



Appeal Decision

Site visit made on 24 May 2023

by E Brownless BA (Hons) Solicitor (non-practising)

an Inspector appointed by the Secretary of State

Decision date: 18 July 2023

Appeal Ref: APP/V2635/C/22/3304147

Land North East of 12 Saltpans Close, King's Lynn, Norfolk

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended (the "Act"). The appeal is made by Mr Gary Kirk against an enforcement notice issued by King's Lynn and West Norfolk Borough Council.
 - The notice, numbered 19/00055/UNOPDE, was issued on 20 June 2022.
 - The breach of planning control as alleged in the notice is without planning permission, the unauthorised erection/construction of a dwellinghouse.
 - The requirements of the notice are to:
 - i) permanently remove the dwelling from the land.
 - ii) restore the land to its original condition.
 - The period for compliance with the requirements is: six months from the date the notice takes effect.
 - The appeal is proceeding on the grounds set out in section 174(2)(a), (b), (g) of the Act. Since an appeal has been brought on ground (a), an application for planning permission is deemed to have been made under section 177(5) of the Act.
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Decision

1. The appeal is dismissed, the enforcement notice is upheld and planning permission is refused on the application deemed to have been made under section 177(5) of the Act.

Preliminary Matters

2. The appellant suggests the enforcement notice is ambiguous at Section 1 due to the use of the word 'annex'. However, the reference to 'annex' in this section is a reference to the annexure at the end of the notice and not a reference to the unauthorised development. To this extent I consider that the enforcement notice is in clear and unambiguous terms.
3. The appellant's final comments allege that the Council have introduced new matters within their statement which were not given in their reasons for the enforcement notice, namely that the Council state that the annexe should not be described as such, but as a "new dwelling". However, the notice expressly sets out that the breach of planning control alleged is the unauthorised erection/construction of a dwellinghouse without planning permission. I do not therefore share the appellants' view on this matter.
4. It is accepted by the parties that the appeal site had previously been in horticultural use. However, it is the appellant's case that the appeal site currently forms part of the 'extended garden curtilage' of 12 Saltpans Close. The Council disagrees and sets out that permitted development rights for residential outbuildings do not apply in this instance as the land does not form part of any residential curtilage. When planning permission was granted by the

Council for the residential development of 12 Saltpans Close¹, the appeal site did not fall within the red line of that application. It is the Council's case that the curtilage of 12 Saltpans Close is defined by the extent of the land shown on the plan, irrespective of whether the land has remained in the same ownership. However, this is secondary to whether a building constituting a dwellinghouse had been erected, as alleged, when the notice was issued.

5. The appellant made an application to the Council for planning permission for a proposal described as 'retention and use of detached self contained annex'². This application was subsequently withdrawn by the appellant, however, the Environment Agency (EA) provided their comments in respect of flood risk as part of that application and those comments have been reproduced for the purposes of this appeal. Where relevant, I have taken these into account in my determination of this appeal.

Ground (b)

6. The enforcement notice alleges the erection/construction of a dwellinghouse without planning permission. In pursuing the appeal on ground (b), the onus is on the appellant to show that at the point that the enforcement notice was issued, matters stated in the notice have not occurred as a matter of fact, on the balance of probabilities.
7. It is the appellant's case that the appeal building is an annex which is for ancillary purposes incidental to the enjoyment of the dwellinghouse. Although I recognise that what matters is what was in existence at the time the notice was issued, I saw from my site visit that the unauthorised building is physically separate from the main dwellinghouse. The entrance door is positioned partway along the side of the unauthorised building and it leads into a hallway with several rooms leading off from it. These rooms included a dining room, bedroom, lounge, bathroom and kitchen. The kitchen included a cooker, hob, sink, fridge freezer, several cupboards for storage and a large worktop area.
8. It is the appellant's case that the annex provides a '*basic level of accommodation that is commensurate with its ancillary use to the main dwelling*'. However, I disagree. The internal space was pleasantly spacious, adequate and comfortable and to my mind it includes all the facilities necessary for day-to-day private domestic existence.
9. From the front door of the unauthorised building, an area of decking connects to the lawned rear garden of the main dwellinghouse. There is no physical delineation between these two areas and it is possible to walk easily between the two. However, patio doors from the lounge area of the unauthorised building provide access into a separate area of garden to the rear of that building. This area of garden is large in size and the submitted photographic evidence shows it has contained a variety of garden furniture in the past.
10. Access to the unauthorised building from Saltpans Close is capable via a gate positioned to the side of the main dwellinghouse. However, access can also be readily gained via a track which lies to the rear of even Nos 2-12 Saltpans Close. Moreover, there is a large parking area situated at the end of this track which is positioned adjacent to the unauthorised building. This is closer to the entrance door of the unauthorised building and in my opinion, it represents a

¹ Planning Reference:- 11/02167/F

² Planning Reference:- 21/00227/F

more convenient location for parking and access than the alternative which would entail parking within the driveway at the front of the main dwellinghouse. On this basis, I take the view that the annex could operate independently from the main dwellinghouse without the occupiers having to enter the main house or its garden.

11. I am mindful that caselaw has established that the fact that a building that is capable of being used as a separate, self-contained residential unit does not necessarily mean that this is what has occurred. In the case of *Uttlesford DC v SSE & White [1992] JPL 171*, the Court considered that, even if the accommodation provided facilities for independent day-to-day living, it would not necessarily become a separate planning unit from the main dwelling; it would be a matter of fact and degree. The issue is whether, as a matter of fact and degree, the building was both physically and functionally a separate planning unit at the time the notice was issued.
12. The appellant is stated to have constructed the main dwelling house and the unauthorised building. However, whilst ownership of the latter has been retained by the appellant, the ownership of the main dwelling house has been transferred to the appellants' son and partner, and together with their child they have been in occupation of the main dwellinghouse since 23 October 2020.
13. At the same date, the unauthorised building is stated to have been in occupation by the appellants' daughter. This is the situation that continued to exist at the time of the notice being issued. Despite being members of the same family, the main dwelling house and annex are in separate ownership with the appellant choosing to use the '*joint property as an occasional part-time residence (staying over in the main house) and as a postal address as he is in the process of moving home elsewhere*'. The appellant asserts that the use of the unauthorised building has '*only ever been as a building occupied by a family member in connection with the main dwelling house*'.
14. The claim is that the appellant's daughter has free access to shared facilities in the main house, however, other than the availability of the garage as a shared storage area, no evidence has been provided regarding the range of facilities that are used or their frequency of use. Whilst the garden is available for use by the occupant of the annex, however, again, little detailed information has been submitted regarding the frequency of this activity. Reference is made to meals being '*periodically*' taken together, but no precise details have been presented. Information about when or how the family socialise or interact as a single household is also lacking in detail and clarity.
15. Whilst the parking area adjacent to the unauthorised building is capable of being used by the residents of the main dwelling for vehicular parking, there is limited information indicating the likelihood of this occurring. Moreover, even with vehicles being parked within Saltpan's close, in my view, the private driveway is sufficiently wide enough to enable a vehicle to manoeuvre around those that are parked. The availability of a more conveniently sited area of parking to the front of the main dwellinghouse which is capable of accommodating several vehicles simultaneously, reduces the likelihood of the parking area adjacent to the unauthorised building being used frequently and consistently by the residents of the main dwellinghouse.

16. Electric, water and internet/wifi connections are shared with the main dwellinghouse. Gas is supplied independently via a LPG canister. The sharing of utility charges may be the manner in which this family chooses to operate, but it does not show that the use of the building would be ancillary to the main dwellinghouse. Importantly, I also note that council tax for the unauthorised building has been paid separately to that of the main dwelling and this is further evidence of independent occupation.
17. Although the building is occupied by the appellant's daughter, I consider that the evidence presented regarding the degree of interdependence between the living accommodation in the unauthorised building and main dwellinghouse and how the family functions as a single household is lacking in detail and precision. Given that the unauthorised building contains the necessary facilities for day-to-day living, I find on the balance of probabilities that at the time the notice was issued the building was in use as a separate and self-contained dwellinghouse. It has therefore resulted in the creation of a separate planning unit for which it cannot reasonably be regarded as being part and parcel of the residential use of the main dwelling and for which planning permission is required.
18. Additionally, whilst the submitted photograph attempts to show the unauthorised garden area connected to the garden area of the main house, at the time of my site visit, fencing had been erected to the side of its western elevation thus closing up the access along the western elevation of the unauthorised building. This results in the garden area of the unauthorised building being both physically and visually separate from the main dwellinghouse.
19. Accordingly, I conclude that the appeal on ground (b) fails.

Ground (a)

20. The main issue is whether the development would accord with local and national planning policy which seeks to steer new development away from areas at the highest risk of flooding.
21. The appeal site consists of a single storey residential property that is located within Flood Zones 2 and 3a and the Flood Hazard Zone of the Council's adopted Strategic Flood Risk Assessment (2018)(SFRA), an area that is identified as having a high risk of flooding. Whilst the Tidal Hazard Mapping indicates the property would flood up to a depth of some 1.5 metres, the Council indicates there is a potential for a greater flood depth of up to 2 metres. In the event of a flood occurring, even taking the lower figure of 1.5 metres, the property would be likely to experience significant internal flooding throughout the entire building.
22. Policy CS08 of the King's Lynn & West Norfolk Borough Council Local Development Framework Core Strategy (2011)(CS) sets out that the SFRA outlines potential flood risk throughout the borough. It outlines that in order to ensure future growth within the borough is sustainable, the findings of the SFRA will be used to guide planned growth and future developments away from areas of high flood risk and that the Council will work in conjunction with the Environment Agency (EA) and ensure that decisions take into account coastal flooding and climate change adaptation issues.

23. The policy goes on to acknowledge that some development may be required in flood risk areas. Where a development proposal would be in a high-risk flood area, it will need to demonstrate that the type of development is appropriate to the level of flood risk identified in the SFRA. In the event that the development vulnerability type is not compatible with the flood zone, a proposal will need to demonstrate that the development contributes to the regeneration objectives of King's Lynn or the wider sustainability needs of rural communities. A proposal should demonstrate that flood risk is fully mitigated through appropriate design and engineering solutions.
24. Policy DM21 of the Site Allocations and Development Management Policies Plan (2016)(SADMPP) sets out that for sites within flood risk zones 2 and 3 or flood defence breach Hazard Zones identified by the SFRA, a site specific flood risk assessment will be required to satisfactorily demonstrate that the development will be safe for its lifetime, taking climate change into account, and with regard to the vulnerability of its users, without increasing flood risk elsewhere and, where possible, reducing flood risk overall. It goes on to state that the design of new dwellings will be required to accord with the Flood Risk Design Guidance (FRDG) appended to the SADMPP at Appendix 5.
25. The FRDG stipulates that for sites where flood depths of over 1 metre and up to 2 metres are identified, a Site Specific Flood Risk Assessment (FRA) will need to identify the precise flood risk to the site and the necessary resiliency measures having regard to incorporating some or all of the specified flood resiliency measures set out within the guidance, namely, finished floor level raising, dam boards, other resiliency measures such as raising of electrical sockets/switches, no ground floor sleeping accommodation and safe refuge provision.
26. The National Planning Policy Framework (the Framework) has similar aims, requiring development in Flood Zones 2 and 3 to include a FRA. The assessment should demonstrate how flood risk will be managed now and over the development's lifetime, taking climate change into account and with regard to the vulnerability of its users. The Planning Practice Guidance identifies that a building used for a dwelling house is classed as a 'more vulnerable' use.
27. The objectives of a site-specific flood risk assessment are to establish that flood risk would not be increased elsewhere. Among other things, it also needs to show that the development is appropriately flood resistant and resilient, any residual risk can be safely managed, and that safe access and escape routes are included where appropriate.
28. A FRA has been submitted as part of this appeal. Whilst it demonstrates that flood risk would not be increased elsewhere, it relies upon an alteration being made to the existing building to incorporate a 'raised deck area' within the bedroom space. This would result in a floor level of 730mm above external ground levels and seeks to show that the appeal scheme could be made to be flood resistant and resilient. Submitted plan GK/01/2021-2A sets out the proposed changes to the building. Given that what is shown within the plan is not materially different to what is alleged within the notice, in these circumstances it may be appropriate to ensure alterations are carried out by way of an appropriately worded planning condition if the DPA is otherwise acceptable.

29. However, the EA's comments concern the method of determining the design flood level, which includes the use of an average of an adjusted depth range. In the absence of using the specific flood depth of 1.5 metres, there is reasonable uncertainty regarding the use of adjusted flood depths and the accuracy of the design flood level is questionable. As a result, it is far from certain on the evidence before me that the precise flood risk to the site has been identified as is required by the FRDG.
30. Setting aside the accuracy of the FRA, a flood event caused as a consequence of the failure of tidal defences is likely to be prolonged. As such, the use of an internal refuge on a 'bed deck' as a point of safe refuge is not supported by the EA and I would agree with this view.
31. The submitted Flood Evacuation Plan (FEP) does not specify a safe refuge point and sets out, by reference to a plan, a safe route to higher ground at John Kennedy Road and it advises signing up for the EA's flood warning service. In my view, there would be a clear conflict with the FRDG given that the appeal scheme comprises a single storey property that includes ground floor sleeping accommodation and there would be little opportunity for occupants to occupy a safe refuge within the property. This has the potential to place the occupants at significant risk and to my mind, the evacuation measures set out within the FEP fall far short of what is necessary to ensure the safety of occupants of the appeal scheme in extreme circumstances.
32. Whilst the EA did not provide an objection to the provision of an annex for residential use, in doing so, their reasoning was based on the unauthorised building being tied to the use of the main dwellinghouse. The EA expressly state, *'we would resist any application to make this building a separate dwelling as it contradicts the policies of the SADMP'*. By reason of my findings above, I have determined that the dwellinghouse has created a separate planning unit which cannot reasonably be regarded as being part and parcel of the residential use of the main dwellinghouse.
33. I have therefore given consideration to whether an appropriately worded planning condition could be used to bind the annex to the main dwellinghouse in order to secure the provision of a safe refuge at first floor level if it should become necessary. However, given that the other dwellinghouse isn't in the appellant's ownership or control, it is not possible to include a planning condition which would impose an obligation to provide flood refuge on a third party in perpetuity.
34. Notwithstanding that the two dwellinghouses are currently within separate ownership, albeit owned by father and son and therefore within the same family, there is nothing to preclude the ownership of either dwellinghouse being transferred to an unrelated third party at some future date.
35. Although there is a suggestion that the ownership of the two units may be joined together again at some future point, there is no certainty of this occurring.
36. To my mind, on the evidence before me, it has not been demonstrated that the appeal scheme is appropriately flood resistant and resilient nor that flood risk is fully mitigated. The appeal scheme would be at unacceptable risk of flooding and there would be conflict with CS Policies CS01, CS08 and SADMP Policy

DM21. Among other things, these policies seek to ensure that development is directed away from areas at risk of flooding now or in the future.

37. In addition, the scheme would also be contrary to the aims of the Framework insofar as it seeks to ensure that inappropriate development in areas at risk of flooding now, or in the future, should be avoided.

Other Matters

38. The Council's enforcement notice also cites Policy CS03 of the CS and SADMPP Policy DM15 as a reason for issuing the notice. However, CS Policy CS03 provides a strategy for growth of the King's Lynn area including the provision of new dwellings and SADMPP Policy DM15 is concerned with the environment, design and amenity. As the Council have not set out any specific conflict with these policies, I ascribe no weight to any conflict with those policies.
39. My attention has been drawn to SADMPP Policy DM7 which concerns 'residential annexes'. However, by reason of my findings above, I have concluded that the appeal property is a separate unit of accommodation, it therefore fails to satisfy the 'ancillary' requirement of this policy. Whilst other criteria of this policy are stated not to have been met, as the appeal scheme fails on the 'ancillary' point it has not been necessary to give these matters any further consideration.
40. No adverse harm has been identified with regard to the character and appearance of the area. The appeal scheme would safeguard the living conditions of neighbouring occupiers and it would also achieve an adequate level of privacy for occupants of the appeal scheme. Similarly, it makes adequate provision for the parking of vehicles. However, the absence of harm is a neutral matter that weighs neither for nor against a proposal.
41. Reference is made to other residential developments being constructed within the locality including, 12 Saltpans Close. However, unlike the single storey building of the appeal scheme, 12 Saltpans Close is a two-storey building that is capable of offering floor refuge at first floor level and no other specific examples have been referred to by the appellant. It is not clear to me whether the examples referred to are single storey dwellings, and if so, the particular circumstances of those developments and whether their circumstances are therefore comparable to the appeal proposal. A comparison is of limited relevance in this instance and I have determined the appeal scheme before me with regard to its individual planning merits.
42. The unauthorised development contributes an additional dwelling to the supply of housing and it is located within the built-up part of King's Lynn within a reasonable walking distance of the services and facilities located within the town centre. Whilst it is put to me that the principle of residential development is acceptable at this location, this is subject to the appeal scheme's compliance with other policies of the development plan, including its policies concerning flood risk.

Conclusion on Ground (a)

43. The unauthorised development fails to accord with CS Policies CS01, CS08 and SADMPP Policy DM21 and it would conflict with the Framework's provisions regarding flood risk. This is a matter of significant importance that weighs against the proposal. The material considerations weighing in favour of the

appeal scheme are limited and do not justify a decision otherwise than in accordance with the development plan.

44. For the reasons given above, I conclude that the appeal made on ground (a) shall not succeed.

Ground (g)

45. It is the appellant's case that the six month period for compliance with the notice is too short and should be extended. I am mindful that the building is currently occupied residentially and therefore sufficient time is required to allow the occupant to find suitable alternative accommodation.
46. I accept that the current occupier will feel some personal distress as a consequence, however, I have no specific information regarding the personal circumstances of the occupier, or why a period of six months would be inadequate to secure alternative accommodation. Whilst a property purchase may take longer than six months, there is no information to explain why temporary accommodation such as rental accommodation would not be adequate in any intervening period.
47. The suggested period of 18 months would be exceptionally long and tantamount to a temporary planning permission. In allowing unauthorised development that I have identified as being at an unacceptable risk of flooding and comprises a 'more vulnerable' use to remain for that long would be inconsistent with my findings in relation to ground (a).
48. I note that the Council have indicated a willingness to extend the period to 12 months, albeit no explanation has been given regarding this change of view. However, if reliable evidence were put forward to show why the appellant were to require longer than six months, it would be possible for the Council to extend the compliance period under the provisions of s.173A(1)(b) of the Act. Accordingly, I consider that a period of six months is a reasonable time scale to carry out the required steps of the enforcement notice.

Overall Conclusion

49. For the reasons given above, I conclude that the appeal should not succeed. I shall uphold the enforcement notice and refuse to grant planning permission on the application deemed to have been made under section 177(5) of the Act.

E Brownless

INSPECTOR