

Date: 1st February 2016
Our ref:
Your ref: P00492875



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Dear Ms Sinclair,

Re: Dobcross Works, Huddersfield Road, Diggle

Thank you for your letter dated 12th January 2016. In response, I would make the following points.

Background

In May 2015, Oldham Metropolitan Borough Council, in relation to development proposals concerning land at Dobcross Works, Huddersfield Road, Diggle, took legal advice on whether the curtilage of the Dobcross Works Office Building - a Grade II listed building - extended only to the immediate vicinity of the office building or whether it included any of the other factory buildings on the wider factory site. The advice we were given by Robin Green of Cornerstone Barristers was as follows:

"10. From the papers before me it appears that the listed office building was part of a substantial manufacturing complex, devoted first to the manufacture of looms and then the manufacture of pallets. The office provided the space in which administrative tasks supporting the manufacturing processes were carried out. In terms of scale and function I take the view that the listed building was ancillary to the other principal buildings and structures around it at the time of listing in 1968.

11. If this analysis is correct (and it is ultimately a matter of judgment for the Council¹) then the listed building is likely to have had a restricted curtilage, not extending to any other building or structure in its vicinity (unless those buildings and structures could be said to have been ancillary to the office building) ... If anything, it is more likely that the office building was within the curtilage of the primary manufacturing buildings (particularly the large building to which it was linked by a footbridge) than the other way round.

¹ The Council do consider this is correct.

12. *Based on the material I have seen, I would agree with the Council that the curtilage of the listed building only extends to the immediate vicinity of the office building and does not include any of the other factory buildings on the wider factory site.*"

Our barrister also expressed the view that, as the link bridge at the rear of the listed building was fixed to that building, it was deemed to be part of the building for the purposes of listed building protection.

Finally, he said:

"It follows from what I have said above that listed building consent would be required for the removal of the link bridge and any other works of alteration to the listed building, but would not be required for the demolition of other non-ancillary buildings on the site. If, as appears to be the case, all the other buildings proposed to be demolished were not and are not ancillary buildings, listed building consent would not be required for their removal."

The Application

By letter of 5th January 2016, the Council notified Historic England of a planning application (reference no. PA/337931/15) for the demolition of five buildings at the Dobcross Works site, including the building to the rear of the listed building to which the link bridge is attached. By letter dated 12th January 2016 Historic England offered general observations on the application, including the following:

*"It is for the local planning authority to determine curtilage with respect to section 5 (b) of the Planning (Listed Buildings and Conservation Areas) Act 1990, and as you have come to the view that the unattached buildings are not within the curtilage of the building, we will not comment on their proposed demolition in line with our statutory remit. **However, unless specifically excluded from the listing under the new list descriptions from the Enterprise and Regulatory Reform Act (2013), those buildings which are physically attached to a listed building are listed under Section 5(a) of the 1990 Act. On the basis of the information provided, we understand that only the building to the east of the Dobcross Works office building (Grade II) is currently physically attached via the link bridge. This is therefore listed under section 5(a) and falls within our remit with regards to its demolition, and we offer the following advice on this basis" (emphasis added)**".*

In these circumstances, we asked our barrister to comment on the position taken by Historic England (in the passage in bold) that the building to the rear (east) of the listed building connected to it by the link bridge is deemed to form part of the listed building.

For the reasons given below, he respectfully considers that the view expressed in Historic England's letter is wrong.

The extent of listing

The references to "section 5(a)" and "section 5(b)" in Historic England's letter must be to section 1(5)(a) and (b) of the Planning (Listed Buildings and Conservation Areas) Act 1990, which are as follows:

"(5) In this Act '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 this Act –

(a) any object or structure fixed to the building;

(b) any object or structure within the curtilage of the building which, although not fixed to the building, forms part of the land and has done so since before 1st July 1948,

shall, subject to subsection (5A) (a), be treated as part of the building."

In his earlier advice the Council's barrister referred to case law in which the meaning of these and similar provisions had been considered. One of the cases to which he referred was *Debenhams Plc v Westminster City Council [1987] AC 396*, in which the House of Lords looked at section 54(9) of the Town and Country Planning Act 1971, the predecessor to section 1(5) of the 1990 Act. In that case a listed building was connected at the date of listing to a second building by a footbridge and tunnel. The question was whether the second building was a "structure" fixed to or within the curtilage of the listed building for the purposes of section 54(9) of the 1971 Act. The House of Lords held that it was not. At 402F-403G Lord Keith explained why in his opinion the term "structure" had, in the statutory context, a restricted meaning that did not extend to a separate building that was not subordinate or ancillary to the listed building. At 408H-410C Lord Mackay gave similar reasons for rejecting the view that "structure" included a completely distinct building which is connected structurally to a listed building.

Our view is the decision in the Debenhams case remains good law. A building that is physically attached to a listed building will not constitute a structure fixed to the listed building for the purposes of section 1(5) (a) of the 1990 Act unless it is subordinate or ancillary to the listed building.

Historic England's own guidance correctly reflects the state of the law. The following passage is the most relevant:

"Objects and structures fixed to the building

In general, a structure attached to a building, such as adjoining buildings or walls, will also be covered by the listing if the structure was ancillary to the principal building at the date of listing (or possibly 1 January 1969 for buildings listed before that date - this is not a settled point of law). ...” (the Council’s underlining).

The link bridge was plainly an ancillary structure at the date of listing. Whether or not the factory building attached via the link bridge to the listed office building was ancillary to the listed building at the date of listing is a matter for the Council’s judgment. We take the view that it was not. If that is the case, the factory building would not constitute a structure fixed to the listed building for the purposes of section 1(5) (a) of the 1990 Act.

It appears to the Council that the author of the letter from Historic England has failed to consider whether the factory building was a subordinate or ancillary building at the date of listing. Instead, they have proceeded on the erroneous basis that the factory building is deemed to be listed by virtue of section 1(5) (a) merely because it is physically connected to the listed building.

Conclusion

We are therefore writing to Historic England to say that, in view of the decision of the House of Lords in *Debenhams Plc v Westminster City Council [1987] AC 396* - which is reflected in Historic England’s own guidance - the building attached to the listed building by the link bridge should not be treated as part of the listed building unless, at the date of listing, it was ancillary to the listed building. In our view it was not since the size and function of the factory building are factors showing that it was not ancillary to the listed office building in any sense.

In these circumstances, the Council intends to determine the application on the basis that the factory building is not listed.

Should Historic England wish to provide any further observations on this subject, then we would be grateful if it could be done before 9th February 2016.

For information

In determining any planning application for development affecting the setting of a listed building, the Council will bear in mind section 66(1) of the 1990 Act, which states:

“In considering whether to grant planning permission for development which affects a listed building or its setting, the local planning authority or, as the case may be, the Secretary of State shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses”.

This provision has been the subject of extensive recent litigation and in determining an application for the demolition of buildings within the setting of the listed office building the Council will seek to demonstrate in the decision-making process that it has attached considerable importance and weight to the preservation of the setting of the building.

I trust the contents of this letter are self-explanatory, but please let me know if anything is not clear or you have any further questions.

Yours sincerely,



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