



Appeal Decision

Site visit made on 6 February 2023

by Anthony J Wharton BArch RIBA RIAS MRTPI

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

Decision date: 28 February 2023

Appeal Ref: APP/C2741/X/22/3304438

Village Farm Bungalow, Main Street, Askham Richard, York YO23 3NY

- 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 Daryll Thompson against the decision of York City Council (the LPA).
 - The application, Ref21/02214/CPD, dated 1 October 2021, was refused by notice dated 24 November 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 erection of a detached pool house and gym with associated plant room'.
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Decision

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

Introduction, background information and relevant caselaw

2. The appeal property is a detached dormer bungalow. It is set back a considerable distance from Main Street and is accessed via a rough unmade track. The track also gives access to agricultural outbuildings and stables. The original dwelling dates back to the 1950/60s and it was extended around 2013 by the addition of a first floor and dormer windows. An application in 2019 (19/02179/FUL) granted consent for the conversion of the attached garage into a residential annexe and during my site visit I noted that it was in use as such.

3. The Council has confirmed that there is no dispute regarding the actual residential curtilage of the dwellinghouse. It has also agreed that the proposal falls within the size criteria set out at Paragraph E.1 of Class E, Part 1, Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order 2015 (GPDO).

4. Section 192(2) of the Town and Country Planning Act 1990 (The Act) indicates that if an LPA is provided with information to satisfy them that what is described in the LDC application would be lawful, a LDC should be issued and that any decision must be based on the facts of the case and judicial authority.

5. The planning merits of the case are not relevant and the main question is whether the Council's decision to refuse to grant a LDC was, or was not, well-founded. The burden of proof is on the appellant to demonstrate that, on the balance of probability, the proposed development would have been lawful on the date the LDC application.

6. The case of '*Emin v SSE & Mid Sussex DC (1989) JPL 90*' is the leading case in relation to the meaning of '*incidental*' in respect of Class E outbuildings. This established that a '*purpose incidental to the enjoyment of the dwellinghouse as such*'

is a broad concept and that, whether or not a building meets this requirement is a matter of fact and degree in each case.

7. With regard to whether the purpose of the proposed outbuilding is '*incidental to the enjoyment of the dwellinghouse*', case law also confirms that the keynote is '*reasonableness*'. It has been established that what is abnormal is not necessarily unreasonable, and that the concept of what is '*incidental to the enjoyment of the dwellinghouse*' involves an element of objective reasonableness. It connotes some sense of reasonableness in all the circumstances of a particular case and that the word '*incidental*' connotes an element of subordination in land use terms in relation to the enjoyment of the dwellinghouse'.

8. The purposes for which the outbuilding is proposed are, as a pool house (swimming pool), a gym and a plant room. In principle, all of these purposes can be classed as being '*incidental*' to the enjoyment of the dwellinghouse and the proposed plans do not indicate any additional primary living space within the outbuilding.

9. However, it is still a matter of fact and degree as to whether or not the proposal is '*incidental*' based on all the facts of the case. In *Wallington v SSW (1991) 62 &CR 150*, the Court of Appeal held that the words '*as such*' in the Act must mean '*of and incidental to the enjoyment of the dwellinghouse as a dwelling-house*'. In that case it was held that the mere fact that the occupier may genuinely regard the relevant activity as a hobby was not sufficient to prove that the purpose was incidental to the enjoyment of the dwellinghouse as a dwellinghouse. An objective standard has to be applied in considering the relevance or otherwise of the provisions of the GPDO.

10. There is no dispute in this case that the various uses proposed are, in principle, uses that could be considered '*incidental*' but, as referred to above, it is a matter of fact and degree as to whether the nature and scale of the proposed uses are '*reasonably required*' for these particular incidental purposes. I now turn, therefore, to the respective cases.

The gist of the Council's case

11. The Council stresses that the five bedroomed, two-storey property has a footprint of approximately 160m², with a total depth of around 15.4m and an overall width of around 20m. It is indicated that the proposal would have a footprint of 129m², or thereabouts. It would measure around 7.6m by 17m, with a pool of 8m x 4m; a 2m x 2m whirlpool; a 10m x 4.9m (reducing to 3m) poolside area; a gym measuring 3.9m x 3.8m, a changing and shower room of 2m x 3.7m and a plant room 6.2m x 3m.

12. The Council has expressed concerns regarding what it considers to be a substantial footprint and questions the need for excessively large areas such as the poolside space. It is considered that this excessive area is not put to any other particular reasonable incidental use. In addition, the need for the changing and shower room was questioned, due to the proximity of such facilities in the main house. The size of the plant room is also questioned.

The gist of the case for the Appellant

13. In response it is indicated on behalf of the appellant that the 'footprint complies with Class E rules'. It is also stressed that the poolside space is required for the enjoyment of the pool because the building is detached from the main house. This is

different to a previous proposal for an extension to the house under 20/00420/FUL, which was refused on Green Belt grounds. It is contended that the space around the pool is an essential requirement in order that the Appellant's young children can remain within earshot of the pool activities.

14. It is also stressed that the changing and shower room is essential because the pool is detached from the dwelling. The suggestion that the nearby bathroom in the house could be used is contested. It is argued that children could not be left unattended and that it would not be desirable for children or guests to cross to the main house in their swimwear. This is particularly the case in inclement weather.

15. With regard to the size of the plant room it is stressed that this is required because it needs to house and incorporate *'several renewable technologies which may include thermal store, heat pumps, solar thermal controls, heat recover and the like'*.

My assessment and conclusions

Main Issue

16. The main issue is whether or not the proposed outbuilding is required for a purpose incidental to the enjoyment of the dwellinghouse. 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?

Reasons

17. Section 192(2) of the Town and Country Planning Act 1990 (1990 Act) indicates that if, on an application under that section, the LPA 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 based on the facts of the case and judicial authority and the planning merits of the proposal do not fall to be considered.

18. Firstly, there is no dispute between the appellant and the LPA that, in terms of its size and location, the proposed building would comply with all of the dimensional and conditional limitations of Classes E.1, E.2 and E.3 of the GPDO. I have no reason to disagree. The dispute is whether or not the proposed outbuilding is reasonably required for a purpose *'incidental to the enjoyment of the dwellinghouse'*.

19. The purposes for which the outbuilding is sought are: as a pool house (swimming pool), a gym and a plant room associated with the use. In principle, all of these are purposes would be classed as being *'incidental'* to the purpose of the dwellinghouse.

20. However, it is still a matter of fact and degree as to whether the proposal is *'incidental'* based on all the facts of the case. In *Wallington v SSW (1991) 62 &CR 150*, the Court of Appeal held that the words *'as such'* in the Act must mean *'of and incidental to the enjoyment of the dwellinghouse as a dwelling-house'*. In that case it was held that the mere fact that the occupier may genuinely regard the relevant activity as a hobby was not sufficient to prove that the purpose was incidental to the enjoyment of the dwellinghouse as a dwellinghouse. An objective standard has to be applied in considering the relevance or otherwise of the provisions of the GPDO.

21. There is no dispute in this case that the various uses proposed are, in principle, uses that could be considered '*incidental*' but, as referred to above it is a matter of fact and degree as to whether the nature and scale of the proposed uses are reasonably required for incidental purposes.

22. I have noted the Council's concerns regarding the substantial footprint of the building and the fact that they questioned the need for large areas such as the poolside space. It is considered that this is excessive and is not put to any other particular incidental use. In addition, the Council questions the need for the changing and shower room due to the proximity of such facilities in the main house and also queries the size of the proposed plant room.

23. In response to these concerns I acknowledge that the 'footprint complies with Class E rules; that some poolside space is required for the enjoyment of the pool and that young children need to remain within earshot of the pool activities. It is also indicated that the changing and shower room is essential; that the use of the bathroom in the main house is not practicable and that it would not be desirable for children or guests to cross to the main house in their swimwear.

24. With regard to the size of the plant room it is stressed that this is required at this size due to the fact that it needs to house and incorporate '*several renewable technologies which may include thermal store, heat pumps, solar thermal controls, heat recover and the like*'. It is indicated that access is via a louvered panel door.

25. On the first point regarding the area immediately surrounding the pool, having seen the proposed plans, I share the Council's view that the area is excessive. Excluding the whirlpool, the area surrounding the pool is, in fact, larger than the pool itself. Whilst accepting that a certain amount of area is required to accommodate sunbeds and other equipment, in my view it has not been demonstrated that this is an appropriately sized space which is reasonably and necessarily required for the incidental enjoyment of the dwelling.

26. I accept the appellant's point that there is a need for the shower and changing area within the pool building. Despite the proximity of the bathroom in the main house I do not consider that it is unreasonable to provide these facilities in the location shown. I also consider that the small gym equipment area is reasonably sized. However, the plant room at over 18m² seems oversized and there are no details of the '*several renewable technologies which may include thermal store, heat pumps, solar thermal controls, heat recover and the like*'. This is rather a vague, imprecise and ambiguous statement.

27. Clearly size alone cannot be a determinative factor and although the area of the pool building is less than that of the main dwelling, it does not alter the fact that, in my view, the basic overall size of the proposal (due mainly to the pool surrounding area and the plant room) is excessive and, therefore, unreasonable in terms of it being incidental to the enjoyment of the main dwellinghouse. I consider that a smaller structure could still reasonably and practically accommodate the various incidental uses desired by the appellant.

28. It follows that, based on the facts of this case and having applied a judgement of objective reasonableness, I do not consider that this particular pool building can be reasonably said to be required for purposes incidental to the enjoyment of the main

dwellinghouse. The proposed development is, therefore, not permitted development under the terms of Class E of Part 1 of Schedule 2 of the Town and Country Planning (General Permitted Development) Order 2015 as amended.

29. In reaching my conclusions I have taken into account all of the other matters raised on behalf of the appellant and the Council. However, none of these matters alter my conclusions or change my decision which has been made on the facts of this case.

Formal Decision

30. The appeal is dismissed and a Lawful Development Certificate for the development as applied for is not issued.

Anthony J Wharton

Inspector