



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

Tribunal Reference: CR/2015/0008
Appellant: J. Haley (Old Boot Inn)
Respondent: West Berkshire District Council
Second Respondent: S. Logan (Re-Boot Community Pub Ltd)
Judge: Peter Lane

DECISION NOTICE

Introduction

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. Section 88(1) of the 2011 Act provides as follows:-

“(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. Section 92 of the 2011 Act provides that the owner of land included in the local authority's list of assets of community value may ask the authority to review the authority's decision. Regulation 11 of the Assets of Community Value (England) Regulations 2012 (SI2012/2421) states that an owner of listed land may appeal to the First-tier Tribunal against the local authority's decision on a listing review in respect of the land.

The appeal

4. The present appeal concerns the decision of West Berkshire District Council ("the Council"), on a statutory review, to maintain in its list of assets of community value a public house known as the Old Boot Inn, Stanford Dingley, and its car park, on the basis that that land meets the requirement of section 88(1). The proprietor of the Old Boot Inn, Mr Haley, appeals against the Council's decision. The parties were content for the appeal to be determined without a hearing and I am satisfied that I can do so justly.

5. A bundle of documents has been prepared by the Council (and also by Mr Haley). I have regard to all of these documents in the process of reaching my decision in the appeal. I have also seen and had regard to a report on the Old Boot Inn prepared by Morgan and Clarke Chartered Surveyors in respect of Mr Haley's appeal against the decision of the local planning authority to refuse a change of use of the Old Boot Inn from that of a public house to a private residence. I have seen and had regard to the written criticisms of that report prepared on behalf of Mr Haley by Mr Culverhouse.

6. I have been sent the decision of 8 December 2015 by the planning inspector, dismissing Mr Haley's appeal against refusal to grant planning permission for change of use and removal of outbuildings. It is submitted on behalf of Mr Haley that the planning inspector's decision is immaterial to the present proceedings. As can be seen in previous appeal decisions, that submission is plainly incorrect. As I shall explain, the inspector's decision is relevant if and insofar as it touches on matters that are germane to the present proceedings.

7. I should also make it clear that the present appeal involves a full reconsideration by the Tribunal of all the issues, looking at the facts as they stand at the date of the Tribunal's consideration of the appeal, in order to decide whether the land in question is, in fact, land of community value within the scope of section 88(1). Thus, the issue, raised on behalf of Mr Haley, concerning the failure of the Council to inform him of the listing of the Old Boot Inn is not determinative of the appeal.

Discussion

8. It is unclear whether Mr Haley is contending that the current use of the Old Boot Inn as a pub does not at present further the social wellbeing or social

interests of the local community. In any event, I consider that it is clear from the evidence that the pub does serve such a function. The appellant has put forward no evidence to show on balance that Mr Logan's statement in the second respondent's submissions is wrong. Mr Logan said until recently he made regular use of the Old Boot Inn, and would like to do so again, were Mr Haley prepared to make him welcome. Furthermore, there is no evidence to refute the statement that, of the 24 listed nominees of "Re-boot", three quarters are known to be users of the pub, with several more amongst the unlisted nominees. It is quite clear from the evidence that the use made by the local community furthers the social well being and social interests of that community.

9. The real matter of contention in the appeal is whether the requirement of section 88(1)(b) is satisfied; namely whether it is realistic to think that there can continue to be non-ancillary use of the building which will further (whether or not in the same way) the social wellbeing or social interests of the local community. Mr Haley contends that it is not realistic. The pub is not a viable business. It has been on the market as a pub for some time but no one has been interested in purchasing it for that purpose.

10. In his nomination for listing, Mr Logan stated that "I have pledges in excess of £300,000" and that:-

"If we were to be able to buy the asset we would propose to refurbish as necessary, advertise for a suitable tenant and allow them to run the business as a commercial concern. The fact that a landlord/lady could live in the property in our lovely village would be a strong factor in attracting the correct tenant. We would also make clear that the community would need the right to run Christmas parties/village fetes/barn dances/vegetable shows/wine evenings/curry nights etc within the curtilage. These activities are extant but presently scattered across the village, often on private property, barns etc. In a non-alcoholic environment parish meetings and parish council meetings would also be held.

The Bull is also a treasured asset and we would not seek to compete with its "gastro-pub" status: concentrating more on the "pie and pint" end of the spectrum so ably demonstrated by the Bell at Aldworth or the Pot Kiln in its previous iterations. We understand that the management of the Bull do not feel threatened by this.

We feel that collective ownership of the Old Boot and its centrally placed car park would be a great feather in the cap of the village and West Berkshire in general. It would pull together many loose strands in our community and be a valuable historic asset for the wider community. "

11. The reference to the Bull is to the other pub in the village. The Bull is presently trading successfully in high-end meals, as well as having guest accommodation. Mr Haley cites the presence of the Bull as a factor demonstrating that the Old Boot is not viable as a public house. Those acting for him also point to the large number of other pubs within close proximity of the village.

12. The second respondent has received financial assistance from the Plunkett Foundation, which enabled it to commission a report from Morgan and Clarke. That report derives from Mr Clarke's over 40 years experience as a surveyor specialising in the licence/leisure business. He considers that, having regard to the wider range of pub businesses in the locality, offering food at varying levels of sophistication, it is incorrect to infer that the Old Boot would have to survive on trade from the local community. Mr Morgan sees no reason why the Old Boot and the Bull should not complement one another, appealing to different user groups. The financial history of the Old Boot does not, according to Mr Morgan demonstrate commercial unviability. The way that the Boot is being marketed for sale emphasises that viability.

13. Importantly, at 9.8.2 of his report, Mr Morgan finds that "it is more than likely that the hypothetical freehold owner of the Old Boot would utilise the premises for their own occupation and use and be hands-on rather than having a management trading regime". The present owner of the Old Boot is, according to Mr Morgan, in the nature of "a sole trading operation with a commensurate affect on wage costs. Envisaging a family or partnership trading operation which has the benefit of two double bedrooms for on-site staff accommodation, it is entirely feasible that the wage overhead would be restricted to 20%. This is directly in line with similar trading operations having the subsidy of an off-site staff accommodation. Forecasting wages at £100,000 is wildly unrealistic..." (9.14.4)

14. According to the report, it appears that Mr Haley makes only intermittent use of the integral residential accommodation available at the Old Boot and that staff members only make use of separate residential accommodation, from time to time. Mr Morgan concludes that:-

"From the GA select particulars of sale.... there is a detached cottage letting unit with ground floor double bedroom and further staff accommodation featuring a bedroom, bathroom and wc. It would be entirely acceptable to utilize these two double bedrooms for staff purposes which would predominantly be the kitchen brigade, thereby making considerable savings on wages costs. As a direct result, a reduction in staff overhead from 25% to 22%, utilizing the wage subsidy of staff accommodation, is entirely believable."

15. Mr Morgan also takes issue with the accounting figures provided by Mr Haley recording staff meals at £2,390, which Mr Morgan regards as "an unusual feature which would [not] necessarily be replicated with the new purchaser". The same applies to the accountancy charge of £4,963, which Mr Morgan regards as excessive.

16. Mr Culverhouse, on behalf of Mr Haley, challenges Mr Morgan's report. He takes issue with the use made by Mr Morgan, in examining future viability, of the EBITDA profit level (earnings before interest, tax, depreciation and

amortisation). This contrasts with the “net profit before tax” approach of Mr Culverhouse. On behalf of Mr Haley, Mr Culverhouse also submits that pubs such as the Old Boot Inn need a regular clientele as a bedrock, particularly during the winter months. So far as concerns the marketing of the Old Boot, Mr Culverhouse contends that Mr Morgan has ignored the fact that estate agents are given to adopting a “flowery” style in order to command the attention of potential purchasers.

17. As has been pointed out in other cases, the requirement in section 88(1)(b) is that it is “realistic to think that there can continue to be” relevant use of the building. Whether something is realistic does not mean that it must be more likely than not to happen. A use may be “realistic”, even though it is one of a number of possibilities.

18. In paragraph 17 of his report, the planning inspector found that Mr Haley’s:-

“financial accounts would be a significant consideration for any person or company looking to take on the public house as a business. No doubt, it could influence whether the new operator could raise finance. However, possible new operators will differ in their need to raise finance and the operating profit of a previous operator will not necessarily be the same as another operator. Therefore, estimating trading potential rather than the actual level of trade under existing control is highly relevant which is the approach taken by the DCL report and the RBCPL.” [DCL is a Council-commissioned report and RBCPL is the Re-boot Community Pub Ltd]

19. I agree with the inspector’s conclusion on this issue. If the second respondent acquires the Old Boot Inn, allowing a tenant to run the business as a commercial concern (from the tenant’s perspective), that is clearly a different proposition from an outside purchaser of the Old Boot Inn, who might have to factor-in the cost of acquiring the property in formulating its view of the business’s viability. Furthermore, as Mr Morgan’s report makes clear, if a couple were to purchase the Old Boot Inn as both a family home and a place of business, they would make more intensive and cost-efficient use of the asset than Mr Haley appears to be doing. In short, Mr Haley’s way of running the Old Boot Inn is far from being the only viable means of doing so.

20. For the purposes of determining this appeal, it is unnecessary for me to prefer one “viability method” over another. Notwithstanding the points made by Mr Culverhouse, it has not been shown that Mr Morgan’s method is so deficient that it cannot support a conclusion that it is realistic to think that relevant community use can continue. Indeed, the points made above regarding the consequences of the Old Boot being owned by, respectively the second respondent or by a couple making maximum use of the residential opportunities of the property do not require one to chose one particular profit-calculating method over another.

21. Finally, the planning decision is manifestly relevant to the section 88(1)(b) issue in that, since planning permission for change of use has been refused on appeal, it must, as matters stand, be realistic to think that Mr Haley will continue to run the Old Boot Inn as a pub, furthering local social wellbeing and interests; alternatively, that a buyer may emerge for the Old Boot Inn as a pub.

Decision

22. This appeal is dismissed.

Judge Peter Lane
Chamber President
24 February 2016