
Appeal Decision

by Anthony J Wharton BArch RIBA RIAS MRTPI

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

Decision date: 5 October 2020

Appeal Ref: APP/N5090/X/20/3248537

118 Warwick Avenue, Edgware, Middlesex HA8 8UL

- 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 Jonathan Benson against the decision of the Council of the London Borough of Barnet (the LPA).
 - The application Ref 20/0459/192, dated 27 January 2020, was refused by notice dated 28 February 2020.
 - 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:
Construction of a detached outbuilding at the rear of the property.
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Decision

1. The appeal is allowed. See formal decision below.

Matters of clarification

2. Further to the case officer's letters to the parties, I consider that this appeal can be determined without the need for a physical site visit. This is because I have been able to reach a decision based on the initial submissions, supplemented by additional information and photographs being supplied. The appellant and the Council have agreed to the appeal proceeding without a site visit and I am satisfied that, in dealing with it in this manner, no injustice is caused.

3. In reaching my decision I have taken into account the detailed final comments (dated 27 August 2020) by the appellant on the Council's statement. In particular I have noted that there is no single storey extension to the property and that the proposed outbuilding would occupy the full depth of the patio but only part of its width. From the additional submitted information and photographs, I have noted the double height extension at No 85 Kenilworth Road and the size of the garden area to the appellant's property.

Background information

4. The single storey detached dormer bungalow at No 118, is located on the east side of Warwick Avenue and is in a predominantly residential area. It does not lie within a conservation area. The submitted plans and photographs clearly show the layout and detailing of the dwellinghouse.

5. The planning history is set out in Section 2.0 of the Council's Delegated Report. It shows that, since the middle of 2019, the Appellant has sought, first Prior Approval, then planning permission for a single storey rear extension. A certificate under Section 192 was then sought for an outbuilding, fundamentally the same as the one

subject to this appeal and also described as a 'gymnasium'. This was determined to be unlawful by the LPA for the same reason as the LDC the subject of this appeal.

6. This proposed building would be parallel to the rear elevation of the host property. It would involve the bricking-up of existing doors and windows in the rear elevation and would provide new rearward-facing windows and access to and from the garden.

Reasons

Introduction

7. An appeal relating to a Certificate of Lawful Use or Development (LDC) is confined to the narrow remit of reviewing the LPA's reason for refusal and then deciding whether the reasons are well-founded. The planning merits of the case do not fall to be considered and the relevant test, relating to the submitted evidence, is '*the balance of probability*'.

8. National Planning Practice Guidance (PPG) indicates that an applicant is responsible for providing sufficient information to support a LDC application and that, without sufficient, precise and unambiguous information (my underlining), a LPA may be justified in refusing to grant a certificate. However, PPG also indicates that if a LPA has no contrary evidence itself and there is none from others to contradict or otherwise make the applicant's version of events less than probable, there is no good reason to refuse the application.

9. The Council refused the LDC application for the following reason: '*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. Such development is NOT PERMITTED under Class E, Part 1 of Schedule 2 of the Town and Country Planning (General Permitted Development) Order 2015.*

10. From the Council's Delegated Report it is clear that the application was rejected and deemed '*unlawful*' on the basis that it was not considered, or demonstrated to be, '*incidental to the enjoyment of the dwellinghouse*'. This was because, amongst other things, the gap between the house and the proposed outbuilding was too small. The Council interprets a '*significant gap*' between a dwelling and a Class E building as being at least 0.5m. In this case, from scaling the submitted drawing, it is stated that the gap is only around 0.25m.

11. The main issue in this case, therefore, relates to the small proposed gap between the dwelling house and the outbuilding, and consequently to whether or not it has been demonstrated that the proposed use would be '*incidental to the enjoyment of the dwellinghouse*'.

The gist of the case for the appellant

12. The appellant contends that the development is permitted by Article 3(1) and Schedule 2, Part 2, Class E of the Town and Country Planning (General Permitted Development) (England) Order 2015 (GPDO). Class E authorises the provision within the curtilage of a dwellinghouse of any building required for a purpose incidental to the enjoyment of the dwellinghouse as such, subject to several limitations all of which are considered to have been complied with in this instance.

13. It is stressed that under the Class E, within the GPDO, there is no minimum gap requirement between the two buildings and there is not even a local by-law appertaining to a Council planning requirement which stipulates that there must be a gap in excess of 0.5m. There is also no term within the Act which refers to '*a significant gap*'. It is contended that the Council's judgment that a gap of 0.5m between the buildings is required is, in itself, unlawful. Although it is accepted that

there used to be a requirement that the outbuilding had to be located over 7m away from the main property, this requirement was removed and no alternative minimum distance or requirement has been stipulated.

14. It is stressed that all of the other criteria for a LDC have been complied with. The eaves height is 2.5m and the location from the boundary is 2.1m (ie. greater than 2m). It is stated that the dimensions regarding the eaves height of the proposed outbuilding have been either incorrectly or fraudulently entered into this application above the permitted height. The eaves height is clearly shown on the proposed plans as being 2.5m from ground level.

15. In the comments on the LPA statement (dated 27 August 2020) it is stressed that there is no rear extension to retain and the LPA's diligence in dealing with the LDC application is questioned, as is their lack of objectivity in referring to the '*deliberately nominal separation*'. It is stressed that the LPA has not provided any evidence to prove that the intentions to use the outbuilding as a gymnasium are anything but honest or that the proposed use is less than probable.

16 The proposed gymnasium would be incidental to the use of the main dwelling. Furthermore, the nature and quantity of the equipment would be prohibitively large to accommodate within any conventional residential setting and thus requires its own space. It is also noted that, had the LPA been interested in objectively evaluating the application, nothing prevented them from inquiring as to the intended use of the outbuilding. It is indicated that it was the original intention to house a gymnasium within the extended property until it became apparent this would not be approved.

17. It is stressed that the LPA's contention that the previous planning request for an outbuilding '*was determined to be unlawful by the LPA for the same reasons*' is a misrepresentation of the facts. The delegated report makes clear that there were two issues with that particular application: the '*proposed width of 4.5m, which is nearly half of the width of 10m*' and the '*significant*' gap issue. In this application the proposed width is no longer an obstacle.

18. It is contended that instead of recognising that the plans have been amended according to the LPA's objections, their conclusions are based a biased and contorted assessment. The placement of the '*mimicking*' new rearward-facing windows and access to/from the garden are designed to maximise the light into the gym, while maintaining maximum privacy for neighbours.

19. The plot upon which the property sits is by no means large and considering the of equipment intended for use, the siting the gymnasium closer to the main house also enables the best use to be made of the remaining amenity space. The proposed proximity of the gymnasium to the main house is a purely practical consideration and is in no way contrived. As to the LPA's reference to the minimal separation, the LPA has approved similar gaps between outbuildings and a dwellinghouse, e.g. 15/04850/192 (this is clearly visible in the plans submitted).

20. There is no reason, and the LPA can provide no evidence, that changing the gap from 0.25m to 0.50m will alter the perception of the outbuilding by any 3rd party. In the conditions listed by the LPA under '*policy context*' no mention is made of the degree of separation between a dwellinghouse and an outbuilding under Class E. The Council's position in respect of the proposed development is diametrically opposed to the advice and approval provided by them to other applicants eg 15/04850/192.

21. The case of *Emin v SSE & Mid Sussex DC* [1989], sets out the test to be applied: '*...whether the uses of the proposed buildings, when considered in the context of the planning unit, are intended and will remain ancillary or subordinate to the main use of*

the property as a dwelling house'. The answer to this is unequivocally 'Yes'. Furthermore, in applying the above mentioned test, regard should be had to *'the use to which it is proposed to put a building and to considering the nature and scale of that use in the context of whether it is a purpose incidental to the enjoyment of the dwellinghouse'*. The equipment proposed satisfies both the nature and scale of the proposed outbuilding.

22. It is stressed that these principles were reiterated in *LB Croydon v Gladden* [1994] 1 PLR 2 and *Holding v FSS & Thurrock BC* [2004] JPL 1405. The term 'required' is interpreted for the purposes of applying Class E as meaning 'reasonably required'. Other judgments clarify that in each case it has to remain a matter of fact and degree as to whether facilities were, or were not, an integral part of the ordinary residential use of the primary unit (*Peche D'or Investments v SSE* [1996] JPL 311) and that the facilities could not be something for the provision of a primary dwellinghouse purpose (*Rambridge v SSE & East Herts DC* [1996] QBD).

23. Based on these judgements, the LPA correctly refer to *'what is incidental to the enjoyment of a dwelling as such involves an element of objective reasonableness and does not rest solely on the unrestrained whim of the occupier.'* Neither does it rest solely on the unrestrained whim of the LPA. As stated in APP/Q5300/X/18/3218125 (paragraph 13), *'whether a building is 'reasonably required' does not need to be anything other than sensibly related to their enjoyment of the dwelling.'*

24. It is indicated that the LPA has approved other applications as being incidental to the enjoyment of the original dwellinghouse (Class E.1.i) where outbuildings have been designated as a gym, amongst others in the following planning permissions: 20/0665/192; 19/5160/HSE; 18/1137/FUL; 17/4945/FUL; 16/3139/RCU. It is argued that a gym is either incidental to use of the residential property in all cases or not. The location of the proposed development should bear no significance in this determination, and neither should the Council's stipulation relating to a 0.5m gap.

25. Other appeal decisions relating to the separation distances are quoted. In the case of appeal APP/Q5300/X/18/3218125 it is indicated that the gap was a mere 0.07m and where the Inspector stated: *'I agree that since the proposed building would be separated from the dwellinghouse by some 7cm and accessed separately, it would not be an enlargement of the dwellinghouse as a matter of fact and degree.'*

26. In another case APP/Y3615/X/17/3181457 allows the appeal where there is only 0.15m separation between the two buildings and the Inspector stated: *'There is nothing within the GPDO or indeed the accompanying Technical Guidance which lends support to an argument that there has to be a 'material gap between the two buildings nor does the Council indicate what it considers a material gap to be. The Technical Guidance makes clear that "Buildings which are attached to the house are not permitted under Class E (they would be subject to the rules in Class A). The building would not be attached to the house as a matter of fact.'*

27. The decision continues *'I do not consider that the close proximity of an outbuilding to the house it belongs to precludes it from being incidental Class E permitted development, as long as it is a separate building and it is not connected or linked to the house. It would be different if it abutted the house without a gap, in which case it would be assessed against Class A and would in this instance be unauthorised because it would extend too far, but what is being proposed in this appeal would leave a clear gap and the building would be inaccessible from the house without going outside into the back garden. It would therefore be a separate building not connected or linked to the house and be within Class E.'*

28. The LPA should have restricted itself to objectively evaluating whether or not this proposed application is permitted under Class E of Part 1, Schedule 2 of the GDPO. References to appeal decisions submitted by the LPA in support of their decision to refuse our application are wholly incompatible with this particular application and specific needs..

29. In addition, the Council's Residential Design Guidance SPD, under paragraph 14.40, stipulates that back garden buildings should ensure that they do not significantly reduce the size of available outdoor amenity space. If the space between the proposed detached outbuilding were to be increased two-to fourfold, it would have a significant impact on the enjoyability of the outdoor space. Keeping the spacing as is proposed would ensure that the remaining garden amenity space is plentiful for enjoyment as it is currently.

30. In summary it is evident that the evidence provided satisfies the balance of probability test (which is the civil standard applicable.) The use of the detached outbuilding as a gymnasium is both incidental to the use of a residential property in the context and spirit of the law and with regards to the LPA's practice as supported by the highlighted applications. As quoted from APP/Q5300/X/18/3218125 above: *'whether a building is 'reasonably required' does not need to be anything other than sensibly related to their enjoyment of the dwelling'*.

31. The proposed building would not be attached, connected or linked to the house. It would be inaccessible from the house, without going outside into the back garden. Therefore, it clearly complies with all the requirements to be permitted under Class E of Part 1, Schedule 2 Town and Country Planning (General Permitted Development) (England) Order 2015 and do not as maintained by the LPA fall under Class A.

The gist of the case for the Council

32. The Council indicates that the plan submitted by the Appellant (Drawing No WA 118/4) incorporate a scale bar. Using that scale bar, the gap between the existing dwelling and proposed outbuilding, it is argued, can be closely approximated and that accounting for the irregular thickness of the lines, it can be readily measured as falling between 0.22m and 0.27m.

33. Notwithstanding that matter, as per the Delegated Report, the LPA considers that the deliberately nominal separation is such that it should, in any reasonable sense, fall to be considered under Class A. Consequently, as a result of the existing extensions to the property, the combined enlarged part would be deeper than 4m and extend beyond a wall forming a side elevation and be more than half the width of the house.

34. The Council relies upon the judgement in *Emin v SSE & Mid Sussex DC* [1989] where it was held that the concept, of what is *'incidental to the enjoyment of a dwelling'* as such, involves an element of objective reasonableness and does not rest solely on the unrestrained whim of the occupier. To fall within Class E, a building must be *'required for some incidental purpose'*.

35. It is therefore necessary to identify the purpose and incidental quality in relation to the enjoyment of the dwelling, and whether the building would be genuinely and reasonably required to accommodate the proposed use or activity and thus achieve that purpose. In this case, the Council contends that there is no clear and precise evidence on the intended use of the proposed building.

36. The Council stresses that it is necessary to consider the planning history and this indicates that since the middle of 2019, the Appellant has sought first Prior Approval, then planning permission for a single storey rear extension (see the plans included at Appendix A and B) then a LDC (see above).

37. The Council accepts that the limitations in Class E do not prevent an incidental building from being sited very close to a dwelling. However, in line with submitted appeal decision APP/Q5300/X/19/3220325, siting the building only around 0.25m away from the rear elevation of the dwelling would provide little obvious practical benefit in terms of an incidental use. Furthermore it would not be possible for a person to access such a narrow gap the purposes of maintenance.

38. In addition, it is stressed that restricting the existing outlook from ground floor windows at the rear of the dwelling was considered by the Inspector to be a relevant factor in relation to the reasonableness and practicality of the proposal. In that respect, it is similar to the Inspector's decision (APP/Q5300/X/19/3228822), where it was considered, as a matter of fact and degree, that it was very obvious in these circumstances that the proposed development would be '*[an] extension masquerading as an outbuilding*'.

39. The Council contends that although in theory the buildings are not connected, the separation between the rear elevation of the dwelling and the building would be so small as to be 'de minimis'. Given the minimal separation between them, the building would be bound to have a more intimate visual relationship with the dwelling than might normally be typical of a building in an incidental use.

40. Consequently, it is contended that the building would generally be seen as a further enlargement of the dwelling, as opposed to a separate structure. This would be especially the case in views from the rear garden and the adjoining properties.

41. As a result, the LPA contends that, when looked at objectively and having regard to the absence of any alternative explanation, the siting of the building appears to have been contrived to try and make the proposal fit within the limits of Class E, rather being than a genuine consequence of an intended function which would be incidental to the enjoyment of the dwelling. It is argued that the available evidence also does not show why the siting would be 'reasonable' in relation to the proposed use of the building.

My assessment

42. I acknowledge that the GPDO does not specify any minimum (or maximum) distance between a dwellinghouse and a Class E building. However, the courts have held that an 'incidental use' must be seen to be reasonable in the overall circumstances of a case. In other appeal decisions the gaps between host building and proposed buildings have been found to be material in relation to what is reasonably '*incidental to the enjoyment of a dwellinghouse*'.

43. Having considered all of the submissions in this case, I do not share the Council's view. Irrespective of the planning history I consider that the appellant has indicated in a precise and unambiguous manner, that the outbuilding is required for use as a gymnasium and that this use would serve an '*incidental purpose*' as opposed to being an extension to the primary living facilities of the dwellinghouse.

44. I do not consider that the proposal would be perceived as providing additional '*primary*' accommodation. As a matter of fact and degree, it seems to me that in these circumstances the development would not be a rear extension to the house. I do not agree, therefore, with the Council that it ought to be treated under Class A of the GPDO.

45. The Courts have confirmed that the concept of what is '*incidental*' to the enjoyment of a dwelling as such, involves an element of objective reasonableness and does not rest solely on the unrestrained whim of the occupier. To fall within Class E, a building must be '*required for some incidental purpose*' in relation to a dwelling. It is necessary to identify the purpose and incidental quality in relation to the enjoyment of

the dwelling, and whether the building would be genuinely and reasonably required to accommodate the proposed use or activity and thus achieve that purpose.

46. In this case I consider that the incidental purpose has been readily identified and that the evidence demonstrates that the gymnasium building would have a functionally subordinate relationship with the primary residential use of the house.

47. The limitations in Class E do not prevent an incidental building from being sited very close to a dwelling. In the examples referred to above even smaller distances than 0.25m have been found to be acceptable between a host dwelling and an building which is incidental to its use. I accept that siting the building only around 0.25m away from the dwelling would restrict the outlook from the rear of the house and that this can be a relevant factor in relation to the reasonableness and practicality of the proposal. However, each case must be assessed on its own merits.

48. As indicated by previous Inspectors in the quoted appeals above, there is nothing within the GPDO or the Technical Guidance which lends support to an argument that there has to be a 'material gap' between the two buildings. The proposal would not be attached to the house as a matter of fact. I also agree with the contention that the close proximity of an outbuilding to the house it belongs does not precludes it from being incidental Class E permitted development.

49. What is being proposed in this case would leave a clear gap, albeit only around 0.25m, and the building would be inaccessible from the house without going into the garden. As a matter of fact it would therefore be a separate building not connected or linked to the house and as a gymnasium would be within Class E.

50. Clearly if the gap is not maintained and a direct link with the house were to be formed then there would be the potential for the incidental space to be used as primary accommodation. Any attempt to link the buildings and to incorporate the outbuilding with the primary residential use could be subject to enforcement action.

51. In conclusion, therefore, and when looked at objectively, I consider that the siting of the building and the reasons for its use, meet with the requirements and conditions of Class E. The LPA has no contrary evidence itself and there is none from others to contradict or otherwise make the applicant's case less than probable. Thus, there is no good reason to refuse the application.

52. For the above reasons, I find that the Council's reasons for not issuing a LDC were not well-founded. The appeal therefore succeeds and a LDC will be issued

Other Matters

53. In reaching my conclusions I have taken into account all of the other matters raised by the appellant and the Council. These include the full planning history; all of the initial and subsequent submissions; the submitted plans; the Council's Delegated Report, all of the previous appeal decisions and the relevant case law referred to by the parties. However, none of these carries sufficient weight to alter my conclusions.

Formal Decision

54. The appeal is allowed and a Lawful Development Certificate is attached below.

Anthony J Wharton

Inspector



The Planning Inspectorate

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 2010: ARTICLE 35

IT IS HEREBY CERTIFIED that on 27 January 2020, the development described in the First Schedule hereto, in respect of the property specified in the Second Schedule hereto, was lawful within the meaning of section 192 of the Town and Country Planning Act 1990 (as amended), for the following reason:

The proposed development constituted permitted development under Class E of Part 1, Schedule 2 Town and Country Planning (General Permitted Development) (England) Order 2015.

Signed

Anthony J Wharton
Inspector

Date: 5 October 2020

Appeal Reference: APP/N5090/X/20/3248537

First Schedule

Construction of a detached outbuilding at the rear of the property.

Second Schedule

118 Warwick Avenue, Edgware, Middlesex HA8 8UL

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 above property.

It certifies that the development described in the First Schedule, at the property 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 the development described in the First Schedule; to the property specified in the Second Schedule and to the plans submitted with the LDC application (Plan WA 118/4 and 1:1250 Location Plan).

Any other development which is in any way materially different from that shown on the above plans may result in a breach of planning control which is liable to enforcement action by the local planning authority. The gap between the outbuilding and the dwellinghouse must be retained as indicated on the application drawing.