The Planning Inspectorate

Appeal Decision

Hearing Held on 14 March 2019
Site visit made on 14 March 2019

by A A Phillips BA(Hons) Dip TP MTP MRTPI

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

Decision date: 15 April 2019

Appeal Ref: APP/P1805/X/18/3202923
390 Bromsgrove Road, Halesowen, Worcestershire B62 0JN

- 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 James Lane against the decision of Bromsgrove District Council.
- The application Ref 17/01104/CPL, dated 26 September 2017, was refused by notice dated 20 November 2017.
- 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 an outbuilding.

Decision

1. The appeal is dismissed.

Procedural Matters

2. I have taken the description of the development proposal from the Council's decision notice dated 20 November 2017 rather than the application form because it more accurately and succinctly describes the development the subject of the application and this appeal.

3. I noted at my site visit that although the certificate of lawfulness for the proposed development was refused the development has continued to be implemented and now appears to have been completed. Nevertheless, this appeal will be determined on the basis of it being a proposed development rather than for a certificate of lawfulness for an existing development.

4. It has been noted that there is some concern that the appellant is seeking to amend the application proposal the subject of the original application in that the Appeal Statement refers to drawings 2704/1 Rev B, 2704/2 Rev B and 2704/3 in addition to 2704/1 Rev A and 2704/2 Rev A on which the application was determined. The appellant was reminded that if he thinks that amending the proposal can overcome the local planning authority's reasons for refusal a fresh application should normally be made. If an appeal has been made the appeal process should not be used to evolve a scheme and it is important that what is considered by the Inspector is essentially what was considered by the local planning authority. Consequently, it was agreed by the appellant and the

local planning authority that the appeal should be determined on the basis of the originally submitted plans rather than the amendments.

5. Section 192(2) of the Act states that if the local planning authority is provided with information satisfying them that the 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. Therefore, although this appeal shall be determined under Section 192, the fact that it is substantially completed and fitted out is relevant to the determination of the appeal and the consideration of the reasons for refusal; more particularly whether the building is reasonably required for a purpose incidental to the enjoyment of the dwellinghouse. The local authority considers that the building gives information on the nature and scale of the development and therefore whether it goes beyond what is genuinely and reasonably required for incidental purposes. The appellant's representative commented that she had no issue with that approach.

6. The appeal relates to a certificate of lawfulness (proposed) for an outbuilding within the curtilage of a dwellinghouse which was refused on two grounds. Firstly, that the development included a raised platform and therefore the development failed to meet the provisions of the Town and Country Planning (General Permitted Development) (England) Order 2015, (the GPDO) Schedule 2, Part 1, Class E, provision (h) and secondly, the building is not reasonably required for purposes incidental to the enjoyment of the dwellinghouse.

7. In Bromsgrove District Council's Statement of Case it is clear to me that the Council withdraws the first reason for refusal on the grounds that the plans submitted with the application have resulted in confusion by references to differing floor levels and natural ground level.

8. Prior to the Hearing I was asked to consider as a matter of fact and degree whether the decking/raised platform in the garden would fit in with the definition of 'building' for the purposes of E.1(b) of Part 1, Class E. However, it is my understanding that the Council considers the outbuilding the subject of this appeal and the decking to be two separate structures. Consequently, this appeal shall deal with the proposal the subject of the application which is the outbuilding. Therefore the status or otherwise of the decking as a 'building' under E.1(b) of Part 1, Class E of the GPDO has not been determined through this appeal and therefore for the purposes of clarification the local planning authority is not precluded from dealing with it as an entirely separate matter, irrespective of the outcome of this appeal.

Main Issue

9. The main issue is whether the Council's decision to refuse to issue a lawful development certificate was well-founded. In this case that turns on whether the development falls within Schedule 2, Part 1, Class E of the GPDO.

Reasons

10. It is quite clear from the Council's remaining reason for refusal and associated documentation that there is no contention that the building in question does not meet all the conditions set out in paragraph E.1 of Class E and, indeed, I have no reason to bring this into question. The Council's decision is based on their claim that the building is not required for a purpose incidental to the

enjoyment of the dwellinghouse as such, which is the precise wording used within sub-paragraph (a) of Class E. This is disputed by the appellant.

11. The Planning Practice Guidance makes it clear that the applicant is responsible for submitting sufficient information to support an application. It goes on to state that in the case for a proposed development such as this the applicant needs to describe the proposal with sufficient clarity and precision to enable the local planning authority to understand exactly what is proposed and what the development involves. The key question for the decision maker is whether the development had commenced on the application date, would it have been lawful for planning purposes.

12. The host dwelling is a detached two storey property with five bedrooms. The appellant has three children and states that with his children and own pursuits in fitness the house is full and it has been outgrown to a degree. He wishes to use the existing extension and conservatory to be used for their intended purposes as a dining room and a family room in a conservatory rather than them being full of sports and exercise kit and toys. Consequently, the appellant states that he wishes to construct a building for recreational use by his children with a view to carrying out activities in a safe, covered area in his back garden. He contends that the outbuilding is intended to allow him to embrace the family's time together within a safe environment and create a place the children can call their own. The house does not currently present this space for the children and their friends. It also provides the appellant with somewhere he can socialise with friends in a way not suited to the living room in the house.

13. The proposed plans show three main areas within the outbuilding. There is a proposed gym measuring approximately 78 square metres, a large television/cinema room with sofas and bean bags which measures approximately 140 square metres and finally a room for a pool table, ice hockey table, table football, chalk board and bean bags. Elsewhere within the outbuilding there is proposed a sauna, toy store area and circulation space. The total internal area of the outbuilding is approximately 342 square metres with a total external area of approximately 375 square metres.

14. There is no statutory definition of "incidental" in the GPDO. Case law provides guidance on how it should be interpreted by decision-makers and indicates that games rooms and gym areas can be considered to be incidental to the enjoyment of a dwellinghouse. In the Emin case[1] it was held that the size of an outbuilding is not relevant for the purposes of Class E, but the building must be 'required for some incidental purpose' in relation to the dwellinghouse. When dealing with cases such as this it is necessary to identify the purpose and incidental quality in relation to the enjoyment of the dwellinghouse, and whether the building is genuinely and reasonably required in order to accommodate the proposed use or activity and thus achieve that purpose. In the Emin case it was held that it is wrong to conclude that an outbuilding could not be said to be incidental as such because it would provide more accommodation for secondary activities than the dwellinghouse provides for primary purposes.

[1] Emin v SSE & Mid Sussex DC [1989] JPL 909

15. Nonetheless, the Wallington case [2] established that it is necessary to consider whether the relevant purpose is incidental to the particular dwellinghouse in question rather than any dwellinghouse. The case of Holding[3] which concerned what might be regarded as a very large incidental building within the curtilage of a dwellinghouse, confirmed that this is indeed the correct approach. In determining that case the Inspector considered that it is reasonable to suppose that the purpose of the permission granted under Class E is to allow for accommodation for hobbies for which people need space in and around their home to be provided without the need for the formality of a planning application. Nevertheless, the test that should be applied must retain an element of objective reasonableness and should not be based on the unrestrained whim of the occupier. A hard objective test should not be imposed on cases to frustrate the reasonable aspirations of an owner as long as they are sensibly related to the enjoyment of the dwelling.

16. I find that these judgments and their detailed findings illustrate that in cases such as this it is very much a matter of fact and degree based on the specific circumstances of each case. Furthermore, it seems to me that there are a number of factors relating to whether an outbuilding is incidental. The actual physical size is of some relevance, but that should not be determinative. The relevance of size lies in the indication it may provide of the scale of activities and whether they would be subordinate to the main use of the dwellinghouse. I see nothing in the Emin judgment that leads me to conclude that whether a building is incidental should turn to some extent on the size of the proposed building and the size of the dwellinghouse itself. Indeed, if Class E sought to impose a limit on the size of an outbuilding or its relative size in relation to its host dwellinghouse, it could have done so.

17. In this case the appellant presents that the space proposed is genuinely and reasonably required by the appellant and necessary to accommodate its intended use. However, the Council disputes this, stating that in accordance with case law some objectivity is required as to whether the building is reasonably incidental to the dwellinghouse.

18. In order for a building to be considered as permitted development all of it must be required for incidental purposes. A building which is only in part required for incidental purposes is not incidental to the enjoyment of the dwellinghouse. I have noted that the plans show a large room with a TV/cinema screen and large seating area. It seems to me that this area is something that could reasonably be expected to be accommodated in the main dwelling. It does not appear that the appellant intended to have a custom-built film screening area, but rather an area where the family could watch television and films. As such the layout and use of the space is not something that would normally require accommodation separate to the living space contained within the main dwelling. The use of this space would not materially differ from the use of the existing living room and as such the outbuilding merely replicates the use of the existing accommodation within the house and extends the primary residential use into the new outbuilding.

19. Therefore, whilst I am satisfied that some of the proposed activities can be said to be incidental, I am not satisfied that as a whole the outbuilding would be

[2] Wallington v SSE & Montgomeryshire DC [1990] JPL 112; [1991] JPL 942 (CoA)]
[3] Holding v First Secretary of State [2003] EWHC 3138 (Admin)

required for incidental purposes. Therefore, it would not fall within the scope of Class E as permitted development.

20. The Council has calculated that the equipment proposed for the outbuilding could be accommodated in a building which would be less than one quarter of the floor area created by the outbuilding. The research and calculations undertaken by the Council do have significant limitations but they nonetheless bring into question the key matter of whether the building is genuinely and reasonably required in order to accommodate the proposed use or activities.

21. I do not accept the Council's argument that in terms of its actual physical size the outbuilding should be subordinate to the main dwelling, but the size of the proposed gym and games area is particularly large for its intended purposes and activities. In particular, whilst I recognise that some general circulation space is required and additional circulation and clearance space is required around the games tables and gym area, the space proposed to be provided is excessive for an intended incidental use. In my mind that concern is illustrated by the actual use of some of the space I observed at my site visit and the use of that space, including the fact that some of the internal space is currently taken by twenty lockers and additional cube storage cabinets, for example.

22. I do not take issue with the quality and standard of the equipment provided, nor should the appellant be penalised for wishing to have a high quality set of facilities for his and his family's use. I also agree with the appellant that the appeal should be determined on the basis of how it is intended to use the outbuilding rather than speculation regarding how it could be used. However, the proposed outbuilding goes beyond that which can genuinely and reasonably be required in order to accommodate the proposed uses or activity so as to be considered to be incidental to the enjoyment of the dwellinghouse. Case law is quite clear that the test that should be applied to cases such as this must retain an element of objective reasonableness and proposals should not be based on the unrestrained whim of the occupier. The proposed outbuilding before me appears to be based precisely on the unrestrained whim of the appellant which has led to an outbuilding proposal which is not sensibly related to the enjoyment of the dwellinghouse.

23. It has been put to me by both main parties that there are other similar cases where appeal decision support their main arguments. However, I do not have all the details of the circumstances that led to those decisions and so cannot be sure that they represent a direct parallel to the appeal proposal before me, including with respect to uses and scale. In any case it has been determined by caselaw that cases such as this often come down to are a matter of fact and degree. I have determined this case on its own merits.

24. I have also taken account of the case law to which my attention has been drawn by both parties, recognising that cases such as this can be difficult and often finely balanced issues of fact and degree. It is also recognised that case law is only concerned with errors of law and not matters of judgments on the particular facts of individual cases.

25. I have also noted the appellant's comments with respect to the effect of the proposed outbuilding on the living conditions of the occupants of neighbouring residential properties, but in a case such as this planning merits are not material.

Conclusion

26. I conclude that the outbuilding would not be required in its entirety for incidental purposes. In addition, the size of the building would be much larger than would genuinely and reasonably be required to serve its specified incidental purposes. As such it would not be permitted development by virtue of Schedule 2, Part 1, Class E of the GPDO.

27. 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 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.

A A Phillips

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Nina Pindham of Counsel	
Kevin Lynch	Wilkes Partnership

FOR THE LOCAL PLANNING AUTHORITY:

Tracy Lovejoy	Legal Department
Simon Jones	Principal Planning Officer
Paul Murphy	Enforcement Officer