First-tier Tribunal
(General Regulatory Chamber)
Community Right To Bid

Appeal Reference: CR/2015/0013

Heard at Field House
On 3 March 2016

Before

JUDGE PETER LANE

Between

NEW RIVER TRUSTEE 7 LTD

NEW RIVER TRUSTEE 8 LTD

Appellants

and

WYRE FOREST DISTRICT COUNCIL

Respondent

and

THE FRIENDS AND RESIDENTS OF BLAKEDOWN

Second Respondent

Appearances:
For the appellants: Ms V Hutton, Counsel, instructed by DWF
For the respondents: no appearance or representation

DECISION AND REASONS

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.

The woodland

2. The appeal concerns a portion of woodland (or wooded area) adjacent to the garden of a public house in Blakedown, known as the Swan. On 16 February 2015, the second respondent nominated as an asset of community value under the 2011 Act a building and land which it described in the nomination form as "the Swan Public House and car park" and which it delineated as the "area within bold around the boundary i.e. the pub, its car park and rear garden". It appears from the plan in section 4 (bundle, page 26) that, contrary to the appellants' contention, the boundary drawn by the second respondent did, in fact, include the small area of woodland.

3. The appellants do not oppose the listing under the 2011 Act of the building comprising the Swan Inn, its car park and garden (including children's play area). The appellants did, however, challenge the council's decision, in response to the nomination, to list the land comprising the woodland. On review, the first respondent decided to maintain the listing of the woodland. The appellants appealed to the First-tier Tribunal.

The hearing

4. At the hearing of the appeal on 3 March 2016, there was no appearance by the first or second respondent. I was satisfied that both had been correctly notified of the date and place of the hearing. There was no explanation for their absence. Ms V. Hutton, counsel, appeared on behalf of the appellants.

5. In all the circumstances, I was satisfied that it was in the interests of justice to proceed with the hearing. I heard submissions from Ms Hutton.

6. In reaching my decision in this case, I have had regard to those submissions and also to the written materials comprised in an appeal bundle running to 72 pages, together with an additional photograph and a skeleton argument from Ms Hutton. The fact that I do not refer to a particular submission or part of the written materials is not to be taken as indicating that I have not considered the same.

Legislation

7. Section 88 of the 2011 Act provides as follows:-

> "88 Land of community value
>
> (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 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."
>
> (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.

(6) In this section—

"legislation" means—

(a) an Act, or

(b) a Measure or Act of the National Assembly for Wales;

"social interests" includes (in particular) each of the following—

(a) cultural interests;

(b) recreational interests;

(c) sporting interests;

"statutory provision" means a provision of—

(a) legislation, or

(b) an instrument made under legislation."

9. Section 108 includes the following definitions:-

""building" includes part of a building;

…

"land" includes—

(a) part of a building,

…."

The issue

10. As indicated earlier, the issue in this appeal is whether the wooded area should be included in the list maintained by the first respondent under the 2011 Act. According to the first respondent's review:-

> "The wooded area, in my view, performs a physical function of providing a visual and aural buffer to the beer garden and play area such that, if it were not present, there would be detriment to the overall asset of the public house beyond that of simply enhancing the ambience. In my view the wooded area performs an actual current use that is not ancillary and that it therefore does meet the requirement of s88(1) of the Localism Act 2011.
> …
> The question here is whether the wooded area is demonstrably part of the overall unit of the asset being proposed such that the nominating body intended it to be included. From my visit to this site I formed the view I took in respect of my conclusion on your primary case above, I consider that the wooded area is an intrinsic part of the Swan Public House overall asset and that it forms part of what the nominating body, and I believe any individual, would consider to be the overall boundary of the asset. I do not believe therefore that it was an oversight of the nominating body but they clearly included the wooded area within the boundary of the plan at section 4 of the nomination form, despite there being no direct mention of the land in the written description. In my view, the nominating body would have considered this land to be non-ancillary as I conclude above and thus I am satisfied that the pub, car park, beer garden, play area and wooded area should remain as the single discrete asset on the list described as "Swan Public House & Car Park""

Discussion

11. In cases of this kind, the task of the Tribunal is to decide whether there is a sufficient physical and functional relationship between the land in dispute and the land as regards which (if it were taken on its own) the requirements of section 88(1) or (2), as the case may be, would be satisfied. The task is a fact-sensitive one. Just as the concept of the "planning unit" is not determinative of questions arising under the 2011 Act and the Regulations (see e.g. Wellington Pub Company v Royal Borough of Kensington and Chelsea and another: CR/2015/0007), so too, in the present case, the fact that the woodland is included in the same Land Registry title as the pub, car park and garden is not determinative.

12. Accordingly, the issue in the present appeal is whether, on all the relevant facts, there is a sufficient physical and functional relationship between the woodland and the other land contained within the nomination (the pub etc).

13. Whilst I have had due regard to the views of the officer of the first respondent who carried out the review, the overall evidence leads me to conclude that, as a matter of fact, there is no sufficient physical or functional relationship between the woodland and the pub etc. So far as the physical aspect is concerned, whilst the woodland is contiguous with part of the pub garden and play area, the woodland is fenced off from them. There is no physical access from the pub, car park or garden to the woodland. The aerial photograph of the site in my view shows quite clearly that the woodland is part of a much larger area of woods that extends to the northeast, along the railway line, as well as a smaller area to the southwest. Anyone looking at the photograph, without the benefit of lines delineating ownership, would regard all of the woodland (including that belonging to the appellants) as a single piece of wooded land.

14. There is, I find, no functional relationship between the disputed wooded area and the pub etc. The evidence shows clearly that no actual use is made of that woodland by customers of the pub (or by its staff). Although it is suggested by the first respondent that the woodland acts as an acoustic barrier between the pub garden and the railway line, there is no actual evidence to support this. In any event, it is clear from the plans and photograph that, even if the appellant's woodland was not there, a much greater degree of acoustic screening is likely to be provided by the remaining woodland, which is not in their ownership.

15. That last point also disposes of any argument regarding the visual impact of the railway, so far as the garden is concerned.

16. Finally on this issue, I accept Ms Hutton's submission that, in considering the issue of noise, it is relevant to observe that the A456 Birmingham Road passes directly outside the pub, car park and garden and that the pub and garden are, in fact, very much closer to that road than they are to the railway.

17. In my view, the fact that the wooded area is held by the appellants under the same legal title as the pub, car park and garden is not such as to constitute the requisite physical and functional relationship, in the light of the findings I have just set out. Accordingly, for the purposes of listing under the 2011 Act, the area falls to be examined separately.

18. Considered in these terms, the woodland cannot satisfy the requirements of section 88 of the 2011 Act. There is no "actual current use" of the land that furthers the social wellbeing or social interests of the local community. The community makes no physical use of it whatsoever. The fact that members of the local community, sitting in the garden of the pub, might enjoy looking at the

woodland is, in my view, insufficient (see Banner Homes Ltd v St Albans City and District Council and Verulam Residents Association (CR/2014/0018).

Decision

19. The woodland/wooded area does not meet the requirements of the 2011 Act for listing as an asset of community value and should, accordingly, be removed from the first respondents list. The appeal is, accordingly, allowed.

Judge Peter Lane

11 May 2016