



**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
Community Right to Bid**

Tribunal Reference: CR/2015/0007
Appellant: Wellington Pub Company
Respondent: The Royal Borough of Kensington and Chelsea
Second Respondent: The Norland Conservation Society
Judge: Peter Lane

DECISION NOTICE

Introduction

1. The Localism Act 2011 requires local authorities to keep a list of assets (meaning buildings or other land) which are of community value. Once an asset is placed on the list it will usually remain there for five years. The effect of listing is that, generally speaking, an owner intending to sell the asset must give notice to the local authority. A community interest group then has six weeks in which to ask to be treated as a potential bidder. If it does so, the sale cannot take place for six months. The theory is that this period, known as “the moratorium”, will allow the community group to come up with an alternative proposal – although, at the end of the moratorium, it is entirely up to the owner whether a sale goes through, to whom and for how much. There are arrangements for the local authority to pay compensation to an owner who loses money in consequence of the asset being listed.

2. The Academy, 57 Princedale Road, London W11, is a public house, previously known as the Crown, which was built in 1851. 57 Princedale Road comprises a basement, ground floor and two upper stories. The ground floor is the pub, with the basement serving as storage for the pub. The first and second floors comprise residential accommodation.

3. On 8 January 2015 the Council was asked to review its decision to list the Academy as an asset of community value under the provisions of the 2011 Act.

The listing extended to the entirety of 57 Princedale Road; that is to say, the basement, ground floor, first and second floors. The outcome of the review, recorded in the Council's letter of 2 March 2015, was to maintain the listing of the entire premises.

4. The appellant appealed to the First-tier Tribunal. The hearing of the appeal took place at Field House on 30 September 2015, when Mr Gregory Jones QC appeared for the appellant; Mr Richard Turney of counsel appeared for the Council; and Mr Scott Stemp of counsel appeared for the second respondent. I heard oral evidence from Mr Darko Luger and Mr James Preece. I have taken account of all the evidence and submissions, in reaching my decision.

Legislation and advice

5. Section 88 of the 2011 Act provides as follows:-

“88 Land of community value

- (1) For the purposes of this Chapter but subject to regulations under subsection (3), a building or other land in a local authority's area is land of community value if in the opinion of the authority—
 - (a) an actual current use of the building or other land that is not an ancillary use furthers the social wellbeing or social interests of the local community, and
 - (b) it is realistic to think that there can continue to be non-ancillary use of the building or other land which will further (whether or not in the same way) the social wellbeing or social interests of the local community.
- (2) For the purposes of this Chapter but subject to regulations under subsection (3), a building or other land in a local authority's area that is not land of community value as a result of subsection (1) is land of community value if in the opinion of the local authority-
 - (a) there is a time in the recent past when an actual use of the building or other land that was not an ancillary use furthered the social wellbeing or interests of the local community, and
 - (b) it is realistic to think that there is a time in the next five years when there could be non-ancillary use of the building or other land that would further (whether or not in the same way as before) the social wellbeing or social interests of the local community.”
 - (3) The appropriate authority may by regulations—
 - (a) provide that a building or other land is not land of community value if the building or other land is specified in the regulations or is of a description specified in the regulations;

- (b) provide that a building or other land in a local authority's area is not land of community value if the local authority or some other person specified in the regulations considers that the building or other land is of a description specified in the regulations.
- (4) A description specified under subsection (3) may be framed by reference to such matters as the appropriate authority considers appropriate.
- (5) In relation to any land, those matters include (in particular)—
 - (a) the owner of any estate or interest in any of the land or in other land;
 - (b) any occupier of any of the land or of other land;
 - (c) the nature of any estate or interest in any of the land or in other land;
 - (d) any use to which any of the land or other land has been, is being or could be put;
 - (e) statutory provisions, or things done under statutory provisions, that have effect (or do not have effect) in relation to—
 - (i) any of the land or other land, or
 - (ii) any of the matters within paragraphs (a) to (d);
 - (f) any price, or value for any purpose, of any of the land or other land.
- (6) In this section—
 - “legislation” means—
 - (a) an Act, or
 - (b) a Measure or Act of the National Assembly for Wales;
 - “social interests” includes (in particular) each of the following—
 - (a) cultural interests;
 - (b) recreational interests;
 - (c) sporting interests;
 - “statutory provision” means a provision of—
 - (a) legislation, or
 - (b) an instrument made under legislation.”

6. Section 108 includes the following definitions:-

- “building” includes part of a building;
- ...
- “land” includes—
 - (a) part of a building,
 -”

7. The Assets of Community Value (England) Regulations 2012 make further detailed provision in relation to relevant provisions of the Act, as regards England. Regulation 3 provides that:-

“ 3. A building or other land within the description specified within Schedule 1 is not land of community value (and therefore may not be listed)”.

8. Schedule 1 describes types of land which are not of community value and therefore may not be listed. Paragraph 1 provides:-

“ 1. – (1) Subject to sub-paragraph (5) and paragraph 2, a residence together with land connected with that residence.

(2) In this paragraph, subject to sub-paragraphs (3) and (4), land is connected with a residence if—

(a) the land, and the residence, are owned by a single owner; and

(b) every part of the land can be reached from the residence without having to cross land which is not owned by that single owner.

(3) Sub-paragraph (2)(b) is satisfied where a part of the land cannot be reached from the residence by reason only of intervening land in other ownership on which there is a road, railway, river or canal, provided that the additional requirement in sub-paragraph (4) is met.

(4) The additional requirement referred to in sub-paragraph (3) is that it is reasonable to think that sub-paragraph (2)(b) would be satisfied if the intervening land were to be removed leaving no gap.

(5) Land which falls within sub-paragraph (1) may be listed if—

(a) the residence is a building that is only partly used as a residence; and

(b) but for that residential use of the building, the land would be eligible for listing.”

9. Paragraph 2 of Schedule 1 states that:-

“(a) “residence” means a building used or partly used as a residence
...”

10. In October 2012 the Department for Communities and Local Government published a non-statutory advice note for local authorities concerning the community right to bid provisions of the Localism Act 2011 and its related Regulations. Section 3 of this advice concerns the list of assets of community value. Paragraphs 3.5 to 3.8 describe land which may, and may not, be listed as such an asset. Paragraphs 3.6 and 3.7 are relevant for our purposes:-

“3.6 There are some categories of assets that are excluded from listing. The principal one is residential property. This includes

gardens, outbuildings and other associated land, including land that it is reasonable to consider as part of the land with the residence where it is separated from it only by a road, railway line, river or canal where they are in the same ownership as the associated residence. Details of this are set out in paragraphs 1 and 2 of Schedule 1 to the Regulations. "The same ownership" includes ownership by different trusts of land settled by the same settlor as well as literally the same individual owner.

- 3.7 There is an exception to this general exclusion of residential property from listing. This is where an asset which could otherwise be listed contains integral residential quarters, such as accommodation as part of a pub or a caretaker's flat."

The issue

11. The appellant's position is that, whilst it has no objection to the ground floor and basement of 57 Princedale Road being listed as an asset of community value, it objects to the inclusion in the listing of the first and second floors, comprising the residential accommodation. Since a residence is excluded from the category of land that can be listed, the appellant contends that, having regard to the fact that a "building" includes "part of a building", the "exception to the exception" in paragraph 1(5) of Schedule 1 is not satisfied. In the circumstances of the present case, the residential accommodation is not "integral" to that part of 57 Princedale Road which comprises the pub known as the Academy.

12. The appellant submits that it is significant for the purposes of the present appeal that, in July 2011, the Council's development control officer stated in writing that 57 Princedale Road was in use at basement and ground floor level as a public house, within Class A4 (drinking establishments) use, with basement storage and the ground floor level used for trading. The first and second floor levels were described as "residential use within Class C3 (dwelling houses) access via an external entrance to the rear".

Evidence

13. Mr Luger signed two witness statements dated 23 April and 2 September 2015. He describes that he and his wife, Marta, are the lessees and licensees of the Academy pub and that they have leased and operated the Academy for the past 27 years. During that time they have lived with their family in the residential flat on the first and second floors. The lease granted to Mr and Mrs Luger covered the entirety of the premises (that is to say, both the pub and the residential accommodation). They pay rent in respect of the entirety of the demised property. The residential element is charged at a VAT exempt rate. He and his wife are the sole directors of Academy Bars Ltd. Provision of the residential accommodation is treated for tax purposes as a benefit in kind and is so recorded in the company's tax returns.

14. When Mr and Mrs Luger came to 57 Princedale Road, the only means of access to the residential accommodation on the first and second floors was through the pub on the ground floor. In order to ensure privacy and security for them and their family, about 18 years ago Mr Luger had constructed a direct outdoor access, which has been used as the main access to the residential flat ever since. The internal connection between flat and pub has, however, been maintained. Mr Luger uses this as a matter of convenience when entering the pub on business. Mr Luger's activities in the pub do not include serving behind the bar. He and his wife employ a manager, who oversees the running of the business, including the hiring of bar staff. Neither the manager nor any of the staff lives in the residential accommodation. Mr Luger used to be present in the pub on a regular basis until mid 1990 but his attendance now is for "management meetings to attend to business needs and issues I have to address as the owner, or for a meal and to have a drink with regular customers".

15. Mr and Mrs Luger are the licensees. Mr Luger is the designated premises supervisor for the purposes of the licensing legislation. There can only be one such supervisor for each set of licensed premises. It had been Mr Luger's intention to have his manager assume that function but this has not occurred. The designated premises supervisor is the first point of contact with relevant authorities, in relation to issues arising at the premises. Mr Luger did not, however, think that a designated premises supervisor was required to live on the licensed premises, or above them.

16. Mr Luger said that there was "a certain practicality" in maintaining the internal connection between the flat and the pub.

17. Mr Luger stated that the lease of the premises had come to an end but that he had a short separate lease on the residential premises. He had also agreed an extension on the lease of the pub, but with a different notice period. The pub had unfortunately been losing money for the past three years. There were not enough regular drinking customers, owing to demographic changes in the neighbourhood, which had become more affluent, with a corresponding decline in bedsit and other cheaper accommodation. The business had increasingly come to rely on the sale of food.

18. Mr Luger stated that the utility bills for the commercial and residential elements of the premises, such as electricity, gas, water and telephone, were all on one shared account under the name "The Academy". There was also one gas, electricity and water meter for the entire premises. The Academy was reimbursed by Mr and Mrs Luger for an agreed proportion of utilities costs.

19. Mr Preece is a planning policy officer with the Council. His duties include making decisions in respect of lists of assets of community value held by the Council. He paid a site visit to 57 Princedale Road and spoke to Mr and Mrs Luger. During the visit, Mr Preece gained access via the internal doorway to the public house to the flat above, which he considered confirmed the continuing

physical relationship between flat and pub. Mr Preece believes the written view expressed in July 2011 concerning use classes of the premises is incorrect. In his view, the “entire building should be regarded as a single planning unit consisting of the public house and ancillary residential accommodation”. The same was true of further reports issued in respect of article 4 directions in 2014. The officers involved in those reports did not undertake a site visit. The latest delegated decision report confirming an article 4 direction in respect of the Academy, dated 23 April 2015, stated that the suggestion the upper floors were in C3 use was incorrect and that the entire property is in use as a public house (class A4).

20. Mr Preece said that, although the licensing position played a part in his decision regarding listing of the Academy as an asset of community value, he was not an expert in licensing law. He did not know if it was a requirement for a designated premises supervisor to reside on the premises. The Council's previous stance, that the residential accommodation had been a separate planning unit, had been an informal view. Mr Preece accepted that the officer who had formed that view had based it on a site visit. The fact that the residential accommodation was viewed as C3 use meant, Mr Preece admitted, it was thereby regarded as a separate planning unit. The issue of planning units was relevant in determining the issue of an article 4 direction.

21. There were also before me statements from individuals connected with the second respondent. Photographic evidence from the 1980s showed signage advertising the pub (then the Crown) attached to the first and second floor exterior. The thrust of this evidence (not disputed by the appellant) is that there has, since the 19th century, been use made of the residential accommodation by persons working in the pub below in a serving or “hands on” capacity. Mr Jones QC's submission is, however, that that type of activity had ceased with the changes made by Mr Luger and that this meant the residential accommodation could not be included in the listing.

Discussion

22. As has been pointed out in other cases, the concept of the “planning unit” is not determinative of questions arising under the 2011 Act and the Regulations. That is not to say the concept can never be of any relevance in answering those questions. What matters is whether the particular factors underlying the identification of a planning unit have practical utility in answering the questions posed by the community right to bid scheme.

23. Adopting this approach, I do not consider that any material assistance can be derived from the decision of the deputy High Court judge in Henriks v Secretary of State for the Environment and Eastbourne Borough Council (59 P&CR 443). In that case, it was held, on the facts, that each part of a single building, having identifiable component parts as, respectively, stabling and dog kennels, could as a matter of law be treated as a separate building, as regards each of those parts, for

the purposes of the General Development Order 1977. If one were to apply to the 2011 Act the principle that the mere existence of component parts within a building means that each such part has to be treated as a “part of a building” within the meaning of section 108(1), then any residential flat above a pub would be a “building” (and therefore land) in its own right for the purposes of paragraph 1(5) of Schedule 1, with the result that the purpose of paragraph 1(5) would effectively be subverted.

24. Conversely, Mr Stemp, in his submissions, in my view went too far in contending that a residential flat within a building can never be regarded, for the purposes of the 2011 Act, as a separate building. To take the example of the Barbican Estate in London, each of its three tall towers may, at least in one sense, properly be regarded as a building. It would, however, be perverse if the presence on the ground floor of one of those towers of a pub or community shop were to lead to the listing of the entire tower as an asset of community value, including its scores of residential flats.

25. The correct answer is that the question of what constitutes a building for the purposes of paragraph 1 of Schedule 1 is one of fact and degree.

26. Mr Jones QC submitted that, even if the residential accommodation at 57 Princedale Road was not a separate planning unit from the pub, the requirements of paragraph 1(5) were still not met because the residential accommodation was not “integral”, as demanded by the advice note. In his closing submissions, he said that, in order to be “integral”, the residential accommodation had to be “necessary” for the community asset to function. In the present case, that was plainly not so. Mr Luger did not need to live above the pub in order for it to function as a drinking and eating establishment.

27. I consider that Mr Jones QC’s submissions, if accepted, would, again, rob paragraph 1(5) of much of its purpose. It is difficult to conceive of any pub where it is “necessary” for the landlord or staff to live above it. By the same token, many buildings can be cleaned, maintained and kept secure by staff who do not need to live on the premises.

28. Accordingly, quite apart from the fact that the advice is, of course, not statutory, I do not consider that the word “integral” in paragraph 3.7 falls to be read in the way the appellant contends. Rather, the question of what constitutes the “building” which is to be the focus of paragraph 1(5) is to be determined by deciding, on all the relevant facts, whether there is a sufficient physical and functional relationship between the “residence” and the remainder of the premises which are the subject of listing.

(a) Physical relationship

29. The physical relationship between the residential accommodation and the pub is, and always has been, the same in one sense; namely that the

accommodation sits immediately above the two levels used for the pub business, with nothing else above that. The physical connection between the residence and the business has changed, to the extent that for the past 18 years or so access to the residential accommodation has been possible without having to go through the pub. I take due account of that fact. However, importantly, I also take account of the fact that the access has been maintained by the Lugers and continues to be used by Mr Luger, in particular, for accessing the pub for the purpose of carrying out business activities connected with the pub.

30. In making a finding on this issue, I have had regard to the fact that the Council has previously expressed the view that the residential accommodation fell within a different use class, for planning purposes, than did the ground and basement floors. In all the circumstances, however, I do not regard that fact as having any significant bearing on the issue of physical relationship.

31. On the evidence, I find that there is currently a sufficient physical relationship between the residential premises and the ground and basement floors of 57 Princedale Road, such that it was correct for the Council to treat the relevant building, for the purposes of the listing nomination, as comprising the entire premises of 57 Princedale Road; provided that there was also a sufficient functional relationship.

(b) Functional relationship

32. In the present case, the evidence demonstrates that it is more likely than not that the premises were constructed as a pub, with accommodation above for those engaged in running the business. During the second half of the 19th century and for most of the 20th, this was the functional relationship between the residential accommodation and the pub business.

33. The question of whether there currently exists a sufficient functional relationship between the residential accommodation and the pub needs to be viewed against that historical background. It is also relevant that Mr or Mrs Luger have not done anything which would impede any future occupier of the residential accommodation from again carrying out all aspects of the pub business, including service behind the bar, which went on in the past.

34. Considering the totality of the evidence, I find that the requisite functional relationship between the residential accommodation and the pub currently exists, despite the use made of a non-resident manager and staff. My reasons are as follows.

35. Until very recently, the lease of 57 Princedale Road covered the entirety of that building. The rental element in respect of the residential accommodation has been treated as a benefit in kind. The arrangements in respect of utilities continue to relate to the entirety of the premises.

36. Mr and Mrs Luger are the licensees of the licensed premises. Mr Luger is the designated premises supervisor for the purposes of the licensing regime, making him the point of contact in respect of emergencies. Whether or not a designated premises supervisor is legally required to live on the licensed premises, it is plainly convenient for the exercise of that role if he or she does so. Mr and Mrs Luger live in the residential accommodation, which has historically been used in connection with the pub. Mr Luger uses the internal form of communication between the residential accommodation and the pub in order to transact business relating to the pub.

37. As I have already said (paragraph 23 above), the fact that Mr Luger might be able to run the pub business, whilst living somewhere else, does not mean that the required functional connection cannot exist. Were the position to be otherwise, paragraph 1(5) of Schedule 1 to the Regulations would lose much of its utility.

38. As with the issue of physical relationship, in making my findings regarding the functional relationship, I have had regard to the Council's previous stance on use classes. On its face, the stance is indicative of there having been some change in that relationship during the more recent period of the Lugers' occupation of the premises. But the factors weighing in favour of the opposite conclusion are, I consider, far weightier. It would be quite wrong to ignore these factors, arising directly from the detailed evidence put before the Tribunal in the present proceedings.

39. I have borne in mind that paragraph 1(5) is, as Mr Jones QC pointed out, in the nature of an exception to the general exception in paragraph 1(1) that precludes a residence from being listed as an asset of community value. Insofar as the submission suggests that caution must be exercised in interpreting paragraph 1(5), I agree. As I have explained, however, the submission, if accepted in full, would go far beyond caution. The requirement that there be a current physical and functional relationship, of the kind present in this case, will ensure that the exception in paragraph 1(1) remains important.

Decision

40. The consequence of my conclusion that, on the facts, there is a sufficient physical and a functional relationship between the residential accommodation and the pub at 57 Princedale Road is that the Council was correct to treat the whole of those premises as comprising a building for the purposes of paragraph 1(5), which is only partly used as a residence. But for that residential use, the land in question would be eligible for listing as an asset of community value.

41. This means it is unnecessary to decide whether the listing of 57 Princedale Road could be amended, so as to relate only to the ground and basement floors of the building. This is not, however, to be taken as disapproving any stance which the Tribunal may previously have taken on this issue.

42. This appeal is dismissed.

Peter Lane

Chamber President

Dated 2 November 2015