

DELEGATED OFFICER REPORT



WOKINGHAM
BOROUGH COUNCIL

Application Number:	260144
Site Address:	Arkham Asylum, Heath Ride, Finchampstead, Wokingham, RG40 3QJ
Expiry Date:	8 April 2026
Site Visit Date:	12 March 2026
Proposal: Application for a certificate of existing lawful development for the use of the rear garden for residential purposes C3.	

PLANNING HISTORY

Application No.	Description	Decision & Date
251912	Full application for the proposed erection of 1 no. detached dwelling with 2 no. carports, front wall and entrance gates and associated landscaping, following demolition of the existing dwelling and outbuildings.	Approved 12/01/2016
251783	Householder application for the proposed erection of swimming pool and associated garden house.	Withdrawn 01/12/2025
250144	Application for a certificate of lawfulness for the proposed erection of a detached pool house including lower ground floor level, outdoor swimming pool and associated structures to rear.	Refused 21/03/2025
20582	Single storey rear extension to provide utility room and playroom/bedroom.	Approved 30/01/1984

INFORMATION PROVIDED

By the applicant:

- Lawful Development Certificate Application Form states that land has been in use as residential garden for more than 10 years.
- Location Plan.
- Site Plan.
- Outbuilding Plans.
- Aerial images.

By the Council:

- Planning history records check.
- Planning enforcement history check.
- Officer site visit photographs (dated 12/03/2026).

- Officer site visit photographs for planning enforcement case RFS/2025/090502 (dated 27/06/2025).
- Officer site visit photographs for planning application 260068 (dated 12/03/2026).
- Officer site visit photographs for planning application 251912 (dated 10/10/2025).
- Land Registry Search BK50126 (01/04/2026).
- Google Image Mapping.

By third parties:

- None.

APPRAISAL

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 (formerly four years) beginning with the date on which the operations were substantially completed.

Section 171B (3) states that in the case of any other breach of planning control, no enforcement action may be taken after the end of ten years beginning with the date of the breach.

Regarding the above, Section 5 of The Planning Act 2008 (Commencement No. 8) and Levelling-up and Regeneration Act 2023 (Commencement No. 4 and Transitional Provisions) Regulations 2024 states that the amendments made to the 1990 Act by section 115 of the 2023 act (time limits for enforcement) do not apply where in respect of a breach referred to in section 171B(1), the operations were substantially completed before the day on which that section comes into force (25/04/2024). This means that where operational development has been carried out before 25/04/2024 the four year rule still applies (except where the operations has facilitated a material change of use).

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.

The *Panton* case was considered further by the Courts in *Secretary of State for the Environment, Transport, and the Regions v Thurrock BC* [2002] EWCA Civ 226. In this case the Court of Appeal considered that the rationale of immunity from enforcement was that throughout the whole of the ten-year period of unlawful use the Local Planning Authority, although having the power to take enforcement action, had failed to do so. So, if at any time during the relevant period the authority would not have been able to take enforcement proceedings in respect of the breach (because for example the unauthorised use had temporarily ceased) then any such period could not count towards the ten-year period which gives rise to immunity.

The effect of the decision in *Thurrock* is to require a far more stringent test of immunity than had previously been thought following the decision in *Panton*. In particular, the decision means that if an unlawful use ceases and is then recommenced, the ten-year period required for immunity begins on the act of recommencement. For an unlawful

use to obtain immunity from enforcement it has to be exercised continually and without significant interruption for the whole of the ten-year period.

The question is therefore whether an interruption of an unlawful use is enough to defeat any claim of immunity from enforcement proceedings. A short period may be regarded as a continuing use; a longer period may not. The Courts have held that this question is a matter of fact and degree for the decision maker in every case.

APPRAISAL:

The application is for a Certificate of Lawful Existing Use for the incidental residential use of land within the curtilage of Arkham Asylum, Heath Ride.

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

- within ten 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 ten 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 four years of substantial completion for a breach of planning control consisting of operational development where substantial completion took place before 25 April 2024;
- within four years for an unauthorised change of use to a single dwellinghouse where the change of use took place before 25 April 2024.
- within ten years for any other breach of planning control (essentially other changes of use).

In the case of this Certificate, it must be demonstrated that the land used for incidental residential purposes was within the curtilage of the dwellinghouse at the date of the application's submission and, whether the use has been occurring for a consecutive period of ten years (21/01/2016).

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. 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".

Site Description:

The application site consists of a detached bungalow, detached garage and detached outbuilding set within a large plot on the northern side of Heath Ride. There is also one recently erected outbuilding located to rear of adjoining neighbour; Little Oak. Planning permission 251912 for the host dwelling was approved on 12/01/2026 for the demolition of the existing bungalow and outbuildings and erection of one replacement dwelling.

The site is located within countryside. The central section and rear edges of the site are covered by Woodland Tree Preservation Order (TPO) 874/1997. This covers all

trees of whatever species. There is also a Single TPO - 289/1985, T4 (Turkey Oak) which is not within the site but close to the western shared boundary along with Group TPO - 0289-1985 which covers 11 Birch and 4 Oak trees.

Heath Ride is a classified Public Right of Way – Restricted Byway (FINC24). A public right of way is a highway over which the public have a right of access along the route.

The property is set back a substantial distance from the road and set back from the established building within the vicinity.

260144 Arkham Asylum, Heath Ride



Figure 1: Application site (ArcGIS mapping (01/04/2026))

The application site consists of approximately 4,240sqm of land to the rear of Arkham Asylum (originally named Silver Birches). Prior to its current use, the land was an area of largely undisturbed woodland, and this is reflected in its visual appearance; the land towards the centre and rear end of the site is almost completely covered with dense, mature trees bar a small area of cleared woodland from the central section of the land.

The existing dwelling is a detached bungalow set back from the established building line of properties within the vicinity. The dwelling's external curtilage/garden is located to the immediate north of the building and is approximately 60m in length. The garden area was originally mainly grassed with a patio and stepping stones.

The Applicant's Evidence:

The application form states that it seeks to confirm the lawfulness of the following development:

"Existing use of rear garden for residential purposes (C3)".

The application form explains why the certificate should be granted:

"The evidence submitted demonstrates, on the balance of probability, that the application land has been used and cultivated continuously as residential curtilage in connection with the dwelling for a period exceeding 10 years".

For this application to be supported, it will be necessary for the Applicant to satisfy the Council on a balance of probabilities that:

The land has been in continuous use as residential curtilage for a period of 10 years prior to the date of the application.

Aerial Images:

To support the use of the land as residential curtilage associated with Arkham Asylum, six aerial images have been provided by the applicant from September 2004 and May 2025.



Figure 2: Aerial Image from May 2025 provided by the Applicant.



Figure 3: Aerial Image from April 2020 provided by the Applicant.



Figure 4: Aerial Image from March 2017 provided by the Applicant.



Figure 5: Aerial Image from June 2013 provided by the Applicant.



Figure 6: Aerial Image from December 2005 provided by the Applicant.



Figure 7: Aerial Image from September 2004 provided by the Applicant.

Assessment

Case law establishes that the assessment begins with assessing whether a material change of use of the land has occurred. If proved to be within the curtilage and in residential use on the date of the application's submission, the ten-year immunity rule does not apply because as per Section 55(2)(d) of the TCPA, the use of any land within the curtilage of a dwellinghouse for any purpose incidental to the enjoyment of the dwellinghouse is not considered development. If proven not to be within the curtilage of the dwellinghouse, the ten-year immunity rule applies.

Has a material change of use of the land for incidental residential purposes occurred?

The applicant confirms that a material change of use has occurred in their Certificate Application Form.

While much of the ground cover and original lawn had been cleared at the time of the site visit, the Case Officer's site visit made note of an old, shed structure evident within the area of land subject to this application.

However, the aerial images that have been submitted to demonstrate the use of the land within curtilage associated with Arkham Asylum do not make it abundantly clear that they were being used as residential land within a residential curtilage associated with the host dwelling. There is no evidence of any recreational activity and/ or paraphernalia associated with its occupation evident in any of the images.

Based on the activities described by the Applicant (the land having been cultivated continuously for at least 10 years) and the observations made by the Case Officer during their site visit, it is considered that on the balance of probabilities, a change of use of the land to incidental residential garden land has not occurred.

The Council's Evidence:

If a material change of use has occurred, was the land within the curtilage of the dwellinghouse on the date of the application's submission?

The residential curtilage of the host dwelling was set out in refused Proposed Lawful Development Certificate 250144 (determined 21/03/2025). The Planning Officer concluded that:

"The proposed outbuilding would be situated approximately 130 metres from the host dwelling. Whilst separation distance is not in itself the sole indication for residential curtilage, it is clear in this site-specific circumstance that the proposed location for the outbuilding would be in an area of carefully managed woodland, as opposed to residential garden. In any case, it is an established fact that even if the land was currently in a residential use associated with Silver Birches, this does not necessarily mean that it lies within the curtilage of the dwellinghouse. It is to be noted that the concept of 'curtilage' is different to 'land use', and 'residential curtilage' is not a use of land as set out in the Use Classes Order. A residential/garden use of land does not necessarily equate to it falling within the curtilage of a dwellinghouse.

It is acknowledged that this area of the site is open and has been maintained as such for a considerable period of time, however, it is also evidently clear that this was historically woodland. This is supported by historic mapping, which gives a clear indication as to when the tree

coverage began to reduce. No planning permission has been granted for any change of use of this land".

The findings of the refused application confirm that the subject land does not form part of the curtilage in association with the host dwelling.

The relevant propositions for the assessment of curtilage are from Attorney General ex rel Sutcliffe v Calderdale MBC [1982] (hereafter referred to as Calderdale), R (Hampshire Country Council) v Secretary of State for Environment, Food and Rural Affairs [2022] QB 103 (hereafter referred to as 'Blackbushe Airport'), Challenge Fencing Ltd v Secretary of State for Housing, Communities and Local Government [2019] EWHC 553 (Admin) (hereafter referred to as 'Challenge Fencing') as:

- The extent of the curtilage of a building is a question of fact and degree, and therefore it must be a matter for the decision-maker, subject to normal principles of public law

- The three Stephenson factors must be taken into account

- a) Physical layout

- b) the ownership past and present

- c) the use or function of the land or buildings (past and present);

- A curtilage does not have to be small, but that does not mean that the relative size between the building and its claimed curtilage is not a relevant consideration. Blackbushe Airport clarified that the Court of Appeal had gone further than was necessary to go in expressing that a curtilage must always be small or that smallness is inherent to the expression of curtilage in Dyer v Dorset County Council [1989] and in McAlpine v SSE [1995].

- Whether the building or land within the claimed curtilage is ancillary to the main building will be a relevant consideration, but it is not a legal requirement that the claimed curtilage is ancillary.

- The judgement of Hiley v The Secretary of State for Levelling Up, Housing and Communities (SSLHC) & East Lindsey District Council (ELDC) [2022] EWHC 1289 (hereafter referred to as 'Hiley') found that a curtilage no longer has to consist of land being in a single enclosure.

Sinclair-Lockhart's Trustees v Central Land Board [1950] 1 P&CR 195 stated that where to fall within the curtilage of a building, land should serve the purpose of the building in some reasonably useful or necessary manner. Methuen-Campbell v Walters [1979] requires land to have an intimate association with, and forms part and parcel of, the building.

Each of the three main Calderdale factors, with consideration for the more recent case law highlighted above, are addressed in turn below.

Physical Layout:

The existing outdoor curtilage of the dwelling is confined to the garden space located to the immediate north of the dwelling and evident from the original manicured lawn and stepping stones and is approximately 1,370sqm in size.

As seen in Figures 8 and 9 below (Enforcement Case Officer photographs for Enforcement case ref: RFS/2025/090502), this area is enclosed by tall timber and close board fencing along the site edges.



Figure 8: Taken by case officer for enforcement case RFS/2025/090502 (dated 27/06/2025)



Figure 9: Taken by case officer for enforcement case RFS/2025/090502 (dated 27/06/2025)



Figure 10: Taken by case officer for application 251912 (dated 10/10/2025)



Figure11: Taken by case officer for application 251912 (dated 10/10/2025)

In contrast, the central and rear sections of the site are enclosed with wire mesh fencing as shown in Figures 12 and 13 below.



Figure 12: Case Officer site visit photograph taken for application 260068 12/03/2026



Figure 13: Case Officer site visit photograph taken for application 260068 12/03/2026

The fencing type is one marker that delineates the area of land forming the extent of the curtilage. The application form states that the extended area of land subject to this application has been “*used and cultivated continuously as residential curtilage*”. However, the site visit undertaken by the case officer showed the land to transition into dense, mature woodland that is not landscaped, rather, it is undeveloped and natural in character.

Therefore, there is a clear physical separation between the application land and that of the original curtilage of the dwelling. The land that is clearly defined by an area that is devoid of mature trees and marks the extent of what is considered the curtilage in connection with Arkham Asylum.



Figure 14: Google Image (01/04/2026) Red arrow – approximate position of curtilage extent, blue – original dwelling

While a curtilage does not have to be small, that does not mean that the relative size between the building and its claimed curtilage is not a relevant consideration. In this instance, the proposed length of curtilage extends to a significant distance of and approximate 149m in length (from the rear building line of the host dwelling). Such a significant distance weighs strongly against a finding that the land is intimately associated with the host dwelling that it forms part of its curtilage. Therefore, the fact that the land is physically divorced from the dwelling is a determining factor.

Regarding the size of the claimed curtilage in relation to the existing dwelling, the relative size between the building and its claimed curtilage is a relevant consideration enforced by the the *Blackbushe Airport* judgement. The dwelling is a 4/5-bedroom bungalow with a footprint of approximately 214sqm. The recognised outdoor curtilage/garden space is approximately 60m in length (1,379sqm footprint), this is not disproportionately small when compared with the size of the dwelling.

When compared with the application site, the additionally claimed curtilage is approximately 4,255sqm footprint which is a 208% increase upon the original size. It is considered that this drastic increase in curtilage size is disproportionate to the size of

the dwelling and its use, thereby meaning it does not serve a reasonably necessary purpose.

Overall, the application land is not considered to comply with the first Calderdale factor.

The Ownership, Past and Present:

The dwelling, its curtilage and the application site have all been under the same ownership since February 2025. Therefore, the land ownership and use of the site is consistent and under the same ownership.

The Use or Function of the Land or Buildings (past and present):

It has already been outlined above that the Council consider that a material change of use of the land from woodland to residential garden has not occurred. The use of land for residential garden purposes generally involves activities that are commonly associated with that of a dwelling's residential curtilage.

The change of use is unlawful as it has not been demonstrated to be occurring continuously for at least 10 years. This use of land is therefore not permanently or lawfully established on the date of the submission.

Summary:

The land clearly fails the first Calderdale factor; unlike the recognised curtilage, the land is considered associated with and is subsequently part and parcel of Arkham Asylum, rather than private curtilage of the host dwelling. Its size is also disproportionate to the size of the dwelling and the original curtilage, thereby not serving a reasonably necessary purpose.

Overall, the application land in total is not considered to be within the curtilage of Arkham Asylum.

If not within the curtilage of the dwellinghouse, has the use persisted for a consistent period of ten years prior to the submission of the application?

As the land is not considered to be within the curtilage of the dwellinghouse, the ten-year immunity rule applies; to be considered lawful by the passing of time, the use of the land for residential purposes must have occurred consistently since at least 21/01/2016.

The decision date for refused Proposed Lawful Development Certificate 250144 was 21/03/2025 which is less than ten years prior to the submission of this application.

The aerial images submitted by the Applicant and Case Officer site visit photographs do not make it clear that the subject land was being used for residential purposes.

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 use of the land for residential purposes has not been occurring for a consecutive period of ten years.

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

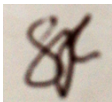
characteristics as identified by the Act have or will have different needs, experiences, issues and priorities in relation to this particular planning application and there would be no significant adverse impacts as a result of the development.

RECOMMENDATION

The material change of use of the land for residential purposes has not been occurring for a consecutive period of ten years based on the applicant's own case; evidence provided; and, the Local Planning Authority's own information.

The application site is not considered to be within the established curtilage of Arkham Asylum.

The certificate is refused for the reasons set out in this report

Date:	1 April 2026
Earliest date for decision:	4 March 2026
Recommendation agreed by: (Authorised Officer)	
Date:	1.4.26