

Appeal Decisions

Inquiry Held on 12 October and 21 October 2021

Site visit made on 12 October 2021

by Roy Curnow MA BSc(Hons) MRTPI

An Inspector appointed by the Secretary of State

Decision date: 03 December 2021

Appeal A Ref: APP/B9506/X/19/3243817

**Land at Stud Farm Cottage, Lower Mead End Road, Sway,
Lymington SO41 6EL**

- 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 P Upward against the decision of New Forest National Park Authority.
 - The application Ref 19/00580, dated 15 July 2019, was refused by notice dated 12 September 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 Material change of use of barn to dwelling.
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Appeal B Ref: APP/B9506/C/21/3269878

**Land at Stud Farm Cottage, Lower Mead End Road, Sway,
Lymington SO41 6EL**

- 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 Mrs P Upward against an enforcement notice issued by New Forest National Park Authority (the Notice).
 - The enforcement notice, numbered EN19/0249, was issued on 28 January 2021.
 - The breach of planning control as alleged in the notice is Without planning permission the material change of use of an outbuilding shown in the approximate position shaded blue on the plan attached to this Notice to an independent unit of residential accommodation (C3 dwelling).
 - The requirements of the notice is Cease the use of the building shown in the approximate position shaded blue on the plan attached to this Notice as an independent unit of residential accommodation (C3 dwelling).
 - The period for compliance with the requirements is 9 months.
 - The appeal is proceeding on the grounds set out in section 174(2)(d) of the Town and Country Planning Act 1990 as amended.
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Decisions

Appeal A

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

Appeal B

2. The appeal is allowed and the enforcement notice is quashed.

Procedural Matters

3. The Inquiry was scheduled for one day. Due to time constraints, the Inquiry was not completed on its first day of sitting. All oral evidence was given on that day, save for the Advocate's Closing Statements. These were heard virtually on 21 October 2021 using Microsoft Teams.
4. As the appeals related to the same development with much of the evidence being germane to both cases, they are capable of being dealt with in a single decision letter. I have, however, referred to the individual cases where appropriate.
5. Given the nature of the appeal, all oral evidence given to the Inquiry was done so under oath.
6. I received two Statements of 'Common Ground' (SoCG); one from each party. As they could not reach agreement on a number of points, neither party had signed the other's SoCG. There is, however, a degree of commonality in the two SoCG. That there is not a single document does not hamper me in my decision-making.

Main Issues

7. The main issues are similar for each appeal. In respect of that made under S195, (Appeal A), this is whether the decision of the New Forest National Park Authority (NPA) to refuse to issue a certificate of lawfulness was well-founded. In respect of Appeal B, the matter for consideration in a Ground (d) appeal is whether, at the time when the notice was issued, enforcement action could be taken in respect of any breach of planning control which may be constituted by the matters alleged in the Notice.
8. The time limits against which the decision has to be assessed are set out in S171B(2) of the Act, which states
"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".
9. Therefore, in both appeals, the decision turns on whether the building was used continuously as a single dwellinghouse for a period of more than four years. In respect of Appeal A, the 'relevant date' is four years prior to the date that the S191 application for a certificate of lawful existing use was made – that is to say, 15 July 2015. For Appeal B, the relevant date is four years prior to the date that the Notice was issued – that is to say, 28 January 2017.

Reasons

10. S191(2) sets out that the use would be lawful 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".

11. From this, if the Appellant can show that he accords with the terms of S191(2)(a) he will be successful in his Appeal A as the enforcement notice in respect of the development was not issued until well after the date of the S191 application.
12. In that event, I would need to assess whether the use had subsequently been lost between the date that the S191 application was made and that when the Notice was issued. If it was not, then I need go no further with Appeal B.
13. In both appeals, the burden of proof lies with the Appellant to make his case on the balance of probability.
14. The Inquiry was told that Mrs Upward and Mr Beale had known one another as teenagers but had drifted apart. They met again by chance at a party in 2009. Some 18 months later, Mrs Upward contacted Mr Beale and they began a relationship. Mrs Upward was going through a divorce and part of the settlement was that her husband was to have half of the value of the land at Stud Farm Cottage. Having sold his property in Christchurch, Mr Beale was able to assist financially in Mrs Upward's settlement. Prior to the work being undertaken to the barn, he lived in Stud Farm Cottage with Mrs Upward.
15. I found the evidence given by Mrs Upward and Mr Beale around this matter to have been delivered precisely and unambiguously. In the absence of any evidence to the contrary, I take it to be the case.
16. In their Proofs of Evidence, (PoE), Mrs Upward and Mr Beale state that work on the conversion of the barn commenced in May 2013. Under cross-examination, (XX), Mr Beale agreed that, given his photographs¹ dated 1 May 2013 show building work to be quite advanced, his assertion that work was commenced in May 2013 must be incorrect. The reason he gave for this claim was that these were the closest dated photographs he had and simply gave the date as May. Mrs Upward, when asked about this, recalled that it was during "beautiful spring weather".
17. Mrs Upward and Mr Beale stated that the work on the barn was completed by the autumn of 2013, and he moved in shortly afterwards.
18. In respect of the timing of building works on the barn, the NPA's case largely relied upon evidence provided by Mr Warden. He used to own Stud Farm Cottage, prior to Mrs Upward, and lives locally. He owns adjacent land, which he regularly visited prior to the covid pandemic.
19. Mr Warden provided photographs² of the building. The date that these were taken is given, in handwriting on the document, as 24 May 2015. Mr Warden stated that the photographs show that the windows and doors had "recently been installed". In XX, he agreed that the photographs do not show that this was the case, only that they were in position. He also agreed that his photographs showed no evidence of whether and how the building was being used. When asked about the discrepancy between what was shown on his and Mr Beale's photographs, he suggested that it was "possible, no probable" that the date given for Mr Beale's photographs had been tampered with. However, he could provide no evidence for this.

¹ Appendix C to his Statement of Case

² Document 2 attached to his letter to NFNPA dated 19 August 2019

20. Mr Warden referred to an extension to the northern end of the barn, which I took to mean its enclosure with a small projecting element. This is shown in his photographs. However, again, they do not demonstrate when this was work was undertaken and do not undermine the evidence of Mrs Upward and Mr Beale on the matter of the barn's substantial completion.
21. I have no reason to doubt that both sets of photographs were taken on the dates claimed. It appears to me that at least some of the windows were in place at the time that Mr Beale took his, including that shown in the external photograph dated 10 May 2013. To my mind, this clearly shows the frame of the window in place. Given that Mr Beale stated that the windows were supplied ready glazed, a point that was not countered in the Inquiry, I find that it was in-situ at that time.
22. This casts doubt on Mr Warden's suggestion that the windows in his photographs were recently installed. In this regard, I find that, on the balance of probability, he is mistaken.
23. Mr Beale did not have receipts of the building works that were undertaken that might have helped his position. That this was the case some 8 years after he said he did the work could not be seen to be unusual or harmful to his case. I find similarly with the lack of consent for the works under the Building Regulations. Mr Beale said he was aware of the requirements of those Regulations, but chose not to apply for consent. That cannot be taken as an indication that the works were not carried out at the time he claims.
24. On the basis of his own photographs, I have no doubt that Mr Beale was not accurate regarding the date that he commenced the building works. However, from his and Mrs Upward's evidence I find that, on the balance of probability it was in the spring of 2013, probably a little before May. Notwithstanding this, the date of commencement is not of the same importance as the date the operational development to convert the barn to a dwelling was complete.
25. The Council's evidential position is based on the evidence put forward by Mr Warden. I have found that his assertion that the work was not complete by May 2015 was not correct. Conversely, I find that the evidence put forward by Mrs Upward and Mr Beale was sufficiently precise and unambiguous to show, on the balance of probability, that the conversion work was complete by the autumn of 2013.
26. Having established the date of substantial completion, it is necessary to assess whether what was created had the facilities required for day-to-day living required of a dwellinghouse³. In XX, Mr Williams agreed that the *Gravesham* 'test' was met by the barn but, correctly, that this would be the case whether used as a separate independent dwellinghouse, holiday let or ancillary use. However, the NPA did question the use by the occupants of the barn of clothes' washing facilities in an adjacent barn. However, I do not find that this resulted in the barn being used in an ancillary manner, nor that it affected its status as a *Gravesham* dwelling. Whilst these facilities are undoubtedly desirable in contemporary life, they are not actually required for day-to-day living; many people use laundrettes, for example.

³ The 'test' set out in *Gravesham BC v SSE & O'Brien* [1983] JPL 306

27. Case law⁴ sets out that a change of use would not commence merely through the fitting out of a property. It is not a case of the availability for use, but of actual usage. I have found that the barn was available for use from the autumn of 2013. From this, the evidence identifies several distinct periods of alleged residential use of the barn: that from September 2013 to February 2017; that from February 2017 to March 2018; and that from March 2018 to the issuing of the Notice. The relevant date for Appeal A falls within the second of these periods. If the barn's continuous use as a dwellinghouse to that point is proven then it would have become immune from enforcement action. The question to be addressed at that point would be whether the use was subsequently lost.
28. Mr Beale submitted a sworn statement with his application for a certificate of lawfulness. Whilst the copy before me is signed and dated, it seems that the version that the NPA based its assessment of that application on was incomplete. However, as Mr Beale gave evidence that was consistent with his sworn statement under oath, the issue of the NPA's incomplete version is academic. In brief, Mr Beale claimed that he lived in the barn as a separate dwellinghouse from September 2013 to February 2017.
29. The NPA questions the nature of Mr Beale's use of the barn. On the basis of his relationship with Mrs Upward, it says his use of the barn was not independent of, but ancillary to, Stud Farm Cottage.
30. His explanation that the lack of detail on his relationship with Mrs Upward, in his written submissions, was because he had not realised that "personal lives come into this" was understandable. In response to the question of why he moved into the barn in 2013, his account that whilst the two of them were friends and companions, they were unsuited to living together. He put this as "dating was different to living together" and this was, again, understandable and persuasive.
31. I do not doubt that Mr Warden received Christmas cards jointly signed by Mrs Upward and Mr Beale. However, I accept Mrs Upward's explanation that this did not indicate that they were co-habiting or that Mr Beale's use of the Barn was in any way ancillary to the use of Stud Farm Cottage. I find similarly with regards to the use of "we" and "additional" by Mr Beale in respect of the decision to convert the barn. The former merely indicated that there was a consensus between them on the matter; and the latter that the conversion of the barn would result in a separate additional unit of accommodation, rather than accommodation additional and ancillary to Stud Farm Cottage. There was disagreement between the parties regarding meetings between Mr Beale and Mr Warden, but this did not take either case further forward.
32. Mr Warden also referred to comments he said were made by people that used his land for the keeping of horses. However, as they did not attend the Inquiry, nor provide written representations, I give little weight to this 'hearsay' evidence. Mr Warden said he heard loud arguments between Mr Beale and Mrs Upward; however, I find that this did not show that Mr Beale's use of the barn was ancillary to Stud Farm Cottage.
33. Both Mrs Upward and Mr Beale stated that a Mr Pidsley, the son of a good friend of Mrs Upward, occupied the barn from February 2017. An Assured Shorthold Tenancy agreement, (AST), dated 19 February 2017 was submitted.

⁴ *Islington LBC v SSHCLG & Maxwell Estates* [2019] EWHC 2691 (Admin)

Mr Beale states that the initials on this belong to he and Mr Pidsley, and I have no good reason to find that this was not the case. Although the NPA understandably questions the absence of the inventory and schedule of conditions to which the AST refers, it accepts that on the balance of probability Mr Pidsley occupied the barn until 19 August 2017.

34. Although the NPA was unable to offer any directly contradictory evidence to back this up, as expressed by Mr Williams in XX, it had serious doubts that Mr Pidsley occupied the barn after 19 August 2017. It pointed to a lack of corroboratory evidence that it would expect to see, particularly in the form of a statement from Mr Pidsley himself who, working in IT, should have been contactable.
35. Whilst such evidence would clearly have been of assistance to the Inquiry, following the *Gabbitas* principle, the lack of it should not necessarily militate against the Appellant's case. As there is no substantive evidence to contradict what Mrs Upward and Mr Beale have said, or make it less than probable, it has to be assessed whether their evidence is sufficiently precise and unambiguous. If so, it should be accepted.
36. Both Mrs Upward and Mr Beale stated that Mr Pidsley occupied the barn as his main residence until March 2018. He moved out, they say, as he found new accommodation. Whilst somewhat spartan, their evidence set out precisely and unambiguously when and how Mr Pidsley occupied the barn. Although no AST to cover the period from 19 August 2017 to March 2018 was produced, this cannot be seen as evidence that Mr Pidsley was not occupying the barn.
37. On this matter, I am also aware of Mr Warden's submission⁵ written in respect of Appeal A. In response to the statement in paragraph 4.1 on this matter, in Mr Hull's Proof of Evidence (PoE), Mr Warden states "It is not disputed that David Pidsley occupied the dwelling from February 2017 until March 2018". Thus, although not required, Mr Warden provides corroboratory evidence for the Appellant's case on this matter.
38. Water to Stud Farm Cottage comes via Mr Warden's land. He receives the bills from the water company and then charges Mrs Upward for her usage. He provided evidence that showed the bills received from the water company were relatively stable for the period from July 2012 to July 2017. However, there was a marked increase in the bills for the period from the latter date until July 2019; he told the Inquiry that there was no alteration to the water company's charging regime over the whole of the period.
39. Mr Warden agreed that, although he checks it regularly, it was possible that this increase in consumption could be down to a leak in the pipe on his holding. Furthermore, it was put forward by the Appellant that this increase reflected their proposition that there was a greater number of people living at Stud Farm Cottage and the barn. I have no doubt that the figures put forward by Mr Warden were correct. However, I cannot conclude on the balance of probability that the increase arises from the material change of use occurring during the period of increased water consumption.
40. Therefore, I find that on the balance of probability that during David Pidsley's occupation, the barn became continuously used as a dwellinghouse in a

⁵ Dated 6 April 2020

manner that was physically and functionally separate from Stud Farm Cottage for four years. It was a separate planning unit in the manner established in *Uttlesford DC v SSE & White* [1992] JPL 171. This occurred prior to the date that the S191 application was made.

41. The evidence shows that, following Mr Pidsley's departure, the barn was decorated and was advertised as holiday accommodation through AirBnB. Save for references to letting in the proofs of Mrs Upward and Mr Beale, little documentary evidence of letting was provided. However, the NPA stated that it was following its use by a holiday-maker that the use of the barn came to its attention.
42. Mr Williams visited the site and advised that the use should cease, as it required, but did not have, planning permission. There is dispute regarding what was said at his meeting on site with Mr Beale. It is common ground that Mr Beale did not mention his earlier occupation of the barn. He says that he did not recall being asked this at the meeting with Mr Williams. The NPA hold that Mr Beale described the use of the barn as "additional" or "ancillary" accommodation. For his part, he says that he did not say this and that, in any event, he would not have used the word ancillary. Mr Hull said later in the Inquiry that he had to explain its meaning to Mr Beale.
43. Mr Williams did not make notes on-site, but did so on the way to the car and then typed these up later in the office. Two undated computer file notes were submitted by the NPA that reflect what it says occurred on-site. Although I find on the balance of probability that Mr Beale would not have used the word ancillary, it may well be that he gave the impression that the barn had been used in this manner. However, it is notable that the NPA did not undertake any further, more formal investigation on the matter, such as by serving a Planning Contravention Notice⁶. This might have clarified the situation.
44. In any event, as I have found that the barn had been used as a separate residential unit for a continuous period in excess of four years prior to Mr Williams' visit, the question of who said what is largely immaterial.
45. Initially, there was a single entry for Council Tax at the property, and Mr Beale explained that he simply did not initially register the dwelling created in the barn. It appears that the later Council Tax Band A rating given to the barn arose from a reference on a planning list. The oral evidence of Mr Hull showed that this rating could apply to self-contained dwellings and not just ancillary accommodation.
46. That Council Tax was not paid on the dwelling does not show that the Barn was used for purposes ancillary to Stud Farm Cottage. Furthermore, that the property had been given a Band A rating, which might have covered an annexe or a self-contained dwelling, leads me to the same finding.
47. It is an established principle that each case has to be assessed on its individual merits. Although the three appeal cases⁷ put forward by the Appellant have similarities with the case before me, following this principle, none of these cases provide evidence that is determinative.

⁶ S171C of the 1990 Act

⁷ APP/U1240/C/09/2115467 *et al* Draper's Farm, Chalbury; APP/C1570/C/11/2145469 *et al* Great Halingbury; APP/V2255/C/13/2196314 *et al* Whiteleaf Villa, Teynham

48. Given my finding on the four-year period, the question to be addressed at this juncture is whether the residential use was lost thereafter; although this is not a matter that the NPA has raised. This needs to be assessed against the four criteria for abandonment established by the Court in *Trustees of Castell-y-Mynach Estate v Taff-Ely BC* [1985] JPL 40. These are: the period of non-use; the physical condition of the land or building; whether there had been any other use; and the owner's intentions as to whether to suspend the use or to cease it permanently. The weight attached to each of the criteria is a matter of judgment for the decision-maker⁸.
49. Following the departure of Mr Pidsley, there was a short break in occupation before the barn was used by AirBnB holidaymakers, from June to October 2018. A further break in letting took place following Mr Williams' correspondence with Mrs Upward, but this, again, was for a short period and holiday letting recommenced around Christmas and New Year 2018/2019. Following this, it has been let, as Covid restrictions have allowed. None of these breaks has been of such duration that would indicate that the use has been abandoned.
50. There is nothing before me to indicate that the barn's physical condition has been such that it would have precluded its residential use, including the period in which it was redecorated. Similarly, the evidence does not show that the building has been put to any other use; nor does it suggest that the owner had any intention to permanently cease the use.
51. The upshot of this is that the use of the barn as an independent unit of residential accommodation was established in a timely manner and was not lost thereafter. Therefore, I do not have to address Appeal B.

Conclusions

Appeal A

52. 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 material change of use of barn to dwelling 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.

Appeal B

53. For the reasons given above, I conclude that the appeal should succeed on ground (d). The enforcement notice will be quashed.

Roy Curnow

Inspector

⁸ Bramall v SSCLG [2011] JPL 1373

APPEARANCES

FOR THE APPELLANT:

Mr Conor Fegan** Counsel, of Francis Taylor Building.
He Called:

(In Order of Appearance)

Douglas Beale

Mrs Patty Upward

Mr Bob Hull*

The Appellant

Planning Consultant

FOR NEW FOREST NATIONAL PARK AUTHORITY (NPA):

Mrs Poonam Pattni** Counsel, of 12CP Barristers.
She Called:

David Williams* Planning Enforcement Manager (NPA)

THIRD PARTY MAKING REPRESENTATIONS

John Warden

OBSERVERS

Stephen Tarling

Jerry Davies

Miss Laura Duff* (Pupil Barrister)

** - Also attended and spoke at the 'Closings' on 21 October 2021

* - Also attended the virtual 'Closings' on 21 October 2021

DOCUMENTS PRESENTED AT THE INQUIRY

Letters of Notification for the Appeals

Names and Addresses of those Notified

Copy of the Notification of the Public Inquiry

Statement of Common Ground – Submitted by the Appellant

Opening Statements from the Parties

Statement of John Warden – which he read at the Inquiry

Attendance List

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 15 July 2019 the use described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged and cross-hatched in black 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:

It has been demonstrated on the balance of probability, and in terms that are precise and unambiguous, that the building had been used as a dwellinghouse, independent of Stud Farm Cottage, for a period in excess of four years on 15 July 2019 when application 19/00580 was made to the New Forest National Park Authority.

Signed

Roy Curnow
Inspector

Date: 03 December 2021
Reference: APP/B9506/X/19/3243817

First Schedule

Material change of use of barn to dwelling

Second Schedule

Land at Stud Farm Cottage, Lower Mead End Road, Sway, Lymington SO41 6EL

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: 03 December 2021

by Roy Curnow MA BSc(Hons) MRTPI

Land at: Stud Farm Cottage, Lower Mead End Road, Sway, Lymington SO41 6EL

Reference: APP/B9506/X/19/3243817

Scale: Not to Scale

