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# Appeal Decision

Site visit made on 13 July 2015

**by P N Jarratt BA(Hons) DipTP MRTPI**

**an Inspector appointed by the Secretary of State for Communities and Local Government**

**Decision date: 28 July 2015**

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**Appeal Ref: APP/P1805/X/14/3000650**

**Badgers Bank Farm, New Road, Fairfield, Bromsgrove, Worcs., B61 9LP**

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development (LDC).
  - The appeal is made by Mrs Leonora Davenport against the decision of Bromsgrove District Council.
  - The application Ref 14/0150, dated 15 January 2014, was refused by notice dated 21 May 2014.
  - The application was made under section 191(1)(b) of the Town and Country Planning Act 1990 as amended.
  - The development for which a certificate of lawful use or development is sought is a residential dwelling without conditions imposed by B13140.
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## Preliminary matters

1. For the avoidance of doubt, I should explain that the planning merits of any future use or operations are not relevant, and they are not therefore an issue for me to consider, in the context of an appeal under section 195 of the Town and Country Planning Act 1990 as amended, which relates to an application for a lawful development certificate (LDC). My decision rests on the facts of the case, and on relevant planning law and judicial authority. The burden of proof rests with the appellant and the appropriate test of evidence is the balance of probabilities.

## Main Issue

2. I consider that the main issue is whether the Council's decision to refuse to grant a lawful development certificate was well-founded.

## The Site and Relevant Planning history

3. The dwelling at Badgers Bank Farm is a detached chalet style dwelling set in its own gardens and accessed off a private drive.
4. Outline planning permission was granted in August 1985 for the erection of a bungalow subject to conditions, including an agricultural occupancy condition. (B13140). Approval of reserved matters was granted in July 1986 also subject to conditions (B14100).
5. An application to remove the agricultural occupancy condition in 2013 failed in the absence of evidence to establish there was no longer a need to retain the dwelling for agricultural workers.

### **The case for the appellant**

6. The appellant states that the dwelling, attached garage and driveway were not built in accordance with the plans approved under application B14100. It was therefore unlawful at the time of construction and the planning permission and its associated conditions have now lapsed in their entirety.
7. In particular, the appellant contends that the dwelling has been shifted from its proposed position some 8.02m to the SSE. Additionally there are other significant differences with the approved plans:
  - a) The access track from Mount Road was not constructed
  - b) Windows inserted in first floor on both side elevations
  - c) Additional door inserted in front elevation
  - d) Garage constructed with two single doors and not a double door.
  - e) Front door and side lights differ from that permitted
  - f) Additional window on ground floor rear elevation
  - g) Roof provides canopy over rear access to boot room
  - h) Door rather than window in rear elevation
  - i) Ridge height 0.48m higher than permitted
  - j) Chimney in utility room replaced with stainless steel flue
  - k) The front wall of the garage has been extended across the front elevation to enclose the coal and log stores and created instead a boot room.
  - l) Roof lights inserted in rear roof slope
  - m) Garage 15% larger than permitted and constructed to be 6.24m wide rather than 5.43m
8. There have been no significant external alterations to the property since it was built and the structure of the property exists today as it did in 1988<sup>1</sup>. As the dwelling was substantially completed more than four years before the application for an LDC it is immune from enforcement action.

### **The case for the Council**

9. In April 1988 the agent stated that the building had been constructed in accordance with the approved plans, albeit regarding building regulations.
10. The alterations to the external envelope of the dwelling are *de minimis* or non-material and the general layout and appearance of the building is not materially different to the 1986 approval. The access track has never been constructed and represents a failure to complete the development and not a deviation from the permission. The overall dwelling position does not deviate from the approved drawings. The size of the site and the nature of the site as open agricultural land would have made it difficult to establish an accurate reference point to start construction. As the 'as built' and 'as approved' overlap, along with the size of the plot and its isolated location means that the 'as built' position of the dwelling is not considered to be materially different.

### **Reasons**

11. This case rests on whether the differences between what has been approved and what has been built are material or not. This is a subjective judgement based on a fact and degree assessment dependent on the individual circumstances of the case.

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<sup>1</sup> This is confirmed in a Statutory Declaration by the appellant dated 10 January 2014.

12. In *Commercial Land*<sup>2</sup>, it was held that in assessing whether a material operation is 'comprised in the development' it is not sufficient to consider the differences between 2 plans but to consider the significance of the differences. Although this case deals with the issue of substantial completion rather than implementation, I consider the main point to be useful in this appeal.
13. The differences identified above in paragraph 7 (a) – (m) are not in dispute, only their materiality. I agree with the Council that the fact that the access track has never been constructed represents a failure to complete the development, rather than a deviation from the permission. The enlarged garage and increased ridge height would normally be material in an otherwise built up area with closer neighbours but in this location in open countryside the effects of these changes are not sufficiently significant in themselves to be determinative. The majority of the other changes are cosmetic and do not materially alter the appearance of the dwelling.
14. The most significant issue is the siting of the dwelling which the appellant states has been shifted by 8.02m and shown in the appellant's Appendix 5 of the Planning Statement. This is a very precise figure and because of the nature and small scale of the plans attached to the original permission and without a measured survey, I find it difficult to understand how this distance has been measured or whether it under-estimates the degree of overlap between the 'as built' and the 'approved' positions. Nevertheless, this degree of shift has not been disputed by the Council and it is evident from the submitted plans, aerial photographs and from observation on the site that the dwelling, as a matter of fact and degree, is in a different position to that approved. The degree of shift is not small but is of several metres which I regard to be significant and materially different, even though the building plot was originally in the corner of a field and some distance from its neighbours.
15. As a consequence, the dwelling has not been built in accordance with the approved plans but has been built without planning permission. As stated in *Handoll*<sup>3</sup>, if a development has been carried out other than in accordance with the planning permission granted it is unauthorised and unlawful, and therefore any conditions attached to the permission can have no effect on it. The relevant permission has not been implemented and the Council could have taken enforcement action any time up to 4 years after the development was substantially completed. This was not done and the development is immune from enforcement action.
16. I note that the Council has relied on an assurance that the building had been constructed in accordance with the approved plans under the building regulations but there is no guarantee that these would have been the same plans as approved through the planning permission.
17. I have also had regard to the various appeals and local authority decisions referred to by the appellant.

## Conclusions

18. For the reasons given above I conclude, on the evidence now available, that the Council's refusal to grant a lawful development certificate was not well-founded

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<sup>2</sup> *Commercial Land v SSSLGR* (2002)

<sup>3</sup> *Handoll v Warner, Goodman and Streat & East Lindsey DC* [1995] JPL 930 (CA)

and that the appeal should succeed. I will exercise accordingly the powers transferred to me under section 195(2) of the 1990 Act as amended.

**Formal decision**

19. The appeal is allowed and attached to this decision is a lawful development certificate describing the extent of the existing operation considered to be lawful.

*P N Jarratt*

INSPECTOR



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## Lawful Development Certificate

APPEAL REFERENCE APP/P1805/X/14/3000650  
TOWN AND COUNTRY PLANNING ACT 1990: SECTION 191 *or* 192  
(as amended by section 10 of the Planning and Compensation Act 1991)

THE TOWN AND COUNTRY PLANNING (DEVELOPMENT MANAGEMENT PROCEDURE) (ENGLAND)  
ORDER 2010: ARTICLE 35

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**IT IS HEREBY CERTIFIED** that on 15 January 2014 the operations described in the First Schedule hereto, in respect of the land specified in the Second Schedule hereto and edged in black and red on the plan attached to this certificate was lawful within the meaning of section 192(1) of the Town and Country Planning Act 1990 as amended, for the following reason:

The dwelling as built is materially different to the dwelling permitted under planning permission references B13140 and B14100 such that the original permissions were not implemented. As the 'as built' dwelling was substantially completed in excess of four years prior to the application for the LDC, it is immune from enforcement action and the conditions imposed on the original permissions do not apply.

*P N Jarratt*

INSPECTOR

Date 28.07.2015

### ***First Schedule***

Residential dwelling without conditions imposed by Planning Permission B13140

### ***Second Schedule***

Badgers Bank Farm, New Road, Fairfield, Bromsgrove, Worcs., B61 9LP

## **NOTES**

1. This certificate is issued solely for the purpose of section 191 or 192 of the Town and Country Planning Act 1990 as amended.
2. It certifies that the operations described in the First Schedule taking place on the land specified in the Second Schedule would have been lawful, on the certified date and, thus, would not have been liable to enforcement action, under section 172 of the 1990 Act, on that date.
3. This certificate applies only to the extent of the operations described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any operation which is materially different from that described, or which relates to any other land, may result in a breach of planning control which is liable to enforcement action by the local planning authority.

## Plan

This is the plan referred to in the Lawful Development Certificate dated: 28.07.2015

by P N Jarratt BA(Hons) DipTP MRTPI  
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Scale: Do not scale

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