

## Further guidance on the operation of the ACV regime

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The rising interest in Assets of Community Value shows no sign of abating. In an article earlier this year I set out what I felt was guidance that could be given as to the manner in which the ACV regime operates in seven areas. This was derived principally from appeal decisions by judges of the First-tier Tribunal but also from some decisions of Planning Inspectors. Two new appeal decisions have been released which consider two fresh areas of the ACV regime. One concerns how to determine when a residential part of a building is to be excluded from the listing of the building. The other is the first appeal concerning a compensation decision. Each is an important area of the ACV regime which will affect both owners and local authorities.

As with previous appeal decisions the two new judgments contain helpful general guidance which seeks to put flesh on to the ACV statutory skeleton and to provide steers as to how the regime should operate. This provides a degree of certainty which is welcome albeit that it is being provided by the First-tier Tribunal rather than the local authorities and is to a certain extent contrary to what was stated in the non-statutory guidance issued by the DCLG in October 2012.

1. Part of building a residence – there is a lack of clarity in the regime when part of a nominated building is used for residential purposes. A building is not land of community value and cannot be listed if it falls within one of the descriptions specified in Schedule 1 to the Assets of Community Value (England) Regulations 2012/2421 (“the 2012 Regulations”) (reg. 3). There are three classes of excluded land and the principal one is a residence together with land connected with that residence (para. 1(1) Schedule 1).

A residence is defined as “a building used or partly used as a residence” (para. 2(a)). In para. 2(b) circumstances are specified which treat a building as a residence albeit that it would appear that this provision is not intended to be comprehensive in scope. It starts with a building which is “normally used or partly used as a residence but for any reason so much of it as is normally used a residence is temporarily unoccupied” (para.2(b)(i)). It then extends the definition to holiday dwellings, hotels, hostels and such buildings and houses in multiple occupation. Para. 2(c) sets out certain specified circumstances in which land or a building do not qualify for exclusion from being an ACV as a residence such as an uncompleted house.

No guidance is given in paragraph 2 of Schedule 1 as to how a building which is partly residential is to be treated. In section 108(1) of the Localism Act 2011 it is provided that “land” includes “part of a building”. That indicates that different parts of a building can be treated differently under the ACV regime but does not indicate when. This is left to para. 1(5) of Schedule 1 of the 2012 Regulations to deal with. It provides:

“(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.”

In the DCLG’s guidance at para. 3.7 it is stated that paragraph 1(5) applies “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.” This is a gloss on para. 1(5) but understandably local authorities have adopted it when dealing with the nomination of buildings such as pubs which include residential accommodation. An example is the manner in which the nomination of the Tabard pub and theatre in Chiswick was approached. It included a flat on the first floor for use by the staff. The stages by which Hounslow LBC determined the nomination were to ask whether (i) the flat is an integral part of the public house; (ii) there is a single owner; and (iii) it is a residential flat. After doing so the Tabard was listed.

What is meant by “integral” for this purpose and is it a requirement that needs to be satisfied? These issues were considered by Judge Lane in *Wellington Pub Limited v Kensington & Chelsea BC* CR/2015/0007. The authority had listed the Academy pub which had been running as a pub since 1851. The building comprised a pub on the ground floor with storage in the basement and residential accommodation on the first and second floors. The whole building had been leased to the husband and wife licensees and they lived with the family in the upper floors. Shortly before the listing the licensees took separate leases of the pub and the upper floors. Until the licensees took over the only access to the upper floors had been internally from the pub but for reasons of privacy and security the current licensees had an outside access just to the upper floors whilst retaining the internal access. There was a single account for the whole building for each of the utility services. Some years prior to nomination the Council had stated that there was a separate C3 planning use for the upper part rather than the residential part being ancillary to the pub use.

The owner sought to have the residential part taken out of the listing. The argument was that it is a separate part and so as a residence excluded by para. 1 Schedule 1 of the 2012 Regulations. In support reliance was placed on the planning position which it was argued would treat the upper part as a separate planning unit applying the decision in *Hendriks v SSE* (1989) 59 PCR 443 that for planning purposes and the General Development Order 1977 identifiable components of a building as a matter of law constitute a separate building.

Judge Lane reaffirmed that ACV decisions are not to be determined by the position under planning law and ACV would not equate with planning units even though the factors underlying planning units could be taken into account. He also rejected the argument as it would make ineffective para. 1(5). For the same reason he rejected the counter argument that a flat can never be treated as a separate part for the purposes of the ACV regime.

Parts of a building may or may not be treated as comprised in the listed building. Judge Lane accepted that as para. 1(5) is an exception from a general exception from listing there was a need to be cautious when interpreting it. Bearing that in mind he considered that for a residential part to be included in a listed building there must be both a current physical and functional relationship between the residential part and the remainder. This

decision has to be based on all the relevant facts set against the historical background of the building.

What does not have to be shown is that the residential part is necessary in order to enable the remainder of the building to function. Integral does not mean essential to the function of the part from which the community use is carried on. In this case the licensees employed a manager who did not live in and their presence at the premises was not a requirement of the operation of the pub. Staff did not need to live over the pub for it to continue to trade. This did not prevent it being treated as part of the pub.

Taking into account the internal access Judge Lane considered that there was a sufficient physical relationship between the two parts of the building. Taking into account the long period during which the building had been a pub with living accommodation over the functional relationship was also satisfied. In consequence listing of the building including the residential upper floors was correct.

The decision provides some welcome clarity as regards the interpretation of para. 1(5) and emphasises that the residential part does not need to be essential for the functioning of the remainder of the building. It also emphasises again that the planning position does not govern decisions under the ACV regime.

The judge deliberately did not address the issue as to whether there was power to remove part of a building from a listing and emphasised that this should not be taken as disapproving of any earlier judicial statements on the issue.

2. Compensation – Chadwick v Rossendale BC CR/2015/0006 is the first appeal concerning a local authority compensation decision under the ACV regime. The point of considerable importance in the judgment of Judge Lane is his statement at paragraph 17 that it appears that the owner of a listed asset is not intended to be compensated for a diminution in the value of the asset due to listing. The reason given for this is that there is no specific reference to this type of loss in reg. 14 of the 2012 Regulations. This will be a surprise to many not least because in the DCLG guidance it stated that although most of the claims for compensation are expected to be due to the operation of the moratorium provision which is specifically mentioned in para. 14(3) “the wording allows for claims for loss or expense arising simply as a result of the land being listed”.

The general test of eligibility for a compensation claim is set out in regulation 14(2) of the 2012 Regulations. This provides that an owner of a listed asset is entitled to compensation if the owner “incurred loss or expense in relation to the land which would be likely not to have been incurred if the land had not been listed”. In addition to the general test there are two specific types of claim which regulation 14.3 provides qualifies as loss that can be the subject of a compensation claim. At the start of regulation 14.3 it is stated to be for “the avoidance of doubt and without prejudice to other types of claim which may be made”. This wording would indicate that the general test of eligibility in regulation 14.2 and its scope is not intended to be limited by regulation 14.3. However, by regulation 14.3 expressly referring to two types of claim and not referring to a claim based on the reduction in value of a listed asset due to listing that is what seems to be concluded.

There are undoubtedly cases in which the listing of a property causes its value to be reduced. Such a loss would appear to be covered by the general test in regulation 14.2. Why

should the provision be construed so as to exclude this type of loss? If it is then it could create some odd situations. Loss caused by the operation of the moratorium is expressly covered by regulation 14(3)(a). If as a result of the operation of the moratorium a prospective sale is delayed and then proceeds at a reduced price is the reduction covered? Is it loss attributable to the operation of the moratorium or is it attributable to the listing? A similar point arises if the sale is lost altogether.

Listing is an interference in the rights of an owner. Compensation was provided to balance that. The type of loss covered was not limited to those two specific types of loss covered by regulation 14(3). The government clearly understood the type of loss covered to include a reduction in the value of the listed asset due to the listing. It will be a matter of concern to property owners that the scope of compensation payments should be limited in this manner. It is a significant issue and it is to be expected that it will need to be fully argued at some stage.

Apart from this important general point the judgment in the Chadwick case

- (i) highlighted that a loss claimed in accordance with regulation 14(3)(a) resulting from the operation of the moratorium provisions has to be “wholly caused” by the operation of those provisions.
- (ii) emphasised that claims will be scrutinised. If the claim is for loss caused by the operation of the moratorium provisions as in the Chadwick case the initial focus will be on whether the loss has been wholly caused by the operation of the provisions. In the Chadwick case the oral evidence was that the prospective purchaser did not proceed with the purchase because of the perceived attitude of the council and not because of the moratorium which was fatal to the compensation claim.
- (iii) reaffirmed that the burden of proof both as regards causation and quantum rests on the claimant.
- (iv) stated that a compensation claim must be properly articulated in accordance with regulation 14(5) at the time the claim is made. However, there seems to be scope for additional heads of loss to be made subsequently but there will need to be a good reason for the lateness of the claim.
- (v) confirmed that the local authority has no discretion as to the operation of the moratorium provisions and has to comply with those provisions. Any grievance for a failure by an authority to waive or relax the operation of the ACV regime is accordingly misplaced.

For a further consideration of these decisions and recent developments regarding the ACV regime my ACV Guide has been updated to 12<sup>th</sup> November 2015 and can be found at [http://www.9stonebuildings.com/wp-content/uploads/2015/11/cc\\_Assets-of-Community-Value-guide-12-11-15-Third-version.pdf](http://www.9stonebuildings.com/wp-content/uploads/2015/11/cc_Assets-of-Community-Value-guide-12-11-15-Third-version.pdf)

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