



Appeal Decisions

Site visit made on 8 September 2020

by Hilary Orr MSc, MRTPI

an Inspector appointed by the Secretary of State

Decision date: 29 September 2020

Appeal A Ref: APP/U1430/X/20/3254035

Silverhill Pump House Business Unit, Bodiam Road, Silverhill, Hurst Green TN19 7QD

- 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 Ms E Beckford against the decision of Rother District Council.
- The application Ref RR/2020/226/0, dated 07 February 2020, was refused by notice dated 1 May 2020.
- 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 for a Lawful development certificate for a proposed extension of an existing B8 Use Class business unit.

Summary decision: The appeal is allowed and a certificate of lawful use or development is issued, in the terms set out below in the Formal Decision.

Appeal B Ref: APP/U1430/X/20/3254036

Silverhill Pump House Business Unit, Bodiam Road, Silverhill, Hurst Green TN19 7QD

- 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 Ms E Beckford against the decision of Rother District Council.
- The application Ref RR/2020/225/0, dated 7 February 2020, was refused by notice dated 1 May 2020.
- 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 proposed provision of an area of external, permeable hard standing totalling 310 sq.m.

Summary decision: The appeal is dismissed.

Decision

Appeal A

1. The appeal is allowed and attached to this decision is a certificate of lawful use or development describing the extent of the proposed operation which is found to be lawful.

Appeal B

2. The appeal is dismissed.

Application for costs

3. An application for costs was made by Ms E Beckford against Rother District Council for both appeals. These applications will be the subject of a separate Decision.

Procedural matters

4. Two applications were submitted by the appellant for this site and are both subject to separate appeals. I have considered each of these separately and referred to them as Appeal A and Appeal B respectively.
5. The description of the proposal on the application form for Appeal A was 'The proposed addition to the existing Pump House Business Unit as a lawful, existing B8 use have been assessed in relation to the Permitted Development Rights pertaining to Class H (Extensions, Etc. of Industrial and Warehouse) of Schedule 2, Part 7 of the General Permitted Development Order. The Certificate application seeks to establish the proposed lawful development of an extension to the existing Pump House Business Unit totalling an additional 6.72 sq.m (Gross Internal Area). The proposed addition to the existing building will be the same height as the existing building and would be constructed in the same materials to match the existing. The enclosed plans, drawings and covering assessment letter provide more details of the development to be undertaken.'
6. Similarly, the description for Appeal B was 'The proposed addition to the existing Pump House Business Unit as a lawful, existing B8 use have been assessed in relation to the Permitted Development Rights pertaining to Class J (Hard Surfaces for Industrial and Warehouse Premises) of Schedule 2, Part 7 of the General Permitted Development Order. The Certificate application seeks to establish the proposed lawful development of an area of external hard standing for the existing Pump House Business Unit. The enclose plans, drawings and covering assessment letter provide more details of the development to be undertaken.'
7. These descriptions both include wording that is not a description of development. They were both amended on the appellant's appeal forms to clarify the development sought. As the new descriptions better describe the proposals and generally accord with those used by the Council, I have considered the appeals on this basis. The above headings for both appeals have been amended to reflect this.

Main Issue for Appeal A and Appeal B

8. The main issue for both appeals is whether the Council's decisions to refuse to grant the Certificates of Lawful Development (LDC) were well founded. It is important to note that in LDC applications the burden of proof is on the appellant.

Reasons

9. In a LDC appeal the onus of proof is on the appellant to show that, on the balance of probability, the development would have been lawful, at the time of the application. Article 3(1) of the Town and Country Planning (General Permitted Development) Order (the GPDO), grants planning permission for those classes of development described as 'permitted development' (PD) in

Schedule 2.

Appeal A

10. The site comprises a triangular piece of land to the north of Mill Cottage being accessed along an existing track from the highway. It is some 0.38 hectares in area and mainly comprises roughly cleared scrub, with some established trees and shrubs to the boundaries. The building is a circular structure lying close to the main access point. Although I did not have access inside the building, it is of single storey, but appeared to also extend below the ground. At the time of my visit there was an area of shingle surfacing surrounding and immediately adjacent to the building. There were a number of vans generally parked within this area, although the site did not have the appearance of being actively occupied. The lawful use of the site is accepted by the parties as B8 use.
11. The proposal sought to extend this building as an existing B8 storage unit. It is the appellant's case that the proposal accords with Schedule 2, Part 7, Class H of the GDPO, which permits the erection, the extension or the alteration of an industrial building or warehouse. It goes on to specify the circumstances where development is not permitted.
12. The principal points at issue are: whether the proposed extension would be used for the purpose of the undertaking concerned, or the provision of employee facilities ancillary to the undertaking; and whether the excavation required for the proposal would in itself require planning, falling outside the scope of this part of the GDPO.
13. H.2. sets out that development is permitted subject to a number of conditions, including (b). This makes it clear that any extension permitted under Class H can only be used for the purposes of the undertaking. To my mind, this condition should be treated in the same way as a condition imposed on a planning permission. Accordingly, it controls the future use of any extension, but it falls short of requiring that the use of the building must be ongoing for the provision of this class to apply. I therefore find that the development complies with condition (b).
14. Turning to the excavation required to carry out the proposal. The below ground nature of the proposal will require a significant amount of excavation. Part 7, Class H sets out development that can be carried out without the need for express planning permission. The definition of development is set out in s55 as, 'The carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change of use of any buildings or other land'. It is clear from this and the wording of the GDPO that development as envisaged in Class H, does not preclude underground works.
15. It is acknowledged that in common with most new buildings or extensions, this proposal will result in some degree of excavation and the extent of excavation works will vary from site to site. However, I have no evidence before me that the excavation would go further than to facilitate the proposal or result in a separate operation for which planning permission is required. Accordingly, I find that the excavation of materials that are necessary, and that form an integral part of otherwise permitted works, do not require planning permission in their own right. I have had regard to the other conditions and limitations attached to Class H and I am satisfied that, on the balance of probability, given

the modest scale of the proposal and its proximity to the building, it would be sited on land that forms part of the curtilage of the building.

16. Overall, for the above reasons I find that the proposal for a proposed extension of an existing B8 Use Class business unit and the associated excavation complies with Schedule 2 Part 7, Class H of the GDPO. The decision of the Council was therefore not well founded and a Certificate should be granted.

Appeal B

17. The application for Appeal B, sought a certificate that an area of external permeable hard standing would be lawful by virtue of Schedule 2 Part 7 Class J of the GDPO (hard surfaces for industrial and warehouse premises). This class of the GDPO permits development consisting of: (a) the provision of a hard surface within the curtilage of an industrial building or warehouse to be used for the purpose of the undertaking concerned; or (b) the replacement in whole or in part of such a surface.
18. There are two areas of disagreement namely: whether the proposed hard standing would be for the purpose of the undertaking concerned; and secondly whether it would be sited within the curtilage of the building. The appellant largely relies on the 2019 appeal decision (APP/U1430/W/18/3218644).
19. With regard to the first matter, the restrictive wording of Class J to the use of any hard surface to a purpose of the undertaking concerned, differs from Class H as it is not a condition. It is agreed that the building has in the past been used for B8 purposes and this remains its lawful use. It is also agreed that this use is currently not taking place. Nonetheless, I have no evidence before me, to suggest that the B8 use has been abandoned or otherwise lost for any reason. Moreover, there is no evidence that it the building will not be used for its lawful use in the future, as indicated in the appellant's evidence. I am mindful of the decision in *Challenge Fencing Ltd v SSHCLG* [2019] EWHC 553. However, the facts differ from this site, as in that case where the use of the site was unclear. Furthermore, I note that there was no definitive ruling on the Inspectors conclusion regarding the requirement for an existing operational business. Consequently, I find that the proposal complies with Class J in this regard.
20. Turning to the question of the curtilage. 'Curtilage' is a legal concept and not a use of land. The term generally refers to land which serves the purpose of a building in some reasonably necessary or useful manner; it has been held that the tests of physical layout, ownership (past and present) and use (past and present) are relevant considerations. The question is whether, as a matter of fact and degree, the land forms part and parcel of, or has an intimate association with the building to which it is attached.
21. The appellant has drawn my attention to the previous Inspectors decision dated 9 September 2019. I note that in his decision he refers to the previously developed nature of the site. It is the appellant's view that, in the context of that appeal, the Inspector must therefore have considered that the whole application site formed part of the curtilage of the building. I acknowledge the importance of consistency in decision making. However, this was an appeal under s78, and as such a formal determination as to the existence, or extent, of any lawful curtilage to the building was not a matter before him. Consequently, I do not consider that this reference to previously developed

land, in the absence of the above tests being evaluated, in itself amounts to a legal determination regarding the curtilage. I shall therefore consider this aspect of the appeal on the evidence before me.

22. The appellant has provided me with little evidence regarding the past and present ownership of the land, or evidence to demonstrate how the building and wider site have been used historically. At the time of my site visit, save for the limited area of informal shingle sited around the building, the site had the appearance of a small parcel of cleared rough grass, with shrubs and trees and a stand-alone building. Whilst there were no internal boundaries visible, there was no evidence that the wider site had, either a recent, or past functional relationship to the pumping station building. Indeed, I have no evidence that the pumping station would have required the wider area of land to serve the building in a reasonably necessary and useful manner, and if it did, how it was so used.
23. For the above reasons, I find that the appellant's evidence is not sufficient to demonstrate that, on the balance of probabilities, the proposed hard standing would be sited within the curtilage of the building. Accordingly, the proposal does not comply with the limits and conditions of PD, as set out in Schedule 2 Part 7 Class J of the GDPO. The decision of the Council was therefore well founded on this point.
24. Drawing all of the above points together, whilst I find that the hard surface would be used for the purpose of the undertaking concerned, I find that on the evidence before me and on the balance of probability it is not sited within the curtilage of the building for the purposes of applying Class J.

Conclusion

Appeal A

25. For the reasons given above I conclude, on the evidence now available, that the Council's refusal to grant a certificate of lawful use or development in respect of the proposed provision of an area of external, permeable hard standing totalling 310 sq.m. 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.

Appeal B

26. 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 proposed provision of an area of external, permeable hard standing totalling 310 sq.m, 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

Hilary Orr

INSPECTOR



Lawful Development Certificate

TOWN AND COUNTRY PLANNING ACT 1990: SECTION 192
(as amended by Section 10 of the Planning and Compensation Act 1991)

TOWN AND COUNTRY PLANNING (DEVELOPMENT MANAGEMENT PROCEDURE) (ENGLAND)
ORDER 2015: ARTICLE 39

IT IS HEREBY CERTIFIED that on 7 February 2020 the operations described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged in red on the plan attached to this certificate, would have been lawful within the meaning of section 192(2) of the Town and Country Planning Act 1990 (as amended), for the following reason:

The proposed extension to the existing B8 use class business unit would be permitted development under Schedule 2, Part 7, Class H of the GDPO.

Signed

Hilary Orr

INSPECTOR

Date: 29 September 2020
Reference: APP/U1430/X/20/3254035

First Schedule

A proposed extension of an existing B8 Use Class business unit.

Second Schedule

Land at Silverhill Pump House Business Unit, Bodiam Road, Silverhill, Hurst Green
TN19 7QD

NOTES

This certificate is issued solely for the purpose of Section 192 of the Town and Country Planning Act 1990 (as amended).

This certificate applies only to the extent of the operations described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any operation which is materially different from that described, or which relates to any other land, may result in a breach of planning control which is liable to enforcement action by the local planning authority.



Plan

This is the plan referred to in the Lawful Development Certificate dated: 29 September 2020

by Hilary Orr MSc, MRTPI

Land at: Silverhill Pump House Business Unit, Bodiam Road, Silverhill, Hurst Green TN19 7QD

Reference: APP/U1430/X/20/3254035

Scale: Not to scale

Taken from Drawing No: 434 /110b dated Jan 2020.

