

Ecclesiastical Buildings and the Planning and Listed Buildings Regimes

The Duffield Questions

- 1) All consecrated church buildings and land falls under the jurisdiction of the Chancellor of the Diocese, through the Faculty Jurisdiction; in addition, the curtilage of a consecrated building falls within the jurisdiction, and so do other buildings which are brought within the jurisdiction by a direction by the Bishop. Clergy must ensure that before any works or non worship related activities are carried out, the formal authority of a Faculty is applied for and obtained.
- 2) **Planning Permission:** If the proposed works involve the development of land, such as building or engineering operations (including demolition, flood lighting, and significant earth works (eg landscaping)), or a change of the use of the land, planning permission will be required just as for any secular building, in addition to a Faculty. The exemption from listed building control noted below does not in any sense change the requirement for planning permission for development. Internal changes to a church would not amount to planning permission, but alterations which would affect the external appearance of the building will usually require permission. So an extension to a church will require planning permission in the normal way, and if the church is listed, the planning authority will take into account the impact on the listed building, and apply normal secular planning policies from the National Planning Policy Framework and their Development Plan, just as if the building had had a secular function.
- 3) **The Ecclesiastical Exemption:** In the case of secular buildings which are listed, listed building consent would also be required for many works both to the interior or the exterior of the building. Any work, be it alteration or extension, which would affect the character of the building as a building of special architectural or historic interest would need listed building consent. However the Listed Buildings Act 1990 includes an exemption from listed building controls for any *'ecclesiastical building which is for the time being used for ecclesiastical purposes'*. This exemption means that the authority of a Faculty replaces the need for listed building consent.
- 4) The normal procedure is that where a planning permission is also needed, then the Consistory Court would not issue the Faculty until the planning permission has been issued. That rule is not an absolute rule, but where a Faculty is issued prior to the grant of planning approval, the Court is likely to impose a condition preventing its implementation until planning consent is given. Where there is doubt over whether planning permission is needed for a particular work the local planning authority should be asked to confirm their view, and if there is doubt, it may be necessary to seek a Certificate of Lawful Proposed Development from the authority.
- 5) The 2010 Ecclesiastical Exemption Order made under the Act purports to go a little further than the Act, and to provide that *'any object or structure within the curtilage of the [church building] which although not fixed to that building forms part of the land shall be treated as part of the church building'* – thus apparently making free standing structures exempt from listed building control. The interpretation of this Order rarely causes difficulty, but at least one local council in their non-statutory guidance regards parish halls and school rooms as being such buildings, even though those are not ecclesiastical buildings and are not primarily in use as a place of worship; whilst another council threatened enforcement against an incumbent, over the movement of a curtilage listed structure from the churchyard into the church building. So the risk from different views on the question is a live problem. Before undertaking any work to a structure within the curtilage of a listed church, which existed in 1948 (such as memorials) the minister should check whether the structure is separately listed, and advice should be sought from the local planning authority the DAC and the Registry.
- 6) **Designated Heritage Assets:** this is a term developed recently in the secular planning regime to refer to formally listed buildings and conservation areas (as well as some other categories of heritage). Whenever a planning decision is made about a Designated Heritage Asset, an evaluation of its significance has to be made. Significance is the value of the asset to this and future generations from its archaeological, architectural artistic or historic interest, including not only the asset but its setting. The setting is a broad concept, and will include the surroundings of

the asset in which the asset is experienced, both visually and in any perceptible sense. The question then is whether there would be harm to the significance of the asset, and if so whether that harm is substantial or less than substantial. An assessment of significance is therefore needed, and under the Faculty Jurisdiction this takes the form of a Statement of Significance. The harm then has to be balanced against the need for the proposed change. Guidance on such statements is given in the DAC section of the web site. But the document is vitally important for the Chancellor when s/he comes to consider the balance between significance, harm, and need. Whilst this matter is assessed in a planning context by planning authorities under the guidance within the National Planning Policy Framework and the Planning Policy Guidance, for an ecclesiastical heritage asset, the questions are approached slightly differently in relation to the Faculty Jurisdiction and this approach is set out below as the 'Duffield Questions'.

- 7) **The listed building:** If a building is listed then the whole of the building is listed, whatever its grade, and whatever information is given within the listing details. The listing details are not determinative of the extent of the listing, and are not determinative of the significance of the building or any of its parts. The listing details are a starting point, but are not a complete summary.
- 8) **Curtilage listing:** The statutory law is that if a structure is listed, then any other structure which lies within its curtilage and which was in existence prior to 1 July 1948 is deemed listed too. The definition of the 'curtilage' of a structure is a question on which one could have endless debate. It is a mixed question of function, and ownership. Function can be fairly broadly interpreted – for example a listing of a mill was held to include a couple of cottages which were actually on the other side of a river and across a bridge : the jurisdiction was that the cottages housed essential workers and formed a composite whole. Since 1986 Historic England have been trying to be helpful within listing information, as to the extent of curtilage, because of the difficulty that has arisen in so many cases.
- 9) With most ecclesiastical buildings there is usually no doubt: the church and its churchyard will form a curtilage. Land can be 'added' in to the curtilage, so that a recent extension to a churchyard (perhaps postdating the date of listing) could well form part of a curtilage.
- 10) There is a significant body of case law on the question, but some key decisions have held that a 'purposive approach' to the question needs to be adopted – and, in the leading case, the purpose was described as being to ensure that buildings were protected, rather than to exclude buildings from protection.
- 11) With ecclesiastical buildings, ownerships of parts of what might appear to be a single site may in fact be separate (eg benefice, parsonage, glebe, trust and so on), and there could be a view that these reflect different functions or alternatively, the view might be that they are purposefully part of a single mission function.
- 12) Ultimately the extent of a curtilage is a matter for a Court but for practical purposes, councils will be the first port of call for a judgment where there is any doubt. But the Chancellor would also have to decide that question, as a preliminary 'jurisdictional' question in any Faculty proceedings. In theory one could see the two taking different decisions on the same point, but case law militates against that possibility.
- 13) What makes things more difficult is that a Council might take a different view at different times on this kind of issue – because ultimately the matter is a question of law which would be determined according to the evidence available, and because it is now well established that principles of estoppel do not apply against a public authority.
- 14) Fortunately controversy on the question of curtilage is rare in ecclesiastical cases, but if any doubt arises the advice of the Registrar should be sought.
- 15) **Conservation Areas:** before making any proposal for works to the exterior of a church whether listed or not, enquiry should be made as to whether a building is in a conservation area, because these areas are designated heritage assets in respect of which there is a statutory duty to have regard to the desirability of preservation or enhancement of the character and appearance of the area.

- 16) **Non-Designated Heritage Assets and Local listing:** these terms reflect an almost entirely non-statutory process. The National Planning Framework recognises the concept as a means of identifying situations where the heritage value or significance of a building or structure should be recognised and taken into consideration in planning cases (and therefore in relation to Faculty matters), even if it is not sufficient to warrant full listing as a listed building. The council will be able to identify whether a building is locally listed or not, but in case of doubt one should consult the Historic Environment Record. An Historic Environment Record can be obtained from the Local Planning Authority.
- 17) **The Duffield Questions:** The test, or guidelines, that in law must be applied by the Chancellor in reaching a decision are set out in the case of Re St Alkmund, Duffield [2013] Fam. 158 at paragraph 87:
- (1) Would the proposals, if implemented, result in harm to the significance of the church as a building of special architectural or historic interest?
 - (2) If the answer to the question (1) is 'no', the ordinary assumption in faculty proceedings 'in favour of things as they stand' is applicable, and can be rebutted more or less readily, depending on the particular nature of the proposals (see Peak v Trower (1881) 7 PD 21, 26-28, and the review of the case law by Chancellor Bursell QC, in In re St Mary's, White Waltham (No.2) [2010] PTSR 1689 at para 11). Questions 3, 4 and 5 do not arise.
 - (3) If the answer to question (1) is 'yes', how serious would the harm be?
 - (4) How clear and convincing is the justification for carrying out the proposals?
 - (5) Bearing in mind that there is a strong presumption against proposals which will adversely affect the special character of a listed building (see St Luke, Maidstone [1995] Fam. 1 at 8), will any resulting public benefit (including matters such as liturgical freedom, pastoral well-being, opportunities for mission and putting the church to viable uses that are consistent with its role as a place of worship and mission) outweigh the harm?
- 18) In answering question (5), it is well established that the more serious the harm, the greater will be the level of benefit needed before the proposals should be permitted. This will particularly be the case if the harm is to a building which is listed Grade I or II*, where serious harm should only be exceptionally allowed.
- 19) Further assistance has been given in the case of re St John the Baptist, Penshurst [2015] PTSR Digest 40 (see paragraph 22 of the full judgement quoted in re St Peter, Shipton Bellinger [2016] Fam 192 at paragraph 39) where the Arches Court of Canterbury made four observations:
- a) Question (1) cannot be answered without prior consideration of what is the special architectural and/or historic interest of the listed church. That is why each of those matters was specially addressed in Duffield, paras 57-58, the court having already found in para 52(i) that "*the chancellor fell into material error in failing to identify what was the special character and historic interest of the church as a whole (including the appearance of the chancel) and then to consider whether there would be an overall adverse affect by reason of the proposed change*". The clearer and more comprehensive the assessment of significance is, the more readily can that kind of error be avoided. An architect with conservation experience, and possibly a specialist heritage consultant should be engaged to assist in writing the Statement of Significance
 - b) In answering questions (1) and (3), the particular grading of the listed church is highly relevant, whether or not serious harm will be occasioned. That is why in Duffield para 56 the court's analysis of the effect on the character of the listed building referred to "*the starting point... that this is a grade I listed building*".
 - c) In answering question (4), what matters are the elements which compromise the justification, including justification falling short of need or necessity: see Duffield paras 85-86. That is why the document setting out the justification for the proposals is now described in rule 4.3(1)(b) of

the 2015 rules as a document *commonly known* as a ‘statement of needs’, in recognition that it is not confined to needs, strictly so-called.

- d) Questions (1), (3) and (5) are directed at the effect of the works on the character of the listed building, rather than the effects of alteration, removal or disposal on a particular article.
- 20) The National Planning Policy Framework (NPPF) does not directly apply to faculty proceedings but nevertheless may in appropriate cases provide some guidance to the approach to be taken by consistory courts in cases relating to works to listed churches: see In re St Peter, Shipton Bellinger [2016] Fam 193 at paragraphs 34-48 in relation to the secular planning jurisdiction and its relationship to faculty cases. Paragraph 132 states in part: *“When considering the impact of a proposed development on the significance of a designated heritage asset, great weight should be given to the asset’s conservation. The more important the asset, the greater the weight should be.”* In fact, the second sentence of that extract does no more than make specific what is already embraced within the chancellor’s duty to reach a decision on a balance of probabilities: *“... [I]t is not so much that a different standard of proof is required in different circumstances varying according to the gravity of the issue, but that the gravity of the issue becomes part of the circumstances that the court has to take into consideration in deciding whether or not the burden of proof has been discharged: the more serious the allegation, the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it”*
- 21) It is thus imperative to recognise within any proposal for works, that a listed building *“has been judged to be of national importance in terms of architectural or historic interest”* (see the Planning Inspectorate’s Guidance Note entitled Listed building consent (version 3.3)). The direction of the Arches Court of Canterbury in In re St Peter, Shipton Bellinger [2016] Fam 193 at paragraphs 37 says *“Faculties involving alterations to listed churches require particular attention from the chancellors because listing is proof, save in the most exceptional cases and then only upon compelling expert evidence, that the building is of national importance”*; and at paragraph 34) that *“... on ordinary common law principles the weight given to an objection may be increased by the status and expertise of the body making the objection... This does not mean, of course, that in every case an objection from a body such as the Victorian society will prevail... But it does mean that a statutory amenity society’s objections should never be simply brushed aside.”* (See, too, re St Mary the Great and St Michael, Cambridge [2017] ECC Ely 1 at 21.) The same consideration, of course, applies to the views of Historic England, the Church Buildings Council and the local planning authority.

Niall Blackie

Lichfield Diocesan Registrar

Telford

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