



Appeal Decision

Inquiry Held on 23, 24 & 25 March 2021

Site visit made on 26 March 2021

by M Savage BSc (Hons) MCD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 27 May 2021

Appeal Ref: APP/D0121/C/20/3253852

The Olde Shoppe, West Hay Farm, Summer Lane, Banwell BS29 6LE

- 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 Bateman against an enforcement notice issued by North Somerset Council.
 - The enforcement notice was issued on 26 May 2020.
 - The breach of planning control as alleged in the notice is without planning permission, the change of use of a building to a residential dwelling.
 - The requirements of the notice are:
 1. Cease the residential use of the building,
 2. Remove all fixtures, fittings and all other items associated with the residential use.
 - The period for compliance with the requirements is six months from when this notice takes effect
 - The appeal is proceeding on the grounds set out in section 174(2)(d) and (e) of the Town and Country Planning Act 1990 as amended ('the Act').
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Decision

1. The appeal is dismissed and the enforcement notice is upheld.

Application for costs

2. Applications for costs have been made by both the Council (during the Inquiry) and the appellant (prior to the Inquiry). These applications are the subject of separate Decisions.

Procedural Matters

3. The appellant withdrew an appeal against a refusal in part to grant a certificate of lawful use or development (LDC) prior to the Inquiry in respect of, amongst other things, the residential use of the Olde Shoppe. Although documentation submitted by both the appellant and the Council refers to the LDC appeal, since it has now been withdrawn, it does not form part of this decision.
4. I am aware that a Planning Enforcement Order (PEO) has been applied for under section 171BA of the Act but remains undetermined. The PEO includes consideration of the use of the Olde Shoppe as well as the stationing of two caravans. The Olde Shoppe is the subject of this appeal, however, the use of the caravans is not before me. The appellant suggests that the PEO and appeal processes are mutually exclusive and has drawn my attention to guidance within the Planning Practice Guidance which states that 'a local planning authority may decide to serve an enforcement notice 'out of time' or apply for a planning enforcement order. It is for the local planning authority to decide which approach is appropriate in each case.'

5. Whilst the PPG suggests it is a choice as to which procedure a local planning authority follows, the procedure for determining the PEO is distinct from the planning appeal process. An enforcement notice has been issued, the failure with which to comply can result in prosecution and/or direct action. Section 191(3A) of the Act provides that the time for taking enforcement action is to be taken not to have expired where an application has been made for a PEO which has neither been decided nor withdrawn. This may prevent an LDC application from succeeding where a PEO has been made. However, section 191(3A) applies 'for the purposes of this section' i.e. applications under section 191 and not appeals made under section 174. It does not prevent my consideration of the section 174 appeal under grounds (d) and (e). I shall proceed accordingly.
6. The Council confirmed during the Inquiry that although it had carried out written notification of the Inquiry, it had not issued a press notice as requested in writing by the Planning Inspectorate. The appellant's advocate was of the view that there is a risk that parties could be prejudiced by the omission if the Inquiry proceeded and made reference to interest on social media. However, the advocate confirmed she is not aware of any specific person who would be disadvantaged. Counsel for the Council pointed out that the matters to be considered are legal grounds of appeal, there is no ground (a) and so it is difficult to see how any interested person could have added to the outcome. He also noted that public interest appears limited. A notice of the Inquiry has been posted on the appeal site and written letters of notification have been issued. In the circumstances, I consider it is very unlikely that anyone who might have wanted to contribute at the Inquiry was denied the opportunity to do so. The Inquiry proceeded accordingly.
7. I was further advised that the Inquiry notification letters were served incorrectly on the appellant as they were sent to the wrong address. Despite this, the appellant was aware of the Inquiry and was able to attend. He was therefore not prejudiced.

Ground (e)

8. Ground (e) is made on the basis that copies of the enforcement notice were not served as required by section 172 of the Act. Section 172 provides that a copy of the enforcement notice shall be served on the owner and occupier of the land to which it relates, and any other person having an interest in the land, including mortgagees. Section 176(5) provides that where it would otherwise be a ground for determining an appeal under section 174 in favour of the appellant that a person required to be served with a copy of the enforcement notice was not served, the Secretary of State may disregard that fact if neither the appellant nor that person has been substantially prejudiced by the failure to serve them.
9. The main thrust of the appellant's case is that the enforcement notice was not served on the site mortgagee. In an appeal on ground (e) the onus is on the appellant to make their case on the balance of probabilities. In support of the appellant's case under ground (e), he has provided a survey which, it is asserted, demonstrates that the Olde Shoppe falls within both H.M. Land Registry Title No. ST137496, which identifies a mortgagee and ST288366 which does not.
10. The Council's case is that the Olde Shoppe falls entirely within Title No. ST288366 for which there is no mortgagee.

11. The Title Plan for ST37496 passes through the centre of a square building, which the appellant suggests is the Olde Shoppe. Information shown on the Land Registry Title plans show general boundaries and is based on Ordnance Survey mapping. Given the location and footprint of the Olde Shoppe, I do not consider the square building shown on the Title Plan is an accurate representation of the Olde Shoppe.
12. The appellant has provided a plan titled 'Survey + LR Overlay' which he asserts shows that the Land Registry Plan is inaccurate and that the Olde Shoppe falls within the two Title plans. The methodology used by the company who produced the plan is not clear, nor is the plan sufficiently annotated to enable an uninformed reader what the different lines represent. The appellant explained during the Inquiry that the datum point used in drawing up the 'Survey + LR Overlay' plan was based upon the corner of a building which was also used when drawing up the transfer plan in the 1990's.
13. A series of signed witness statements have been provided, which all make reference to measurements being taken from the corner of an existing building and include signed plans. The witness statements, however, do not indicate the location of the building, nor do the plans identify the building being referred to.
14. The Council highlighted how the building cannot be seen on an aerial photograph dated 1999. During the course of the Inquiry, the appellant conceded that the building referred to in his witness statement was not actually present on site when the land transfer took place and the two Title plans were drawn. The appellant suggested that there was definitely a marker point which is now the corner of the building and that he took the measurements from a fixed structure, such as a post or that there may be a date error. However, I find this assertion to be vague and contradictory to evidence previously provided.
15. The Council carried out a Land Registry search on 22 May 2020 prior to the issue of the enforcement notice on 26 May 2020. Although the documentation provided by the Council does not include a plan, it is highly unlikely the Council would go to the trouble of obtaining a copy of the register and not look at the Title Plan to which it relates. The Council has provided an aerial overlay, which indicates that the Olde Shoppe is located within Title Plan ST288366 and has provided a detailed methodology to show how its plans are digitised. In this regard, I find the Council's evidence clear, precise and unambiguous.
16. A Sketch Plan submitted by the appellant, although hand drawn, appears to show the Olde Shoppe within Title No. ST288366 and therefore seems to support the Council's case. Thus, I conclude, on the balance of probabilities, that the Olde Shoppe is located within Title No. ST288366 and therefore, the notice was served, as required by section 172 of the Act.
17. I agree it is extremely important that all reasonable steps should be taken to identify those persons entitled to be served with an enforcement notice and they should be properly served, as set out in *Mayes and others v Secretary of State for Wales [1989]* and *R (Stern) v. Horsham District Council [2013] EWHC 1460 (Admin)*. Nevertheless, whilst the Council did not serve a Planning Contravention Notice, as set out above, I have found that the Olde Shoppe falls within the Title without a mortgagee. Thus, even if the Council could have done more to identify those persons with an interest in the land, the outcome would have been the same.

18. Given that I have found the notice was served, as required by section 172 of the Act, it follows that the mortgagee has not been substantially prejudiced since there has been no failure of service in this case. Consequently, the appeal under ground (e) must fail.

Ground (d)

19. 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. The building, The Olde Shoppe, was built in 1996 with the intention of constructing a farm shop. Although the Council initially concluded within its delegated report for the LDC application that the time limit for the taking of enforcement action was 10 years, it is now common ground that the relevant time period is four years¹.
20. It was established in *Welwyn Hatfield BC v SSCLG & Beesley* [2011] UKSC 15; [2011] that where there has been positive deception in matters integral to the planning process which are directly intended to and did undermine the regular operation of that process, an individual cannot rely on the time limits for taking enforcement action in section 171B. Part of the Council's case is that even if the building has been continuously occupied for a period of four years, there has been concealment of the change of use to a residential dwelling by positive deception, so as to deprive the appellant of the benefit of the four year limitation period in section 171B(2) of the Act.
21. The main thrust of the appellant's case is that the Olde Shoppe has been used as a separate residential unit and let for those purposes for in excess of 4 years prior to the issue of the enforcement notice.
22. Case law has established that it is for the appellant to make their case on the balance of probabilities. As set out in Planning Practice Guidance (PPG) and established in case law², the appellant's evidence should not be rejected simply because it is not corroborated. 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, and their evidence is sufficiently precise and unambiguous, it should be accepted.
23. Given the above, the main issues are:
- Whether the appellant can show on the balance of probabilities that the material change of use of the building began on or before 26 May 2016³ and, if so, whether it continued without significant interruption for at least 4 years thereafter.
 - Whether there has been concealment of the change of use to a residential dwelling by positive deception, so as to engage the Welwyn principle and deprive the appellant of the benefit of the four year limitation period in section 171B(2) of the Act.
24. To determine the date of a change of use of a building dwellinghouse, caselaw⁴ has established that regard should be had to two factors, neither of which is

¹ S171B(2) of the Act

² *Gabbittas v SSE & Newham LBC* [1985] JPL 630

³ Namely 4 years prior to the date of issue of the notice.

⁴ *Impey v SSE & Lake District SPB* [1981] JPL 363, [1984] 47 P&CR 157

decisive: when the building provided viable facilities for living, with regard to the *Gravesham*⁵ characteristics of a dwellinghouse; and when the use actually commenced. In *Welwyn* it was held it is appropriate to look at the matter in the round and to ask what the building has or of what use it is.

25. The appellant states that he carried out works in 2012, when he was upgrading East Lodge, to upgrade the Olde Shoppe and that he replaced the doors and the felt roof as well as repainting throughout. However, he has provided no detailed information regarding the conversion works which facilitated the change of use to a dwelling and so it is not clear precisely when the building provided viable facilities for day-to-day living.
26. The appellant's case in relation to the LDC application was that the residential use of the Olde Shoppe began 4 years prior to 24 July 2018, i.e. on or before 24 July 2014. Within a statutory declaration dated 14 March 2019, the appellant states that the Olde Shoppe has been used as a separate residential unit and let for those purposes for in excess of 4 years, i.e. on or before 14 March 2015.
27. The appellant sets out in his appeal statement the names of occupants of the Olde Shoppe between January 2015 and February 2020 which indicates a succession of continuous tenancies with only limited gaps in occupation. During the Inquiry, the appellant also made reference to informal 'verbal' tenancy agreements and suggested that the use had in fact commenced on an informal basis before January 2015. However, no detail of occupation has been provided prior to this date.
28. The appellant asserts the appeal building was occupied by one individual, hereon in referred to as 'Occupant A', between January 2015 and May 2016 and by another, hereon in referred to as 'Occupant B' between June 2016 and August 2016. A tenancy agreement dated 1 June 2016 and associated claim form for housing benefit and Council Tax support affirms the occupation of the property by occupant B from 1 June 2016. However, the claim form also states within Section N: Other Information '...the property has just been made into a dwelling'.
29. The appellant questions the reliability of the comments made by Occupant B in the claim form and suggests it would not be a matter within the tenant's knowledge. It appears, nevertheless, consistent with an email sent by the appellant's wife regarding Council Tax dated 8 December 2016, which states that the unit 'is an outbuilding which was converted from 1 May 2016'. Both the email and the claim form point towards the building not being converted until May 2016. It is unclear, therefore, how a tenant could have occupied the property between January 2015 and May 2016 if the building was not converted until 1 May 2016.
30. The appellant asserts that Occupant B moved in prior to June 2016 as an emergency placement and suggested in opening submissions that his wife was confirming in her email that the unit was 'tidied up for Mr Davies to occupy on 1 May 2016'. He went on to explain that a charitable organisation paid the occupant's deposit and a month's rent in advance and that he was required to have been placed in the accommodation in order to qualify for the grant. A

⁵ It was held in *Gravesham BC v SSE & O'Brien* [1983] JPL 306 the distinctive characteristic of a dwellinghouse was its ability to afford to those who used it the facilities required for day to day private domestic existence.

bank statement shows that a payment from a charitable organisation was received by the appellant on 17 May 2016. The appellant made reference to an invoice during the Inquiry, however no such supporting documentation has been provided in this regard.

31. The appellant suggests that the tenancy agreement dated 1 June 2016 simply reflected the date upon which Occupant B made the claim. However, the claim was made a number of days after the tenancy agreement was signed and dated. Payment by the charitable organisation was made on 17 May 2016, which is well after the 1 May date the occupant is alleged to have moved in. Furthermore, there is no detail as to what period the payment was intended to cover. Whilst the Council has no record of where Occupant B lived prior to 1 June 2016, this is not itself indicative that he must have lived in the Olde Shoppe.
32. The evidence provided by the appellant is contradictory, seeking on the one hand to show that Occupant A occupied the building until May 2016 and on the other, that Occupant B's occupation of the premises commenced as early as 1 May 2016. There is no suggestion that they occupied the property together. Given the above, there is, in my view, considerable ambiguity as to when the building was converted and who occupied the property in May 2016.
33. In *Thurrock BC v SSETR & Holding* [2002] EWCA Civ 226 it was established that a use can only become lawful if it continues throughout the relevant immunity period, such that the local planning authority could have taken enforcement action at any time. As confirmed in the case of *Swale*⁶, there is a difference between an established dwellinghouse, when an occupier does not have to be continuously or even regularly present in order for the building to remain in use as a dwellinghouse, and where there is no established use.
34. The appellant stated under affirmation, that a third occupant, hereon in referred to as 'Occupant C', occupied the property between 14 August 2016 and October 2016. However, there is a paucity of documentary evidence to support this assertion. The occupant is not identified as paying Council Tax during this period and whilst the occupant would have been responsible for advising the council tax team of his occupation, an email dated 8 December 2016, sent by the appellant's wife, makes no mention of Occupant C living at the property.
35. The appellant went on to suggest during the Inquiry that he and his wife paid the Council Tax on the occupant's behalf because he did not have any money. However, had the property been occupied, I would have expected the appellant's wife to acknowledge this within her email, since this is likely to have affected the amount of Council Tax which was payable. This, in my view, is inconsistent with the appellant's assertion that the property was occupied by Occupant C between 14 August 2016 and October 2016.
36. The appellant has drawn my attention to alleged Council Tax errors made by the 'Council Tax Team'. Even if mistakes were made, it is the correspondence from the appellant's wife which I find particularly instructive and which, in my view, contradicts the appellant's versions of events.
37. In my view, a period of non-occupation, between 14 August 2016 and

⁶ *Swale BC v FSS & Lee* [2005] EWCA Civ 1568

28 November 2016, is not *de minimis* but is significant as a matter of fact and degree and resulted in the four year clock starting again.

38. The appellant has provided a letter from Mrs Maxine deHann, dated 14 January 2019, who confirms that she 'used to do the painting and general cleaning in the 2 caravans' so is 'able to confirm their continued residential use'. Mrs deHann states that the bungalow was built in the early 2000s, however, since the Olde Shoppe was constructed around 1996, it is not clear whether 'the bungalow' referred to in the letter is the Olde Shoppe. Furthermore, Mrs deHann makes no reference to its use.
39. The appellant has provided a signed statement, dated 13 March 2018, by the then resident of North Lodge⁷. However, it simply confirms that The Old Shop [sic], at Westhay Farm, has been occupied for a number years. It does not provide any detail as to how it was occupied or over what period.
40. The appellant refers to charity tractor runs and has submitted a flyer for one of the runs dated 10 May 2015. Evidence was given to the Inquiry by Trevor Savage, who referred to the tractor runs and advised that during the runs, tea and coffee and other refreshments were prepared in the kitchen of 'the bungalow in the Yard'. During the Inquiry Mr Savage confirmed that he did not go into the Olde Shoppe but always left a space for the occupant when visiting the site for 'Moose Club' meetings. Whilst I have no reason to question Mr Savage's evidence in this regard, his knowledge of the way in which the building is used is therefore very limited.
41. The appellant's case seems to be predicated on an assumption that the Council must have evidence to the contrary to the applicant's version of events. This is, in my view, a misinterpretation of the judgment in *Gabbitas*. The decision in *LB Islington v Maxwell* [2019] EWHC 2691 (Admin) reaffirms the established position that the burden of proof lay on the appellant, on the balance of probabilities. In that case, it was held that the question the decision maker should ask, is whether the appellant had demonstrated that the local planning authority would have been able to take enforcement action during the four year period.
42. The appellant has not demonstrated when the conversion of the building to a residential dwelling took place, or that continuous occupation as a dwelling has occurred such that the Council could have taken enforcement action during any four year period. The appellant suggests that it can be presumed that the change of use took place at the very latest at some point between 1 May and 17 May 2016. This in itself contradicts other evidence that the unit was being occupied from January 2015.
43. I found the appellant's evidence regarding occupancy of the building to be contradictory and imprecise. Evidence provided by Mrs deHaan, the resident of North Lodge and Mr Savage, whilst not contradicted, does not show how the building was used during the critical time periods. Whilst it may be the appellant's wife who does the paperwork for the business, the onus is on the appellant to demonstrate his case, on the balance of probabilities. In my view, the appellant's evidence is not sufficiently precise and unambiguous and has therefore not demonstrated, on the balance of probabilities, that the material change of use of the building began on or before 26 May 2016, nor has it been

⁷ Exhibit PRB3

demonstrated that it continued without significant interruption for at least 4 years thereafter.

44. Given my findings above, it is not necessary for me to consider whether there has been concealment of the change of use to a residential dwelling by positive deception, so as to engage the *Welwyn* principle and deprive the appellant of the benefit of the four year limitation period in section 171B(2) of the Act.

45. Thus, for the reasons given above, the ground (d) appeal must fail.

Conclusion

46. For the reasons given above, I conclude that the appeal should not succeed. The appeal is dismissed and the enforcement notice upheld.

M Savage

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Amanda Sutherland LLB. (Hons), PG Dip LPC	Agent
She called:	
Paul Bateman	Appellant
Trevor Savage	Witness

FOR THE LOCAL PLANNING AUTHORITY

Harry Spurr	Of Counsel
He called:	
Emma Anderson	Solicitor

DOCUMENTS SUBMITTED AT THE INQUIRY:

1. Council's opening statement.
2. Appellant's opening statement.
3. Appeal notification and inquiry notification.
4. Lloyds Bank statement, dated 27 May 2016.
5. Paginated document bundle from the appellant.
6. Closing submissions on behalf of the Council, including a costs application, *Thurrock BC v SSETR & Holding* [2002] EWCA Civ 226, *Swale BC v FSS & Lee* [2005] EWCA Civ 1568, *Islington LBC v SSHCLG & Maxwell Estates* [2019] EWHC 2691 (Admin), *Mayes v SSW* [1989] JPL 848 and *Ravensdale Ltd v SSCLG* [2016] EWHC 2374 (Admin).
7. Closing submissions on behalf of the appellant.
8. Costs response on behalf of the appellant.
9. Photographs of the site notice.
10. *R (Gleeson Developments Limited) v Secretary of State for Communities and Local Government* [2014] EWCA Civ 1118
11. *Gabbittas v SSE & Newham LBC* [1985] JPL 630