
Appeal Decision

Site visit made on 15 May 2017

by Diane Fleming BA (Hons) MRTPI

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

Decision date: 14 June 2017

Appeal Ref: APP/Z3635/X/16/3164470
50 Hogarth Avenue, Ashford TW15 1QA

- 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 Wade against the decision of Spelthorne Borough Council.
 - The application, Ref 16/00488/CPD, dated 30 March 2016, was refused by notice dated 27 June 2016.
 - 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 described as 'Loft conversion with dormer, single storey rear extension and garden outbuilding'.
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Decision

1. The appeal is dismissed.

Application for costs

2. An application for costs was made by Mr and Mrs Wade against Spelthorne Borough Council. This application is the subject of a separate Decision.

Procedural Matters

3. Section 192(2) of the Town and Country Planning Act 1990 (1990 Act) indicates that if, on an application under that section, the local planning authority are provided with information satisfying them that the use or operations described in the application would be lawful if instituted or begun at the time of the application, they shall issue a certificate to that effect. In any other case they shall refuse the application.
 4. There are three elements to the appellants' proposal. Applying the terms of Section 192(2) of the 1990 Act to the appeal proposal for the outbuilding, the Council has determined the application against the provisions set out in Schedule 2, Part 1, Class E of the Town and Country Planning (General Permitted Development) (England) Order 2015 (GPDO).
 5. The Council also assessed the proposed loft conversion and single storey rear extension against the requirements of the relevant parts of the GPDO. They found that each of these proposals complied with the listed criteria and were therefore permitted development (PD). I have therefore confined my decision to the consideration of the proposed garden outbuilding. For the avoidance of
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doubt I would also point out that a LDC under section 192 is not the equivalent, in law, of a planning permission and therefore the issue of planning merits is not relevant to this appeal.

6. I am also required to consider the application for development as described by the appellants as this is what they wish to build and I am unable to change the basis of their application. The appeal is confined to the narrow remit of reviewing the Council's decision as to whether it was well-founded or not well-founded. I am therefore unable to dismiss the appeal on the basis of what might be, notwithstanding the Council's submissions on this point. This is because it is open to the Council to take action if there is a subsequent material change of use of the outbuilding.

Reasons

7. The appeal relates to a semi-detached house which is situated on the corner of Hogarth Avenue near to the junction with Glenfield Road. The property has a large side garden at the bottom of which there is a detached garage.
8. The appellants propose to erect an outbuilding to the side of the dwelling. It would have a pitched roof and the drawings indicate that it would be 10.6m in depth and 5.6m wide. Inside the outbuilding there would be three rooms, accessed from a large lobby area, for use as an office, a gym and a lounge. There would also be a toilet and a small storage area.
9. The principle points at issue are the Council's determination that the use of the outbuilding would not be required for a purpose incidental to the enjoyment of the dwelling house. The Council are also concerned that the eaves height of the outbuilding would exceed the limitations of Class E. The first consideration raises two questions, whether the purpose of the proposed outbuilding would be incidental to the enjoyment of the dwelling and if so, whether the proposed outbuilding is reasonably required for that purpose.

Incidental to the enjoyment of the dwelling

10. With regard to the first question, case law confirms that the key point is reasonableness. It establishes that what is abnormal is not necessarily unreasonable, but also that what could be regarded as incidental does not depend on the unrestrained whim of the occupier. This approach follows that taken in *Emin*¹ and subsequently reiterated in *Croydon*² in which the court held that the concept of what was incidental to the enjoyment of the dwelling as such involved an element of objective reasonableness and was not a matter solely at the whim of the individual owner or occupier.
11. The Department for Communities and Local Government has produced 'Permitted development rights for householders: technical guidance' (TG). This document assists with the interpretation of the GPDO and sets out (page 42) that the meaning of incidental does not cover use of an outbuilding for primary living accommodation such as a bedroom, bathroom or kitchen.
12. The appellants submit that, on their own, the use of each room has been found to be an incidental use to the enjoyment of the dwelling. Furthermore, a toilet is required otherwise users of the outbuilding would have a long walk to use

¹ *Emin v SSE & Mid Sussex DC* [1989] EGCS 16

² *Croydon LBC v Gladden* [1994] 1 PLR 30

facilities within the host dwelling. However, in order to be PD the use of the entire outbuilding must be required to be incidental to the enjoyment of the dwelling and a building that has a mixed use would not fall within Class E.

13. I find that the proposed lounge area provides primary living accommodation. It could also be argued that the proposal for a toilet falls within the scope of primary living accommodation. This is because 'bathroom' is not defined in the TG and bathrooms often contain a toilet as well as a bath or shower. I also consider the appellants' argument about the distance to the toilet in the host dwelling is undermined by their placing of the entrance door to the outbuilding on the far side of the structure, away from the entrance into the host dwelling. This creates a longer walk between the buildings. As there would be a lounge and a toilet within the outbuilding, I find that the use would not be incidental to the enjoyment of the dwelling.
14. The onus of proof is on the appellant to show, on the balance of probabilities, that what is proposed is reasonably required for a purpose incidental to the use of the dwelling as a dwelling. This is because there must be a prospect that the nature and scale of such activities could go beyond a purpose merely incidental to the enjoyment of the dwelling as such. In that context the physical size of the outbuilding could be a relevant part of the consideration in that it might represent some index of the nature and scale of the activities.
15. The Council state that the footprint of the outbuilding, at 59.36 sq m, would be larger than the footprint of the original dwelling at 51.5 sq m. In particular, the proposed lounge area within the outbuilding would be larger than the lounge within the dwelling. The appellants state that the outbuilding would be built first and that the proposed loft conversion and rear extension may not be built at all. This means that the difference between the footprints of the outbuilding and the dwelling would remain significant.
16. Having regard to *Emin*, such a generous amount of floor space does not in itself preclude the lawfulness of an outbuilding. However, I am mindful that the host dwelling is not unduly large and that the addition of the outbuilding would be almost as wide as the dwelling, which is 5.8m and would be more than double the ground floor accommodation of the dwelling. As a previous Inspector observed³ in relation to a proposed outbuilding at another site 'To give some sense of perspective, a building of 54.55sqm would meet the minimum gross internal floor area space standards that are set out in...the *Nationally Described Space Standards (2015)* for a new, single storey 1 bedroom/1 person flat (39sqm) or a 1 bedroom/2 person flat (50sqm).' I therefore find that whilst physical size is not itself conclusive, it is nonetheless an important determinative in this case.
17. The appellants have not demonstrated that space for an office, gym and additional lounge, whilst no doubt welcome by them, is reasonably required on such a scale in relation to the host dwelling. Their submission of an application for a LDC and stating a proposed use or uses does not provide a case that what is proposed is or would be reasonably required.

³ Ref APP/T5150/X/16/3152242 submitted by the Council

18. Both the appellants and the Council have referred me to previous decisions⁴ in support of their respective cases. I have not been provided with the full details of each of the applications referred to by the appellants; however, whether or not the use of a building would be incidental is a matter of fact and degree. My determination requires a judgement to be made in relation to the specific facts of each individual case. Each of the appeal decisions referred to by the Council turned on facts that are materially different to those in this case. Whilst the general principles in law remain applicable, the findings of the Inspectors based on those facts do not assist me in determining this appeal. I have based my decision solely on the facts that apply to this case.
19. Having regard to all of the above points, the evidence presented does not show, on the balance of probabilities, that the outbuilding would reasonably be required for a purpose incidental to the enjoyment of the host dwelling.

The eaves height

20. Paragraph E.1.(f) of Class E within the GPDO states that development is not permitted if the eaves height of the building would exceed 2.5m. The Council submit that the proposed eaves height, when measured both electronically and manually, exceeds the 2.5m limit as it is 2.55m. In doing this they have also made use of the scale bar on the plans. The appellants submit this represents a difference of 2% and that in the printing process it is not unusual for there to be a minor distortion of the drawing. They also submit a letter from their draughtsman who refers to the permitted height of 2.5m.
21. Whilst the appellants state that the proposal is PD, the burden of proof regarding decisive matters of fact rests on them. They must put together enough relevant, clear and unambiguous evidence to demonstrate the truth of what they claim.
22. On this point it is my view that the appellants' evidence could have been clearer. The drawings are annotated '1:50(A1)' and include a scale bar but they also state 'Use figured dimensions given in preference to scaling. All dimensions to be checked on site'. Although the width and depth of the outbuilding are shown with a figured dimension, given the relevance of the eaves height and the warning on the drawing, it is unusual that the eaves height dimension is not also shown. As it is often accepted practice in situations where there is a disparity between scaled measurements to rely on figured dimensions, a figured eaves height dimension would have been helpful. I do not accept the appellants' explanation that there are distortions when drawings are printed as the Council also made use of an electronic measuring tool when apparently viewing the plans online.
23. The onus is on the appellants to provide clear and unambiguous evidence. Their letter of support from the draughtsman does not directly say that the height of the eaves would be 2.5m; rather it is stated 'the Case Officer measured the eaves height to be 2.55m rather than the Permitted 2.5m height.' I therefore give weight to the Council's findings and although the eaves height limitation is only minimally exceeded, nevertheless it is overstepped.

⁴ Ref APP/R5510/X/15/3131751, APP/T5150/X/15/3139823 & 16/3152242, APP/Z3635/C/15/3008291 submitted by the Council

24. I therefore conclude, on the balance of probabilities, that the proposed outbuilding and the facilities within it, would be of such a scale, in comparison with the existing dwelling, that the proposal does not fall within the parameters of Class E of Part 1 Schedule 2 to the GPDO. In addition, I also conclude that the development would fail to meet the physical criteria in paragraph E.1.(f) in that the height of the eaves would be greater than 2.5m.

Conclusion

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

D Fleming

INSPECTOR