**IN THE MATTER OF SITE AT:**

**WELL END LODGE, WELL END ROAD, BOREHAMWOOD**

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**COUNSEL NOTE**

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## Introduction

1. In this I have been asked to comment on the site at Well End Lodge, in relation to a Permitted Development ("PD") application. I have been given the benefit of a recent refusal in relation to this matter dated **24 February 2023.** An officer's delegated report was attached to the decision notice, concluding,

   *"Overall, by virtue of the scale of the outbuildings comparable to the size of the existing property and the intensification of their use, cumulatively, it is considered the proposal would result in an unbalanced relationship between the main dwellinghouse and the proposed outbuildings and would not be incidental to the enjoyment of the main dwellinghouse."*

2. The proposed development was pursuant to a Class E (a) Part 1, Schedule 2 of the TCPA GPDO 2015. The decision was to refuse to grant a certificate. The application was for the construction of 3x outbuildings ancillary to the main dwelling, to include pool building, home gym and office and garden store.

3. I have been asked to reflect on the legal principles, and their application, by the Council ahead of a new application.

4. To this end, I first turn to the principles. Much of what follows will be mostly familiar, so forgive any unnecessary repetition.

**Legal Principles**

5. **Class E** authorises the provision, within the curtilage of a dwelling house, of buildings incidental to the enjoyment of the dwelling house. The purpose must be incidental to the primary part of the house, rather than new buildings intended to be used as the primary part itself. Layout and design will therefore be important factors, and the purpose for which it is being required to be judged as a matter of 'fact and degree'.[1]

6. The central case relating to this area is that of *Emin v Secretary of State for the Environment* [1987] JPL 144. I have been specifically asked to reflect on it. The facts of the case concerned an appeal against a determination made under Section 53 of the TCPA 1971[2] relating to the erection of two buildings to provide facilities for archery, billiards and pottery for the benefit of an existing dwelling house. The High Court found that the Inspector was wrong in concluding that archery could **not** be a purpose *incidental* to the enjoyment of a dwelling house.

7. Similarly, and this is important for the present case, **the Inspector was wrong** to place emphasis on the **size of the new buildings** which the Inspector felt would provide more accommodation for *secondary* activities than the dwelling house provided for *primary* activities.

8. In short, the court found that the size of new buildings as compared to the existing dwelling house **was irrelevant** and, while size was relevant to whether the use was **incidental**, *all factors* must be considered when applying the test. This case underscored the principle that it is **wrong** to understate other factors in favour of size. The use carried on new buildings must be connected with the running of the dwelling house, or with the leisure activities of those living in it, rather than a use as ancillary living accommodation.[3]

[1] *Cawley v Secretary of State for the Environment and Brentwood District Council [1991] JPL 548*
[2] The equivalent to Section 145 of the TCPA 1990
[3] In *JM Hendriks v Secretary of State for the Environment [1990] JPL 191*, the Court held, allowing the appeal, that where a structure was erected as a single building, but there were identifiable component parts to the structure, **each part could as a matter of law be treated** as separate buildings, and parts could fall within different classes of use permitted by the then GDO 1977

9. Let me also be clear about what we mean by *'incidental'.* It is obvious (or at least should be) that something *incidental* cannot itself be a dwellinghouse. It means, simply, something occurring together with something else and being subordinate to it.[4] The particular wording of a '*purpose incidental to the enjoyment of the dwellinghouse'* is quite a broad concept. We know that recreational uses, including swimming pools and game rooms, fall within the acceptable categories.

10. There is also another concept worth considering; namely that of '*objective reasonableness'*[5]. I note the Council in this case has referred to it. The test here being whether the buildings are reasonably required for a purpose *incidental* to the enjoyment of the particular dwellinghouse. There have been extreme cases; i.e. the Court of Appeal held that no one could regard it as reasonable to keep a large wooden replica of a Spitfire in the curtilage of a dwellinghouse as something *incidental* to the enjoyment of the dwellinghouse.[6]

11. In another case, a clear distinction has been made between Class E and a building clearly designed as a primary residential accommodation, the sort which is clearly intended to be covered by Class A.[7]

12. Every case re-iterates the point about fact and degree.

13. There are other points considered in case law which is beyond the scope of this note; i.e. limitations as to height, dwellinghouses falling within a World Heritage Site, any potential switch from 'incidental' residential use to primary residential use, and any risk of a commercial use being introduced etc.

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[4] **In an appeal decision reported *[1987] J.P.L. 144*** – *"Accordingly, a purpose which is incidental to the enjoyment of a dwellinghouse is distinct from activities which constitute actually living in a dwellinghouse. Incidental purposes are regarded as being those connected with the running of a dwelling-house or with the domestic or leisure activities of the persons living in it, rather than with the use as ordinary living accommodation."*

[5] See *Wallington v Secretary of State for Wales (1990) 62 P.&C.R. 150; Holding v First Secretary of State [2004] J.P.L. 1405*

[6] *Croydon LBC v Gladden [1994] 1 P.L.R. 30*

[7] *Rambridge v Secretary of State for the Environment (1997) 74 P. & C.R 126* – involving the construction of what was described by the Court as a *'substantial building at the end of the garden for use as a residential annexe…'*

14. Turning now to the application of these principles to the facts.

**Application**

15. Turning to the facts of the case. As far as I am aware, the issue of whether what is being proposed as outbuildings is within the curtilage of the dwelling house is not an issue. So I need not consider this at this stage. I have come to the following conclusions.

16. **First**, the Council's clear fixation with size is wrong, and does not accord with the proper and logical interpretation of *Emin.* It is no doubt a consideration but this must not be overstated. Whilst the Council's previous officer's delegated report mentions that size itself could not be '*determinative or conclusive',* their whole approach would appear to take the opposite approach.

17. **Second,** the Council does not specify in any way what they think going *'beyond a purpose incidental to the enjoyment of the dwelling'* means. Do they think that these outbuildings shall constitute new dwellinghouses in of themselves? If they do, they should state so explicitly.

18. **Third,** in terms of any particular sizes relating to the buildings proposed, the Council have not (and rightly should not) be suggesting particular metric/sizes. To my mind, to ask for the reduction of the sizes of the buildings proposed would be nothing more than arbitrary response to the Council's unspecified and baffling ideas.

19. Nothing in the officer's delegated report helps to clarify any of this. To that end, how are the architects meant to appropriately respond?

20. **Fourth,** if the Council is not suggesting that an element of a commercial use is being introduced (which I do not understand their position to be so) then it seems to me a pool house, a home office/gym and garden store, whatever their size, can reasonably (and objectively) be said to be *incidental* to the dwellinghouse.

21. **Finally,** I have also seen the application submitted on behalf of the applicant by hgh consulting. To my mind, it is clear and makes a cogent case for consenting this proposal. I agree with the analysis contained therein and have nothing further to add. I would commend it to the Council.

**Conclusion**

22. I trust that the above is clear as to the applicable legal principles to this case. The applications statement clearly set out the merits of the proposal and addresses all the concerns raised by the Council previously. I have also seen the drawings of the existing and proposed scheme by Hub Architects and am clear that they seek to meet the relevant requirements.

23. I see no good reason why this proposal should not be granted consent forthwith. If I could be of any further assistance please do not hesitate to get in touch with me or the clerks.

**HASHI MOHAMED**

**Barrister**

Landmark Chambers

15 August 2023