



Appeal Decision

Site visit made on 19 November 2020

by Timothy C King BA (Hons) MRTPI

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

Decision date: 19 January 2021

Appeal Ref: APP/T2215/X/20/3257240

The Nursery, Green Street Green Road, Dartford, Kent DA2 8DP

- 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 Dean Keys against the decision of Dartford Borough Council.
 - The application Ref DA/20/00652/LDC, dated 5 June 2020, was refused by notice dated 10 July 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 described as a 'pool and pool-house'.
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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 use which is considered to be lawful.

Preliminary Matters

2. The relevant date for the determination of lawfulness is the date of the LDC application, i.e. 5 June 2020. The matter to be decided upon is whether the development, if carried out at that date, would have been lawful. The determination is to be made against the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) as subsisted at the time of the application which, hereafter, I shall refer to as "the GPDO".
3. In an appeal under s195 of the Act against the refusal of a LDC the planning merits and/or impacts of the matter applied for do not fall to be considered. Instead, the decision is based strictly on the evidential facts and on relevant planning law. The burden of proof is on the appellant, and I shall reach my decision on the various evidence before me and also observations at my site visit.
4. The Council mentions that the main dwelling has been extended by way of side and rear additions which, by way of a LDC issued under ref 18/00817/LDC, is considered to fall within the limitations of the permitted development entitlement. At my site visit I noted that the footprint of the dwelling erected on the site accords with this permitted enlargement.
5. I also observed that the garage/workshop building shown on Drawing no 01 submitted with the s192 application, the subject of this appeal, was also substantially complete.

Main Issue

6. The legislation, under Article 3, Schedule 2, Part 1, Class E of the GPDO, grants planning permission for, amongst other things, any building or enclosure, swimming or other pool required for a purpose incidental to the enjoyment of the dwellinghouse.
7. The GPDO's Technical Guidance document, which provides clarification as to the interpretation of householder permitted development (PD) rights, indicates that Class E also allows, subject to certain conditions and limitations, a large range of other buildings on land surrounding a house, as long as they can be properly be described as having a purpose incidental to the enjoyment of the house
8. The main issue in this appeal is whether the Council's decision to refuse the LDC was well founded.

Reasons

9. It appears that the only issue of contention between the two main parties is the Council not accepting the appellant's view that the proposed development would be 'incidental' to the enjoyment of the dwellinghouse.
10. The development involves the erection of a single-storey building with a pitched roof arrangement that would house an indoor swimming pool, changing room facilities and associated pump room. In terms of the comparative footprints it would be a sizeable building relative to the dwellinghouse. The Council, in its case report, has calculated that the proposed building would have an external footprint of approximately 90 sqm, whilst calculating the dwellinghouse at some 113 sqm. As mentioned, though, the dwelling has since been extended. The two buildings would also be in close proximity to one another.
11. For an outbuilding to be considered incidental it cannot house primary living accommodation and should be for a purpose, and provide appropriate floorspace for such which cannot, or at least cannot practicably, be accommodated within the dwellinghouse to which the building would be incidental. As the Council acknowledges, a purpose 'incidental to the enjoyment of the dwellinghouse' is a broad concept, and one of fact and degree in each individual instance. The applicant/appellant needs to demonstrate that the building is 'required' for the incidental purpose.
12. The courts have held that the term "required" in this part of the GPDO should be interpreted to mean "reasonably required." In the judgement of *Emin v SSE and Mid Sussex DC* [1989] JPL 909 it was held that when deciding whether the proposed use of a building would be incidental to the enjoyment of the dwellinghouse it was necessary to consider whether the building is genuinely and reasonably required or necessary to achieve that purpose. The proposed outbuilding will not necessarily be required just because the householder says it is and it is for the appellant to show it is reasonably required and designed with incidental uses in mind. The keynote is 'reasonableness'.
13. The above principles were reiterated in *Holding v FSS & Thurrock BC* [2004] JPL 1405 and *LB Croydon v Gladden* [1994] 1 PRL 2. In the case of *Holding*, which concerned what might be regarded as a very large incidental building

within the curtilage of a dwellinghouse, the Inspector considered that it is reasonable to suppose that the purpose of the permission granted under Class E is to allow accommodation for hobbies to which people need space in and around their home to be provided without the need for the formality of a planning application. In the *Gladden* case it was held that for a use to be considered incidental to the enjoyment of a dwellinghouse and exempted from development under s55(2)(d), it must be of a scale and nature that is incidental to the reasonable enjoyment of the normal residential use of the buildings and land which comprise the dwellinghouse and its curtilage.

14. 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 itself be determinative. The relevance of size lies in the indication it may provide for the scale of activities and whether they would be subordinate to the main use of the dwellinghouse. However, 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 dwelling, it could have done so.
15. The Council has cited certain previous appeal decisions in an attempt to add support to its decision to not issue the LDC. However, whilst there are pointers to support the Council's approach there are also other factors evident which would tend to favour the appellant's stance. To summarise, the case of 282 Cassiobury Drive, Watford, involving a proposed gym, was one where the Inspector considered that the appellant had failed to demonstrate why such a large building was required for incidental purposes. In the appeal regarding 3 Gooseacre Lane, Harrow, the Inspector's concern was that the appellant had not convincingly shown why the family's storage needs were such that they could not be met within the dwellinghouse itself. It then followed, accordingly, why such a sizeable 'store' building was reasonably required. Similarly, in the case of 30 Merton Road, Harrow, the appeal turned on the lack of detailed information produced to show that the nature and scale of the building and its use as an office, gym and sauna could not reasonably be accommodated, at least in part, within the host dwelling. As such, the Inspector doubted that the design and size of the outbuilding would have reasonably been required for incidental purposes.
16. I have had regard to all the LDC cases referred to by both parties and whilst points of law will obviously have significant bearing on these, evidential fact will largely relate to the particular factors and circumstances peculiar to each individual case. Hence, the fact and degree considerations. As such, direct parallels between cases are not easily drawn. Nonetheless, in applying the principles I have highlighted, for the current appeal I am satisfied that for a swimming pool measuring 8.9m x 3m, and including the necessary circulation space and associated facilities and pump room, the proposed building would be of an appropriate size. Detailed drawings have been supplied to this end. Moreover, the building's proposed use would not involve the creation of additional primary, habitable accommodation and, given the circumstances, I am fully convinced that such a self-contained facility unit could not reasonably be accommodated within the dwelling itself.

17. The Council mentions that previous Inspectors have made reference to permitted development rights being potentially abused by sham proposals where buildings have been constructed on the basis of their stated purpose, but were then used for different means. However, the project in hand has to be judged on the intended purpose, rather than on conjecture as to what might happen in the future. This was addressed in the appeal relating to 55 Hitherbroom Road, Hayes (*APP/R5510/X/19/3225396*), also cited by the Council. The terms of the LDC, and its explanatory wording, serve to provide an adequate safeguard in this regard.
18. Further points raised by the Council are that a consequence of the proposal, given the existence of the garage/workshop building, would be that the main activity would be shifted away from the dwellinghouse, and also that the proposed pool building's siting is illogical and could lead to the sub-division of the plot. The issue of character and site arrangement is, though, not material to the assessment of this proposal, other than the building is required to fall within the limitations set out in the various provisos to Class E. Should the site be sub-divided at some point in the future and a breach of planning control was identified the Council can employ its remedial powers to address the matter, as considered expedient.
19. Although the Council, in referring to previous appeal decisions, has provided a comprehensive account of issues arising from these proposals, I am not convinced that this has transferred itself to a full, objective assessment of the proposal in hand. Instead, in, weighing up the various factors and considerations involved, and then applying a test of objective reasonableness, I am satisfied that, as a matter of fact and degree, the totality of the proposed outbuilding is genuinely and reasonably required to achieve the purpose of accommodating the intended indoor swimming pool and associated facilities, which I consider would be incidental to the enjoyment of the dwellinghouse.

Conclusion

20. For the reasons given above I conclude, on the evidence available, that on the balance of probability, the proposed building, subject to compliance with the conditions and limitations of Class E, would also be incidental to the enjoyment of the dwellinghouse. The Council's refusal to issue a LDC was therefore not well-founded and, accordingly, the appeal should succeed. In this respect I will exercise the powers transferred to me under s195(2) of the 1990 Act as amended.

Timothy C King

INSPECTOR



The Planning Inspectorate

Lawful Development Certificate

APPEAL REF. APP/T2215/X/20/3257240

TOWN AND COUNTRY PLANNING ACT 1990: SECTION 192

(as amended by section 10 of the Planning and Compensation Act 1991)

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

IT IS HEREBY CERTIFIED that on 5 June 2020 the operations described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and shown edged in red on the plan attached to this certificate would have been lawful within the meaning of section 191(2) of the Town and Country Planning Act 1990 as amended, for the following reason:

The proposed operations described in the first schedule would be permitted development within the terms of Article 3 and Class E within Part 1 and Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order 2015 as amended.

Timothy C King

INSPECTOR

Date: 19 January 2021

First Schedule

Erection of outbuilding for use as an indoor swimming pool and associated ancillary purposes as shown on drawings 01, 02, 03 and 04 (submitted with application DA/20/00652/LDC, dated 5 June 2020).

Second Schedule

The Nursery, Green Street Green Road, Dartford, Kent DA2 8DP

Notes

1. This certificate is issued solely for the purpose of section 192 of the Town and Country Planning Act 1990 as amended.
2. It certifies that the operations described in the First Schedule taking place on the land specified in the Second Schedule would have been lawful on the certified date and, thus, would not have been liable to enforcement action under section 172 of the 1990 Act as amended on that date.
3. 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.
4. The effect of the certificate is subject to the provisions in section 192(4) of the 1990 Act, as amended, which state that the lawfulness of a specified use or operation is only conclusively presumed where there has been no material change, before the use is instituted or the operations begun, in any of the matters which were relevant to the decision about lawfulness.

Plan

This is the plan attached to the Lawful Development Certificate dated: 19 January 2021
by **Timothy C King BA (Hons) MRTPI**

**The Nursery, Green Street Green Road, Dartford,
Kent DA2 8DP**

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DO NOT SCALE

