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## Appeal Decision

Site visit made on 6 January 2020

**by J Whitfield BA (Hons) DipTP MRTPI**

**an Inspector appointed by the Secretary of State**

**Decision date: 28 January 2020**

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**Appeal Ref: APP/Y2736/X/19/3228478**

**The Bungalow, High Street, Rillington, Malton, North Yorkshire YO17 8LA**

- 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 Mr Brian Newcombe against the decision of Ryedale District Council.
  - The application Ref 18/01110/CLEUD , dated 8 October 2018, was refused by notice dated 21 December 2018.
  - The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended.
  - The use for which a certificate of lawful use or development is sought is use as a dwelling house and associated amenity space.
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### Decision

1. The appeal is dismissed.

### Main Issue

2. The main issue is whether the Council's decision to refuse to grant an LDC was well-founded. In particular, the appeal turns on the question of whether or not the residential use of the land has been abandoned.

### Reasons

#### *Background*

3. Section 191(2) of the 1990 Act states that uses are lawful at any time if 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, they do not constitute a contravention of any of the requirements of any enforcement notice then in force.
4. The appellant's basis for seeking an LDC is that the use began more than 10 years before the date of the application. The Council also appeared to have considered the application on the same basis. Section 171B of the 1990 Act sets out that, as is the case here, where there has been a breach of planning control which is not comprised of building operations or the material change of use of a building to a single dwellinghouse, no enforcement action may be taken after the end of the period of ten years beginning with the date of the breach. In those circumstances it would be necessary for the appellant to demonstrate that the material change of use of the appeal site to a dwelling

house and associated amenity space took place on or before 8 October 2008 and continued for four years thereafter.

5. Nevertheless I am satisfied that, on the balance of probabilities, the use of the building and associated land as a dwellinghouse was lawfully accrued from 1946 onwards. Indeed, I note there is no dispute from the Council that this is the case and I see no reason to take a different view.
6. The question for the appeal is therefore whether or not that lawful use has been abandoned. The concept of abandonment is used by the Courts to describe the circumstances in which rights to resume a lawful use carried out in the past may be lost because of the cessation of that use. There are several lines of judicial authority which set out how to approach that concept.
7. Of particular note is the *Hartley*<sup>1</sup> case, in which the Courts held that the mere cessation of a use is not development, but if a building or land “remains unused for a considerable time, in such circumstances that a reasonable man might conclude that the previous use had been abandoned”, the concept of abandonment applies. The *Castell-y-Mynach*<sup>2</sup> case went further, establishing four criteria on which to assess whether a use had been abandoned. They are: (1) the period of non-use; (2) the physical condition of the building and land; (3) whether there had been any other use; and, (4) the owner’s intention as to whether to suspend the use or cease it permanently. The subsequent *Hughes*<sup>3</sup> case established that, with regard to criteria four, the owner’s intention should be objective and not subjective, the Court of Appeal finding that, although to be considered, the owner’s intentions were not decisive. Case law has established the weight attached to each of the criteria is a matter of planning judgement for the decision taker.

#### *Period of non-use*

8. The last residential occupation of the building is said by the appellant to have been in 1960. The appellant indicates that the electoral roll indicates there was no record of anyone living there between 1960 and 1968. On 19 November 1968, the land and the building were bought by the appellant’s father and used commenced thereafter for dog kennelling. There is no evidence of residential use of the building or land being resumed at any point up until the date of the LDC application. To that end, there has been a period of around 58 years non-use for residential purposes up to the time of the application. Whilst not in itself determinative, I consider such a period to be substantial.

#### *Physical condition of the building*

9. The building measures around 8m x 5m and is constructed from timber walls and a slate roof. At the time of my site visit, and indeed at the time of the LDC application, the building had been boarded up externally. I saw from my visit that the building was intact with a timber frame and blockwork exterior. Nevertheless, the building was in poor condition.
10. With external boarding, undoubtedly, efforts have been made by the appellant over a period of years to protect the building from vandalism and to repair it on occasion. Also, the appellant indicates that, whilst dilapidated, the walls and

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<sup>1</sup> *Hartley v MHLG* [1970] 1QB 413

<sup>2</sup> *Trustees of Castell-y-Mynach Estate v Taff-Ely BC* [1985] JPL 40

<sup>3</sup> *Hughes v SSETR* [2000] 80 P&CR 397

roof of the building are sound. However, no structural evidence has been supplied to support this view. Moreover, I saw from my site visit that the roof was partially collapsed whilst internally, the building was still arranged for dog kennelling with the partitions still in place. This appears to have been the case at the time of the LDC application from the photograph submitted by the appellant.

11. Furthermore, I note the appellant's father was unable to return the building to residential use partly because of the prohibitive financial cost of bringing the building up to date, laying a driveway and reconnecting services. This suggests that over time the condition of the building became less able to support its use as a dwelling. Indeed, at my site visit, there was no vehicular access to the site whilst pedestrian access was difficult because of the undulating and overgrown nature of the land.
12. As a result, whilst I am satisfied that sufficient of the building remains that it could take the form of a dwellinghouse, I am not satisfied it has been suitably demonstrated, on the balance of probabilities, that the building is sufficiently intact or capable of supporting its return to a use as a dwellinghouse.

*Whether there had been any other use*

13. At the point he purchased the property in November 1968, the appellant's father had already obtained planning permission<sup>4</sup> on 25 September 1968 for the use of the dwelling house for the kennelling of dogs. The appellant indicates his father thereafter converted the interior of the building, removing a partition wall that separated the two bedrooms and constructing a series of individual dog pens. There is no indication that the appellant's father used the building at any point for residential occupation.
14. The appellant's statement indicates that between 1968 and 2003, the building was used for the kennelling of dogs. This is evidenced by the grant of several planning permissions. In 1974, planning permission<sup>5</sup> was granted for the continued use of the dwellinghouse for kennelling of dogs. Subsequently, permission was granted in 1977<sup>6</sup>, 1980<sup>7</sup>, 1983<sup>8</sup> and 1986<sup>9</sup> for 'the continued use of the dwellinghouse for kennelling of dogs'. The 1986 permission was granted on a personal basis to Mr GG Newcombe – the appellant's father – via a condition which referenced him by name and indicated that the use for dog kennelling shall be terminated at such time as Mr Newcombe ceases to occupy the premises. There was no condition imposed on the permission which required the building to revert to residential use upon cessation of the dog kennelling use.
15. In addition, there are no Council Tax records for the building going back to 1992, which suggests it has not been used as a dwelling at any time since then as if it had been, it would have been liable for Council Tax. Moreover, the LDC application was subject to representation from an interested party which indicates that the appellant's father continued to use the building into the 1990s for dog kennelling.

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<sup>4</sup> LPA Ref: P.602(b)

<sup>5</sup> LPA Ref: 3/106/10/PA

<sup>6</sup> LPA Ref: 3/106/10A/PA

<sup>7</sup> LPA Ref: 3/106/10B/PA

<sup>8</sup> LPA Ref: 3/106/10C/PA

<sup>9</sup> LPA Ref: 3/106/10D/PA

16. I saw from my site visit that the interior of the building was still laid out with the individual dog pens covering half of the floor space. There was no indication visually that a residential use had ever been resumed. As a result, I am satisfied that, since the last point the building was used for residential purposes, there has been a substantial period where its primary use was as dog kennelling.

*Owner's intentions*

17. The appellant indicates that the use of the building between the 1968 and 2003 for dog kennelling was only ever intended to be temporary. I note that his father's intention was to return the building to a residential status to downsize in his retirement.
18. However, the appellant's father had already obtained planning permission for the change of use to the kennelling of dogs two months prior to actually acquiring the property. Thereafter, he set about converting the building internally to set up the kennelling. There is no evidence nor indication that the appellant's father ever occupied the building as a dwelling at any point following his purchase. Indeed, I note that, whilst retaining the letter box, the appellant's father disconnected the mains water and electricity connection to the building soon after his purchase.
19. The appellant indicates his brother recalls their father having discussions regarding equity release on the property with a financial institution. However, no further evidence of such discussions has been provided.
20. Moreover, whilst I note he approached Mr Bowes who owned land opposite regarding whether he was able to build a bungalow on the land in the future, the wording of Mr Bowes recollection that Mr Newcombe asked if he was "able to build him a bungalow on their property at some point in the future", is vague and uncertain. In any event, an intention to building a new property on the land, would not indicate intention to resume the use of the existing building for residential purposes.
21. I note that the appellant and his brother have had various discussions over the years regarding replacing the building with a new dwelling, including making representations for its inclusion in the Ryedale Local Plan in 2007. However, again this does not indicate an intention to resume the use of the existing building for a residential use.
22. Overall, the appellant's father may have at some point desired to return the building to a dwellinghouse use. However, given that he never did so over his 35 years of ownership, that he purchased the property with the initial intention of using it for dog kennelling and that he subsequently carried out the use of dog kennelling as the building's primary use for a period of around 35 years, it is difficult to see how the owner's intention could be seen by a reasonable person as simply the suspension of the dwellinghouse use. Rather, it seems to me that, taking an objective approach, the owner's intention can be seen as to cease the dwellinghouse use permanently.
23. Taking into account the above, I conclude overall that the lawful use of the building and associated land as a dwellinghouse has been abandoned. Consequently, the resumption of that use would not be lawful.

**Conclusion**

24. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of use as a dwelling house and associated amenity space was well-founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

*J Whitfield*

**INSPECTOR**