



## Appeal Decision

Hearing Held on 15 December 2020

Site visit made on 16 December 2020

**by Roy Merrett Bsc(Hons) DipTP MRTPI**

an Inspector appointed by the Secretary of State

Decision date: 12 January 2021

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### **Appeal Ref: APP/E2001/X/19/3232649 Waverley, Easington Road, Kilnsea HU12 0UB**

- 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 and Mrs Clarke against the decision of East Riding of Yorkshire Council.
  - The application Ref 18/04130/CLE, dated 20 December 2018, was refused by notice dated 14 February 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 single dwellinghouse and garden area (C3).
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### **Decision**

1. 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.

### **Main Issue**

2. The main issue is whether the lawful residential use of the property, known as Waverley, has been lost through being 'abandoned'.

### **Background**

3. The appeal site comprises a small building, constructed predominantly in timber and asbestos sheeting, and its immediate surroundings. It is situated adjacent to Rose Cottage, which is also in the ownership of the appellant and in relation to which it is not separated by any internal boundary enclosure.
4. It was established at the Hearing that there is no dispute between the parties that the residential use of Waverley commenced before 1 July 1948. The implication of this is that its lawful use rights could only be lost through abandonment or through a subsequent material change of use.
5. The following matters relating to chronology are also undisputed between the parties. The property has been in the ownership of the appellant's family for many years, having been owned by the appellant's grandmother until 1967, latterly by the appellant's mother until 2011, and then most recently by the appellant himself. It was last occupied by a registered tenant as a single

independent property in 1996. In September 1996 the Council deemed the property to be unfit for habitation and formally prohibited its occupation. This was reflected in the property being made exempt from Council tax liability, under Class G. The Council's records indicate that in 1999 Waverley continued to be declared uninhabitable by the Council's Environmental Health team, and in April 2001 it was removed from the Council tax ratings list. Whilst only the appellant says that Waverley continued to be used between 1996 and 2011 (as overspill accommodation to the adjacent Rose Cottage), the parties do not dispute that the property has been unoccupied since the latter date.

## Reasons

6. In an LDC appeal the onus is on the appellant to make out their case to the standard of the balance of probabilities. I am mindful that planning practice guidance states *"In the case of applications for existing use, 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."*
7. Abandonment involves a cessation of use in such a way and for such a time as to give the impression to a reasonable onlooker, applying an objective rather than a subjective test, that it was not to be resumed. It is settled case law that there are four key criteria against which the question of abandonment needs to be assessed. These are as follows:-
  - Whether there had been any other use;
  - The physical condition of the land or building;
  - The period of non-use; and
  - The owner's intentions as to whether to suspend the use or to cease it permanently.
8. The appellant has submitted various evidence in support of the claim that Waverley has not been abandoned. This evidence includes statutory declarations from the appellant, the appellant's father and various local residents regarding the previous use of Waverley; email correspondence regarding the vacation of the property; medical information relating to the appellant's mother; documents showing financial investment in Rose Cottage; the results of a questionnaire regarding whether the use of Waverley was considered to be abandoned; various photographs; a structural survey report; previous appeal decisions relating to sites elsewhere; and pre-application enquiries and a planning application relating to the intended future use of the site. I shall assess this evidence in the context of the aforementioned four criteria.

### *Any Other Use*

9. There is common ground between the parties that between 1996, when the Council recorded the last residential occupation of Waverley, and the present day, there has been no intervening use, alternative to residential, made of the property.

10. The Council takes the view that, because of its very dilapidated condition, the building is unlikely to have been used for any purpose at all following its last recorded occupation. It says, within its statement, that if Waverley is considered to have been used [between 1996 and 2011] as ancillary to the adjacent Rose Cottage then it could be argued that the property ceased to be a separate dwelling and its resurrection as such would be development in its own right. However, the Council clarified its view at the Hearing, stating that any ancillary use would still not have constituted a material change of use of Waverley, the Council saying that, to its knowledge, there has been nothing other than residential use there.
11. From the information before me, I have no reason to dispute the view that there has been no material change of use of the property, even if Waverley was used only for ancillary residential purposes over the period in question, such that its use as an independent dwelling once again would not, in itself, amount to development. Therefore the nature of the use of the property, would not point to a reason, in its own right, for residential use having been abandoned.

*Physical condition*

12. The very poor physical condition of the building is apparent from photographs submitted by both parties and was confirmed during my visit. The external walls and roof, though largely present, feature missing apertures including windows and the rear door. It appears that the remains of the front porch were dismantled, apparently having succumbed to storm damage in the last few years. A number of roof tiles are missing and where paint has been applied in years gone by, it now peels.
13. Inside the building, there is evidence that some of the ceiling boards and floorboards have rotted away in part, as a result exposure to the elements. Within what would have been the living room, daylight visible between the floor and side wall reveals separation between the two, and I noted that the timber panels forming the side wall of the former bathroom were loose to the touch. In summary I am in no doubt that the building has been allowed to deteriorate over time; also that Waverley is in a dilapidated state and remains uninhabitable today.
14. However, I am mindful of the findings of the structural report produced following a survey of the property in June 2019<sup>1</sup>. Whilst the foundations were not exposed, the conclusions in the report, which are undisputed to have been made by a qualified structural engineer, include that "the general timber structure is sound and stable and rotten timbers can be replaced" and that "by undertaking appropriate remedial works the property can be modernised for continued habitable use". There is nothing to persuade me that the report findings do not continue to be relevant to the present situation, but in any event would be relevant to the date in relation to which the LDC is sought (December 2018).
15. In terms of works that could be permissible without planning permission, Section 55(2) of the Act, states at subsection (a) that the carrying out of improvement works which do not materially affect the external appearance of the building shall not be taken to involve development of the land.

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<sup>1</sup> By Stephen Moffat Associates

Furthermore Schedule 2 Part 2 Class C of The Town and Country Planning (General Permitted Development) (England) Order 2015 (GPDO), allows for the exterior painting of a building.

16. Despite disagreement between the parties, I am not persuaded that it would be impossible to improve and modernise the property so as to appear sufficiently similar to the present construction to not constitute development, or so that it varied only in accordance with what would be permissible within the terms of the GPDO, such that planning permission would not be required. Neither do I have any reason to doubt that utility service connections to the property could be easily reinstated.
17. Therefore, despite the undoubted very poor physical condition of the building, I give weight to the consideration that its habitability remains, on the balance of probability, a retrievable situation.
18. The appellant has referred to the results of an online questionnaire, in which a majority of respondents considered that Waverley had not been abandoned. Although I agree with the Council that the question was phrased in a leading way, I consider that from public viewpoints along the adjacent highway, the front and side elevations of the building appear sufficiently complete, with the remains of curtains visible, so as not to give the impression to a 'reasonable onlooker' of abandonment of residential use in physical terms.

*Period of non-use*

19. The appellant's evidence, within his statutory declaration and statement, is that following the departure of the last registered tenant from Waverley and the ending of its use as a single independent property in 1996, Waverley was subsequently used by the tenant of the adjacent Rose Cottage, during his occupation of that property between 1996 and 2011. The appellant refers, within his declarations, to the occupier of Rose Cottage having the keys to both buildings and to the occupier using Waverley as 'overspill' accommodation. Reference is made to the construction during this time of a fireplace and hearth in the former living room of Waverley, and at the Hearing to a corresponding external chimney stack, which were evident from photographs and during my visit.
20. Further statutory declarations made by local residents refer to Waverley continuing to be 'used' by the occupier of Rose Cottage and other members of his family. One resident, in particular, refers to a meeting, around 2005, that he had with the said occupier, in Waverley, regarding the potential purchase of a shotgun, which was said to have been shown to him there.
21. The Council, however, say that there is a lack of evidence to demonstrate the use of Waverley since 1996, and it considers the assertions around ancillary use remain ambiguous. The Council also emphasise that it is not only the case that the property was removed from the Council tax ratings list, but that its occupation was actually prohibited by law, having been formally declared uninhabitable.
22. With regard to the statutory declarations, given that any person who lies about the information contained in an affidavit could be prosecuted for the crime of perjury, and if convicted may have to pay significant fines or be sentenced to time in prison, I give these significant weight. Although none of the

declarations provide a detailed account of how Waverley was actually 'used' over the period 1996 to 2011, and I am not persuaded that it would have likely been lived in on a day to day basis when considering its 'uninhabitable status', there is nevertheless some evidence that it has been lived in to a degree, given the reference to a meeting there with the occupier and to the construction of the fireplace, which I consider to be indicative of an intention to spend time there. The Council's reference to the description of the property as a former dwelling in relation to a 2016 planning application does not alter my view in this regard.

23. I acknowledge that the formal prohibition of the occupation of Waverley is a central part of the Council's case. However, this does not mean that the building was not used for residential purposes in practice. Even if it was only lived in very erratically, on the balance of probability, I do not consider that this would amount to abandonment of the residential use over this period.
24. I accept that the contribution of an unlawful act, that is to say the occupation of Waverley, in favour of the lawful residential use of the site could, at face value, be regarded as a perverse interpretation. However it seems to me that such an effect is reasonably justified because of the independent operation of different Council consenting regimes. It would have been open to the Council to have sought to enforce against any unlawful occupation of the property. However the Council has not provided any information to indicate that the site was monitored for compliance with the prohibition requirement which, if it had been, may also have given weight to its argument regarding non-use since 1996.
25. It is undisputed by the parties that Waverley has not been occupied in any form since the departure of the last Rose Cottage tenant in July 2011. However lack of occupation does not equate to abandonment of lawful use and it is necessary to consider the appellant's intentions.

#### *Owner's intentions*

26. The appellant has set out, within his statement and declaration, a chronology of how improvements to Waverley have been intended. It is claimed that after the property was declared uninhabitable by the Council, it was the intention of his mother, the previous owner of Waverley, to restore or replace the building. This outcome, it is said, was not achieved due to prohibitive building costs and also due to the appellant's mother experiencing a deterioration in her mental health.
27. It seems to me that there is evidence of such intention within email correspondence provided by the Council Tax division<sup>2</sup> and also within the appellant's father's statutory declaration, which refers to some continuation of superficial maintenance. I also acknowledge the evidence provided of the appellant's mother's severe health issues and find this, together with financial cost reasons, to be a plausible explanation for improvements to the property not being made a priority. To my mind such constraints would not be consistent with an intention to permanently cease the use of Waverley. Rather I consider that this evidence of intention to improve the property, albeit unrealised to any substantive degree but in the context particularly of

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<sup>2</sup> See email dated 9 January 2015 appended to the Council's statement.

debilitating health constraints, weighs strongly against the notion of abandonment.

28. Subsequent to this period, following his sole acquisition of Waverley in January 2012, it is evident that the appellant sought the Council's informal advice on two occasions, in 2012 and 2014, regarding the possibility of constructing a replacement dwelling on the site, including for holiday use, and latterly made a planning application for the same in 2016. I am firmly of the view that this would be inconsistent with any intention to give up the residential use of the site. Furthermore I am not persuaded that any acceptance on the part of the appellant to the use of the term 'former dwelling' or informal reference to the building being redundant, dilapidated or disused, in relation to the previous planning application and pre-application correspondence, equates to an acceptance at that time of the residential use having been abandoned.
29. Whilst it could be argued that it is surprising that the appellant has not sought to make the building wind and watertight with a view to resisting its further physical deterioration, the explanation of not wishing to incur abortive costs in the context of an aspiration to rebuild on the site is a plausible one. Notwithstanding this, as set out above, I consider that the efforts made by the appellant to engage with the Council about the future residential use of the site weighs more persuasively against the notion of abandonment. Equally I have no good reason to doubt the explanation that the re-construction of the pedestrian access between the front of the property and the highway has not been undertaken due to security reasons.
30. The significant costs incurred in renovating Rose Cottage, from 2012, which I have no reason to dispute and the evidence of which was apparent during my visit, also provides a credible explanation for work not having been carried out sooner to renovate Waverley, and for a lack of investment in its protection. Furthermore, the very fact that the appellant has invested in the maintenance and improvement of Rose Cottage supports the view that he would have similar aspirations in relation to Waverley, in preference to ceasing the residential use there.
31. I therefore find that, despite the failure to physically implement any substantive remedial works, there is evidence of sustained intention over time to continue the residential use of the site, such that there was not an intention to abort that residential use.

## **Conclusion**

32. Drawing all of the above considerations together I find that the appellant's evidence is sufficiently precise and unambiguous to demonstrate to a reasonable onlooker, on the balance of probabilities, that the lawful residential use of the property has not been abandoned. Similarly, I find the Council's evidence insufficient to make the appellant's version of events less than probable. Whilst I have considered the various appeal decisions provided by the appellant in relation to sites elsewhere, and note similarities in some of the circumstances, and also the representations regarding a nearby site (Sunny Cliff), these matters have not influenced my conclusion, which has been based on the specific facts of this case.
33. For the reasons given above I conclude, on the evidence available, that the Council's refusal to grant a certificate of lawful use or development in respect

of “single dwellinghouse and garden area (C3)” at Waverley, Easington Road, Kilnsea HU12 0UB 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.

*Roy Merrett*

INSPECTOR

## **APPEARANCES**

FOR THE APPELLANT:

Mr Paul Clarke – Appellant

Ms Sophie Cattlin – Planning consultant

FOR THE LOCAL PLANNING AUTHORITY:

Mrs Karen Abba – Principal Development Management Officer





## 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

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**IT IS HEREBY CERTIFIED** that on 20 December 2018 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:

On the balance of probability the residential use of the property was lawful on 1 July 1948 and has not been superseded or abandoned.

Signed

*Roy Merrett*

Inspector

Date: 12 January 2021

Reference: APP/E2001/X/19/3232649

### **First Schedule**

Single dwellinghouse and garden area (C3).

### **Second Schedule**

Land at Waverley, Easington Road, Kilnsea HU12 0UB

## 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 described in the First Schedule taking place on the land specified in the Second Schedule was lawful, on the certified date and, thus, was 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 described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any use 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: 12 January 2021

by **Roy Merrett Bsc(Hons) DipTP MRTPI**

**Land at: Waverley, Easington Road, Kilnsea HU12 0UB**

**Reference: APP/E2001/X/19/3232649**

**Scale: Not to Scale**

