
Appeal Decision

by K R Saward Solicitor

an Inspector appointed by the Secretary of State

Decision date: 10 August 2020

Appeal Ref: APP/X1545/X/19/3238459

9 Captains Wood Road, Great Totham CM9 8PU

- 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 N Johnson against the decision of Maldon District Council.
 - The application Ref LDE/MAL/19/00810, dated 22 July 2019, was refused by notice dated 16 September 2019.
 - The application was made under section 191(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 for the erection of outbuilding for use as summer room and hot tub incidental to the enjoyment of the dwelling.
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Decision

1. The appeal is allowed and attached to this decision is a certificate of lawful use or development describing the existing operation which is considered to be lawful.

Application for costs

2. An application for costs was made by Mr N Johnson against the Council. This application is the subject of a separate Decision.

Procedural Matters

3. Having consulted the parties, I have not undertaken a site visit but I am satisfied that I have sufficient information to enable me to arrive at a decision without a site visit being necessary.
4. In an LDC appeal, the planning merits of the outbuilding are irrelevant. My decision rests on the application of relevant planning law and judicial authority to the facts of the case.

Main Issue

5. The main issue is whether the Council's decision to refuse to issue an LDC was well-founded. This turns on whether the development constituted permitted development by virtue of the provisions of Class E of Part 1 of Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order 2015 ('the GPDO').

Reasons

6. In an LDC appeal the onus of proof is on the appellant to show that, on the balance of probabilities, the development was lawful at the time of the

application.

7. The dwelling at the appeal site is a two storey detached house occupying an irregular shaped plot with part of the garden lying behind the neighbouring property at No 7. The outbuilding which is the subject of the appeal is a partially open sided L-shaped single storey building with dual pitched roof located in a corner position within the garden near to the boundary with No 7.
8. Article 3(1) of the GPDO grants planning permission for the classes of development set out in Schedule 2 to the Order. It includes, at Part 1, Class E, the provision within the curtilage of a dwellinghouse of any building required for a purpose incidental to the enjoyment of the dwellinghouse as such.
9. Whilst a retrospective planning application for the outbuilding was refused in April 2019, the Council confirms that the outbuilding complies with the limitations of paragraph E.1. of Class E. It further acknowledges that a summer room and hot tub area are uses capable of being a purpose incidental to the enjoyment of the dwellinghouse. The Council's concern arises over the scale of the building comparative to the main dwelling which it considers to be excessive and with insufficient information to demonstrate it to be 'reasonably required' for the stated purpose.
10. The Council Officer's report identified the floor space of the outbuilding to be 41.5m² being approximately 50% of the footprint of the dwellinghouse. The Council considers the floorspace to be large enough to be capable of activities of a nature and scale beyond a purpose merely incidental to the enjoyment of the dwellinghouse.
11. In response the appellant has sought clarification of the footprint figures from 'a professionally qualified Design Technician'. It is submitted that the revised calculations show that the footprint of the existing outbuilding to be 39.86m². The dwelling as extended is 138.16m². On this basis, the footprint of the outbuilding is 28.85% in comparison to the host dwelling and not 50%.
12. The figure for the original dwelling in un-extended form is not provided, but the appellant points out that the comparable percentage figure for floor space would be even lower when taking into account the upper floor space of the existing dwellinghouse.
13. The Council relies on the judgment in *Emin v SSE*¹. Although this case concerned proposed buildings under an earlier development order than the GPDO it nevertheless provides High Court authority for the approach to be taken in the consideration of whether a building is 'required for a purpose incidental to the enjoyment of the dwelling house as such.'
14. When making an assessment as to whether the outbuilding would be 'required' for incidental purposes, *Emin* confirmed that it is necessary to consider whether the building would be genuinely and reasonably required to accommodate the proposed use or activity and thus achieve those purposes. The Court made clear that the physical size of an outbuilding in comparison to the dwellinghouse can be an important consideration as to whether it would be required for a purpose incidental to the enjoyment of the dwelling but would not by itself be a conclusive factor.

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

15. The judgment goes on to establish that 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.
16. It is clear from *Emin* that it should be established whether the building is genuinely or reasonably required or necessary in order to accommodate the use or activity and thus achieve that purpose.
17. It follows that there must be sufficient information to demonstrate that the size of the outbuilding is not excessive for the stated uses and that those purposes would be incidental to the enjoyment of the dwellinghouse as such.
18. The appellant refers to another decision taken by the Council to grant a LDC for a proposed outbuilding at Mill Road, Burnham on Crouch which had a total footprint equating to 68% of the dwelling and a smaller plot size than the appeal site. My attention is also drawn to an Appeal Decision² where a LDC was allowed for an outbuilding to be used as a swimming pool and gymnasium. In that case the Inspector found the proposed activities were on a scale "intrinsically incidental to the enjoyment of the dwellinghouse and there would be a functional relationship between the occupation of the property as a family home and the ancillary use of the building". The law is the same but the outcome depends on the particular facts and so these cases do not set any form of irresistible precedent.
19. Additionally, the Council considers that as the separation distance between the dwelling and outbuilding exceeds 9m it is 'more of an ancillary use than incidental'. The appellant says the separation distance is more like 7m. Whatever the precise distance, the outbuilding is not far from the dwelling.
20. In the context of the site as a whole, the outbuilding is within reasonably close proximity to the dwelling. It can be seen from the photographs provided that there is a visual and functional relationship in the use and layout with a hot tub and barbeque within the outbuilding. The appellant says it also houses furniture and domestic storage. A built-in seating area adjoins the low level walls to the frontage with a patio in front and paving leading through a small area of garden between the buildings.
21. The garden overall is large and it is evident from the scaled site location plan that the outbuilding occupies only a small proportion of the overall area.
22. The Council notes that the walls of the open-sided structure could be filled in without planning permission. It fears that the outbuilding could be used for other purposes as the outbuilding 'is large enough to be capable of activities of a nature and scale beyond a purpose merely incidental to the enjoyment of the dwellinghouse'. If that were to happen then the LDC would be of no benefit to the appellant. All that an LDC can certify is an outbuilding for use for incidental

² Appeal Ref: APP/Z5060/X/18/3206508 dated 14 February 2019

purposes to the dwelling, as applied for. Any different use would be subject to the application of planning controls applicable at the time.

23. As a matter of fact and degree I am satisfied that the stated uses would provide facilities associated with the enjoyment of the dwellinghouse at the appeal site and that the outbuilding would not be excessively large for the intended purposes. Accordingly, the outbuilding would be reasonably required for a purpose incidental to the enjoyment of the dwellinghouse as such to constitute permitted development within Class E.

Conclusion

24. For the reasons given above I conclude, on the evidence now available, that the Council's refusal to grant a certificate of lawful use or development in respect of the erection of an outbuilding for use as a summer room and hot tub incidental to the enjoyment of the dwelling was not well-founded and that the appeal should succeed. I will exercise the powers transferred to me under section 195(2) of the 1990 Act as amended.

KR Seward

INSPECTOR



Lawful Development Certificate

TOWN AND COUNTRY PLANNING ACT 1990: SECTION 191
(as amended by Section 10 of the Planning and Compensation Act 1991)

TOWN AND COUNTRY PLANNING (DEVELOPMENT MANAGEMENT PROCEDURE) (ENGLAND)
ORDER 2015: ARTICLE 39

IT IS HEREBY CERTIFIED that on 22 July 2019 the operations described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged red on the plan attached to this certificate, were lawful within the meaning of section 191(2) of the Town and Country Planning Act 1990 (as amended), for the following reason:

The development would have benefited from the deemed permission granted under Article 3 and Class E of Part 1 of Schedule 2 of the Town and Country Planning (General Permitted Development)(England) Order 2015.

Signed:

KR Saward

INSPECTOR

Date: 10 August 2020

Reference: APP/X1545/X/19/3238459

First Schedule

The erection of an outbuilding for use as summer room and hot tub incidental to the enjoyment of the dwelling (as shown on the submitted plans Nos 19.5862/M002 and 19.5862/E102).

Second Schedule

Land at 9 Captains Wood Road, Great Totham CM9 8PU

NOTES

This certificate is issued solely for the purpose of Section 191 of the Town and Country Planning Act 1990 (as amended).

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

This certificate applies only to the extent of the operations described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. 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.



Plan

This is the plan referred to in the Lawful Development Certificate dated: 10 August 2020

by **K R Saward Solicitor**

Land at: 9 Captains Wood Road, Great Totham CM9 8PU

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Scale: NOT TO SCALE

