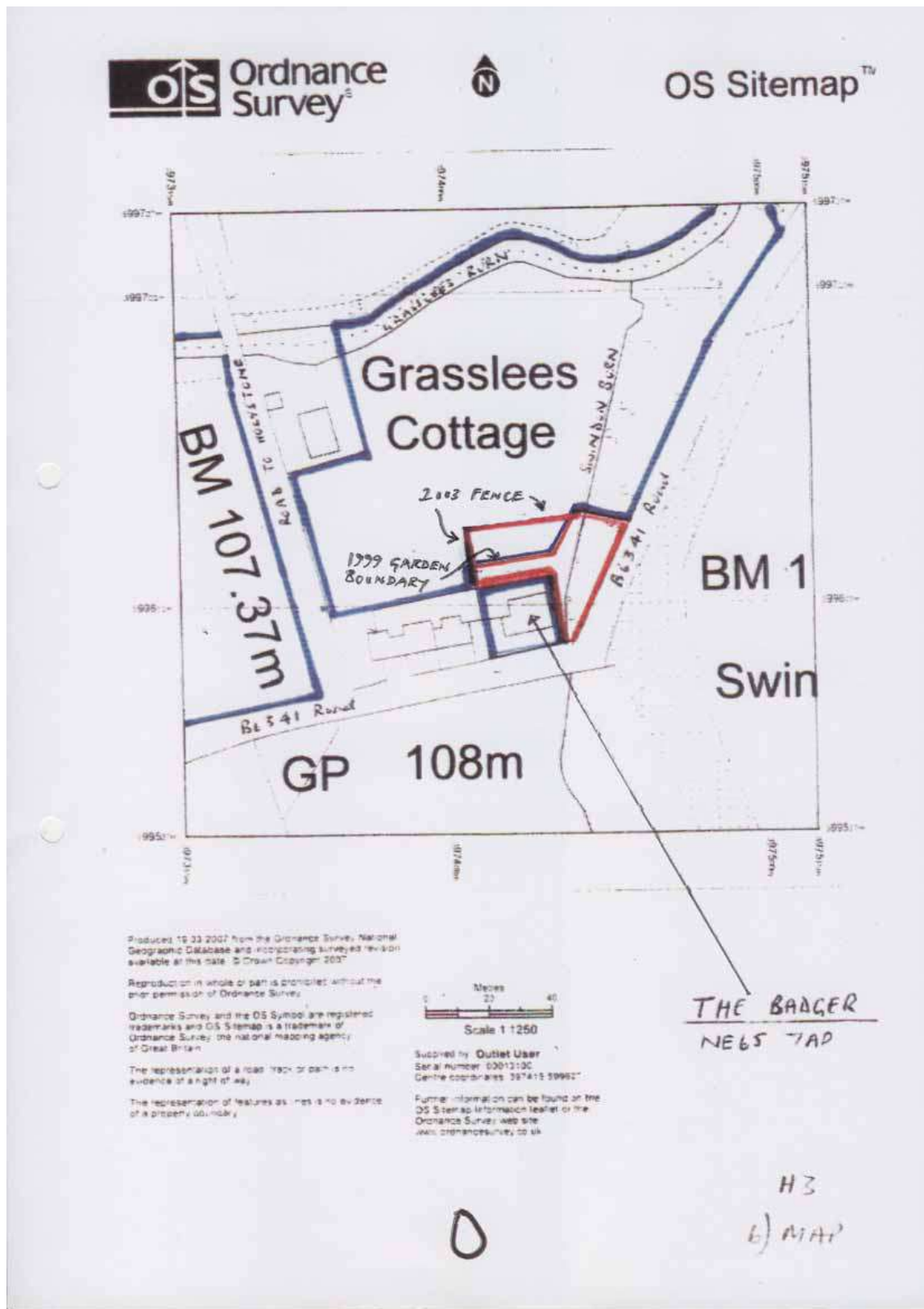
For further information contact Ms L Butler, Development Control Manager, on 01434 611508 or e-mail: [planning@nnpa.org.uk](mailto:planning@nnpa.org.uk).

#### **Background Papers:**

Planning Application Files: 09NP0043, 08NP0018 and 98NP20



Plan submitted as part of the application





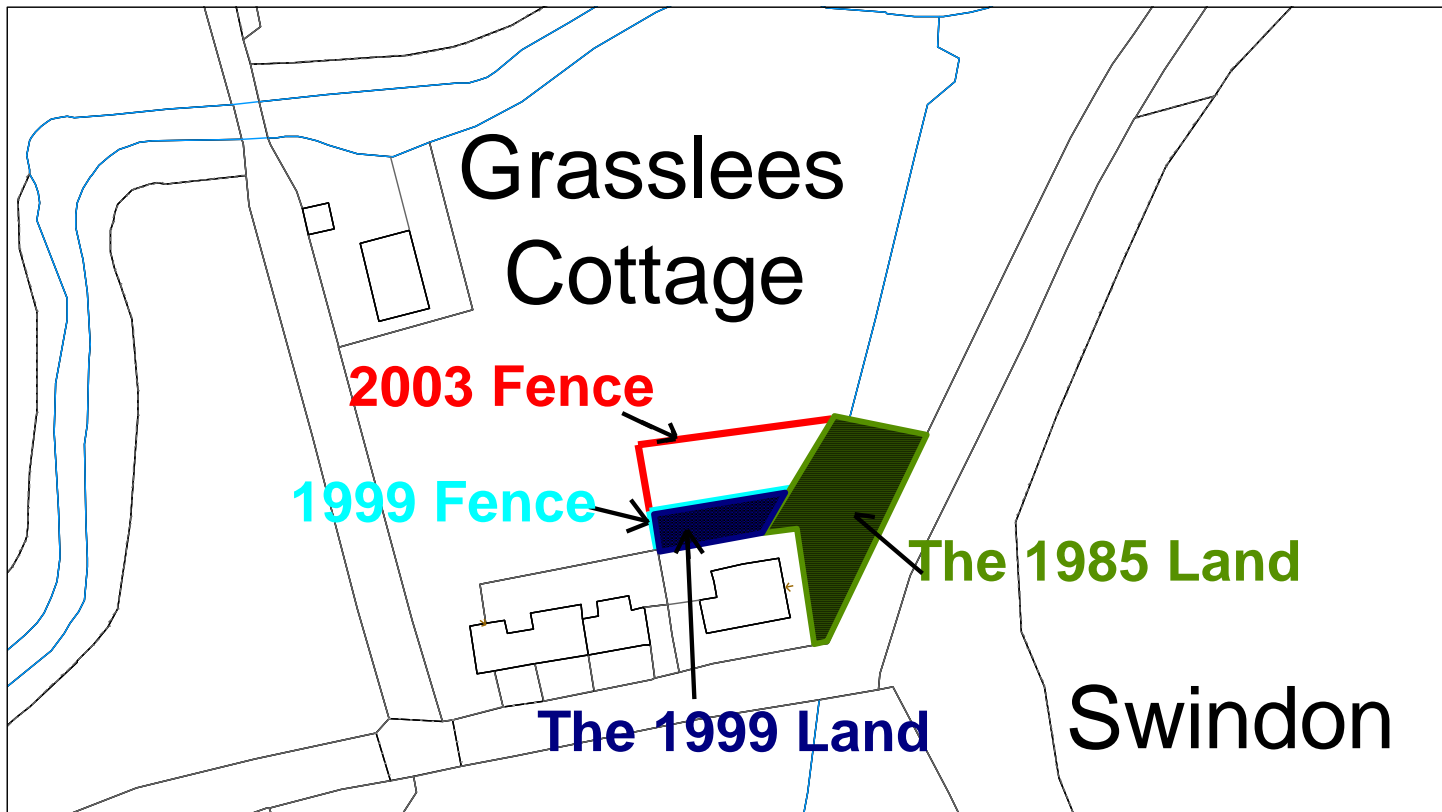
**09NP0043 Badger CLEUD**

Compiled by Northumberland National Park Authority on 30 October 2009

Northumberland National Park Authority



Scale 1:1000



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