



Appeal Decision

by Elizabeth Jones BSc (Hons) MTCP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 01 November 2021

Appeal Ref: APP/Q1445/X/21/3268281

Summer House, Land to the South of 44 The Cliff, Brighton BN2 5RE

- 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 Dr A Paolella against the decision of Brighton & Hove City Council.
 - The application Ref BH2020/02637, dated 16 September 2020, was refused by notice dated 18 November 2020.
 - 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 as an independent single dwellinghouse (C3).
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Decision

1. The appeal is dismissed.

Procedural Matters

2. I consider that this appeal can be determined without a site visit without causing prejudice to any party. This is because I have been able to reach a decision based on the documentary evidence submitted.
3. Both parties in their submissions refer to two additional outbuildings on the land. For the avoidance of doubt these buildings, which I am informed by the appellant, were constructed within the last two years, do not form part of the LDC application subject of this appeal.

The Appeal Site and Planning History

4. 44 The Cliff was originally constructed as two flats (a maisonette with a 'granny flat' over) with planning permission¹ granted in 1989.
5. In 1990 planning permission² was granted for the 'erection of a greenhouse and garden store' within the rear garden of 44 The Cliff.
6. I am informed that the summer house, a single storey L shaped building, was constructed at the rear of 44 The Cliff in the 'broad location' of the greenhouse and garden store approved in 1990.

¹ Ref: 89/0206/F.

² Ref: 90/0868/F.

7. In 1992 the appellant's parents moved into 44 The Cliff and the appellant stayed with them at weekends and holidays. I am informed by the appellant that family members occupied the flats up until 2015 and the garden was in communal use.
8. Tenancy Agreements provided show that 44 The Cliff and 44a The Cliff were rented on a continual basis between 2015 and 2020.

Main Issue

9. The main issue is whether the Council's decision to refuse an LDC was well-founded. Accordingly, it is necessary to consider whether the appellant can show, on the balance of probabilities, that the appeal building has been in use as an independent single dwellinghouse (Class C3) for a substantially uninterrupted period of four years commencing on or before the date of the LDC application, which is 16 September 2020.
10. This consideration is an issue of lawfulness which cannot take account of any matters of planning merit.

Reasons

11. For a LDC to be issued in respect of the appeal in accordance with s191(a), the appellant would need to show that the summer house has been in substantially uninterrupted use for residential purposes for four years under s171B(2)³.
12. The appellant's case is that the summer house has been used as their principal accommodation when visiting Brighton since 2013. The evidence does not need to be independently corroborated in order to be relied upon but it needs to be sufficiently precise and unambiguous.
13. The appellant's evidence comprises tenancy agreements⁴ for the period 17 November 2015 to 17 November 2020 (44 The Cliff) and 1 October 2015 to 3 September 2020 (44a The Cliff)⁵, a number of statutory declarations⁶ and documents relating to an access⁷.
14. The Council served two Planning Contravention Notices (PCN) on the appellant, the first dated 20 July 2017 (hereafter referred to as the '2017 PCN')⁸ and the other served in June 2019.
15. Notwithstanding the comments regarding the definition of the word 'use', it is clear from the 2017 PCN and the accompanying covering letter, that the Council were trying to establish whether a breach of planning control was taking place at the appeal property. To this end the accompanying letter clearly explained several matters that the Council were investigating regarding the summer house. The questions asked in the PCN in my view, were unambiguous.

³ Town and Country Planning Act 1990 s171B(2) Where there has been a breach of planning control consisting in the change of use of any building to use as a single dwelling house, no enforcement action may be taken after the end of the period of four years beginning with the date of the breach.

⁴ Appendices D and E of the Appellant's Planning Statement.

⁵ Appendices D and E of the Appellant's Planning Statement.

⁶ Appendix F of the Appellant's Planning Statement.

⁷ Appendices D and E of the Appellant's Grounds of Appeal and Statement of Case.

⁸ Appendix C of the Appellants Grounds of Appeal and Statement of Case.

16. There is no requirement for the appellant to be represented by a planning professional in order to be able to complete the PCN. Albeit the appellant's response to the 2017 PCN was via email sent from the appellant's assistant, the response to the 2017 PCN made on the appellant's behalf carries considerable weight since it is an offence to knowingly or recklessly give information, in response to a PCN, which is false or misleading. I therefore afford little weight to the argument that the 2017 PCN response only related to the period 1998 to 2008 when the summer house was used ancillary to 44 and 44a The Cliff by the appellant's child.
17. The response to the 2017 PCN⁹ states that since 1990 the summer house was used "to facilitate overspill for visitors and general 'rumpus' room and sleeping accommodation for children and their friends when younger" on an "'ad hoc basis' at present but probably most weekends in the future."
18. In response to a second PCN served in June 2019 the use of the outbuilding was described as "a repository for personal belongings and used for occasional weekend visits" and "was at that time being used as accommodation for builders constructing a sunken garden".
19. The declarations made in the PCNs directly conflict with what I am now being asked to believe about the use of the summer house as a self-contained dwelling. The different versions of use cast considerable doubt on the credibility of the appellant's evidence.
20. A further PCN in July 2019, served on the tenants of No 44, indicates that the tenants did not have access to the summer house and that it was "often used by the appellant to stay in and also by builders working on the sunken garden." The use of the summer house by builders working on the sunken garden is corroborated by local residents who state that the garden works started in September 2018.
21. All the tenancy agreements for both Nos 44 and 44a define 'premises' as "to include all or any part of the dwellinghouse, gardens... or other outbuildings which form part of the let. Where the premises only form part of another property (e.g. in a block of flats) the letting includes the use, in common with others, of communal access ways and other similar facilities."
22. One of the tenancy agreements in relation to No 44 for the period 17 November 2015 to 17 September 2016 specifically excluded the "garage and adjoining storage room, summer house and shed" from the tenancy. Thus, it is reasonable to assume that from September 2016 onwards the summer house could have been used by the occupying tenants as part of their tenancy. This casts doubt on the summer house being used as an independent dwellinghouse since 2015 as claimed by the appellant.
23. Also, the tenancy agreements regarding No 44, for the period 18 September 2018 to 17 September 2020 included a special or additional clause which indicate that the appellant paid a financial electricity contribution to "cover the expense of the summer house." The clause also required the tenants to "keep the side entrance of the house clear of rubbish or any obstruction at all times as this is the access to the summer house which the landlady rightfully requires access to." It is not clear whether the appellant had sole use of the summer

⁹ Appendix C of the Appellant's Grounds of Appeal and Statement of Case, Email from Sally Boshell dated 26 July 2017.

house during this period or whether it was shared with the tenants. Moreover, this clause indicates that there was a shared electricity supply between the summer house and No 44 for which the appellant paid a contribution to the tenants. Taken as a whole, the tenancy agreements do not provide evidence of a separate residential use of the summer house substantially uninterrupted for the required four-year period.

24. The vehicular access arrangement¹⁰ and pedestrian access (bricked up in 2019) at the rear of 44 The Cliff are not indicators of the summer house being in separate residential use because the licence for the vehicular access was granted in 2013 when the family were in residence. Moreover, the use of the side entrance to No 44 as a means of access to the summer house is not indicative of a separate residential use.
25. The annotated aerial google images¹¹ in my view are not sufficiently clear to show a fence separating the rear garden area. It is likely that if a fence existed in the location as marked by the appellant on the 2019 image, it would obstruct access to the summer house via the side entrance to No 44 as required by the tenancy agreement in place at that time.
26. The appellant's statutory declaration states that she has used the summer house as "an independent dwelling, independent of both 44 and 44a The Cliff" and that she has used the summer house "in excess of four years independent of 44 and 44a The Cliff". Shadi Baja's statutory declaration states that from 2016 to 2020 (21.08.20) the summer house was used by the owner of the property as a separate dwelling to the two flats. These declarations are far from being precise and unambiguous as they do not necessarily indicate that the summer house has been used as an independent dwelling for the required substantially uninterrupted period of four years.
27. The statutory declarations from the appellant's friends are materially identical in form so far as the substance of them is concerned. The declarations do not provide details of the facilities provided in the summer house or when the friends first started staying there and how often they stayed overnight. These declarations are not sufficiently precise because there is no evidence to ascertain at what point the level of occupation amounted to a material change of use of the building. Although this is not a reason to set these statutory declarations to one side, it does reduce the amount of weight I am able to give them.
28. The evidence from a local resident states that they have regularly walked past the site for over eight years and have never seen the appellant living in the summer house.
29. For the above reasons, I consider that the summer house appears to have been used for overnight accommodation by the appellant and others including friends and family. However, on the balance of probabilities, the evidence falls short of showing that the summer house has been used as a single dwelling house substantially uninterrupted over the requisite four year period.
30. Moreover, the tenancy agreements from September 2016 suggest that the tenants may have had legal access to the summer house. Thus, the evidence

¹⁰ Appendices D & E of the Appellant's Grounds of Appeal and Statement of Case.

¹¹ Appendix C of the Appellant's Planning Statement

leads me to the view that as a matter of fact and degree a separate planning unit was not established in 2015.

31. In any event, even if I am wrong and a separate residential planning unit was formed in 2015, the submitted evidence casts doubt on the summer house being used substantially uninterrupted for the requisite four years.

Conclusion

32. Taking all these matters into account, I find that whilst it may have been used for residential periods, the evidence is not sufficiently precise and unambiguous to show that on the balance of probabilities, the summer house has been used as an independent single dwelling substantially uninterrupted for the requisite four-year period.
33. For the above reasons, I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of the Summer House, Land to the South of 44 The Cliff, Brighton BN2 5RE as an independent single dwellinghouse was well founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

Elizabeth Jones

INSPECTOR