

DELEGATED OFFICER REPORT



WOKINGHAM
BOROUGH COUNCIL

Application Number:	242499
Site Address:	178 Land At, Bearwood Road, Barkham, Wokingham, RG41 4SH
Expiry Date:	12 February 2025
Site Visit Date:	26/11/2024
Proposal: Application for a certificate of existing lawful development for the incidental residential garden use of land associated with The Lodge (also ancillary development associated with construction of dwelling).	

PLANNING HISTORY

Application No.	Description	Decision & Date
061138	Application for a certificate of existing lawful use for the use of an existing annexe as a separate dwelling.	Approved: July 2006
231275	Application for a certificate of existing lawful development for the use of a residential dwelling house outlined in red on the attached plan, the use of a wood store and shed outlined in green on the attached plan, and construction of 3no. buildings outlined in blue on the attached plan	Approved: 09/10/23
231276	Application for a certificate of existing lawful development for the use of a residential dwelling house outlined in red on the attached plan and the use of the building outlined in blue for the storage of household, DIY and gardening equipment by the residents of the dwelling outline in red	Approved: 13/10/23
240935	Application for a certificate of existing lawful development for the incidental residential use of land associated with The Lodge, plus a septic tank.	Refused, 10/06/2024

INFORMATION PROVIDED

By the applicant:

- Lawful Development Certificate Application form:
- States that the use began more than 10 years before the date of this application.

Statutory Declaration of Christopher Kay dated 28/03/2024

- Currently resides at The Lake House
- A large family unit occupied no.178 Bearwood Road during Christopher's childhood between 1957 – 1994
- Christopher, his wife Mary Elisabeth Kay, and children moved into No.178 Bearwood Road in 1994.
- Activities detailed in the declaration had changed the layout of the garden, the activities and use was still that of an incidental residential nature serving the dwelling between 1994 – 2008, across the whole of the site.
- Arrangement changed in 2008 upon the completion of 'The Lodge'. Upon the occupation of The Lodge, Philippa Kay and Luke Sanders began using part of the site as their private garden effectively 'severing' it from the garden of no.178 Bearwood Road.
- Upon the completion of 'The Lake House' in 2013 and its occupation by Joseph Kay, the area around The Lake House was severed from the garden of no.178 Bearwood Road.
- In 2022, Christopher and Mary Elisabeth Kay moved into The Lake House and vice versa Joseph Kay, his wife and children moved into no.178 Bearwood Road. This has resulted in Christopher and Mary Elisabeth Kay using the incidental area (including incidental/ancillary buildings) associated with The Lake House (not retaining any of the garden they benefited from using when occupying no.178 Bearwood Road prior to 2022)

Statutory Declaration of Philippa Kay dated 28/03/24

- States the incidental use of the wider garden solely associated with no.178 Bearwood Road until 2008 when The Lodge completed and occupied.
- States the severing of the garden from no.178 Bearwood Road in 2008.
- Presence of a septic tank and garden activities including martial arts, gymnastics, trampolining and attaching swings to trees in the garden area
- The activities in the garden changed in 2012 owing to the birth of Philippa and Luke's daughter Frida but remained in a use incidental to the dwelling house. Includes birthday parties, log stores and a compost heap.
- The creation of several vegetable patches on site. These were maintained between 2010-2012 and 2019-2022 (no longer on site).

Statutory Declaration of Joseph Adam Kay dated 28/03/24

- (Current occupier of no.178 Bearwood Road), confirms the garden layout of no.178 Bearwood Road as per GCLBW002 since 1994 – 2008 having lived and grown up at the property since 1994.
- States the incidental activities that occurred during this time.
- Joseph moved into The Lake House in 2013 and became responsible for the maintenance of the garden as indicated in drawings GCLBW003 and GCLBW005 (and at this point these areas were no longer part of the garden of no.178 Bearwood Road). The declaration also details that the activities undertaken by occupiers and areas occupied by The Lake House also did not overlap with the resultant garden area of no.178 Bearwood Road, nor that of The Lodge.
- The declaration states the other declarations in confirming that in 2022, Joseph and his family moved out of The Lake House and into no.178

Bearwood (whilst Christopher and Mary moved into the Lake House). This coincided with all the garden areas remaining the same (with garden areas not changing as they are associated with their dwellings and not their occupiers).

- Having resided at the Lake House since 2013 and being a close family member, Joseph is able to attest that Philippa and Luke have lived at The Lodge since 2008 and have had their own separate garden area, which does not overlap with the gardens of The Lake House nor 178 Bearwood Road.

Statement of Truth from Mike Powell dated 04/04/24

- Corroborates and witnesses a number of the activities and features described in Appendix 2 largely pertaining to outdoor sports, attending parties, socialising.

Statement of Truth from Shaini Patel 05/04/24

- Incidental residential use of the garden surrounding The Lodge since 2015. This involves socialising and attending parties. Notably, Shaini's daughter has attended a number of birthday parties at The Lodge and confirms both of her children have played in The Lodge garden with Philippa's daughter Frida
- Aerial Imagery of The Lodge (provided by Google Earth Pro) dated from 2005 to 2023.
- Photographs detailing the Incidental Residential Use of Land: from 2008 to 2023.

By the Council:

- Aerial images from the Council's mapping.
- Google Earth images.
- Site visit photographs taken on 26/11/2024.
- Defra Magic Map.

By third parties: None

SITE DESCRIPTION

The application site is situated to the rear garden of No. 178 Bearwood Road and is accessed via a gravelled track off the access that serves the main property. Due to its location, it is not visible from the highway.

The site is located within countryside and has strong woodland characteristics.

There are no listed buildings at the site and the property is not within a Conservation Area or other 'Article 2(3) land' (Town and Country Planning (General Permitted Development) Order 2015).

LEGISLATION

Town and Country Planning Act 1990 (as amended)

Section 55(1) of the Town and Country Planning Act 1990 (as amended) defines

development as “the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land.”

Section 57 of The Town and Country Planning Act 1990 (as amended) requires that planning permission is required for the carrying out of any development of land. Section 171B (1) states that 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 ten years beginning with the date on which the operations were substantially completed.

Section 171B (2) provides that where there has been a breach of planning control consisting in the change of use of any building to use as a single dwellinghouse, no enforcement action may be taken after the end of the period of four years beginning with the date of the breach. The applicant is required to demonstrate on the balance of probabilities that the use commenced and has been continuous for 10 years prior to the date of application in order for the change of use to have become lawful.

Section 171B(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 that breach.

Section 191 deals with applications for Certificates of Lawfulness of existing development, and the authority’s duty to determine them. Section 191(1)(a) provides that if any person wishes to ascertain whether any existing use of a building or other land is lawful they may make an application for that purpose to the local planning authority specifying the land and describing the use, operations or other matter. As Section 191(1) (a) is written in the present tense, it is plain that the use must exist at the time of the application.

For the purpose of the 1990 Act s.191(2) defines operations as ‘lawful’ if:

- a) no enforcement action may be taken in respect of them (whether because they did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason); and*
- b) they do not constitute a contravention of any of the requirements of any enforcement notice then in force.*

Case Law

The courts have held in *Gabbittas v Secretary of State for the Environment* [1985] JPL 630 that the relevant test of evidence on such matters is ‘the balance of probability’. The Courts have also held that the applicant’s own evidence does not need to be corroborated by ‘independent’ evidence in order to be accepted. If the Local Planning Authority has no evidence of their own, or from others, to contradict or otherwise make the applicant’s version of events less probable, there is no good reason to refuse that application, provided the applicant’s evidence alone is sufficiently precise and unambiguous to justify the grant of a certificate on the balance of probability.

In considering applications for a Certificate the guidance given by the High Court in

Panton and Farmer v Secretary of State for the Environment, Transport and the Regions and Vale of White Horse D.C. [1999] JPL 461 is of value.

Three questions need to be answered. Firstly, “When did the material change of use specified in the application occur?” To be lawful, this would need to be before 1 July 1948, by 31 December 1963, or at a date at least 10 years prior to the current application, or 4 years for operational development or use of a building as a single dwelling.

Secondly, if the material change took place prior to those dates, has the use specified in the application been lost by operation of law in one of three possible ways, namely by abandonment, the formation of a new planning unit, or by way of a material change of use, be it by way of implementation of a further planning permission or otherwise.

Finally, if the decision maker is not satisfied that the description of the use as specified in the application properly describes the nature of the use, the decision maker must modify/substitute each description so as to properly describe the nature of the material change of use which occurred.

APPRAISAL

The application is for a Certificate of Lawful Existing Use to regularise the incidental residential use of land associated with The Lodge.

In determining a Certificate of Lawful Existing Use a Local Planning Authority needs to consider whether, on the facts of the case and relevant planning law, the specific matter is lawful. Lawful development is development against which no enforcement action may be taken and where no enforcement notice is in force, or, for which planning permission is not required. In the case of this Certificate, it must be demonstrated that the incidental residential use of land associated with The Lodge has been on-going continuously for at least ten years.

The National Planning Policy Guidance (NPPG) sets out that the onus of proof is on the applicant, not the Local Planning Authority in submitting a Certificate of Lawfulness. However, the NPPG also states that “if Local Planning Authorities have no evidence of their own to contradict or undermine the applicant’s version of events, there is no good reason to refuse the application provided that the applicant’s evidence is clear and unambiguous to justify the grant of a certificate”.

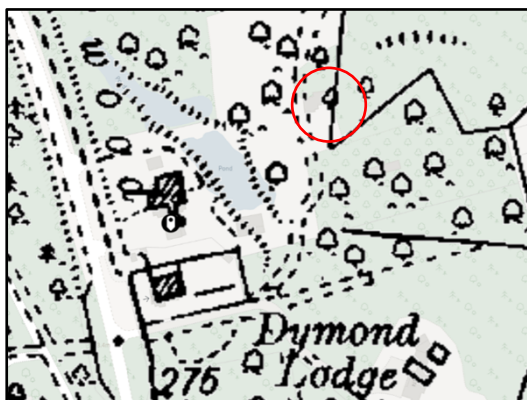
Where the burden of proof is on the applicant, the relevant test of the evidence on such matters is ‘the balance of probability.’ Planning merits are not relevant at any stage in the process however evidence from third parties, including neighbours, can be obtained should the Local Planning Authority consider it necessary to do so.

This application is a resubmission of a similar Certificate of Lawfulness of Existing Use or Development (CLEUD) application, which was recently refused in June 2024 under planning reference 240935. In this resubmission, the proposed garden boundary, as shown on the submitted red line plan, has been reduced in size and

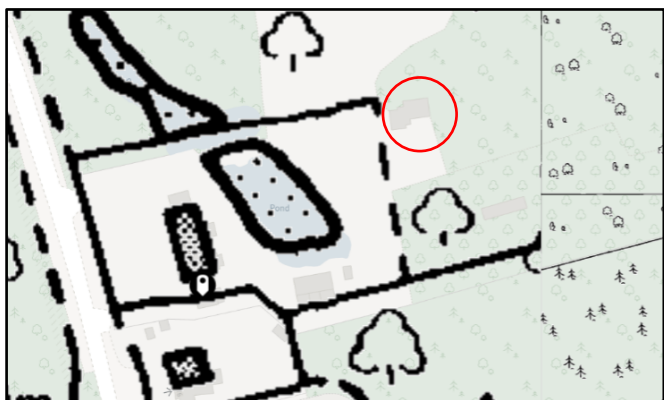
some further evidence has been provided.

The first claim to address is whether there has been a material change of use of the land because the land was incidental residential garden land as part of no.178 Bearwood Road, before The Lodge building was erected and occupied as a separate dwelling in 2008.

The above claim, that the land was incidental residential garden to 178 Bearwood Road, is not supported by historic aerial photographs or maps. Aerial Maps from 1960 – 1988 clearly show this land being outside of the residential boundary of 178 Lodge Road. It is cut off from the remaining land by ponds and woodland. This can be seen from the maps below with the underling layer showing the existing lodge outside of where the residential boundary was drawn for 178 Bearwood Road.



1960 Map



1988 Map.

The land being outside of the residential garden to 178 Bearwood Road continues through to the aerial photographs. Which shows the land to the north east as dense deciduous woodland (Agricultural Use) after Mr Christopher Kay and his family moved to 178 Bearwood Road in 1994. The aerial photographs below are overlaid with the submitted redline and shows how the majority of the land claimed to be garden was dense woodland.



Aerial Photo 1999



Aerial Photo 2003

In addition to the above, Historic Tree Preservation Orders (TPO-0087-1978 and TPO-0020-1973) relate to large sections of the land immediately to the north and northeast of The Lodge property. The Woodland Preservation Orders are not

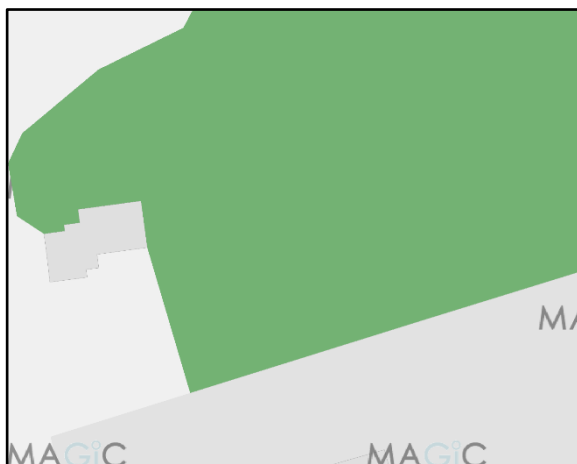
compatible with a residential use of the land and to cultivate as domestic garden would be to violate the TPO requirements.



Aerial imagery taken in 2022. The trees within the red polygon boundary are subject to Woodland Preservation Orders (TPO), specifically TPO-0087-1978 and TPO-0020-1973.

The TPOs also ensure that regenerative natural regrowth is protected after the TPO is made, this is because the purpose of the TPO is to safeguard the woodland unit as a whole, which depends on regeneration or new planting. Domestic cultivation of the land after the woodland TPOs were made in the 1970s cannot occur without a breach of these orders.

A significant portion of the surrounding woodland areas are also shown as Priority Habitat Deciduous Woodland on the Defra Magic Map (see figure 2 below). The stability of the land being Deciduous Woodland is afforded by the Woodland Tree Protection Orders, which are between 45 – 50 years old. Such as constraint could not be afforded if the land was domestic garden.



Defra Magic Map. The trees within the green polygon boundary are part of the Deciduous Woodland Priority Habitat Inventory for England.

The applicant has submitted several statutory declarations from family members, including Christopher Kay, Philippa Rose Kay, and Joseph Adam Kay. These declarations state the land and its use as garden space at 178 Bearwood Road occurred since 1957. They state an incidental residential use of the land, describing the history of occupation, garden activities, and various uses by the occupants over the years.

The photographs submitted with this evidence however show a layout of the land consistent with maps and aerial photographs. There is a residential curtilage around and enclosing the bungalow and beyond that various small agricultural / horticultural activities occurred including maintaining a small orchard. The photographs also depict some of woodland back drop, which includes the land outlined in red in this submission.

After 1994, there is also insufficient evidence to demonstrate that a continuous use of the land as incidental residential garden occurred up until The Lodge was built and occupied in 2008. Whilst some maintenance of this land and use has been described to occur over this period, this does not represent a continuous use of the land as incidental garden up until The Lodge was occupied in 2008. The Aerial photographs and maps do not show a residential use of all this land and show it to be predominantly remaining as woodland. In addition, the TPO and Designation and the Defra Magic map further evidence that the land has been longstanding undeveloped woodland.

Notwithstanding the above, the creation of an entirely new residential garden associated with a new dwelling would have resulted in the creation of a new planning unit and chapter, resulting in a material change of use.

The next claim to consider is whether since the occupation of The Lodge in 2008, the land outlined in red has continuously been used as garden in association with that dwelling for 10 years.

The application includes photographs (Appendix 6) depicting various friends and family members engaging in activities such as gardening, playing, and socialising within the garden over the years. These images provide a brief snapshot in time and do not conclusively demonstrate continuous and uninterrupted use of the entire garden area over the required 10-year period for a Certificate of Existing Lawful Development (CLEUD). The photographs capture only specific moments in time and often present limited or fragmented views of the site, rather than clearly illustrating the full spatial extent of the garden as outlined in the red line plan. It appears to be occasional use (not a material change of use) and temporary uses of up to 28 days may be permitted without planning permission from the Council being required.

Five additional historic photographs were provided by the agent over the course of this application which date back to the construction of The Lodge and further in 2009. However, these photos only show the immediate land surrounding the lodge which appears to have been maintained rather than whole area outlined in red on the submitted red line boundary.

Aerial photographs show that the clearance of trees around the lodge occurred relatively recently since 2019. This can be seen from comparing WBC aerial images

from 2019 and 2022 (as per figures 3 and 4 below). This has opened up the land and trees have been replaced by areas of mowed lawn. This has not been carried for a continuous period of 10 years. The site as it appears to today is notably different to 10 years ago.



Aerial imagery of the application site from 2019 (left) and 2022 (right).

During the site visit it was also observed that parts of the redline were not part of the garden and were either remaining parts of the woodland, natural areas or former horticultural uses – including remnants of the orchard. Land management is not the same as activities carried out incidental to a residential use.



Site Visit Photos November 2024

As stated, the woodland areas with various constraints, designations and dense tree cover are not conducive to regular residential use. The presence of these historic TPOs significantly restricts activities that could reasonably be considered incidental to residential garden use. Features such as a zip line or washing line do not indicate that the land has been used consistently as a garden; rather, they suggest sporadic recreational use. These activities do not require the same level of land management that would ordinarily classify an area as a cultivated domestic garden such as regular maintenance, including mowing, pruning, and planting and landscaping or defined garden structures (patios, flower beds, pathways, fencing) for 10 years.

There is no evidence of fencing or clear demarcation separating the woodland from the wider landscape. A lack of boundary treatment suggests that the whole area outlined in red on the submitted red line boundary was not actively use as a garden incidental to the residential use.

The dense woodland canopy significantly restricts sunlight penetration, making it challenging to sustain typical garden planting, lawn growth, or recreational use commonly associated with a domestic setting. Woodland environments naturally feature uneven terrain, dense undergrowth, and self-seeding trees, all of which hinder routine garden maintenance. Notably, the presence of unmanaged vegetation, particularly towards the east and southeast of The Lodge surrounding the log store (prior to its clearance from 2019 onwards), is more characteristic of an undisturbed woodland than a maintained residential garden. Areas with dense tree cover up until 2019 would have also not been conducive to a continued residential use when the alleged breach started and have only been cleared recently.

The land outlined in red also significantly large in relation to a single family dwellinghouse and number of occupants within that building.

As such, on the balance of probabilities, continuous use of all the land within the red line as residential garden for the last 10 years has not been demonstrated.

Notwithstanding this, there is a notable difference in the appearance and maintenance of the land immediately to the south of The Lodge which is shown to be manicured mowed lawn and has had various paraphernalia across over historic aerial photographs. Many of the photographs submitted also appear to relate to the is area rather than the woodland and other areas to the east.

Based on the site visit conducted by the Case Officer, as well as the aerial imagery and historic photographs submitted by the applicant, it appears that the land immediately to the south of the Lodge is consistent with incidental residential garden use associated with this property. This mostly rectangular area has been consistently well-maintained, with a lawn kept since 2010, showing evidence of typical domestic garden activities over this period. The certificate is therefore amended accordingly.

Conclusion:

It is necessary for the LPA to weigh up the evidence and determine, on the balance of probabilities, whether or not those matters asserted by the applicant have occurred as a matter of fact. In this case, based on the applicant's evidence and the LPA's own information and assessment above, it is considered that the applicant has not discharged their burden of proof in proving the whole incidental residential use of land associated with The Lodge as outlined in red on the submitted Location Plan has been on-going continuously for at least ten years. The evidence available to the council indicates that, on the balance of probability, only a small parcel to the south of the Lodge has been demonstrated to be residential garden to the Lodge for a continuous Period of 10 years.

Therefore, the certificate can only be approved for this area of land. The redline has been amended accordingly.

The Public Sector Equality Duty (Equality Act 2010):

In determining this application the Council is required to have due regard to its obligations under the Equality Act 2010. The key equalities protected characteristics include age, disability, gender, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief. There is no indication or evidence (including from consultation on the application) that persons with protected characteristics as identified by the Act have or will have different needs, experiences, issues and priorities in relation to this particular planning application and there would be no significant adverse impacts as a result of the development.

RECOMMENDATION

The relevant test for Lawful Use is the 'balance of probability'. Based on the evidence provided and the Local Planning Authority's own information, it is considered to have been demonstrated that the incidental residential garden use of land to the south of the Lodge, along with the immediate surrounding has been as residential garden for a consecutive period of over 10 years preceding the application. It is therefore considered that the certificate of existing lawful use should be amended and approved.

Date:	22 January 2025
Earliest date for decision:	4 November 2024
Recommendation agreed by: (Authorised Officer)	<i>MC</i>
Date:	13.02.2025