



Appeal Decision

Site visit made on [Event Date]

by Elizabeth Jones BSc (Hons) MTCP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 11 July 2023

Appeal Ref: APP/R5510/X/22/3303062

31 St. Edmunds Avenue, Ruislip, HA4 7XW

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended against a refusal to grant a certificate of lawful use or development (LDC).
- The appeal is made by Mr Karol Sieniuc against the decision of London Borough of Hillingdon.
- The application ref 58245/APP/2021/4066, dated 2 November 2021, was refused by notice dated 26 April 2022.
- 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 demolition of existing garage and erection of the single storey detached outbuilding in the rear garden to serve as a family gym, spa and garden tools storage - ancillary to the main dwelling house. The maximum height will be 2.50m measured from natural ground level. All external finishing materials to match existing house.

Decision

1. The appeal is dismissed.

Preliminary Matters

2. I consider that this appeal can be determined without a site visit without causing prejudice to any party. This is because I have been able to reach a decision based on the documentary evidence submitted.
3. Notwithstanding the description of development set out above, which is taken from the application form, it is clear from the submissions that development for which the LDC is sought is for the 'demolition of existing garage and erection of outbuilding including a decking area to rear garden' as described by the Council in its decision notice. The Council dealt with the proposal on this basis and so shall I. Moreover, the appellant has used the Council's description in the appeal form. Thus, I consider no injustice will be caused to either party.
4. The application and appeal forms indicate that the LDC application was made under s192 of the 1990 Act - for proposed development. Although the appellant indicates on the application form that the proposed development had not started, their submissions state that the application was submitted "shortly after the work had started". The work was completed by the time the application was refused and the decision notice issued under s191 of the Act - for existing development. Albeit the proposed development had started I shall consider the appeal under s192(1)(b)¹, that is whether, as a whole, the proposal was lawful on the date of the LDC application.

¹ S192(1)(b) states: "If any person wishes to ascertain whether any operations proposed to be carried out in, on, over or under land are lawful.

5. The front covers of the appeal statements of both parties refer to the appeal as an appeal made under Section 78 of the Act. For clarification, this is an LDC appeal and not a s78 appeal.

Main Issue

6. The appeal property is a detached bungalow. The appeal development comprises an outbuilding positioned in the rear garden. Scaled drawings were submitted with the LDC application². It is contended by the appellant that the proposed development is permitted development (PD) under the Town and Country Planning (General Permitted Development) Order 2015 (GPDO).
7. In an application for an LDC, the burden of proof is firmly on the appellant to demonstrate on the balance of probabilities that, at the time of the application to the Council, the development was lawful. Further, it has been established that if the Local Planning Authority has no evidence of its own, or from others, to contradict or otherwise make the appellant's version of events less than probable, there is no good reason not to grant an LDC provided the appellant's evidence alone is sufficiently precise and unambiguous.
8. The main issue therefore is whether the Council's refusal to grant an LDC was well-founded. This consideration is an issue of lawfulness which cannot take account of any matters of planning merit.

Reasons

9. Article 3(1) of the GPDO grants planning permission for the classes of development set out in Schedule 2 to that Order. Class E of Part 1 sets out that the provision within the curtilage of a dwellinghouse, "any building required for a purpose incidental to the enjoyment of the dwellinghouse as such" is PD, subject to various restrictions in size and location.
10. The Council submits that due to its size and function, the outbuilding cannot be considered incidental. Also, that due to its height, the outbuilding does not comply with Class E, Paragraph E.1.(e)(ii), (f), and (h)³ and Class A.1(k)(i)⁴.
11. For the provision of an outbuilding to be PD under Class E it must be required for a purpose incidental to the enjoyment of the dwellinghouse – and not be for a primary residential use. Incidental connotes an element of subordination in land use terms in relation to the enjoyment of the dwellinghouse and I need to consider whether, in this particular case, it has been shown that the outbuilding is reasonably required for the purposes incidental to the enjoyment of the dwellinghouse.

² Drawing Numbers A-HA-031-PL-150 Rev.01, A-HA-031-BP-002 Rev.01, A-HA-031-PL-100 Rev.01, A-HA-031-SL-001 Rev.00 & A-HA-031-PL-151 Rev.01.

³ Class E Paragraph E.1 states development is not permitted: -

(e)(ii) "if the height of the building, enclosure or container would exceed – (ii) 2.5 metres in the case of a building, enclosure, or container within 2 metres of the boundary of the curtilage of the dwellinghouse.

(f) the height of the eaves of the building would exceed 2.5 metres.

(h) it would include the construction or provision of a verandah, balcony or raised platform.

⁴ Class A.1 states development not permitted - (k) it would consist of or include: - (i) the construction or provision of a verandah, balcony or raised platform.

12. There is no dispute that the drawings submitted with the application show a building with an approximate footprint of 56m² comprising a shower room, a spa, a gym with a sink and bar area and a garden tools store.
13. In this case, a gym, spa and garden store are uses not usually part of primary living accommodation. They are capable in principle of being incidental to the enjoyment of the dwellinghouse. A shower room whilst it could be regarded as primary living accommodation, in this case would be an ancillary function to the gym and spa and its provision would not be unreasonable. I note the appellant's comments that the recently extended dwellinghouse does not allow scope for a gym, sauna or jacuzzi. However, no layout of the dwelling has been provided and it has not been shown whether or not all/some of the facilities could be accommodated within the main dwellinghouse. Moreover, albeit the family are keen on physical exercise, no information is provided regarding the family - such as numbers of individuals in the household and whether the provision of this level of accommodation is reasonably required to serve the household.
14. The provision of a sink/bar area, (referred to as a kitchenette by the Council), could be considered as primary accommodation. I note the appellant's comments regarding the imposition of a condition to seek its removal however, an LDC cannot be subject to conditions. The outbuilding is large. As such, it provides spacious accommodation.
15. My attention has been drawn to Case law⁵ which refers to the need to consider whether "the nature of the activities carried out in the proposed building ensure they are incidental or conducive to the very condition of living in the dwellinghouse.... the physical sizes of buildings could be a relevant consideration in that they might represent some indicia as to the nature and scale of the activities." "When a matter is looked at as a whole, size might be an important consideration but not in itself conclusive." It was held that "incidental connoted an element of subordination in land use terms in relation to the enjoyment of the dwellinghouse." Moreover, it is established that the term 'incidental to the enjoyment of the dwellinghouse' "cannot rest solely on the unrestrained whim of him who dwells there but connotes some sense of reasonableness in all the circumstances of the particular case."
16. At 56m², there is no dispute that the outbuilding is below 50% of the total area of the curtilage and that the remaining garden complies with the Council's policy regarding amenity space standards for houses. However, whether or not the outbuilding complies with Council policy in this regard carries little weight because it still has to be shown that its use is incidental to the enjoyment of the dwellinghouse.
17. Notwithstanding the appellant's submissions regarding the scale of each constituent activity, on the submitted evidence before me, I consider that, as a matter of fact and degree, it has not been shown that the outbuilding is genuinely subordinate and reasonably required for purposes incidental to the enjoyment of the dwellinghouse. Thus, it would not be permitted development falling within Class E of the GPDO.
18. In any event, the building will need to be within the size limitations set out in the GPDO. The submitted drawings provide dimensions and measurements of

⁵ Emin v Secretary of State for the Environment and Mid Sussex District Council [1989] JPL 909

the proposed development. The Council refers to Government guidance in relation to the GPDO contained within the publication 'Permitted development rights for householders – Technical Guidance'⁶ (TG). The TG states "reference to height is the height measured from ground level (ground level is the surface of the ground immediately adjacent to the building in question and would not include any addition laid on top of the ground such as decking. Where ground level is not uniform (for example if the ground is sloping), then the ground level is the highest part of the surface of the ground next to the building.) Moreover, a raised platform in the TG is defined as "any platform that has a height of more than 0.3metres".

19. The appellant contends that the area of concrete adjacent to the drainage gully is the original land level. The Council's submissions, whilst acknowledging that the land is sloping, indicates that the Council's enforcement officer at their site visit found that the ground levels at the site had been altered. Moreover, albeit the submitted drawings indicate that the height of the building is 2.5m, the photographs⁷ show the height exceeds 2.5m. The appellant suggests that a discrepancy of 30mm could be considered de minimis. However, such considerations are not relevant in a LDC application which is a matter of law and not a matter of judgement.
20. The appellant's evidence regarding the original ground level is not sufficiently precise and unambiguous to show on the balance of probabilities that the decking is PD.
21. Thus, on the evidence available to me and having regard to all other matters raised, I find that, as a matter of fact and degree, it has not been demonstrated that the appeal development is PD by virtue of Class E, Paragraph E.1.(e)(ii), (f), and (h)⁸ and Class A.1(k)(i) of the GPDO.

Other Matters

22. The appellant with reference to size has drawn my attention to a planning permission granted for an outbuilding with a footprint of 60m²⁹. I acknowledge the importance of consistency in decision-making. The Council assessed this application on the particular facts and site-specific circumstances, which included the need for a hydrotherapy pool. However, the local planning authority in that case was not considering the specific question of whether the provision of the building was reasonably required for purposes incidental to the enjoyment of the dwellinghouse as such. It is not therefore directly relevant.
23. I note the appellant's comments regarding the time taken by the Council to determine the LDC application. Dissatisfaction with the Council's procedures should appropriately be addressed in the first instance through the authority's own complaints procedure.

⁶ Published by the Ministry for Housing, Communities and Local Government, September 2019.

⁷ Pages 9 and 10 of the Appellant's Statement of Case.

⁸ Class E Paragraph E.1 states development is not permitted: -

(e)(ii) "if the height of the building, enclosure or container would exceed – (ii) 2.5 metres in the case of a building, enclosure, or container within 2 metres of the boundary of the curtilage of the dwellinghouse.

(f) the height of the eaves of the building would exceed 2.5 metres.

(h) it would include the construction or provision of a verandah, balcony or raised platform.

⁹ Planning permission Ref 66891/APP/2022/594.

Conclusion

24. 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 appeal development was well-founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

Elizabeth Jones

INSPECTOR