First-tier Tribunal
(General Regulatory Chamber)

Tribunal Reference: CR/2016/0025

Before

TRIBUNAL JUDGE SIMON BIRD QC

Between

(1) JONATHAN DAVID MARSHALL
(2) JULIETTE GRACE CLAIRE MARSHALL
(3) BESPOKE CORPORATE TRUSTEES LIMITED
(AS TRUSTEES OF THE J MARSHALL LIMITED SSAS)

Appellants

and

ARUN DISTRICT COUNCIL

First Respondent

and

CHRIS SHORE

Second Respondent

Representation:

For the appellants:	Mr Simon Adamyk of counsel
For the first respondent:	Mr Lawson Akhigbe Litigation Solicitor, Arun District Council
For the second respondent:	Mr Chris Shore

DECISION AND REASONS

A Introduction

1. The Localism Act 2011 ("the 2011 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

Assets which may be listed

2. Section 88 of the 2011 Act provides so far as is material to this appeal:

> *"(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".*

3. The power to exclude land by regulation from being land of community value is provided by section 88(3)–(5):

> *"(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."

4. The Secretary of State who is the appropriate authority for the purposes of Part 5 of the Localism Act 2011 has made the Assets of Community Value (England) Regulations 2012 ("the Regulations") and by Regulation 3 and Schedule 1 to the Regulations, land which is not of community value and may not therefore be listed is dealt with as follows:

"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.

2. 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.

3. Land in respect of which a site licence is required under Part 1 of the Caravan Sites and Control of Development Act 1960 , or would be so required if paragraphs 1 , 4, 5 and 10 to 11A of Schedule 1 to that Act were omitted.

4. Operational land as defined in section 263 of the Town and Country Planning Act 1990."

Who may nominate

5. Section 89 of the Localism Act 2011 states:

"(1) Land in a local authority's area which is of community value may be included by a local authority in its list of assets of community value only—

(a) in response to a community nomination, or

(b) where permitted by regulations made by the appropriate authority.

(2) For the purposes of this Chapter "community nomination"*, in relation to a local authority, means a nomination which—*

(a) nominates land in the local authority's area for inclusion in the local authority's list of assets of community value, and

(b) is made—

(i) by a parish council in respect of land in England in the parish council's area,

(ii) by a community council in respect of land in Wales in the community council's area, or

(iii) by a person that is a voluntary or community body with a local connection.

(3) Regulations under subsection (1)(b) may (in particular) permit land to be included in a local authority's list of assets of community value in response to a nomination other than a community nomination.

(4) The appropriate authority may by regulations make provision as to—

(a) the meaning in subsection (2)(b)(iii) of "voluntary or community body"*;*

(b) the conditions that have to be met for a person to have a local connection for the purposes of subsection (2)(b)(iii);

(c) the contents of community nominations;

(d) the contents of any other nominations which, as a result of regulations under subsection (1)(b), may give rise to land being included in a local authority's list of assets of community value.

(5) The appropriate authority may by regulations make provision for, or in connection with, the procedure to be followed where a local authority is considering whether land should be included in its list of assets of community value".

6. *Section 89 is supplemented by the provisions of regulations 4, 5 and 6 of the Regulations:*

"4 (1) For the purposes of these regulations and section 89(2)(b)(iii) of the Act, a body other than a parish council has a local connection with land in a local authority's area if—

(a) the body's activities are wholly or partly concerned—
(i) with the local authority's area, or
(ii) with a neighbouring authority's area;
(b) in the case of a body within regulation 5(1)(c) , (e) or (f), any surplus it makes is wholly or partly applied—
(i) for the benefit of the local authority's area, or
(ii) for the benefit of a neighbouring authority's area; and
(c) in the case of a body within regulation 5(1)(c) it has at least 21 local members.

(2) For the purposes of these regulations and section 89(2)(b)(iii) of the Act—

(a) a parish council has a local connection with land in another parish council's area if any part of the boundary of the first council's area is also part of the boundary of the other council's area; and
(b) a parish council has a local connection with land that is in a local authority's area but is not in any parish council's area if—
(i) the council's area is within the local authority's area, or
(ii) any part of the boundary of the council's area is also part of the boundary of the local authority's area.

(3) In paragraph (1)(c), "local member" means a member who is registered, at an address in the local authority's area or in a neighbouring authority's area, as a local government elector in the register of local government electors kept in

accordance with the provisions of the Representation of the People Acts.

5 (1) For the purposes of section 89(2)(b)(iii) of the Act, but subject to paragraph (2), "a voluntary or community body" means—

(a) a body designated as a neighbourhood forum pursuant to section 61F of the Town and Country Planning Act 1990;

(b) a parish council;

(c) an unincorporated body—

(i) whose members include at least 21 individuals, and

(ii) which does not distribute any surplus it makes to its members;

(d) a charity;

(e) a company limited by guarantee which does not distribute any surplus it makes to its members;

(f) a co-operative or community benefit society which does not distribute any surplus it makes to its members; or

(g) a community interest company.

(2) A public or local authority may not be a voluntary or community body, but this does not apply to a parish council.

(3) In this regulation "co-operative or community benefit society" means a registered society within the meaning given by section 1(1) of the Co-operative and Community Benefit Societies Act 2014, other than a society registered as a credit union.

6. A community nomination must include the following matters—

(a) a description of the nominated land including its proposed boundaries;

(b) a statement of all the information which the nominator has with regard to—

(i) the names of current occupants of the land, and

(ii) the names and current or last-known addresses of all those holding a freehold or leasehold estate in the land;

(c) the nominator's reasons for thinking that the responsible authority should conclude that the land is of community value; and

(d) evidence that the nominator is eligible to make a community nomination".

C Non Statutory Guidance

7. In October 2012 the Department of Communities and Local Government issued non-statutory guidance entitled *"Community Right to Bid: Non – statutory advice note for local authorities* ("the Guidance"). Within the Guidance it 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 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.*
>
> *3.8 There are two further categories of assets excluded from listing:*
>
> *(a) Land licensed for use as a residential caravan site (and some types of residential caravan site which do not need a licence), in paragraph 3 of Schedule 1 to the Regulations.*
> *(b) Operational land of statutory undertakers as defined in section 263 of the Town and Country Planning Act 1990, in paragraph 4 of Schedule 1 to the Regulations."*

D The Listed Asset

8. This appeal concerns the Seaview Hotel, 127 Sea Road, East Preston, Littlehampton, West Sussex BN16 1PD ("the Seaview Hotel"). On 15 March 2015 a nomination was received by the First Respondent that the Seaview Hotel should be added to the First Respondent's list of assets of community value ("LACV"). The nomination form stated that the name of the nominating organisation was *"Supporters of the Seaview Hotel".*

9. The nomination was successful and on 11 June 2015, the Appellants were notified by the First Respondent that the Seaview Hotel would be added to the LACV. A review of that decision was requested and although there were a

number of procedural failings in the way the review process was carried out, there is no dispute between the parties that the outcome of that review was that the inclusion of the Seaview Hotel on the LACV was maintained. This was communicated to the Appellants by letter dated 24 November 2016.

10. The Appellants appealed to the Tribunal against that decision by notice dated 18 December 2016. The appeal has taken the form of a full reconsideration on the merits.

E The Issues

11. There are agreed to be two issues in this appeal:

    (i) Whether by virtue of regulation 3 and schedule 1 paragraph 1(1) of the Regulations the Seaview Hotel is land which is not of community value and therefore may not be listed; and
    (ii) Whether the nomination for inclusion of the land on the LACV was a valid nomination having regard to the requirements of section 89 of the Act and regulations 4-6 of the Regulations.

F The Background

12. There are no material disputes of fact in this case.

13. The Seaview Hotel appears to have originated as an early C19th slate-roofed cottage which has subsequently been extended. In the 1930's the property operated as a clubhouse known as "The King of Clubs" in conjunction with the adjoining caravan site. The property continued to trade as the King of Clubs until at least 1978, but in the 1980s it was extended at ground floor level with the addition of a manager's flat which allowed the upper parts to be converted to bedrooms for guests. The property has traded as the Seaview Hotel since that time.

14. As to the nature of that trading activity, the building has always been called the Seaview Hotel, it has been marketed as such and all its published material in the form of signage, menus, bills, adverts and website material uses that name. The Seaview Hotel has five guest bedrooms (all en-suite) on the first floor and a terrace at first floor level exclusively available for residents. The building is rated for the purposes of non-domestic rates as *"Hotel and Premises".*

15. However, there is no dispute that the premises also operate as a public house. The ground floor has two public entrances which provide access to a bar and a bar/dining area which serves both the public house and hotel elements of the business. There is no dedicated separate entrance for hotel guests and no dedicated reception area for hotel guests. Hotel residents have sole use of the bar/dining area at breakfast time but during licensed hours it is only the first floor and its associated terrace which is for hotel residents only.

16. In terms of the public house use, the Second Respondent's description of the use of the Seaview Hotel was not significantly disputed. In the nomination form, he described it as a small family run Hotel/Public House serving the community of East Preston and beyond and continuing to be a popular place for socialising, making friends and enjoying special occasions and celebrations, wedding receptions and birthdays. Various groups, organisations and clubs are said to use its facilities and it is frequently used as a venue for live music. The five en suite letting rooms provide what is described as *"very scarce hotel accommodation".* The Appellants accept that the Seaview Hotel is in part used for purposes which further the social wellbeing of the local community.

17. In terms of floorspace, the Appellants' have assessed that 61% of the floor area of Seaview Hotel is used for hotel use and 39% for the pub/restaurant use. However, the 61% figure reflects an apportionment of the floor area of those parts of the premises which serve both uses. The trading performance of the premises shows that of the total turnover of the Seaview Hotel, approximately 22-25% is derived from the hotel part of the business and some 75-78% from the public house/restaurant trade.

18. That is consistent with the terms of the lease between the Appellants and the leaseholder Sugarloaf Inns Limited which contains a user clause which restricts the use of the premises to use:

> *"as a public house licensed for the sale by retail of alcoholic drinks (and the ancillary provision of accommodation, food, refreshment and recreation for the public)"*

19. The public house licensing hours during which it may be open to the public are Monday to Thursday 11.00 to 23.30, Friday and Saturday 11.00 to 00.30 and Sunday 12.00 to 23.30. The hotel by contrast operates on a 24 hour basis, with a manager resident only because of the hotel side of the business.

20. In terms of the nomination process, the Second Respondent had sought to follow the CAMRA guidelines and had believed that a list of persons supporting

the listing of the Seaview Hotel just to show the local authority that there was local support, was all that was required at the nomination stage. He believed that once the asset was listed there would be the time to form an action committee and to get a group together.

21. Other than securing the signatures for the nomination form, he had taken no other steps and, save for a Mr Davies taking the form to the Seaview Hotel to obtain signatures, no other person had been involved in the process. There had been no meeting or communications and no consideration given to the issue of funding. The Second Respondent alone had decided what was to happen. The name "*Supporters of the Seaview Hotel*" had simply been an easy name to come up with and the signatories were just that; they were not members of anything. There was no written constitution and no chair or secretary. No authority existed on the Second Respondent's part to speak on behalf of any other person.

G The Appellants' contentions

22. The Appellants contend that the Seaview Hotel should be removed from the LACV because:

(a) It falls within the exemption set put in paragraph 2(b)(iii) of Schedule 1 to the regulations by reason of the fact that *"it, or part of it, is a hotel or is otherwise principally used for letting or licensing accommodation to paying occupants".* The Seaview Hotel is therefore a "*residence"* for the purposes of paragraph 1 of Schedule 1 and under Regulation 3 it is not land of community value and may not be listed.

(b) The exemption may be satisfied in any of four different ways, namely if:
  (i) The building *"is a hotel";*
  (ii) Part of the building "*is a hotel";*
  (iii) The building is *"principally used for letting or licensing accommodation to paying occupants"; or*
  (iv) Part of the building is *"principally used for letting or licensing accommodation to paying occupants".*

(c) The Seaview Hotel *"is a hotel"* (option (i)) alternatively part of the building *"is a hotel"* (option (ii)), alternatively part of the building is *"principally used for letting or licensing accommodation to paying occupants"* (option (iv)). The result of any or all of these is that the Seaview Hotel cannot be listed.

(d) Having regard to the layout and business of the Seaview Hotel, the usage of the floorspace, the licensing position and the assessment of the building for rating purposes, the Seaview Hotel *"is a hotel".* The Appellants do not argue that the Seaview Hotel is a hotel because it is called a hotel; rather it is called a hotel because it is one. Therefore its use falls within either option (i), (ii) or option (iv) under the exemption. It does not matter which of the various means of triggering the exemption applies; the effect is the same, the Seaview Hotel may not be listed as an asset of community value.

(e) The local authority relies on Hawthorne Leisure Acquisitions Ltd v Northumberland County Council [2015] UKFTT CR/2014/0012 but the facts of that case are distinguishable and the option (ii) and (iv) means of satisfying the exemption were not grappled with by the Tribunal in that case. That case is neither persuasive nor similar and not binding. The Council's submission that *"The lodging....is incidental to the main business of the Asset"* misstates the statutory test and seeks to introduce a new test (not found in the legislation) of *"incidental use".* Such a test is unfounded and legally irrelevant.

(f) The Second Respondent relies upon the Explanatory Memorandum to the Regulations (paragraph 7.6) but that is not a substitute for the legislation and it has no statutory force. The only test is that set out in the Regulations. In any event, the passage relied upon is aimed at a different scenario, namely , that of an asset which otherwise qualifies for listing such as a straightforward pub but which also happens to contain integral residential accommodation which is tied to the site's main function (such as a manager's flat or a caretaker's flat). It is not aimed at the situation here where the building does not otherwise qualify because it is expressly and specifically excluded by the exemption. That is consistent with the Department for Communities and Local Government's non statutory advice note (paragraphs 3.6-3.7). Following Wellington Pub Company v Royal Borough of Kensington and Chelsea [2015] UKFTT CR/2015/0007 it is clear that the guest bedrooms are part of the building and therefore the exemption applies to the whole.

(g) As to the purported nomination, it was not a valid nomination for the purposes of the legislation. Not just anyone can nominate an asset for inclusion within the list. To be valid, a nomination must be a *"community nomination"* i.e. made *"by a person that is a voluntary or community body with a local connection".* The persons who satisfy this requirement are set out in Regulation 5 and in this case regulation 5(1)(c).

(h) The purported nominator here is not an *"unincorporated body"* within the meaning of section 89(2)(b)(iii) and Regulation 5(1)(c) and it does not have

"members" within the meaning of Regulation 4(1)(c) and 5(1)(c) of the Regulations.

(i) There is no evidence that any group called the "*Supporters of the Seaview Hotel*" was mentioned to any of the individuals who signed the forms, either at the time of signing or subsequently.

(j) There is no evidence as to the existence of any constitution, how any person would become a member, as to eligibility or as to meetings or any other discussion between members. Further, there is no evidence that Mr Shore had authority to speak on behalf of any other person.

(k) In the circumstances, there cannot be any *"body"* within the meaning of the Act and the Regulations nor can it sensibly be said that it has any *"members".* A body is defined as being "*an organized group of people with a common function*" in the Concise Oxford English Dictionary. This definition has been adopted in other appeals (see Hamna Wakaf Ltd v London Borough of Lambeth [2016] UKFTT CR/2015/0026 and Mendoza Ltd v London Borough of Camden [2016] UKFTT CR/2015/0015. This definition is not satisfied on the facts here.

(l) Further, section 89(2)(b)(iii) and Regulation 5(1)(c) permit a nomination to be made by an unincorporated body whose members include at least 21 individuals, but only if it is an organisation *"which does not distribute any surplus it makes to its members".* Section 89(2)(b)(iii) and Regulation 4(1)(b) also require that in the case of an unincorporated body whose members include at least 21 individuals and which does not distribute any surplus it makes to members *"any surplus it makes is wholly or partly applied (i) for the benefit of the local authority's area, or (ii) for the benefit of a neighbouring authority's area".* There is no evidence that either requirement was met, as required by Regulation 6(d), and therefore the nomination failed in this respect also.

H The First Respondent's contentions

23. The First Respondent argues that:

(a) The Seaview Hotel does not fall within the exemption set out in paragraph 2(b)(iii) of Schedule 1 to the Regulations. Despite its title it is not principally a hotel nor is it principally used for letting or licensing accommodation. In the case of Hawthorn Leisure which should guide this Tribunal, the Tribunal held that:

"The activities carried on there and the small number of guest bedrooms in relation to its size give me the impression that, in the ordinary use of language, people would not describe it as a "hotel". Nor, in my judgment, is the letting of the guest bedrooms a principal use."

(b) The title of the Asset is not the main consideration; the issue is the principal use of the asset. Lodging at the Seaview Hotel is incidental to the main business of the asset. Its main income is received from the public house/restaurant use. That is consistent with the user clause in the lease. This places the asset outside the ambit of the exemption.

(c) As to the nomination, the unincorporated body called "*Supporters of the Seaview Hotel*" satisfies the legislative requirements for a valid nominator as set out in the legislation. The nominators, led by the Second Respondent are a group of more than 21 people with local connection to the asset.

(d) The requirements of the application form submitted on 15 March 2015 mirrored the requirements of section 89 of the Act and regulations 4 and 5 and the form states that there is no surplus so regulation 4(1)(b) does not apply. It is not a requirement of the Regulations that there be a surplus.

I The Second Respondent's contentions

24. The Second Respondent contends that:

(a) Hotels are exempt from listing as an ACV although the Campaign for Real Ale ACV listing website shows several hotels as being listed.

(b) The Seaview Hotel is well supported by local residents from East Preston and neighbouring villages and towns and sells a wide range of beer including three real ales and also serves good food. There are regular themed music nights etc. and a Bar Billiard table. There are only five letting rooms and no obvious separate residents lounge, dining room or reception desk for guests that might be expected in a hotel. Despite the signage it is more akin to a Public House with a few letting rooms. Hotel or not, paragraph 7.6 of the Explanatory Memorandum to the Regulations states:

"The Government recognises that some assets of importance to communities, such as pubs, may have integral accommodation tied to the site's main function. The policy objective is that such assets should be capable of being listed so long as the main purpose of the building or land meets the

definition of community value; hence the exclusion from listing for residences does not apply in such cases".

(c) As to the nomination the Second Respondent the nomination was carried out in exactly the same way as the nomination which he had undertaken for another public house in the village which was accepted without question. He therefore saw no reason why this nomination should be invalid.

J Findings

25. It is most logical to deal first with the issue of the validity of the nomination.

26. I accept the submissions made on behalf of the Appellants. The relevant statutory requirement in this case was that the nominating body had to be an *"unincorporated body".* That term is not defined within the Act or the Regulations but I accept that the word *"body"* bears its ordinary and natural meaning which is reflected in the Concise Oxford English Dictionary namely *"an organized group of people with a common function."* This has been the previous finding of Tribunals in both Hamna Wakaf (@ paragraph 72) and Mendoza (@ paragraph 20) and I agree with it.

27. On the facts here there was no organized group. There was simply a list of signatures of persons obtained in support of listing organised by one person with minor assistance from another. Those adding their names to that list did so on a random basis and they were simply signing a form, rather than joining an organized group or signing up to an objective of an organized group. The decision to seek support in the form of the list of names was a decision taken by the Second Respondent alone and did not flow from any course of action agreed at a meeting of those supporters. Even the name of the supporters was the decision of the Second Respondent acting alone.

28. The Second Respondent readily and fairly accepted that he had been given no authority to act on behalf of any other person and there was no formality involved in the process other than the preparation of the list. This was because his understanding had been that any requirement for greater formality would follow the listing rather than being a pre-requisite for it.

29. I find that there was no *"body"* and, as there was no body, there were no *"members".* It follows that the requirements of section 89(2)(b)(iii) and Regulation 5(1)(c) were incapable of being satisfied as at the date of listing. It follows that there was no valid nomination and the Seaview Hotel should not have been included on the LACV and the appeal must succeed on that ground.

30. I also find that the requirements of Regulation 4(1)(b) were not met. Whilst I am not satisfied that this would of itself have been fatal to the listing of the Seaview Hotel had I been persuaded that the nomination was otherwise valid and had there been evidence before me of how any surplus would in fact be dealt with, the Second Respondent accepted that no consideration had yet been given to funds and funding and therefore this requirement was not met.

31. I should add that nothing in my conclusions on the facts of this case detracts from the conclusions of earlier Tribunals that there can be a degree of informality in the setting up and administration of unincorporated bodies. For example, the absence of a written constitution is not of itself a bar to a group being an unincorporated body for the purposes of the Act. However, there must at least be a group which is organized and capable of taking group decisions to further the objective of listing, whether through meetings or other less formal means of group decision taking. That was the position in the Hawthorn Leisure case which the First Respondent relied upon and which is clearly distinguishable on its facts from this case. It is the absence of any group decision making which prevented the requirements for a valid nominations being met.

32. Because of my finding in relation to the issue of the validity of the nomination it is not strictly necessary for me to decide whether the Seaview Hotel was in any event exempt from listing. However, I heard full argument on the issue and as it is one of potentially wider and wide import, I will set out my findings.

33. I start with the scope of the exemption from listing provided by a combination of Regulation 3 and Schedule 1 of the Regulations. The exemption applies to *"a residence and land connected with that residence"* (Schedule 1 paragraph 1(1)). The definition of *"a residence"* extends to a building used or partly used as a residence (e.g. a house or flat) (Schedule 1 paragraph 2(a)) and other buildings or land which are used to provide residential accommodation in the sense that they provide a home, even if that home may be occupied on a temporary or seasonal basis.

34. The term "*residence"* thus extends to include dwellings temporarily unoccupied (paragraph 2(b)(i)), dwellings let for holiday use (paragraph 2(b)(ii)), houses in multiple occupation (paragraph 2(b)(iv)), but not permitted dwellings yet to be built (paragraph 2(c)(i)), dwellings in the course of construction but not yet complete (paragraph 2(c)(ii)) or buildings once used as dwelling but which are to be converted to other uses with the benefit of a planning permission or other consent (paragraph 2(c)(iii).

35. Sitting not entirely comfortably within the expanded definition of *residence* is the paragraph 2(b)(iii) category:

> *"it, or part of it, is a hotel or is otherwise principally used for letting or licensing accommodation to paying occupants".*

36. Whilst hotels can and do provide permanent residential accommodation for some long terms residents, the more typical hotel use in the 21st century is the provision of accommodation and board on a temporary and short term basis for guests who may be away from their principal or main home for various purposes. To that extent, this category of *"a residence"* differs materially from the others. Of itself, that is not an issue; an exemption is an exemption and it is for Parliament to prescribe what categories of land and land uses it wishes to exempt.

37. However, a potential difficulty arises with what I will call for shorthand purposes "*the paragraph 2(b)(iii) exemption*", because, if read literally and alone, it would operate to exclude from the compass of listing many of the properties which it was clearly the intent of Parliament should benefit from the scheme of listing. For example, any public house which let rooms for accommodation to paying occupants would be exempt from listing because a *"part of it"* is *"principally used for letting or licensing accommodation to paying occupants".* Equally any building styled as a pub/hotel and in part used for letting or licensing accommodation would be exempt from listing irrespective of the extent of the accommodation use relative to the public house use.

38. Such a result would be so at odds with the clear intent of Parliament in introducing the scheme of listing, that unless compelled to give the legislation a meaning which reflects that literal approach by the absence of any reasonable alternative interpretation, it should, in my view be rejected.

39. However, as the submissions made before the Tribunal recognised, the difficulty is that there is, in truth, no interpretation of Schedule 1 in the context of the paragraph 2(b)(iii) exemption which is free from some obvious objection either because it cannot be squared with the language used in the Regulations or because its consequences sit uncomfortably with the intent of the statutory scheme taken as a whole.

40. Dealing with each of the possible interpretations canvassed at the hearing, I start with the literal interpretation advanced by the Appellants.

41. Exempting a hotel or a building used principally for the provision of accommodation is unexceptional and provides a reasonably logical additional category of *"residence".* Buildings with the main function of serving a

population resident in the building itself, are to be exempt. Such buildings, if they do serve a local social or community role will do so as a secondary part of the main business.

42. The difficulties arise because the exemption does not apply simply when the whole building is devoted to that principal or main purpose, but also where part of the building is so used. As I have indicated above, taken literally, that would mean that a public house with one or more guest bedrooms is exempt from listing as is a hotel/pub providing overnight accommodation. Unless "*the exception to the exemption"* provided by paragraph 1(5) of the Schedule applies in such circumstances such buildings are exempt from listing.

43. However, the Appellants contend this exception is restricted in its application to units of self-contained accommodation such as a staff flat and it is not intended to apply in relation to the paragraph 2(b)(iii) category of accommodation. They argue that to find otherwise would not be consistent with the non-statutory guidance and would introduce circularity into the statutory scheme. However, as I have said, if that is right, then without more, many public houses would be exempt from listing and, by adopting the simple expedient of letting one or more rooms for accommodation, many other buildings would be capable of benefitting from the exemption.

44. Recognising the problem with that literal interpretation, the Appellants invited me to consider implying the word *"material"* into the paragraph so that reads *"it, or a material part of it....is otherwise used principally for letting or licensing accommodation to paying occupants."* The difficulty with that is that it introduces an additional layer of uncertainty, rather than clarifying the scope of what should be a straightforward exemption. For example, how would *"materiality"* be assessed in this context? It would lead to 'line drawing' with no clear reference point as to how or where to draw the line and little obvious logic in terms of statutory purpose.

45. A possible alternative interpretation of the paragraph 2(b)(iii) exemption is that, as with the other categories of "*residence*", it should be read as being restricted to buildings which provide a permanent home for the residents who are accommodated i.e. a limited sub-category of hotels and/or hostels. This interpretation would provide a much more narrowly defined exemption and one which would result in less damage to the intent of the statutory scheme. However, the difficulty with this interpretation is that it would be inconsistent with the use within the exemption of the word "*hotel*" without gloss or restriction and it would require "*letting or licensing"* also to be given a narrow meaning i.e. letting or licensing for residential occupation.

46. Thus how the paragraph 2(b)(iii) exemption should be applied is unclear and the intent behind its inclusion within the Regulations is equally opaque.

47. My conclusion on the proper approach to the exemption is as follows:

48. The exemption contained in paragraph 1 to schedule 1 applies to *"a residence."* The purpose of paragraph 2 to the schedule is to provide a definition of the term residence which is both for clarification and to provide an extended meaning to the ordinary and natural meaning of that term (e.g. to include hotels).

49. The single exception to the exemption is provided by paragraph 1(5) to the Schedule and this uses the term *"residence"* without any indication that it should be given a narrower meaning than that contained in paragraph 2. There is nothing to indicate that the exception to the exemption should be confined only to residences which fall within paragraph 2(a). Indeed, paragraph 2 expressly provides that the definition is *"for the purposes of paragraph 1".* Had Parliament intended to restrict the exception to the exemption to self-contained ancillary dwellings alone, it would in my view, have said so.

50. I acknowledge that paragraph 3.7 of the non-statutory guidance refers only to *"integral residential quarters"* when describing the exception to the exemption but it gives as an example *"accommodation as part of a pub or a caretaker's flat".* It seems to me that *"accommodation as part of a pub"* is broad enough to include guest accommodation. This indicates to my mind that *"residential quarters"* is to be given a broad meaning.

51. The absence from the guidance of any other assistance on the scope of the exception to the exemption tends to support my conclusion. It would be surprising, in my view, if the Department for Communities and Local Government had given no guidance on all of the means of satisfying this part of the exemption within the guidance which, as appears from the wording of paragraph 3.8 *("There are two further categories of assets excluded from listing...")* was intended to be comprehensive.

52. My conclusion also sits comfortably with paragraph 7.6 of the explanatory memorandum to the Regulations relied upon by the Second Respondent. For example, guest bedrooms in public houses are in my view fairly described as "*integral accommodation tied to the site's main function".*

53. The consequence of this is that the paragraph 2(b)(iii) exemption will only be satisfied where the nature and extent of the hotel use of the premises or its letting or licensing accommodation to paying occupants (whether this is the

whole or part of the premises) is such that, taking the premises as a whole, the accommodation use is the main purpose of the building i.e. any social or community use is secondary or ancillary to it.

54. I accept that this introduces a degree of circularity into the statutory scheme because an ancillary social or community use would not in any event satisfy the requirements of section 88(1) of the Act and the exemption could be said to add nothing other than avoiding doubt. However, I can see no sensible interpretation of the Schedule which avoids this circularity without at the same time driving a coach and horses through the Act's intended protection.

55. This approach, whilst still requiring judgments of fact and degree, avoids the need to introduce the gloss to the paragraph 2(b)(iii) exemption advocated by the Appellants (the introduction of the word *"material"* before *"part")* which in my view is unsatisfactory for the reasons I have set out above. On my reading, what has to be decided is what the main purpose of the building, taken as a whole, is.

56. I should add for completeness that I see nothing in the case of the Wellington Pub Company which particularly assists on the issues which arise in this case. That case were concerned with whether the residential accommodation concerned was part of the same building which the Tribunal held fell to be judged by reference to the physical and functional relationship between the accommodation and the pub uses. In this case, there is no dispute the Tribunal is concerned with a single building. The issue is what the use made of it is and which, if any, is the main use.

57. Applying what I have concluded is the correct interpretation of the paragraph 2(b)(iii) exemption and the paragraph 1(5) exception to the exemption, my view on the evidence before me is that the Seaview Hotel is not a building which would have been excluded from listing had the Second Respondent's nomination been valid. Taking account of all of the circumstances and giving due weight to the name of the premises, its marketing and other material and its business rates status, in my view the main use of the building is as a public house and not as a hotel.

58. I note the Appellants' evidence as to the floorspace apportionment between the hotel use and the public house/restaurant use but this principally shows how much floorspace is available to residents and drinkers/diners respectively. It provides no indication of the extent of activity which is made of the available floorspace by the users of the public house and hotel respectively. The trading turnover of the premises coupled with the user covenant within the lease are, in my view, the most appropriate guide as to what is the main use made of the

premises and these indicate that the public house/restaurant use is the main use made of the building with the hotel element very much secondary. The accommodation use is reliant on the existence of the public house/restaurant use and therefore the terms of the exception to the exemption are met.

59. On this ground, I therefore conclude that had it been necessary for me to decide the issue, I would have concluded on the evidence before me, that the Seaview Hotel is a building which could be included on the LACV. However, by reason of the invalid nomination made by the Second Respondent, it should not have been included on the LACV.

Decision

60. The appeal is allowed.

Signed Simon Bird QC

Judge of the First-tier Tribunal
Date: 30 April 2017

(Amended to accommodate typographical and formatting corrections 3 May 2017