8/9

59 Doughty Street
London WC1N 2JT

The Planning Inspectorate
Room 3/26a
Temple Quay House
2, The Square
Temple Quay
Bristol
BS1 6PN

26th July 2016

Dear Sir/Madam,

Reference Number: APP/X5210/C/16/3151149
58 Doughty Street/28 Brownlow Mews London WC1

We are writing to object to the current sub-division of the garden between 58 Doughty Street and 28 Brownlow Mews.

Doughty Street is a Georgian street of terraced houses which has three English Heritage plaques (including on 58 Doughty Street) and was the home of Charles Dickens. The houses, gardens and mews between 56 and 61 Doughty Street have remained largely untouched since construction: despite some development it is remarkable that the essential character of houses and mews has been maintained and there are (until this application) no gardens to the mews houses and no large windows in the mews properties. The Doughty Street houses are listed Grade II. (The Dickens house is listed Grade I.) Each house has a garden from which the rear elevation of the terrace can be appreciated. The proposal would disrupt the overall historic layout of the plots (sub-division of the garden) and would be a loss of itself and could lead to further loss over time as a precedent would have been set. The private aspect of the rear of the houses is important. The division of the garden makes a substantial impact on the setting of and aspect from the listed house and the sub-division of the garden diminishes the historic significance of the plot. We strongly believe that it is of importance to maintain the architectural integrity of this part of the terrace.

In 2007 the current owners of the above properties made a planning application for the development of the mews house and for the splitting of the garden. In 'Other Matters' of the delegated report on the planning application for 28 Brownlow Mews 2007/0893/P (refused) the officer writes: 'In terms of use, the self containment of the mews will hive off a section of the garden and the mew [sic] building which is currently in the cartilege [sic] of the listed building. This is considered to compromise its original form and although the applicants have said that the mews will remain as part of the house this would be uncontrollable if planning permission was approved. As such **the physical separation of**

the mews and part of the garden from the main house would harm the setting and character of the listed plot and is not desirable.' (My bold type).

The appeal you are considering against the refusal of a certificate of lawfulness, of 25th May 2016 by H Planning Ltd, makes no mention of the above delegated report. The setting of a listed building is the environment of which the building was designed to be a principal focus, and which it is designed to overlook. The setting of a listed building should take into account a broad assessment of the siting and situation of the building. The curtilage of a house will normally form part of the setting. To divide the garden and thereby create another residential unit, with a separated garden, is a very material change in the setting and character of the plot. Such a change also affects the land and/or properties adjacent to 58 Doughty Street.

It is perhaps of relevance in this context that no planning permission was given for the door onto the garden from the mews house, opened up in the 1980s.

Despite the ruling of 2007/0893/P the owners have by now made four attempts to sub-divide the garden. In each case they have failed to apply for the necessary planning permission. As the properties are listed, planning permission is required to erect walls and fences that are usually permitted development for other householders. Operational development within the curtilage of a listed building does not have permitted development rights. In each of the four attempts to sub-divide the garden it has been impossible to walk from one end of the garden to the other.

We note that the applicants state that 'emptying the planter is likely to be equivalent to 1-2 hours work.' It strikes us that dismantling a fixed fence in the same position would probably take less time. Thus the 'moveable' planter, with earth, is practically speaking equivalent to a fixed object. It is noteworthy that in the period of over a year that this 'moveable' planter has been in place it has never been moved. We doubt that it will ever be moved for some considerable time. However as case law demonstrates it is irrelevant whether the object is fixed or not. I asked Richard Harwood QC, a leading planning barrister, to provide the legal background to this particular case. His conclusion in paragraph 8 of advice on 14th September 2015 is: 'Despite the ongoing efforts of the owner to avoid the need for planning permission, he is continuing to put in place a permanent barrier. That is operational development and requires planning permission.'

We are objecting and have always been objecting to the division of the garden of a listed building. Its appearance and mobility or immobility is immaterial to us.

Yours sincerely,

James Shillingford

Rachel Gould

James Shillingford Rachel Gould

Enclosures:

Advice from Richard Harwood, QC in the matter of 58 Doughty Street WC1, the first of 21st July 2015 and the second of 14th September 2015.

IN THE MATTER OF 58 DOUGHTY STREET, WC1

ADVICE NOTE

1. I am instructed to advise Mr James Shillingford and Ms Rachel Gould of 59, Doughty Street WC1N 2JT on issues arising from further efforts by the owners of 58 Doughty Street and 28 Brownlow Mews to sub-divide the garden. I gave a written advice dated 21st July 2015 on the use of planter as a barrier between the two buildings.

2. On 8th July 2015 Mr Roger Keeling, the owner of 58 Doughty Street and 28 Brownlow Mews submitted a Certificate for the Lawfulness of Proposed Use or Development for the installation of a planting box on wheels. He contends that planning permission is not required for the installation of this planter in this position on the basis that this does not constitute development. Whilst the application was made on the form for a proposal, section 8 shows that the proposal had already begun.

3. The new planter is metal, with dimensions given as '127cm x 80cm x 72.1cm'. I am not certain whether it is the same planter discussed in my 21st July advice, since the photographs with the application show another planter in position and then being replaced. That does not matter for present purposes: the thee differences from the planter addressed in the earlier advice are that the dimensions are smaller than those assumed; the planter has four swivel wheels, each in a recess in corners of its base; and two rails run under the wheels and onto the pathway at 58 Doughty Street.

4. The application explains that the Council had previously said that planning permission was required for a wooden planting box because it was difficult to move.[1] The justification given includes:

> "This matter involves a yew bush that has been planted in a plant-holder and placed in a garden. The planter is not fixed to the ground and is easily movable; there clearly has been no demolition, rebuilding of or structural alterations to a building and no operations that are normally undertaken by a builder have taken place.
>
> The judgments in Cardiff Rating Authority v Guest Keen Baldwins Iron & Steel Co Limited [1949] 1 K.B. 385 and Skerrits of Nottingham Ltd v Secretary of State

[1] Form, section 4.

for the Environment, Transport in the Regions (No.2) [2000] 2 P.L.R. 102 identified three primary factors as being relevant to the question of what was a building requiring planning permission. These are size, permanence and physical attachment. The planter is of small size (127cm x 80cm x 72.1cm) and has wheels so does not require any special equipment to move it. In Hall Hunter Partnership v First Secretary of State [2006] E.W.H.C 3482 (Admin) it was held that agricultural polytunnels sitting on top of stilts that penetrated one metre into the ground amounted to operational development because "it took teams of ten men 45 man hours to fully erect 1 acre and 32 man hours to dismantle the same". This is clearly incomparable to the positioning of a small portable planter containing a yew bush located in a garden.

Our clients have cooperated with the planning authority at every stage of this protracted matter. Our clients have directly addressed the Council's concerns that the planter cannot be moved easily and we believe that the existence of a small, portable planter does not amount to operational development in need of planning permission."

5. On the dimensions given, the volume of the planter will be 0.73 m^3. Filled with soil that will be between 0.86 and 1.22 tonnes in weight. The yew bush planted in it is similar to those in the raised beds on either side of the path.

6. The application submissions fail to consider the cases of *Islam* and *Save Woolley Valley* and the possibility that what has been done constitutes 'other operations'.[2] The assemblage of items in *Islam* was not fixed to the ground and the poultry units in *Save Woolley Valley* were moveable around the field (albeit their manner of construction was more in the style of a builder. It is not readily apparent, and the Council may wish to consider this on site, whether the planter could be moved when full and whether that could be done without the rails.

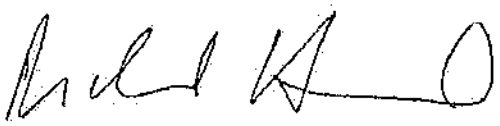
7. The degree of permanence and so its effect in land use and development terms is to be judged objectively, but the planter is put there permanently. It has, quite deliberately, a visual impact in sub-dividing the garden. This is perhaps the critical point: it is positioned as a permanent barrier down the middle of the garden. Any ability to move

[2] A similar approach has also been taken by the High Court to moveable pig ares' in *R(McPhee) v South Downs National Park Authority* [2015] EWHC 1661 (Admin).

an object on rollers does not necessarily prevent it from being operational development, see the tilting furnaces in *Cardiff Rating Authority*.

8. Despite the ongoing efforts of the owner to avoid the need for planning permission, he is continuing to put in place a permanent barrier. That is operational development and requires planning permission.

9. If any matters arise out of this advice, please do not hesitate to contact me in Chambers.



39 Essex Chambers
39 Essex Street
London, WC2R 3AT

Richard Harwood QC

14th September 2015

IN THE MATTER OF 58 DOUGHTY STREET, WC1

ADVICE

1. I am instructed to advise Mr James Shillingford and Ms Rachel Gould of 59, Doughty Street WC1N 2JT on issues arising from further efforts by the owners of 58 Doughty Street and 28 Brownlow Mews to sub-divide the garden.

2. The centre of the garden has two raised beds, behind brick walls, with a brick paved path in between the two parts of the garden and the two buildings. The beds were originally for flowers or shrubs but now contain tall, bushy evergreen trees.

3. Sub-division was originally carried out by the erection of a 2 metre high steel mesh fence in December 2011. The Council served an enforcement notice and the fence was subsequently removed. Ivy on bamboo canes pressed into the ground was then used as a barrier. Following judicial review proceedings brought by Mr Shillingford and Ms Gould in 2013, the Council issued a further enforcement notice which was also complied with.

4. The owners then assembled a planter. Following an inspection the Council decided that this was fixed down and was development requiring planning permission.[1] Again, this was subsequently removed.

5. In June 2015 the owners then obtained a large planter, which appears from photographs to be roughly 1 metre high, 1 metre deep and 2 metres wide. This was placed between the two beds, filled with earth and planted with tall trees, similar in nature and height to those in the beds. The trees are about 4 metres in height above the planter and the beds.

6. Subject to immaterial exceptions, planning permission is required for the carrying out of development: Town and Country Planning Act 1990, section 57. Development is defined as (section 55(1)):

> "Subject to the following provisions of this section, in this Act, except where the context otherwise requires, "development," means the carrying out of building,

[1] Letter, 27th March 2015 to Mr Shillingford.

engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land"

7. By section 55(1A) 'building operations' includes:

"(a) demolition of buildings;

(b) rebuilding;

(c) structural alterations of or additions to buildings; and

(d) other operations normally undertaken by a person carrying on business as a builder."

8. Lord Denning MR observed in *Parkes v Secretary of State for the Environment*:[2]

"in the first half "operations" comprises activities which result in some physical alteration to the land, which has some degree of permanence to the land itself: whereas in the second half "use" comprises activities which are done in, alongside or on the land but do not interfere with the actual physical characteristics of the land."

9. Building operations do not necessarily result in a building although activities which do would be the product of building operations. Building must be considered in its wide definition in the Town and Country Planning Act 1990 as including any structure or erection or part of a building.[3] Whether an object is a building is often judged by reference to three factors: size; the nature and degree of attachment; and the degree of permanence. Permanence was concerned with 'a sufficient length of time to be of significance in the planning context'.[4].

10. The setting up of umbrellas and side panels to create a marquee type structure in the rear garden of a shisha lounge was also a building operation.[5] 'Poultry units' each housing up to 1,000 birds and said to be moved periodically around their paddocks could also be

[2] [1978] 1 W.L.R. 1308 at 1311.
[3] Town and Country Planning Act 1990, s.336(1).
[4] *Skerritts of Nottingham v Secretary of State for the Environment, Transport and the Regions* [2000] J.P.L. 1025 at 1034 per Schiemann LJ.
[5] *Islam v Secretary of State for Communities and Local Government* [2012] EWHC 1314 (Admin), [2012] JPL 1378.

buildings (or the product of building operations).[6] An object may be a building in planning law without being incorporated into the land, as part of the realty.[7]

11. Recognising that it is not essential that the object is part of the land, it may still be helpful to consider whether it is. There are two tests applied when considering whether an object has become part of land: (i) the method and degree of annexation; (ii) the object and purpose of the annexation.[8] The purpose broadly distinguishes between objects which are positioned as part of an overall design and those which are there for the enjoyment of the objects themselves. Even if the positioning of a statue might be important, it might not matter what the statue is. It can be the case that the statues are not part of the land but the plinths they rest on or are attached to are.[9]

12. The leading land law decision is that of the Court of Appeal in *Berkley v Poulett*.[10] The Court held that 'whether objects which were originally chattels have become fixtures, that is to say part of the freehold, depends upon the application of two tests: (1) the method and degree of annexation; (2) the object and purpose of the annexation'. Those tests were applied to objects within a building and also to objects in the grounds.

13. The House of Lords in *Elitestone v Morris*[11] adopted a three-fold distinction:

> "An object which is brought onto land may be classified under one of three broad heads. It may be (a) a chattel; (b) a fixture; or (c) part and parcel of the land itself. Objects in categories (b) and (c) are treated as being part of the land."

14. The test for being a part and parcel of the land was the same as for fixtures: 'on the circumstances of each case, but mainly on two factors, the degree of annexation to the land, and the object of the annexation'.[12]

15. In *Holland v Hodgson*[13] Blackburn J suggested:

> "Perhaps the true rule is, that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the

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[6] *R(Save Woolley Valley Action Group Ltd) v Bath and North East Somerset Council* [2012] EWHC 2161 (Admin), [2013] Env LR 8.
[7] *R. v Swansea City Council ex p Elitestone* (1993) 66 P & CR 422.
[8] *Berkley v Poulett* (1977) Real Property and Conveyancing 754.
[9] For example, *Berkley v Poulett*.
[10] [1977] 1 E.G.L.R. 86, [1977] RPC 754.
[11] [1997] 1 W.L.R. 687 at 691 per Lord Lloyd of Berwick. The case concerned whether a chalet was part of the land.
[12] *Elitestone* at 692.
[13] L.R. 7 C.P. 328.

circumstances are such as to shew that they were intended to be part of the land, the onus of shewing that they were so intended lying on those who assert that they have ceased to be chattels, and that, on the contrary, an article which is affixed to the land even slightly is to be considered as part of the land, unless the circumstances are such as to shew that it was intended all along to continue a chattel, the onus lying on those who contend that it is a chattel."

16. The issue has arisen recently on the status of a Henry Moore sculpture 'Draped Seated Woman' (or 'Old Flo'). In *London Borough of Tower Hamlets v London Borough of Bromley*[14] Mr Justice Norris said:

"15. In my judgment the sculpture, which was originally a chattel, remained a chattel and never formed part of the realty.

16. It is always a question of fact in the individual case whether something has remained a chattel or become a fixture; other cases therefore serve as no more than illustrations of the application of the relevant principles. Conventionally, those principles require the application of two tests: (a) the method and degree of annexation; and, (b) the object and purpose of annexation. Generally, the second of those tests is taken to be the more significant and can enable a Court to decide when an object is a chattel, or is a fixture, or is part and parcel of the land itself. In *Elitestone Limited v Morris* [1997] 2 All ER 513 at 518j Lord Lloyd noted:-

"Many different tests have been suggested, such as whether the object which has been fixed to the property has been so fixed for the better enjoyment of the object as a chattel, or whether it has been fixed with a view to effecting a permanent improvement of the freehold."

This, and similar tests are useful when one is considering an object such as a tapestry, which may or may not be fixed to a house so as to become part of the freehold: see *Leigh v Taylor* [1902] AC 157.

17. Applying the conventional tests and bearing in mind Lord Lloyd's observation, the following considerations are in my judgment material. The sculpture is an entire object in itself. It rested by its own weight upon the ground and could be (and was) removed without damage and without diminishing its inherent beauty. It might adorn or beautify

[14] [2015] EWHC 1954 (Ch).

a location, but it was not in any real sense dependant upon that location. It is true that one subsequent commentator on the LCC policy wrote:-

> "Occasionally, the sensitive placement of a non-commissioned work resulted in an impressive interaction of art and environment as in Henry Moore's Draped Seated Woman, whose longing gaze scans an expansive lawn".

But in my view the sculpture's power was no greater in Stepney than in Cologne or Melbourne. The sculpture did not form part of an integral design of the Stifford Estate; and whilst it must have been intended to confer some benefits upon the residents of the Stifford Estate it conferred equal benefits upon anyone passing along Jamaica Street or Stepney Green. Upon an objective consideration of all of the circumstances of the case I conclude that the sculpture remained a chattel. This outcome is consistent with the application of these principles in cases such as *D'Eyncourt v Gregory* (1866) LR 3 Eq 382 (subject to the criticism in *Re de Falbe* [1901] 1 Ch 523) and *Berkley v Poulett* [1977] 1 EGLR 86."

17. In *Hamp v Bygrave*[15] the purchaser of a house sued for the return of garden ornaments including stone urns, a stone statue, a stone ornament perhaps of Chinese origin and a lead trough and patio lights which had been removed by the vendor. Most of these items had been acquired by the vendor from the previous owners with the house. As they rested on their own weight the items were prima facie chattels however the High Court considered the vendor's intention at the time of sale and found that they were being treated as part of the freehold. Boreham J said 'I consider the clear inference to be that the defendants regarded all the disputed items as features of, and part and parcel of, the garden. I conclude, therefore, that they were fixtures and that they passed on conveyance of the land to the plaintiffs'.

Assessment

18. *Hamp* began by reflecting the general position that garden ornaments tend to be chattels. A vendor will often take their potted plants and planters with them but there may be circumstances where the intention, objectively determined, is for these to be part of the land. As it is now filled, the planter will be extremely heavy. Soil weighs between 1.2 and 1.7 tonnes per cubic metre and the volume of the planter appears to be

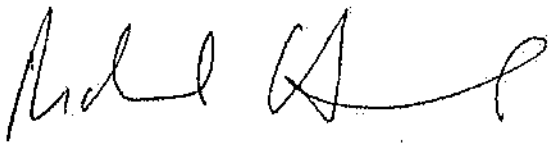
[15] [1983] 1 EGLR 174. Other cases where the status of objects changed in a sale include *Chesterfield's Estates* and *Berkley v Poulett*.

between one and two cubic metres. It contains tall trees and it will be difficult to move the planter at all without emptying it out, let alone to take it out of the garden.

19. The planter constitutes a permanent element in the garden unless and until a decision is taken to physically open the whole garden to both buildings. It has the practical consequence of preventing any movement between what are now two halves of the garden. That an object might be resting on the ground, and even that it could be moved, does not prevent its placing being a building operation.[16] It might here become part of the land, resting on its own weight, being difficult to move and objectively being to improve the land, by blocking off 28 Brownlow Mews, rather than for its enjoyment. In practical terms a permanent barrier has been put up between the two buildings.

20. The planter is in this case operational development, either as a building operation or other operation. It might also have become part of the land.

21. If any matters arise out of this advice, please do not hesitate to contact me in Chambers.



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Richard Harwood QC

21st July 2015

[16] See *Save Woolley Valley, Islam.*