



Appeal Decision

Site visit made on 23 January 2024

by Timothy C King BA (Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 23 February 2024

Appeal Ref: APP/V2255/X/23/3318631

Security Gatehouse, Guillat Avenue, Kent Science Park, Sittingbourne, Kent ME9 8AG

- 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 [hereafter referred to as "LDC"].
 - The appeal is made by Jazz Pharmaceuticals (formerly GW Pharma) against the decision of Swale Borough Council.
 - The application Ref 22/504606/LAWPRO, dated 21 September 2022 was refused by notice dated 23 February 2023.
 - 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 described as *'Develop a utilities slab & Recycling area located to the west of Building 750 between Building 750 and Shimmin Road. The area would accommodate building utilities facilities, covered area for storage, relocation of existing silo (currently located at south west corner of Building 750), packaged boiler house, buried services and external storage for empty IBC's.'*
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Decision

1. The appeal is dismissed.

Preliminary Matter

2. The Council has identified that, since the application was submitted, the development proposed has been revised with the deletion of the boiler house from the scheme.

Main Issue

3. The main issue is whether the Council's decision not to issue a LDC was well founded.

Reasons

4. In an appeal under s195 of the Act against the refusal of a LDC the planning merits and/or impacts of the use applied for do not fall to be considered. Instead, the decision is based strictly on the evidential facts and on relevant planning law. The burden of proof is on the appellant, and I shall reach my decision on the various evidence before me.
5. The matter to be decided upon is whether the development, if carried out at the date of the application ie 21 September 2022, would have been lawful. The determination is to be made against the Town and Country Planning (General

Permitted Development) Order 2015, as amended (GPDO) as subsisted at the time of the application.

6. The appeal involves the proposed recycling and utility area use being situated on a vacant piece of land adjacent to Buildings 750 and 720, although it is accepted that there is some vegetation along the boundary with the latter.
7. The Council, in its decision notice, refers to Class H, Part 7, Schedule 2 of the GPDO. This allows for the erection, extension or alteration of an industrial building or warehouse subject to certain provisos; the most relevant here being condition H.2(a) which requires that the development is carried out within the curtilage of an existing industrial building or warehouse.
8. Curtilage is not defined within the GPDO. However, it is not a use of land but an area delineated through its physical association with a building. In a recent judgement, *R Hampshire CC) v Blackbushe Airport Ltd* [2021] EWCA Civ 398, which dates from 2021, it was held that the correct question to consider is whether the land forms part and parcel with the building, and not whether the land together with the building fall within, or comprise, a unit devoted to the same or equivalent function or purpose, nor whether the building forms part and parcel of some unit which includes that land.
9. An earlier case, *Challenge Fencing Ltd v SSHCLG* [2019] EWHC 553, which was endorsed by the Blackbushe judgement, did indeed find the extent of a curtilage would be a matter of fact and degree and confirmed that factors such as physical layout, the ownership, both past and present, and the use or function of the land or buildings, also past and present, are relevant to making the decision. If the land is in ancillary use to the building this will also be relevant, but it is not a legal requirement. The concept of one enclosure is also of relevance. In *Blackbushe* it was noted that, whilst not exhaustive, the guidance in *Challenge Fencing* was helpful in identifying a curtilage.
10. Most recently, in May 2022, the judgement of *Hiley v SoS* [2022] EWHC 1289 (Admin) was reported. This case has been highlighted by the appellant. It concerned a proposal to erect a steel-clad workshop and storage building, plus associated hardstanding and vehicular access, on a site adjoining a business park. The task was to determine whether the proposed development would be within the 'curtilage' of the adjacent business park buildings.
11. The challenge had been brought following an unsuccessful appeal against the Council's decision to refuse to issue a lawful development certificate to confirm, as claimed, that the proposed development would benefit from the allowance under Class H. In dismissing the appeal the Inspector had found that there was a striking difference between the character and appearance of the appeal site and the industrial/warehouse buildings, and he concluded that the site was visually, spatially and physically separate from the business park.
12. The challenge was subsequently upheld by the court, with the judge deciding that the Inspector had misdirected himself, both in considering that a curtilage "is a feature constrained to a small area about a building and that, in order to satisfy the Class H condition, the site and the business park had to form part of a single enclosure. In his reasoning the judge took a similar line to that held in the *Blackbushe* and *Challenge Fencing* cases.

13. Turning to the current appeal I have had regard to the correct approach and criteria set out above as to identifying what constitutes curtilage. Given the relevant factors, and the physical arrangement with Jazz Pharmaceuticals – who, as lessee, would operate the proposed recycling and utilities plant – occupying both said buildings, I am satisfied that the piece of land at issue can be considered as curtilage thereto.
14. However, neither building would be extended or altered by the proposal. A portal-framed building, labelled a 'Recycling Management Skip Shed' and a water tank structure would be separate buildings erected as part of the scheme. Also, stationed throughout the western half of the site would be a considerable number of drums and skips. In the circumstances I am of the view that the proposed development would, in its entirety, represent a mixture of development potentially permitted by way of Classes H and I; the latter being concerned with developments relating to an industrial process.
15. Class I allows for development carried out on industrial land for the purposes of an industrial process consisting of, amongst other things, the installation of additional or replacement plant or machinery. However, Class I has a specific limitation which stipulates that development is not permitted if it would materially affect the external appearance of the premises of the undertaking concerned.
16. Taking the premises as comprising both the buildings and its associated land I consider that the extent of the development proposed and its various components would materially effect its external appearance, particularly when viewed from Shimmin Road off which the site's exit gates reached via a proposed vehicular egress roadway, would be positioned. As such, the proposal fails to satisfy the requirements of Class I.
17. I must therefore disagree with the Council's first ground of refusal given that, contrary to the Council's view, I have identified the appeal site as curtilage. To this extent the Council's decision was not well founded. Nonetheless, due to the relevance of Class I, the legislation indicates that the proposal would not represent permitted development.
18. Finally, with regard to the second ground of refusal, I must agree with the Council that, as Shimmin Road is used by vehicular traffic – irrespective of whether it is public highway – boundary fencing is subject to the limitations in Class A, Part 2, Schedule 2 of the GPDO. Accordingly, any means of enclosure erected adjacent to Shimmin Road should not exceed 1 metre in height otherwise the benefit of planning permission is required.
19. For the reasons given above I conclude that, on the evidence available, the appeal should not succeed. Accordingly, I shall exercise the powers transferred to me under section 195(3) of the 1990 Act, as amended.

Timothy C King

INSPECTOR