
Appeal Decision

by Grahame Kean B.A. (Hons), PgCert CIPFA, Solicitor HCA

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 31 March 2017

Appeal Ref: APP/Q1445/X/16/3159422

160 New Church Road, Hove BN3 4JE

- 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 Mervat Emmanuel against the decision of Brighton and Hove City Council.
 - The application Ref BH2016/01469, dated 28 April 2016, was refused by notice dated 18 August 2016.
 - The application was made under section 192(1)(a) of the Town and Country Planning Act 1990 as amended.
 - The development for which a certificate of lawful use or development is sought is retention of accommodation for occupation by visiting family members or B&B guests.
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Decision

1. The appeal is dismissed.

Preliminary Matter

2. The application form clearly states that the proposed use is considered to fall within the Class C3 dwellinghouse use. It is explained in a covering letter that the element of bed and breakfast accommodation proposed is intended to be part and parcel of the C3 residential use of the main dwelling.
3. The Council substituted its own description of the proposed use as "proposed use of the existing outbuilding as residential (C3) and bed and breakfast accommodation (C1)". Whilst it has been suggested that if the description of use in the application does not properly describe the nature of the use, the decision-maker should substitute an accurate description, it is established that a local planning authority has no power unilaterally to modify the description of the proposed use or development in a s192 application.
4. Accordingly I have reinstated the proposed use as described in the rubric of the covering letter with the application. The form, taken with the covering letter to which it refers, complies with advice in Planning Practice Guidance that the application must be accompanied by sufficient information for a local planning authority to decide the application which will need to "describe precisely what is being applied for (not simply the use class)".¹

¹ Paragraph: 005 Reference ID: 17c-005-20140306

Main Issue

5. The main issue to consider is whether, irrespective of the wording of the reason for refusal, the Council's decision to refuse the LDC was well-founded, having regard to the proposal at the date of the application.

Reasons

6. By s55(2)(d) of the 1990 Act the use of any buildings or other land within the curtilage of a dwellinghouse for any purpose incidental to the enjoyment of the dwellinghouse shall not be taken to involve development on the land. The Council considered the proposed use of the outbuilding for residential (C3) and bed and breakfast (C1) use would be a material change of use by forming a separate planning unit from the main dwelling and not lawful under s55(2).
7. 160 New Church Road is a detached dwelling sited at a corner of New Church Road and Saxon Road. The outbuilding is at the rear of the site with a main door facing a gate giving access onto Saxon Road.

Planning history and its implications for current use of the outbuilding

8. A certificate of lawfulness of proposed development (2008 LDC) was obtained on 26 September 2008 for "proposed external and internal alterations to existing garage to create a granny annexe". Subsequent to the 2008 LDC, a planning permission Ref BH2014/02223, was granted on 26 August 2014 (2014 permission) for the erection of a single storey extension and associated alterations to fenestration to existing detached garage.
9. The appellant accepts that any proposed use of the annexe as residential accommodation separate from the main dwelling at the property, cannot be achieved through a certificate of lawful proposed use. That would represent a material change of use for which planning permission would be needed and the appellant states he is not relying on an historic established use. However he does rely on the planning history, including the approach taken by the Council to demonstrate that there is no restriction on the outbuilding's use for a commercial or business use, whilst remaining essentially as a C3 dwelling use.
10. The external alterations to the outbuilding did not comply with the drawings submitted with the LDC application. A larger front bay was constructed and approved in accordance with the 2014 permission, which permission had however approved a different layout, comprising a study, games room, laundry room and shower room. These uses are incidental to the enjoyment of the dwelling but subsequent inspection by the Council revealed that it is laid out for primary residential use as a living/kitchen room, bedroom and shower room.
11. Condition 4 of the 2014 permission stated: "*The outbuilding hereby permitted shall be used solely for purposes incidental to the enjoyment of the dwelling house as such and shall at no time be occupied as a separate unit of accommodation or for commercial or business use*". However the permission was varied in 2015 to omit condition 4. I agree with the Council that the condition was unnecessary inasmuch as a separate permission would be required to subdivide No 160 into two or more dwellings or materially change the use to a commercial or business use. However its removal dispensed with the need to confine the use of the outbuilding to a non-primary residential use provided that, in accordance with established planning principles, any use remained ancillary to, and in the same planning unit as, the C3 use of No 160.

12. Regarding the distinction between primary and incidental uses, the appellant has picked up on the Council's reasoning in the 2008 LDC that purports to consider primary living accommodation an incidental use. I would disagree with that reasoning but that said, it is not directly relevant to the main issue.²

Current use

13. An initial step in a use application case is to consider the appropriate planning unit following the guidance in *Burdle v Secretary of State for the Environment* [1972] 1 W.L.R. 1207, considering the unit(s) of occupation, range of activities carried on and their relationship one to another. This will assist in determining whether or not the change of use would constitute a material change of use requiring planning permission.
14. The outbuilding is used for visiting relatives, including elderly relatives who, due to ill health are unable to access the first floor accommodation in the main house. Visitors share facilities with the main house, including amenity space and on occasion take meals together. Utilities are shared with the main house, including gas, electricity and water.
15. I also take into account that there is a path from the outbuilding to the main house, and no barrier in between or designation of separate amenity space. The outbuilding is nevertheless isolated from the main house, being sited at the bottom of the rear garden. As the 2008 LDC also noted, facilities associated with the "granny annexe" include separate access and parking.
16. I agree with the appellant that *Uttlesford District Council v Secretary of State for the Environment and White* [1992] remains relevant in pointing out that, even if accommodation provides facilities for independent day-to-day living, it would not necessarily become a separate planning unit from the main dwelling, but would be a matter to decide on a fact and degree basis.
17. In my view the outbuilding has all the necessary facilities required for the unit to function independently from the main dwelling, including separate access. However as currently used, and bearing in mind the strong familial relationship between its occupiers and those of the main house, it remains an ancillary use to that of the main house and within the same planning unit.

Nature of proposed use

18. It is proposed to provide bed and breakfast accommodation for up to 4 to 6 months of the year with guests staying 2 to 3 nights at a time. Relatives would continue to use the outbuilding at other times and thus it is argued, a C3 use within the premises would be preserved.
19. Use by family members and visitors is intermittent and for temporary periods, and there appears no reason why this level of use would change significantly. The use classes order defines a C1 use as use for a hotel or as a boarding or guest house where, in each case, no significant element of care is provided. Apart from occasional use by relatives, the whole outbuilding would be in use as bed and breakfast accommodation by paying guests over a significant period

² The LDC stated that the development benefits from deemed consent under Class E of Part I, Schedule 2 of the Town and Country Planning (General Permitted Development) Order 1995 "because the use as proposed is incidental to the enjoyment of the dwellinghouse as such". However the LDC makes lawful an intended primary residential use that is nevertheless ancillary to the main dwelling ("granny annexe"); not a use that is incidental and a non-primary use.

each year. This would result in a changed pattern of activity in and around the outbuilding, where the clientele would not form part of the same household as occupiers of the main house, a use not normally found within the C3 use class.

20. Thus a commercial activity would be introduced into a self-contained unit of accommodation, some 3.9m high and 9.6m wide by 5.2m deep (maximum) narrowing to 3.5m, which is physically separate from the main dwellinghouse. Despite the level of accommodation provided by the main property which is a large 4 bed dwelling, in my judgement the proposal would not be incidental or ancillary to No 160, but would be a significant change to the use of the outbuilding, creating a separate planning unit.
21. Breakfast is for most people an important ingredient of a bed and breakfast stay. Although it would be offered in the main house, kitchen facilities in the outbuilding would be available, including for cooking other meals during the stay. The nexus between the bed and breakfast function as proposed in both buildings, is too slight in my view to reduce the materiality of the change of use of the outbuilding, if used by paying guests for the periods intended.

Other appeal decisions

22. Reference is made to other appeal decisions including at Sevenoaks and Newcastle upon Tyne where certificates were granted for B&B use for bedrooms within a dwelling. The decisions do not relate to the use of a separate building and I consider they carry little weight in this appeal.
23. The Council referred to an appeal decision in Chichester but full details were not provided. From what I understand of the Council's reference to it, permission was refused for the separate residential use of a garage, because a condition to ensure it remained ancillary to the main dwelling was not considered to be enforceable. Such considerations are not however relevant to the current appeal under s195 of the Act.
24. The Brighton appeal decision³, also cited by the Council, dealt with a similar issue concerning enforceability of a condition. As the appellant points out, if a use is lawful but would be difficult to enforce or is contrary to policy, these are immaterial considerations in a certificate application.

Conclusion

25. I am satisfied on the evidence that the proposed use of the outbuilding by paying guests for bed and breakfast stays would, despite its occasional use exclusively for family visitors, be a material change of use of the building falling within the C1 use class, involving development that requires planning permission. I am not persuaded on the balance of probabilities that the extent of activity proposed would as a matter of fact and degree, be merely incidental or ancillary to the residential use of the main dwelling house.

Overall Conclusion

26. For the reasons given above I conclude that the Council's refusal to grant an LDC in respect of the proposed development was well founded. I will exercise the powers transferred to me in s195(3) of the Act and dismiss the appeal.

³ APP/Q1445/D/16/3151556

Grahame Kean

INSPECTOR