

14 Greenaway Gardens

LEGAL SUBMISSION WITH APPEAL

1 INTRODUCTION.

- 1.1 In the large curtilage of 14 Greenaway Gardens there are appeals submitted in relation to 4 LDC certificates. Each one is for permitted development. The issue that has arisen is whether they are within Schedule 2 Part 1 Class E of the GPDO which provides that the following is permitted development.

(a)..any building or enclosure, swimming or other pool required for a purpose incidental to the enjoyment of the dwellinghouse as such...

- 1.2 There is no dispute that all of the other criteria are satisfied, and the buildings proposed come within all of the restrictions in paragraph E1.
- 1.3 A comprehensive advice dated 25 July 2023 was submitted with the application by Morag Ellis KC that concluded “that the proposed works fall within Class E and are lawful”. That is a legally correct and compelling analysis which can be followed.
- 1.4 This document explains that each of the applications fulfil the test in Class E and each should be allowed on appeal. It will be necessary for the Inspector to reach a conclusion on each application and so each is set out individually to assist.

2 THE LAW

- 2.1 The law is not in dispute between the parties and the test for how it is to be determined whether a use is incidental to the use of a dwelling house as such has been set out in the case of *Emin v Secretary of State for the Environment* 58 P&CR 416. In that case the decision of the Secretary

of State was quashed because he had erred in law by regarding the physical size of the buildings and the relative size as the sole test as to whether they were incidental. The judge went on to set out how the test should be applied.

- 2.2 He said that whether it is required for a purpose associated with the enjoyment of a dwelling-house cannot rest solely on the unrestrained whim of the owner. However, a hard objective test could not be used to frustrate reasonable aspirations as long as they are sensibly related to enjoyment of the dwelling.

*The fact that such a building has to be required for a purpose associated with the enjoyment of a dwelling-house 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. That is not to say that the arbiter can impose **some hard objective test so as to frustrate the reasonable aspirations of a particular owner or occupier so long as they are sensibly related to his enjoyment of the dwelling.**¹*

- 2.3 He also said that incidental use connotes an element of subordination.

The word "incidental" connotes an element of subordination in land use terms in relation to the enjoyment of the dwelling-house itself. I would endorse the general approach adopted by the Secretary of State in the present case. He is correct in stating that the overriding factor in deciding the question as to whether uses of the proposed buildings can properly be regarded as incidental to the enjoyment of the dwelling-house must concern the incidental use, which, in that context, must be a use which occurs together with something else but nevertheless remains at all times subordinate to it.

- 2.4 The nature and scale of the use is relevant as to whether it is incidental to the enjoyment of the dwellinghouse as such.

The arbiter of the facts in a case such as this will need to concern himself with the nature of the activities carried on in the proposed buildings so as to ensure that they are incidental or conducive to the very condition of living in the dwelling-house and, in that sense, further that condition. In that connection the scale of those activities is obviously an important matter because there must be a prospect that the nature and scale of such activities could go beyond a purpose merely incidental to the enjoyment of the dwelling-house as such and constitute something

¹ My emphasis.

greater than a requirement related solely to that purpose. In that context 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.

3 ONE SINGLE STOREY OUTBUILDING [POOL HALL]

- 3.1 The proposal is for the construction of one single storey outbuilding in the rear garden for this pool hall.
- 3.2 The nature of this use is clearly one that is incidental to a residential use. It is expressly mentioned in Class E as an example of such an incidental use. It is clearly a nature of use that is subordinate to normal residential use.
- 3.3 The owner has set out how he and his family and visitors intend to use the pool and that they currently use a pool at the house they are living in now in his statutory declaration. From this sworn evidence it is impossible to conclude that this is an unrestrained whim with no sense of reasonableness. It is in the words of the judge in *Emin* one of the “reasonable aspirations of a particular owner .. which is sensibly related to his enjoyment of the dwelling.” It is accordingly incidental to the dwellinghouse as such.
- 3.4 The Council’s delegated report really only complains about the size of the pool hall and the fact it has some space around it and some clearly related facilities such as changing rooms sauna and jacuzzi. It also seeks to rely on various appeal decisions none of which relate to a pool.
- 3.5 In terms of size this clearly cannot be the only factor being considered because this would be a legal error as held in *Emin*. The Council’s case makes or comes very close to making this error. However insofar as size is relevant the following are the important comparisons to make.

- 3.6 The curtilage of the original dwellinghouse is 3,139sqm ² and the total curtilage less the original dwellinghouse is 2,853sqm. The PD criteria in Class E 1(b) provides that the area to be covered must not exceed 50% of the curtilage excluding the original dwellinghouse. This Pool Hall would cover 194sqm. This is 6.7% of the total curtilage less the original dwellinghouse which is much less than the 50% allowed. The 50% figure would be 1,426sqm and this is only 194sqm.
- 3.7 In terms of GIA it is clearly very subordinate to the main house. The GIA of the main house is 1112 sqm and the GIA of the swimming pool hall is 164sqm.
- 3.8 The Council have sought to rely on various appeal decisions in their officer report. However, it is difficult to see that any of those appeal decisions relate to:-
- i) A swimming pool.
 - ii) A case where the curtilage less the original dwellinghouse is of anything like the same order as this house which is 2,853 sqm.
 - iii) A case where the owner has given sworn evidence that sets out how the use is related to his use of the dwelling.
- 3.9 It is also clearly not a comprehensive search of appeal decisions; the Council have only relied on decisions that go one way.
- 3.10 Of far more relevance is the case that appears in the Statement of Case by the Appellant³ from Porters Cross which is specifically for a pool building of 200sqm. That was in the context of a house with a floor area of 300sqm. The Inspector there concluded that the pool house was

² See page 3.8 of PD compliance document.

³ See Appendix 4

subordinate to the house and was incidental to the use of the dwellinghouse. The critical paragraphs are as follows.

6. The single storey pool building in this case would have a floor area of about 200 sq.m.⁷ and would be sited a short distance from the house within the garden. The pool itself would have a maximum length of about 12m (to the semi-circular end) and a width of about 4.5m. There would be 2 changing rooms and a plant room at the northern end.
9. I do not have any survey information or large scale plans of the existing house and it is therefore not possible reach a definitive conclusion on the floor area. However it appears that the footprint of the house as it stands is about 235 sq.m.⁹ It is then necessary to add the first floor area (i.e. the second storey of the house). This appears to be about 65 sq.m. So as a rough estimate I consider the floor area to be about 300 sq.m. – and not 413.26 as suggested by the agent. Comparing this figure with that of the pool building, I calculate that the pool building would have a floor area about 67% of the existing dwelling. This compares with a figure of about 51% advanced for the appellant. Whichever of these figures are taken, it is clear that the floor area of the pool building would remain subordinate to the house. I have also taken into consideration the size of residential curtilage which is substantial. I am therefore satisfied that the size of the building and its use would be within the bounds of objective reasonableness when considering whether it is incidental.
11. Bringing these points together, as a matter of fact and degree, I find that the proposed pool building would satisfy the test of being required for a purpose incidental to the enjoyment of the dwellinghouse as such. Accordingly it would be permitted development by virtue of the rights conveyed by Class E of Part 1 of Schedule 2 of the GPDO. For the reasons given above I conclude that the Council's refusal to grant a LDC in respect of the swimming pool building was not well-founded and that the appeal should succeed. I will exercise the powers transferred to me under section 195(2) of the 1990 Act as amended.

3.11 The Savills Statement of Case attaches numerous other appeal decisions where Inspectors have reached a consistent judgment that pool buildings are incidental to the use of dwellinghouses as such.

i) The decision at Thorndon Cottage of Inspector Clive Whitehouse BA(Hons) MCD MRTPI was that a building of 30m by 10.5 m which is some 315 sqm was incidental. The Inspector said:

8. *A building to house a swimming pool would clearly be "incidental", as indicated in the wording of paragraph E(a) of Class E. The proposed pool in this case would not be unusually large for domestic family use and I consider that that element of the building would be permitted development.*
9. *The proposed gym and sauna would also in my view be for a purpose incidental to the enjoyment of the dwellinghouse as such and would not be excessively large.*

- ii) Appendix 3 is the decision at 30 Linksway. That was a case where a building for a swimming pool steam room leisure room shower and toilet with a total footprint of 144sq m was found to be incidental. In that case it occupied 10% of the net area of the curtilage which is considerably more than in this case as set out above.
- iii) Appendix 5 is the decision at 25 Cornmoor Road. In that case the building housing the pool was larger than in this case being 10 metres by 20 metres. That was in the context of a house that was considerably smaller. The building in that case was larger than the dwellinghouse. The Inspector treated the 10% of the curtilage as a small figure. He said it was “ a small size in comparison with the size of the residential plot on which it would be located”. [see para 11 of Decision letter] Here at 14 Greenaway the Pool House is smaller the house is larger, and the curtilage is considerably larger. The conclusion of the Inspector at 25 Cornmoor Road was that:
“The proposed building is reasonably required for a purpose incidental to the enjoyment of the dwellinghouse as such”⁴

3.12 As a matter of law and judgment the same approach should be followed here of allowing the appeal against the refusal to grant an LDC for the Pool Hall building. This is entirely consistent with the advice of Morag Ellis KC of 25 July 2023 who concluded that all of the LDC applications would fall within Class E and are lawful.

⁴ See paragraph 11.

4 TWO SINGLE STOREY OUTBUILDINGS IN REAR GARDEN (POOL FILTRATION AND IRRIGATION STORES)

- 4.1 The requirement for these buildings has been set out in the detailed statement of case. The pool filtration element of the building is required for the proper functioning of the pool. The garden store element which is the larger area of this building is akin to a garden shed. The proposed irrigation store replaces a previous shed and will contain pumps related the house's ground source heat pump installation.
- 4.2 It is quite clear from this material that these are incidental to the use of the dwelling as such. They do not in any way involve primary residential use. They support the clearly incidental pool and assist with the keeping of the garden. They cannot possibly be described as a whim of the owner but are instead reasonable aspirations sensibly related to residential use.
- 4.3 The Council in the delegated report accepts that the size of this building in comparison with the dwellinghouse is clearly subordinate. The delegated report says that:
- Considering the physical size of an outbuilding in comparison to the dwellinghouse (286 square metres) it would clearly be subordinate structure of a size which if used for another purpose could be considered as incidental to the enjoyment of dwellinghouse.*
- 4.4 Insofar as these buildings are used for irrigation and maintenance of the garden and storing of garden equipment the council accordingly do not object. The Council's objection only seems to allege that it is not subordinate in relation to its role for filtration of the swimming pool. For the reasons set out above the pool is clearly an incidental use and is of a size in this context of this large house and large curtilage which is clearly subordinate. These buildings taken together are only 41sqm by comparison with the revised curtilage being 2,853 sqm.
- 4.5 Accordingly, these two very small buildings are incidental to the use of a dwellinghouse as such and the appeal under section 195 should be

allowed. This is entirely consistent with the advice of Morag Ellis KC of 25 July 2023 who concluded that all the LDC applications would fall within Class E and are lawful.

5 THE SINGLE STOREY OUTBUILDING(GYMNASIUM)

5.1 Having a gym in the garden is a typical use that supports residential use. The Council unsurprisingly do not appear to say otherwise in the delegated report. In fact, in two of the appeal decisions provided with the Statement of case Inspectors have found that gym use is incidental.

i) Appendix 2 Thorndon Cottage the Inspector said.

9. *The proposed gym and sauna would also in my view be for a purpose incidental to the enjoyment of the dwellinghouse as such and would not be excessively large.*

ii) In Appendix 6 at paragraph 8 the Inspector said as follows.

8. *Similarly, the provision of domestic gym/studio and sauna facilities within the curtilage of a dwelling is not unusual in terms of modern lifestyles and the space identified for these uses appears reasonable*

5.2 The owner has explained in his statutory declaration at paragraphs 11 and 12 how he and his family propose to use this building for the hobbies of his family

[REDACTED]

This is also sensible because of the impracticability of regularly moving free weights and cardio machines.

5.3 From this sworn evidence it is impossible to conclude that this is an unrestrained whim with no sense of reasonableness. It is in the words of the judge in *Emin* one of the: “reasonable aspirations of a particular owner .. which is sensibly related to his enjoyment of the dwelling.” It is accordingly incidental to the dwellinghouse as such.

5.4 The size of this building in the context reinforces that it is subordinate and incidental to the residential use.

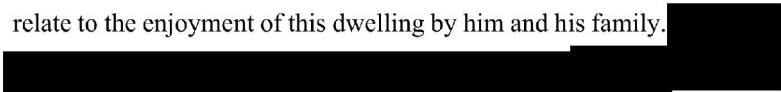
i) The size of this building is 77sqm by comparison with a revised curtilage of 2853 sqm. [50% of revised curtilage ie the maximum for PD is 1426sq m]

ii) The Gross internal area of the gym is 64sqm by comparison with the GIA of the dwellinghouse as proposed which is 1112 square metres.

5.5 Thus, the nature of the use being a gym, the explanation of the use by the owner and the scale all point to this being incidental to the use as a dwellinghouse as such and so the decision of the council is not well founded and the appeal should be allowed. This is entirely consistent with the advice of Morag Ellis KC of 25 July 2023 who conclude that all of the LDC applications would fall within Class E and are lawful.

6 SINGLE OUTBUILDING FOR GAMES HALL AND GALLERY.

6.1 The owner has explained in his sworn evidence at paragraph 13-19 how this building will be used for reasonable aspirations which sensibly relate to the enjoyment of this dwelling by him and his family.

 These are clearly perfectly usual hobbies and in the words of the judge in Emin sensibly relate to his enjoyment of his dwelling. The Inspector when dealing with an appeal at 12 Gladsdale Drive⁵ said the following.

“Garages and games room are capable of being a type of use which is incidental to a dwelling house.”⁶

⁵ See appendix 7 to Statement of Case.

⁶ See §6 of Decision letter.

- 6.2 The size of this building in context reinforces that it is incidental to the residential use.
- i) The ground area size of this building is 185sqm. This is by comparison with 50% of the revised curtilage [i.e. the PD tolerance amount] being 1,426sq m at this site.
 - ii) The GIA of this building is 160sqm by comparison with the GIA of the dwellinghouse of 1,112 sqm.
- 6.3 Accordingly, the nature of the use and the size of the building all indicate that these uses are within Class E and accordingly the appeal should be allowed. This is entirely consistent with the advice of Morag Ellis KC of 25 July 2023 who concluded that all of the LDC applications would fall within Class E and are lawful.

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