Consultation Response

Listed buildings and curtilage

Historic England consultation

Date: 24 March 2017

A. Summary

1. In outline, 'curtilage listing' extends listed building protection beyond the structures specifically mentioned in the list description of a listed building to further structures that were (a) built before 1948, and also at the date of listing were (b) in the same ownership as the listed building, and (c) in its curtilage, and (d) had a use ancillary to its use.

2. Extending listing building protection to buildings not identifiable from the list description has obvious minuses as well as pluses (see paragraph 9 below). But at least in most cases it is – or could and should be – straightforward in practice to decide whether a structure is, or is not, 'curtilage listed' (see paragraph 10).

3. Unfortunately (see Section C), three myths have developed, (i) that 'curtilage listing' is extremely complicated; (ii) that it covers structures outwith the rules in paragraph 1 above; and (iii) that curtilage structures being listed buildings must by definition have 'special interest', which must then be protected as assiduously as the special interest of a specifically-listed building. These myths have led to a 'clear as mud' approach to 'curtilage listing', routinely found in local planning authority (LPA) and even Historic England (HE) guidance, which has created a high degree of misunderstanding and uncertainty. This largely-artificial uncertainty has substantial costs for both LPAs and those who manage heritage, diverting scarce resources from more important priorities into unnecessary arguments and applications. Worse – because 'curtilage listing' can 'list' things of little or no or even negative interest; because it is widely used to 'list' structures clearly outside its scope; because it leads to law-abiding people being threatened with criminal prosecution and enforcement; and because the problem has continued for decades – 'curtilage listing' has become notorious, a classic criticism of listing legislation even from those who strongly support heritage protection, and a stick with which the heritage protection system is routinely beaten by those who want to undermine it.

4. These problems can, and should, be largely solved by clear HE advice. If it is clear that a structure is a curtilage structure, and what that means in terms of the need for listed building consent (LBC), everyone knows where they stand. If it is clear that a structure is not a curtilage structure, arguments, and applications, can be avoided. The 2016 advice was imperfect, but it was a great advance on having no substantive advice at all. **It is vital that HE now publishes** (see Section D below) **clear, accurate, and well-signposted advice on 'curtilage listing', both on whether a structure is a curtilage structure or not, and on the actual implications if it is**.

B. The CLA and listed building protection

5. The CLA (Country Land & Business Association) has more than 30,000 members – not-for-profit, government, commercial, or private – who collectively manage at least a quarter of all heritage in England. The CLA is thus by far the largest stakeholder group of managers and owners of heritage. CLA policy strongly supports the proportionate and effective protection of heritage.

6. CLA members manage or own at least 100,000 listed buildings and curtilage structures; and make thousands of LBC and heritage-relevant planning applications each year. We receive many member enquiries about curtilage, from widely-differing angles. These include for example members seeking to show that buildings are 'curtilage structures', in order to qualify for relief from empty business rates. They also include members who have altered buildings which are not mentioned in the list description and which are not, on any sustainable interpretation of statute and case law, curtilage structures, but who are being aggressively threatened with prosecution and/or enforcement action by LPAs which are claiming that they are.

C. Introduction: the problems with 'curtilage listing'

7. Curtilage structures are not listed by HE, or on the basis of their 'special interest'; they are 'listed' by a legal formula, a 1968 addition to the previous system of listed building protection, now in s1(5) of the 1990 Act[1]. It has been widely criticised by users and lawyers[2], and governments and HE have long acknowledged the criticisms, and have taken some steps (see 27 below) to reduce them, though primarily for new listings.

8. The problems include:

(a) Understanding of and advice on 'curtilage listing' has been inadequate at best, and actively misleading at worst, creating great (and largely-unnecessary) uncertainty

9. The aim of Section 1(5) – essentially to 'list' things not already identified in list descriptions – is obviously not above criticism[3], and the drafting of s1(5) may not be perfect. But if properly understood, and clearly explained, s1(5) with some straightforward case law does at least give clarity in most cases. In essence, what could be called 'the s1(5) tests' it establishes say:

> The 'Section 1(5) tests'
> A structure is a curtilage structure if – and only if – it:
>
> (i) was built before 1948; and

[1] Planning (Listed Buildings and Conservation Areas) Act 1990.
[2] For example Charles Mynors, *Listed buildings, Conservation areas and Monuments*, 2006, pp128-30, suggests a need for reform, as have HE and many others.
[3] A CLA position on 'curtilage listing' might be that it is very undesirable in principle, for reasons set out in this response, but might be difficult to abolish in practice because of the incompleteness of some list descriptions, and that if restricted to clearly-ancillary structures, as the law says, it is – at least arguably – defensible as a compromise.

(ii) was in the same ownership as the principal listed building at the date of listing[4]; and
(iii) was in the curtilage of the principal listed building; and
(iv) was ancillary to the principal listed building.

If a structure meets all these tests, it is likely to be a curtilage structure. If it fails one or more of these tests, it is not likely to be a curtilage structure.

10. In some cases some part of this may need further investigation or analysis (for example sometimes there is uncertainty about whether a building is pre-1948, or who owned it when, or a real question about the physical extent of curtilage). But in most cases whether a structure is a curtilage structure is – or at least should be – clear in practice. The CLA is usually able to give members a clear answer. The nine examples in the draft advice, though not designed to be simple, also give clear answers in nearly all cases.

11. Unfortunately for the heritage protection system, however, some observers have convinced themselves that the legal position is not clear, indeed that it is very complex. Others seem to have taken a different view, that it is too clear, and too apt to exclude other buildings from the listing, and that it would be better to have an 'extend protection' approach, in which every listing should list as many other buildings as possible.

12. An 'extend protection' approach is questionable in principle (see 24 below) as well as in law, but importantly a combination of these 'it's very complex' and 'extend protection' approaches has generated an approach to 'curtilage listing' which might be called the 'clear as mud' approach. This usually begins with what are often called "the Calderdale tests". At root, these overlap with the s1(5) tests as above, but they have been extracted out of context from the *Calderdale*[5] judgment, in a form which makes them both almost useless in practice and misleading, as follows[6]:

"The Calderdale tests"
"Three factors have to be taken into account […]:

(1) the physical layout of the building and the structure
(2) their ownership, past and present
(3) their use and function, past and present."

13. This text has been extensively quoted in LPA and other guidance, and has been put into both iterations of HE's curtilage advice, but its meaning is of course completely unclear. What aspects of 'physical layout', or what forms of 'ownership', or what kinds of 'use', make a building a curtilage structure? Users are in the dark. This is almost useless, especially when then combined with warnings about the "complexity" of the issue. Worse, the "Calderdale tests" approach is especially misleading in presenting these 'factors' as if they were shades of grey, encouraging people to think that (say) post-1948 buildings, or

[4] Or perhaps in 1969, if that is later – see 42 below.
[5] *AG ex rel Sutcliffe etc vs Calderdale BC*, 1982.
[6] The *Calderdale* judgement has often been criticised, and Stephenson LJ said that his decision was "difficult" and that he had "doubt". More particularly, it seems unlikely – especially given that Stephenson LJ said (twice) that "I cannot think of a poorer test case than this one" – that he was expecting these specific words to be taken from their context and packaged as a kind of standalone 'Curtilage listing for dummies' guide, to be used without explanation in all subsequent cases.

buildings which were in different ownerships, can somehow nevertheless be 'curtilage listed' because they score 'highly' on some other 'factor'. Unsurprisingly, this misleading approach has misled LPA staff into 'listing' structures on pretexts which are very difficult to reconcile with s1(5). It has also misled planning inspectors into some very-hard-to-defend appeal decisions, in which for example the inspector has decided that a building is not ancillary, but, because it scores 'highly' on some other 'factor' like proximity, it nevertheless somehow is 'curtilage listed'. Reports of such cases are widely disseminated, further increasing confusion.

(b) Asking the local authority does not solve these problems

14. The second part of the 'clear as mud' approach is to say that this "great complexity" is not really a problem, because the user can ask the LPA and it will provide the right answer. In practice of course there are multiple problems with this:

(i) The 'clear as mud' approach sees LPA staff as possessing greater expertise on this subject than Supreme Court judges. The logic of this is unclear. What they are being asked to do, in the absence of any effective guidance on statute and case law, is to assess the implications of statute and case law, in (again) the absence of any effective guidance. Some LPA staff may have the skills to do this, but most of those asked will not, and why should they?

(ii) Severe resource pressures – and probably also an understandable reluctance to provide a clear answer to what is being presented as a very complex question – mean that LPA staff often do not actually respond to this question substantively, or at all (often they promise to "get back to you", but do not).

(iii) Even if the LPA does give a substantive response, in practice it nearly always seems to say that a structure is a curtilage structure, on the precautionary principle basis of defaulting to the 'safest' option, or because some LPA staff seek to maximise the amount of heritage which is covered by listed building protection (cf Charles Mynors: "The problem in practice with approaching the local authority for clarification is that it may express the view that […it is a curtilage structure], in truth because it wishes that it were…"[7]).

(iv) A core problem is that this is not a level playing field: the LPA can take almost any decision it likes, knowing that the owner will not question this in court because of the cost, and that courts are extremely reluctant to reverse an LPA decision (cf for example the *Tarn* judgment: "['curtilage listing'] is… for the LPA… to decide. …I would interfere with the District Council's decision… only… if its conclusion was perverse"[8]).

(v) Even if the LPA says that a structure is not a curtilage structure, that does not necessarily give certainty (Mynors adds that "any opinion which the local authority

[7] Charles Mynors, p128.
[8] *R v North Devon DC, ex p Tarn*, 1998.

may express will not bind it; and its view may well change…"[9]), so consulting the LPA has limited benefit: the owner could still face enforcement action. The 2013 Certificate of Lawful Works procedure may deal with this specific point, but has a cost, and does not overcome any of the other problems listed above.

15. In practical terms, therefore, there is limited point in asking the LPA: it may well give no substantive answer, any answer is unlikely to bind it, and if it does answer it will almost inevitably say the structure is a curtilage structure, in which case there is nothing the owner can do to challenge that, and it would be risky, having put the LPA on notice, to ignore its view (as Mynors says, "once such a view has been expressed, it could be tricky to go ahead with the works, and face potential criminal prosecution"[10]). The owner is no better off than if he/she had simply assumed that the structure is a curtilage structure.

16. The owner could apply to the court for a declaration, but that is likely to be prohibitively expensive, and the court might well decline to take a decision[11]. There is now the possibility of using HE's Enhanced Advisory Services, but owners appear reluctant to use these, assuming that HE like an LPA will always say a structure is 'curtilage listed', and that HE while on site will gratuitously designate other currently-undesignated buildings. These services of course have a cost, and again enquiries to HE suggest that it might not be willing, at least in some cases, to take definitive decisions about curtilage structures. Alternatively, owners can take a view, perhaps setting out in a letter/email/planning statement (or, at a cost, counsel's opinion) why they believe a building is or is not a curtilage structure, but – especially in the absence of clear published advice – there is always a risk of enforcement action and/or prosecution.

(c) Local authorities often misunderstand what 'curtilage listing' means

17. A third part of the 'clear as mud' approach is to have no clarity on what 'curtilage listing' actually means in practice, achieved by providing no advice on this. HE itself is at least partially guilty of this: it has provided some limited advice GPA2 paragraph 15[12], but very few users are aware of this because other HE advice does not refer to it, and the HE 2016 and draft 2017 advice on curtilage again do not mention it at all.

18. This lack of advice and lack of clarity has two important implications:

19. Firstly, LPAs usually seem to assume that a 'curtilage listed structure' must by definition have 'special interest'. This is of course incorrect, because special interest, not being one of the s1(5) tests, is not a criterion. Curtilage structures may have special interest, or they may have less-than-special, or no, or negative, interest[13]. Mynors says that "s1(5) does not import any special interest to something that in fact has none"[14], giving as an example

[9] Charles Mynors, p127. Richard Harwood, *Historic environment law*, 2012, p72, makes the same point.
[10] Charles Mynors, p128.
[11] cf (i) the refusal of the High Court to make such a declaration in *Chambers v Guildford BC*, 2008; (ii) the *Tarn* judgment quoted above; and (iii) Charles Mynors p128.
[12] See https://content.historicengland.org.uk/images-books/publications/gpa2-managing-significance-in-decision-taking/gpa2.pdf/ (this need for such a paragraph was suggested by the CLA).
[13] in *Calderdale* for example the SoS had already confirmed that the buildings did not have special interest.
[14] Charles Mynors, p101.

"a decaying garden shed"[15]). The major practical problem is that, in the absence of advice, LPA staff naturally tend to assume that – because it is 'listed' and because change requires LBC – the decaying garden shed must have special interest. They then defend that presumed special interest in the same way that they would defend the special interest of a building listed by the Secretary of State, and they are – because of its presumed special interest – very resistant to any contrary argument. This is especially problematic in the case of demolition: LPAs (rightly) enthusiastically defend the special interest of listed buildings from demolition, but they also apply the same approach to the demolition of a curtilage structure – like Mynors's decaying shed – of no interest at all.

20. Secondly, LPAs assume that a curtilage structure must be treated as if it is listed in its own right. Mynors says that "the…structure associated with the building that is itself included in the list is by virtue of s1(5) to be regarded as part of *that* building [and] not to be considered as if it was listed in its own right…"[16], and that "LBC would only be needed… if the proposed works would affect the character of the listed building as a whole"[17]. But – in the absence of advice – most LPAs both demand an LBC application, and then treat that application, exactly as if a curtilage structure was listed in its own right.

(d) Uncertainty over curtilage has real costs for local authorities and owners

21. These are not just theoretical problems: this artificial uncertainty has major practical implications both for owners and for LPAs, diverting scarce resources from more important priorities into unnecessary arguments and applications.

22. The universally-acknowledged shortage of resource in LPAs, which have cut heritage-skilled staff by 35 per cent since 2006, is probably the biggest problem in heritage protection. Anything which adds LPA workload, especially for skilled staff (where they exist), is unhelpful. It is particularly unhelpful when – as with curtilage enquiries – the question is presented as very difficult, and is not accompanied by substantive guidance. Perhaps unsurprisingly in these circumstances, LPAs tend (as above) to adopt the precautionary principle approach that structures are curtilage structures, which then further diverts them away from other work by burdening them with more LBC applications.

23. For owners (assuming they are actually aware of the issue), there is no safe option: applying or not applying for LBC both carry risks. Uncertainty over curtilage ramps up costs and risk. Carrying out work to a listed building that requires LBC without LBC is a criminal offence punishable with (potentially very large) fines, and (potentially very expensive) enforcement. Applying for LBC carries its own costs, risks, and delays, and leads the LPA to think that the building is listed and must have special interest which must be defended. Owners can apply, with its costs and risks, or take the risk of not applying, or can – this is probably common in practice, because most owners are risk-averse and much heritage work, especially work which safeguards heritage for the long term, is not financially profitable – simply not proceed with the proposal.

[15] Charles Mynors, p115.
[16] Charles Mynors, p101.
[17] Charles Mynors, p115.

(e) Uncertainty about 'curtilage listing' harms the whole heritage protection system

24. This is not only a resourcing problem, important though that is. Legislation is only a part of heritage protection: without the support of (a) the public, and also (b) of owners, those most directly affected by it, heritage protection is unlikely to be effective. Uncertainty over 'curtilage listing' damages the whole heritage protection system, because:

    (i) its diversion of scarce resource from more productive activities to arguments about curtilage (as above) undermines heritage's case for support and continued funding;

    (ii) the 'listing' by LPAs of structures not mentioned in list descriptions, especially where they are not even ancillary, feeds the perception that heritage protection sprays protection around indiscriminately;

    (iii) the reluctance of LPAs to accept change to structures which clearly lack special interest feeds the perception that heritage protection discourages all change;

    (iv) it leads to law-abiding people who checked their list descriptions before starting work being threatened out of the blue with criminal prosecution and enforcement. There are also many already-altered buildings whose owners, or subsequent owners, wittingly or unwittingly have that potential threat permanently hanging over them;

    (v) it undermines the heritage protection consensus. Most people agree that buildings of 'special interest' should be listed, and that change to them should be managed[18], but, to ensure or maximise that consensus, the legislation has always set that 'special interest' hurdle. 'Curtilage listing' has no special interest hurdle, and people are understandably less willing to see the extra costs and risks listing imposes as reasonable if the asset has less-than-special, or no, or negative, interest;

    (vi) these problems have continued for decades.

25. For these reasons 'curtilage listing' has become notorious, a standard criticism of listed building legislation even from those who strongly support heritage protection, and a stick with which the heritage protection system is routinely beaten by those who want to undermine it. The validity – and the negative effects – of the criticisms have been acknowledged by Government and HE for decades.

(f) 'Curtilage listing' may not protect some heritage which needs protecting

26. There is also a potential problem of structures near to or which arguably relate to listed buildings and are of some 'interest' but which, because they are not listed or 'curtilage listed', may lack protection. This issue is covered in the Appendix.

[18] (or at least would accept this if the controls were more proportionate, effective, and transparent).

D. Comments on the consultation document

General comments

27. The problems set out above are serious and should – and to a great extent can – be resolved. Some small legislative and other steps have been taken, like the decision to amend s1(5) to allow HE to exclude specified structures from the curtilage in new and revised listings (though these still say that "any… structure within the curtilage… is… part of the listed building", so may not remove all potential for argument). But new and revised listings will always be a tiny minority of all listings. **The provision of effective advice is therefore of fundamental importance**, and the decision to do that in 2016 was extremely welcome.

28. The role of HE advice clearly should be to explain 'curtilage listing' and its implications clearly and briefly, minimising uncertainty, and minimising the negative effects of 'curtilage listing' on the credibility of the heritage protection system. LPAs and owners and advisers should then be able to work out what is 'curtilage listed' and what is not, and know what this means, and does not mean, on the ground, and can then focus on their day jobs.

29. The most vital point is that HE advice must, obviously, not take the 'clear as mud' approach. It must be based on Section 1(5), not on the so-called "Calderdale tests".

30. Textbooks already do this, because an author who said "here is some waffle which does not answer the question – I suggest you ask the LPA" would be the object of derision. Mynors, after a long discussion of the issues, arrives at a straightforward summary[19], restating the s1(5) tests set out in paragraph 9 above:

> "Any pre-1948 structure that was in the curtilage of the principal [listed] building at the date of listing (or possibly January 1, 1969) will be included in the listing, provided that it is [fixed to the land], and is ancillary to the principal building". He adds that "The practical effect of inclusion… is limited by the requirement that LBC is only needed for works… where they affect the special character of the listed building as a whole".

31. Similarly Richard Harwood[20] says, again restating the s1(5) tests in 9 above:

> "There are four elements in deciding whether an object or structure is listed as a curtilage structure under s1(5):
>
> (i) being within the curtilage of the listed building; [and]
> (ii) forming part of the land; [and]
> (iii) having been part of the land since before 1 July 1948; [and]
> (iv) being ancillary to the listed building."

32. Martin Goodall[21] takes a similar approach, with repeated emphasis on the need for a curtilage structure to be ancillary to the listed building, and in the same planning unit.

[19] Charles Mynors, p127.
[20] Richard Harwood, *Historic environment law*, 2012, p61.

33. These authors, all authorities on this subject, therefore all take what paragraph 9 above calls the s1(5) approach. None use the 'clear as mud' approach, or base their analysis on the so-called "Calderdale tests".

34. In contrast, LPAs and even HE seem to favour the 'clear as mud' approach. HE's online advice on listed buildings[22] does include one paragraph which says "Any pre-1948 building that was in the curtilage of the principal building at the date of listing (or possibly at January 1969…) is protected provided it is fixed to the land and is ancillary to the principal building." Unfortunately, however, that same document then adds in the full 'clear as mud' approach, describing this as "a complex question", quoting the so-called "Calderdale tests", and stressing that it is "vital" to consult the LPA in cases of "any" doubt.

35. This is not helpful. **HE advice needs to take the s1(5) approach, not the "Calderdale tests" approach**. A few straightforward changes can readily achieve that:

The Summary

36. The first sentence of the Summary therefore needs to be extended slightly to include the need for a curtilage structure to be ancillary to the principal building and in the same ownership. The second and third sentences would be clearer if brought together (ie "…consent, and carrying out…"). More importantly, the fourth sentence (now beginning "It is…") needs to be replaced with something like "Whether a structure is a curtilage structure is usually straightforward, though may be less clear in a minority of cases. This advice note gives hypothetical examples…". With these small but important changes, and a brief summary of impacts (see 41 below) this would be a good and helpful summary.

Introduction

37. This Introduction section is a full exposition of the 'clear as mud' approach with all its mud-spraying ingredients: the "Calderdale tests", statements about "difficulty" and "doubt", menacing threats of criminal prosecution, and instructions to consult the LPA if in "any" doubt, and it adds further confusion by (in sentence 1) ignoring the existence of the list description.

38. This would confuse anyone who read it. Above all it would confuse LPA staff, who would find only uncertainty and instructions to consult themselves. The introduction should definitely not be published in this form.

39. This confusion is harmful (see 21 to 25 above), and it is also unnecessary. This section could easily be good. As in 27 to 35 above, **it needs to start with a straightforward statement of the s1(5) tests**, on the clear and comprehensible basis set out in paragraphs 9, 30, and 31 above, making it clear that a structure is 'curtilage listed' if, and

[21] Martin Goodall, *A practical guide to permitted changes of use*, 2016, pp283-6, and 2013- blog entries at http://planninglawblog.blogspot.co.uk/2013/03/barns-near-listed-farmhouses.html.
[22] https://historicengland.org.uk/advice/hpg/has/listed-buildings/

only if, all these four or five elements are present. It could continue with a discussion of what these four or five elements mean in practice, like (for example) Harwood[23], or it could say just "The curtilage examples below illustrate how this operates in practice". **It is important is that this section then says that these issues are not likely to be problematic in most cases** (see paragraph 10 above). Again, it is vital that it does not quote the so-called "Calderdale tests", which can have no place in helpful or competent advice on 'curtilage listing'.

40. To avoid confusion, HE's web advice on listed buildings and LBC should give only a brief summary of 'curtilage listing', based on s1(5), and then refer users to this advice.

The introduction needs to explain the implications of 'curtilage listing'

41. Deciding whether or not a structure is a 'curtilage structure' is of course only part of the issue here. If it is, **there are three important further points which need to be made in this advice on the implications of 'curtilage listing'**, ie:

- Firstly, as discussed in 19 above, a curtilage structure does not necessarily have special interest, or even any interest at all. This is not obvious and it is important that LPAs are wholly aware of this, so the advice should make this clear (clearer than GPA2 paragraph 15). It should take a positive 'Constructive Conservation' approach, (i) pointing out that interest may be less than special, or there may be no interest at all; (ii) discouraging LPAs from thinking that 'interest' (where it does exist) needs to be preserved from all change[24]; and (iii) especially encouraging change which has beneficial effects on the asset.

- Secondly, it should be clear also that LBC is only needed where the works would affect the special interest of the listed asset as a whole (see the discussion in 20 above). GPA2 paragraph 15 does not cover this at all.

- Thirdly, the advice should also very briefly point out the other consequences of 'curtilage listing', especially exemption from empty business rates.

Buildings listed before 1969

42. This appears to pick up the sensible suggestion in Mynors[25] that, where a building was listed before 1969, the questions in the s1(5) tests (ie again was it pre-1948, in the same ownership, in the curtilage, and ancillary?) may need to be asked as of 1 January 1969, rather than at the actual date of listing, but the wording probably needs to be clarified.

[23] Richard Harwood, *Historic environment law*, 2012, pp61-64.
[24] Where 'interest' is positive but less than 'special', the approach to handling change might logically resemble the NPPF treatment of non-designated heritage assets.
[25] Charles Mynors, pp107-08.

Curtilage examples

43. Well-drafted hypothetical examples, as the two iterations of the advice show, illuminate the issues in a way which lengthy theoretical text would not: examples are helpful, or essential. The 'caveats' in this section sensibly point out that real cases may differ from the examples, but **this text should be amended because it exaggerates the difficulties involved and the proportion of all cases which should give rise to any real uncertainty, which is likely to be small** (see paragraph 10 above).

Review and revision of list entries

44. What is said here about revision is true as far as it goes, but HE is highly unlikely in practice to do this unless the asset is part of a strategic programme of designation, or is otherwise a high priority[26]. Nearly all users who hope for clarity via this route will have to pay, though messages that owners "must pay" to get any certainty inevitably tend to undermine the heritage protection system (see 24 above).

Other provisions for protection

45. This section correctly points out that not being 'curtilage listed' does not necessarily mean that a structure is unprotected. This subject is further covered in the Appendix below.

Curtilage examples 1. Domestic

46. These examples are generally clear, straightforward, and helpful. The "If…" sections at the end of each example are very helpful in illustrating how 'curtilage listing' works in practice and what it includes and excludes.

47. In 1.4, the distant lodge was/is ancillary, but there must be some limit to the curtilage of a building. Case law does not set a limit, and it may be right not to give a definite answer, but 2.5 miles must stretch curtilage well beyond breaking point. Curtilage is a planning/ property law as well as listed building law question, and suggesting that it can extend for miles in any direction may have non-heritage implications and might prove controversial.

Curtilage examples 2. Farms

48. It might be better to begin this section with example 2.2, which illustrates the s1(5) tests well. It is clear that the stable and granary structures, which meet all the s1(5) tests including having a use ancillary to that of the listed farmhouse as a domestic building, <u>are</u> curtilage structures. It is clear that the Atcost sheds being post-1948 are <u>not</u> curtilage structures. It is also clear – though should be much more firmly stated – that the farm buildings on the opposite side of the road, being neither ancillary to the domestic use of the farmhouse nor in its curtilage, are <u>not</u> curtilage structures.

[26] *Position statement on accepting requests for reassessment of listed buildings*, HE, December 2015.

49. Example 2.3 also illustrates the s1(5) tests clearly.

50. The answer in Example 2.1 should also be clear, and was clear in the 2016 advice (but appears to have been sprayed with mud between 2016 and 2017). The listed domestic building has a clear curtilage, and the farm buildings are outside that. They are also, having always been in agricultural use as opposed to the domestic use of the listed house, clearly not ancillary to the listed house. They therefore fail at least two of the s1(5) tests and, as the 2016 advice said, cannot be curtilage structures.

51. This follows not only from the *Taunton*[27] case, but from preceding case law from *Sinclair-Lockhart's Trustees* onwards. It would almost certainly still be true even if the agricultural building was very close to the farmhouse and there were no boundary between the two. There might be doubt in a few cases (perhaps where farm horses shared a stable with domestic horses, or where uses have changed), but otherwise the significant volume of case law is almost unequivocal in saying that a structure which is not ancillary is incapable of being a curtilage structure, so a farm building in agricultural use cannot be ancillary to a farmhouse. Mynors (before Taunton) says that "the requirement is that the… structure… must have been ancillary to the building in the list at the date of listing"[28]. Martin Goodall says that "in the case of a barn in close proximity to a farmhouse, such a functional relationship would only be established if the barn itself was at the relevant date used for some subsidiary domestic (not agricultural) purpose"[29]. His widely-followed blog makes this point in greater detail[30]. Similarly, HE's Legal & Governance Director said after *Taunton* "it is hard to see why this… would not weigh heavily in all farm cases, even where the buildings were very much closer and no boundaries between them existed"[31].

52. Example 2.1 therefore needs a number of changes. Firstly, the paragraph beginning "A" needs some rewriting because *Taunton* clearly did not turn only, or primarily, on the wall. Secondly, the next paragraph re Keith LJ's *obiter* comments in *Debenhams* in 1987 adds confusion and is, as it says, of limited applicability at best. Thirdly, the now-tepid conclusion that the farm buildings are not curtilage structures should, as above and as before, be much more definite. Fourthly, the final paragraph (a further example of the 'clear as mud' approach) should be removed: its suggestion that simply being physically closer "may well" make the farm buildings into curtilage structures even though they were not ancillary reintroduces uncertainty and more importantly is, as above, difficult to justify in the face of the case law.

Curtilage examples 3. Commercial and industrial premises

53. These look clear and straightforward, though again it might be helpful to include a building which is not a curtilage structure, and/or an "If…" section as in the domestic examples.

[27] *R v Taunton Deane BC*, 2008.
[28] Charles Mynors, pp105.
[29] Martin Goodall, *A practical guide to permitted changes of use*, 2016, p283
[30] http://planninglawblog.blogspot.co.uk/2013/03/barns-near-listed-farmhouses.html.
[31] Mike Harlow, *Legal developments: Curtilage and farm buildings*, in Conservation Bulletin, Summer 2009.

Appendix

Other ways of protecting structures near listed buildings

54. Although this is mainly outside the scope of a consultation about advice, this section looks briefly at the protection of structures near to or associated with listed buildings, but neither included in the list descriptions nor 'curtilage listed'.

55. In theory of course a comprehensive resurvey should list all structures of special interest, and put beyond doubt whether structures are curtilage structures or not, and primary legislation could then remove this aspect of s1(5). In practice, clearly, there will not be a comprehensive resurvey. That may, rightly or wrongly, leave some buildings near listed buildings outside the scope of listed building protection. There is for example a view that some unlisted farm buildings are threatened because they were deliberately left unlisted on the incorrect understanding that they were 'curtilage listed' by the listing of farmhouses. The answer is clearly not to try to spray listing protection indiscriminately over every building anywhere near a listed building[32], even if that were legally possible; it is to scope the problem and then – if it is a problem – target it effectively. It is clear for example that many farm buildings were listed alongside farmhouses; and any failure to list on this basis presumably ended in 1986, when HE undertook to mention in the list description every structure that had special interest, claiming that "the new lists will therefore leave little room for doubt whether a building is listed or not"[33]. The NHLE database could be used to identify a sample of pre-1986 listings of farmhouses which were not accompanied by farm building listings, and these could be looked at using Google Maps/Earth to see whether there appear to be farm buildings of special interest, or interest. Listing staff could then look at a sample of these. If there is evidence of a substantive problem, a larger (but still targeted) exercise might be considered.

56. It is important to view these issues proportionately. Firstly, as the draft advice points out, unlisted structures are often protected in other ways, because they are heritage assets in their own right, or are in the settings of listed buildings, or in conservation areas.

57. Secondly, it is important to focus on the biggest problems. Even if there is a substantive farm buildings issue, this would be a minor issue compared to the much greater problem of redundancy which threatens the survival of hundreds of thousands of unconverted traditional farm buildings. It is the redundancy problem that we should focus on[34].

[32] Similarly, there are tens of thousands of buildings across England which have enough special interest to be listed in their own right under current criteria, but have not been listed, but nobody suggests that we list every building in England in order to ensure that those unlisted buildings are protected.
[33] Hansard (HL) Deb, 13 October 1986, col 623, quoted both in Charles Mynors and in the *Planning Encyclopaedia*.
[34] HE is, to its credit, proposing to publish revised and updated advice which may help to address this problem.

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