SUPPORTING STATEMENT

Hillside

Breach Lane

Totmonslow

Staffordshire

ST10 4JL

Application to Staffordshire Moorlands District Council

for a Lawful Development Certificate

AFA Planning (Agriculture) Ltd

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1) INTRODUCTION

1.1. The grounds for this application are based on the assertion that the dwelling known as Hillside, Breach Lane, Totmonslow, Stafforshire, ST10 4JL was constructed without compliance with the relevant planning permission which therefore cannot be said to have authorised the development that did in fact take place. However since the dwelling has indisputably been in existence for more than four years it is immune from enforcement action under planning law.

1.2. The essence of the application is not therefore the planning merits or otherwise of the dwelling, but that the dwelling which was actually built was not in law the dwelling that had previously been granted planning permission together with an agricultural occupancy condition.

1.3. Furthermore, in view of this there cannot therefore be any agricultural occupancy restriction relating to the current dwelling.

2) RELEVANT PLANNING HISTORY

2.1 Outline planning permission for an agricultural dwelling was granted by your Authority, application reference 21443- 9228 approved 7 March 1973, following outline permission with the same reference number that had been granted 21 July 1972. This was subject to an agricultural occupancy condition (condition 2). Copies of these approvals and related plans are included as Appendix ‘A’ and ‘B’.

3.0 THE LAW & POLICY

3.1 Relevant case law is considered later in this statement, however the principle relevant legislation is as follows:

3.2 Section 171A of the Town & Country Planning Act 1990 (as amended by Section 10 of the Planning & Compensation Act 1991):

(1) For the purposes of this Act—

(a) carrying out development without the required planning permission; or

(b) failing to comply with any condition or limitation subject to which planning permission has been granted, constitutes a breach of planning control.

3.3 Section 171B of the Town & Country Planning Act 1990 as amended.

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

(2) 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.

(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 the breach.

3.4 S.191 of Town & Country Planning Act 1990 as amended:

(1) If any person wishes to ascertain whether—

(a) any existing use of buildings or other land is lawful;

(b) any operations which have been carried out in, on, over or under land are lawful; or

(c) any other matter constituting a failure to comply with any condition or limitation subject to which planning permission has been granted is lawful, he may make an application for the purpose to the planning authority specifying the land and describing the use, operations or other matters.

(2) For the purposes of this Act, uses and operations are lawful at any time if

(a) no enforcement action may then 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.

(3) For the purposes of this Act, any matter constituting a failure to comply with any condition or limitation subject to which planning permission has been granted is lawful at any time if —

(a) the time for taking enforcement action in respect of the failure has then expired; and

(b) it does not constitute a contravention of any of the

(c) requirements of any enforcement notice or breach of condition notice then in force.

(4) If, on an application under this section, the planning authority are provided with information satisfying them of the lawfulness at the time of the

application of the use, operations or other matter described in the application, or that description as modified by the planning authority or a description substituted by them, they shall issue a certificate to that effect; and in any other case they shall refuse the application.

3.5 As far as evidence is concerned, it is a well-established principle that the onus of proof is firmly on the applicant in Lawful Development Certificate cases. Furthermore the courts have also held that the relevant test of the evidence on such matters is *"the balance of probability"* which has sometimes been called *“the 51% test”*. It is also well established that this test will accordingly be applied by the Secretary of State in any appeal against their decision. Therefore a local planning authority should not refuse a certificate because the applicant has failed to discharge the stricter, criminal burden of proof, namely *"beyond reasonable doubt"*.

3.6 Moreover, the Court has held (see *F W Gabbitas v Secretary of State for Environment and Newham LBC* 1985) 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 applicant's evidence alone is sufficiently precise and unambiguous to justify the grant of a certificate *"on the balance of probability."*

4.0 GROUNDS FOR THIS APPLICATION

4.1 This application seeks to assert that there was no lawful implementation of any relevant planning permission as the dwelling was sited in a materially wrong position.

5 INCORRECT SITING OF HILLSIDE

5.1 As set out above planning permission 21443-9228 , the approved plan which was submitted with that application is included in Appendix ‘B’.

5.2 From a comparison of the position of the dwelling shown on the approved plan with the actual position of the dwelling as built discloses significant divergences of siting between the two. In view of this my client commissioned a survey report by Clelford Essex Associates Ltd. That report is now submitted as Appendix ‘C’.

5.3 As a result of a comparison process, Clelford Essex have identified a discrepancy in relation the approved siting of the property on the location plan reference 21443 compared to its actual location as shown in the OS map.

5.4 Firstly, the location plan shows the dwelling to be constructed slightly over 14.598 metres further South and 13.025 metres further East than the approved drawing. Please refer to drawing 17113-01 in the report at Appendix C where the approved location in the approved plan is highlighted by a green outline. It is clear in the

same drawing that Hillside's actual location which is highlighted in red is not consistent with the approved location.

5.5 Clellford Essex's overall conclusion is very clear that the dwelling does not comply with the approval granted in terms of its location on the site.

5.6 On the basis of the above, it is asserted that there is clear evidence that the dwelling was built in a materially different position to that which was approved, and that this divergence cannot be regarded as de minimis.

5.7 We therefore assert that the dwelling was unlawfully developed. As it has clearly been in existence for over four years, under planning law it has become lawful but without any kind of occupancy restriction. This is because the only occupancy restriction in existence was that imposed on a permission which was never in fact implemented.

5.8 There cannot therefore be any occupancy restriction on the dwelling today.

6 CASE LAW RELATING TO INCORRECT SITING

6.1 The leading case which is relevant to this application is Handoll & Suddick v. Warner, Goodman & Streat, Cook & East Lindsey D.C. 1995 (Court of Appeal)(see J.P.L. 1995, page 930).

6.2 The outcome of the Handoll case originally stemmed from the Court of Appeal decision in F. G. Whitely & Sons v Secretary of State for the Environment 1992 which pointed to the principles that:

(1) where operational development is carried out in a way which differs materially from approved plans, it amounts to development without planning permission; and

(2) any conditions imposed on the planning permission for those operations are unenforceable because the particular planning permission has not been implemented.

6.3 In Whitely, Woolf L. J. said:

"…… it is only necessary to ask the single question: are the operations (in other situations the question would refer to the development) permitted by the planning permission read together with its conditions?

6.4 In the Handoll case, a dwelling had been constructed some 27 metres away from its approved siting.

6.5 It is considered that Woolf L. J's question quoted above can only be answered in the negative in this current case; the development was not permitted by the planning permission.

6.6 The statement in the Whitley case that *"Where operational development is carried out in a way which differs materially from approved plans, it amounts to development without planning permission;"* is especially pertinent in this current case as there can be no doubt that the operational development was carried out

in a way which differed materially from approved plans. Therefore it did amount to development without planning permission.

6.7 The assertion that the dwelling subject of this application is a development without planning permission, is further supported by the fact that in the Handoll case the Court of Appeal stated that an earlier case (Kerrier District Council v Secretary of State for the Environment 1980) had been wrongly decided. In that case the building concerned was constructed on the approved site and correctly located (unlike the Handoll dwelling), however the Kerrier dwelling included an unapproved basement. The basement was the significant divergence from the approved plans in the Kerrier case. The wrong decision in Kerrier was that this was insufficient to prove that the whole development was unauthorised.

7 The issue of materiality

7.3 The relevance of the Kerrier case to the current application is that if the building of a dwelling with an unauthorised basement is sufficient to prove that the relevant permission was not lawfully implemented, then it is considered that it follows that the dwelling subject of this application also amounted to an unlawful implementation of the planning permission.

7.4 A key issue of course in such cases will always be whether or not the divergence(s) from the approved plans are material and not merely *de minimis*. In this regard the case of Wycombe District Council v Williams & Others [1995], is very relevant. In that case it was indicated that the Handoll test should not apply where the differences between the approved and the existing development fall

within the normal tolerances and are therefore immaterial. In other words the key issue is that of materiality; there may be a divergence, but how serious is it?

8 Relevant appeal decisions

8.1 There will of course always be borderline cases and there are several appeal decisions which illustrate this but with different outcomes. The following are some appeals which shed light in the issue of materiality. Copies of the decisions are not included with this application, but of course the cases can usually be accessed via the PINS website.

8.2 Firstly there was the appeal relating to Matthews Farm, Dulford, East Devon LPA in 2006 (APPU1105/X/06/2033754) and another appeal relating to Corner House, Market Weighton, East Riding of Yorkshire LPA in 2007. I consider that both cases were fairly borderline, but one was allowed and the other was dismissed.

8.3 In the Matthews Farm appeal, the main divergences were that a conservatory was built instead of a veranda; there were also changes to the chimneys, fenestration, external materials and some external dimensions. However it would appear that conservatory instead of a veranda issue was the one that the Inspector considered to be the most significant (para. 29 & 30). Regarding the minor variations, the Inspector states, *"Whether or not they would by themselves have been sufficient to render the development unauthorised, they can only add weight to my conclusion above".*

8.4 The Matthews Farm appeal also sheds further light on whether or not deviations from the approved plan must always be of the same, or near, the degree of seriousness as that in Handoll. In para. 35 the Inspector states, *"The deviations from the approved plans may not be so obvious in this case as in Handoll, or indeed, in Kerrier, but for the reasons already given, I find them readily apparent and sufficient to grant a certificate."* In the light of this, it is considered that whilst in this current application the measurements are certainly not as severe as in Handoll, nevertheless they are also *"readily apparent"* and therefore the test of materiality can and should be applied in the favour of the current applicant.

8.5 The Matthews Farm appeal was allowed. In contrast the Corner House appeal was dismissed. In that case the approved scheme showed a single ground floor window on the western gable of the proposed house, whereas the dwelling as built had an external chimney stack on this elevation, together with two windows on each side of the chimney stack.

8.6 The reason why I now bring these cases to the attention of the Authority is that the divergence from the approved plans that are key to the grounds of this current application, are I consider, well in excess of the divergences of both the Matthews Farm and the Corner House cases. This therefore I believe strongly indicates that in the case of the dwelling subject of this application, the divergence from the approved plan are not borderline, and certainly not immaterial.

8.7 Also relevant is appeal from Carmarthenshire relating to a dwelling known as Llys Helyg (APP/M/6825/X/14/2220344). This appeal which was submitted my Company was allowed; the decision letter is dated 3 December 2014.

8.8 Our submission in that case also included a survey report from Clelford Essex Associates Ltd. That report concluded that the dwelling was constructed in the order of 6.7 M further west and 7.0 M (at its maximum) further south relative to the road frontage than the approved plan and was rotated approximately 18 degrees clockwise from that shown on the approved plan. The extent of overlap between the as-built position and the approved position was relatively small and was illustrated by the provision of a plan in relation to the Llys Helyg application and which was taken into account by the appeal Inspector in that case.

8.9 Another relevant point is that the Local Planning Authority in the Llys Helyg appeal maintained that the level of the significance of the impact of the divergent position of the dwelling as-built was of relevance and would lead to the conclusion that there was no material variation to that approved. The Inspector however disagreed stating that the divergences were of such an extent that the change in location of the building was material, irrespective of whether or not the change had an adverse impact on the views toward the building from the public realm.

8.12 I now mention this in case your Authority is minded to refuse this current application on the basis that the dwelling is away from public view and that this means that the application should be refused for the same kind of reasons advanced by the Authority in the Llys Helyg appeal.

8.13 Additionally in an appeal in September 2015 APP/DO840/X/15/3006785 - The Old Nursery a divergence of 8m from the approved plan (even despite some overlap with the approved location) was considered a relevant factor in

determining that what was constructed was materially different to what had been approved.

9 Materiality – other considerations

9.1 With respect to the overall issue of materiality, I would suggest that the situation can be further clarified by consideration of the possibility of enforcement action during the dwelling's first four years of existence. In other words, would the Local Planning Authority have been justified during that period, in issuing an enforcement notice on the grounds that the dwelling was built in an unauthorised position?

9.2 Taking the relevant case law and planning appeals into account, it is considered that the answer to the question must be unequivocally in the affirmative.

9.3 To answer the question in the negative would be illogically to assert that the divergences from the approved plans were not really material and that they were only de minimis, or at least that the difference between the approved and the existing development falls within the normal tolerances for minor variations often inherent in the laying out and the construction of buildings as was indicated in Wycombe District Council v Williams & Others [1995].

9.4 Furthermore, I would point out that if enforcement action regarding the incorrect siting had been taken during the first four years, it could only have been by way of an enforcement notice alleging material divergence from the approved plan amounting to an unauthorised development. It is surely not possible that a breach of condition notice would have been capable of addressing the extent of the divergences and the facts of the case. This therefore indicates that the

divergences were far more than mere breaches of condition, serious though that may have been.

9.5 In relation to whether the expediency criteria for enforcement action was satisfied, the Local Planning Authority may, or may not, have considered in the circumstances that enforcement was expedient. However either way, the expediency consideration would have been quite separate from the question of whether a material breach of the planning regulations had occurred and would not have affected the primary justification for the issue of an enforcement notice. This point was illustrated in the Matthews Farm appeal by the Inspector who made it clear that harmfulness and materiality are not the same thing (para.20). In other words the Authority may have decided that the unauthorised siting of the dwelling was acceptable and not harmful and could have been authorised by a subsequent planning permission. That is irrelevant to the issue which matters, i.e. that of materiality. In any case, the degree of divergence in relation to this dwelling is so marked that it seems very likely that your authority would have decided that enforcement action was indeed expedient.

9.6 A second and associated question that also clarifies the situation is whether or not the dwelling as constructed so materially differed from the approved plans that it required a separate permission within four years of its material completion? Again it is considered that the answer must unequivocally be in the affirmative. In this regard, the Inspector in the Matthews Farm appeal, comments at para. 24 are relevant; he writes *"The very fact that it might be necessary to authorise a change from an approved plan to my mind implies that it would be material, whatever the procedure involved."*

10 SUMMARY OF CASE

10.1 This application asserts that the difference in siting between the approved plan, is sufficient grounds for your Authority to grant the Certificate applied for. It is considered that our case provides evidence well beyond the standard of evidence legally required, i.e. *the balance of probabilities.*

10.2 I would emphasise that the relevant evidential test with regard to this application is that of *the balance of probability*, not that of *beyond reasonable doubt*, the latter requiring a far stricter standard of proof as applicable to criminal cases. In this case the Authority has a legal obligation under S. 191 (4) of the Act to issue the Certificate if satisfied that the balance of the evidence is probably on the side of the applicant. With respect therefore I would point out that the Authority has no right to insist on a stricter standard of evidence than that of *the balance of probability.* This has in my view been clearly provided and therefore the Certificate should now be issued.

10.3 This will, of course, mean that all other conditions of the relevant planning permission are unenforceable, in fact have no legal standing. In particular Condition 2 of the permission which seeks to limit occupation of the dwelling to an agricultural or forestry worker and relevant dependants.

10.4 It is for this reason and for the avoidance of any doubt in the matter, that the application is worded *"Dwelling house without any occupancy restriction"*. Should the application be successful therefore, I would ask that this wording is

shown on the Certificate. As it is clearly obvious that the dwelling house has been in existence for more than 4 years, this application has not included additional documentary evidence as to that fact, however if this should be required by the Authority, it can be provided on request.

I hope that the submitted application and evidence is sufficient to enable you to reach a decision on this case within the statutory 8-week period. If you require any further information please contact me at our Company address.

Alan Folkes
Director
AFA Planning (Agriculture) Ltd
January 2018

Appendix A - Planning Permission
Appendix B - Approved Plan
Appendix C - Clelford Essex Report
Appendix D - Appeals