

# Legal Developments

## The extent of listing

**W**hen is an unlisted building listed? When it's in the curtilage of a listed building.

Section 1(5) of the Planning (Listed Buildings and Conservation Areas) Act 1990 provides that:

- (a) any object or structure fixed to the building, and
- (b) any object or structure within the curtilage of the building which, although not fixed to the building, forms part of the land and has done so since before 1 July 1948

are to be treated as part of the listed building and enjoy listed building protection.

In the last issue, I dealt with objects fixed to the building. Here, I deal with objects and structures in the curtilage. This involves answering two questions:

- When does an object or structure 'form part of the land'?
- What is the 'curtilage' of a building?

### When does an object or structure 'form part of the land'?

As before, this is derived from cases concerning land law. In order to form part of the land, an object or structure must be fixed to the land. Broadly, the same tests apply as apply to whether an object is fixed to the building: method and degree of annexation, and object and purpose of annexation.

Thus, for example, a building, such as a barn on a farm or stables in the grounds of a house, will clearly be very firmly fixed to the land via its foundations and will almost certainly be there for the better enjoyment of the land. In the former case, the barn facilitates the agricultural use and, in the latter case, the stables have a clear association (historically at least) with the use of a building as a house.

It is interesting that the framers of the legislation used the term 'object or structure' rather than 'building'. This is a more general term that would appear to cover things such as sundials and garden statuary as well as buildings (provided of course they pass the purpose of annexation test and are not there simply for their enjoyment as objects). The choice of wording also produces interesting, and apparently anomalous, results when applied to plant or machinery. 'Building' is defined in

the 1990 Act to exclude 'plant or machinery comprised in a building'. Thus, in the case of a listed watermill, for example, any surviving machinery would be excluded from the listing. However, a watermill in the curtilage of a listed building, but not listed in its own right, would include the machinery because it is part of the 'structure'.

### What is the curtilage of a building?

In *Attorney-General ex rel Sutcliffe and Hughes v Calderdale Council* (1983) 46 P&CR 399, the Court of Appeal held that the following issues are relevant to a consideration of whether a building is in the curtilage of another:

- (a) their physical layout,
- (b) their past and present ownership, and
- (c) their past and present function and use.

The primary focus of the inquiry, however, should be at the date of listing, not its earlier history (*Morris v National Assembly for Wales* – unreported). The important features to consider are the proximity and accessibility of the buildings and whether one is ancillary to the other in terms of function and ownership and occupation at the date of listing. However, case law offers little guidance beyond setting out the factors to be taken into account, and each case will need to be considered on its own merits.

*Planning Policy Guidance 15: Planning and the Historic Environment* offers, at paragraphs 3.34 and 3.35, an overview of the case law and this helpful nugget: 'Where a self-contained building was fenced or walled off from the remainder of the site at the date of listing, regardless of the purpose for which it was erected and is occupied, it is likely to be regarded as having a separate curtilage.'

Thus, one building will be in the curtilage of another if, at the date of listing, there was a clear relationship between the buildings: specifically, that one was ancillary to the use of the other, the buildings had common ownership or occupation and were not physically fenced off from each other.

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