
Appeal Decision

Site visit made on 22 August 2016

by K R Seward Solicitor

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

Decision date: 2 September 2016

Appeal Ref: APP/W1525/X/16/3141628

Schoolfield Cottage, Radley Green Road, Highwood, Chelmsford CM4 0LS

- 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 Mr and Mrs Ray Fury against the decision of Chelmsford City Council.
 - The application Ref 15/01685/CLOPUD, dated 22 September 2015, was refused by notice dated 9 December 2015.
 - The application was made under section 192(1)(b) of the Town and Country Planning Act 1990 as amended.
 - The development for which a certificate of lawful use or development is sought is proposed detached outbuilding.
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Decision

1. The appeal is dismissed.

Procedural Matters

2. Since the date of the LDC application and the submission of this appeal the Government has issued updated Technical Guidance in April 2016 on '*Permitted development rights for householders*'. It supersedes earlier guidance published in 2014. The latest Technical Guidance applies to the Town and Country Planning (General Permitted Development) (England) Order 2015 ('the GPDO') which was in force at the time of the LDC application and is relevant in this appeal.
3. The appellants have quoted from Circular 10/97: *Enforcing planning control: legislative provisions and procedural requirements*. This publication was withdrawn in March 2014 and replaced with the national Planning Practice Guidance to which I have had regard insofar as relevant to this appeal.

Main Issue

4. The main issue is whether the Council's decision to issue an LDC was well-founded. This turns on whether the proposed development would constitute permitted development by virtue of the provisions of Class E(a) of Part 1 of Schedule 2 of the GPDO.

Reasons

5. In an LDC appeal the onus of proof is on the appellant to show that, on the balance of probabilities, the development would be lawful at the time of the application.
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6. The development would be a single storey detached outbuilding within the garden of the semi-detached house at Schoolfield Cottage. The floorplan accompanying the application shows a lobby, games room, gym, toilet, utility room and two cupboards. An LDC was issued in 2010 for an outbuilding in the same position although that building would have been smaller than the current proposal and also determined on the basis of the facts presented at that time. The previous LDC has no bearing on my decision which must be taken on the facts of the case before me and relevant planning law and judicial authority. Equally, as the planning merits are not relevant in a LDC appeal, no account can be taken of the physical appearance of the proposed building.
7. Article 3(1) of the GPDO grants planning permission for the classes of development set out in Schedule 2 to the Order. This includes at Part 1, Class E(a), the provision within the curtilage of a dwellinghouse of any building required for a purpose incidental to the enjoyment of the dwellinghouse as such. This is subject to various limitations pertaining to size and location, but there is no suggestion that the proposed outbuilding would conflict with any of those criteria. The point in dispute is whether the proposed outbuilding would be required for a purpose incidental to the enjoyment of the dwellinghouse at Schoolfield Cottage.
8. There is no statutory definition of the word "incidental", but case law provides authority for how this should be interpreted by decision makers. The appellant asserts that in considering matters such as necessity, genuineness, reasonableness, subordination, room sizes and comparative size, the Council has applied tests not found anywhere within the GPDO. It is suggested that the Council is straying outside the remit of Class E. However, it is entirely appropriate to have regard to relevant case law where such matters are addressed in the context of permitted development rights.
9. In *Emin v SSE*¹ a number of relevant considerations are raised. The judgment refers to the need to address "*the nature of the activities to be carried on in the proposed building to ensure they are incidental or conducive to the very condition of living in the dwellinghouse.*" The scale of those activities is an important matter and that "*In that context the physical sizes of buildings could be a relevant consideration in that they might represent some indicia as to the nature and scale of the activities.*" "*When a matter is looked at as a whole, size may be an important consideration but not by itself conclusive.*"
10. Whilst it is a matter primarily for the occupier to determine what incidental purposes he proposes to enjoy, an objective test of reasonableness should be applied having regard to the circumstances of a particular case. Whether a building is required for a purpose associated with the enjoyment of a dwellinghouse "*cannot rely on the unrestrained whim of he who dwells there*". On the other hand, a hard objective test should not be imposed to frustrate the reasonable aspirations of a particular owner or occupier so long as they are sensibly related to the enjoyment of the dwelling.
11. The Court in *Emin* also held that the term 'incidental' connotes an element of subordination in land use terms in relation to the enjoyment of the dwelling itself. The test to be applied is whether, in the context of the planning unit, "*the uses of the proposed buildings are intended and would remain ancillary or subordinate to the main use of the building as a dwellinghouse.*"

¹ *Emin v Secretary of State for the Environment and Mid-Sussex County Council*, QBD, 1989, 58 P&CR

12. This illustrates that with each case it is a matter of fact and degree based on the particular circumstances.
13. Having regard to *Emin* I must consider whether, in all the circumstances of this case, it has been shown that the proposed building is reasonably required for purposes incidental to the enjoyment of Schoolfield Cottage as a dwellinghouse. It is for the appellant to show that the floorspace attributed to each proposed use is genuinely and reasonably required or necessary in order to accommodate that use.
14. The building would have a footprint of about 93sqm whereas the dwelling is approximately 90sqm. As such, it would not be appreciably larger. Furthermore, taking into account the size of the residential curtilage, a building of the proposed size could be within the bounds of objective reasonableness. However, size is not the sole factor in determining whether a building is incidental to the enjoyment of the dwelling. The nature and scale of the proposed use must also be considered.
15. The Technical Guidance advises in relation to Class E that a purpose incidental to a house would not cover normal residential uses, such as the use of an outbuilding for primary living accommodation such as a bedroom, bathroom or kitchen.
16. A games room and gym are uses which are not usually part of primary living accommodation. They are capable, in principle, of being incidental to the enjoyment of a dwellinghouse. Whereas a toilet can be regarded as primary living accommodation, in this case it would be an ancillary facility to the gym and games room. In principle its provision would not be unreasonable even though the outbuilding would be in quite close proximity to the nearest toilet within the dwelling.
17. Utility rooms are often found within dwellings. They may have several uses, but typically involve laundry equipment. If so, it is capable of falling within the scope of an incidental use by providing activities that support the running of the dwelling rather than being primary living accommodation. The intended use is unclear, however. Similarly, there is a room annotated on the plans as a 'cupboard' which measures 5.3sqm. Reference is made in the Appeal Statement to 'storage space' which I take to be this and another smaller cupboard, but there is no indication as to the type of storage. In the absence of details, it is difficult to identify if those rooms would be for the provision of facilities associated with the enjoyment of the dwellinghouse.
18. All of the rooms are sizeable. Aside from the large cupboard, the games rooms would be 31sqm and the gym 35.11 sqm. I have no details on the nature and scale of the proposed uses to assess whether rooms of that size are genuinely and reasonably required to accommodate the intended uses/activities. Likewise, it is unclear why the toilet and washbasin need to occupy a space measuring 5sqm or indeed why 10.4sqm is required for the utility room.
19. Whilst there is no evidence that the proposed uses are a 'whim', there is a lack of any detail to identify why rooms, and thus, a building of this size is reasonably required to provide the uses or activities. Simply placing a label on parts of the building does not demonstrate that it is required for those purposes.

20. The appellant has the burden of proof and in order to satisfy Class E it does not suffice in my view to meet the physical criteria and simply state that the building will be used as an 'incidental domestic outbuilding'. Sufficient information is needed to show, on the balance of probabilities, that the building is reasonably required for a use which is genuinely incidental to the enjoyment of the dwellinghouse.
21. From the evidence before me, I am not satisfied that the proposed outbuilding would be incidental to the enjoyment of the dwellinghouse as such. Therefore, I consider that the proposal would not have constituted development that was permitted under Class E of Part 1 of Schedule 2 of the GPDO.

Conclusion

22. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of a detached outbuilding 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.

KR Seward

INSPECTOR