

SUPPORTING STATEMENT

Alvey House

Scalp Road

Fishtoft

Boston

Lincolnshire

PE21 0SH

**Application to Boston Borough Council
for a Lawful Development Certificate (Existing Use)**

AFA Planning (Agriculture) Ltd

January 2024

4 Fenice Court

Phoenix Business Park

St Neots, Cambridgeshire PE19 8EP

[REDACTED]

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1.0 INTRODUCTION

- 1.1 This is an evidenced based application under Section 191 of the Town and Country Planning Act 1990 as amended by Section 10 of the Planning and Compensation Act 1991 for the issue of a certificate of lawful use relating to a dwelling known as Alvey House, Scalp Road, Fishtoft, Boston, Lincolnshire, PE21 0SH.
- 1.2 The application seeks to establish that the balance of probability is that the application property:
- (i) has been continuously used as a dwelling for a period in excess of ten years prior to the application date, and
 - (ii) has been occupied in breach of the relevant occupancy condition for a period in excess of 10 years prior to the application date.
- 1.3 Furthermore, the above does not constitute a contravention of any of the requirements of any enforcement notice, or breach of condition notice in force. In other words, your Authority has not instituted enforcement action the effect of which would have been to 'stop the 10-year clock', the relevant period for the purposes of the application therefore commenced ten years prior to the date of the application.
- 1.4 In view of this, the occupancy condition is no longer enforceable and therefore the certificate applied for should be issued by your Authority confirming that it is lawful for persons not in compliance with the restriction to occupy the dwelling.

2.0 RELEVANT PLANNING HISTORY

2.1 Our enquiries with your Authority's statutory planning register have revealed the following:

2.2. Outline planning permission for the dwelling was granted by your Authority on 4th April 1962 ref: BR104/62 (copy at Appendix 'A'). The permission was approved subject to the imposition of an agricultural occupancy condition, condition No. 2, which stated that:

"The occupation of the house shall be limited to persons employed or last employed locally in agriculture or their dependants."

2.3 Notice of passing of plans for the dwelling was granted by your authority on 17th July 1962 ref: BR213/62 (copy at Appendix 'A') which acts as the approval of all reserved matters, as confirmed by your Authority.

3.0 THE LAW IN RELATION TO BREACH OF CONDITION

3.1 The principle law and guidance relating to this application 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 dwelling house, 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 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 Government advice contained in Planning Practice Guidance - Lawful Development Certificates, published 06 March 2014, makes it clear (para 006) that in determining applications for lawful development certificates, the applicant is responsible for providing sufficient information to support an application and that in the case of applications for existing use, if a local planning authority has no evidence itself, nor from any 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. It is for the local planning authority to consider whether, on the facts of the case and relevant planning law, the specific matter is lawful. The planning merits as such of the case are not therefore relevant at any stage in this particular application.
- 3.6 It is therefore 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*". Moreover, the Court has held (see *F*

W Gabbittas 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."*

3.7 As this test will accordingly be applied by the Secretary of State in any appeal against their decision, 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"*.

3.8 *Nicholson v Secretary of State* 1998, Robin Purchase QC, Sitting as Deputy High Court Judge, held:

"In my judgment, to answer the question of whether enforcement action can be taken against a failure to comply with a condition, the decision maker should identify the failure to comply;

(1) look to see when as a matter of fact and degree that failure began; and

(2) decide whether a period of 10 years has since expired."

3.9 The applicant contends that the above test is relevant and is discussed later.

3.10 I take it that with regard to this present application the Local Planning Authority would apply the current definition of agriculture, i.e. Section 336 (i) of the Town & Country Planning Act 1990 which defines agriculture to include:

“horticulture, fruit growing, seed growing, dairy farming, the breeding and keeping of livestock (including any creature kept for the production of food, wool, skins or fur, or for the purpose of its use in the farming of land), the use of land as grazing land, meadow land, osier land, market gardens and nursery grounds, and the use of land for woodlands where that use is ancillary to the farming of land for other agricultural purposes, and "agricultural" shall be construed accordingly.”

- 3.11 The changes in the legal situation regarding deliberate concealment are discussed at paragraph 7.

4.0 **EVIDENCE**

- 4.1 Evidence which supports the applicant's assertion that the dwelling has been occupied as a dwelling in continuous breach of the relevant occupancy restriction for a period of at least ten years prior to the date of the application consists of the following:
- 4.2 **Affidavit by the Applicant dated 25th October 2023 (Copy at Appendix B).**
- 4.3 Mr Dean Goodeve states that he has lived at the application dwelling continuously since 2003 without a break and during that period has had no other place of residence. Mr Goodeve states that he and his family moved to the application dwelling from Wales after the small calf rearing unit he ran proved to be non-viable as an enterprise. Mr Goodeve also states that he was not employed locally in

agriculture when he moved into the application dwelling and since moving in has been occupied in looking after the family and family home.

Mr Goodeve states that upon moving into the application dwelling his wife became the principal breadwinner and that neither his wife or children have even been involved in agriculture.

Mr Goodeve states that from 2005 he did keep about 30 sheep and 10 cattle and sheep on his property as a hobby. But no profit or income was derived from keeping those animals and these were all sold by 2017, he and his wife having retired from any form of employment.

For the avoidance of doubt Mr Goodeve wishes to make it clear that that these animals were not kept by him in an attempt to comply with any agricultural occupancy restriction or as an employment to earn an income. As a house husband his intention was to keep the animals simply as a diversion from the rest of his duties at home in a way that he found to be an enjoyable outdoor pastime in the fresh air. However, as stated above, by 2017 due to the costs involved he had sold all the cattle and sheep and now keeps only a few ponies on his property.

5.0 EVIDENCE – DOMESTIC DOCUMENTS (see Appendix ‘C’)

- 5.1 Submitted with this application are copies of documents showing the applicant’s name and address for various years from 2004 to 2023.
- 5.2 The documents are also primary evidence that that the property was used as a dwelling during the relevant period and as the owner’s name is clearly shown on each one, they also provide clear evidence of their residential occupation of the

dwelling. The documents are of course, not evidence that any occupancy condition was continuously breached for the last ten years but they are consistent with the rest of the evidence and therefore tend to support the veracity of that other evidence; in that sense they are corroborative of the assertion that the occupancy condition was continuously breached for the last ten years.

6.0 HAS THERE BEEN A CONTINUOUS BREACH OF CONDITION FOR THE LAST 10 YEARS?

- 6.1 It is considered that the answer to this question is clearly in the affirmative. The evidence shows that Mr Goodeve and his wife lived at Alvey House continuously and without a break from when they moved into the property in 2003. Previous to moving into Alvey House Mr Goodeve was not employed locally in agriculture as per condition 2 in the planning decisions for the application dwelling, having run a small calf rearing unit in Wales which was not a viable business. After moving into the property Mr Goodeve was not employed in agriculture or any other form of paid employment. Mr Goodeve kept a few cattle and sheep on the property as a hobby, but these were all sold by 2017. Prior to moving into the property Mrs Goodeve had not been in paid employment but was involved in looking after their children and family home. After moving into the property Mrs Goodeve took up the role of a teaching assistant to become the principal breadwinner for the family. Neither Mrs Goodeve nor the Goodeve's children have ever been involved in agriculture or forestry.

7.0 THE POSSIBLE ISSUE OF DELIBERATE CONCEALMENT

7.1 In cases such as the current application it is relevant to consider issues resulting from the Localism Act 2011 and consequential additions to Section 181 of the Town & Country Planning Act 1990 which mean that applications for certificates can fail where there has been to any extent a deliberate concealment of a breach of planning control.

7.2 As far as this is concerned, I would point out that at no time whatsoever has my client, or anyone else made any attempt to conceal the breach of planning control. There has simply been no concealment, either deliberate or otherwise, not to any extent at all.

8.0 CONCLUSION

8.1 All the evidence in this case shows that no one living at the application property has been in compliance with the condition as *persons employed or last employed locally in agriculture or their dependants* during the relevant 10-year period. Moreover, the evidence also shows that the breach of condition is still continuing.

8.2 It is, therefore, submitted that all the evidence unambiguously demonstrates that there has been a continuous breach of the relevant condition of the planning permission for the dwelling concerned for a continuous period of at least ten years prior to the date of the application.

- 8.3 In addition as your Authority has not at any point instituted enforcement action the effect of which would have been to 'stop the 10-year clock', the relevant period for the purposes of the application therefore commenced ten years prior to the date of the application.
- 9.4 Government guidance and case law makes it clear that the burden of proof is on the appellant. It is considered that this burden has been fully discharged. Furthermore, the Courts have held that the relevant evidential test in such matters is "*the balance of probability*". When applied to the current application this test simply means that the key issue is whether the assertion that a breach of condition has continually occurred for at least the last 10 years, is more likely to be correct than incorrect. It is very important to recognize that the test is not the stricter one of the "*beyond reasonable doubt*" which would be applied in a criminal case. As "*the balance of probability*" test will accordingly be applied by the Secretary of State in any appeal against their decision, an LPA should not refuse a certificate because the applicant has failed to discharge the stricter, criminal burden of proof, namely "*beyond reasonable doubt*".

Moreover, the Gabbittas case demonstrates that the applicant's own evidence does not need to be corroborated by "independent" evidence in order to be accepted. Nevertheless, such corroboration has been provided by way of the evidence of Mr. Goodeve. If the Authority has no evidence of its 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, even in cases where the applicant's evidence alone is submitted, provided that it is sufficiently precise and unambiguous to justify the grant of a certificate "*on the balance of probability*".

9.5 In view of the evidence as stated above and submitted with this application, evidence which actually goes well beyond the standard of the Gabbittas case, it has been clearly demonstrated beyond the balance of probability that:

- (i) the property has been used as a dwelling continuously for a period of at least ten years prior to the date of the application, and that there has been no abandonment of that use,
- (ii) in planning law there has been for at least 10 years, a continuous breach of the relevant condition, and that there has been no abandonment of that breach,

therefore, the certificate should be granted in accordance with the relevant planning legislation, in particular the Town & Country Planning Act 1990 Section 191 (amended) which places a duty on local planning authorities when provided with information satisfying them of the lawfulness at the time of the application of the use, to issue the certificate applied for.

If you have any queries in relation to this application, please do not hesitate to contact me.

Alan Folkes

Director

AFA Planning (Agriculture) Ltd

January 2024