First-tier Tribunal
(General Regulatory Chamber)
Community Right to Bid

Appeal Reference: CR/2015/0012

Before

JUDGE PETER LANE

Between

KICKING HORSE LTD
FAUCET INN LTD

Appellants

and

LONDON BOROUGH OF CAMDEN

Respondent

and

BELSIZE RESIDENTS' ASSOCIATION

Second Respondent

DECISION AND REASONS

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 Sir Richard Steele public house is owned by the first appellant and run by the second appellant. For convenience, I shall refer to them collectively as the appellants. The pub is located on Haverstock Hill, London NW3. It is a Victorian building comprising a basement, ground floor, first and second floors, with an adjoining pub garden. The basement or cellar is used for the purposes of the pub business. Bar premises are located on the ground floor, together with the kitchen, which provides food for customers. Until about one and a half years ago, the first floor was used as a function room for the pub. A number of community events were held in the function room, which also hosted regular comedy nights. The function room has its own bar.

3. The function room is currently used for storage and as office space, in connection with the pub. The second floor is used for staff accommodation. It has its own kitchen, bathroom, living room and bedrooms, with access gained through the pub.

4. The second respondent nominated the building comprising the above-mentioned components (together with the garden) on 5 April 2015, as an asset of community value to be listed under the 2011 Act. The first respondent listed the premises. At the request of the appellants the first respondent undertook a review of the listing on 20 July 2015. The decision was that the entirety of the premises should remain listed.

5. The appellants appealed to the First-tier Tribunal against that decision.

Legislation and advice

6. 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."

7. Section 108 includes the following definitions:-

> ""building" includes part of a building;
> …
> "land" includes—
> (a) part of a building,
> …."

8. 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)".

9. 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."

10. Paragraph 2 of Schedule 1 states that:-

> "(a) "residence" means a building used or partly used as a residence
> …"

11. 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 appellants' case

12. The appellants contend that, whilst they do not object to the listing of the ground floor, the basement, garden, first floor and second floor do not meet the statutory criteria for listing and should, accordingly, be removed from the list maintained by the first respondent. They submit that, having regard to the fact that a "building" for the purposes of the 2011 Act includes "part of a building", the basement and upper floors of the Sir John Steele fall to be considered in their own right. The public does not have access to the basement or to the second floor. There can, accordingly, be no "actual use" of those parts, as required by section 88. The uses carried on in those parts are merely ancillary to the pub use on the ground floor and, thus, cannot meet the statutory requirements. The same is true, according to the appellants, of the pub garden.

13. So far as the function room is concerned, this has been closed to customers of the Sir Richard Steele for over a year. According to a risk assessment commissioned by the appellants, the function room should not currently be used by the public for fire safety reasons. On any view, substantial works would be necessary to put this right, costing (according to the oral evidence) a "six figure sum".

14. The accounts submitted by the appellants show that the income derived from the function room, compared with the costs attributable to it, do not justify such expenditure.

15. The appellants contend that, in the circumstances, section 88(2) of the 2011 Act is relevant, so far as the function room is concerned. They submit that the passage of time since the function room was last used by customers attending a comedy club is such that it cannot be said that there was "a time in the recent past" when the function room furthered social wellbeing or interests of the local community. In any event, the appellants argue that it is uneconomic to carry out the recommended fire safety works, given the pub's trading position, and that it is, therefore, not "realistic to think that there is a time in the next five years when there could be" a use of the function rooms that would further social wellbeing and social interests.

The hearing

16. The hearing of the appeal took place in London on 3 March 2016. The appellants were represented by Ms V Hutton, Counsel, instructed by Maples Teesdale. The first respondent was represented by Mr M Lee, Counsel, instructed by Camden Legal Services, and the second respondent by Professor A Stevens, Honorary Membership Secretary of the Residents' Association.

17. On behalf of the appellants, I heard oral evidence from Mr Stephen Cox and Mr Kieron Hodgson. Professor Stevens called Dr Prabhat Vaze, Mr Ugo Vallauri, Ms Jonquil Stewart, Mr Martin Besserman and Ms Carla Ranicki.

18. An appeal against the first respondent's refusal to grant planning permission for the conversion of the first and second floors into residential flats was dismissed by an inspector on 22 July 2015. I was informed at the hearing that a fresh application for planning permission had just been submitted by the appellants. The new application would, apparently, include new provision at ground floor level for a pub function area. Unlike the previous application, the pub garden would remain for the use of the pub's customers.

Discussion

19. In reaching a decision in this case, I have had regard to the submissions and evidence, both oral and written. The fact that I do not refer to a particular submission or evidential matter is not to be taken as indicating that I have not had regard to the same.

20. I am fully persuaded by the evidence that the Sir Richard Steele currently furthers the social wellbeing and social interests of the local community. It is a functioning and well-loved neighbourhood pub. It is, as Mr Lee submits, used as a place for local residents to meet and socialise. It has, in my view, certainly been additionally used in the recent past for parties, wakes and other gatherings. I accept the evidence of the residents that the garden area is particularly valued and that the

distance from the nearest public open space is not such as materially to detract from this value.

21. The activities to which I have made reference have, in the recent past, included the first floor function room. I reject Ms Hutton's submission that the short period of time since the function room was last used by customers is such as to preclude that use from being in the "recent past" for the purposes of the 2011 Act.

22. It is plainly realistic to think that there can continue to be relevant non-ancillary use of the Sir Richard Steele, which will further social wellbeing or social interests. The pub will, even on the appellants' proposals, continue to be a pub.

23. In order to determine what comprises the land and/or buildings against which the statutory tests in section 88 must applied, it is necessary to adopt a fact-specific investigation, as described in Trouth v Shropshire Council etc (CR/2015/0002) and Wellington Pub Company v Royal Borough of Kensington and Chelsea etc (CR/2015/0007). In the present case, I find that the appellant's submissions on this issue would subvert Parliament's intention in passing the relevant provisions of the 2011 Act. One cannot employ the fact that a "building" includes "a part of a building" in order to apply section 88 separately to elements of premises which, on the facts, have such a physical and functional relationship with each other as to make it necessary for them to be viewed as a whole.

24. A striking incidence of the frankly absurd result for which the appellants contend is the case of the basement of the Sir Richard Steele. Many pubs have cellars or basement areas, in which barrels of beer are kept, as well as other supplies for the pub. On the appellants' analysis, this "part" of the building needs to be separately scrutinised, with the result that the cellar or basement could not meet the section 88 test, since the use of that part of the premises is merely ancillary to what goes on in the room above.

25. Accordingly, the result for which the appellants contend would be that the statutory moratorium on sale would operate so as to give the community the chance to buy the ground floor but not the cellar, which is (or, at least, may be) essential to the operation of the pub. I am in no doubt that this is not what Parliament intended. No canon of statutory construction compels the acceptance of such a result.

26. The same is true of the residential accommodation on the second floor. Ms Hutton was compelled to adopt an extremely strained construction of paragraph 1(5) of Schedule 1 to the 2012 Regulations, in an effort to persuade the Tribunal that – in the context of a public house – the provision could have any practical utility, if the appellants were correct. She suggested that, in this context, paragraph 1(5) might operate so as to bring hotel rooms within the scope of listing, the presence of which would otherwise cause the land or building in question to be excluded, as a result of paragraph 1(1).

27. I can see no reason to give paragraph 1(5) such a narrow remit. Although it is non-statutory, paragraph 3.7 of the Department's guidance makes plain what I in any event consider to be the effect of the legislation; namely, that paragraph 1(5) deals with the position "where an asset which could otherwise be listed contains integral residential quarters, such as accommodation as part of a pub…" On any view, the residential accommodation on the second floor of the Sir John Steele comprises integral residential quarters for the manager of the pub.

28. I turn to the first floor function room. On any rational view, there is a sufficient physical and functional relationship between this room and the rest of the pub, such as to make it properly a part of the listed premises for the purposes of the 2011 Act. This is so, whether one looks at the position which pertained until very recently or at the present position. Until very recently, the function room was used by customers of the pub. It has its own separate bar, which I was not told had been removed. As Mr Lee points out, the appellants have emphasised that the function room is a second "saloon" bar area, available to patrons. The appellants' own grounds of appeal describe the function room as "fundamentally a bar area". The function room thus, I find, has a continuing functional relationship with the rest of the pub, by reason of its nature as a place of public resort. I do not consider that the evidence regarding current fire risk is such as to destroy that relationship. But, even if I am wrong about that, the appellants' evidence is that the function room is currently used as office space and storage for the purposes of the pub. That is, I find, more than sufficient to result in a continuing functional relationship with the ground floor etc.

29. The pub garden has a physical and functional relationship with the rest of the pub, such as to make its inclusion in the listing unit appropriate. The garden is no more or less than another place, apart from the bar areas, in which to drink and consume food purchased in the pub.

30. Accordingly, the entirety of the building comprising the Sir Richard Steele, together with its garden, comprises a single set of premises, for the purposes of section 88. I find that the requirements of section 88(1) of the 2011 Act are satisfied. Particularly having regard to the fact that planning permission was refused, on appeal, as recently as July 2015 for the conversion of the first and second floors to separate residential accommodation, I find that it is realistic to think that there can continue to be relevant use, of the same kind and involving the same areas of the premises, as currently exists.

31. I make that finding, having taken into account the information which emerged at the hearing, that the appellants have submitted a new planning application to the first respondent. It is, in the circumstances, inappropriate to speculate as to what the result of that application might be. Its only relevance to this appeal lies in the fact that it implicitly acknowledges the significance of the functions carried on until very recently in the first floor function room, since I was told that the new proposals would make provision for such functions in an extended ground floor.

32. In the light of my findings, it is unnecessary to deal with Mr Lee's "fall-back" argument regarding the function room. For completeness, however, I shall do so. In essence, Mr Lee submitted that, even if the function room has to be viewed as a separate building, it is still realistic to think that it could re-open as a function room within the next five years. I agree. Even accepting that it may cost slightly in excess of £100,000 to provide what are said to be necessary improvements for fire safety purposes, the present uncertain planning position is such that it is realistic to think the appellants may decide to maximise their investment in the Sir Richard Steele as a pub, or else sell it to someone who is willing and able to make the necessary investment to utilise the function room. I share the scepticism of the respondents regarding the financial figures submitted by the appellants, which attribute what appears to be a disproportionate amount of the pub's expenditure to the function room. But even if that scepticism is misplaced, another owner could realistically adopt a different business model.

Decision

33. This appeal is dismissed.

[Signed on the original]

Judge Peter Lane

Date: 4 May 2016