



**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
Community Right to Bid**

Tribunal Reference: CR/2014/0011
Appellant: St Gabriel Properties Ltd
Respondent: London Borough of Lewisham
Second Respondent: CAMRA - South East London Branch
Judge: NJ Warren

DECISION NOTICE

A. Background

1. The Localism Act 2011 requires local authorities to keep a list of assets (meaning buildings or other land) which are of community value. Once an asset is placed on the list it will usually remain there for five years. The effect of listing is that, generally speaking an owner intending to sell the asset must give notice to the local authority. A community interest group then has six weeks in which to ask to be treated as a potential bidder. If it does so, the sale cannot take place for six months. The theory is that this period known as “the moratorium” will allow the community group to come up with an alternative proposal – although, at the end of the moratorium, it is entirely up to the owner whether a sale goes through, to whom and for how much. There are arrangements for the local authority to pay compensation to an owner who loses money in consequence of the asset being listed.
2. This appeal concerns a pub called “the Windmill” which is situated at Kirkdale in Sydenham which is in the London Borough of Lewisham (“Lewisham”).
3. On 30 October 2013 CAMRA South East London Branch nominated the Windmill for inclusion on Lewisham’s list of assets of community value. The branch has 1,600 members of whom 674 live in Lewisham. On 20 December 2013 the

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Windmill was placed on the list. Within a month the owners, St Gabriel Properties Ltd (“St Gabriel Properties”) closed it. The owners applied for a review of the listing. A hearing followed in April 2014 and a decision confirming the listing was issued on 6 June 2014. St Gabriel Properties had complained about the way they were given notice of the listing. They also submitted that Lewisham had a conflict of interest. It is common ground that neither of these points has any relevance now to the issue immediately before me.

4. There was a hearing of this appeal on 11 December 2014. Ms Bretherton appeared for St Gabriel Properties; Mr Hopkins appeared for Lewisham; and Mr Pettigrew and Ms McKernan represented CAMRA South East London. After the hearing I received further written submissions.

B. The History

5. The Windmill is a new pub, about 15 years old. It has some modern advantages in that access for wheelchair users is good and the design is light and airy, perhaps making it attractive to some who would not conventionally use a pub. On the other hand it is large and difficult to heat. There is no staff accommodation.
6. In December 2003 a firm called London and Edinburgh Inns Ltd agreed to rent the Windmill at £92,000 p.a. rising to £104,000 p.a. in 2008 with later five yearly reviews. In July 2004 St Gabriel Properties paid £1.4 million for the freehold. The transaction was financed by a 100% mortgage. The interest on the mortgage is £64,000 p.a. In 2006 London and Edinburgh Inns became insolvent. Over the next five years, various tenants tried to make a go of the pub.
7. Some of those were skilled and experienced such as Mr Terry O’Sullivan who gave evidence at the hearing. He has had a successful career running a number of pubs. The Windmill, he told me, is the one pub he has had to give back to the owners. He did this by surrendering the lease in 2008. He says he would not want the Windmill now even at a reduced rent. At least two of the other tenants/managers ran off with the takings. More recently the pub was run by a landlady who agreed to be

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responsible for employment of staff and took a commission of about 15% of the takings. The pub has been offered for sale through various agencies.

8. That said, CAMRA South East London's application relied on (and I accept) use of the Windmill by a local allotment society for meetings and by others for darts and pool league matches, birthday parties, first communions, funerals and music nights. The pub participates in Lewisham's "City Safe Haven Scheme", a local initiative to assist the vulnerable.

C. The Nomination

9. St Gabriel Properties' first point is that there is no valid nomination in this case.
10. Land may be included in a list of assets of community value only in response to "a community nomination". See Section 89(1)(a) Localism Act 2011 ("the Act"). In the context of this case, for the nomination to be valid, it must be made "by a person that is a voluntary or community body with a local connection". See Section 89(2)(b)(iii).
11. Voluntary or community bodies are defined in Regulation 5(1) The Assets of Community Value (England) Regulations 2012 ("the Regulations") as meaning:-
- "(a) a body designated as a neighbourhood forum pursuant to section 61F of the Town and Country Planning Act 1990(1);
 - (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) an industrial and provident society which does not distribute any surplus it makes to its members; or
 - (g) a community interest company."
12. "Local connection" is defined in Reg 4 of the Regulations. In the context of this case, for a body to have a local connection with land in Lewisham, its activities

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must be wholly or partly concerned with Lewisham or with the area of a neighbouring authority. See Reg 4(1)(a).

13. There is an additional condition for those voluntary or community bodies qualifying under Regulation 5(1)(c), (e) or (f), i.e. unincorporated bodies, companies limited by guarantee and industrial and provident societies. Any surplus which they make must be applied at least in part for the benefit of the Lewisham area or of that of a neighbouring authority. See Reg 4(1)(b).
14. Finally, voluntary or community bodies within Reg 5(1)(c) – incorporated bodies – must also have at least 21 members registered to vote in Lewisham or in a neighbouring authority. See Reg 4(1)(c)
15. Ms Bretherton submits that CAMRA South East London does not fall within Regulation 5(1). In particular, it cannot come within Regulation 5(1)(c) because it is not an unincorporated body at all. On the contrary, it is a branch of a body corporate – the national CAMRA organisation. CAMRA itself, she conceded, comes within Regulation 5(1)(e); but she submitted that national CAMRA did not have a local connection within Regulation 4. In any event, it was not the national organisation which had made the nomination but its South East London branch.
16. I should here explain that CAMRA (Campaign for Real Ale Ltd) is a company limited by guarantee. Article 5 of its Articles of Association prohibits distribution of its income or property to members.
17. Article 4(h) empowers CAMRA, in pursuit of its objectives:-

 “ To establish and support branches whose objects are the same as the objects of CAMRA....”
18. I was told by Mr Pettigrew, and I accept, that any member of CAMRA living within the geographical area of the branch is allocated to that branch. The branch does not itself receive money from CAMRA head office. The main source of income is an annual local beer festival. The branch’s funds are spent on organising

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social events, supporting local breweries, publishing a news letter and campaigning, for example, for the local Greyhound pub to be rebuilt and reopened.

19. At one point during the hearing, it was suggested on behalf of Lewisham that a national body such as CAMRA might be taken to fulfil the definition of “local connection” in Regulation 4 unless it could be shown that its national activities did not impinge upon the relevant local authority and its neighbours. I am unable to accept that submission. It seems to me to be implicit in Section 89(2) of the Act that a “community nomination” cannot come from a national organisation relying solely on its national activities. Something more by way of local connection is required.
20. The case is different, in my judgement, subject to the facts of any one individual case where a national charity or national company limited by guarantee also has a network of branches. In these circumstances, to regard a local branch and a national organisation as legally separate does not accord with actualities or with the purpose of the statute. It seems to me to be entirely artificial to regard a branch’s link with a national organisation as strong enough to prohibit the branch from having an independent existence under Reg 5(1)(c) and yet not strong enough to permit the branch to take advantage of the national organisation’s status under Regulation 5(1)(e). A proper application of the regulations, in my judgement, treats organisations such as this in a hybrid way. CAMRA South East London Branch is entitled to rely on CAMRA’s status as a company limited by guarantee which does not distribute any surplus it makes to its members in order to satisfy Regulation 5(1)(e). It is then entitled to rely on its own activities in order to satisfy Regulations 4(1)(a) and (b) and I find those sub-paragraphs to be satisfied in this case.
21. I should record that, for Lewisham, Mr Hopkins also submitted that the South East London Branch satisfied Regulation 5(1)(c) as an unincorporated body. I prefer to rest my decision on what I regard as the proper and realistic approach to national organisations with local branches. However, if I am wrong in this approach then I would accept this submission. “Unincorporated body” is a broad term which includes community groups of many descriptions. St Gabriel Properties correctly

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point out that the branch constitution, unlike CAMRA's national Articles of Association, does not prohibit distribution of any surplus to members. There is no requirement, in my judgement however, for an unincorporated body within Reg 5(1)(c) to even have a written constitution; let alone a further requirement that a particular clause should be included.

22. Taking into account the branch's link with CAMRA nationally, and having heard evidence of what the branch actually does with its money, I consider that, as a matter of fact, CAMRA South East London branch would satisfy Regulation 5(1)(c)(ii).

D. The Past and Future Conditions

23. In order to qualify as land of community value, an asset must satisfy either the present and future conditions in Section 88(1) of the Act or the past and future conditions in Section 88(2) of the Act. It is convenient to set out those provisions here:-

“88 (1) For the purposes of this Chapter but subject to regulations under subsection (3), a building or other land in a local authority's area is land of community value if in the opinion of the authority—

- (a) an actual current use of the building or other land that is not an ancillary use furthers the social wellbeing or social interests of the local community, and
- b) it is realistic to think that there can continue to be non-ancillary use of the building or other land which will further (whether or not in the same way) the social wellbeing or social interests of the local community.

(2) For the purposes of this Chapter but subject to regulations under subsection (3), a building or other land in a local authority's area that is not land of community value as a result of subsection (1) is land of community value if in the opinion of the local authority—

- (a) there is a time in the recent past when an actual use of the building or other land that was not an ancillary use furthered the social wellbeing or interests of the local community, and
- (b) it is realistic to think that there is a time in the next five years when there could be non-ancillary use of the

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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.”

24. To these I should add the definition of “social interests” in Section 88(6):-

“ ‘social interests’ includes (in particular) each of the following—

- (a) cultural interests;
- (b) recreational interests;
- (c) sporting interests;”

25. As I have indicated, St Gabriel Properties closed the Windmill within a month of the listing. The original listing had been made under Section 88(1). It was common ground that the review decision had correctly proceeded under Section 88(2) and that I should do the same.

E. A Lacuna?

26. I have always taken the past, present and future conditions in the Act as dealing with uses that further “the social wellbeing or social interests of the local community”. It came to light in the course of this hearing that, whilst that phrase appears in the description of the present condition and of both of the future conditions, the wording of the past condition in Section 88(2)(a) is unaccountably different. The adjective “social” is retained in respect of “wellbeing” of the local community but omitted from the “interests” of the local community in Section 88(2)(a).

27. I am unable to detect any basis on which, in defining “social interests” in Section 88(6) Parliament could have been intending that definition to apply to the present and future conditions but not to the past condition. I therefore construe Section 88(2)(a) of the Act as having the same meaning as if the word “social” appeared in respect of both “wellbeing” and “interests”.

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F. The Past Condition

28. St Gabriel Properties submit that a pub cannot further “the social wellbeing” of a community and that the Windmill harmed the social wellbeing of Lewisham because of the dangers of alcohol and the need to reduce drinking.
29. This is a surprising submission from a company which has owned and been running a pub. I reject it. No one can doubt that alcohol has its dangers. Equally, I have no doubt that licensed premises are capable of furthering the social wellbeing and social interests of the local community.
30. Next, it is submitted that lack of customers and the “ongoing failure” of the Windmill demonstrate that the social interests of the local community were not being served and that the general social activities that took place there were no more than the efforts of the pub, futile as it transpired, to generate business.
31. I am unable to accept this submission. The figures produced by St Gabriel Properties show a turnover of £210,000 a year. That may not be enough for a comfortable profit; but nor does it demonstrate a lack of interest on the part of the local community. I agree with and adopt the approach of Lewisham’s reviewing officer, Mr Shehan, at paras 11(a) – (f) of his witness statement. In my judgement, the use of the Windmill as a pub, which was not an ancillary use, furthered the social wellbeing and interests of the local community and the past condition is satisfied.

G. The Future Condition

32. It may be that the appellants are on stronger ground in their contention that the future condition is not satisfied. I have already described the difficulties there have been in keeping the Windmill a going concern. Mr O’Sullivan, who is very experienced in the trade, would be looking for takings of £9,000-£10,000 a week for the Windmill if he were to make a success of it.
33. On the other hand, the figures produced by St Gabriel Properties to demonstrate a loss of £34,000 p.a. include an interest charge of £64,000 p.a.. I take into account

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St Gabriel Property's difficulties but this demonstrates the close connection between profitability and capital valuation. The Windmill is, everyone agrees, expensive to run compared with similar pubs. Figures on profitability are distorted if an asset is made to bear an interest charge which reflects an over valuation. Different figures have been bandied around but at one time there was a suggestion of a sale at £700,000. That would halve the notional interest bill and bring the pub much closer to profitability.

34. Again, I find myself in agreement with Mr Sheehan, the reviewing officer. Looking to the future, he describes the Sydenham area as upwardly mobile. True it is that the pub trade nationally is in the doldrums but there are examples, to which he refers, of pubs being revived in the area in the last couple of years. The Windmill has been a pub for fifteen years. Despite its past difficulties, it is, in my judgement, still realistic to think that there is a time in the next five years when it could be revived as a pub and run in such a way as would further the social wellbeing and social interests of Sydenham. I take into account what appears to be genuine interest from a keen local community organisation.

H. Article 1, Protocol 1 ECHR

35. Ms Bretherton submitted on the authority of Manchester City Council v Pinnock (2010) UKSC 45 that, because the owners' rights under Article 1 Protocol 1 ECHR are engaged, I must additionally be satisfied that it is in the public interest to add the Windmill to Lewisham's register. I entertain some doubts on both factual and legal grounds as to whether the rights are engaged; but in any event having regard to the overall scheme of the Act, including the provisions concerning compensation, this issue is not, in my judgement, one to be considered at this level at this stage.

I. Compensation

36. In preparation for the review hearing, St Gabriel Properties produced two documents said to be a claim for compensation from Lewisham. One indicated that if the review application was successful they would have a compensation claim of

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about £55,000; the other suggested that if their application was not successful they would have a claim in the region of £124,000.

37. I deprecate this manner of proceeding because of the apparent pressure it places upon the public official whose job it is to give a decision on the review. As it turned out, the official, Mr Shehan, rejected the requests for compensation.
38. Ms Bretherton asked me to reconsider this decision. I accept, however, Mr Hopkins' submission that I cannot do so. Any decision of a local authority on compensation must first go through a review procedure of its own before it becomes susceptible to an appeal to the Tribunal.

J. Conclusion

39. For the reasons I have given, this appeal fails.

NJ Warren

Chamber President

Dated 23 January 2015