



Appeal Decisions

Hearing Held on 27 April 2021

Site visit made on 6 May 2021

by M Savage BSc (Hons) MCD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 14 June 2021

Appeal A Ref: APP/B2355/C/20/3246405

Land at Higher Hollin, Lumb Lane, Rossendale BB4 9RR

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeal is made by Mr Paul Ray against an enforcement notice issued by Rossendale Borough Council.
- The enforcement notice was issued on 31 January 2020.
- The breach of planning control as alleged in the notice is without planning permission the construction of a building including the siting and attachment of a portacabin to create a dwelling used for residential purposes.
- The requirements of the notice are:
 1. Permanently cease the use of the Land for residential use;
 2. In an appropriate manner, remove and/or demolish 'The Cabin' comprising the main building and an attached portacabin, as shown on photograph 1 from the Land;
 3. In an appropriate manner, permanently remove from the Land the following:
 - a. All residential paraphernalia associated with The Cabin;
 - b. The decking and raised platform adjacent to The Cabin;
 - c. All bases, hard surfaces, hardstanding, supporting structures, fixtures and fittings associated with The Cabin;
 4. Remove all materials resulting from compliance with requirements 1-3 (inclusive) from the Land.
- The period for compliance with the requirements is six months.
- The appeal is proceeding on the grounds set out in section 174(2)(a), (d) and (g) of the Town and Country Planning Act 1990 as amended.

Summary Decision: The appeal is allowed, and the enforcement notice is quashed.

Appeal B Ref: APP/B2355/X/20/3244867

The Cabin, Higher Hollin, Lumb Lane, Waterfoot, Rossendale BB4 9RR

- 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 Paul Ray against the decision of Rossendale Borough Council.
- The application Ref 2019/0352, dated 14 August 2019, was refused by notice dated 7 October 2019.
- 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 of a building, including an attached static residential caravan forming part of the residential unit, for residential purposes.

Summary Decision: The appeal is allowed and a certificate of lawful use or development is issued, in the terms set out below in the Formal Decision.

Matters concerning the notice

1. The notice alleges the construction of a building including the siting and attachment of a portacabin to create a dwelling used for residential purposes. However, the Council's case is that the building was constructed under Part 4, Class A of the Town and Country Planning General Development Order (GDO) 1988¹. From the evidence, therefore, it appears that the breach as alleged by the Council should be a breach of condition, rather than operational development or a change of use. It would be the appellant's failure to remove and reinstate the land to its condition before that development was carried out which constitutes the breach.
2. The parties agreed during the hearing that the allegation should be corrected to refer to a breach of condition and S171A(1)(b)² of the Town and Country Planning Act 1990 (as amended) ('the Act') should be cited instead of S171A(1)(a). As set out in S176 of the Act, I have wide powers of correction, so long as I am satisfied that the correction or variation will not cause injustice to the appellant or the local planning authority.
3. The Council states within the enforcement notice 'The Council is of the opinion that "the enforcement clock" only starts when The Cabin is continually used for residential purposes.' However, in light of the above, the breach occurred either as a result of the construction and residential use of the building in 1992, or once Higher Hollin had been completed.
4. The enforcement notice sets out at section 4 that the development of the Land has occurred within the last 4 years. S171B(2) sets the time limit for change of use of a building to residential to 4 years. However, case law³ has established that in cases where the building was constructed unlawfully and used as a single dwellinghouse from the outset, there will have been no change of use and S171B(2) is therefore disapplied. S171B(3) states 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. In either scenario therefore, the relevant time limit would be 10 years.
5. If I find that the building was constructed and occupied in accordance with Part 4, Class A of the GDO, since works to Higher Hollin were not complete in 2017, the appellant cannot demonstrate 4 years, let alone 10 and so it makes no difference to the appellant's case which time period is considered. In this case, I consider there would be no injustice.
6. If I find that the building was not constructed and occupied in accordance with Part 4, Class A of the relevant GDO, the construction of the building would have become immune after a period of 4 years⁴ and the use of the building after a period of 10 years⁵. Since breach of condition attracts a 10 year immunity period by virtue of S171B(3) of the Act, this is greater than the 4 years specified in the notice. Nevertheless, the appellant submitted the S191 application on the basis that the building was constructed and has been occupied for residential purposes in excess of 10 years and has advanced his

¹ Where it is claimed that development is Permitted Development (PD), it is necessary to look at the Order in force when the development was begun. The parties agreed that the Town and Country Planning General Development Order (GDO) 1988 would have been the Order in force when the development was begun.

² Failing to comply with any condition or limitation subject to which planning permission has been granted.

³ *Welwyn Hatfield BC v SSCLG & Beesley* [2011] UKSC 15; [2011] JPL 1183

⁴ S171B(1) of the Act

⁵ S171B(3) of the Act

case in respect of the S174 appeal on the same basis. Consequently, there would be no injustice in this instance.

7. The appellant raised concern regarding his ability to argue ground (b), which is made on the basis that the matters stated in the notice have not occurred. However, the main thrust of the appellant's case is that the building was not constructed under permitted development rights. In this respect, the ground (b) appeal would essentially be the same as the argument advanced in respect of the ground (d) appeal. Given the above, I consider there would be no injustice in amending the notice and shall continue to consider the appeal based on the grounds of appeal advanced.
8. There was also discussion during the hearing regarding the potential implications for the ground (a) appeal if the breach is changed since the ground (a) appeal is made on the basis that planning permission should be granted for the alleged breach. Both parties, however, agreed that injustice would not arise if the ground (d) appeal succeeds.

S174 Appeal Ground (d) & S195 LDC Appeal

9. An appeal under ground (d) is made on the basis that, at the date when the notice was issued, no enforcement action could be taken in respect of any breach of planning control which may be constituted by those matters.
10. An application under S191(1)(a) of the Act⁶ seeks to establish whether any existing use of buildings or other land is lawful. S191(2)(a) and (b) sets out that uses and operations are lawful at any time if: i) No enforcement action may 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 ii) They do not constitute a contravention of any enforcement notice then in force.
11. Part 4, Class A of the GDO permits the provision on land of buildings, moveable structures, works, plant or machinery required temporarily in connection with and for the duration of operations being or to be carried out on, in, under or over that land or on land adjoining that land. Development is permitted by Class A subject to conditions.
12. The alleged breach, as corrected, is the failure to comply with condition A.2 of Class A, Part 4 of the Town and Country Planning General Development Order 1988 (GDO) which states development is permitted by Class A subject to the conditions that, when the operations have been carried out – (a) any building, structure, works, plant or machinery permitted by this order shall be removed, and (b) any adjoining land on which development permitted by this Class has been carried out shall as soon as reasonably practicable, be reinstated to its condition before that development was carried out.'
13. In respect of the S174 appeal, the main thrust of the Council's case is that The Cabin was constructed by the previous owner of Higher Hollin (hereon in referred to as 'the applicant') to reside in whilst working on the renovation and therefore benefited from permitted development rights under Part 4 Class A of the Town and Country Planning (General Permitted Development)(England) Order 2015 (as amended). Since the works to Higher Hollin have now been

⁶ Town and Country Planning Act 1990 (as amended)

- completed, the building no longer benefits from the aforementioned permitted development rights and is now open to enforcement action.
14. In respect of the S195 appeal, the main thrust of the Council's case is that it has not been demonstrated that the building has been continuously occupied as a separate independent dwelling, unconnected to any operations being carried out on the adjacent building (Higher Hollin) prior to the submission of the application. Although an enforcement notice has since been issued, one had not been issued at the time of the LDC application.
 15. Given the similarities between the ground (d) appeal and the S195 appeal in this case, I shall deal with them together.
 16. Correspondence from the Council Tax Manager confirms that Council Tax liability was paid between 1 April 1992 and 7 October 2012, a matter which is confirmed by the Council. I have no reason to believe that occupation of the building during this period was not continuous. Furthermore, the Council conceded during the hearing it does not dispute that residential use of the building began by 1 April 1992 and was continuous until 7 October 2012, issues of continuity arise after 2012.
 17. As held in *Thurrock BC v SSETR & Holding* [2002] EWCA Civ 226 and applied in *Swale BC v FSS & Lee* [2005] EWCA Civ 1568, a use becomes lawful if it continues throughout the relevant immunity period, such that the local planning authority could have taken enforcement action at any time. Case law has established that lawful use rights can only be lost by abandonment⁷, the formation of a new planning unit or by being superseded by a further change of use.
 18. Although occupation since 7 October 2012 has not been continuous, it is clear from the evidence that its residential use has continued, albeit with periods of non-occupation. There is no suggestion by the Council that the use of residential use of the building has been abandoned so as to lose any accrued lawful use rights. Consequently, if I find that it wasn't erected and used in accordance with Part 4, Class A, the appeal must succeed. Conversely, if I find that it was erected and used in accordance with Part 4, Class A, as set out above, the appellant cannot demonstrate that the conditions have been breached for at least 10 years⁸ and so the appeal must fail.
 19. These appeals will therefore turn on whether the appeal building is a permanent dwelling or a temporary structure permitted under the GPDO used in association with the restoration of Higher Hollin.
 20. Planning permission at Higher Hollin was granted on 28 April 1983 for the conversion of three cottages into one dwelling and Listed Building Consent (LBC) was granted on 17 January 1985. The Cabin is located on land adjacent to Higher Hollin. Both parties have drawn my attention to *R. (Wilsdon) v First Secretary of State* [2006] EWHC 2980 (Admin). The Court held that it is not unreasonable to adopt, as a starting point, the proposition that a landowner will not usually erect a permanent building if it is merely required temporarily. Factors such as size, means of construction, the appellant's intentions, the

⁷ Including reversion to a lawful use, as established in *Fairstate Ltd v FSS & Westminster CC* [2005] EWCA Civ 283; [2005] JPL 1333

⁸ As set out in *Ellis v Secretary of State for Communities & Local Government and another* [2009] EWHC 634 (Admin) which concerned breach of condition.

length of time taken to construct the building and the length of time that it has been and is likely to be in situ are all relevant considerations.

21. The Cabin is a substantial building with a breeze block base, blue metal cladding and glazed windows. Affixed to the building is a portacabin which has been integrated with the building using metal sheeting so that it functions as one building. I saw that the building has water and gas, which the appellant advises is mains gas. Internally, the building has a shower room, kitchen with fitted units, sink and various appliances, space for three bedrooms, a lounge and hallway with built-in cupboard.
22. Given the size of the building and its breeze block base, I consider it highly likely it would have been constructed on site and would have taken several days with a number of people needed to assist in its erection. Although the construction of the building is not that which is typical of a dwelling, by the time of my site visit it had been in situ for approximately 29 years, with aerial photography showing that the portacabin was also in situ in 2005.
23. Whilst I don't doubt some repair is likely to have been required over this period, in part as a result of the exposed nature of the site, its construction is clearly sufficiently substantial for it to have remained in place for this long. This, in my view, points towards the building being a permanent building and not a temporary structure which would be permitted by the GDO.
24. The applicant for the planning application and Listed Building Consent (LBC) application is the same person who resided initially in The Cabin. However, there is nothing on the consents to show that the applicant intended to construct a temporary dwelling to reside in whilst carrying out the works, nor have I seen any written confirmation to suggest that this was the applicant's intention.
25. Furthermore, the land upon which the appeal building is located was not purchased by the applicant until 1990, some considerable time after the aforementioned consents were issued and after works to Higher Hollin were commenced. Whilst I cannot know what the intentions were of the individual who constructed it, I consider it highly unlikely he intended to remove it following completion of the works to Higher Hollin given the likely time and cost involved in constructing it.
26. As set out above, the GDO permits buildings required temporarily in connection with operations being carried out. It was confirmed in *Wilsdon*, that 'required' means 'reasonably required', and whether or not a building was reasonably required for a particular purpose is a question of fact and degree. The development of Higher Hollin took approximately 27 years to complete. Whilst I appreciate it can take time to renovate historic buildings, this is a significant time period for a building of this scale to be completed. For much of the time, it is probable that very little, if any works were taking place on Higher Hollin. As such, I consider it highly unlikely that the building was solely being used in connection with these works or that it was reasonably required over that period.
27. The appeal site, although located in open countryside for the purposes of applying policy, is within reasonable driving distance of a range of settlements, including Bacup, where the applicant was shown to reside at the time of the planning application and LBC application. Council Tax records suggest

occupation of the building did not occur until April 1992, over 7 years after the applicant secured the relevant consents to convert Higher Hollin, well after works on The Cabin commenced. Even if the applicant intended to occupy the building in connection with the works to Higher Hollin, given the above, I am not persuaded that it would have been necessary for the applicant to live on site during the works.

28. It is not unusual for the curtilage of a building to be limited in size, particularly when it is located in close proximity to other buildings. The lack of a physically defined curtilage does not mean that the building does not have one. Whilst land around the appeal building appears to have been used for the storage of materials in association with the renovation of Higher Hollin, this is not, in my view, determinative that the building itself was constructed and occupied under permitted development rights.
29. Drawing everything together, given the building's size, construction and length of time it has been in situ, I conclude on the balance of probabilities, that The Cabin is a permanent building which was not reasonably required in connection with the redevelopment of Higher Hollin and would not therefore have been development which would be permitted by the GDO.
30. Since the building was occupied for residential use continuously between 1 April 1992 and 7 October 2012 and has not subsequently been abandoned, at the date when the notice was issued and at the date of the S191(1)(a) application, no enforcement action could be taken and the use of the building for residential purposes was therefore lawful. The appeals made under S174 ground (d) and S195 therefore succeed.

S174 Ground (d) Conclusion

31. For the reasons given above I conclude that the appeal should succeed on ground (d). Accordingly, the enforcement notice will be quashed. In these circumstances the appeal under the various grounds set out in section 174(2) to the 1990 Act as amended and the application for planning permission deemed to have been made under section 177(5) of the 1990 Act as amended do not need to be considered.

S195 Conclusion

32. For the reasons given above I conclude, on the evidence now available, that the Council's refusal to grant a certificate of lawful use or development in respect of the use of a building, including an attached static residential caravan forming part of the residential unit, for residential purposes, was not well-founded and that the appeal should succeed. I will exercise the powers transferred to me under section 195(2) of the 1990 Act as amended.

Decisions:

Appeal A: APP/B2355/C/20/3246405

33. It is directed that the enforcement notice be corrected by:

- The deletion of '(a)' at section 1 and the insertion of '(b)' so that it reads *'THIS NOTICE is Issued by the Council because it appears to them that there has been a breach of planning control within paragraph (b) of Section 171A(1) of the above Act...'*

- The deletion of *'Without the benefit of planning permission the construction of a building including the siting and attachment of a portacabin to create a dwelling used for residential purposes.'* at section 3 and the insertion of: *'failure to comply with condition A.2 of Class A, Part 4 of the Town and Country Planning General Development Order 1988 (GDO) which states development is permitted by Class A subject to the conditions that, when the operations have been carried out –*
 - a. *any building, structure, works, plant or machinery permitted by this order shall be removed, and*
 - b. *any adjoining land on which development permitted by this Class has been carried out shall as soon as reasonably practicable, be reinstated to its condition before that development was carried out.'*
- The deletion of *'4'* at section 4 and insertion of *'10'* so that it reads *'It appears to the Council that the failure to comply with any condition or limitation subject to which planning permission has been granted has occurred within the last 10 years.'*

34. Subject to these corrections, the appeal is allowed, and the enforcement notice is quashed.

Appeal B: APP/B2355/X/20/3244867

35. The appeal is allowed and attached to this decision is a certificate of lawful use or development describing the existing use which is considered to be lawful.

M Savage

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Freddie Humphreys	Counsel
Stephen Hartley	Agent
Paul Ray	Appellant

FOR THE LOCAL PLANNING AUTHORITY

Mark Howells	Counsel
Nick Brookman	Senior Planning Officer
James Dalglish	Planning Officer

DOCUMENTS SUBMITTED AT THE HEARING:

Deed for Title number LA594742
Map of Deed land

Lawful Development Certificate

TOWN AND COUNTRY PLANNING ACT 1990: SECTION 191
(as amended by Section 10 of the Planning and Compensation Act 1991)

TOWN AND COUNTRY PLANNING (DEVELOPMENT MANAGEMENT PROCEDURE) (ENGLAND)
ORDER 2015: ARTICLE 39

IT IS HEREBY CERTIFIED that on 14 August 2019 the use described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged in red on the plan attached to this certificate, was lawful within the meaning of section 191(2) of the Town and Country Planning Act 1990 (as amended), for the following reason:

The available evidence demonstrates that, on the balance of probability, the building was not constructed under Part 4, Class A of the Town and Country Planning General Development Order (GDO) 1988 and has been occupied for residential use for more than 10 years before the date of the application and continued without material interruption for at least 10 years thereafter.

Signed

M Savage
Inspector

Date 14 June 2021

Reference: APP/B2355/X/20/3244867

First Schedule

Use of a building, including an attached static residential caravan forming part of the residential unit, for residential purposes.

Second Schedule

Land at The Cabin, Higher Hollin, Lumb Lane, Waterfoot, Rossendale BB4 9RR

NOTES

This certificate is issued solely for the purpose of Section 191 of the Town and Country Planning Act 1990 (as amended).

It certifies that the use /operations described in the First Schedule taking place on the land specified in the Second Schedule was /were lawful, on the certified date and, thus, was /were not liable to enforcement action, under section 172 of the 1990 Act, on that date.

This certificate applies only to the extent of the use /operations described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any use /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: 14 June 2021

by M Savage BSc (Hons) MCD MRTPI

Land at: The Cabin, Higher Hollin, Lumb Lane, Waterfoot, Rossendale BB4 9RR

Reference: APP/B2355/X/20/3244867

Scale: NTS

