Neutral Citation Number: [2022] EWHC 1289 (Admin)

Case No: CO/2124/2021

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT
BIRMINGHAM DISTRICT REGISTRY

Birmingham Civil and Family Justice Centre
33 Bull St, Birmingham B4 6DS

Date: 27/05/2022

Before :

MR JUSTICE JULIAN KNOWLES

- -

Between :

HERBERT HILEY	**Appellant**
- and -	
(1) THE SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES	
(2) EAST LINDSEY DISTRICT COUNCIL	**Respondents**

- -
- -

Stephen Whale (instructed by **Public Access**) for the **Appellant**
Nina Pindham (instructed by **Government Legal Department**) for the **First Respondent**
The Second Respondent did not appear and was not represented

Hearing dates: **17 May 2022**

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Judgment Approved by the court for handing down

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Mr Justice Julian Knowles:

Introduction

1. This is a statutory appeal under s 288 of the Town and Country Planning Act 1990 (the 1990 Act) with the permission of HHJ Worster sitting as a High Court judge dated 11 January 2022 following an oral renewal hearing.

2. The appeal is against the decision of the Inspector (Alexander Walker, MPlan, MRTPI) appointed by the First Respondent, dated 10 May 2021, following an oral hearing, dismissing the Appellant's appeal under s 195 of the 1990 Act against the Second Respondent's refusal to grant a certificate of lawfulness concerning the proposed construction of a steel-clad workshop/storage building with associated hardstanding (the Development) in respect of an existing recreational vehicle servicing and remodelling facility on land at Station Business Park, Main Road, Stickney, Lincolnshire, PE22 8EE ('the site') (appeal reference APP/D2510/X/20/3253383) (the Decision).

3. The Appellant had argued the development constituted permitted development under Schedule 2, Part 7, Classes H and J of the Town and Country Planning (General Permitted Development) (England) Order 2015 (SI 2015/596) (the GPDO). It was common ground before the Inspector that the Development satisfies all of the conditions set out in Sch 2, Part 7, Classes H and J of the GDPO as amended, with the exception of H.2.(a) and J.(a). These provide:

> "*Class H – extensions etc of industrial and warehouse*
>
> H.2 Development is permitted by Class H subject to the following conditions -
>
> (a) the development is within the curtilage of an existing industrial building or warehouse
> …
>
> *Class J – hard surfaces for industrial and warehouse premises*
>
> Permitted development
>
> J. 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; …"

4. The matter before the Inspector turned on whether or not the green field and pond predominately bounded by a hedge on which the Development was proposed to be built formed part of the curtilage of the adjacent industrial buildings. The Inspector held that they did not, and it is against that finding that the appeal is brought. The issue is whether the Inspector erred in law when he determined that the proposed Development would not be built on land within the curtilage of the existing industrial buildings.

The factual background, existing buildings and land adjacent

5. As its name suggests, Station Business Park is a business park. It is situated on the northern edge of Stickney, a village in Lincolnshire, within the area of East Lindsey District Council (the Council) as local planning authority. The Appellant owns it. There is a range of industrial/warehouse buildings on the business park, together with hardstanding areas for parking and open storage.

6. There is a field immediately to the north of the business park, also owned by the Appellant. It includes a large pond and interceptor channel used for surface water drainage from the business park industrial/warehouse buildings. Drainage pipes connect the business park buildings to the pond and interceptor channel. The field is bounded by trees and hedging, save that there is 20m+ gap in the hedge on the field's southern boundary (affording access between the business park and the field) plus a gap in the hedge on the field's northern boundary.

7. By way of an application dated 30 September 2019, the Appellant applied to the Council under s 192 of the 1990 Act for a certificate to certify that the erection in the field of a workshop and storage building, plus associated hardstanding and vehicular access, would be lawful as permitted development. His case was the proposed development satisfied all the conditions in Sch 2, Part 7, Classes H and J to the GDPO, as amended.

8. On 10 December 2019, the Council refused the application. An appeal was made to the Secretary of State under s 195 of the 1990 Act, and Inspector Walker was appointed to determine it.

9. On 12 January 2021, the hearing before the Inspector took place. The Appellant spoke in support of the appeal. On 16 April 2021, the Inspector carried out a site visit. He described the existing buildings and the adjacent land on which the proposed Development would be built (ie, the appeal site) as follows:

> "8. The appeal site comprises a parcel of land that includes a large pond and interceptor channel that is used for surface water drainage from the adjacent industrial/warehouse buildings as a sustainable urban drainage system. With the exception of the pond and interceptor channel, the land is in a natural state and free from built-form. The land is enclosed by hedging and trees on the north, east and west boundaries. The southern boundary comprises a hedge and fencing, on the opposite side of which runs a public footpath parallel to the site. On the southern side of the footpath is another hedge within which is a double gate allowing access from the adjacent car park/open storage hardstanding area.
>
> 9. The industrial/warehouse buildings and surrounding parking/open storage hardstanding area to the south and south west of the parcel of land that is the subject of this appeal has a definitive commercial appearance. This is in marked contrast to the natural, verdant appearance of the

> appeal site, which, visually and spatially, is more closely associated with the surrounding open land to the north and west. Given this striking difference in character and appearance between the appeal site and the adjacent industrial/warehouse buildings and surrounding parking/open storage hardstanding area, and the physical barrier between the two sites, in the form of the hedgerows and gated access, I find that the subject land is physically separate from the main industrial/warehouse use."

10. On 10 May 2021, he issued his Decision. At [4] the Inspector described the curtilage issue as being 'the crux of the matter'. He dismissed the appeal on the basis that he was, 'not satisfied that the proposed development would have been built on land comprising the curtilage of the industrial/warehouse buildings …' (at [20]).

Legal principles

Appeal framework

11. Section 288(1)(4A) of the 1990 Act provide:

> "(1) If any person -
>
> (a) is aggrieved by any order to which this section applies and wishes to question the validity of that order on the grounds -
>
> (i) that the order is not within the powers of this Act, or
>
> (ii) that any of the relevant requirements have not been complied with in relation to that order; or
>
> (b) is aggrieved by any action on the part of the Secretary of State [or the Welsh Ministers] to which this section applies and wishes to question the validity of that action on the grounds -
>
> (i) that the action is not within the powers of this Act, or
>
> (ii) that any of the relevant requirements have not been complied with in relation to that action,
>
> he may make an application to the High Court under this section.
>
> …
>
> (4A) An application under this section may not be made without the leave of the High Court."

12. The appeal to the Inspector was brought under s 195 of the 1990 Act and so, by virtue of s 284(3)(g), s 288 applies and an appeal may be brought in the High Court, with leave.

13. The proper approach to appeals under s 288 was set out by Lindblom J (as he then was) in *Bloor Homes East Midlands Limited v Secretary of State for Communities and Local Government* [2017] PTSR 1283, [19]:

> "(1) Decisions of the Secretary of State and his inspectors in appeals against the refusal of planning permission are to be construed in a reasonably flexible way. Decision letters are written principally for parties who know what the issues between them are and what evidence and argument has been deployed on those issues. An inspector does not need to "rehearse every argument relating to each matter in every paragraph" (see the judgment of Forbes J. in *Seddon Properties v Secretary of State for the Environment* (1981) 42 P. & C.R. 26, at p.28).
>
> (2) The reasons for an appeal decision must be intelligible and adequate, enabling one to understand why the appeal was decided as it was and what conclusions were reached on the "principal important controversial issues". An inspector's reasoning must not give rise to a substantial doubt as to whether he went wrong in law, for example by misunderstanding a relevant policy or by failing to reach a rational decision on relevant grounds. But the reasons need refer only to the main issues in the dispute, not to every material consideration (see the speech of Lord Brown of Eaton-under-Heywood in *South Bucks District Council and another v Porter (No. 2)* [2004] 1 WLR 1953, at p.1964B-G).
>
> (3) The weight to be attached to any material consideration and all matters of planning judgment are within the exclusive jurisdiction of the decision-maker. They are not for the court. A local planning authority determining an application for planning permission is free, "provided that it does not lapse into *Wednesbury* irrationality" to give material considerations "whatever weight [it] thinks fit or no weight at all" (see the speech of Lord Hoffmann in *Tesco Stores Limited v Secretary of State for the Environment* [1995] 1 WLR 759, at p.780F-H). And, essentially for that reason, an application under section 288 of the 1990 Act does not afford an opportunity for a review of the planning merits of an inspector's decision (see the judgment of Sullivan J., as he then was, in *Newsmith v Secretary of State for* [2001] EWHC Admin 74, at paragraph 6).
>
> (4) Planning policies are not statutory or contractual provisions and should not be construed as if they were. The

> proper interpretation of planning policy is ultimately a matter of law for the court. The application of relevant policy is for the decision-maker. But statements of policy are to be interpreted objectively by the court in accordance with the language used and in its proper context. A failure properly to understand and apply relevant policy will constitute a failure to have regard to a material consideration, or will amount to having regard to an immaterial consideration (see the judgment of Lord Reed in *Tesco Stores v Dundee City Council* [2012] PTSR 983, at paragraphs 17 to 22).
>
> (5) When it is suggested that an inspector has failed to grasp a relevant policy one must look at what he thought the important planning issues were and decide whether it appears from the way he dealt with them that he must have misunderstood the policy in question (see the judgment of Hoffmann L.J., as he then was, *South Somerset District Council v The Secretary of State for the Environment* (1993) 66 P. & C.R. 80, at p.83E-H).
>
> (6) Because it is reasonable to assume that national planning policy is familiar to the Secretary of State and his inspectors, the fact that a particular policy is not mentioned in the decision letter does not necessarily mean that it has been ignored (see, for example, the judgment of Lang J. in *Sea Land Power & Energy Limited v Secretary of State for Communities and Local Government* [2012] EWHC 1419 (QB), at paragraph 58).
>
> (7) Consistency in decision-making is important both to developers and local planning authorities, because it serves to maintain public confidence in the operation of the development control system. But it is not a principle of law that like cases must always be decided alike. An inspector must exercise his own judgment on this question, if it arises (see, for example, the judgment of Pill L.J. *Fox Strategic Land and Property Ltd. v Secretary of State for Communities and Local Government* [2013] 1 P. & C.R. 6, at paragraphs 12 to 14, citing the judgment of Mann L.J. in *North Wiltshire District Council v Secretary of State for the Environment* [1992] 65 P. & C.R. 137, at p.145)."

14. Lindblom LJ (as he now is) emphasised the importance of heeding these 'well settled principles' in *Mansell v Tonbridge and Malling Borough Council* [2017] EWCA Civ 1314, [41].

15. In *Challenge Fencing Ltd v Secretary of State for Housing, Communities and Local Government* [2019] EWHC 553 (Admin) which, like the case before me, was a s 288 appeal against an Inspector's decision in respect of curtilage, Lieven J said at [19]:

> "19. The approach that this Court should take to a challenge to a decision letter is extremely well known and set out by the Court of Appeal in *Barwood Strategic Land v East Staffordshire [2017] EWCA Civ 893* at [50] and the Supreme court in *Suffolk Coastal DC v Hopkins Homes 2017 UKSC 37*. The two most important principles relevant here are that the decision letter should be read as a whole, and the Court should not take an overly legalistic approach. Mr Clay sought to persuade me that because this was a challenge to an LDC, specifically on the grounds of the meaning of 'curtilage', a stricter approach should be taken to the Inspector's reasoning and analysis. This was on the basis that the decision did not turn on the type of planning judgment which arose in *Hopkins Homes* or similar types of cases. However, as I have explained above the decision as to the curtilage is one of fact and degree and therefore necessarily involves a judgment by the decision maker. In my view the principles on the Court's approach to decision letters is no different in this case than in any other."

Legal principles relating to curtilage

16. The word 'curtilage' is used in a number of different pieces of legislation to do with land and planning. Mr Whale for the Appellant referred me to *Methuen-Campbell v Walters* [1979] 1 QB 525, in which Buckley LJ said, in a paragraph beginning at p543E-G with the question 'What then is meant by the curtilage of a property ?' that the land must be:

> "… so intimately connected with [the building] as to lead to the conclusion that the former in truth forms part and parcel of the latter."

17. The concept of 'curtilage' was recently considered by the Court of Appeal in *R (Hampshire County Council) v Secretary of State for Environment, Food and Rural Affairs* [2022] QB 103. The case concerned the use of the word in relation to the deregistration of common land in [6] of Sch 2 to the Commons Act 2006. The land in question was situated at Blackbushe Airport in Hampshire. I will refer to this case as *Blackbushe Airport*. In his concurring judgment in that case at [130] Nugee LJ observed that the word 'curtilage' is not one in general everyday usage (at least in most of the UK), and that dictionary definitions of it often beg more questions than they answer.

18. In that decision Andrews LJ said at [61]-[62] of her judgment (with which Nugee and King LLJ agreed):

> "61. Buckley LJ said [in *Methuen-Campbell*] that the word 'premises' must be interpreted in relation to the house in accordance with the definition contained in section 2(3) of the 1967 Act. Having rejected the view of the judge below that the paddock was 'a parcel of the house' merely because it had been both let and occupied with it, he then said this (at pp. 543F-544G):

‘What then is meant by the curtilage of the property? In my judgment it is not sufficient to constitute two pieces of land parts of one and the same curtilage that they should have been conveyed or demised together, for a single conveyance or lease can comprise more than one parcel of land, neither of which need be in any sense an appurtenance of the other or within the curtilage of the other. Nor is it sufficient that they have been occupied together. *Nor is the test whether the enjoyment of one is advantageous or convenient or necessary for the full enjoyment of the other*. A piece of land may fall clearly within the curtilage of a parcel conveyed without its contributing in any significant way to the convenience or value of the rest of the parcel. On the other hand it may be very advantageous or convenient to the owner of one parcel of land also to own an adjoining parcel, although it may be clear from the facts that the two parcels are entirely distinct pieces of property. *In my judgment, for one corporeal hereditament to fall within the curtilage of another, the former must be so intimately associated with the latter as to lead to the conclusion that the former in truth forms part and parcel of the latter.*

There can be very few houses indeed that do not have associated with them at least some few square yards of land, constituting a yard or a basement area or passageway or something of the kind, owned and enjoyed with the house, *which on a reasonable view could only be regarded as part of the messuage,* and such small pieces of land would be held to fall within the curtilage of the messuage. This *may extend to* ancillary buildings, structures or areas such as outhouses, garage, driveway, garden and so forth. *How far it is appropriate to regard this identity as parts of one messuage or parcel of land as extending* must depend on the character and the circumstances of the items under consideration. *To the extent that it is reasonable to regard them as constituting one messuage or parcel of land*, they will be properly regarded as all falling within one curtilage; they constitute an integral whole." [Emphasis supplied.]

62. Although the case was specifically concerned with a dwelling-house, this is as good an expression of the concept of curtilage as one is likely to find.”

19. *Blackbushe Airport* therefore confirms that this represents the correct test (see also at [116]), the application of which in a given case is one of fact and degree having regard to the relevant factors.

20. In his Skeleton Argument, Mr Whale for the Appellant distilled the following propositions from *Blackbushe Airport*, which Ms Pindham for the Secretary of State did not dissent from (paragraph numbers are taken from the judgment of Andrews LJ):

    a. There are some words or expressions which are like an elephant; its essence is difficult to put into words, but you know it when you see it. "Curtilage" is a word of that nature ([50]);

    b. It is not possible to give a comprehensive definition of 'curtilage' and it would be 'most inadvisable' to try to do so ([50];

    c. The focus should be on the *building* whose curtilage is to be ascertained ([47] and [69]);

    d. The determination of what is the curtilage is a matter of fact and degree for the decision-maker, taking into account the relevant considerations ([116]);

    e. There is no prescribed or exhaustive list of relevant factors ([114]);

    f. One needs to ask whether the land in question is so intimately associated with the building as to lead to the conclusion that the land forms 'part and parcel of the building' ([61]-[62] and [127]). Applying that test, one may conclude that the land and building together constitute an 'integral whole' but that is a *consequence* of applying the test not another way of articulating that test ([64]);

    g. The three 'Stephenson factors' (named for Stephenson LJ) identified in *Attorney General, ex r Sutcliffe v Calderdale Borough Council* (1983) 46 P&CR 399 (namely, (i) the physical layout of the listed building and the structure; (ii) their ownership, past and present and (iii) their function, past and present) are factors which may be applied; they are not determinative, and they do not displace the 'part and parcel' test ([88]-[90]). (Mr Whale criticised the Inspector for describing these factors at [17] of the Decision as 'tests' So far as it goes, that criticism is valid. They are factors be taken into account as part of the *Methuen-Campbell* test, as *Blackbushe Airport* makes clear at [88]. But as I said at the hearing, I would not quash the Inspector's Decision on that basis).

    h. 'Functional equivalence', or 'functional interdependence' is irrelevant ([47], [116]);

    i. The question whether the land and building together form part of some residential or industrial or operational 'unit' is irrelevant ([47] and [65];

    j. The test is not whether the building and land 'fall within a single enclosure' ([65]);

    k. 'Smallness' is not inherent in curtilage. There is no test that a curtilage has to be 'small', but that does not mean that relative size is an irrelevant consideration ([102] and [108]);

l. The land does not have to be 'ancillary' to the building in order to fall within its curtilage, although whether it is ancillary is relevant and may be highly relevant ([118)];

m. The 'curtilage' of a building is a different concept from 'the planning unit' ([115]).

The Inspector's Decision

21. The decision in *Blackbushe Airport* was handed down after the hearing before the Inspector but before he issued his Decision. I am told it was not drawn to his attention.

22. The parties were agreed that the question whether the appeal land was within the curtilage of the existing buildings was a mixed question of fact and law: *Blackbushe Airport*, [51]. They were equally agreed that that question involved the decision maker (ie, the Inspector) making assessments of fact and degree (see at [113]; and see *Burford v Secretary of State for Communities and Local Government and Test Valley District Council* [2017] EWHC 1493 (Admin), [33]). However, as Mr Whale rightly emphasised, the Inspector was required to direct himself correctly on the legal principles to be applied. In *Dyer v Dorset County Council* [1989] 1 QB 346, 355B, Lord Donaldson MR said:

> "[The question of determining the extent of the curtilage] is a question of fact and degree and thus primarily a matter for the trial judge, provided that he has correctly directed himself on the meaning of 'curtilage' in its statutory context."

23. At [6]-[7] the Inspector discussed planning units by reference to the decision in *Burdle v Secretary of State for the Environment and New Forest Rural District Council* [1972] 1 WLR 1207.

24. At [8]-[9] he described the Site and the appeal land. Between [10]-[12] the Inspector considered the pond on the appeal land and concluded at [12] that

> "12. Consequently, as the pond does not form an incidental or ancillary use to the main industrial/warehouse use operating on the adjacent land, and as there is no argument presented to me that the parcel of land within which the pond is located is used for any other purposes associated with the industrial/warehouse
> use, it does not form part of the same planning unit."

25. At [13] he dealt with the hedge between the Site and the appeal land, and noted that it formed a physical barrier between them, however he added that the curtilage question did not turn on the presence of the hedge.

26. They key part of the Inspector's decision, and the part on which Mr Whale focussed his submissions, is [14]-[21] where the Inspector said this:

"14. Turning to the crux of the matter – whether the appeal site falls within the curtilage of the industrial/warehouse use – I have been presented with various caselaw regarding curtilage.

15. The Court of Appeal judgment of *Methuen-Campbell v Walters* [1979] 1 QB 525 established that for land to fall within the curtilage of a building, it must be intimately associated with the building to support the conclusion that it forms part and parcel of the building. In *McAlpine v SSE* [1995] 159 L.G. Rev. 429 it was held that 'there is no rigid definition to a curtilage', but that: it is a feature constrained to a small area about a building; apparently in 'intimate association' with such building; and no physical enclosure is necessary to define it, 'but the considered land must be part of the enclosure with the house'.

16. Whilst the pond serves as a drainage system for the buildings, due to their physical and functional separation and being located within separately defined parcels of land, I do not consider that this amounts to an intimate association.

17. The Court of Appeal judgement of *Att. Gen Ex Rel. Sutcliffe v Calderdale BC* [1982] P&CR 399 set out three tests in the consideration of curtilage; (i) the physical 'layout' of the building and structure; (ii) their ownership past and present; and (iii) their use or function past and present. This was later reaffirmed in *Burford v SSCLG and Test Valley DC* [2017] EWHC 1493 (Admin) and there it was noted that 'Whether something falls within a curtilage is a question of fact and degree and thus primarily a matter for the decision-maker' and 'It was for the Inspector to decide what weight should be given to each of the relevant factors.'

18. There is no dispute that the pond and the parcel of land in which it is located is within the same ownership of the adjacent industrial/warehouse land and buildings. However, for the same reasons why I have found that it is not within the same planning unit as the industrial/warehouse buildings, ie the physical and functional separation, I do not consider that the land in question satisfies *Sutcliffe* tests (i) and (iii). Consequently, it does not fall within the curtilage of the industrial/warehouse buildings.

19. The appellant argues that the planning history of the site supports the view that it falls within the curtilage of the buildings as it has been included within the red edged area

> on previous planning applications, most notably LPA ref: S/169/01679/08 which was granted permission on appeal1. However, the red line on a planning application merely defines the application site. It cannot be relied upon to definitively define a planning unit or curtilage. I note that the Inspector in the previous appeal decision noted that the "site itself includes an undeveloped "field" to the north", which would appear to be the land that is the
> subject of this appeal. In his consideration of the proposed creation of a car park and the relocation of the car and a caravan sales in the field to the north of the site, the Inspector went on to state that "there would be a material extension of the business into the surrounding open land", which clearly indicates that he did not consider the field to form part of the existing business.
>
> 20. On the information before me, the land concerned does not have a close visual and spatial relationship with the industrial/warehouse buildings nor does it form one enclosure with them. There is not an intimate association between what is essentially a utility service and the buildings. Taking account of the factors as a whole, I am not satisfied that the proposed development would have been built on land comprising the curtilage of the industrial/warehouse buildings when the application was made.
>
> Conclusion
>
> 21. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of a workshop/storage building, associated hard standing and vehicular access 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."

The parties' submissions

27. On behalf of the Appellant, Mr Whale submitted that the Inspector had misdirected himself in law and so reached the wrong conclusion and hence that his Decision had to be quashed and the matter remitted to the Secretary of State for a fresh decision to be made. He said, in summary, that the Inspector's approach was at variance with some of the agreed principles to be derived from *Blackbushe Airport.*

28. Mr Whale said that it was at [15] of the Decision that the Inspector's reasoning 'started to unravel'. The Inspector's self-directions in that paragraph that a curtilage 'is a feature constrained to a small area about a building' and that the considered land 'must be part of the enclosure' with the building were plainly wrong and contrary to propositions (j)-(k) in [20] above. He said that, to the extent that the decision in *McAlpine* was authority

for that approach, it was wrong and could not sit with *Blackbushe Airport.* He said that [16] clearly derived from *McAlpine* rather than *Methuen-Campbell* or *Blackbushe Airport* The reliance upon physical separation, functional separation and separately defined parcels of land is plainly contrary to propositions (h)-(j).

29. Mr Whale said that in [18], there had been further erroneous reliance upon physical and functional separation (contrary to propositions (h)-(j)). The Inspector had also wrongly elided the planning unit with the curtilage, contrary to proposition (m). The conclusion that the appeal land does not satisfy tests (i) and (iii) of *Calderdale* **(**ie**,** the Stephenson factors) and 'consequently' does not fall within the curtilage of the buildings was a *non sequitur*.

30. In [19], the Inspector again erroneously applied a functional equivalence criterion, contrary to proposition (h). Thus: "…he did not consider the field to form part of the existing business."

31. In [20], the Inspector again erroneously applied a single enclosure test (contrary to proposition (k)). Contrary to his finding, the land does not need to 'form one enclosure' with the buildings.

32. Finally, Mr Whale said that the application in [20] of a finding that there is no intimate association 'between what is essentially a utility service and the buildings' is again contrary to proposition (h) given that 'functional equivalence' is irrelevant. Contrary to proposition (c), the Inspector's focus was on the field rather than on the buildings. Contrary to proposition (f), the Inspector failed to ask, or answer, the question as to whether the field is so intimately associated with the buildings as to lead to the conclusion that it forms 'part and parcel' of the existing buildings.

33. On behalf of the Secretary of State, Ms Pindham submitted that, reading the Decision in the flexible way required (per *Bloor Homes*), it was clear that the Inspector had adopted the right approach and that his Decision should therefore be upheld. She said that *Blackbushe Airport* did not change the law on curtilage. The matter of curtilage is an intensely fact-specific question of judgment, determined as a matter of fact and degree having regard to all the circumstances. The correct test for decision-makers to apply was the appropriately broad test set out in *Methuen-Campbell*: whether the land was part and parcel of the building in question. She said the Inspector had been entitled to conclude this test was not made out.

34. She said certain factors have been confirmed by judges as relevant to this exercise of planning judgment. Relative size is one of those facts: it was material in *Blackbushe Airport*; it was material in *Methuen-Campbell*, p543F ('… such small pieces of land would be held to fall within the curtilage of the messuage …'); it was material in *Dyer*, p357G (''curtilage' seems always to involve some small and necessary extension to that to which the word is attached'); and it was material in *McAlpine*, p432. Ms Pindham also relied on the following passage from the same case:

> "From these cases it appears that the concept of curtilage is not capable of such easy and precise definition that it can immediately be seen to apply, or not apply, to a given situation. Fact and degree play a very large part in such a

> question. Accordingly provided the principles derived from these cases are followed or not breached the Court should be cautious in finding that the Inspector has fallen into error in determining that a particular piece of land is, or is not, within the curtilage of a dwelling. I refrain from seeking to distil rigid specified principles from the judgments which I have cited."

35. Ms Pindham said none of the Appellant's criticisms of the Inspector's Decision had merit. He was entitled to apply *McAlpine* in relation to 'smallness', which he rightly treated as a relevant factor. The Inspector was entitled to find, having visited and seen the two areas of land, that there was no close visual and spatial relationship between them and no intimate association because the two areas of land were located within separately defined parcels and did not constitute one enclosure.

36. Overall Ms Pindham said the Inspector did not unlawfully constrain his determination of curtilage based on smallness, enclosure, physical or functional separation, any "elevation" of relevant considerations, planning unit, or functional equivalence. These features of the Inspector's decision (save smallness, which did not feature) were all rightly considered relevant factors to take into account in what was a holistic overall judgment on the question of whether the field formed part of the curtilage of the industrial buildings.

37. For completeness, in her Skeleton Argument Ms Pindham made a number of other points that were not pursued orally, and about which I need not say any more.

Discussion

38. For the substance of the reasons advanced by Mr Whale, I am satisfied that the Inspector's Decision is legally erroneous in light of the decision in *Blackbushe Airport*. It is plain, even on a benevolent reading of the Decision, that the Inspector misapplied the law in several respects, such that his Decision cannot stand.

39. The test to be applied is as set out in *Methuen-Campbell* and approved in *Blackbushe Airport*. Also helpful is the judgment of Lieven J in *Challenge Fencing Ltd*, which was considered and approved in the latter decision (at [113]-[115]). At [18] she said by reference to the decisions in *Skerritts of Nottingham Ltd v Secretary of State for the Environment, Transport and the Regions* [2001] QB 59, *Sumption v London Borough of Greenwich* [2007] EWHC 2776 (Admin), and *Calderdale*:

> "18. From these cases I draw the following propositions:
>
> i) The extent of the curtilage of a building is a question of fact and degree, and therefore it must be a matter for the decision-maker, subject to normal principles of public law;
>
> ii) The three Stephenson factors must be taken into account;
>
> a) Physical layout;

b) The ownership past and present;
c) The use or function of the land or buildings, past and present.

iii) A curtilage does not have to be small, but that does not mean that the relative size between the building and its claimed curtilage is not a relevant consideration. *Skerritts* p.67;

iv) Whether the building or land within the claimed curtilage is ancillary to the main building will be a relevant consideration, but it is not a legal requirement that the claimed curtilage should be ancillary; *Skerritts* p.67C;

v) The degree to which the building and the claimed curtilage fall within one enclosure is relevant, *Sumption* at para 17 and the quotation form the OED of curtilage as "A small court, yard or piece of ground attached to a dwelling house and forming one enclosure with it". In my view this will be one aspect of the physical layout, being the first of the *Calderdale* factors.

vi) The relevant date on which to determine the extent of the curtilage is the date of the application; but this will involve considering both the past history of the site, and how it is laid out and used at the time of the application itself; *Sumption* at [27]. It appears from *Sumption* that the Judge considered future intended use of the land or buildings may be relevant, but in my view some care would be needed in applying this proposition to the facts of a particular case. A developer cannot change the curtilage simply by asserting that s/he intends to use the site in a particular way in the future."

40. Whilst generally approving this passage, Andrews LJ in *Blackbushe Airport*, [114]-[115], said:

> "114. Holgate J said in the present case at [123] that the guidance in paragraph 18 of *Challenge Fencing*, although helpful, and sufficient for the purposes of that case, did not purport to be exhaustive on the approach to identifying a "curtilage," and it is important to read that decision as a whole. I would strongly endorse that observation. Just as it would be inadvisable to try and define "curtilage", there are obvious dangers in attempting to be too prescriptive about what factors are relevant to determining the curtilage in a given case, or in trying to create an exhaustive list of them. Reading her judgment as a whole, it is plain that Lieven J did not fall into that trap. Paragraph 18 does no more than helpfully identify some important propositions drawn from some of the earlier authorities.

> 115. What matters for present purposes is that (i) Lieven J approached the question on the basis that the 'part and parcel' test adopted in *Dyer* but taken from *Methuen-Campbell* was correct; and (ii) she expressly acknowledged (at [31]) that, whilst the facts that the land and building were being used together and were closely related to each other were relevant considerations, there may be situations where the planning unit is different from (and almost certainly larger than) the curtilage of the building. The two concepts are not the same."

41. The first sentence of [15] of the Inspector's Decision is unobjectionable, reciting as it does the *Methuen* test which was approved in *Blackbushe Airport.* The problems start in the second part of that paragraph, where the Inspector referred to curtilage being 'a feature constrained to a small area about a building; apparently in 'intimate association' with such building' and that 'no physical enclosure is necessary to define it, 'but the considered land must be part of the enclosure with the house'. Both of these statements are contrary to what was said in *Blackbushe Airport* as summarised in the agreed propositions in [20] above. In relation to smallness, it is quite correct that in *McAlpine*, a decision of a Deputy High Court Judge from 1994 referred to by the Inspector, the judge said at p432 that there were 'three identified characteristics of curtilage' which were especially relevant to the case before him:

> "- curtilage is constrained to a small area about a building
>
> - an intimate association with land which is undoubtedly within the curtilage is required in order to make the land under consideration part and parcel of that undoubted curtilage land
>
> - it is not necessary for there to be physical enclosure of that land which is within the curtilage, but the land in question at least needs to be regarded in law as part of one enclosure with the house."

42. However, it seems to me that in light of subsequent authority at least this part of the decision can no longer be regarded as containing correct statements of principle. As to 'smallness', it is sufficient to quote what Andrews LJ said in *Blackbushe Airport*, [106]-[108]:

> > "106. … Robert Walker LJ said in terms [in *Skerritts*] that the decision in *Dyer* was "plainly correct". He quoted with approval the passage in Nourse LJ's judgment to which I have referred in paragraph 75 above, thereby accepting that there are limits to the extent of the curtilage, and that in that case, the Court of Appeal had been right to decide that it did not include the park. However, he said the Court went further than was necessary to go in expressing the view that the curtilage of a building must always be small, or that the notion of smallness is inherent in the expression. As he

> correctly observed, the observations about smallness were not necessary to the decision.
>
> 108. At p.67 Robert Walker LJ pointed out that Nourse LJ had recognised in *Dyer* that in the case of a "principal mansion house", which is what Grimsdyke was built as, the stables and other outbuildings were likely to be included within its curtilage. He observed that the curtilage of a substantial listed building is "likely to extend to what are or have been, in terms of ownership and function, ancillary buildings", although he still accepted that "in the nature of things, the curtilage within which a mansion's satellite buildings are found is bound to be relatively limited." However, he said that the concept of smallness in that context was so completely relative as to be almost meaningless, and unhelpful as a criterion.
>
> 109. As Lieven J put it in *Challenge Fencing* at [29], the Court of Appeal in *Skerritts* made it clear that there is no test that a curtilage has to be small; but that does not mean that relative size is an irrelevant consideration. As she said, it may well be the case that a large house would more easily be found on the facts to have a curtilage that extended to outbuildings, than if the house were a small cottage. It was a relevant factor in *Challenge Fencing* itself that the building was small and the curtilage being claimed was extensive. It was also found to be plainly relevant that a number of other buildings on the site on which the building stood had been demolished, and would have had their own curtilages."

43. As to the enclosure point, in *Blackbushe Airport*, [65], Andrews LJ said (emphasis added):

> "65. 1 have quoted the entirety of the relevant passage in Buckley LJ's judgment because the introductory paragraph illustrates that the test is <u>not</u> whether the terminal building could function without an operational airport, nor whether the Application Land was *necessary* for the functioning of the airport. Nor is the test whether the Application Land and the terminal building together form one part of an operational unit *or whether they fall within a single enclosure*. The question whether, by reason of the association between them, the law would treat them as if they formed one parcel, or as an integral whole, depends on the application of the "part and parcel" test to the facts of the particular case."

44. It therefore seems to me that [15] of the Inspector's Decision contains two errors of principle on the proper approach to curtilage.

45. Apart from the point about the use of the word ‘test’ in relation to the Stephenson factors, [17] is unobjectionable.

46. I think [18] is open to the objection that the Inspector regarded ‘functional separation’ as relevant; if he meant that as an antonym to ‘functional equivalence’ or ‘functional interdependence’, this was another error: *Blackbushe Airport,* [47] (‘… ‘functional equivalence’ is irrelevant, as is the question whether the land and building together form part of some residential or industrial or operational unit …’ and [116] (‘… *Methuen-Campbell* itself would have been decided very differently if the test had been whether the land and building together formed part of some wider residential or industrial unit, or that there was ‘functional interdependence’ …)

47. Paragraph [20] contains a repeat of the ‘single enclosure’ error in [15], an error which then feeds into the next sentence beginning, ‘There is not an intimate association …’.

48. Overall, I am satisfied that the Inspector misdirected himself on a number of issues in a sufficiently serious way that his Decision cannot stand.

Conclusion

49. This appeal is therefore allowed; the Inspector’s Decision is quashed; and the matter is remitted to the Secretary of State for a fresh decision under s 195 to be taken.