

Appeal Decision

by Anthony J Wharton BArch RIBA RIAS MRTPI

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

Decision date: 25 April 2017

Appeal Ref: APP/N5090/X/16/3150464
45 Totteridge Common, London N20 8LU

- 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 Giles Turner against the decision of the London Borough of Barnet.
- The application, Ref 15/07845/192, dated 6 January 2016, was refused by notice, dated 24 March 2016.
- The application was made under section 192(1)(b) of the Town and Country Planning Act 1990 as amended.
- The proposed development for which a certificate of lawful development was sought comprised the following:
 - a single storey basement underneath the original dwelling house;
 - a single storey rear extension;
 - a single storey outbuilding; and
 - a single storey garage.

Note: the above was taken from the application form.

This decision is issued in accordance with Section 56(2) of the Planning and Compulsory Purchase Act 2004 (as amended) and supersedes the decision issued on 22 February 2017.

Decision

1. The Appeal is allowed and a Lawful Development Certificate (LDC) is issued.

Matters of clarification and background information

2. An appeal relating to a Certificate of Lawful Use or development (LDC) is confined to the narrow remit of reviewing the Local Planning Authority's (LPA) reason for refusal and then deciding whether the reasons are, or are not, '*well-founded*'. The planning merits of the case do not fall to be considered and in this case a site visit was not necessary. The burden of proof in an LDC case rests with the Appellant and the appropriate test for the evidence submitted is based upon the 'balance of probabilities'.
 3. The two-storey, three bedroom, detached dwelling house is located on the south side of Totteridge Common, within an extensive wooded and landscaped site. It is accessed via a driveway which leads from the Common to the eastern boundary and is within the Totteridge Conservation Area (TCA). A previous LDC was granted on 25 November 2015 (Ref: 15/04813/192) and this related to repairs to reinstate the property to a habitable state following a fire in 2012.
 4. This appeal LDC application was intended to establish whether or not three elements: a single storey rear extension; the construction of a basement level and a proposed new single storey outbuilding, were lawful for planning purposes. This description, of what the LDC application sought to establish, was that set out in
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the Council's refusal notice dated 6 January 2016. This differs slightly from the wording on the application form but, from the appeal submissions, it is evident that it was these three elements which were the subject of the application and I have dealt with the appeal on that basis.

5. Following registration of the application, on 6 January 2016, the LPA sought additional information and queried a number of issues. The main point raised by the LPA was that the proposed outbuilding did not comply with Class E (E4) of The Town and Country Planning (General Permitted Development) Order 2015 (GPDO). The LPA indicated that the proposed outbuilding was of a substantial size and that it had not been demonstrated why a building of that size was necessary or that it would be used for purposes incidental to the enjoyment of the dwelling house. It would appear that the other two elements of proposed works were considered to constitute permitted development under the GPDO.

6. In response to the queries a reply, on behalf of the Appellant, provided evidence to confirm the view that the proposal was lawful. The reasons given were firstly, that the outbuilding would not exceed 50% of the total area of the curtilage of the property and, secondly, that the outbuilding comprised a swimming pool and other associated uses all of which were classed as being an incidental use and which accorded with Class E of the GPDO 2015.

7. The LPA, however, confirmed its stance that the proposed outbuilding did not comply with Class E (E4) of the GPDO and, in the officer report, went on to deem that the application for the LDC was unlawful. The report stated:

'The dictionary definition of incidental is 'Of a minor, casual or subordinate nature and the proposed outbuilding has an area of 205 square metres. Whilst facilities of the kind proposed may sometimes be required for incidental purposes, the proposed facilities would exceed what might reasonably be required by a single household occupying such a small property. The size of the proposal is such that, with a redistribution of accommodation, which need not in itself require planning permission, the existing dwelling could easily become incidental to the outbuilding, rather than vice versa. Therefore it is not considered that the proposed outbuilding would be incidental to the enjoyment of the house.'

8. The Council's formal reason for refusal (RR) on the LDC application confirmed that the proposal did not comply with E4 of Class E, Part 1, and Schedule 2 of the GPDO. The actual wording of the RR was as follows:

'The proposal is for a building operation/use which by virtue of Sections 55 and 57 of The Town and Country Planning Act 1990 is development requiring planning permission, but such development is NOT PERMITTED under Class E, Part 1 Schedule 2 of the Town and Country Planning (General Permitted Development) Order 2015'.

9. It is evident from the submissions that the only part of the proposed works which was not considered to be lawful was the proposed outbuilding, incorporating the swimming pool; the gymnasium; the steam room and WC/changing and shower facilities and the garden store. The LPA appears to accept that the other two elements of the proposed works; the single storey rear extension and the construction of the basement level, fall within the relevant permitted development rights of the GPDO. From the submissions and my own assessment of the relevant sections of the GPDO, I consider this to be the case. I proceed to deal below, therefore, with whether or not the outbuilding (swimming pool/spa; wc/shower; gymnasium; plant room and garden store) is also lawful.

Main Issue

10. The main issue relates to whether the Council's decision not to issue a LDC for all three elements of the proposed works was well-founded.

Reasons

11. Class E, Part 1 of Schedule 2 of the GPDO 2015 sets out, amongst other things, that the provision within the curtilage of a dwelling house of *'any building ..required for a purpose incidental to the enjoyment of the dwelling house as such'* is permitted development. It is not disputed that the outbuilding would be within the curtilage of No 45 Totteridge Common and would not infringe any other requirements of the GPDO. The Technical Guidance document *'Permitted Development for Householders'* explains that a purpose incidental to a dwelling house would not cover separate, self-contained accommodation or an outbuilding providing primary living accommodation.

12. The case of *Emin v Secretary of State for the Environment and Mid-Sussex County Council, QBD, 1989, 58 P&CR*, involved two schemes for buildings in the curtilage of a dwelling house. The first was for a pottery, utility and garden room and the second was for a building which included an archery use. The court found that there was a need to address *'the nature of the activities to be carried out in the proposed buildings to ensure they are incidental or conducive to the very condition of living in the dwelling house'*.

13. It was stated that 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'* and that, *'when a matter is looked at as a whole, size may be an important consideration but not by itself conclusive'*. Clearly, it is a matter primarily for an occupier of a dwelling to determine what incidental activities he/she wishes to carry out within such a building. However, an objective test of reasonableness should be applied having regard to the particular circumstances of the case.

14. The court also held that whether a building is required for a purpose associated with the enjoyment of a dwelling house *'cannot rely on the unrestrained whim of he who dwells there'*. It was also held that the term *'incidental'* connotes an element of subordination in land use terms in relation to the enjoyment of the dwelling itself. Reference is made to the need to consider 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 dwelling house'*.

15. Turning to this particular case the proposed L-shaped outbuilding would be just over 18m at its longest; the western elevation and around 15m to its northern elevation. Overall it would have an area of 205m² representing an increase of around 140% of the floorspace of the existing dwelling. It is shown as housing a 15.6m long swimming pool; a small gymnasium, changing, shower and steam room facilities, a small plant room and a garden store. The building is referred to as the 'Pool House'.

16. The Council refers to the *'Emin'* case and that one of the key elements is the interpretation of *'reasonableness'*. It refutes the contention made on behalf of the Appellant in relation to the proposed uses that *'the nature and scale would be subordinate to the enjoyment of the dwelling house'*. Whilst acknowledging that the uses proposed would, in their own right, not be unreasonable and could be classed as being *'incidental'*, the size of the proposal should be taken into account

in relation to the main house. It is stressed that this only has three bedrooms and that, in the Council's view, the cumulative scale of the outbuilding would be significant, not subordinate and not reasonable to the enjoyment of the house.

17. The Council refers to the case of *'Peche D'Or Investments v SOS for the Environment [1996] JPL 311*. This maintains that the determination of whether or not the use to which a building is put, is a matter of fact and degree, to be determined according to the facts of the case. It also established that previous decisions, whilst of assistance, should not be considered as determinative of future applications. It is stressed by the Council that the proposal has elements akin to a small leisure centre and that overall this would not ordinarily be considered to be reasonably incidental to the enjoyment of a three bedroom house.

18. The rationale set out in the case of *Rambridge v SOS for the Environment [1996] EWHC Admin 262*, that a development could not fall within Class E if the outbuilding is being constructed to be solely used for residential, is accepted by the Council. However, it is the Council's view that one of the key constraints within Class E is the purpose for which an outbuilding is being erected and the officer report indicated that the outbuilding, due to its size, could be used as the principle accommodation with the original dwelling house becoming incidental.

19. On behalf of the Appellant the relevant test (based on *Emin*), relating to what should be considered incidental to the enjoyment of a dwelling house, is outlined. This test is to consider the incidental quality of the uses, in relation to the enjoyment of the dwelling house, and whether the proposed building is genuinely and reasonably required for its intended purposes. The various uses are outlined and Class E, as well as the CLG *'Permitted Development for Householders'* is referred to. It is indicated that such uses as a *Swimming pool and spa (Jacuzzi); a Gymnasium and Steam Room; Changing rooms, toilet and shower and a Garden store* are all examples of such outbuildings allowed by Class E. I agree that this is the case.

20. The next step to consider is whether a family occupying the existing dwelling house could reasonably require each and every one of the above elements as being incidental to their enjoyment of the house. If this is found to be the case then the uses stated would be classed as being ancillary to the residential occupation of the house in functional terms. The *Peche D'Or* case maintains that the determination of whether or not the use, to which a building is put, is a matter of fact and degree, to be determined according to the facts of the case and this must be the test to be applied in this case.

21. I acknowledge that the proposed outbuilding is much larger than the original dwelling house and I also note that the examples preyed in support of the Appellant's case related to a much larger original dwelling houses in comparison with what was proposed in those instances. However, the courts have held that size, or comparative size, cannot be a determining factor in itself. It is necessary, therefore, to look at the specific facts and details of this case in order to reach a decision as to whether or not the proposed outbuilding is justified as being incidental to the enjoyment of the existing dwelling house.

22. Turning to the proposed uses of the building, there is no dispute that they are all typical uses which would, in principle, be incidental to the enjoyment of any dwelling house. They are not proposed to be residential additions (such as bedrooms, kitchens or bathrooms) to the existing house. All of the facilities proposed are common additions that occupants of a house might wish to add, within the grounds of their dwelling, and which would clearly add to the enjoyment

of living there. I find that the proposed uses are indeed incidental to such enjoyment and the Council accepts that such uses are not unreasonable.

23. What the Council does find '*unreasonable*', however, is the comparative sizes of the outbuilding and the original house. Taking into account size only I can, to a certain extent, understand the Council's point. However, on the basis of all of the submissions before me and as a matter of fact and degree, I do not consider that the Council had a '*well-founded*' case to refuse the grant of a LDC.

24. Having studied the existing and proposed drawings of the house, it seems to me that it is clearly not, or not intended to be, a simple 3 bedroomed house. Whilst acknowledging that the proposed alteration works (extension-to kitchen and basement-cinema, utility and plant) are not currently in place, these proposals, like the outbuilding, are parts of the LDC application. Taking the whole application on its face, there is nothing before me to indicate that it is not the Appellant's intention to both extend the house (sideways and downwards), as well as providing (in the outbuilding) other facilities which any occupier would find to be incidental to and enjoyable to the enjoyment of their home.

25. I agree with the argument put forward on behalf of the Appellant that the Council appear to have focussed purely on the comparative sizes of the existing house and the proposed outbuilding. I also accept that a family occupying the existing dwelling could reasonably require each of the elements as proposed. In my view it is perfectly understandable to expect occupiers of this existing dwelling to require a swimming pool/spa and associated facilities. At around 15m long the swimming pool is far from any commercially sized pool; the Gymnasium is minimal in size and only suitable for family use and the other elements can hardly be called excessive for the occupants of a house such as this (albeit with only three bedrooms).

26. As a matter of fact and degree, therefore, I consider that the proposed outbuilding with its various facilities would be subordinate to the use of the main dwelling and would be incidental to the enjoyment of the house. Taking into account the scale of the incidental uses and the proposed plans of the existing house, I do not consider that the latter would be subordinate to the outbuilding.

Conclusion

27. For the reasons given above I conclude that in this case the Council's refusal to issue a LDC was not well-founded. The appeal succeeds therefore and a LDC (see below) is issued.

Other Matters

28. In reaching my conclusions I have taken into account all of the other matters raised by the Council. These include the relevant planning history; all references to the GPDO and caselaw; the detailed comments on the Appellant's grounds of appeal and the contents of the delegated report. However, none of these factors alters my conclusion and nor is any other matter of such significance so as to change my decision that a LDC should be granted.

Formal Decision

29. The appeal is allowed and a Lawful Development Certificate relating to the property at 45 Totteridge Common, London N20 8LU is granted in the form set out below.

Anthony J Wharton

Inspector



The Planning Inspectorate

Lawful Development Certificate

TOWN AND COUNTRY PLANNING ACT 1990: SECTION 192
(as amended by Section 10 of the Planning and Compensation Act 1991)

TOWN AND COUNTRY PLANNING (DEVELOPMENT MANAGEMENT PROCEDURE) (ENGLAND)
ORDER 2010: ARTICLE 35

IT IS HEREBY CERTIFIED that on 6 January 2016 the development described in the First Schedule hereto in respect of the land/property specified in the Second Schedule hereto, was lawful within the meaning of section 192(1)(b) of the Town and Country Planning Act 1990 (as amended), for the following reason:

The proposals are incidental to the use of the dwelling house and do not constitute development under section 55 of The Town and Country Planning Act 1990 as amended.

Signed

Anthony J Wharton

Inspector

Date: 25 April 2017

Appeal Reference: APP/JN5090/X/16/3150464

First Schedule

- a single storey basement underneath the original dwelling house;
- a single storey rear extension; and
- a single storey outbuilding;
- All as shown on the application drawings entitled CERTIFICATE OF LAWFULNESS Dwelling House – existing and proposed Drawings 101 – 107
Location Plan (Drawing No 116)
Outbuilding proposed (Drawings No 111 – 114); and
Proposed Site Plan (Drawing No 115)

Second Schedule

45 Totteridge Common, London N20 8LU

Notes:

This certificate is issued solely for the purpose of Section 192 of the Town and Country Planning Act 1990 (as amended) and relates only to the works set out in the first schedule above.

It certifies that the proposals described in the First Schedule, on the land specified in the Second Schedule, was lawful, on the certified date and, thus, was not liable to enforcement action, under section 172 of the 1990 Act, on that date.

This certificate applies only to the extent of development described in the First Schedule and to the land/property specified in the Second Schedule. Any operation which is materially different from that described, or which relates to any other land, may result in a breach of planning control which is liable to enforcement action by the local planning authority.