

DELEGATED OFFICER REPORT



WOKINGHAM
BOROUGH COUNCIL

Application Number:	251248
Site Address:	Land at 178 Bearwood Road, Barkham, Wokingham, RG41 4SH
Expiry Date:	28 July 2025
Site Visit Date:	21 July 2023 & 26 November 2024
Proposal: Application for a certificate of existing lawful development for the use of land as residential garden associated with the Lake House.	

PLANNING HISTORY

Application No.	Description	Decision & Date
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: October 2023

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.
- The area of land immediately adjacent to the Lake House became incidental garden following its construction in 2013.
- Philippa's parents moved into the Lake House in 2022.

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 Patrick Coghlan dated 09/05/2025

- Corroborates and witnesses that the Lake House and surrounding garden has been occupied since 2013 when Joseph Kay moved in.
- Witnessed and been a part of the incidental use of the decking and garden.
- They regularly park at the Lakehouse when visiting.

Statement of Truth from John Parten 10/05/2025

- Corroborates and witnesses that the Lake House and surrounding garden has been occupied since 2013 when Joseph Kay moved in.
- Witnessed and been a part of the incidental use of the decking and garden.
- They regularly park at the Lakehouse when visiting.

- Aerial Imagery of The Lodge (provided by Google Earth Pro) dated from 2018 to 2025.
- Photographs detailing the Incidental Residential Use of Land.
- Certificate of Lawfulness Statement, which details and discusses the validity of the various evidence set out above

By the Council:

- Aerial images from the Council's mapping.
- Google Earth images.
- Site visit photographs.

By third parties: None

SITE DESCRIPTION

The application site is situated to the rear 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.

In most cases, development becomes immune from enforcement if no action is taken:

- within 10 years of substantial completion for a breach of planning control consisting of operational development where substantial completion took place on or after 25 April 2024
- within 10 years for an unauthorised change of use to a single dwellinghouse where the change of use took place on or after 25 April 2024

- within 4 years of substantial completion for a breach of planning control consisting of operational development where substantial completion took place before 25 April 2024;
- within 4 years for an unauthorised change of use to a single dwellinghouse where the change of use took place before 25 April 2024

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 *Gabbitts 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 residential use of land associated with The Lake House. (*Officer Note: The LPA has removed curtilage from the description of development as a Certificate cannot be issued for curtilage as this is not a use of land.*)

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 residential use of land associated with The Lake House 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 approved in October 2023 under planning reference 231275, however, a split decision was issued with the residential

use of land being omitted from the granted certificate as there was insufficient evidence on the balance of probabilities. It also must be noted that any evidence submitted as part of this previous application cannot be re-used for this application unless it has been specifically re-submitted for consideration.

In this resubmission, further evidence has been provided, and it is also noted that a similar certificate was recently granted at The Lodge, which is a neighbouring property to the Lake House with similar historical context. Nonetheless, this adjacent site is not determinative to the facts of this case.

The application features 5 site/layout plans (the plans prior to 24/05/2015 are not relevant to the determination of this Certificate) which detail features and areas of the land between certain time periods to demonstrate land use within the wider and immediate site. The plans showing the site area are drawn in shapes with right angle corners and given there are no boundaries on the site, it is unrealistic and unlikely that these lines follow the exact area of usage. These plans are created by an architect rather than someone with firsthand knowledge of the site and limited references are made to them in the Statutory Declarations. The submitted evidence, such as photographs and aerial imagery seeks to corroborate these plans. These do not all relate to the application site itself therefore are not wholly relevant as evidence, but provide useful background information. The evidence must show on the balance of probabilities that only the **site applied for** has been used as residential garden for the requisite 10 year period.

The evidence 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. The photographs from 1963 and 2014 are not relevant as they are prior to the 10 year period and prior to the existence of the Lake House as a dwelling. The photos are not dated, nor has metadata been provided, but are imprecise as they are annotated manually month/year.

As stated within the appraisal of application 231275, these images provide a brief snapshot in time. One photograph within the relevant timeframe has been submitted from 2021 of one specific area (adjacent to driveway, additionally, these are imprecise as no exact dates are given). This does 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. Furthermore, the photographs in June 2022 within a temporary gazebo structure appears to be occasional/temporary recreational use (not a material change of use). Temporary uses of up to 28 days may be permitted without planning permission from the Council being required.

Other than stating in the Statutory Declarations that the entire land was in garden use, there is no actual evidence that the area which is marked 'septic tank and soakaway' on plan GCLBW003 was used as residential garden. The Statutory Declarations refer to the garden activities taking place in 2013 on the decking and the grassed area to the east, adjacent to the pond. The decking is also shown in photographs. This does not directly correlate with the statements that the full extent of the land outlined in blue on

plans GCLBW003 and GCLBWO05 was the sole garden of the Lake House. Again, they state in 2022 that the outbuildings, decking and parking areas are used in association with the Lake House, when the occupants changed. They state that the pond is used by the occupiers of 178 Bearwood Road since their occupation in 2022 i.e. indicating it is not residential garden associated with The Lake House. Also, the Statutory Declaration contains no specific dates, only years are given.

Overall, the statutory declarations are imprecise as they muddle 178 Bearwood Road, The Lake House and The Lodge and it is not wholly clear which areas are being referred to at certain points e.g. reading the statement chronologically, paragraph 17 of Adam Kay's declaration appears to be after 2022 when they lived at 178 Bearwood Road and they describe their family as using the land nearby The Lake House which would indicate it is associated with 178 Bearwood Road.

Further to the above, the aerial photographs provided by the applicant only date back to 2018. These highlight certain features such as being in use, such as the decking and driveway, however, it does not demonstrate continuous use of all the land within the red line as residential garden for the last 10 years, due to the dates of the imagery being only for the last 7 years.

Overall, the photographs and aerial images do not themselves provide great validity to the claims that the land within the red line has been used as residential garden to the Lakehouse for a continuous period of 10 years.

The area of the septic tank is not directly referenced in any Statutory Declarations or photographs. The mere presence of a septic tank on land does not automatically make the land residential in planning terms. The infrastructure or operational development is not determinative of the use, but the land must be used for residential purposes e.g. garden. Septic tanks can be (and often are) connected to a dwelling outside their curtilage or garden.

Notwithstanding the above, it is noted that the application heavily relies on the statutory declarations provided by Christopher, Phillipa and Joseph Kay and the photographs and aerial imagery only seek to accompany this. The statutory declarations describe the wider site of 178 Bearwood Road, The Lodge and The Lake House. There is little differentiation between these properties which somewhat introduces ambiguity blurs the distinction on how this land is residential associated with The Lake House.

They state that the land was former residential garden of 178 Bearwood Road but no specific dates are given or any further evidence to support this. They state in 2013 that the area around the lake house was no longer used as part of the garden of 178 Bearwood Road. This is imprecise information as there are no exact dates given. The submitted evidence for this area of land is solely a plan identified the location of a septic tank, this is insufficient to demonstrate on the balance of probabilities that the land has been used as residential garden for a continuous period of 10 years.

Furthermore, the statutory declarations are dated 2024 which provides no evidence for the period between 28 March 2024 and the date of the application 24/05/2025. Whilst they refer more specifically to the use of the land for residential garden than those accompanying the previous application (ref: 231275), however, the ambiguous nature

of the statements remain such that on the balance of probabilities, the LPA cannot justify the granting of a certificate for the sought after use.

It is understood from the previous Certificate that Lake House construction, commenced in August 2010 and was completed only in April 2013 and the occupiers only moved in on 4 May 2013. It is also noted that the decking was not erected at this time. It was not in situ in the aerial imagery dated 6.6.2013 or 11.7.2013. it cannot therefore be argued to be in residential use since 2013 as for part of this time it did not exist, nor did the driveway. This raises further questions to the accuracy of the Statutory Declarations.



The statutory declarations are detailed in the relevant sections above, however, importantly, they all state that the Lake House has been served by separate garden, as shown on the submitted red line. Based on the site visit conducted by the Case Officer, as well as the Councils own aerial imagery, it appears that some of the land immediately surrounding the Lake House may be consistent with residential garden use associated with this property, however, the evidence itself and this statement alone does not contain sufficient evidence that is clear, precise and unambiguous to substantiate that it this use has been continuously occurring since 24/05/2015.

Although the Council has limited contrary evidence, of its own, or from others, to contradict or otherwise make the applicant's version of events less than probable, there is reason to refuse the certificate, because the applicant's evidence alone is insufficiently precise and unambiguous to justify the grant of a certificate on the balance of probability. The lack of contrary evidence is insufficient to approve an application, the applicant's evidence must meet the threshold of being clear, precise and unambiguous and the onus is on the applicant to provide sufficient clear, precise and unambiguous evidence.

During the site visit, it was also observed that part of the redline comprised the pond to the north of the dwelling. It is clear that this does not form part of the garden of the Lake House, and it is questioned how the boundary line was drawn in this respect. It is more likely that the pond as a whole is part of 178 Bearwood Road or that the residential use of 178 Bearwood ends at the pond. Occasional amenity use is not the same as activities carried out incidental to a residential use.

Conclusion:

It is accepted that the application has been resubmitted following the split decision on 231275 however, the only additional information provided is some plans drawn by Artel and two (non-specific) dates added to Appendix 6. This does not add significant evidence that tips the balance of probabilities. As stated previously, the statutory declarations refer more specifically to the use of the land for residential garden than those accompanying the previous application, however, they remain unambiguous for the reasons detailed throughout this report. They have been reused from other applications, which is not in itself an issue, but emphasises the ambiguity as they are covering a large number of sites and issues rather than specific to this 'garden'.

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 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 residential use of land associated with The Lake House, as outlined in red on the submitted Location Plan, has been on-going continuously for at least ten years. Therefore, the certificate cannot be approved for this area, and the certificate is thus recommended for refusal.

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 that the applicant has not discharged their burden of proof in proving the whole incidental residential use of land associated with The Lake House, as outlined in red on the submitted Location Plan, has been on-going continuously for at least ten years. Therefore, the certificate cannot be approved for this area, and the certificate is thus recommended for refusal.

Date:	7 August 2025
Earliest date for decision:	17 June 2025
Recommendation agreed by: (Authorised Officer)	

Date:	7 August 2025
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