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Dear Sir

Consultation on Listed Buildings and Curtilage

The Institute of Historic Building Conservation is the professional body of the United Kingdom representing conservation specialists and historic environment practitioners in the public and private sectors. The Institute exists to establish the highest standards of conservation practice, to support the effective protection and enhancement of the historic environment, and to promote heritage-led regeneration and access to the historic environment for all.

We are very pleased to have the chance to comment on the consultation document. The Institute's comments are as follows:

General Observations:

1. The IHBC is pleased that the original advice note has been withdrawn but continues to have serious concerns regarding the draft replacement document, which contains a considerable amount of uncertainty and ambiguity. Whilst we appreciate the intent to provide what is very necessary guidance for practitioners and decision-makers, in our view, any advice given should be limited to clear and unambiguous matters.

2. Careful thought should be given to the wisdom of providing examples, especially where the outcome is not clear-cut. IHBC is concerned that the advice note is having an effect contrary from its

intention, because as it stands the document could potentially cause more confusion than it aims to resolve.

3. We suggest that the Advice Note requires a significantly more substantial executive summary in the commencing paragraphs. It should include a clear and precise statement of the law in relation to curtilage buildings and the requirements of listed building consent for carrying out works to such structures.

4 The context for this Advice Note should be set so that there can be a more demonstrable rationale concerning the reasons why it might be important to assess the extent of the curtilage of a listed building. It should formally state that it is drafted taking into account current legislative provisions and the principles arising from the existing body of case law, which is cross referred in another document.

5. The Advice needs to highlight the original purpose of the statute – why curtilage was included within the definition of what is Listed. This purpose was clearly stated in the Calderdale Case (1971) where the Court of Appeal set out that the purpose of the statute was to bring within control works to objects and structures which might not intrinsically be of interest, but which were so closely related to a Listed Building that their removal might adversely affect it. The curtilage tests then follow on from this intent. This guidance must emphasise the prime importance of the well-established curtilage tests and the purpose of the statute. The guidance needs to state that the curtilage tests should be considered as a whole and no one factor is decisive.

6. IHBC considers that the note fails to stress adequately that all cases have to be determined individually on their merits and that such determination should be founded primarily on the three Calderdale tests combined with the two additional tests referred to below. In addition to the Calderdale tests, a fourth test arises from the Debenhams decision and that should be set out in Advices. In that case the concept of 'principal and accessory' was established ie. that the ancillary building should be used in connection with the listed building. A fifth test which should also be referenced in Advices is whether the object or structure within the curtilage of a listed building, which though not fixed to the building, forms part of the land and has done so since before 1 July 1948.

7. The important principles, which are known with certainty, could more usefully be set out in this Advice Note. The Advice needs to use those principles to minimize uncertainty where possible. It would be more helpful if the principles were grouped and referred to

together. The guidance should explain the hierarchy of court decisions: for example a Supreme Court decision should carry more weight than an Inspector's decision.

8. This Advice Note is seeking to give assistance to owners and professional practitioners on how to determine the curtilage of a listed building. It seeks to clarify how to make that determination where it is not clear on the face of it from the Listing. It does this by introducing a range of information sets, each of which required a determination concerning the extent of the curtilage. It gives hypothetical examples to assist in that assessment. In circumstances where the law will decide each case on its own merits, it may be obvious to suggest to EH the use of examples, which are real. The examples might better use past cases where binding decisions have been made in the courts where there can at least be certainty and clarity about the findings.

9. The Advice Note should acknowledge that there may, at times, be some level of uncertainty unless a case is on all fours with a previously determined case. However it should present reassurance to practitioners and decision-makers that sometimes common sense will allow certain assumptions to be made based on a reading of the legislative components and on the relevant principles extracted from case law.

10. The Advice should continually emphasize the importance of the facts 'at the date of listing' to ensure there is clarity about this point. The date of listing of a building is given in the list entry summary at the 'date of listing' field. Certain fixtures introduced after the original date of listing may be determined to be included within the ambit of protection because a test concerning the nature of their attachment and the degree of annexation is applicable. It is a cause of concern as to how the original date of listing operates in the context of resurveys and reissued lists, as we are not aware of this issue having been deliberated upon in a legal context.

11. It would be helpful to provide guidance in this document about complications, which may arise, around having a separately listed structure within the curtilage of the building. Some curtilage structures may be listed separately but that does not limit their status as curtilage buildings. The advice note should clarify this issue. It would be useful for HE to consider including an example, based on a real set of circumstances, of a church in a churchyard with listed monuments and a churchyard boundary wall. A simple example like this based might serve to clarify confusion here.

12. The document should explain the route of HE's services for revisiting the listing with a view to establishing what requires Listed Building Consent and what does not, within an appropriate timescale. The Enhanced Advisory Service for listing Enhancement, which allows owners to pay, at cost –recovery rate only, for an enhanced listing within an agreed timescale. For large sites where HE's free service might not allow the capacity to examine all potential curtilage structures, for example, and HE might opt not to use the powers of exclusion, the paid service allows HE to scope and cost doing this.

Specific comments on the text

We would like HE to address our specific concerns on the Advice Note. There is some material that is really useful but overall certain points need clarification and parts of the text need adjustment

Page 1: This paragraph should be altered to set the scene with a positive statement providing context and rationale for the entire document. It could be renamed 'context' as it is not really a summary of the content of the document.

Introduction: The guidance should more strongly state the law that in effect each case is different and will be assessed on its individual circumstances notwithstanding the examples shown. We suggest that the old PPG15 clause 3.34 – 3.36 was useful.¹

¹ 3.34 The principal tests as to whether an object or structure is within the curtilage of a listed building relate to the physical layout of the land surrounding the listed building at the date of the statutory listing and the relationship of the structures on the surrounding land to each other. Changes in ownership, occupation or use after the listing date will not bring about the de-listing of a building which formed part of the principal building at the date of listing. The Courts have held that for a structure or building within the curtilage of a listed building to be part of a listed building it must be ancillary to the principal building, that is it must have served the purposes of the principal building at the date of listing, or at a recent time before the date of listing, in a necessary or reasonably useful way and must not be historically an independent building. 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. The structure or building must still form part of the land, and this probably means that there must be some degree of physical annexation to the land.

3.35 Considerations which may assist local planning authorities in forming their own views, or giving advice if requested, include:

- the historical independence of the building;
- the physical layout of the principal building and other buildings;
- the ownership of the buildings now and at the time of listing;
- whether the structure forms part of the land;
- the use and function of the buildings, and whether a building is ancillary or subordinate to the principal building.

3.36 It is always necessary to recognise, however, that the question of whether a building, structure or object is within the curtilage of, or is fixed to, the principal building, unless

In the introduction other factors that may be relevant and we consider to be worthy of inclusion include:
1) Understanding of the property's planning history and
2) that it is always advisable to check with the local planning authority to see if Listed Building Consent had been acquired in respect of previous alterations to the building in question.

5th Paragraph: We recommend the additions shown here in bold to the sentence. 'It may be a criminal offence to carry out works to a building in the curtilage of a listed building **that would affect the character of the listed building as a whole**, without listed building consent. So if you have any doubt about the extent of the curtilage then please contact your Local Authority's Planning **or Conservation** department for advice'.

It would be appropriate to cross refer to the separate guidance published on Listed Building Consent at <https://historicengland.org.uk/advice/hpg/consent/lbc/>

7th Paragraph: We suggest separating out the last part of the third bullet point as follows:

'The courts have said that there are three key factors to be taken into account in assessing whether a structure or object is within the curtilage of a listed building:

- the physical layout of the listed building and the structure ;
- their ownership, both historically and at the date of listing; and
- the use or function of the relevant buildings, again both historically and at the date of listing – and in particular whether the use of the structure was ancillary to (that is, subordinate to and dependent on) the purposes of the listed building at the date of listing

These tests were first proposed in the Attorney-General ex rel. Sutcliffe and Others v. Calderdale BC, 1982 (Calderdale), as accepted by Debenhams plc. v Westminster CC, 1987(Debenhams).'

Page 2: Refers to the Sutcliffe v Calderdale (Court of Appeal 1982) test accepted by Debenhams plc. v Westminster (House of Lords 1987).

specifically included in the listing, is in any particular case a matter of fact and ultimately a matter for the Courts. Great caution must, therefore, be exercised in attempting to extrapolate any general principles from recent decisions and this guidance does not purport to be definitive.

The advices could add some further clarification in the light of case law. It would be more helpful if the principles within the Act itself, Calderdale and Debenhams were grouped and set out clearly. It would also more helpful to refer to and reference the legal cases Calderdale, Debenhams, Skerrits and Shimizu within the document.²

In addition to the Calderdale tests, a fourth test arises from the Debenhams decision and that should be set out in Advices. In that case the concept of 'principal and accessory' was established i.e. that the ancillary building should be used in connection with the listed building.

A fifth test which should also be referenced in Advice is whether the object or structure within the curtilage of a listed building, which though not fixed to the building, forms part of the land and has done so since before 1 July 1948.

The guidance should give much less weight to the Taunton Deane case and should clearly set out its distinguishing facts. The Debenhams case should also be better explained since it is specifically referred to on a number of occasions, and there are many other more recent cases which give a more representative view to explain curtilage tests farm buildings.³

The statement that these principles should be applied at the date of listing and that 'past' refers to the situation pre-listing should also be clarified.

Last paragraph of the introduction: This is not factually correct – not all demolition requires planning permission and alteration may also require planning permission. It would be better to state that demolition and alteration may require planning permission.

² Attorney-General ex rel. Sutcliffe and Others v. Calderdale BC, 1982
Debenhams plc. v Westminster CC, 1987
Secretary of State v Skerrits (Court of Appeal 2000) and
Schimizu v Westminster Council (House of Lords 1997).

³ There are other appeal cases (some more recent) which give a more representative view to explain the curtilage tests in relation to farm buildings. E.g. Chipping Camden Appeal (Ref. App/G/92/F1610/1) which hinged on the visual relationship of farm buildings to the Listed farmhouse. Buckingham Mills Farm Case (Ref.App/F1230/A/14/2224806) which examined the Taunton Deane case but concluded that it had limited relevance.

Buildings listed before 1969

A general point can be made concerning the precautionary manner in which HE sets out the effect of current legislative arrangements in reference to buildings listed prior to January 1 1969. We appreciate that HE only has capacity to underpin and reinforce the existing law as interpreted. However we have grave concerns over the wording of this section, particularly that relating to the intentions of the 1968 legislation. The wording could be deemed to be beyond the remit of the Advice Note.

The 'may be uncertainties' is felt to be unhelpful in advice that should provide clarity, particularly regarding legislation. We suggest it is being overemphasized. The Advice Note could be addressed in a more positive way rather than presenting such a strong focus on this apparent weakness of not having the capacity to interpret with any confidence that the curtilage protection from this date could be applied retrospectively on all existing listed building. The 1968 provision was introduced to make sure that curtilage assets were understood to be covered by listing.

IHBC suggests that the interpretation given in the Advice Note in the opening boxed summary, which effectively removes protection from curtilage structures where listing was effected prior to 1969, is disputable and needs more testing. Perhaps HE could review more deeply and consult more widely on this particular point should it not be possible to support such an interpretation with case law. In the event of this issue leading to reduced protection for pre 1969 listings IHBC suggests that HE should plug the gap through advocacy and promotion of legislative amendments rather than effecting removal of protection through an Advice Note.

If the principal building was listed prior to 1969⁴, (when the provisions which applied to a listed building only referred to a 'building' and had no reference to ancillary objects or structures attaching to a building or to structures within the curtilage), it may nonetheless have carried a curtilage. However, the pragmatic way to interpret the level of protection through listing can be equated to that which existed prior to 1 January 1969⁵. This may be so stated because there has not been any legal interpretation specifically

⁴ Provisions equivalent to S1(5) of the Planning (Listed Building and Conservation Area) Act 1990 have been in effect since 1 January 1969. The 1968 Town and Country Planning Act came into force on this date. The legal definition of a 'building' used in earlier legislation is required. There is a view that 'building' as referred to in earlier legislation comprised a legal curtilage relating to all in the same ownership at the address at the time. The 1968 Act sought to apply a more helpful account of what this meant in terms of extent.

⁵ As stated in the current HE advice online on consent, paragraph 3, at <https://historicengland.org.uk/advice/hpg/consent/lbc/>

determining this point nor is there any relevant precedent to be followed. It would be better not to address this issue than to make unclear statements.

The unhelpful parenthetical caveats, it should be noted, refer to a reading about ancillary status at 1969 (as opposed to the ancillary status at the time of listing), not to the possibility of the point being suggested as the standard in the advice note - that the ancillaries should specifically be taken as NOT listed if the listing predates 1969.

General and specific comments on the examples given.

A. We think the facts relating to the examples should be laid out more methodically in each case, covering the situation at the date of listing, the current situation and the dates of any changes that have happened in between.

B. Clear examples can be very helpful but if examples are to be presented then they should be very detailed and include all relevant dates.

C. The three Calderdale tests should be methodically assessed in all the examples in the note and the fourth test arising from the Debenhams decision whether there is a principal and accessory relationship between structures and finally the fifth test concerning whether it is pre-1948.

D. It is good to have a variety of situations shown in examples. It is important that there are clear examples where they are presented to promote certainty where one can actually be certain.

E. Each broad example shown could include a range of layouts and the issues differentiating them could be identified and how they may influence a potential decision on whether a particular building or structure lies within a particular curtilage.

F. The approach to the examples needs to be altered to show what is protected, what is clearly not curtilage and some examples which show gradations of the situation. It seems that the examples were trying to show where the boundaries were with determining curtilage, which was a good idea but not with all of the examples as stated. Whilst some of the examples were useful, we also have concerns regarding the wording of some. Generally it would be helpful to add variations to the other examples as with the 'House' examples. The diagrams used need to be more detailed, with

annotations of what everything shown is (for example is it a farm track or a public highway?) and the distances between the features.

G. The farm examples are a cause of concern due to their lack of clarity. The farm building guidance is unbalanced and should provide positive examples for agricultural uses not just domestic uses. It needs to be emphasized that farm buildings would normally be curtilage listed except in specific circumstances where it can be shown that there was not a functional relationship in existence. A further example of a farmhouse with a steading, closed range or informal group should be included to guide that this example irrespective of its use as stable, garage or cow shed would be curtilage

In particular examples 2.1, 2.2 and 3.1 were felt to be very unclear and ambiguous partly due to the facts of each not being fully stated. We suggest that examples 2.1, 2.2 & 3.1 should be removed. There needs to be clear advice and avoid a woolly conclusion such as in 2.1 that they may or may not be listed. Any chance of ambiguity of interpretation should be avoided.

For example in Farm example 2.1 the local PA needs to take into account the three criteria on each occasion and the way this is written could be taken to imply that selling off will immediately stop it being curtilage. The example states that the barn went into separate ownership after listing. It acknowledges the reality that change of use might affect curtilage status.

With respect to the example at 2.1 – the illustrated example (plan) bears only slight resemblance to the configuration at Jews Farm, the subject of the High Court decision in *R (on the application of Egerton) v Taunton Deane Borough Council* [2008] All ER(D) 231 and it is possible that a different conclusion could be arrived at. In the Jews Farm case the farm buildings were found to be some considerable distance from the farmhouse and separated from it by a wall, and the farm and farm buildings had separate entrances/driveways. The barn in question was found to be part of a group of four buildings which 'turns its back' on the farmhouse on the other side of the wall. The illustrative example by contrast suggests the farmhouse accessed through the farm courtyard. The Taunton Deane case confirms the principle, established in the earlier Calderdale case, so the view is that this remains the leading authority.

It would be more helpful for the guidance to have a range of farmstead examples, including those that have had different decisions in relation to curtilage such as Buckham Mills Farm,

Beaminster (APP/F1230/A/14/2224806) where a Planning Inspector came to a different conclusion following close examination of Taunton Deane.

H. The potential under the Planning (Listed Buildings and Conservation Areas) Act 1990, to seek clarification regarding the need for consent should be highlighted more strongly in the Advice Note:

S.1(5A) allows List entries to include confirmation of whether certain buildings or fixtures within the curtilage should or should not be treated as part of the listed building. It also allows List entries to confirm that certain features are not of special interest.⁶

S.26A allows the local planning authority to make a Heritage Partnership Agreement with a building owner, specifying whether certain works require consent, have consent or conditional consent, or would require further agreement.

S.26D allows the local planning authority to issue a Local Listed Building Consent Order, granting consent for certain works for all or some of the listed buildings within its area.

S.26H allows the local planning authority to issue a Certificate of Lawfulness,⁷ confirming that the specified works applied for would not require Listed Building Consent.

Yours sincerely

A handwritten signature in black ink, appearing to read 'FN', written in a cursive style.

Fiona Newton
Operations Director

⁶ It should be clarified that the identification of particular objects or features in a List entry as not being of special interest does NOT mean that LBC would definitely not be required for their removal or replacement – for example, it may be impossible to remove them without harming fabric of interest, or their replacement items might in themselves harm the character.

⁷ It can be emphasized that 'Certificates of Lawfulness' will give the legal certainty, that text exclusions can only guide decision-makers; That mapping exclusions ARE definitive, but only in a negative sense. Application of the powers is selective.