

# **SUPPORTING PLANNING**

## **STATEMENT**

**Turbury Croft**

**Long Lane, Dunkeswell**

**Honiton**

**EX14 4QN**

**Application To East Devon District Council**

**For A Lawful Development Certificate**

**26<sup>th</sup> October 2022**

**AFA Planning Ltd**

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## 1.0 **INTRODUCTION**

1.1 This is an evidenced based application for a certificate of lawful use relating to Turbury Croft, Long Lane, Dunkeswell, Honiton, Devon, EX14 4QN.

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 Planning application granted by East Devon District Council, application no: 7/56/91/P0243/00182 (copy enclosed at Appendix 'A'). The permission was approved subject to the imposition of an agricultural occupancy condition stating that:

*“The occupation of the dwelling shall be limited to a person solely or mainly employed, or last employed, in the locality in agriculture as defined in section 336(1) of the Town and Country Planning Act 1990, or in forestry, (including any dependants of such a person residing with him) or a widow or widower of such a person.”*

## **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 6.

#### **4.0 DESCRIPTION OF THE EVIDENCE & ITS RELEVANCE**

4.1 The 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 (Appendix B) provided by the applicant Mr Derek Hurst, dated 22<sup>nd</sup> September 2022**

4.3 Mr Hurst states that he moved into the mentioned property with his wife Elizabeth Hurst in 2011.

With respect to employment Mr. Hurst worked at his fathers farm along with his brothers until 1973. This farm was rented and became unfarmable after the owner sold off the majority of the land. Between 1973 and 1979 Mr. Hurst worked in



Southampton cleaning roads and carrying out maintenance work for McAlpine on the M27 & M271. This employment concluded in 1979 to enable him more time to look after his children following his wife passing away. Employment resumed in 1990 where he then rented a shop from the Southampton City Council called 'The Fruit & Veg Shop'. This employment ended in 1992 where it became clear that overheads and costs outstripped any value in continuing the business.

In May 2007 he started worked at Somerset Willows in Weston Zoyland, Bridgewater where he worked on a machine that stripped the willow taking bark off the branches. This was only ever a machine operated position and was the main source of my income at the time. Because of the cold damp working environment, he concluded this employment in May 2009.

For the avoidance of doubt, I can confirm that during the course of this employment he was not involved in any agricultural or forestry work, including the growing, planting or harvesting of willow. All he did is as described as above and within the affidavit.

The other person living in the house is his wife Elizabeth Hurst. In relation to her employment history, I can state the following. Between 1993 and 2006, she worked at a service station on the M27 working in the cash office. In 2006 Mrs. Hurst was made redundant from the service station. This was her last employment.

No one else has ever lived in this house besides Mr. and Mrs. Hurst.

Again, to avoid any doubt, the planning application granted on the land in 2012 Ref. No: 12/0832/FUL was for two polytunnels. They in fact only ever erected one, as that allowed Mr. & Mrs. Hurst to grow enough vegetables purely for their own consumption. They felt the need to have a polytunnel because the land and position meant the soil gets very wet and cold, making growing conditions virtually impossible

without the warmth and protection of a polytunnel. The polytunnel has and is only ever used for their own personal growing of vegetables ie: for their own consumption and never sold on. If they every grew too much they would sometime leave it at the front of the house for passers-by to take for free.

Mr Hurst categorically states that in the last 10 years neither he or anyone else living in the property have worked in agriculture or forestry either locally or elsewhere. In addition, he states that he has no intention whatsoever of becoming employed in agriculture or forestry in the future or that any person so employed should take up residence in his home.

4.4 Mr Hursts affidavit therefore provides the Authority with primary evidence that:

- (a) the dwelling concerned was continuously used as a dwelling during the last ten years,
- (b) the relevant occupancy condition was continuously breached for the last ten years.

4.5 **Statement dated 16<sup>th</sup> September 2022 provided by Mr. Steve Owen, a friend of the applicant (Appendix C)**

Mr. Owen knows that this statement will be used to make a forthcoming planning application and states that he does not stand to benefit financially or in any other way from the provision of this statement.

4.6 Mr Owen states that he has known Mr & Mrs Hurst since they moved into the area in 2011 and has visited the house on many occasions, usually once or twice a week. Mr. Owen states that he has never seen or heard anything whatsoever either

from either Mr & Mrs Hurst or from any other person or any other source that would give him the slightest suspicion that they work or have worked in farming, horticulture or forestry over the last 10 years.

Finally, Mr. Owen makes a declaration regarding his liability to prosecution under Section 194 of the Town & Country Planning Act 1990 if he has furnished false or misleading information or withheld material information with intent to deceive.

4.7 Mr. Owens statement therefore provides the Authority with primary evidence that Mr. Hurst has been in breach of the relevant occupancy condition for over 10 years.

4.8 **Statement dated 16<sup>th</sup> September 2022 provided by Mr. Skelton, a friend of Mr Hurst. (Appendix C)**

Mr Skelton knows that his statement will be used to make a forthcoming planning application and he states that he does not stand to benefit financially or in any other way from the provision of this statement.

Mr Skelton has known Mr Hurst for the last 15 years. Mr Skelton has visited Mr & Mrs Hurst's house on regular occasions over the last 10 years.

Mr Skelton says that he has never seen or heard anything whatsoever either from Mr or Mrs Hurst or from any other person or any other source that would give him the slightest suspicion that they work or has worked in farming, horticulture or forestry in the last 10 years.

Finally, Mr. Skelton makes a declaration regarding his liability to prosecution under Section 194 of the Town & Country Planning Act 1990 if he has furnished false or misleading information or withheld material information with intent to deceive.

4.9.1 Mr. Skelton's statement therefore provides the Authority with primary evidence that Mr. Hurst has been in breach of the relevant occupancy condition for some 10 years.

4.9.2 Whilst the statements provided as above do not of course have the same evidential weight as affidavits or statutory declarations, they both make it clear that they know that their statements will be used to support a forthcoming planning application and also make it clear that they do not stand to benefit financially or in any other way from the provision of the statements which they simply provide as statements of fact with the intention of assisting the Local Planning Authority to arrive at a correct determination. Furthermore they both conclude their statements by stating that they know that they will be liable to prosecution under Section 194 of the Town & Country Planning Act 1990 if they have furnished false or misleading information or withheld material information with intent to deceive.

In the light of the above, it is considered that these statements should not be dismissed simply because they are not sworn evidence, but that they should be taken at face value as statements of truth and therefore given due weight in the determination of this application.

## **5.0 OTHER DOCUMENTARY EVIDENCE**

5.1 Submitted with this application (Appendix D) are copies of a range of documentation showing the applicant's name, address and the year, i.e. one such document for each year from 2012.

5.2 The documents are primary evidence that Turbury Croft was used as a dwelling during the relevant period. The documents are not of course evidence that any occupancy condition was continuously breached for the last ten years, but they do tend to support the veracity of the other evidence and therefore in that sense they are corroborative of the assertion that the occupancy condition was continuously breached for the last ten years.

5.3 OS Extract of Appendix E

## **6.0 THE POSSIBLE ISSUE OF DELIBERATE CONCEALMENT**

6.1 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.

6.2 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.

## 7.0 CONCLUSION

- 7.1 All the evidence in this case shows that neither the applicant, nor his wife nor any other person residing at the dwelling, was employed in agriculture or forestry during the relevant 10 year period.
- 7.2 It is therefore submitted that all the evidence in this case 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.
- 7.3 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.
- 7.4 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 Gabbitas 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 Owen and Mr Skelton. 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*".

7.5 In view of the evidence as stated above and submitted with this application, evidence which actually goes well beyond the standard of the Gabbitas case, it has been clearly demonstrated beyond the balance of probability (at least) that the dwelling:

- (i) has been used as a dwelling continuously for a period of ten years prior to the date of the application,
- (ii) has been occupied by persons in continuous breach of the relevant condition, i.e. persons whose employment was not in compliance with the restriction, this being continuous for a period of ten years prior to the date of the application,

therefore, the certificate should be granted in accordance with the relevant planning law, 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.

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Director

AFA Planning Ltd- 26<sup>th</sup> October 2022

**Appendices**

- Appendix A: Copy of Decision Notice
- Appendix B: Affidavit
- Appendix C: Statements of Truth
- Appendix D: Evidence of Living at Property
- Appendix E: OS Extract