



Appeal Decisions

Site visit made on 9 August 2022

by **S A Hanson BA(Hons) BTP MRTPI**

an Inspector appointed by the Secretary of State

Decision date: 27 September 2022

Appeal A Ref: APP/C3105/C/22/3297872

Appeal B Ref: APP/C3105/C/22/3297873

Land at 107 Middleton Road, Banbury, Oxfordshire OX16 3QS

- The appeals are made under section 174 of the Town and Country Planning Act 1990 as amended. The appeals are made by Mr J C Kent-Baguley (Appeal A) and Mrs A C Kent-Baguley (Appeal B) against an enforcement notice issued by Cherwell District Council.
- The notice, numbered 17/00334/ENFC, was issued on 29 March 2022.
- The breach of planning control as alleged in the notice is: Without planning permission, the creation of 7 No. Self-Contained units of residential accommodation (6 No. Studio Flats and 1 No. one bedroom flat).
- The requirements of the notice are to:
 1. Cease the use of 7 self-contained flats situated at basement, ground floor, first floor and second floor.
 2. Remove from the building all fixtures and fittings associated with the unauthorised flats and remove them from the Land including, but not limited to kitchen units, kitchen sink, cooker, toilet, shower, sink, baths.
 3. Remove all utilities associated with the unauthorised flats including, but not limited to the meter boxes, cabling and any pipe work associated with the unauthorised flats and remove those items from the land.
 4. Remove all the partitions and fixtures that were installed in order to create the unauthorised flats.
 5. Restore the land to its condition before the breach took place.
- The period for compliance with the requirements is: 12 (twelve) months.
- 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). Since the prescribed fees have not been paid within the specified period, the appeal on ground (a) and the application for planning permission deemed to have been made under section 177(5) of the Act have lapsed.

Decision

1. It is directed that the enforcement notice is corrected by:
2. the deletion of step 1. of the requirements "cease the use of 7 self-contained flats situated at basement, ground floor, first floor and second floor" and the substitution with the words "cease the use of the premises to provide more than 4 self-contained flats."
3. Subject to the correction, the appeals are dismissed and the enforcement notice is upheld.

Matters concerning the notice

4. The council in its appeal submissions¹ confirms that it 'does not dispute that the lawful use of the land would have been for four flats in their previous layout'. Accordingly, the requirements for compliance with the notice should be corrected to reflect the previous use the council considers to be lawful.

The appeal site and relevant planning history

5. The appeal property, 107 Middleton Road (No.107) is a three storey end terrace property with a basement, in a row of similar properties within a predominantly residential area on the edge of the town centre. The appellants bought the property, which had been converted from a single dwellinghouse into 4 flats, in May 2017. Planning permission had been previously granted² for the general improvement and conversion of Nos. 107, 111 and 113 Middleton Road to 12 self-contained flats including a small rear extension to No. 107.
6. An application³ was refused by the council for 'proposed sub-division of existing 4 No. flats into 7 No. individual self-contained units' on 5 September 2017. A subsequent application⁴ for 'sub-division of existing 4 flats into 7 individual self-contained units (part retrospective)' was refused by the council on 16 May 2018. An appeal against the planning refusal was dismissed by the Planning Inspectorate on 19 March 2019⁵.
7. The property currently contains 7 separate self-contained units of accommodation formed by the reconfiguration of internal walls and services. Each unit of accommodation has a separate lockable access.

The appeals on ground (e)

8. This ground of appeal is that copies of the notice were not served as required by section 172 of the Town and Country Planning Act 1990 (the Act). Section 172(2) of the Act provides that a copy of the notice shall be served on the owner and occupier of land to which it relates, and any other person having an interest in the land, including mortgagees, tenants and sub-tenants, being an interest which, in the opinion of the LPA, is materially affected.
9. The onus is on the appellant, in this case the owners of the appeal property, to prove their case. The appellants claim that the notice was not served on the owners or received at the owners' home or trading address.
10. Section 329 of the Act sets out the legal framework for the service of a notice. Amongst its terms, sub-section (1)(b) states this can be done "by leaving it at the usual or last known place of abode of that person or, in a case where an address for service has been given by that person, at that address". Under s176(5) of the Act, 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 him.

¹ Paragraph 4.8 LPA Appeal Statement

² CHN.150/80

³ LPA ref: 17/01218/F

⁴ LPA ref: 18/00228/F

⁵ APP/C3105/W/18/3208551

11. For its part, the council identified the owners of the property from the Official Copy of Register of Title obtained from the Land Registry (the Title Document). This showed the owners to be Jeremy Richard Kent-Baguley and Aurora Celeste Kent-Baguley of 107 Middleton Road, Banbury OX16 3QS. Furthermore, addresses previously provided by the appellants on applications for planning permission and a planning appeal had been given as 107 Middleton Road. The council's submissions show that a copy of the notice was sent to each of the 7 flats and addressed individually to Mr Kent-Baguley, Mrs Kent-Baguley and to the 'Owner/Occupier'. A copy was also sent to the mortgage company. Case law⁶ has determined that the use of a Title Document is an appropriate method for identifying the owner of land in the matter of serving notices.
12. The appellants claim that they had not been issued with any formal paperwork/notice at their current homes or trading office address, which differs from the appeal address. Following contact from the appellants' agent on 21 April 2022 to enquire whether any paperwork had been issued concerning No.107, the council sent a further copy at the appellants request, to their home address which was then provided to the council. A tracked copy of the notice was sent by recorded delivery and collected by 'Baguley' from the Banbury Delivery Office at 11:08 on Friday 29 April 2022. The appeal against the notice was received by the Planning Inspectorate on Thursday 28 April 2022 at 23:09 the day before the notice would have taken effect if an appeal had not been made against it beforehand.
13. From the evidence before me, it appears that the council served the notice correctly but even if they did not, the appellants have submitted their appeal against the notice within the timeframe, prior to the copy of the tracked notice being received and have had an opportunity to argue their case fully during the appeal proceedings. It cannot, therefore, be said that the appellants have suffered any substantial prejudice.
14. Therefore, for the reasons given above, I conclude that the appeal on ground (e) should fail.

The appeals on ground (d)

15. In an appeal on ground (d), the onus is on the appellant to demonstrate, on the balance of probabilities, that at the time the notice was issued, it was too late to take enforcement action in respect of the alleged breach of planning control. Under s171B(2) of the Act, where there has been a breach of planning control consisting in the change of use of any building to use as a single dwellinghouse, no enforcement action may be taken after the end of the period of four years beginning with the date of the breach. The 'four year rule' applies where the change of use has resulted in the creation of flats, so long as each is used as a self-contained dwellinghouse.
16. The notice was issued on 29 March 2022. For the appeal to succeed on ground (d), the appellants must show that the change of use from 4 flats to 7 flats had occurred by no later than 29 March 2018. In determining when the change of use took place, regard should be had to when the building provided viable facilities for living, and when the use actually commenced. It is also necessary for the appellants to show that the use of the property as 7 flats took place for

⁶ Oldham Metropolitan Borough Council v Tanna [2017]

a continuous four year period, within which the council could have taken enforcement action at any time.

The evidence

17. The appellants grounds of appeal are limited. They state that 'the property contains 7 separate units these were formed by the reconfiguration of the internal walls, services, accommodation with separate access' and that 'the building was originally 4 individual units (Units A, B, C and D) benefiting from Planning Permission so there was no change of use required for the continued use'.
18. Under their appeal on ground (d) they argue that 'the original flats were reduced in size the excess areas form Studio flats more than 4 years ago' and that they are unclear which units are being attacked by the enforcement notice.
19. Firstly, the alleged breach of planning control is the creation of 7 self-contained units of residential accommodation (7 flats). At the time of purchase, May 2017, the appellants confirm that the property was divided into 4 flats. They also provide that the building was in a poor state of repair and was unoccupied. Since then, the property has been reconfigured and subdivided into 7 flats. Drawing no. P/17/166/002 dated May 2017 provided by the appellants labels the four floors within the property as existing. Drawing P/17/166/003 Rev A dated May 2017 provided by the appellants labels the four floors as proposed. This being the present layout of the appeal building. The plans clearly show that the building has been entirely reconfigured by physical works to accommodate 7 flats.
20. The council has provided a copy of the appellants' application for an unoccupied property Council Tax discount for Flat A and B made on 2 July 2018 and received by the council on 4 July 2018. In the application, the property is described by the appellants as in need of major structural repairs which were in progress at the time. The application confirms that the flats are unoccupied and substantially unfurnished. The works were said to have commenced on 8 May 2017 and were due to be completed in April 2019. While there was no application for Flats C and D, the council confirms that as the council tax officer's visit confirmed the entire property to be unoccupied, a separate application was not required. Furthermore, an email from Mr Kent-Baguley to the council tax department dated 27 June 2018 confirms that 'the property is currently divided into four flats A,B,C & D; all four of which have been unfurnished & unoccupied for the whole duration and are still so'.
21. In the copy of the council's inspection report dated 20 July 2018 following a full tour of the property, the author confirms that the works were not far from completion and that the owner hoped completion would be within the following 10 weeks. The report also confirms that the property would have been uninhabitable at the time of the application (2 July 2018) and not safe to live in. It goes on to say that the whole property had been stripped back, re-wired and reconfigured to accommodate 7 flats.
22. On the basis of the submitted evidence, the 7 flats did not provide *viable facilities* for living and were not occupied on the critical date, that is 29 March 2018 and thus have not been *occupied* for a continuous period of four years prior to the notice being issued on 29 March 2022. Accordingly, the appellants

have not shown, as a matter of fact and degree, that when the notice was issued, no enforcement action could be taken in respect of the breach of planning control namely, the use of the appeal property as 7 self-contained flats.

23. For these reasons the appeal on ground (d) cannot succeed.

SA Hanson

INSPECTOR