
Appeal Decision

by Paul Freer BA (Hons) LLM PhD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 18 February 2022

Appeal Ref: APP/V1505/X/21/3281201

Foxfield House, Potash Road, Billericay, Essex CM11 1DJ

- 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 Alex Headley against the decision of Basildon District Council.
 - The application Ref 21/00370/LDCP, dated 8 March 2021, was refused by notice dated 16 April 2021.
 - 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 the construction of a new swimming pool and gymnasium outbuilding.
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Decision: the appeal is dismissed

Application for costs

1. An application for costs was made by Mr Alex Headley against Basildon District Council. This application is the subject of a separate Decision.

Reasons

2. 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; and in any other case shall refuse the application. My decision is therefore based on the facts of the case and judicial authority. For the avoidance of doubt, this means that the planning merits of the proposed development are not relevant to this appeal and the main issue is whether the Council's decision to refuse to grant a Certificate of Lawful Use or Development (LDC) was well founded. In this respect, the burden of proof is on the appellant to show that, on the balance of probability, the development proposed would have been lawful on the date on which the application was made.
3. The provision within the curtilage of a dwellinghouse of any building or enclosure, swimming or other pool required for a purpose incidental to the enjoyment of the dwellinghouse as such is permitted by Class E, Part 1, Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order 2015 (GPDO), subject to the limitations set out at Classes E.1, E.2 and E.3. The Council is satisfied that the proposed outbuilding complies with the limitations at Classes E.1, E.2 and E.3, and I see no reason to take a different view.

4. The area of dispute is whether the proposed outbuilding is required for a purpose incidental to the enjoyment of the dwellinghouse as such. Consideration of this issue raises two questions: is the purpose of the proposed outbuilding incidental to the enjoyment of the dwellinghouse as such and, if so, is the proposed outbuilding reasonably required for that purpose.
5. In terms of whether the purpose of the proposed outbuilding incidental to the enjoyment of the dwellinghouse as such, case law confirms that the keynote is reasonableness. Case law 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. In this regard, the Courts have held that the concept of what is incidental to the enjoyment of the dwellinghouse as such involves an element of objective reasonableness and is not a matter solely at the whim of the individual owner or occupier.
6. The purposes for which the outbuilding is sought are a swimming pool and a gymnasium, together with associated changing rooms and shower rooms. In principle, both of these purposes would be reasonably incidental to the purpose of the dwellinghouse.
7. Class E provides for any building or enclosure, swimming or other pool *required* for a purpose incidental to the enjoyment of the dwellinghouse as such (emphasis added). The Oxford English Dictionary (OED) defines 'required' as 'needed for a purpose'. In relation to Class E, the Courts have interpreted 'required' as meaning 'reasonably required'. Put another way, in the context of Class E this translates as reasonably needed for that purpose.
8. I have no reason to believe that the swimming pool is excessive in size in the context of a private dwelling, even taking into account that the property already benefits from having an outdoor swimming pool. I am therefore satisfied that the swimming pool is reasonably required for a purpose incidental to the enjoyment of this particular dwellinghouse.
9. However, the same cannot be said about the gymnasium or, more precisely, the space allocated to 1-1 dance lessons for the appellant's children. In the absence of further justification from the appellant, I am not immediately persuaded that the provision of dance lessons is a purpose that can be considered as being genuinely incidental to the enjoyment of the dwellinghouse as such. Furthermore, the dance lessons would be a transient activity and when dance lessons were not taking place the space would be available for use in connection with the gymnasium. There is no justification from the appellant as to why a gymnasium space of that size would be genuinely and reasonably required in the context of this particular dwellinghouse. Consequently, as a matter of fact and degree, I am not satisfied that the gymnasium can be regarded as being reasonably required for that purpose.
10. The ancillary accommodation within the outbuilding, in terms of changing rooms, showers, etc, is duplicated, with separate facilities serving the gymnasium and swimming pool. This appears to derive from the appellant's decision to make the swimming pool area and gymnasium area physically separate. In the context of an outbuilding intended to be for purposes incidental to the enjoyment of a dwellinghouse that is the appellant's family home, that appears to me to be unusual, unnecessary and solely at the whim of the individual owner or occupier. The appellant has not provided an explanation for this unusual arrangement.

11. There is no doubt that an element of ancillary accommodation is required within the outbuilding in order to obviate the need for those using it to walk the not inconsiderable distance between the outbuilding and the main house in order to have a shower/get changed, etc. An element of ancillary accommodation would therefore be entirely reasonable. However, by duplicating the ancillary accommodation provided, the outbuilding as a whole cannot be regarded as being genuinely and reasonably required for purposes incidental to the enjoyment of the dwellinghouse.
12. In turn, the space taken up by the gymnasium and the ancillary accommodation goes to the overall size of the outbuilding. It is settled case law that the size of the building is not, in itself, determinative of whether a development falls within the provision of Class E1¹. Nevertheless, the Courts have held that the size of the outbuilding is a material consideration and indeed that, when the matter is looked at as a whole, size may be an important consideration.
13. In order to accommodate the gymnasium (including space for dance lessons) and the two sets of ancillary accommodation proposed, the outbuilding is larger than would otherwise be necessary to accommodate the purposes that are genuinely incidental to the enjoyment of the dwellinghouse as such (i.e the swimming pool, a smaller gymnasium and one set of ancillary accommodation). For that reason, I consider that the size of the outbuilding taken as a whole is not, as a matter of fact and degree, genuinely and reasonably required for purposes genuinely incidental to the enjoyment of the dwellinghouse as such.
14. 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 construction of a new swimming pool and gymnasium outbuilding at Foxfield House, Potash Road, Billericay, Essex CM11 1DJ was well-founded and that the appeal should not succeed. I will exercise the powers transferred to me in section 195(2) of the 1990 Act as amended.

Formal Decision

15. The appeal is dismissed.

Paul Freer
INSPECTOR

¹ *Emin v Secretary of State for the Environment* [1989] J.P.L. 909