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Case Reference: CR/2023/0005

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

**Decided without a hearing
Decision given on 12 February 2024**

Before

TRIBUNAL JUDGE S. BIRD KC

Between

TAVERN GROUP PROPERTIES LIMITED

Appellant

and

SOUTH KESTEVEN DISTRICT COUNCIL

Respondent

REASONS

A Introduction

1. The Localism Act 2011 (“the Act”) requires local authorities to keep a list of assets (meaning buildings or other land) which are of community value. 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, a sale cannot take place for six months. The intention is that this period, known as “the moratorium”, will allow the community group to come up with an alternative proposal. However, at the end of the moratorium it remains up to the owner whether the asset is sold, to whom and at what price. There are arrangements for the local authority to pay compensation to an owner who loses money in consequence of the asset being listed.

B Legislation

2. Section 88 of the Act provides, so far as is material to this appeal:

“(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 of 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."

3. Section 88(6) of the Act defines "social interests" as including (in particular) each "cultural interest", "recreational interests" and "sporting interests".

4. Section 108 of the Act includes the following definitions:

"building" includes part of a building:

.....

"land" includes –

(a) part of a building

....."

5. Regulation 3 of the Assets of Community Value (England) Regulations 2012 ("the Regulations") provides:

"A building or other land within a description specified in Schedule 1 is not land of community value (and therefore may not be listed)."

6. Schedule 1 states, to the extent material to this appeal:

"(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 residence, are owned by a single landowner; 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 landowner.

(3) Sub-paragraph 3(b) is satisfied where a part of the land cannot be reached from the residence by reason of 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 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.*

2(1) *For the purposes of paragraph 1 and this paragraph –*

- (a) *“residence” means a building used or partly used as a residence;*
- (b) *a building is a residence if –*
 - (i) *it is normally used or partly used as a residence, but for any reason so much of it as is normally used as a residence is temporarily unoccupied;*
 - (ii) *it is let or partly let for use as a holiday dwelling;*
 - (iii) *it, or part of it, is a hotel or is otherwise principally used for letting or licensing accommodation to paying occupants; or*
 - (iv) *it is a house in multiple occupation as defined in section 77 of the Housing Act 2004; and*
- (c) *a building or other land is not a residence if –*
 - (i) *it is land on which currently there are no residences but for which planning permission or development consent has been granted for the construction of residences;*
 - (ii) *it is a building undergoing construction where there is planning permission or development consent for the completed building to be used as a residence, but construction is not yet complete; or*
 - (iii) *it was previously used as a residence but is in future to be used for a different purpose and planning permission or development consent for a change of use to that purpose has been granted.”*

- 7. The Regulations also define which bodies may be voluntary and community bodies for the purpose of making valid nominations under the Act and set out what a community nomination should contain (Regulations 5 and 6).

C The Nomination and Listing

- 8. This appeal concerns the Wheatsheaf Inn, Main Street, Dry Doddington, Newark NG23 5HU (“the Inn”).
- 9. On 17 January 2023 the Respondent received a nomination from Save the Wheatsheaf Inn (“the Nominating Body”) nominating the Inn for inclusion on its List of Assets of Community Value (“LACV”).

10. On 11 April 2022 the Respondent determined that the Red Lion should be included on its LACV and this decision was affirmed, following a review, on 4 September 2023.
11. The Appellant appealed to the Tribunal by notice dated 27 September 2023.

D The Appeal

12. Both Parties have agreed that this appeal should be dealt with by way of paper consideration and, having considered the bundle and the issues in the appeal, I am satisfied that this mode of appeal is suitable in this case. I have been supplied with an appeal bundle of 173 pages which, in this instance, was prepared by the staff of the Tribunal due to personnel changes at the Respondent. Before proceeding to determine the appeal in reliance on this bundle I sought confirmation from the parties that they were each satisfied that it contained all of the documents which had been submitted to the Tribunal and that there was nothing they wished to have added to the bundle or which they required further time to submit. The Appellant confirmed that this was the case on 28 January 2024. The Respondent confirmed that this was the case on 1 February 2024. I therefore proceeded to determine the appeal on 1 February 2024.
13. As to my approach to this appeal, in accordance with decision of the Upper Tribunal in Admiral Taverns v Cheshire [2018] UKUT 15 (AAC), it has taken the form of complete reconsideration of whether the Inn should be included on the LACV. In reaching a decision, I have had regard to all the written evidence and submissions comprised in the appeal bundle. The fact that I do not make specific reference to a particular document or submission does not mean that I have not taken it into account.

E Background

14. The nomination made by the Nominating Body proposed the inclusion of the entirety of the Inn building, land within its curtilage and a garden area for inclusion on the LACV. The Respondent decided that the Inn building and its curtilage land should be included on the LACV but not the garden area, which it concluded was used more as a garden in association with Wheatsheaf Cottage, than as a beer garden in association with the Inn. The Inn and garden are within separate registered titles at HM Land Registry. The Inn is within Title Number LL225192 and the garden area is within Title LL225193 which is the title to Wheatsheaf Cottage.

15. As I understand the position, the Inn and the garden area have been in two separate titles since March 1992, although there has remained a nexus, in terms of use, between the two. The titles appear to have been in common ownership until the Appellant purchased title to the Inn in October 2021 and his son and daughter in law subsequently purchased the title to Wheatsheaf Cottage and its garden from the same vendor in July 2022. The Appellant had been involved in the running of the Inn since 2018. The separate ownership of the titles has resulted in some anomalies, for example, the Inn's rear car park and oil tank are located on land which falls within the ownership of Wheatsheaf Cottage as, the Appellant claims, is part of the Inn's pool room, although this is disputed by the Respondent.
16. Part of Wheatsheaf Cottage also lies above the ground floor of the Inn below under a "flying freehold". I note that in an email dated 14 March 2023 the Appellant stated that there were plans to realign the boundaries to make the land better suited to both landowning parties.
17. The Inn building itself also contains two uses. The ground floor of the building was, until it closed in 2023, used as a public house. At first floor level there is a flat in residential use which originally took access from the Inn below. However, on 25 September 2003, the Respondent granted planning permission for the alteration and extension of the Inn with the approved plan showing the flat at first floor level with no internal access from the Inn. Access is shown as being taken from a new external staircase. This is how the flat is currently accessed and there is no means of accessing it internally from the Inn below. The flat also benefits from a small courtyard which is separated from the curtilage of the Inn and to which only the tenants of the flat have access. The occupants of the flat pay Council Tax, with the Inn being the subject of business rates.
18. There is some dispute in relation to the past use of the two parts of the Inn building. In relation to the past Inn use, the Nominating Body states that these were used for live music events bringing the community together, the screening of sporting events, a monthly quiz, food events and as a meeting place for village activities including village walks. It was also used during village fetes and celebrations which as the Queen's Jubilee and following services at the nearby Church for socialising after services such as christenings, weddings and funerals. The Nominating Body supported this contention with details of recent such events over the period March 2019 to January 2023.
19. Whilst the Appellant disputes the use of the Inn part of the building by community groups such as the Womens' Institute, in his reply to the Respondent's response to the appeal, he accepts that *"In the recent past the property has to some degree furthered the social well-being of the local community"*. This concession is caveated by *"but this has been alongside the services and amenities of the village hall, has never been viable and could not continue..."*

20. As to that part of the building used as a flat, the Nominating Body asserted in its response to the Appellant's request for a review of the decision to include the Inn on the LACV that:

"The "flat" is an integral part of the pub building and has always been used as living quarters in connection with the running of the pub, either by the owner or its workers/employees."

21. In response, the Appellant has provided evidence through its Director, Mr Barry Woodward ("BW") that the flat is let under an assured shorthold tenancy as a three bedroom self-contained flat. All the utilities are included in the monthly rent, because the water, gas and electricity supply are common to the pub, with no separate meters BW states that the flat has been used continuously as a residence for over 10 years, with the current tenants occupying the flat since December 2021. Neither of the two current occupants were employed in the pub at the time of its closure of the pub, but one had previously undertaken bar work in the pub under a zero hours contract. However, the accommodation was not linked to her contract of employment.
22. On 12 June 2023, the BW confirmed to the Council he was *"not 100% sure of the employment status of all of the occupants"* of the flat prior to his involvement with the pub. On 20 June 2023, in response to enquiries made by the Respondent as part of its Review of the original decision to include the Inn on the LACV, BW clarified the occupation of the Inn during his involvement with the premises. BW's evidence was that the flat was occupied by his son and daughter in law. They vacated the flat in April 2020, although BW's son continued to be employed by the Appellant until November 2022 and his daughter in law until February 2023, when the Inn closed.
23. As to the past trading performance of the Inn, the statements of the Nominating Body again conflict with those made on behalf of the Appellant. The Nominating Body states in its nomination form that the pub business was very successful as a restaurant in the recent past and that the Appellant's recent closure of the kitchen and restaurant damaged its viability.
24. BW states that over the last 8 years the two previous operators of the pub business could not make it viable, both closed the Inn and walked away, losing considerable amounts of money. When the Appellant took it on in 2018 it had been closed for 6 weeks and it tried many ways to make the business viable, including embarking, at the end of 2021, on a diversification project to drive additional trade. This project involved relocating the beer garden to be closer to the back of the Inn and covered, heated pods. The land previously used as a grassed beer garden was proposed for use to install timber glamping pods. Planning permission was applied for, but the application was subsequently

withdrawn. BW states that this was due to a combination of neighbour objection and the lack of support from the Parish Council.

25. BW states that the decision to close the pub business was not a choice made lightly, but over the four years it ran the business the Appellant had never made any money and had lost £150,000. BW further states that the Appellant could not support the high labour costs associated with serving food, but to encourage trade, allowed patrons to order and have delivered takeaway meals. It had considered a recovery plan involving the physical reduction of the Inn to the size it last operated viably, which was as a wet pub in 2003, allowing the remainder to be used to house a flat, thus generating additional income.
26. BW states that these plans were initially broadly accepted by the village, however, with the absence of subsequent support for the diversification project and continuing falling turnover, the decision was taken on 28 January 2023 to close the pub, with the last day of trading on 3 February 2023. The premises were, however, made available until 6 March 2023 for those pool teams who made use of the Inn so that they could finish their season fixtures.
27. Turning to the future trading potential of the Inn as a pub, the Nominating Body stated in its nomination form that its members have expressed a strong interest in buying and/or running the Inn and that it has been a profitable pub in the past and could be run as either a profit making business or a non-profit making community asset. It also stated that it had the funds available to purchase and invest in the Inn to enable it to be a sustainable business.
28. In its email to the Appellant dated 14 July 2023, the Parish Council stated that the pub could be a viable business, as it had been, especially if a food service were offered and good management were in place. It further stated that it had seen nothing to suggest that the Inn had been offered for sale as a pub on the open market since it was closed. It further stated that it had been advised by the Nominating Body that the Appellant would not allow an independent valuation of the Inn and that the sale price was a non-negotiable £475,000 thus preventing a meaningful meeting to discuss a purchase.
29. In an e-mail dated 4 June 2023 written to the Parish Council, BW stated that whilst the Appellant owned the Inn, it would never again open as a pub. However, the Appellant wished to sell the building either for someone to re-open the pub, although BW this unlikely, or for it to be developed into a home should planning permit. BW stated that he had tried to arrange a meeting with the Nominating Body on many occasions but it not seem to wish to enter into a dialogue.
30. BW further stated in the e-mail that, with the existing boundary issues associated with the separate titles and trading history, it would be almost

impossible for a third party to purchase and/or raise finance against its purchase. The premises licence had also been removed and, with the proximity of residential rooms and the potential for future noise complaints, it would be unlikely to obtain a new premises licence. He added that it also no longer had any cellar equipment or pumps, which were removed by Greene King when the purchase of beer ceased. Further, the village hall and unofficial "Farmer's Arms" provided alternative competing venues serving the village. Given this context, the Appellant stated that it was extremely unlikely that the Inn would ever re-open regardless of ownership.

31. BW stated that on 19 February 2023 it advised the Respondent that it would be more than happy to sell the Inn to the nominator and the Parish Council was copied in to this, inviting contact, but none was made. On 18 April 2023 the Respondent had informed the Appellant that the initial moratorium period had commenced and, on the final day of this period, the Nominating Body had indicated an interest in submitting a bid for the Inn. The full moratorium period was then in place and the Respondent advised that this would expire on 18 October 2023. Whilst a meeting was held on 8 August 2023, at which the Appellant offered to sell the Inn at a price of £250,000, reflecting its value as a failed pub rather than £450,000 which reflected development potential, subject to an obligation on the purchaser to re-open the pub, no offer was made to purchase the Inn during the full moratorium period.

F The Issues

32. Having regard to the Appellant's grounds of appeal, this appeal raises two main issues:
 - (i) Whether the Inn is land which is not of community value by reason of Regulation 3 and Schedule 1 paragraph 1 to the Regulations and may therefore not be listed; and if not,
 - (ii) Whether it is realistic to think that there is a time in the next five years when there could be a non-ancillary use of the building or other land that would further the social well-being of the or social interests of the local community.

It is accepted by the Appellant and the evidence before me, including that of the Appellant, shows that the use of the Inn in the recent past i.e. prior to its closure in February 2023, fell within the scope of s.88(2)(a) of the Act.

G The Appellants' Submissions

33. The Appellant's main reason for objecting to the inclusion of the Inn on the LACV is because the property has a large residential element and therefore

does not meet the criteria detailed in Schedule 1 of the Regulations. This alone, it argues, should prevent the inclusion of the Inn on the LACV. The entire first floor of the Inn is in residential use with no physical access between the flat and the pub below. Nor are there any contractual links between the flat and the business of the Inn. This argument was not considered in the Respondent's original decision to include the Inn on the LACV, as it had not been made aware of the existence of the flat by the Nominating Body. The occupants of the flat pay the Council Tax separate from the business rates associated with the Inn

34. There is no internal staircase between the flat and the pub below, the internal staircase having been removed in 2003 as part of a major refurbishment and separation project carried out by the previous owners. There is therefore no current physical relationship between the two parts. Access to the flat is via its own dedicated external staircase from the flat's private courtyard.
35. There is no functional relationship between the two parts of the premises. One of the current tenants who has occupied the flat since December 2021 did, prior to July 2022, occasionally work as a part time bar attendant on a zero hours contract for which she was paid an hourly rate, However, occupation of the flat was never a term of her employment contract and the flat was occupied under a separate assured shorthold tenancy. Any link in her case was coincidental, with the bar work used to supplement her income as a Teaching Assistant. The other current tenant has never worked in the Inn. The Inn has been closed since February 2023 and there is no question of the tenants being required to leave.
36. Prior to the Appellant's involvement with the Inn, it understood that a Chef did occupy the flat but, because this was before 2018 and the Appellant's first involvement with the premises, there are no details. The Appellant's understanding is that the Chef did rent the flat but he was primarily employed as a Gas Fitter/Engineer with no link to the pub and only worked occasionally/ part time in the Inn's kitchen.
37. BW's son and daughter in law who occupied the flat between October 2018 and April 2020, had been employees of the Inn, but their employment was totally separate to their occupation of the flat which was under an assured shorthold tenancy.
38. Further, and in any event, due to the way the title to the Inn has been split, it would be almost impossible for an interested party to purchase it. The Appellant had tried to correct this through the planning application which was submitted in order to support a land swap, but this was withdrawn following objection.
39. There is also a good quality village hall approximately 50m from the Inn in the centre of the village. The Appellant had offered to install a bar and other

facilities here to give the community all of the facilities they were worried about losing at the Inn, whilst also enhancing the revenue of the village hall, but this proposal was rejected. This rejection did not support the claim that the community want the facilities.

40. It is not realistic to think that in the next five years there could be a qualifying use made of the Inn. There have been four successive failures in terms of operating the Inn over the past 10 years and the climate for such a business is now considerably worse, given the cost of living crisis. The village is relatively small and cannot support two properties so close together. The full moratorium period has expired and there was no interest from the community to develop a new offering. Pubs throughout the country continue to fail on a regular basis, and pubs in nearby villages have been on the market for several years without interest. There are other pubs in nearby, larger villages, that are currently managing to trade and for the few people in the village who want this facility, they have shown they are willing to travel.

H The Respondent's Submissions

41. The Inn is in the ownership of the Appellant of which the named director and secretary of the Group is BW. The title listing for the Inn includes both the pub and the flat above.
42. The Nature of Business (SIC) code for the company identifies it as "68100 - Buying and selling of own real estate" and "68209 - Other letting and operating of own or leased real estate". The usual SIC code for running public houses and bars is "56302 - Public Houses and Bars" which does not appear.
43. It appears that the land was purchased by the Group in or around October 2021. The rear of the site, containing areas which were previously used in connection with the Inn, are now in the ownership of the Director's son and daughter in law, with the purchase having taken place in or around June/July 2022.
44. The Nominating Body met the requirements of a voluntary body for the purposes of making a community nomination and therefore the Respondent had been correct to consider the nomination.
45. No further substantial or material information has been provided in support of the Appellant's appeal to change the opinion of the Respondent in terms of the inclusion of the Inn on the LACV.
46. The Appellant acknowledges that the "flat" above the Inn was previously accessed through the public house. It acknowledges that, whilst it was not their sole occupation, residents in the flat did work on contract within the pub. Notwithstanding that the flat is now accessed externally, it still shares a

commonality of space and a commonality of purpose with the pub and shares common services including gas, water, electricity supplies which are metred through the pub building. It is still one building and has still remained occupied by people who, at least in part worked within the pub whilst it was open. On that basis, the flat, which has been artificially separated by introducing an external access has not changed. It still remains in contiguity with the pub use below. This is acknowledged in the Appellant's grounds of appeal.

47. There is no need, as far as Schedule 1 paragraph 1(5) of the Act is concerned, for there to be a physical internal link. The key element is how the use is perceived and how the flat has actually been utilised. It is accepted by the Appellant that even since the internal connection was severed (circa 2003) those occupying the flat have had a direct relationship within the Inn.
48. Accordingly, the flat, whether separate or not, does form part of the whole building, including the pub. Only part of the building is in residential use, the flat, and but for the remainder of the building would be eligible for listing. This clearly falls within the reasoning of Tribunal in Wellington Pub Company v RB Kensington and Chelsea (2015). In which it was decided by the Tribunal that the approach to the definition of the planning unit for the purposes of the Town and Country Planning Act 1990 did not provide assistance in relation to the correct approach under the Act. It was further held that to be part of the relevant asset for the purposes of listing, there must be a current physical and functional relationship between residential part and the remainder. A similar approach was taken in Kicking Horse v Camden LBC CR/2015/0121 in which residential accommodation on the second floor of a building, with a pub at ground floor level and which was used to provide staff accommodation, was lawfully included on the relevant LACV being "integral residential quarters".
49. The key element here is the fact and degree relationship between the flat and pub use. The physical separation is neither overriding nor conclusive. It is clear from the Appellant's own evidence that the use of the flat continued with an ancillary connection to the pub use. As a matter of fact, the flat can reasonably be considered to have retained a connection with the pub despite the separate entrance.
50. Section 3 of the Department for Communities and Local Government non-statutory advice for local authorities is relevant to the community right to bid provisions of the Act and states:

"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 was a 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 caretaker's flat".

51. The Appellant makes much of the fact that because of the way the title is now split it will be almost impossible for an interested party to purchase it. The land was split following purchase of the whole site by the Appellant company and the company is run by a sole director. The purchasers of the split site are the son and daughter in law of the sole director and they had also lived in the flat above the pub and had been employees at the pub between 2018 and 2020.
52. At the least, it now seems contrived for the Appellant to assert that the flat had no link to the pub given that BW, as the sole director of the Appellant, acknowledges that his son and daughter in law all worked in the pub to some degree and that the pub is no longer capable of functioning as a pub because the Appellant has sold off land which it claims makes it unviable.
53. As to the requirements of section 88(2), the premises have been used in the very recent past for uses which have furthered the social wellbeing, social interests and, in fact, the general community spirit of the local community. Moreover, the community group has confirmed that it has the realistic potential to be of continuing benefit if it were purchased by the nominator and returned to its use. Perhaps most importantly the Nominating Body confirms that it is a very realistic probability that, if they were able to purchase the pub, which they have the funds to do, they would be able to deliver a new offering that would support the local community and improve the sense of social well-being of social interest in local offerings. The submissions on behalf of the Nominating Body suggest that on the balance of probabilities, it is realistic to think that the pub would be brought into a position where it would be brought into community use within the next five years.

I Findings

54. I am satisfied from the Nominating Body's terms of reference, the membership detail contained in the appeal bundle and the confirmation that no part of any surplus funds would be distributed to its members, that it met the statutory requirements for a body to be able make a community nomination and that the contents of the nomination met the requirements of the Regulations. I therefore turn to the issues raised by the Appellant's appeal.

Issue 1 - Is the Inn excluded from listing by reason of Regulation 3 and Schedule 1(5) to the Regulations?

55. As was made clear in the Tribunal's decision in Wellington Pub Company v The Royal Borough of Kensington and Chelsea CR/2015/0007, the focus in applying Schedule 1 to the Regulations is to ask what constitutes the building (see decision at paragraph 28). Whilst Schedule 1(1) excludes a residence and its connected land from listing, subject to the exception provided by paragraph 1(5), it is first necessary to ask what comprises the residence. "Residence" is defined as meaning "building used or partly used as a residence". However, this begs the question what is the "building" which is to be considered.
56. Under section 108 of the Act, "building" includes "part of a building" and, therefore, the listing regime allows for the listing of part only of a building where the part itself comprises "a building". It is, therefore, possible for what may "physically" be a single building, to comprise more than one building for the purposes of the Act where there are physically and functionally discrete parts, each in themselves falling within the statutory definition of "a building". In Wellington Pub Company Judge Lane took the example of the Barbican Estate in London (see paragraph 24):
- "...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"*
57. Equally perverse would be finding on those facts that the pub or community shop at ground floor was excluded from listing because in the same tower block there were numerous unconnected residential flats.
58. The statutory purpose of paragraph 1(1) of Schedule 1 to the Act is to prevent residences being included on an LACV unless (paragraph 1(5)) the residential element is an integral part of a qualifying community use i.e. having regard to the physical and functional relationship between the uses, there is a dual composite use of a single building, with residential use being part of that use. So, in Wellington Pub Company where the residential and pub premises within a three storey building were occupied by the licensees, with internal access possible and used between the pub and residential elements and with no separate metering or statutory services serving both the residential and pub premises, the Tribunal concluded that there was a single building comprising both the residential and pub elements and therefore paragraph 1(5) of the Schedule applied.

59. In contrast in Aron v Tunbridge Wells Borough Council CR/2021/0005, the Tribunal found that part of building used as both a Post Office was capable of being listed notwithstanding that the remaining part of the building was in use as a residence. Whilst the occupier of the residence had once operated the Post Office, she had since ceased to do so, closed the access between the two parts and leased the Post Office to a Community Benefit Society. On those facts, the Tribunal held that the Post Office element was a building and capable of being listed, there being both physical and functional separation.
60. What constitutes the relevant building will always be a question of fact and degree to be determined by reference to all the relevant circumstances.
61. Considering all of the relevant circumstances here, the flat, whilst part of the Inn building as a whole, is physically separate from it in that no internal access between the flat and pub premises is possible and this has been the position since 2003. There is therefore sufficient physical separation between the flat and the pub for the flat to be a building in its own right for the purposes of the Act. However, it is also necessary to consider the functional relationship between the two elements to ascertain whether the Inn as a whole should be regarded as a single building for the purposes of the Act.
62. In relation to the functional relationship, the position is less clear cut than the physical relationship. The pub and the flat share utilities and are not separately metered. The flat has at times since its physical separation from the pub below, been occupied by persons who have also been employed in the pub. Other than in period from 2018 when the Appellant has been involved with the premises, there are no clear details of the terms under which the tenants over time of the flat occupied it or the extent to which there was any tie to employment in the pub. However, since the Appellant's involvement in the Inn, the flat has been occupied under a series of assured shorthold tenancies with no contractual commitment to any employment within the pub.
63. Whilst, as a matter of fact, some of the occupants were related to the Appellant's sole Director and were employed in the pub and one of the subsequent tenants was also employed on a zero hours contract in the pub, in my view, the functional relationship of the two parts of the property is not sufficient when combined with the physical separation, to support the conclusion that the Inn building as a whole should be regarded as a single building for the purposes of the Act. The employment relationship at the point of listing appears to have been coincidental and unlike the Wellington Pub Company case, occupation was not by the licensees of the pub or anyone concerned with the control of the pub. In my judgment, as a matter of fact and degree there are two physically and functionally separate buildings here; the pub and the above it the flat.
64. In consequence of this finding, the flat is a residence for the purposes of Schedule 1(1) of the Act and may not be listed.

65. However, the pub, situated on the ground floor of the Inn is a separate building for the purposes of the Act and the Regulations and no part of it is a residence and therefore, subject to satisfying the criteria of section 88(2) of the Act may be included on the LACV.

Issue 2 Are the requirements of section 88(2) satisfied?

66. As I have indicated above, I am satisfied from the Appellant's evidence alone that the ground floor of the Inn was used in the recent past for a use which furthered the social wellbeing or interests of the local community. The evidence of the pub use during the Appellant's involvement with the Inn coupled with the evidence that the pub was used by pool teams to play home league games, is sufficient in my view to meet this requirement with the pub being a place for local residents to meet and socialise.
67. The Appellant's evidence was supplemented in this case by details of the range of activities supported by the pub premises during the Appellant's involvement with it, provided by the Nominating Body. Whilst I take into account that the Appellant disputes the accuracy of some of what was said by the Nominating Body, there was no dispute that the pub had been used for Karaoke, open microphone nights, food nights, birthday parties, wakes and christenings, as well as the screening of sports matches. Taken together, these are all activities which, in my view, can be said to have furthered the social wellbeing of the local community. The use of the ground floor as a pub was clearly its primary use, rather than being an ancillary use.
68. The issue in this appeal therefore narrows to whether or not it is realistic to think that there is a time in the next five years when there could be a non-ancillary use of the ground floor of the pub that would further (whether or not in the same way as before) the social wellbeing or interests of the local community.
69. The statutory test of "*realistic to think*" as used in section 88(2)(b) has consistently been interpreted by the First Tier Tribunals as a low threshold, to be distinguished from higher thresholds, notably "*balance of probabilities*". "*Realistic*" does not mean "*most likely*"; it permits of a number of possibilities; see Evenden Estates v Brighton and Hove City Council CR/2015/0015). This consistent approach of First-tier Tribunal's was endorsed by Lane J in R (oao TV Harrison CIC v Leeds School Sports Association [2022] EWHC 130 (Admin):

"41. The legislation does not require there to be only one "realistic" future use of a building or other land. Several possibilities may each be realistic. The legislation does not require a potential future use to be more likely than not to come into being, in order for it to be realistic. The fact that the most likely of a number of scenarios is

one which would not satisfy the statutory criteria (e.g. a change of use from pub to residential) does not mean that any other potential future use is, without more, unrealistic. It is only if the non-compliant scenario is so likely to occur as to render any compliant complaint scenario unrealistic, that the non-compliant scenario will be determinative of nomination"

70. In T V Harrison, Lane J also addressed the relevance of the stated intention of the relevant landowner:

"48. By using the "realistic to think" test, Parliament has set a standard which means that a local authority must not approach the future use of land as necessarily a binary issue, as between the current intention of the owner and the current proposals of the nominator. Although the development intentions of the owner will be relevant, particularly in the planning context, any factors casting doubt on the owner's ability to achieve those aims must be considered. It is on the strength of those doubts that the "realistic" nature – or otherwise – of the envisaged social use may depend".

71. Section 88(1)(b) which deals with "actual current uses" sets no time period over which the qualifying use "can continue" in order for the building supporting it to be listed. The position under section 88(2)(b) which deals with those cases such as the present, in which the qualifying use was in the "recent past", requires that before the land can be listed, it has to be realistic to think that there is a time "in the next five years" when there could be a qualifying use made of the building. Neither sub-section makes it a pre-requisite of listing that qualifying uses have the potential to be sustained over a given or set period of time.
72. Whilst there is a difference between the two sub-sections, in my view they are both directed at ensuring that land and/or buildings are included on the LACV only where there is evidence that they can be sustainable and that there is some prospect of them continuing (section 88(1)(a)) or, relevant to this appeal, being re-introduced (section 88(2)(b)).
73. As to whether it is realistic to think that a qualifying use of the ground floor of the Inn could be made in the next five years, the information before me is very mixed and comprises largely of assertion rather than evidence to which I can attach material weight.
74. The Appellant relies on its loss of £150,000 during its period of involvement of the business and the failures of other operators over the past 10 years to operate the public house viably. It also relies on the constraints which the split Land Registry titles have given rise to and the need to replace equipment removed by Greene King on the closure of the pub. In addition, the Appellant says that

the relationship between the pub use on the ground floor and the residential use on the first floor is such that a premises licence would not be obtainable.

75. Conversely the Respondent, relying exclusively on what the Nominating Body has previously stated, asserts that there has been confirmation from the Body that the Inn has realistic potential to be of continuing benefit if purchased by it and that it has confirmed that it has the funds to effect a purchase and would deliver a new offering.
76. There are weaknesses in both the Appellant's and the Respondent's contentions.
77. In relation to the Appellant's submissions, I share the concern of the Respondent that the evidence of trading over the period 2018-2023 is unlikely to be representative of the potential of a pub business at the Inn given the effect of the COVID restrictions during the 2020-2021 period and the consequences for the hospitality industry. It also says little about the potential for the Inn to operate in the future under community ownership with a different business model.
78. I am also not satisfied that the constraints identified by the Appellant are such that they would necessarily prevent a pub use of the ground floor of the premises. The Appellant has itself recognised the need for the property titles to be rationalised and identified one solution, albeit this was not progressed with proving to be locally unpopular. In relation to the premises licence, on the Appellant's evidence the flat has been occupied for in excess of 10 years by persons whose main employment was not in the pub below, and there is no evidence that any issues which this relationship gave rise to any material threat to the continuation of the premises licence. Evidence of marketing of the Inn as a pub would have assisted in understanding the extent to which these were regarded by the market as constraining the future potential of the Inn, but there has been no marketing campaign following the closure of the pub.
79. As to the Respondent's submissions, these are no more than assertions with no substantive evidence base to support them. The Respondent has not sought to adduce any evidence as to the future trading potential of the Inn and the Nominating Group has played no role in the proceedings whether to support by evidence its claims that it has or could have the funds to acquire the Inn over the next five years or that if the Inn provided a different offering, it could be viable.
80. The extent to which there needs to be at least some detail as to the past trading performance of an asset and its future trading potential, will turn on the facts of any given case. There will be a spectrum of cases. At one end there may be an asset which has traded very successfully until recently but closed for reasons other than viability. In such a case detailed evidence of part trading

performance and future potential is unlikely to be required to support listing. At the other end of the spectrum there may be a seriously fire damaged asset with a very chequered trading past. In such a case, for it to be concluded that it is realistic to conclude that a qualifying use could be carried on in the premises, would be likely to require a business plan with appropriate financial modelling to support its listing. Where on the spectrum any given case falls will turn on the facts.

81. Here, allowing for the weaknesses in the Appellant's submissions on viability, there is still a history of business failure at the Inn and these included failures before the COVID pandemic. There is no cogent evidence of any sustained successful trading from the premises over the past 10 years. Whilst the Nominating Group relies on providing a different offer in support of its assertion that a pub use could be viable, that is not supported by any evidence. Tellingly, when given the opportunity to purchase the Inn at a value reflecting its pub use, it did not do so and the full moratorium period expired with no offer having been made.
82. Given that context and the absence of any cogent from the Nominating Group or the Respondent to the contrary, I have concluded on the material before me, that, with the expiry of the moratorium period and no offer having been made by the Nominating Body, this is a case in which there is now simply insufficient evidence to conclude other than that the closure of the pub is so likely to be permanent as to render unrealistic any qualifying use.
83. I should add that I have noted the Nominating Group's statement that the pub could be used for other uses such as a shop, but without any indication of whether such a use would be feasible, I can attach no weight to it. Equally, the Appellant's proposals to enhance the facilities at the village hall are not material to whether the section 88(2) criteria are satisfied and I have attached no weight to those.
84. For the reasons I have given I allow the appeal and conclude that the Inn and its curtilage should be removed from the Respondent's LACV.

JUDGE SIMON BIRD KC
9 February 2024