Report on Curtilage

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Introduction:
This study has been commissioned by The Heritage Council to review a body of case law, journals, textbooks and policy guidance notes in Ireland and in comparative systems of law where the subject of “curtilage” has been considered. This term “curtilage” is used in Part IV of the Planning and Development Act, 2000 in the context of the protection of the architectural heritage. The word “curtilage” is not defined by the Planning Acts nor is it defined in any other piece of legislation.

The objective of this research is to find information that will give a better understanding of the effect of the inclusion of an entry in the Record of Protected Structures (RPS) maintained by each planning authority, particularly when an issue of interpretation arises concerning the scope or extent of the protection.

In relation to the content of this report it is necessary to be mindful that in considering case law, policy guidance and other material written on the subject of curtilage any information based on extrapolation of principles from case law must be viewed with caution. This is because it has been clearly established in law that every case can only be determined in the light of its own individual facts and circumstances.

However, whilst no guidance can be definitive, some decisions of the courts have generated “useful principles” or “indicators” which may assist the interpretation of the term “curtilage” provided they are viewed in the context of the caveat referred to above. This report includes a summary of “useful principles” or “indicators” drawn from the sources referred to and a list of selected cases with case notes has been set out separately to form an Appendix to this report.
Legal context
The legal interpretation of curtilage is of course influenced by other than architectural heritage considerations even though that is the primary perspective in which curtilage is considered in this report. In a legal context, consideration of the term “curtilage” by the courts has arisen in the context of criminal law, property law, taxation and in relation to planning law. The sparsity of Irish authorities is notable in this report, but it was found in the course of the research that recent Irish case law where curtilage has arisen has been in the context of constitutional rights in relation to private property in criminal proceedings. The term curtilage certainly arises in many of the Irish court cases and in the course of appeals before An Bórd Pleanála. However, no Irish decision was found where the issue for consideration was concerned directly with defining the term “curtilage”, or with the consideration of the scope or extent of a structure’s curtilage in the context of a particular set of facts.

Legislative Protection
From the perspective of the protection of the architectural heritage, it is the Planning and Development Acts, 2000 – 2006 which establish the parameters of protection for structures of special interest. A development plan made under the Acts, must include objectives for the "protection of structures or parts of structures, which are of special architectural, historical, archaeological, artistic, cultural, scientific, social or technical interest". To that end it is mandatory for each planning authority to include a "Record of Protected Structures"(RPS) in its development plan.

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2 Sfar v Louth County Council [2008] 7 I.C.M.D. 5
3 An Irish decision “the Riversdale House case” which which touched on the issue of curtilage is referred to later in this report.
4 Section 10(2)(f) Planning and Development Act 2000
5 Section 51(1) (Planning and Development Act, 2000
A "protected structure" is defined as follows by the Planning and Development Act, 2000:

[It] "is a structure or a specified part of a structure, which is included in a Record of Protected Structures in a development plan. The record may also include any specified feature within the attendant grounds of the structure, which would not otherwise be included". The "attendant grounds" of a structure form an intrinsic part of their setting and may include land outside the curtilage of the structure. The attendant grounds could include land or features which were originally within the curtilage of the structure and which through change of ownership or subdivision of the site have been separated from the building. They might potentially include land historically associated with that structure.

The Minister for the Environment, Heritage and Local Government has prescribed the form of the RPS. Any description of the structure included in the record is for identification purposes alone and is not in any way intended to define the extent of the protection afforded. The protection provided by the inclusion of a structure in the RPS originates from the definition in Section 2 of the Planning and Development Act, 2000 of the term "structure" in the context of a "protected structure or a proposed protected structure" and it includes "(i) the interior of the structure, (ii) the land lying within the curtilage of the structure, (iii) any other structures lying within that curtilage and their interiors, (iv) all fixtures and features which form part of the interior or exterior of any structure or structures referred to in subparagraph (i) or (iii)"

In effect a "protected structure" is a legal concept rather than an actual physical building, in that by virtue of the statutory provisions the ambit of protection automatically extends to the interior of the structure, the land lying within the curtilage of the structure and any other structures lying within that curtilage and their interiors, and to all fixtures and features which form part of the interior.

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5 Statutory Instrument No 600 2001 Planning and Development Regulations, 2001 Part 6 Article 51
or exterior of the principal structure or any other structures within the curtilage of the principal structure. The extent of protection is determined by the extent of the curtilage which may or may not have been defined. The only circumstance where the protection can extend beyond the curtilage is where the “attendant grounds” provision is used by the planning authority at the time of inclusion of a structure in the RPS.

This study has involved looking at case law from other jurisdictions, namely England and Wales, Scotland and Northern Ireland, but it is important to bear in mind that the manner in which the legal protection for “protected structures” operates under Irish legislation is slightly different from the protection of “listed buildings” in the United Kingdom.

In England and Wales a “listed building” means a building included in a list compiled by the Secretary of State under the S.1 (5) of the Planning (Listed Buildings and Conservation Areas) Act 1990 and includes:

“any object or structure fixed to the building; and any object or structure within the curtilage of the building which, although not fixed to the buildings forms part of the land and has done so since before July 1, 1948” The Scottish legislation, namely The Town and Country Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 is in identical terms, and the Northern Ireland provisions from Article 42 of the Planning (Northern Ireland ) Order, 1991 are similar except that the date is October 1973. The statutory listing itself is compiled and the designation attributed to individual structures on a centralised basis by the relevant bodies in England, Wales, Scotland and Northern Ireland, which differs from the Irish situation.

In Ireland the inventories compiled by the National Inventory of Architectural Heritage (NIAH) do not have a statutory status but form the basis for Ministerial Recommendations made under Section 53(1) of the Planning and Development Act, 2000 to local authorities of structures to include in their

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6 The Statutory function of the N.I.A.H. to make inventories is established under the Architectural Heritage (National Inventory) and Historic Monuments (Misc. Provisions) Act, 1999
statutory list, which is the RPS within each development plan. The Planning Authority itself has responsibility for the inclusion of structures in the RPS, the final decision being a reserved function of the elected representatives. Since January 1, 2000 there are no longer “listed buildings” in Ireland but “protected structures”. However where referring to cases from the UK the term “listed building” applies and has been used where appropriate in this report.

Statutory Guidelines
In 2004 the Department of the Environment, Heritage and Local Government published Architectural Heritage Protection Guidelines for Planning Authorities in relation to Part IV of the Planning and Development Act, 2000. (This superseded the Draft Guidelines which had been published in 2001). Part 2 of these Guidelines comprises detailed Guidance Notes which include Chapter 13 on Curtilage and Attendant Grounds. The Statutory Guidelines provide a practical methodology for defining curtilage and a recommended approach to consideration of applications for proposed development within the curtilage of protected structures, bearing in mind that the Planning and Development Acts, 2000-2006 are designed to prevent inappropriate development within the curtilage of a protected structure which would affect its character and special interest.

The term “Curtilage”:
As has been set out, the term curtilage is not defined by the Planning Acts or indeed by any other piece of legislation. Where a word is not defined in a statute a series of rules of interpretation is applied by the courts. First, words are interpreted by common sense and given their ordinary meaning. The word curtilage is not used in common parlance and therefore it is necessary to look to the dictionary definition. The Oxford English Dictionary (OED) describes curtilage as “the area attached to a dwelling as part of its enclosure”, and also as a “small court”. In the 1973 edition of the OED, the definition includes the adjective “small”: it reads “A small court, yard or piece of ground attached to a dwelling house and...”

7 This might also bring within control works to objects and structures which in themselves might not be intrinsically of interest but which are so closely related to the protected structure that their removal might adversely affect it.
forming one enclosure with it.” Murdock’s Irish Legal Companion describes curtilage as “A courtyard, garden, yard, field, or piece of ground lying near and belonging to a dwellinghouse.”.

The second rule of interpretation is that one may look not only at the words surrounding the word in question but at the statute as a whole or indeed at earlier legislation dealing with the same subject matter. In this context it would be appropriate to look to the long title of the Planning and Development Act, 1999 which was set out in the following terms:

"To make better provision for the protection of the architectural heritage in the interests of the common good". The 1999 Act which changed the system of protection for the architectural heritage in Ireland on a systematic basis, forms part of the consolidated Planning and Development Act, 2000.

The third rule is to interpret in the light of policy, which involves looking to the intention of the legislature. The intention of the legislature could be said to be to give effect to our national commitment under the Granada Convention of 1985 to implement statutory protection procedures for the preservation of the architectural heritage.

General observations
Broadly speaking curtilage is a parcel of land, which has an immediate association with a particular structure. However the definition of curtilage depends on the character and circumstances of the structures under consideration. The term curtilage was originally associated with domestic buildings and certainly that is the sense which is conveyed to the term in the dictionary definitions. It has long been established through case law that curtilage comprises the ground which is used "for the comfortable enjoyment of the house or building" and which might be regarded as an integral part of the same although it has not been marked off or enclosed in any other way. “It is enough that it serves the purpose of the house in some necessary or reasonably useful way" by its close association and relationship to that

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9 Sinclair Lockhart’s Trustees v Central Land Board [1951] P & C.R. 195
building, and is or was, clearly intended to be part of one functioning entity.

One case stated that "Usually the nature and extent of curtilage is obvious; the building is set in the land; the land is used in conjunction with the building; there are physical boundaries; there are Ordnance Survey and other map indications; there is a history of connected or associated use". These factors are of course full of common sense but the definition of curtilage is not always clearcut as is evidenced by the body of recent case law on the subject.

It may be obvious to state that the structures protected under planning legislation include a wide range of building types ranging from ecclesiastical structures to commercial buildings, however the concept of what the curtilage of each of these building typologies might mean has not been definitively addressed in law.

Clarity about what structures are protected
Owners and occupiers of protected structures and of those who have to make decisions about those structures need to be clear about what is included in the protection. This was the subject matter of proceedings in “the Riverdale House case” in 2003 in the High Court in relation to the former home of the poet W.B. Yeats, Riversdale House, Rathfarnham, Co. Dublin, a protected structure. In that case the entry in the RPS referred to “Riversdale House, the original gates and piers and the arched bridge”. The applicant tried to argue that the curtilage of the house was not included in the protection because specific separate references were made in the RPS to elements within the curtilage. It was argued on behalf of An Bórd Pleanála that there is no provision for a planning authority to expressly exclude lands lying within the curtilage of a protected structure from its protected status, that such power cannot arise by inference merely because a planning authority has added elements within a curtilage to its list of protected structures. The judge decided that in specifying Riversdale House in the Record of

10 Debenhams v Westminster City Council [1987] 1AER 51
11 In Re St Georges Church Oakdale 1975 2 All ER 870 the Lord Chancellor made observations about curtilage in the context of a church (referred to later) in this report
12 Begley and ors v An Bórd Pleanála [2003] 4 I.C.L.M.D. 60
Protected Structures, the council was including a particular structure rather than specific parts and that this protection extended to the curtilage of the house. In that case the High Court Judgment does not set out precisely what the curtilage of Riversdale House comprised. In the inspectors report to An Bórd Pleanála is is stated that the original curtilage of the house was 4 acres but the site is now 1.1 acres. His report states that the entire site at the time of the development application is the curtilage of the house.

More emphasis is placed on the wording of the description in the statutory listing in the U.K., however the wording is not definitive, as was highlighted in "the Redford Barracks case"\(^{13}\) in Scotland, involving a former riding school, where the listing referred to the name of the building and set out ‘original buildings of 1909 - 1915 only’. A problem arose because the riding school was built after 1915. The case went to the House of Lords where Lord Clyde remarked that plainly it is desirable to compile the list with sufficient clarity and precision to avoid the kind of question which arises here. Lord Hope considered that the imprecise language used in some of the description in this particular case, which related to a large group of buildings, meant that it was clearly not designed to be a definitive description of the entire premises within the curtilage.

The "Redford Barracks case" does not have an application in Ireland since the Irish legislation provides that a description serves to identify the structure(s) the subject of protection only. However it is still important to have a clarity in what is identified for protection through the RPS. It is important to note that one cannot have absolute clarity about what structures are protected unless the curtilage has been defined. The curtilage of a structure should ideally be defined prior to inclusion in the RPS. This recommendation is reinforced by the Irish Statutory Guidance\(^{14}\); however, in practice the curtilage is often not defined at the point at which protection is given to a structure.

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\(^{13}\) City of Edinburgh Council v Secretary of State for Scotland & anor[ 1998] 1 All ER 174

\(^{14}\) Architectural Heritage Protection Guidelines for Planning Authorities, Department of the Environment and Local Government 2004
The effect of separate protective measures for ancillary structures

Where one structure that is clearly ancillary to a protected structure is protected separately in its own right, that does not mean that the structure is outside the curtilage of the principal building. That was the effect of the decision in "the Riversdale House case".\(^\text{15}\)

Also in "the North Aston Hall case"\(^\text{16}\) it was stated that any such structures are listed because of their own merit but are clearly within the curtilage of listed buildings. It cannot be assumed that each structure in such a group has its own distinct curtilage, for that might involve splitting up a single clearly defined curtilage into parcels without individually definable curtilages. In "the North Aston Hall Case" the owner of a Grade II listed building, had constructed a new dry stone wall from the stones from a ha-ha and had filled in the ditch. The judge accepted that the elements of the ha-ha namely a wall and a ditch were integral parts of the structure and formed part of the listed building provided they were within the curtilage. This decision confirms that listing extends to structures forming part of the layout of the grounds of a building, such as terraces, balustrades, flights of steps and so forth and are therefore structures capable of being treated as part of a listed building. The outcome relied on the finding that the ditch and the wall constituted a single entity.

\(^{15}\) Begley v An Bórd Pleanála [2003] 4 I.C.L.M.D. 60
\(^{16}\) Watson Smyth v Secretary of State, and Charwell DC (1991) 64 &CR.156
Statutory Guidance on considerations for defining curtilage

Considerations for determining the curtilage of a protected structure are set out in The Architectural Heritage Protection Guidelines for Planning Authorities at para 13.1.5.:

“...In making a decision as to the extent of the curtilage of a protected structure and the other structures within the curtilage, the planning authority should consider:
a) Is, or was, there a functional connection between the structures? For example, was the structure within the curtilage constructed to service the main building, such as a coach house, stores and the like?
b) Was there a historical relationship between the main structure and the structure(s) within the curtilage which may no longer be obvious? In many cases, the Planning Authority will need to consult historic maps and other documents to ascertain this;
c) Are the structures in the same ownership? Were they previously in the same ownership, for example, at the time of construction of one or other of the structures?"

Thus to summarise, there are three considerations referred to in the Statutory guidance, namely a functional connection between the structures; an historical relationship between the main structure and the structure and the ownership past and present of the structures.
Useful principles or Indicators

In practical terms it is hoped that the indicators outlined in the following part of this report will help planning authorities and the owners of buildings to come to working arrangements for managing the architectural heritage within their remit, and to achieve consensus about the extent of protection of a protected structure.

1. Physical layout
The cases emphasise the importance of having regard to the physical layout of the principal structure and other structures. The principal building may be identified from the description in the statutory record, that being the only purpose of the description. The curtilage of the principal building will then be identified which will be “quintessentially a matter of fact”17 In "the James case" a tennis court had been constructed towards the far end of a 0.5 hectare parcel of land surrounding a detached house set in wooded countryside. The inspector had found that the field was in the same ownership as the house and that there was a functional association between the field and the house. However on the facts the inspector found that the field was quite separate and distinct from the cultivated garden attached to the house, and the house and the tennis court did not have the appearance of close association or of being in the same enclosure. The decision of the inspector that the field was not in the curtilage of the house was upheld by the court.

A factor to be taken into account also is the physical layout of the site concerned. In "the Jews farmhouse case"18 the site concerned was a farm, where the whole of the farm and the agricultural buildings including Mill Barn for which planning permission had been sought was in common ownership when the farmhouse was listed in 1984. It was found that the listed farmhouse and its residential curtilage was both physically separated, and functionally distinct from, the agricultural land and buildings on the other side of the wall. The fact that the buildings were all constituent parts of the

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17 James v Secretary of State [1991] 1 P.L.R.
18 R (on the application of Egerton) v Taunton Deane Borough Council [2008] All ER(D) 231 Oct
same farming enterprise did not mean that they were within the curtilage of the farmhouse.

As has been set out previously “the North Aston Hall decision”\(^\text{19}\) confirms that listing extends to structures, such as terraces, balustrades, flights of steps, ice houses, and garden temples, which form part of the layout of the grounds of a country house. The judgment suggests that the curtilage will extend as far as the ha-ha, the barrier for grazing animals, if there is one, or at least to the point whether wall, hedge or fence where pleasure garden ends and agriculture begins.

2. Integrality
A key test in determining curtilage is whether the land near to a listed building, or a building, structure or object upon it can be said to be so closely connected with the intended purpose of the listed building that it forms or formed an integral part of the listed building.\(^\text{20}\) This was established in “the Methuen Campbell case”, which involved a dwelling house, garden and an area of rough pasture known as the “paddock”. The garden was divided from the paddock by a wire fence and a wicket gate gave access from the garden to the paddock until sometime before 1973, when the gate was boarded up. The judgment stated that what is within the curtilage is a question of fact in each case, and that this comparatively extensive piece of pasture ought not to be regarded as being within the curtilage, as it was clearly divided off physically from the house and garden right from the start. This was a functional concept and not dependent on what lands might have been conveyed as a parcel. The garden was intimately associated with the functioning of the house, but not the paddock even though they had been held together as a single parcel of land.

Buckley L.J. made some helpful observations concerning curtilage in the course of his judgment where he said:

“What then is meant by the curtilage of a 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

\(^{19}\)Watson Smyth v Secretary of State, and Charwell DC (1991) 64 P. &C.R. 156
\(^{20}\)Methuen Campbell v Walters[1979] Q.B. 525
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\textsuperscript{21} 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\textsuperscript{22} 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, a garage, a driveway, a 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.\textquotedbl"

An earlier decision of the Chancellor Judge Ellison concerning St George’s Church Oakdale\textsuperscript{23} specifically considered the territorial extent of curtilage in the church context. He found that curtilage is by no

\textsuperscript{21} Visible and tangible property eg. land and structures thereon
Murdoch’s dictionary of Irish Law 2009
\textsuperscript{22} A dwellinghouse including gardens orchards courtyard and outbuildings
Murdoch’s dictionary of Irish Law 2009
\textsuperscript{23} Re St Georges Church Oakdale (1975) 2 All ER 870
means necessarily synonymous with church yard. He concluded that "for the purposes of S.7 of the [Faculty jurisdiction] 1964 Measure curtilage is to be construed as meaning such small area of churchyard which physically adjoins the church building and is required to serve some purpose of the church building in a necessary or useful way. It is in effect an integral part of the church......It is enough that the two are in common occupation not necessarily exclusive occupation. Its territorial extent will depend on the facts of the individual case and circumstances of the particular site. In the ordinary run of events the footpaths which may surround the church and the land which carries extended foundations the drains and the soakaways and supply services will obviously be part of the curtilage but beyond that one hesitates to express any general view as to the limits. If the churchyard happens to be quite small, it may well be that in such circumstances the churchyard and the curtilage of the church are coterminous in fact."
3. Ancillary, accessory or subordinate.
The decision in "the Debenhams case"\textsuperscript{24} concerned whether a second building could be defined as a structure fixed to a building. The judgment placed emphasis on the importance of whether a structure is ancillary, accessory or subordinate to the listed building. Use of the words “ancillary” and “accessory” connote a sense of the subordinate in both a functional and a physical sense.

Accordingly from the findings in this case it is open to find that any structure in the curtilage of the principal building is included in the listing, provided that it is ancillary, accessory or subordinate to the principal building.

"The Debenhams case" concerned the application of rates provisions to buildings listed as being of special architectural or historic interest. The respondents were the owners of a hereditament\textsuperscript{25} which comprised two separate buildings (the Regent street building and the Kingly Street building) on opposite sides of the street but joined by a footbridge over and a tunnel under the street.

In 1973 the Secretary of State for the Environment included the Regent Street building in a list of buildings of special architectural or historical interest compiled under Section 54 of the Town and Country Planning Act, 1971. The two buildings had been used as a single commercial unit, the Kingly Street building being treated as an annex of the Regent Street building. The hereditament was vacated in 1981. The footbridge was removed and the tunnel was filled in to allow the buildings to be sold separately. Debenhams claimed exemption from rates for the period the hereditament was unoccupied. They claimed that the Kingly street building was a "structure fixed to a listed building" in the terms of Section 54(9) of the Act.\textsuperscript{26}

\textsuperscript{24}Debenhams v Westminster City Council [1987] A.C.396
\textsuperscript{25}meaning a transferable interest in land
\textsuperscript{26}S.54(9) of the 1971 Act states: “In this Act a ‘listed building’ means a building which is for the time being included in a list compiled or approved by the Secretary of State under this section; and for the purposes of the provisions of this Act relating to listed buildings and building preservation notices, any object or structure fixed to a building, or forming part of the land and comprised within the curtilage of a building, shall be treated as part of the building.”
It was decided that a structure fixed to a listed building under the terms of the Planning Act only encompassed a structure which was ancillary and subordinate to the listed building itself and which was either fixed to the main building or within its curtilage. The fact that one building was subordinated to another for the commercial purposes of the occupier or that a completely distinct building was connected to a listed building to which it was not subordinate did not make it a structure fixed to a listed building. The buildings were historically completely independent. Lord Keith of Kinkel in his judgment looked to the intention behind the legislation and stated that he was satisfied that the word “structure” in the Town and Country Planning Act, 1971 is intended to convey a limitation to such structures as are ancillary to the listed building itself, either fixed to the main building or within it’s curtilage. Lord Keith went on to say that “in his opinion the concept envisaged is that of principal and accessory”.

4. Time of designation
Primary importance is placed on the curtilage at the time of designation of protection. This was highlighted by “the Bix Manor case” which concerned the demolition of part of a wall that ran alongside a road between Bix Manor the principal structure and a nearby barn. The barn had been in the curtilage of the Manor until 1981 when the owner of both properties sold the manor and retained the barn. The Manor house was listed in 1985 together with other ancillary buildings to the south, but the listing did not include the barn or the wall. When a dispute arose as to the extent of the protection the courts decided that the wall formed part of the curtilage of another property separate from the listed building in terms of ownership and physical occupation; that other property was being put to an independent use and there was no functional connection; also that the section of wall, in question did not in any way serve the listed building and was clearly ancillary to a separate building.

The principle which “the Bix Manor case” highlights is that if an ancillary object or structure is to be treated as part of a listed building it must, at the date of inclusion in the listing be associated with

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that building.\footnote{28}{The extent of protection extended to a structure included in the RPS in this jurisdiction emanates from the statutory definition of the term “structure” as it relates to “protected structures”} In this jurisdiction, as has been set out earlier, the extent of protection extended to a structure included in the RPS emanates from the statutory definition of the term “structure” as it relates to “protected structures.” However the ancillary concept in relation to other structures can be applied where the curtilage has not been defined or the structures which are included within the protective net have not been itemised.\footnote{29}{There is no legal obligation to itemize the structures included within the ambit of protection or to define the curtilage from the outset} \footnote{30}{R v Camden LBC, ex parte Bellamy [1991] J.P.L. 225}

“The Camden case”\footnote{30}{R v Camden LBC, ex parte Bellamy [1991] J.P.L. 225} established the following principle namely that a building may be ancillary to another and thus included in the listing if the ancillary building is not an historically independent building; the ancillary building is in physical proximity to the other building; the two buildings are in the same ownership and the use of the ancillary building is ancillary to the other building.

In “the Camden case” two buildings had been involved firstly number 22, Perrins Walk which was not itself included in the list but had originally formed the stable or coach house for the second building number 22, Church Row, which had been included in the list in 1950. It was agreed that the two properties had been in the same ownership until 1970, and that the garden between them was used at all material times by the owners and occupiers of Church Row, the principal structure. There was a dispute about the use of 22, Perrins Walk, as it may have been used as a garage for 22, Church Row or it may have been used as a garage for car repairs on a commercial basis at the time of listing. It was held that that the requirement is that the object or structure or, as in this case, the building must have been ancillary to the building in the list at the date of the listing.

The appropriate time for consideration of a boundary in matters relating to curtilage is the time when the development in dispute took place but historical evidence may also be relevant. This was the finding in
“the McAlpine case” 31 where a swimming pool and tennis court had been constructed on an extensive open grassed area which lay beyond the formal garden to a Grade II listed house. A retaining wall separated the formal garden and an orchard from the site in question. The inspector had found that the site had the appearance of being separate from the formal garden and the retaining wall acted as a clear line of demarcation coinciding with the boundary of glebe land historically associated with the house which had in the 18th Century been a rectory. He found that the site was visually and in terms of its use and its historical association with the house more akin to a large field or paddock than part of the extensive garden area of the house.

31 McAlpine v Secretary of State for the Environment and another [1995] 1P.L.R.16
It is notable that whilst older case law emphasises the importance of having regard to the use and function of the building now and in the past, recent cases emphasise use at the time protection begins, rather than past use. In “the Morris case” \(^{32}\) a house and outbuilding were in single ownership when listed in 1966 but were under separate occupation and use. The owner Mr. Morris replaced the defective slate roof of his outbuilding with corrugated steel sheeting. The Planning Authority served an enforcement notice. It was held that in determining whether one building was within the curtilage of another, the test was whether the two buildings were sufficiently close and accessible to one another and whether, in terms of function, one was ancillary to the other. In applying that test, the primary focus was the state of affairs existing at the time of listing.

In this case, it was found that the inspector had erred in focusing upon the past history of the premises. Applying the correct test, at the time of listing the occupier of the house had had no right to use the outbuildings in question, nor had he had any occasion to do so, and accordingly the outbuildings had not been ancillary to the house at that time. Moreover, there had not at that date been any ready access between the house and the outbuildings now occupied by Mr. Morris, despite their physical proximity. It followed that Mr. Morris’s premises had not been within the curtilage of the house at the time of listing. The fact that the buildings had been in common ownership at that time could not affect that outcome.

\(^{32}\) Morris v Wrexham CBC and the National Assembly [2002] 2 P.&C.R. 7
5. Size
A curtilage may be small but it does not always follow that it be so. In "the Skerritts case" 33 the local Planning authority had served a listed building enforcement notice for a breach of listed building control in respect of the stable block lying within the curtilage of the Grade II* listed building, the Grymsdyke Hotel. The contravention alleged was the removal of the existing timber-framed windows and the installation of white plastic double glazed windows without listed building consent. The stable block was 200 metres from the main building, an English country house designed by the eminent Victorian Architect Norman Shaw. The stable block had not been separately listed.

It was held that the curtilage of a building need not always be small, nor was the notion of smallness inherent in the expression; that the question of what fell within the curtilage of a building was one of fact and degree; that the curtilage of a substantial listed building was likely to extend to what were or had been, in terms of ownership and function, ancillary buildings; that as an outbuilding of a substantial listed building, the stable block was an ancillary building capable of being within its curtilage.

It is clear that small areas which fall within the dictionary meaning of curtilage are accepted in law as being within the curtilage of a building but it is less clear how larger areas of land generally associated with a building are to be treated.

The curtilage of listed structures on a site has been found not to be capable of being extended to the whole of the site even though its boundaries were clearly defined and had altered little since its original construction. 34 This was the finding in "the Camperdown Works case" at Dundee where the High Mill and the Factory Chimney were found to be the most prominent buildings on the site, but there were found to be other substantial freestanding buildings which

33 Skerritts of Nottingham Ltd v Secretary of State [2001] Q.B. 59
34 Dundee District Council v Dinnington Demolitions and Developments Ltd referred to in a paper in May, 1992 to assist staff in the Scottish Executive’s Inquiry Reporter’s Unit by way of broad guidance (No case report found)
had been of equally important function, which had not been listed.

The effect of the finding in this case is to impose on Planning Authorities the requirement to be very specific in relation to all new designations for protection. As a matter of practice it is good practice to consider individually all the buildings and structures on a site individually and to designate for protection those and only those which qualify.35

6. Changing curtilages
It is noteworthy from the cases that a curtilage can reduce with subdivision of a property but may not increase in size. The concept of a curtilage can be a changing one and is not rigid, fixed or inflexible. Over time it is apparent that usage of structures within a complex that were in the curtilage of a principal structure can change. With that, physical demarcation can occur that will have the effect of altering the curtilage.

Whether a structure is within the curtilage of a protected structure is a question of fact and degree.36 “The Dyer case” involved a house in a 100 acre park surrounding the main building Kingston Maurward in whose curtilage the claimant contended it lay. A provision in a Housing Act gave an owner of a dwellinghouse the right to buy it where it either formed part of or was within the curtilage of the main building. The main house was the headquarters of a college of agriculture, with extensive gardens, a park and a mass of outbuildings. The court had to decide the meaning of the phrase “the dwellinghouse either forms part of or is within the curtilage of the building”. The court was unable to find that the house lay within the curtilage of the main building, as such, although it would have said it was within the curtilage of the college.

Arising from “the Dyer decision” every self contained house which is fenced off or walled off from the remainder of the site regardless of the purpose for which the house was erected and is occupied is

35 Journal of Planning and Environmental Law June, 1993 603. English Heritage state that it is their practice now “to consider individually all the structures and building on a site and list those and only those which qualify”
36 Dyer v Dorset County Council [1989] 1Q.B. 346
currently very likely to be regarded as having a separate curtilage. Therefore a subsidiary building that might have been within the curtilage of a principal building in large grounds will probably be considered to be not within that curtilage once it has been enclosed within its own curtilage\textsuperscript{37}. In these circumstances those with responsibility for compiling the record of protected structures for an area might consider entering separate records for structures such as gate lodges etc.

7. Ownership

It is helpful to look to the ownership of the structure now and at the time of inclusion in the RPS. Recent English cases such as "the Camden case" and "the Bix Manor case" emphasise current ownership rather than past. The courts have emphasised that curtilage of a building is not necessarily to be equated to the land in the same ownership as it. Nor is it enough that the land and its curtilage were conveyed or demised together. Not all the land in the same ownership as the principal building will necessarily be included.

\textsuperscript{37} It should be recognised that statutory protection could potentially be hindered by selling off land. For example where buildings, formerly within the curtilage of another building, are separated and sold on, if they are of sufficient interest they must be protected separately. This was illustrated by "the Bix Manor case", supra
In "the Collins case"\textsuperscript{38} a cottage was set in 4.5 acres of land, of which the part nearest to the cottage was a well cut lawn and the remainder was rough grass, largely neglected. The appellant had constructed a summerhouse in the rough part of the gardens which was the subject of an enforcement notice. That judgment followed the principles established in "the Sinclair-Lockhart’s Trustees case"\textsuperscript{39} that in determining the nature and extent of curtilage of a dwelling house it is important that it should serve the purposes of the dwelling in some necessary or useful manner. "The James case" is similar and is referred to earlier in this report.

Some land in separate ownership may be included such as in "the Calderdale case"\textsuperscript{40} where a terrace of former millworkers cottages in separate ownership from a former mill were held to be within its curtilage. In "the Calderdale case" historical connection was regarded as important in deciding that the particular buildings were within the curtilage of the mill. However as can be seen from "the Bix Manor case" it is not always interpreted as such.\textsuperscript{41}

"The Calderdale case" concerned whether the listing of a large five storey mill building extended to a crescent shaped terrace of millworkers cottages linked to the mill by a stone and brick bridge. Historically the cottages had been closely related to the mill but had been transferred to different owners. The court found that the cottages were in the curtilage of the mill. Lord Justice Stephenson identified three relevant factors in determining whether a structure was in the curtilage of an existing building, at p407 of the report:

\begin{itemize}
  \item Sinclair Lockhart’s Trustees v Central Land Board [1951] P. & C.R.
  \item Attorney General v Calderdale Borough Council (1983) 46 P.&C.R. 399
  \item Watts v Secretary of State for the Environment [1991] J.P.L. 718
\end{itemize}
"(1) the physical 'layout' of the listed building and
   the structure,
(2) their ownership, past and present, (3) their
   use or function, past and present. Where they are
in common ownership and one is used in connection
with the other, there is little difficulty in
putting a structure near a building or even some
distance from it into its curtilage."

Lord Justice Stephenson said that the purpose of the
Statute was to bring within control works to objects
and structures which might not be intrinsically of
interest, but which were so closely related to a
listed building that their removal might adversely
affect it. During the course of his judgment
Stephenson LJ did suggest\textsuperscript{42} that the approach to
consideration of the setting of a building, which was
to be considered for listing should be a broad one.
Stephenson L.J. quoted from Buckley LJ's judgment in
"the Methuen-Campbell" case but focused on Buckley
LJ's reference to an "integral whole" rather than his
reference to "small pieces of land".

It is noteworthy also that in Lord Keith of Kinkel's
judgment in "the Debenhams case" he was not accepting of the
width of the reasoning of Stephenson LJ in his
judgment in "the Calderdale case" but was accepting
that there was room for the view in that decision
that the terrace of cottages was ancillary to the
mill. The principles which were enunciated in "the
Calderdale case" have had a major influence on the
form of all of the policy guidance documents referred
to in the course of the research for this report.\textsuperscript{43}
However 25 years have passed since that decision and
further case law has added a range of additional
considerations of relevance in the determination of
individual sets of facts.

\textsuperscript{42} Stephenson LJ Methuen-Cambell and Walters[1982] P.&C.R. p 405
\textsuperscript{43} Irish Architectural Heritage Protection Guidelines Para 13.1.5
Page192; Department of National Heritage Planning Policy
Guidance PPG 15 Para 3.35 for England and Wales; The Scottish
Memorandum of Guidance on Listed Buildings and Conservation
Areas and PPS 6 on Planning Archaeology and the Built Heritage
for Northern Ireland.
8. Planning applications affecting boundary / boundary structures.
The recent “Hillside House case” ruled that even if the wall and gates (which were erected) were not within the curtilage of the listed building, they would need express planning permission as being development “to a gate, wall or other means of enclosure surrounding a listed building”. 44 The practical result of this is that not just owners of listed buildings are restricted but that any owner of land, part of which shares a common boundary with a listed building, wishing to carry out any work to a boundary feature would need to seek formal planning permission, whereas they would not need to do so if bounding a building or structure which was not listed.

9. Appropriateness of forum:
An issue which has arisen in case law concerns the appropriate decisionmaker, be it the Planning Authority, An Bórd Pleanála or the Courts in certain planning matters and some of the principles are noteworthy in the context of this report.

All policy guidance reviewed for the purposes of writing this report state that the definition of curtilage in particular circumstances is a matter of law and as such the ultimate interpretation on an individual set of facts will be the judgment of the courts.

In “the Tennyson case” 46 Mr Justice Barr granted an application for judicial review of a grant of planning permission which the applicants maintained was a material contravention of the Planning Authorities own development plan. It was found that the issues raised by the application involved the interpretation of the development plan in the light of the relevant statutory provisions, which were legal issues in the exclusive jurisdiction of the court and outside the competence of an Bórd Pleanála.

“The Tennyson Case” was referred to in the course of the submissions in “the Riversdale House case” 47 but

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44 Sumption v Greenwich LBC 2007 EWHC 2776 (Admin) Collins J
45 was pointed out by Stuart Moffat in the Journal of Planning and Environmental Law Issue 12 2008
47 Roy Begley and Gerard Clarke and An Bord [2003] 4 I.C.L.M.D.
was rebutted by counsel for An Bórd Pleanála” on the basis that an interpretation of what a protected structure is, is not what the local authority meant but rather what is encompassed by a structure which is a protected structure. "The Methuen-Campbell case” was cited to support this as being an authority for the proposition that whether land fell within the curtilage of a house is a question of fact. The Judge decided that the issue was one of statutory construction and whether the land was part of a protected structure. He was satisfied having regard to the definition of “structure” that the protection extended to the curtilage of Riversdale House.

It is notable however that the courts do protect the discretion of the planning authorities to deal with the matters within their proper professional competence. I refer in particular to the case of O’Keefe v An Bord Pleanála and to the words of Mr Justice Finlay:

“Under the provisions of the Planning Acts the legislature has unequivocally and firmly placed questions of planning, questions of the balance between development and the environment and the proper convenience and amenities of an area within the jurisdiction of the planning authorities and the Board which are expected to have special skill competence and experience in planning questions. The court is not vested with that jurisdiction, nor is it expected to, nor can it, exercise discretion with regard to planning matters”

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60 48 O’Keefe v An Bórd Pleanála [1993] 1 IR 39
49 at page 71
Summary of useful principles.
The foregoing section of the report is a discursive narrative of the principles abstracted from a study of the material to which I have referred supported by reference to a range of legal authorities. Part of the task of this report is to provide a summary of useful principles.

The Irish Statutory guidance refers to the following three considerations when determining curtilage:
1. a functional connection between the structures;
2. an historical relationship between the main structure and the structure;
3. and the ownership past and present of the structures.

1. a functional connection
1(a) In the context of looking at a functional connection regard should be given to the use and function of the building now and in the past. However recent cases emphasise current use rather than past.

1(b) In the context of the functional connection between structures there is a need to highlight the importance of the physical layout of the site and of the principal structure and other structures. This goes beyond function.

1(c) The Integrality concept is also relevant in the context of the functional connection namely whether the land near to a protected structure, or a building, structure or object upon it can be said to be so closely connected with the intended purpose of the principal structure that it forms or formed an integral part of the principal structure.

1(d) Finally in the context of a functional connection it is relevant to analyse whether a structure is ancillary, accessory or subordinate to the principal structure in both a functional and a physical sense.

2. An historical relationship
In relation to the historical relationship between the main structure and other structure(s), recent decisions indicate that whilst the historical connection has been regarded as important it is not always interpreted as such.

3. Ownership
In relation to ownership past and present of the structures care needs to be taken concerning this. Recent cases have found that the curtilage of a building is not necessarily to be equated to the land in the same ownership as it. Nor is it enough that the land and its curtilage were conveyed or demised together.

Cases highlight the following relevant considerations:

4. Designation
The cases highlight the primary importance of curtilage at the time of designation of protection.

5. Size of curtilage
Size of the curtilage can present challenges in interpretation for although a curtilage may be small but it does not always follow that it be so.

In a U.K. case the curtilage of listed building on a site has been found not to be capable of being extended to the whole of the site even though its boundaries were clearly defined and had altered little since its original construction.
6. Alteration of curtilage
Case law highlights the potential for a curtilage to alter. Every self contained house which is fenced off or walled off from the remainder of the site regardless of the purpose for which the house was erected is currently likely to be regarded as having a separate curtilage.

7. Setting of a protected structure.
In terms of planning requirements to protect the setting of a protected structure, it has been found in the U.K. that any owner of land, part of which shares a common boundary with a listed building, wishing to carry out any work to a boundary feature would need to seek formal planning permission, whereas they would not need to do so if bounding a building or structure which is not listed. This decision has significant ramifications for owners of structures which share a common boundary with protected structures should planning authorities in this jurisdiction implement this approach to planning decisions.

8. Avoidance of uncertainty
It would appear that the only way to avoid uncertainty in designating protection to a structure is to make separate designations for individual structures associated with another structure especially in the case of large complexes where a number of buildings is involved. The finding in "the Camperdown case" that curtilage of listed structures on a site are not capable of being extended to the whole of the site even though the site boundaries were clearly defined and had altered little since its original construction reinforces this point.

Also it would appear that where there is any uncertainty as to whether or not a structure is within the curtilage of another, the appropriate action for a planning authority to take in designating protection is to include the structure for protection under the “attendant grounds” provision in the Planning Act.

Conclusion: It should be noted that under the Irish system of legislative protection there is no legal obligation on a Planning Authority to individually itemize the structures which are included within the ambit of protection when a Record of Protected Structures is designated. In fact the form for the Record of Protected Structures which has been prescribed by the Minister only identifies and
locates the structure which is to be protected. The legislation itself through the definition of the word “structure” in relation to “protected structures” is the source of the ambit of protection as has been set out earlier in this report.

Furthermore **there is no obligation on a Planning Authority to define the curtilage of a protected structure from the outset.**

For the legislative protection to operate successfully **there must be a clear identification of what it is sought to protect** by a Planning Authority. This is the recommendation of the Irish Statutory Guidance.

However in the case of any perceived ambiguity, it is suggested that the best mechanism provided for by the Planning Act is the Declaration\(^5^0\) procedure which can operate to clarify what is protected by defining the curtilage where this has been requested by an owner or occupier of a protected structure.

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\(^{50}\) If a structure is included in the Record of Protected Structures a planning authority is obliged to provide an owner or occupier with a declaration where requested to do so under Section 57(2) of the Planning and Development Act 2000. The purpose of a declaration is for planning authorities to clarify in writing for owners and occupiers of protected structures the kind of works which would or would not materially affect the character of that structure or any element of that structure which contributes to its special interest. Also if any question arises as to what, in any particular case, is or is not development or is or is not exempted development within the meaning of the 2000 Act any person may request in writing a declaration on that question and that person shall provide to the planning authority any information necessary to make its decision on the matter.\(^{(S.5)}\)
Report on Curtilage
Appendix A
Case Notes

Mona O’Rourke
November 2009
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In 1861 the Plaintiff Mr Thomas Marson became a tenant of the Kings Arms Public House situate in Surrey Row, in the Blackfriars Road. Surrey Row is a street running east and west. On the south side of it stands the public house in question, with a front looking towards the east over a vacant space of ground, being the piece included in the lease. The piece of land had been treated as passing to the lessee on each new lease of the public house since 1802; it was used by customers of the public house, and it furnished the only means of approach for vehicles to the front door of the public house.

This space of ground is bounded on the north by Surrey Row, there being no fence of any kind; on the east by land which at the date of the below-mentioned notice, was in the possession of the London, Chatham and Dover Railway Company from which it was railed off; on the south by walls at the back of gardens of houses in a street called Wellington Street; and on the west (also without a fence) by a narrow foot pavement, on the other side of which stood the public house. This pavement connects to a passage, and the two are used by the public as a thoroughfare between Surrey Row and Wellington Street; but there is a gate at the end of the passage, which is closed once a year.

The Railway Company served a notice on the Plaintiff under the 92nd section of the Land Clauses Consolidation Act 1845 to compulsorily acquire a small portion of the eastern extremity of the vacant space of ground and the Plaintiff sent a counter notice requiring the company to take all the property comprised in the lease including the Public House. The claim alleged that the ground formed part of the curtilage of the Public House and sought declarations that the Railway Company were bound to purchase the whole of the premises which were comprised in the lease.

It was decided in this case that the piece of land came within the definition of a curtilage, and was part of the house, within the meaning of the 92nd section of the Lands Clauses Act even though it was separated from the public house by a foot pavement.

2

[1963] Clymo (Valuation Officer) v Shell-Mex and B.P. Ltd RA 191; 10 R.R.C. 85

This was a rating case which involved consideration of the word “appurtenance” as
used in Section 22 of the Rating and Valuation Act 1925.

It was decided that the word “appurtenances” as used in that Section, in the context in which it is there to be found, extends to land appurtenant to houses or buildings. It was also found that in the absence of a contrary indication the word “appurtenances” will not be understood to extend to land which would not pass under a conveyance of the principal subject matter without being specifically mentioned; that is to say, to extend only to land or buildings within the curtilage of the principal subject matter.

In his judgment Lord Justice Upjohn also said that what lies within the curtilage is a question of fact depending upon the physical features and circumstances of the principal subject matter.

3

[1975] Re St Georges Church Oakdale 2 All ER 870

In this case which concerned the power to transfer a plot of land to the local authority, the Chancellor Judge Ellison framed the question “what is the territorial extent of curtilage in the church context?” He referred to the Turcan case and to the Sinclair Lockhart decision. He found that curtilage is by no means necessarily synonymous with churchyard. He concluded that “for the purposes of S.7 of the [Faculty jurisdiction] 1964 Measure curtilage is to be construed as meaning such small area of churchyard which physically adjoins the church building and is required to serve some purpose of the church building in a necessary or useful way. It is, in effect, an integral part of the church……It is enough that the two are in common occupation, not necessarily exclusive occupation. Its territorial
extent will depend on the facts of the individual case and circumstances of the particular site. In the ordinary run of events, the footpaths which may surround the church and the land which carries extended foundations the drains and the soakaways and supply services will obviously be part of the curtilage but beyond that one hesitates to express any general view as to the limits. If the churchyard happens to be quite small, it may well be that in such circumstances the churchyard and the curtilage of the church are coterminous in fact.”

4

[1979] Methuen-Campbell v Walters QB 525, [1979] 1 All ER 606;

A property, known as The Gables Reynoldson, Gower, West Glamorganshire, consisting of a dwelling house, garden and an area of rough pasture, known as “the paddock” was assigned to a lessee for a term of 64 years in 1929. The house was at the northern part of the land. South of the house and at a lower level, was a garden and still further south and also again at a lower level there was an area of rough pasture that had been referred to as “the paddock”. The plan to the lease showed an unbroken line denoting the boundary between the garden and the paddock. The garden was divided from the paddock by a wire fence and a wicket gate gave access from the garden to the paddock until sometime before 1973, when the gate was boarded up to prevent sheep and occasional ponies straying from the paddock into the garden. The area of the house and garden was 0.5 of an acre and the paddock 1.6 of an acre.

In 1973, the tenant served notice on the landlord, under the Leasehold Reform Act 1967, for the freehold of the house and premises to be conveyed to her. The landlord sought a declaration that the house and premises, as defined by section 2 (3) of the Act did not include the paddock. The issue was whether the tenant was entitled to the conveyance of the whole or whether the landlord was entitled to exclude the paddock as not falling within the words “house and premises”. The deputy circuit judge held that, on the true construction of the subsection, the paddock was within the meaning of “appurtenances” and passed under the conveyance of the house.

The landlord appealed and the appeal was allowed. It was decided that the provisions of the act which allowed a tenant to acquire property were not to be construed liberally to include all the property occupied by right of the demise but were limited by section 1(1) of the Act to the house and premises; that in the context of the definition of "premises" in section 2(3), "appurtenances" was not to be construed strictly according to its original meaning of incorporeal rights but was to be construed to include land within the curtilage of the house; that, although the paddock was contiguous with the garden of the house and was an amenity enjoyed with the house, it had always been separated there from by a fence and could not be described as within the curtilage.
The judgment stated that what is within the curtilage is a question of fact in each case, and that this comparatively extensive piece of pasture ought not to be regarded as being within the curtilage, particularly where, as here, it was clearly divided off physically from the house and garden right from the start and certainly at all material times.

Buckley LJ gave some helpful guidelines where he said

“What then is meant by the curtilage of a 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 such as outhouses, a garage, a driveway, a 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. The conveyance of that messuage or parcel by general description without reference to metes or bounds, or to the several component parts of it, will pass all those component parts sub silentio. Thus a conveyance of The Gables without more, will pass everything within the curtilage to which that description applies, because every component part falls within the description. The converse proposition, that because an item of property will pass sub silentio under such a conveyance of The Gables, it is therefore within the curtilage of The Gables, cannot in my opinion be maintained, for that confuses cause with effect.”
This case was concerned with a complex of buildings comprising a large five storey mill building, Nutclough Mill, and a crescent-shaped terrace of 15 millworkers cottages (of two storeys at the front, but four storeys at the rear) linked to the mill by a stone and brick bridge, Hebden Bridge. The disused mill had been listed in 1971 but the cottages were not. The issue raised was whether the terrace, even though it was not expressly listed required listed building consent to be demolished because it was deemed to be listed by virtue of Section 54(9) of the Town and Country Planning Act 1971.

Historically the cottages had been closely related to the mill as they had been built to house the operatives of the mill, across the river from the mill, directly linked by a bridge without any intervening street, the mill having been built on the river bank. The ownership of the mill and terrace was split in 1973.

The court of Appeal held that within the meaning of Section 54(9) the terrace of cottages was a structure fixed to the mill and, further, was one which formed part of the land, and was comprised within the curtilage of the mill.

Stephenson LJ identified three relevant factors in determining whether a structure was within the curtilage of an existing building, at p 407:

"(1) the physical 'layout' of the listed building and the structure, (2) their ownership, past and present, (3) their use or function, past and present. Where they are in common ownership and one is used in connection with the other, there is little difficulty in putting a structure near a building or even some distance from it into its curtilage."

Stephenson LJ decided that the terrace had been within the curtilage of the mill when they were built in 1870 and he went on to say that "the terrace has not been taken out of the curtilage by the changes which had taken place and remained so closely related physically or geographically to the mill as to constitute with it a single unit and to be comprised within its curtilage in the sense that those words were used in this subsection".

He said that the purpose of the Statute was to bring within control works to objects and structures which might not be intrinsically of interest, but which were so closely related to a listed building that their removal might adversely affect it. On that basis he favoured a broad approach to the construction of the subsection. He suggested51

51 Stephenson J p 405
that the approach to consideration of the setting of a building, which was to be considered for listing, should be a broad one.

Stephenson LJ also quoted from Buckley LJ’s judgment in Methuen-Campbell’s case but focused on Buckley LJ’s reference to an “integral whole” rather than his reference to “small pieces of land”.

6  
[1987] Debenhams v Westminster City Council 1 AER 51

The respondents were the owners of a hereditament (meaning a transferable interest in land), which comprised two separate buildings (the Regent street building and the Kingly Street building) on opposite sides of the street but joined by a footbridge over and a tunnel under the street. In 1973, the Regent Street building was listed. The two buildings were used as a single commercial unit, the Kingly Street building being treated as an annex of the Regent Street building. The hereditament was vacated in 1981. They claimed exemption from rates for the period the hereditament was unoccupied. They claimed that the Kingly Street building was a structure fixed to a listed building. It was held that a structure fixed to a listed building under the terms of the Planning Act only encompassed a structure which was ancillary and subordinate to the listed building itself and which was either fixed to the main building or within its curtilage. The fact that one building was subordinated to another for the commercial purposes of the occupier or that a completely distinct building was connected to a listed building to which it was not subordinate did not make it a structure fixed to a listed building. The buildings were historically completely independent.

This case was concerned with the definition in section 54(9) of the Town and Country Planning Act 1971 of a ‘structure fixed to a (listed) building’, but in the context of the exemption from rates of an unoccupied listed building. Hamley’s toy shop in Regent Street was a listed building but in the valuation list it was listed with further premises on the other side of Kingly Street, connected by a tunnel and a footbridge (both of which ceased to exist in 1983 as a result of building operations). The case turned more on the meaning of the word “structure” than on “curtilage” but the Calderdale case was considered. Lord Keith of Kinkel (with whose speech the majority of their Lordships agreed) thought that the Calderdale decision could be supported, in relation to a structure which was a separate building, only if the separate building was ancillary to the listed building. He said [1987] AC 396, 403:

“All these considerations, and the general tenor of the second sentence of section 54(9) satisfy me that the word ‘structure’ is intended to convey a limitation to such structures as are ancillary to the listed building itself, for example the stable block of a mansion house, or the steading of a farmhouse,
either fixed to the main building or within its curtilage. In my opinion the concept envisaged is that of principal and accessory. It does not follow that I would overrule the decision in the Calderdale case, though I would not accept the width of the reasoning of Stephenson LJ. There was, in my opinion, room for the view that the terrace of cottages was ancillary to the mill."

He did not criticise Stephenson LJ's view that an ancillary building might be within a main building's curtilage even though some way from it.

7

This case involved a house in a 100 acre park surrounding the main building, Kingston Maurward, in whose curtilage the claimant contended it lay. The tenant was a senior lecturer in animal husbandry at an agricultural college owned by the local authority, his employer. Paragraph 1 Schedule 1 of the Housing Act 1980 gave an owner of a dwellinghouse the right to buy his house from the landlord unless that house is within the curtilage of a building which is held by the Council for purposes other that housing purposes and consisting of accommodation other than housing accommodation.

The main house was the headquarters of a college of agriculture, with extensive gardens, a park and a range of outbuildings. The lecturers' houses, including the one whose status was in dispute, were on the edge of the estate, facing a road which provided the only vehicular access. They were fenced off at the back although there was a pedestrian access to the rest of the college grounds.

Lord Donaldson of Lymington MR described those buildings in these terms at p 355: “There are a number of buildings clustered around and to the east of Kingston Maurwood House, the great house of the old estate and the headquarters of the college. To the west lies the principal's house and six staff houses all within 200 to 400 yards of Kingston Maurwood House. A little further to the west there is Stinsford Dairy, which was one of Mr Dyer's principal responsibilities. The four lecturers houses are about 450 yards to the Northwest of Kingston Maurwood House forming an isolated close. The remainder of the estate is not built on and consists of a driveway from the public road fronting the lecturers houses to Kingston Maurwood House and fenced fields”
The issue came down to whether Mr Dyer's rented house was within the curtilage of one or more of the buildings comprised in the agricultural college. The court had to decide the meaning of the phrase ‘the dwelling house either forms part of or is within the curtilage of the building”. It was held that whether or not a building was in the curtilage of another was “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”.

The judgment went on to state that the word curtilage always had to be read in context. If in this case the relevant words were “curtilage of the college” he would have had little doubt that despite the fact that the house was on the edge of the campus divided by a fence, it could rightly have been held to have been within that curtilage. But those were not the relevant words and he was unable to find that the house lay within the curtilage of any college building or collection of buildings.

It was also recognised that the curtilage of a principal manor house was likely to include the stables and other outbuildings.

8


This case concerned the definition of the curtilage of a cottage which was set in 4.5 acres of gardens in the context of enforcement proceedings. The cottage had a well maintained lawn adjacent to it and the remaining land comprised rough grass which was not maintained. The owner built a summer house in the part of the garden with rough grass furthest away from the cottage. The summer house was the subject of the enforcement proceedings, the issue being whether the section of land where it was built formed part of the curtilage of the cottage. It was decided that in determining the nature and extent of a curtilage of a dwelling house it is important that it should serve the purposes of the dwelling in some necessary or useful manner. The judge found on the facts that the rough part of the garden did not serve the cottage and therefore could not be described as forming part of the curtilage of the cottage.

52 Lord Donaldson MR at p 355
53 Lord Justice Nourse
This case concerned a listed building and its associated buildings. The Manor house, known as Bix Manor, was listed in 1985, together with other ancillary buildings to the south. The listing did not include either the barn to the north or the brick and flint wall the subject matter of these proceedings. The barn had been in the curtilage of the Manor house until 1981 when the owner of both properties sold the Manor House but retained the barn in its own curtilage.

The local planning authority brought enforcement proceedings to secure the reinstatement of part of a wall, that ran alongside a road between Bix Manor and a nearby barn, which had been removed to form a vehicular access. The enforcement notice was brought on the basis that the relevant section of the wall was fixed to a listed building, namely Bix Manor, and was to be treated as part of the listed building by virtue of the provisions of section 54(9) of the town and Country Planning Act 1971.

The cases of Debenhams and Calderdale were considered at length in the context of the proper construction of the word “structure” and the implications of the “ancillary” concept. So the decision involved consideration as to whether the section of the wall was a structure in the sense that it was ancillary to Bix Manor.

It was decided that “At the date of the listing, the section of wall formed part of the curtilage of a property separate from the listed building in terms of ownership and physical occupation. That property was being put to a wholly independent use unassociated with Bix Manor … At the time of the listing there was no functional connection and that section of wall did not in any sense serve the listed building. It was clearly ancillary to another separate building and, in my judgment, was not a structure ancillary to Bix Manor”.

It was also found that the use of words such as “ancillary” and “accessory” connoted a statement of the subordinate and subservient in both a functional and a physical sense; that at the time of the listing there was no functional connection and that the section of wall did not in any sense serve the listed building. It was clearly ancillary to another separate building and was not a structure ancillary to Bix Manor.

The wall was thus found not to be subject to listed building control. If, therefore, an object or structure is to be treated as part of a listed building, it must at the date of
Listing be associated with the building that is itself included in the list, and not merely associated with a building that is only treated as being part of that building by virtue of the wording of the Act.

10


This case involved enforcement proceedings against the owner of North Aston Hall, a listed Grade II country house. The owner had constructed a new dry-stone wall using stones from the wall of a ha-ha and had filled in the ditch. Sir Frank Layfield in his judgment accepted the findings of the inspector that the ha-ha must be an accessory structure since it was designed to permit uninterrupted views of the surrounding land. The judge appeared also to accept without question the findings of the inspector that the two main elements of the ha-ha, the ditch and the wall were integral parts of the structure, and thus they could form part of the listed building provided that the ha-ha was within the curtilage.

Another feature of the North Aston case was the Secretary of State’s firm dismissal of the proposition that each listed structure must have its own curtilage, thereby preventing clearly defined curtilages from being fragmented into indefinable parcels which was endorsed by Sir Frank in his judgment. He said that where one structure that is clearly ancillary to a listed principal building is listed in its own right, that does not of itself mean that the ancillary structure is outside the curtilage of the principal building. That many such structures are listed because of their own merit, but are clearly within the curtilage of listed buildings. Second, he went on to say that it cannot be assumed that each structure in such a group has its own, distinct curtilage, for that might lead to the splitting up of a single, clearly defined curtilage into indefinable parcels.

This decision confirms that listing extends to structures, such as terraces, balustrades, flights of steps, ice houses, and garden temples, which form part of the layout of the grounds of a country house. The judgment suggests that the curtilage will extend as far as the ha-ha, the barrier for grazing animals, if there is one, or at least to the point whether wall, hedge or fence where pleasure garden ends and agriculture begins.
In this case the issue was to determine what was the curtilage of a dwelling house. The judge said that the extent of the curtilage was “quintessentially a matter of fact”. The owner had a 1.2 acre piece of land, comprising a detached house in a wooded countryside setting. The owner had built a tennis court in a field which was distinct and separate from the house and garden. The court found that the field was not within the curtilage of the house; that the house and the tennis court did not have the appearance of close association or of being in the same enclosure.

This case was concerned with the extent of a listing. Two structures were involved namely number 22 Perrins Walk, which was not included in the statutory list, but which had originally been the stable building or coach house for number 22 Church Row which had been included in the statutory list in 1950. It was common case that the two buildings had been in the same ownership until 1970; also that the garden between the two buildings had been used by the owners of number 22 Church Row. There was disagreement between the parties about the use of number 22 Perrins Walk at the time of the listing, as it may have been used as a garage for number 22 Church Row, or a commercial car repairs business may have been carried out in the building at the time of the listing.

It was decided that “The legal position was by no means simple, but if at the time of the listing in 1950, 22 Perrin’s Walk was in use as the garage or coach house of no 22 Church Row, then on the basis of the test laid down in the Calderdale and Debenhams cases it had to be taken to have been included in the listing”. The effect of this was to find that if the building was ancillary to the building which was included in the list at the date of the listing then it was included in the statutory protection.
In 1968, the taxpayer, Lady Beryl Rook, bought Newlands House in Kent, which was set in 10 acres of land with two cottages. The cottages were semi-detached and situated some 175 metres away from the main house. At all relevant times, one of the cottages was occupied by the taxpayer's gardener. In February 1978, the gardener vacated the cottage and it was sold by the taxpayer for £33,000. The taxpayer claimed relief from capital gains tax in respect of a proportion of the gain accruing on the sale on the ground that it was attributable to the "the disposal of ... part of a dwelling house which [was] ... [her] only or main residence" within section 101(1)(a) of the Capital Gains Tax Act 1979.

The case eventually came before the Court of Appeal which decided that although a separate building could form part of a taxpayer's dwelling house for the purposes of section 101(1)(a) of the Capital Gains Tax Act 1979 it would only do so if it was within the curtilage of, and appurtenant to, the main house; that, on the facts, the cottage, situated 175 metres away from the main house, was neither within the curtilage nor appurtenant to it and thus did not form a part of the entity which, together with the main house, constituted the dwelling house occupied by the taxpayer as her residence; and that, accordingly, the private residence exemption did not apply to the gain accruing to the taxpayer on the disposal.

In this case enforcement proceedings were brought seeking to remove a swimming pool and tennis court and to reinstate the land, because it was maintained that they were outside the curtilage of the house and were constructed without planning permission. The development was situated on an extensive open grassed area, which lay beyond the formal garden belonging to a Grade II listed house. A retaining wall separated the formal garden and an orchard from the site in question. The site had been used by Lord McAlpine.
and his predecessors since the 1960s for recreational purposes as part of the
garden. It was submitted that the development had been within the curtilage of the
house and was therefore permitted development.⁵⁴

The inspector had found that the site had the appearance of being separate from the
formal garden, and that the retaining wall acted as a clear line of demarcation
appearing to follow the line of a boundary marked on an old Ordnance Survey map
and coinciding with the boundary of glebe land historically associated with the house,
which had in the eighteenth century been a rectory. He had found that the site was
visually, and in terms of its use and its historical association with the house, more
akin to a large field or paddock than part of the extensive garden area of the house.

The applicant submitted that the inspector had been in error in looking at historic
relationships of land and dwelling when he had relied on the boundary lines on the
Ordnance Survey maps and argued that the line now fulfilled the different purpose of
a twentieth century family house which had been changed by alterations; a larger
dwelling required a larger curtilage. The inspector, it was submitted, had been in
error in looking at the function and purpose of the eighteenth century rather than
looking at the time when the development under consideration was carried out.

The Court found that given the size of the land in question and its association with
the dwelling, the inspector had not constrained himself by looking for or at physical
enclosures. The reference to the historical association was but part of the exercise of
applying to the facts the identified principles arising from the authorities which the
inspector had correctly done. The Court determined that the appropriate time for
consideration of the curtilage boundary was the time when development took place,
but found that the inspector had not fallen into error in the way he had used historical
associations but had looked for identification of the curtilage at the time of the
relevant development.

The Court considered the relevant authorities,⁵⁵ and while refraining from distilling
rigid principles from the judgments, identified three characteristics of curtilage which
were especially relevant to the case:

1. Curtilage was constrained to a small area about a building;

2. An intimate association with land which was undoubtedly within the curtilage was
required in order to make the land under consideration part and parcel of that
undoubted curtilage land, and

3. It was not necessary for there to have been physical enclosure of that land which
was within the curtilage, but the land in question at least needed to be regarded in
law as part of one enclosure with the house.

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[1998] City of Edinburgh Council v Secretary of State for Scotland 1AER 174

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⁵⁴ within Class E of Part 1 of Schedule 2 to the Town and Country Planning General
⁵⁵ including Methuen-Campbell v Walters and Dyer v Dorset County Council
Revival Properties Ltd sought outline planning permission for a development at a site at Edinburgh known as 'Redford Barracks'. It also sought listed building consent for the demolition of a former riding school building, which formed part of the site. An entry had been made in respect of the site on the list of buildings of special architectural or historic interest. It was listed under the column 'name of building' as 'Redford Barracks…. original buildings of 1909-1915 only', but there was also a column headed 'description' which made specific reference to the riding school building. The Council refused both planning permission and listed building consent. Revival Properties Ltd appealed to the Secretary of State. A senior Reporter was appointed to determine the appeal. A problem arose because the riding school was built after 1915, and the Barracks were not completed until the end of 1916. The Reporter decided that the former riding school building had not been included in a larger listed building definition for the purposes of the Act and that, therefore, listed building consent had not been required. He allowed the appeal on the issue of planning permission. The Court of Session and their Lordships' House disagreed with the finding that consent was not required.

In relation to the question of the Reporter's jurisdiction to decide the point, (which, it had been argued, was a question of fact), Lord Hope determined that the issue depended upon the proper construction of the entries in the list and that this was the underlying question, and that if it is truly one of construction he found it to be one of law. The Act assumes, in regard to the statutory procedures, that the question whether or not the building is a listed building can be determined simply by inspecting the list which the Secretary of State has prepared.

Lord Hope had noted that the prescribed notice of listing sent to owners of buildings newly listed only allowed for the specification of the building without any description. He also considered that the imprecise language used in some of the description in this particular case, which related to a large group of buildings, meant that it was clearly not designed to be a definitive description of the entire premises within the curtilage.
Lord Clyde remarked in his judgment that plainly it is desirable to compile the list with sufficient clarity and precision to avoid the kind of question which arises here. He went on to say that the insertion of a complex of buildings as one entry in a list may well give rise to problems. He said that even the provision of the Act which extends the identification to buildings within the curtilage of a building may not produce sufficient clarity, particularly in a case such as the present where the building had passed into separate ownership and occupation and had in some way become separate from the barracks and other buildings still in military occupation. The critical question here was the interpretation of the list and the reporter had misconstrued it.

This case appears to be the closest that the courts have come to considering the jurisdiction question. It refers to the well established principle that matters of planning judgment are within the exclusive province of the local planning authority or the Secretary of State. The power of the court to intervene is a power to challenge the validity of decisions, namely that the action is not within the powers of the act or that there has been a failure to comply with some relevant requirement. Appropriate decision-makers finding could only be challenged if found to be irrational or perverse.
In this case the local planning authority had served on the lessee a listed building enforcement notice alleging a breach of listed building control in respect of "the stable block lying within the curtilage of the Grade II* listed Grimsdyke Hotel, Old Redding, Harrow Weald." The contravention alleged was the removal of the existing timber-framed windows and the installation of white plastic double-glazed windows, without listed building consent. The notice required 19 unauthorised windows to be removed and windows of the traditional type to be reinstated within six months. Grimsdyke had been designed as an English country house by the eminent Victorian architect Norman Shaw, and had been for many years the home of W. S. Gilbert. The stable block, which was about 200 metres from the main hotel building, had almost certainly been designed by the same architect as the main building but had not been separately listed, which was why the issue of curtilage was of central importance. However by section 1(5)(b) of the Planning (Listed Buildings and Conservation Areas) Act 1990 any structure "within the curtilage" of a listed building which had formed part of the land since before 1 July 1948 was to be treated as part of the listed building.

It was held that the curtilage of a building need not always be small, nor was the notion of smallness inherent in the expression; that the question of what fell within the curtilage of a building was one of fact and degree; that the curtilage of a substantial listed building was likely to extend to what were or had been, in terms of ownership and function, ancillary buildings; that, as an outbuilding of a substantial listed building, the stable block was an ancillary building capable of being within its curtilage.
The appellant, Mr Morris, owned property that had previously formed part of the outbuildings of a large house, The Lodge, Halton, Clwyd. The house had been listed in 1966 as a building of special architectural or historic interest, pursuant to s 32(1) of the Town and Country Planning Act 1962. At that time, the house and outbuildings had been in common ownership, but had been under separate occupation and use. The freeholders were the Evans family, [a farming] who used the outbuildings for agricultural purposes and leased the Lodge to a retired Colonel for use as a house. In 1995, Morris replaced the defective slate roof of his property, the north-east outbuildings, with corrugated steel sheeting. The local planning authority served an enforcement notice on him, stating that the new roof was a breach of listed building control and requiring him to remove it and replace it with a slate or tile roof. Morris appealed on the grounds that his property was not a listed building because it did not fall within the curtilage of the house. An inspector rejected that contention on the grounds, that: (i) use of Mr Morris’s property had historically been ancillary to use of the house; and (ii) both premises had been in common ownership at the time of listing. He dismissed the appeal and upheld the enforcement notice. Morris appealed contending that the inspector had erred in law.

The appeal was allowed. In determining whether one building was within the curtilage of another, the test was whether the two buildings were sufficiently close and accessible to one another and whether, in terms of function, one was ancillary to the other. In applying that test, the primary focus was the state of affairs existing at the time of listing. In this case, the inspector had erred in focusing upon the past history of the premises. Applying the correct test, at the time of listing the occupier of the house had had no right to use the outbuildings in question, nor had he had any occasion to do so, and accordingly the outbuildings had not been ancillary to the house at that time. Moreover, there had not at that date been any ready access between the house and the outbuildings now occupied by Mr Morris, despite their physical proximity. It followed that Mr Morris’s premises had not been within the curtilage of the house at the time of listing. The fact that the buildings had been in common ownership at that time could not affect that outcome.

The local planning authority issued an enforcement notice against the owner of a Grade II listed building, against the erection of a chain link fence some 65 metres long running alongside the driveway. The listed building, Alresford Hall, Cambridgeshire, included a hall, barn, outbuildings and a walled garden. Mr Lowe, the claimant relied on the provision of class A to the General Permitted Development
Order, which authorised the erection of such a fence. That order was subject to an exception, which applied to development in the curtilage of a listed building.

The Secretary of State’s planning inspector concluded that the fence did fall within the curtilage of the dwelling. The fence had been erected because Mr. Lowe had attracted the unwanted attention of a group of people who had “ripped up trees, cut down shrubs, dug holes and hidden in woods near the Hall, abusing employees”. The inspector said that Mr. Lowe was obviously attempting to enclose the land within his ownership and the reasons given for erecting the fence suggested to him that it was either defining or lying within the curtilage and that it was most unlikely that it was outside the curtilage.

The claimant successfully appealed contending that the inspector had erred in his definition of the term ‘curtilage’, since he had wrongly had regard to the purpose of the fence, as opposed to the situation before it had been installed. He also argued that the inspector had wrongly implied that it fell within the curtilage, since he owned the entirety of the land.

It was decided that whether land fell within the term ‘curtilage’ for the purposes of class A to the General Permitted Development Order 1995 was a question of fact and degree. The term curtilage had been defined as a small courtyard attached to a dwelling house, forming one enclosure with it. In previous authority, it had been suggested that it referred to a small area due to the use of the diminutive suffix ‘age’. The size of the area was not severely restricted and could include stables, outbuildings and gardens, walled or not provided that they were part of a single enclosure. It did not include all parkland, including the driveway, of an estate.

In this case, the inspector had wrongly had regard to the ownership of the land. That was not determinative of the question since whilst it might be argued that land did not fall within the curtilage if there was shared ownership, it did not follow that it did so fall where the ownership was the same. It was found that the inspector had wrongly had regard to the purpose of the fence when considering whether or not it fell within the curtilage.
This case involved an application to the High Court before Mr Justice Ó Caoimh to judicially review a decision of an Bord Pleanála refusing the applicants planning permission for a development comprising the erection of 18 two bedroom apartments in two storey with attic blocks with ancillary on and off site development works including car parking and landscaping at Riversdale House, a protected structure, which is being retained and the subject of a separate planning application.

Historically the lands had been acquired at auction. South Dublin County Council granted permission for a development in April 2000 and in June 2000 the elected representatives added Riversdale House, the original gates and piers and the arched bridge to the RPS. In December 2000 the Board refused permission for the development. In June 2000 a fresh application for planning permission was made which was granted by the County Council in March 2001. In October 2001 the Board refused planning permission in accordance with the Planning Inspector’s recommendation in the following terms:

“Having regard to the protected status of Riversdale House, which includes the land lying within the curtilage of the house, it is considered that the proposed development, by reason of its nature, scale, disposition, design and carparking layout, would be unacceptable in terms of its effect on the setting of the house and the integrity of its curtilage and would, therefore, be contrary to the proper planning and development of the area”.

The applicant maintained that the protection added specific elements only within the lands of Riversdale House to the record of protected structures namely the house itself, the original gates and arched bridge. Counsel for the applicants submitted that it is open to a planning authority to distinguish between the various components of a protected structure and to include specified parts of a structure only in the RPS. It was contended that the Planning Authority had decided to include the house, the gates and piers and the bridge and therefore not the curtilage.

It was also submitted by the applicants that the interpretation of the Development
Plan is a matter of law for the court and not the Board, and therefore for the court to decide. Reference was also made to the fact that the Minister conveyed to the Planning Authority that the designation of part of the land as a protected structure should not be seen as precluding a sympathetic development of the house. It was conceded that the lands around the house consist of the curtilage.

Counsel for the respondent stated that the Board specifically referred in its decision to the protected status of Riversdale House. Counsel referred back to a definition of the word structure stating that a planning authority cannot preclude the operation of the Act; that a decision in relation to a planning permission is not what a local authority meant but what is encompassed by a structure which is a protected structure. Under Section 8 of the Act works may be carried out to a protected structure provided that they do not materially affect the character of the structure; that in any decision a Planning Authority or the Board must have regard to the protected structure with respect to an application for planning permission. Any application for development must be addressed within the context of Section 8 of the Planning Act.

Counsel for the Board indicated that the Board was correct in its decision having regard to the protected status of the subject structure. Counsel referred to the Methuen Campbell case which is authority for the proposition that whether land fell within the curtilage of a house is a question of fact. Counsel also submitted that the reference to gate and piers and to the arched bridge does not take away from the definition of structure. This clarified their inclusion so as to ensure their protection. It was submitted that to exclude a curtilage from the definition of protected structure by reason of the specification of elements or the addition of elements as protected structures in their own right, would reduce the level of protection afforded to the architectural heritage. To construe it otherwise takes away from the purpose of the 1999 Act. It was submitted that there is no provision for a planning authority to expressly exclude lands lying within the curtilage of a protected structure from its protected status, such power cannot arise by inference merely because the planning authority has added elements within a curtilage to its list of protected structures. Counsel submitted that the construction of the development plan is not a point of law. Riversdale House has been expressly included in the record of protected structures.

Conclusion
Mr Justice Ó Caoimh gave his Judgment in favour of the respondents. He stated that there was no dispute as to the fact that the land proposed to be developed fell within the curtilage of Riversdale House. He said that the issue is one of statutory construction and of whether the land in question is part of a protected structure. He said that he was satisfied that, in specifying Riversdale House in the inclusion of the Register of protected properties, the County Council was including a particular structure rather than specific parts and in relation to Section 1(1) of the 1999 Act this protection extends to the curtilage of the house.

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[2007] Sumption and another v London Borough of Greenwich EWHC 2776 (Admin)
The interested party (IP) was granted a certificate of lawfulness for the erection of a boundary wall and gates under 1 metre in height in respect of Hillside House, 13 Crooms Hill, Greenwich. The claimants sought to quash the certificate on the basis that it should not have been granted.
Hillside House is a Grade II listed building. It is in a conservation area, part of a UNESCO World Heritage Site comprising a visual whole with Greenwich Park and the Royal Naval Hospital within it. Crooms Hill contains a number of houses built between the 17th and the early 19th centuries, all of which are listed, and which create a harmonious whole. The Claimants live on the other side of Crooms Hill opposite Hillside House. The present Hillside House was constructed in the early 19th century on the site of an existing cottage originally built in the 17th century on what was a relatively small strip of land lying between the wall of Greenwich Park and a public way (now Crooms Hill) between Greenwich and Blackheath. It was substantially extended in the 1880s. By the mid nineteenth century, the garden of Hillside House constituted a roughly triangular area, its western boundary being the wall of Greenwich Park. Its eastern boundary was for a short distance bounded by Crooms Hill and then it veered towards the Park wall forming the triangle. The park wall and Crooms Hill meet to the north leaving a narrow area of land which was owned, until the IP bought it in 2004, by a convent and school on the other side of Crooms Hill. The IP erected a chestnut paling fence running as an extension to the existing fence to the then garden of Hillside House along the boundary of Crooms Hill until it abutted the park wall at the apex of the extended triangle.

The IP sought to build a wall in place of the fence. The application was for a brick wall about 125 metres in length with a 1 metre gate towards its north-western end and the form stated that: “The proposed boundary wall would replace the existing timber ‘chestnut fencing’ to provide a new means of enclosure to the recently expanded garden of Hillside House. It will extend from the existing wall of the house at its southern end, to the existing Greenwich Park wall, at its northern end. The proposed 1m wall will not be fixed to, or physically abut, the existing Hillside House boundary wall on the Greenwich Park wall to the south and north respectively. A narrow gap of approximately ... 10 mm will be left between the proposed new wall and the existing walls to either end.”

Permitted development for which planning permission may be granted include the erection, construction, maintenance, improvement or alteration of a gate, fence, wall or other means of enclosure. Development which is not permitted includes development within the curtilage of, or to, a gate, fence, wall or other means of enclosure surrounding a listed building. The legislation contains provisions which constitute some limitations on the freedom to undertake minor operations by imposing some constraints in the public interest. Since the erection of, or carrying out development to, a means of enclosure within the curtilage of or surrounding a listed building will not usually affect the building itself, it is apparent this restriction on development is largely aimed at protection of the listed building's setting.

The Claimants contend first that the wall would involve development within the curtilage of Hillside House, a listed building. Secondly, they say that it would involve development to a gate, fence, wall or other means of enclosure surrounding a listed building. If they are right on either point, the grant of the certificate is unlawful.

In reaching its decision, the Council must have proper regard to all material considerations and eschew all immaterial. I am clearly of the view that the facts permit only one conclusion, namely that the curtilage of Hillside House does extend over the land. The reference in the application to the “recently expanded garden” is accurate and is fatal to the grant of the certificate. It was decided that the grant of the certificate was not lawful and must be quashed. The IP must apply for planning permission to enable him to construct a means of enclosure which does not adversely affect the setting of Hillside House.
The application site was a farm. In 1984, 'Jews Farmhouse' (the farmhouse), which was situated on the eastern part of the farm, was given planning permission for an extension to Mill Barn, Jews Farm, Wiveliscombe, without being required to apply for listed building consent. The listing describes the farmhouse, 18th century, incorporating earlier work, with 19th century alterations, but does not describe or define its curtilage. Other buildings on the farm such as 'Mill Barn' and the 'Old Granary' were not listed. The applicant sought to quash the order for planning permission on the basis that Mill Barn was a listed building in that it was within the curtilage of Jews Farmhouse and, hence, could not be the subject of development. The authority rejected that challenge, following which the claimant applied for judicial review. The issue was whether, by reference to an aerial photograph of the farm, and ordnance survey, it was reasonable for the authority to have concluded that Mill Barn was not within the curtilage of the farmhouse.

It was settled law that the question of whether a structure was within the curtilage of a listed building was one of fact and degree to be determined by the decision maker, and that the factors which had to be taken into account in that regard were the physical layout of the site concerned. The principles established in the Calderdale case were applied.

Although the whole of Jews Farm, including the farmhouse and all of the agricultural buildings, including Mill Barn, was in common ownership when the farmhouse was listed in 1984, the listed farmhouse and its residential curtilage was both physically separated from, and functionally distinct from, the agricultural land and buildings on the other side of the wall. The fact that they were all constituent parts of the same farming enterprise as Jews Farm does not mean that Mill Barn, or any of the Agricultural buildings beyond the wall, were within the curtilage of the farmhouse.

Accordingly, the decision under challenge would stand.

In May 1995, the local planning authority granted planning permission for the erection of a dwelling house on agricultural land. In the approved plans the curtilage surrounding the dwelling had clearly been marked with a red line. In 1998, the claimant successfully sought permission to build an extension on the original dwelling house, Miscombe Manor. In obtaining permission, no permission was sought, and none was granted, to extend the curtilage around the dwelling house or to change the use of the land over which the curtilage would be extended from agricultural use to ancillary residential use. The claimant subsequently built leisure facilities on the land that he believed was within the curtilage. The authority subsequently discovered the claimant's change of use in respect of the leisure facilities built on the curtilage and issued an enforcement notice requiring the facilities to be removed.

The claimant applied for retrospective planning permission, however the planning inspector refused the permission on the basis, that it was local planning policy not to grant permission for change of use of agricultural land. The claimant appealed under section 288 of the Town and Country Planning Act 1990 Act, challenging the inspector's refusal and applied under s.289 of the Act to quash the enforcement notice. He argued, inter alia, that in the permission to build an extension in 1998
implicitly included an extension to the curtilage.

It was held that the appeal and application would be dismissed. The application for planning permission for a proposed new dwelling carries with it the necessary implication that the detached dwelling house will be surrounded by a curtilage which will be used for purposes incidental to the residential use of the proposed dwelling. While not every proposed dwelling, for example flats, will necessarily have a curtilage, a detached dwelling house is bound to have a curtilage. If nothing is said in the application about the extent of the proposed curtilage, the reasonable inference, in the absence of any contrary indication, will be that the red line on the site plan submitted with the application defines the proposed curtilage of the proposed new dwelling house. It will be reasonable to draw this inference whether or not the Applicant has stated in the application form that planning permission is sought for a change of use for residential purposes, in addition to permission to erect the new dwelling. That is because it is implicit in the application that the new dwelling will have a curtilage and the site plan then answers the only outstanding question: how extensive is the proposed curtilage? Given that context and the other information on the site plan, the only reasonable inference was that it defined the extent of the proposed curtilage in 1995.

In 1998, the position was materially different. There was a dwelling in existence, it had a curtilage. It was not a necessary implication of permitting the extension or alteration of that dwelling that its curtilage would be extended beyond that which had been permitted in 1995. That is not the case with an application to extend or alter an existing detached dwelling house. The dwelling house will have an established curtilage. The Inspector treated the drawings approved on appeal in 1995 as defining the permitted curtilage of the dwelling that became Miscombe Manor. The application to extend or alter the dwelling may or may not include an application to extend the curtilage and to change the use of the land within the extension to residential purposes incidental to the residential use of the dwelling house as extended or altered, but there is no necessary implication that it does include such an application. For these reasons the Inspector's conclusion that the 1998 permission did not grant planning permission for an extension to the residential curtilage of Miscombe Manor was correct. It follows that both the s 289 appeal and the s 288 application must be dismissed.