

Case Officer: Daisy Kay-Taylor / Nathanael Stock

Applicant: Mrs Nuzhat Asma Chaudhry

Proposal: Certificate of lawfulness existing - Use of amenity land as residential garden/domestic curtilage

Ward: Banbury Calthorpe And Easington

Councillors: Councillors John Brown, Ian Harwood, Kieron Mallon

Reason for Referral: Called in by Councillor Mallon for the following reasons:

- No evidence is submitted to support that this land has been used for private amenity land at any time

- The planning history of this site (1 Heathcote Avenue)

Also mentions detrimental impact of any hedge/fence on highway safety; loss of public amenity land to residents, loss of a shared space; and landscape impact on openness of the area.

Expiry Date: 28 September 2026

Committee Date: 24 September 2026

SUMMARY OF RECOMMENDATION: GRANT THE LAWFUL DEVELOPMENT CERTIFICATE

MAIN REPORT

1. APPLICATION SITE AND LOCALITY

- 1.1. The application relates to an area of land to the west / south-west of 1 Heathcote Avenue, a detached, two-storey dwelling, occupying a corner plot position facing Heathcote Avenue and with its side elevation being adjacent to Elton Road. The land in question is between the dwelling/its garden and Elton Road.

2. CONSTRAINTS

- 2.1. The application site is within the built limits of Banbury and is bounded by residential properties to its north and east. The site is not within a designated conservation area and there are no other significant constraints e.g. footpaths, contamination, flood risk or records of protected species that may impact assessment of the planning application. The property's permitted development rights have been removed in respect of any gate, fence, wall or other means of enclosure.

3. DESCRIPTION OF PROPOSED DEVELOPMENT

- 3.1. The application seeks to demonstrate that an area of land has been used continuously as part of the residential garden of 1 Heathcote Avenue for a period of time exceeding ten years, and that the use of land is lawful through the passage of time.

- 3.2. The application is accompanied by a Design and Access Statement and a Land Registry title plan.
- 3.3. If this use can be demonstrated, a Lawful Development Certificate could be issued and the use of the land as part of the garden of 1 Heathcote Avenue would become immune from enforcement action.

4. RELEVANT PLANNING HISTORY

- 4.1. The site has the following planning history, albeit none of it is considered relevant to the current proposal:

26/01634/F - Demolition of garage and erection of single storey extensions to side and rear and addition of box dormer to side roof slope (revised scheme of 25/02081/F to amend the roof of the rear extension from a flat roof to a pitched roof and to make changes to fenestration) – under consideration

25/02081/F - Demolition of part garage and erection of single storey extensions to side and rear and addition of box dormer to side roof slope – granted with conditions, 21.01.2026

B.21/71 - Erection of 119 bungalows and houses with roads and sewers. Permitted 13 April 1971

10/00901/F - New dormer windows, granny annex and garage. Application withdrawn 03 August 2010

5. PRE-APPLICATION DISCUSSIONS

- 5.1. No pre-application discussions have taken place with regard to this proposal

6. RESPONSE TO PUBLICITY

- 6.1. This application has been publicised by way of letters sent to all properties immediately adjoining the application site that the Council has been able to identify from its records. The final date for comments was **25 June 2026**, although comments received after this date and before finalising this report have also been taken into account.
- 6.2. Objections have been received from 2 households. The comments raised by third parties are summarised as follows:

- Deficiencies in evidence – lack of objective primary evidence; evidence is inconsistent and does not demonstrate uninterrupted use for the required statutory period; no utility records, tenancy agreements, independent statements and reliable dated material; the evidence is patchy, ambiguous and insufficient to establish continuous use by the applicant; no evidence that the land has been “off-limits” to the general public
- Inconsistency with established facts and local knowledge – based on local residents’ “direct and longstanding” knowledge of the site the use has not been continuous and differs materially from historic use; the applicant’s evidence focuses on historic periods rather than proving unbroken continuity
- Material change and intensification – the current use appears materially different from any alleged historic baseline; impact on immunity period

- Reliance on historic rather than current evidence – insufficient information re continuity up to the date of the application; certificates cannot be approved or granted if the evidence to support its application is not sufficiently met.
- No evidence that the site has been regularly maintained
- Scope of any certificate granted – any certificate should be strictly to the use proven and must not authorise fencing of further development affecting visibility, and must prohibit the continual or any future extensions of the dwelling
- Non-material considerations – site condition; lack of consistent maintenance; highway safety; absence of boundary fence; any activity has been limited to routine maintenance rather than operational development; potential HMO use; timing of the application; the withdrawn planning application; the applicant's intention to build on the land subject of the application, and to submit a new planning application should the LDC be issued.

6.3. The comments received can be viewed in full on the Council's website, via the online Planning Register.

7. RESPONSE TO CONSULTATION

7.1. Below is a summary of the consultation responses received at the time of writing this report. Responses are available to view in full on the Council's website, via the online Planning Register.

7.2. BANBURY TOWN COUNCIL: **Objects**, commenting - There seems to be no evidence submitted to support the assertion that this land has been used for private amenity land. As such the application does not meet the requirements of the Act. The land contributes to the open and spacious nature of this part of the estate and any intention to fence the area and incorporate it into the rear garden would be detrimental to the character and amenity of the area.

8. RELEVANT PLANNING POLICY AND GUIDANCE

- Town and Country Planning Act 1990 (as amended)
- The Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended)

9. APPRAISAL

9.1. The application seeks a Lawful Development Certificate for the use of the land at the application site for residential garden in accordance with S191 of the TCPA 1990 and seeks to demonstrate that the unauthorised use has been taking place as such for a continuous ten year period of time as required by Section 171(B).

9.2. A Lawfulness Development Certificate can only be granted under section 191 of the Town and Country Planning Act 1990 (as amended), if the applicant can demonstrate, on the balance of probability, that the use, operation or other matter is lawful because no enforcement action can be taken against it (either because it does not involve development or require planning permission or because the time for the enforcement action has expired or for any other reason), and because it does not constitute a contravention of any of the requirements of any enforcement notice currently in force.

- 9.3. Government guidance states that the applicant is responsible for providing sufficient information to support an application, and goes on to state that, *‘in the case of applications for existing use, if a local planning authority has no evidence itself, nor any 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 applicant’s evidence alone is sufficiently precise and unambiguous to justify the grant of a certificate on the balance of probability’.*

Applicant’s Evidence

- 9.4. The Land Registry title plan provides evidence of ownership by the applicant of the ‘amenity’ land and the house and its curtilage since 2010.

- 9.5. In the Design and Access Statement (DAS), it states:

- The land has been used for purposes incidental to the enjoyment of the dwellinghouse including general garden maintenance, landscaping, planting and cultivation, domestic recreation, and parking and amenity use (Section 2)
- The land has remained in uninterrupted domestic use for a period exceeding ten years (Section 3)

- 9.6. The DAS also includes aerial photographs and a street view image, and a copy of a letter to the Council from Johnson & Gaunt solicitors. The letter is dated 27 August 2010 and states the following:

- a substantial hedge, which...has been in place for many years
- Mr S Chaudhry purchased the land in April 2010.
- is of the opinion that any Planning Designation as amenity space would have long since fallen into disuse and abandonment

- 9.7. Section 5 of the DAS states that the applicant relies upon (1) a Statutory Declaration, (2) historical aerial imagery, (3) “evidence of enclosure and maintenance of the land”, (4) “landscaping or garden maintenance and receipts”, (5) “title plans and supporting documentation” and (6) “any additional supporting documents enclosed with the application”.

- 9.8. Although referred to in the DAS, there is no statutory declaration with this application and no evidence of (3) or (4) has been submitted.

- 9.9. Overall, the applicant’s evidence is considered to be light. However, the aerial imagery provided in the DAS, alongside the letter dated August 2010, which advised that at that time the area of land in question had been enclosed for many years and be used as part of the garden, does demonstrate that the land had been enclosed over 10 years ago and became part of the curtilage/garden of No. 1 Heathcote Avenue.

Council’s Evidence

- 9.10. Turning to what evidence the Council has as its disposal, it has aerial photography for the years 1999, 2004-5, 2006, 2009, 2014-15, 2019 and 2022. Street view imagery is also publicly available for the years 2009, 2022 and 2025.

- 9.11. The 1999 aerial photograph shows the land enclosed by planting and appears to show the majority of the land laid to hardstanding. There appears to be a large

shrub on the and just forward of the garage and to its side. The 2004-5 aerial photograph shows the same.

- 9.12. The 2006 aerial photograph is clearer; it appears to show a maintained hedge or row of shrubs that enclose the land; it shows the land is mainly laid to hardstanding and it shows the aforementioned large shrub.
- 9.13. The 2009 aerial photograph shows the same green enclosure of the land and the same aforementioned large shrub but also shows other shrubs/plants.
- 9.14. The 2014-5 aerial photograph is grainier than those of 2006 and 2009 but appears to show the land is clearer of planting than in 2009 particularly the part of the site forward of the front building line of the garage; the large shrub appears not to be present; the enclosing hedge appears to be thicker/more continuous than in earlier aerial photographs; the majority of the land is laid to hardstanding.
- 9.15. All of the foregoing is reflected in the 2019 aerial photograph, although a smaller shrub has appeared, in line with the rear building line of the garage.
- 9.16. The 2022 aerial photograph shows similar to the 2019 one, with the addition of another small shrub close to where the larger one was in earlier years.
- 9.17. The street views from 2009, 2022 and 2025 all show the land to be laid to hardstanding and not separated from the applicant's driveway. In all of the street views, but especially in those of 2022 and 2025, the front part of the land appears as capable of being used as the applicant's driveway or in use for car parking, e.g. in the 2025 street view there is a car straddling the applicant's driveway and the site.
- 9.18. All of the street views, when looking eastward from Elton Road into the side, corroborate what is evident from the aerial photography.
- 9.19. In all of the street views, 2009, 2022 and 2025, it is clear that the rear part of the site is separated from the applicant's rear garden by a brick wall and the side wall of the applicant's garage. In none of the street views is there an active use of the space as garden land or enjoyment of the land as part of the applicant's rear garden.
- 9.20. However, it is also the case that the site was all laid to hardstanding, that this took place no later than 1999 i.e. well over ten years ago, that other than the aforementioned shrubs there is no clear separation between the two parts of the site, and that all of the land has had a residential character throughout this time.
- 9.21. Overall, the evidence available to the Council would lead to the conclusion that the land has been used for residential purposes ancillary to the dwelling currently known as 1 Heathcote Avenue for a period well exceeding ten years.

Evidence from consultees/Third Parties

- 9.22. The representations of the town council and objectors are noted. Both the town council and objectors refer to the applicant's lack of evidence. Both the town council and objectors refer to the value of the land to local visual amenity and impact of a change of use of the land and erection of a fence on the character and appearance of the area. However, this application does not relate to the planning merits of a change of use of land but whether or not the available evidence leads to a conclusion that the land has been used for domestic purposes.

10. CONCLUSION

10.1. On the balance of probabilities, the Council concludes that a lawful development certificate should be issued in relation to the land.

11. RECOMMENDATION

FIRST SCHEDULE

Use of land for purposes ancillary to the enjoyment of the dwellinghouse.

SECOND SCHEDULE

1 Heathcote Avenue, Banbury, OX16 9TP

THIRD SCHEDULE

On the balance of probabilities, the Local Planning Authority is satisfied from the available evidence that the land has been used for purposes ancillary to the enjoyment of the dwellinghouse currently known as 1 Heathcote Avenue for a period of time exceeding ten years.

CASE OFFICER: Nathanael Stock