

Your Ref: 2461/30947138

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By email and post



28 February 2014

Dear Sirs

**REVIEW OF LISTING AS AN ASSET OF COMMUNITY VALUE: THE UNDERCROFT, BENEATH
QUEEN ELIZABETH HALL, SOUTHBANK LONDON, SE1 8XX**

I refer to your request for a review of the decision made by London Borough of Lambeth to list the above space, known as the Undercroft, as an Asset of Community Value (ACV) at a decision made on the 12 July 2013 and confirmed in a letter of 18 July 2013. By agreement the parties extended the period of the review until 28 February 2014.

As the appointed Reviewing Officer, I can confirm the review of the nomination of the Undercroft as an Asset of Community Value took place and the following documents/evidence were considered (in addition to the above letters of July 2013): The Localism Act 2011, The Assets of Community Value (England) Regulations 2012, the Community Right to Bid: Non-statutory advice note for local authorities, Long Live Southbank's (the "Nominator") application dated 2 May 2013, written representations on behalf of Southbank Centre Limited ("SBC"), attached to their letters dated 14 June 2013, 5 September 2013 with annexed representations from Mr Douglas Edwards QC and George Mackenzie, a review hearing held on 8 October 2013 including the Speaking Note prepared on their behalf by Mr Douglas Edwards QC, and a subsequent letter and attachments from Herbert Smith Freehills LLP dated 18 October 2013 and the Unilateral Undertaking dated 25 October 2013. In addition to the above, the officer had the benefit of the Preliminary Joint Opinion (PJO) and Final Joint Opinion (FJO) of George Laurence QC and Mr Simon Adamyk. Following the agreement to further

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extensions, numerous other letters, evidence and opinions have been given due regard. These are listed in Appendix 1.

Background

The background to this review is set out in paragraphs 3 to 13 of Douglas Edwards QC and George Mackenzie's representations on behalf of the Southbank Centre Limited ("SBC") dated 5 September 2013. SBC has sought to review the decision of the officer level assessment panel contained in the letter of 12 July 2013 that the Undercroft was an Asset of Community Value within the meaning of section 88 of the Localism Act 2011. The grounds the SBC has sought to review that decision are set out in their representations of 5 September 2013 referred to above and the speaking note of 8 October 2013 and subsequent correspondence. In brief the grounds the SBC is seeking to review are:

- (1) The recreational use of the Undercroft is an ancillary use;
- (2) The use of the Undercroft does not benefit the "local community";
- (3) The current use of the Undercroft cannot in reality continue; and
- (4) The proposals to relocate the facilities at the Undercroft.

The Reviewing Officer taking the decision as to whether to uphold the Council's first decision gave detailed and specific consideration to the following:

1. Ground 1a

Whether the use can be considered ancillary or non-ancillary in accordance with Section 88 (1) (a – first part) of the 2011 Localism Act:

"(1) an actual current use to the building or other land that is not an ancillary use"

This ground is far from a straightforward statement to come to a conclusion about. Indeed, the Reviewing Officer has read the latest First Tier Tribunal Case (Dorset County Council/Purbeck District Council) and notes that the Judge there stated at paragraph 16 that (in respect of the question whether a use is ancillary or not) *"there is no certain guidance or touchstone. The answer may indeed vary according to how the question of ancillary use is posed"*.

The primary use of the Southbank Estate is for the "promotion of the arts" (HSF, letter 14 June 2013) and in the Speaking Note of 8 October at paragraph 26 the "promotion and performance of the arts" and whilst arts and cultural activities do take place in the Undercroft and other parts

of the estate, both indoors and outdoors, the skateboarding park could be considered, in the officer's opinion, as a separate entity, as it is not wholly dependent on the Southbank Centre.

The Reviewer has had the benefit of the Further Joint Opinion of George Laurence QC and is mindful of a number of questions and statements which they pose, but does not wholly agree with their 'impression' that the (8i) "actual current use of the Undercroft has been for the most part merely tolerated or permitted" – in fact it is understood by her that the SBC has provided some support to the skateboarders over the years to a greater or lesser extent. The key question is, as the Further Joint Opinion states at paragraph 13, whether "*after considering all the evidence, [...] its significance and community value give it a separate and independent importance such as to justify the description of the actual current use as "not an ancillary use"*" [my emphasis] *within the meaning of section 88 (1) (a) of the 2011 Act*".

At the Oral hearing on 8 October 2013, SBC states that (see also 28 of the speaking note), they do not promote skateboarding as part of their charitable objects – presumably because otherwise it would become a primary use and therefore by default, a non-ancillary use. The question is therefore whether the actual current use of the Undercroft is ancillary to the primary use of the complex by SBC. Taking the example of the Purbeck case, which SBC has cited, the reviewer notes that the Judge states at paragraph 17 that it is "*artificial to divorce the playing fields from [the school]... the reality on the ground is that there was a school with its playground and playing fields attached*".

I am not persuaded that this argument can logically be applied to the Southbank Centre. As I understand it, the Undercroft was not specifically designed or built as a skateboarding park with a pre-determined use, but the use grew organically (albeit with further modifications to enhance it) and I believe that the significance of the Undercroft as a meeting point for skateboarders is because it has this 'home grown' quality by a reasonably defined group of urban users. The ancillary connection – and I quote from SBC's oral speaking note at paragraph 17 which relies on the Shorter OED definition of "ancillary" as a "subservient, subordinate, auxiliary, providing essential support or services..." is not, to my mind, sufficiently demonstrated.

At the extreme ends of the spectrum, if the SBC were to close its doors tomorrow, the skateboarders would in all likelihood continue to use the Undercroft. If the skateboarders disappeared overnight, the Southbank Centre would continue virtually unchanged. The analogy of the children's play area in the beer garden of a pub was therefore, in the reviewer's opinion, not a persuasive comparison put forward by SBC. If the pub closed, the children's play area

would also close. If the children's play area closed, the pub would continue. It is clear what the primary/ancillary use relationship is in this analogy.

I note that in the Stage 1 report dated 15 January 2014 of the Festival Wing planning application, the Mayor's office refers to the land use of the Undercroft being 'ancillary' but, in the same way that words can have different weight and meaning attached to them depending on the (often legal) context, this was not an ACV question and as such, in my view, it should not be taken as evidence that the use of the Undercroft is definitively ancillary.

I am of the opinion that the use of the skateboarding park at the Undercroft, on the balance of the evidence presented to me, from local knowledge and from having visited the site, is sufficiently independent of the primary uses elsewhere on the site, so it can be considered non-ancillary. I therefore reach the same conclusion as the panel (g and j) in their original decision to list the Undercroft as set out in their letter dated the 18 July 2013.

2. Ground 2

Whether the Undercroft furthers the social well-being or social interests of the local community in accordance with Section 88 1 (a – second part) of the 2011 Localism Act

“will further (whether or not in the same way) the social wellbeing or social interests of the local community”

Section 88 (6) defines “social interests” to includes each of the following—

- (a) *cultural interests;*
- (b) *recreational interests;*
- (c) *sporting interests.*

The SBC has sought to dismiss this ground (e) of the decision letter on the basis that the skateboarders, in their nomination and evidence, have failed to “discharge the burden of demonstrating that this element of the test is met”.

It appears that the legislation does not require absolute proof of numbers or demarcated areas, but that on the balance of probabilities, that the local community's social interests are furthered

by the actual current use of the Undercroft and these uses can include recreational and sporting interests.

The Review Officer noted at the oral hearing and from the speaking notes, it was contended by SBC that no evidence was provided by the Nominator that the skateboarders came from Lambeth and so therefore it cannot be simply assumed “that users or observers form part of the ‘local community’”.

I find the wording of George Laurence QC and Simon Adamyk at paragraph 55 of their preliminary joint opinion the most persuasive on this point:

“Obviously, many of those who take part in the activities or watch them will be from the local community (why would they not be?) and, even if they were not, the existence of a famous tourist attraction in the middle of a local community is very likely to further that community’s social well-being or social interests. In particular, we think that it is simply a non sequitur to argue that because an asset (situated within a local community) is of ‘extra-local significance’ and so valued beyond the local community, it cannot at one and the same time be an asset of local community value as well.”

Furthermore, the question is whether an actual current use furthers the social wellbeing or interests of the local community – this does not necessarily imply having to count how many local people skate or watch proceedings. It is the *use* to which the building is put which is what must further the social interests of the community and on that point I am satisfied that it does.

Taking a step back from the drilling down into the definition, it seems wholly reasonable to me, on the balance of probabilities, combined with common sense and local knowledge generally, that *some* of the skateboarders and observers must come from the London Borough of Lambeth and so to that end, their social interests are supported by the actual current use of the Undercroft.

3. Ground 3

Whether the use can continue in accordance with Section 88 (1) (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”.

The third limb of the legislative test when applied to the Undercroft has proved challenging for the reviewer as a number of representations, proposals and interventions have arisen during the course of the review period, which has necessitated the significant extension to the original timetable in order to give these 'interventions' due consideration. In brief, these included the serving of a unilateral undertaking under Section 106 of the Town and County Planning Act 1990 to re-house the skateboarders on an alternative site, together with Mayor's intervention that the skateboarding park should remain 'in situ' and that, subject to an economic viability study, he would refuse planning for the proposed commercial uses in the Undercroft.

The central plank of SBC's argument is that the Undercroft will close on 31st December 2014 unless, it has been stated, alternative funding arrangements can be made.

I note that in the Patel/Hackney case (which went to the 1st Tier Tribunal in November 2013), the Judge stated that "*it would seem to follow that an owner need only say "I have set my face like flint against any use of community value" and listing will be avoided*". He goes on to add that "*this almost makes the scheme voluntary*" which would of course undermine the objectives of the review process.

The Judge goes on to say that "*the language of the statute is consistent with a number of realistic outcomes co-existing* [my emphasis]".

At the present time, the reviewer is satisfied that there are a number of "realistic outcomes co-existing" as the judge in the LB Hackney/Patel case envisaged. It seems to the reviewer that even with the definitive statement from SBC, that there is still the possibility that the Undercroft as a skateboarding park may continue. Indeed, SBC have themselves stated that if (albeit they say it is unlikely) an alternative funding model was found to enable them to complete the redevelopment of the South Bank Centre, then this would enable the skateboarders to remain, (see the letter from Herbert Smith Freehills dated 21 February 2014). Guidance from George Laurence QC and Simon Adamyk reiterates this point when they state at paragraph 18 of their Further Joint Opinion that "*it might be realistic to think that the skateboarders might go (consistently with SBC's stated intentions) but it is **also** realistic to think that they might stay (**despite** SBC's stated intentions)*".

There is still, as I understand it, ambiguity over the enforceability of the unilateral S106 notice, the position of the Council as planning authority on the matter, and its veracity in the absence of planning permission which may or may not be in place by the end of 2014. Similarly, the

Mayor's viability study has not yet been completed, and as such his definitive position has not, as I understand it, as yet been confirmed.

On the basis that there are, therefore, a number of outcomes which might apply to the SBC's redevelopment, planning applications and processes, would seem to support the status where there are a "number of realistic outcomes co-existing", and on that basis it is the reviewer's opinion that whilst the various permutations are still being explored, the use can continue.

For the avoidance of doubt, the proposed re-provision of alternative facilities at the Hungerford Bridge is not something which is within the remit of consideration as to whether an asset should remain on the Asset of Community Value list.

Conclusion

For the reasons noted above, and to be read in conjunction with the letter from LB Lambeth dated 18th July 2013, the Reviewing Officer upholds the first panel's decision to nominate the Undercroft as an Asset of Community Value.

Next Steps

As you will be aware, if the Reviewing Officer upholds the acceptance of the nomination, then the owner can appeal to a First Tier Tribunal, part of the HM Courts and Tribunals.

Yours faithfully

Sophie Linton

Sophie Linton MA MRICS
Corporate Property Manager

Cc Simon Ricketts, King & Wood Malletsons LLP

Appendix 1

	Date	
1	14/06/13	Letter from Herbert Smith Freehills
2	05/09/2013	Letter from Herbert Smith Freehills with representations by Douglas Edwards QC
3	Various	Bundle for ACV Review
4	08/10/2013	Speaking Note for Southbank Centre Ltd by Douglas Edwards QC
5	08/10/2013	The transcript of the Review hearing
6	18/10/2013	Letter from Herbert Smith Freehills with enclosures
7	18/10/2013	Letter Southbank Centre to Herbert Smith Freehills
8	25/10/2013	Unilateral Undertaking
9	06/11/2013	Letter Southbank Centre to Long Live Southbank
10	11/11/2013	Letter from King & Wood, Mallesons SJ Berwins re unilateral undertaking
11	29/11/2013	Letter from King & Wood, Mallesons
12	03/12/2013	Letter from King & Wood, Mallesons SJ Berwins
13	15/01/2014	Letter from GLA to Lambeth re GLA stage 1 report
14	23/01/2014	Letter from Herbert Smith Freehills enclosing note from Douglas Edwards QC dated 20/01/2014
15	12/02/2014	Letter from Herbert Smith Freehills enclosing letter to King & Wood, Mallesons SJ Berwins
16	20/02/2014	Letter from King & Wood, Mallesons SJ Berwins
17	21/02/2014	Letter from Herbert Smith Freehills
18	26/02/2014	Letter from Herbert Smith Freehills
19	07/10/13	Preliminary Joint Opinion George Laurence QC and Simon Adamyk
20	10/02/2014	Joint Note for Instructing solicitors
22	25/02/2014	Further Joint Opinion George Laurence QC and Simon Adamyk