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8 November 2023

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Dear Ms Williams

PROPOSAL: CERTIFICATE OF LAWFULNESS FOR DWELLING WITH UNRESTRICTED OCCUPANCY AND ASSOCIATED GARDEN (DWELLING FREE FROM THE ENCUMBRANCE OF THE PLANNING CONDITIONS ATTACHED TO PLANNING PERMISSION 4/12/90/610)

SITE: HAVANA HOUSE, CADELEIGH, TIVERTON, DEVON, EX16 8HT

APPLICANTS: MR AND MRS BOLT

1. We write enclosing an application on behalf of the applicants for a certificate of lawfulness for the existing dwelling at the above site with unrestricted occupancy and its associated garden.
2. The application includes the following documents and plans:

Completed application form.

Drawing No. ARPC1 Location plan.

Drawing No. ARPC2 Existing site layout.

Drawing No. ARPC3 Mastermap OS data and position of built dwelling overlaid on extract from block plan stamped approved and dated 2 April 1990.

Drawing No. ARPC4 Mastermap OS data and position of built dwelling overlaid on extract from location plan stamped approved and 21 March 1990.

Drawing No. ARPC5 Mastermap OS data and position of built dwelling overlaid on extract from location plan stamped minor amendments to consent granted and dated 16 February 1995

Drawing No. ARPC6 Mastermap OS data, position of built dwelling and position of approved dwelling from block plan overlaid on aerial photograph.

Drawing No. ARPC7 Existing elevations.

Document bundle A - planning permission reference 4/12/90/610 dated 2 May 1990 and drawings stamped approved.

Document bundle B – Letter dated 17 February 1995 drawings stamped minor amendment granted.

Appeal decision letters APP/D3315/X/16/3150659, APP/P1805/X/14/ - 3000650 and APP/V3310/C/12/2168366.

Statutory declaration by Mr Philip Bolt.

3. This application is submitted under Section 191 of The Town and Country Planning Act 1990 (as amended) (the Act) that allows applications to be made for a certificate of lawfulness by anyone wishing 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.
4. It is submitted that the dwelling and its associated garden are lawful and that the dwelling is free from the encumbrance of the planning conditions attached to planning permission reference 4/12/90/610 (the planning permission) for the reasons set out in this letter.

Background information

5. The applicants are the freehold owners of Havana House. The property comprises a detached dwelling with an attached garage, a garden, outbuildings, stables and other land. In total the property extends to approximately 3.3 acres.
6. On 2 May 1990, Mid Devon District Council (MDDC) granted the planning permission. The particulars of the planning permission described the approved development as being for the “erection of agricultural dwelling” and the details of the consent stated that it was granted to carry out the development described in the application and the plans and drawings attached thereto numbered 4/12/90/610. The planning permission was also subject to seven planning conditions that were identified as conditions a), b), c), d), e), f) and g).
7. Condition b) required the development to be carried out in accordance with the approved drawings. It stated:

“Unless agreed otherwise in writing by the District Planning Authority, the proposed development must be completed in all respects strictly in accordance with the drawings hereby approved, and dated 21st March 1990 and 2nd April 1990.”
8. Condition g) was an agricultural occupancy condition. It stated:

“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 290 (1) of the Town and Country Planning Act, 1971 (including any dependants of such a person residing with him or her) or a widow or widower of such person.”
9. A copy of the planning permission and the drawings that were stamped approved by MDDC are enclosed with this application. The approved drawings included a 1:2500 scale plan showing the position of the proposed dwelling with dimensions relative to the highway and an electricity pole; a block plan at a scale of 1:500 that showed the position of the dwelling with measurements for the location of the

dwelling and garage¹ and drawings that contained detailed elevations, a floor plan and roof plan for the dwelling and the garage.² As approved, the dwelling and garage were separate detached structures.

10. On 17 February 1995, MDDC wrote to the applicant approving revised drawings as minor amendments to the planning permission. A copy of this letter and the stamped approved amended drawings are also enclosed with this application.
11. MDDC's letter explained that the revision to the planning permission was re-siting the garage to the southern elevation of the dwelling. It also referred to drawings that had been submitted for the purposes of approval under the Building Regulations and noted that they showed the following further revisions to the drawings previously approved under the planning permission:

Ground and first floor layouts;
Half-hipping to both ends of the roof;
Fenestration changes to all elevations; and
Addition of a chimney stack onto the north elevation.

12. MDDC's letter noted that the siting and dimensions of the dwelling remained unaltered and went on to confirm the revisions were considered satisfactory and would be treated as a minor amendment of the drawings approved under the planning permission.
13. The built dwelling was completed in 2002.

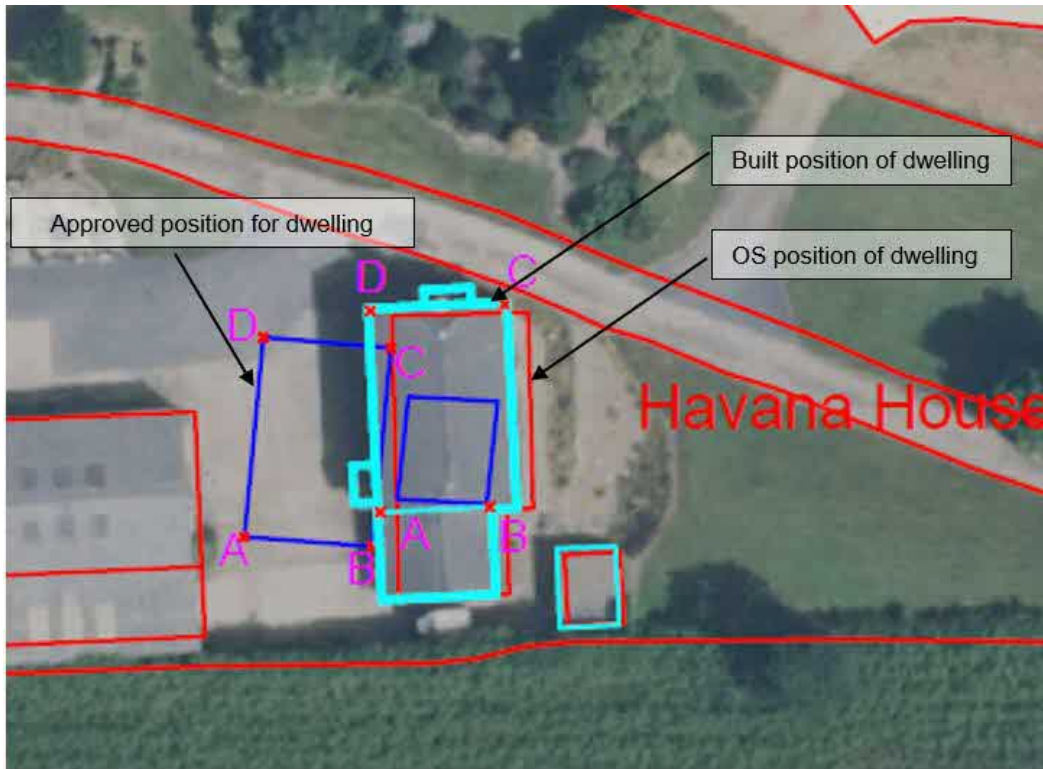
The position of the 'as built' and 'as approved' dwellings

14. The dwelling is set away from the highway and is shown mapped on mastermap ordnance survey data. It is not uncommon to experience errors with OS data and, in this case, there is a minor discrepancy between OS data and the location of the dwelling as shown on a geotagged aerial photograph of the site. Survey measurements that we have taken on site have shown that its position is consistent with the geotagged aerial photograph. This is shown at Figure 1 in this letter in which the OS data is shown red, the as built dwelling is shown light blue and the as approved dwelling is shown in dark blue. This is also shown to scale on Drawing No. ARPC6 that is enclosed with the application.

¹ Drawing No. 36448.

² Drawings numbered page 1 of 5, 2 of 5, 3 of 5, 4 of 5 showed the approved north, south, east and west elevations and floor plan and roof plan for the dwelling and garage. Note, there is no Drawing number page 5 of 5 on the Council's online file.

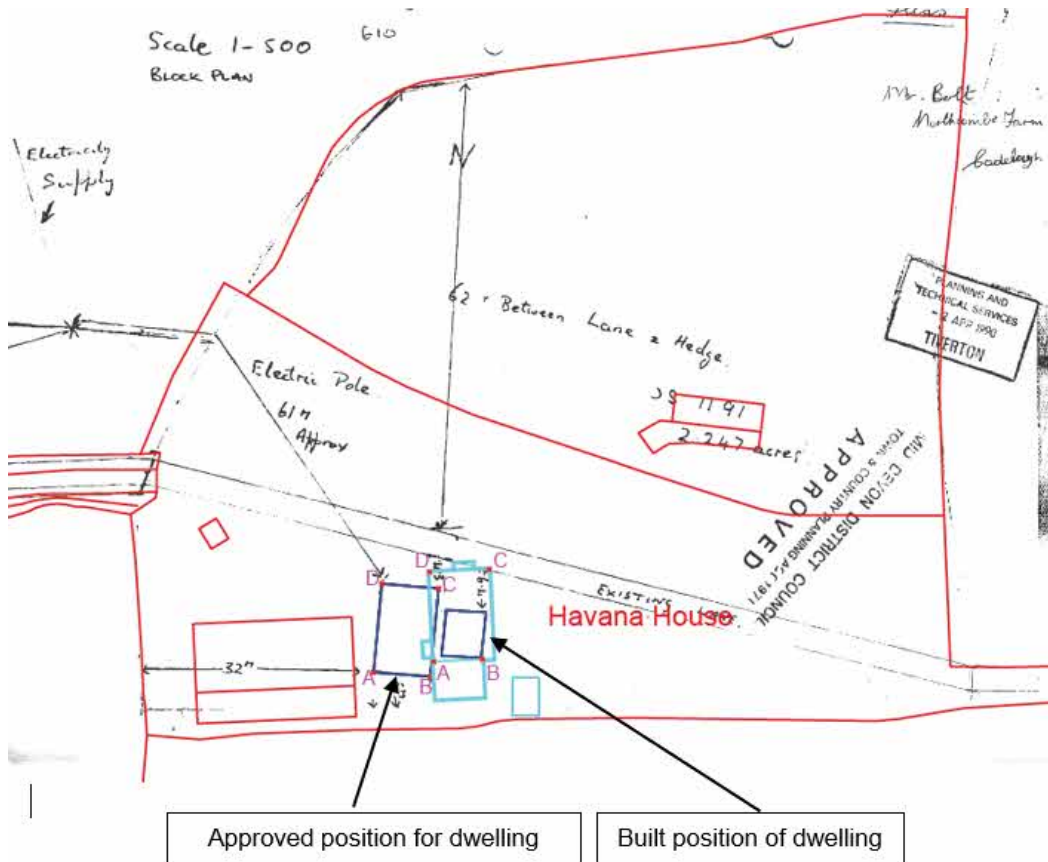
Figure 1. Location of built dwelling on mastermap OS data and geotagged aerial photograph.



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15. The position of the approved dwelling was shown on the 1:500 scale block plan that was stamped approved and dated 2 April 1990 (the block plan); on the 1:2500 scale location plan that was stamped approved and dated 21 March 1990 (the original location plan); and on the 1:2500 scale location plan that was stamped minor amendment approved and dated 16 February 1995 (the amendment location plan).
16. The external dimensions, floor layout, roof and elevations are in line with the minor amendment drawings, other than where a small open fronted porch was built off the west elevation of the dwelling when it was constructed. The dwelling was, however, constructed in a different position from the approved location. This is illustrated on Drawing No. ARPC3 that shows mastermap ordnance survey data and the position of the dwelling as built overlaid on an extract from the block plan and Drawing No. ARPC6 that shows mastermap ordnance survey data and the position of the built dwelling and the position of approved dwelling from the block plan overlaid on aerial photograph. Both drawings show a wholesale shift in the position of the dwelling to the east from where it was approved. An extract from Drawing No. ARPC6 is shown at Figure 1. An extract from Drawing No. ARPC3 is shown at Figure 2.

Figure 2. OS data and position of built dwelling overlaid on approved block plan.



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17. The original location plan and the amendment location plans were at a stated scale of 1:2500 and included rectangular boxes to illustrate the general location of the approved dwelling. The amendment location plan also included a shaded box at the southern end of the dwelling to illustrate the revised position for a garage.
18. The original location plan and amendment location plan did not contain scale bars and even if they did, the margin for error would be considerable when measuring at this scale. It would not be possible to determine the precise location of the dwelling from these drawings. Furthermore, the dimensions that are detailed on this plan do not measure correctly at the stated scale of 1:2500. We have, however, imported the original location plan and the amendment location plan into a computer aided drawing programme and scaled them relative to the position of the public highways to the west and to the east of the site, as mapped on current ordnance survey mastermap data for this area. The scaled version of these plans relative to the position of the highways are illustrated on Drawing no. ARPC4 and Drawing No. ARPC5. Ordnance survey mastermap data, the position of the built dwelling and the position of the dwelling on the approved block plan has also been overlaid on both drawings. This shows that the dwelling marked on both the original location plan and the minor amendment location plan is in a different place from its position on the block plan and that is in a different position from where the dwelling was built.

Residential garden

19. The area of land shown outlined in purple on Drawing No. ARPC2 has been maintained and used by the applicants as residential garden for more than 10 years. A sworn statutory declaration by Mr Bolt that confirms this fact is included with this application.

Other planning history

20. On 18 December 2014 MDDC granted a certificate of lawfulness reference 14/01802/CLU. This certified that the occupation of the dwelling in breach of condition g) of planning permission 4/12/90/610 was lawful on 31 October 2014. At the time of that application, no consideration was given to whether the planning permission had in fact been implemented and whether conditions applied to the built dwelling.

Proposal

21. The application seeks a certificate of lawfulness for the dwelling at Havana House as a dwelling that is free from the encumbrance of the planning conditions attached to planning permission reference 4/12/90/610 and the use of the land associated with it as residential garden.

Planning context

22. Section 171A of the Act states that carrying out development without the required planning permission, or failing to comply with any condition or limitation subject to which a planning permission has been granted constitutes a breach of planning control. Section 171B of the Act prescribes two different time limits for enforcement action for a breach of planning control according to different forms of breach. In summary, as far as it is relevant, Section 171B states:

- i. 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.*
- ii. 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.*
- iii. 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.*
- iv. The preceding points do not prevent—*
 - a) the service of a breach of condition notice in respect of any breach of planning control if an enforcement notice in respect of the breach is in effect; or*
 - b) taking further enforcement action in respect of any breach of planning control if, during the period of four years ending with*

that action being taken, the local planning authority have taken or purported to take enforcement action in respect of that breach.

23. Section 191 of the Act states:

(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 local planning authority specifying the land and describing the use, operations or other matter.

(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 local 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 local 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.

24. So far as supporting an application for a certificate of lawfulness is concerned, the NPPG advises that:³

- i. The applicant is responsible for providing sufficient information to support an application, although a local planning authority always

³ National Planning Practice Guidance Paragraph: 006 Reference ID: 17c-006-20140306.

needs to co-operate with an applicant who is seeking information that the authority may hold about the planning status of the land.

- ii. A local planning authority is entitled to canvass evidence if it so wishes before determining an application. If a local planning authority obtains evidence, this needs to be shared with the applicant who needs to have the opportunity to comment on it and possibly produce counter-evidence.
 - iii. 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.
25. As this application is for a certificate of lawfulness it is a matter of legal determination and its planning merits are irrelevant. Unlike a planning application it is not relevant whether or not it accords with the development plan.

Evaluation

26. In Handoll and Others v Warner Goodman and Streat and Others (1995) the Court of Appeal confirmed that 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 upon it, and that once the time for enforcement action has passed, a planning authority is unable to enforce either the original permission or any conditions attached to it. Further, Sage v Secretary of State for the Environment, Transport and the Regions and Others (2003) established that if a building operation is not carried out in accordance with the permission, the whole operation is unlawful.
27. In the case of this application, the location of the 'as built' dwelling is, at the furthest point, approximately 8.4 metres to the east from the 'as approved' position shown on the approved block plan. As a matter of fact and degree, the difference between the 'as built' and 'as approved' position is significant and not immaterial. As such, the shift in the position of the dwelling could not have been dealt with as a non-material amendment. It follows from the fact that the dwelling was built in a materially different location that the planning permission was not implemented and, therefore, that it was constructed without planning permission. The conditions imposed on the permission are, accordingly, unenforceable.
28. Likewise, the use of the land shown outlined in purple on Drawing No. ARPC2 has been residential garden for more than ten years
29. Under Section 171B(1) and 171B(3) of the Act, the dwelling is immune from enforcement action having been constructed more than 4 years ago and having been in use for more than 10 years preceding the date of this application. It is, therefore, lawful under Section 191 of the Act. In addition to the dwelling, the use of land associated with it as residential garden is also subject to the ten-year time limit provided under Section 171B (3) of the Act and, accordingly, through its residential use for in excess of that period, it is also immune from enforcement action and therefore lawful under Section 191 of the Act.

30. In addition to the judgment of the Court in the Handoll case, our opinion that the dwelling was built without planning permission and is lawful, and is free from the encumbrance of any planning conditions, is supported by cases where on appeal the Secretary of State through his Planning Inspectors has granted certificates of lawfulness for dwellings in comparable circumstances.
31. In appeal decision APP/P1805/X/14/3000650, the Planning Inspector issued a certificate of lawfulness for a residential dwelling at Badgers Bank Farm, Worcestershire without the conditions imposed by planning permission B13140 for the erection of a bungalow with an agricultural occupancy condition. The site of the as built dwelling was in a different position from that approved. The degree of shift in the position of the dwelling, which had been measured by the Appellant's agent to be approximately 8 metres, was regarded by the Inspector as significant and materially different from the approved development. The Inspector reasoned, referring to the Handoll case, that the dwelling had been built without planning permission and, therefore, the conditions attached to planning permission B13140 had no effect on it. The Inspector concluded that as the dwelling was substantially completed in excess of four years prior to the application for the certificate of lawfulness, it was immune from enforcement.
32. In issuing a certificate of lawfulness in appeal decision reference APP/V3310/C/12/2168366 (lead case) relating to a dwelling at Lydeard Hill House, Somerset, the Planning Inspector relied on the fact that the as approved and as built footprints for the house did not match with the front of the built dwelling just overlapping where the rear wall should have been. The Inspector considered this to be a wholesale shift of the house and reasoned that it was in a materially different place from where it was approved. The Inspector concluded that the relevant planning permission had not been implemented and that the dwelling was immune from enforcement action, having been substantially completed for more than four years, and that it was free of encumbrance of the conditions attached to the original planning permission.
33. In granting a certificate of lawfulness in planning appeal APP/D3315/X/16/3150659 for a dwelling at Kedget Barton Farm, the planning inspector determined that the 'as built' development was not carried out in accordance with the planning permission and, therefore, the condition attached to the planning permission had no effect.
34. In application reference 20/01378/CLU, MDDC granted a certificate of lawfulness for a dwelling at Roselands. It was found that the dwelling was built more than 8 metres from the approved position under a planning permission that contained an agricultural occupancy condition. MDDC determined that the dwelling was built in a materially different location and, therefore, the planning permission was never implemented.
35. In application reference 16/00218/CLU MDDC granted a certificate of lawfulness for a dwelling at Hillcrest. It was submitted that the dwelling was built 12.8 metres from the approved position under a planning permission that contained an agricultural occupancy condition. MDDC's report on the application remarked that appeal decision confirm that development has been located far less than 12.8 metres from the approved site with a crossover of building footprint found to be materially different from the approved scheme, so as to render the original permission unimplemented. MDDC determined that the dwelling at Hillcrest was built in a materially different location and, therefore, the planning permission was

never implemented, and the dwelling was not restricted by any conditions of the planning permission.

Conclusion

36. For the reasons set out above, the dwelling known as Havana House was constructed without planning permission. The planning conditions attached to planning permission reference 4/12/90/610 are, therefore, not enforceable and, by virtue of Section 171B (1) and (3) of the Act, the dwelling is immune from enforcement action. The use of land associated with the dwelling as residential garden is also immune from enforcement action under Section 171(B) (3) of the Act. It follows that the dwelling and garden are lawful as an unrestricted property under Section 191 of the Act.

Yours sincerely



Brian Dinnis MSc MRICS AssocRTPI
ACORN RURAL PROPERTY CONSULTANTS



Encs: Certificate of lawfulness application.

Cc: Mr and Mrs Bolt