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The isolated curtilage: where does it all end?

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kI make no excuses for returning to my theme of how judges and inspectors interpret the meaning of words when dealing with planning appeals and related legislation. This is further to last year's judgmenthanded down by Lord Carnwath which determined that a large decorative urn is not a building and cannot therefore be protected by listing*, which I dealt with in a previous edition of this august publication. And (in relation to a legal case not actually concerned with planning law) to a comment of Bertrand Russell: "It is obvious that 'obscenity' is not a term capable of exact legal definition; in the practice of the Courts, it means 'anything that shocks the magistrate'".

So here are some more examples to illustrate the delights of the law in planning and how the English language can apparently be used (definitions taken from The Chambers Dictionary).

Let's start with the word "isolated" (standing apart; separate; solitary). Paragraph 79 of the NPPF requires that planning decisions should avoid the development of isolated homes in the countryside, apparently for reasons of sustainability. In City & Country Bramshill Ltd v Secretary of State for Housing, Communities and Local Government [2021] it was argued that the conversion of a grade I listed mansion into apartments and the construction of 235 houses (some designed to replace existing buildings nearby) on its surrounding large estate, was not an isolated development but rather a "cluster" of existing and new homes. Judges in both the High Court and the Court of Appeal disagreed. So, whereas before it had been thought that the NPPF reference to isolated homes in the countryside related to single properties, it now appears that any development, such as a new town, on land that stands apart from existing villages or other settlements should not now be allowed.

Then there's "curtilage" (a court, garden, field or area of land attached and belonging to a building). The General Permitted Development legislation allows all sorts of construction and activity within the curtilage of houses or other buildings; but planning law does not necessarily recognise the dictionary definition. Instead judges have limited the land defined as curtilage to a small area forming part and parcel of the home or building within it (Dyer v Dorset CC [1988]), which must be intimately associated with the building itself (McAlpine v SSE [1995]) and have a purpose that serves the building where it is located (Sinclair-Lockhart's Trustees v Central Land Board [1950]).

While it's clear that some of these judgements go back many years, the definition of a small area of land closely associated with the building, rather than the wider legal definition of the land in its ownership, remains "as a matter of fact and degree" the key to determining how curtilage is defined in planning law. In Challenge Fencing Ltd v Secretary of State for Housing, Communities & Local Government [2018], the subtlety of what is meant by "within the curtilage" was critical. Class J, part 7, schedule 2 of the GPDO permits "the provision of a hard surface within the curtilage of an industrial building or warehouse…" But there was only a single small building on the site, which consisted mainly of hardstanding for open storage. So in the High Court Mrs Justice Lieven agreed with an appeal inspector that the curtilage of the building could not extend to the entire site, even though it was clearly in one ownership.

In terms of planning law we also need to consider what can be defined as a "building" (a substantial structure for giving shelter). Setting aside the vast amount of data on caravans - fixed or mobile - that continues to exercise the minds of planning consultants everywhere, the criteria that define a building are its size, permanence, and physical attachment to the ground (Cardiff Rating Authority v Guest Keen Baldwin's Iron and Steel Co [1949]). In Skerritts of Nottingham Ltd v Secretary of State for the Environment, Transport and the Regions [2000] a large marquee erected every year for a period of 8 months was held by the Court of Appeal to be a building: as was a massive tower crane sited on a track in Barvis v Secretary of State for the Environment [1971]. But in a recent enforcement notice appeal, a Planning Inspector decided that a sales kiosk outside a tearoom in Bourton on the Water was not a building because it had wheels and could be moved about. So I guess we are back to the old dictum "every case determined on its own merits as a matter of fact and degree". In other words, your guess is as good as mine.

And finally I discovered, by courtesy of a very interesting lockdown Webinar from the 39 Essex chambers, that village green can have a surprisingly wide interpretation, basically meaning any open space that has been used recreationally by local people for at least 20 years. The Commons Registration Act 1965 allows the establishment of village greens and has been applied to beaches, golf courses and car parks in addition to the traditional grassy area (with or without pond and maypole) in a countryside hamlet. Indeed, in T W Logistics Ltd v Essex CC and another [2021] the Supreme Court has confirmed that a concrete quayside at the port of Mistley in Essex, used by heavy goods vehicles and for the temporary storage of cargo but (crucially) also by local people walking their dogs, stopping to chat and enjoying the waterside views, should be registered as a TVG - town or village green - and therefore safety fencing that had been erected was required to be removed. ■

**Resulting in a Written Ministerial Statement and subsequent amending of the General Permitted Development legislation to ensure that any proposal to demolish unlisted statues, memori*

…all in all I'd rather have been a judge than a miner. And what's more, being a miner as soon as you are too old and sick and stupid to do the job properly, you have to go. Well, the very opposite applies with the judges. – Peter Cook as E L Wisty, c1962