FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
Community Right to Bid

Appeal Reference: CR/2015/0020

Decided at Field House without a hearing
On 6 June 2016

Before

JUDGE PETER LANE

Between

HAWTHORN LEISURE LIMITED

Appellant

and

BRACKNELL FOREST BOROUGH COUNCIL

Respondent

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.

Legislation

2. 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 the legislation."

Nomination, listing and appeal

3. On 18 May 2015, Winkfield Parish Council nominated the Royal Hunt Public House, New Road, Ascot as an asset of community value under the 2011 Act. The Royal Hunt ceased to operate as a pub in February 2015. According to the nomination, the Royal Hunt was the:-

> "last one remaining of originally five in the area. There is a need for a community Public House and this site is well served by a populated area. There appears to be a move to change the use of the building to a small general store. This is not needed in this area as it is already well served by two general stores – Costcutters on Fernbank Road and Londis on New Road. A petition is circulating [in] the local community and already has numerous signatures".

4. On 4 June 2015, the Royal Hunt was listed by the respondent. It did so on the basis that the requirements of section 88(2) of the 2011 Act were met; namely, that

there was a time in the recent past when an actual current use of the property furthered the social wellbeing or social interests of the local community and that it was realistic to think that there is a time in the next five years when there could be such a use of the property (whether or not in the same way as before).

5. At the request of the appellant, the respondent undertook a review of the decision to list. The result of the review was that the premises should remain listed.

6. The appellant appealed that decision to the First-tier Tribunal. Both parties were content that the appeal should be determined without a hearing. In all the circumstances, I was satisfied that the Tribunal could justly do so. In reaching my decision I have considered the material set out in the bundle prepared in connection with the appeal. This runs to 488 pages, together with a document entitled "respondent's reply to appellant's further comments dated 17 February 2016 pursuant to the response to the appellant's freedom of information request". The fact that I do not refer in this decision to any specific document is not to be construed as indicating that I have not considered the same.

7. The appellant appealed on four grounds. Ground 1 contends that the requirements of section 88(2) are not satisfied in the case of the premises. Grounds 2 and 3 contend that the nominator did not provide any reasons why it believed the premises were of community value, contrary to regulation 6(c) of the Assets of Community Value (England) Regulations 2012 and failed to include details regarding the proposed boundaries of the nominated land, contrary to regulation 6(a). Ground 4 contends that the respondent failed to conduct the review in accordance with the requirements of paragraph 4 of Schedule 2 to the Regulations.

8. Regulation 6, so far as relevant, provides as follows:-

> "A community nomination must include the following matters -
>
> (a) the description of the nominated land including its proposed boundaries;
>
> … … … … …
>
> (c) the nominator's reasons for thinking that the responsible authority should conclude that the land is of community value
>
> … … … … …".

9. Paragraph 4 of Schedule 2 provides as follows:-

> "An officer of the authority of appropriate seniority who did not take any part in making the decision to be reviewed ('the reviewer') shall carry out the review and make the review decision".

Discussion

10. I shall deal first with grounds 2 to 4. So far as ground 2 is concerned, the reason given by the nominator was, as set out above, that there was a need for a community pub. As the respondent points out, that plainly constitutes a reason. Its significance is a different matter.

11. As for the alleged misdescription of the property (ground 3), I find no substantive merit in this complaint. I accept the respondent's submission that it was obvious from the identification on the nomination form of the property, together with its postcode, that the premises comprising the "Royal Hunt" and its curtilage were being nominated. The appellant has failed to show that some other property, or part thereof, has been nominated, which is not the "Royal Hunt".

12. Ground 4 is, likewise, rejected. The evidence shows clearly that the review was carried out by Ms Alison Sanders, the respondent's Director of Corporate Services. There is no evidence to show on balance that Mr Simon Heard, who was involved in the original nomination, took any material part in the review.

13. If and insofar as the appellant appears to be continuing to contend that a councillor of the respondent and the Parish Council colluded to "elicit a nomination from Winkfield Parish Council", I find on balance that the evidence does not disclose such a state of affairs. In any event, even if there had been relevant communication between a councillor of the respondent and the Parish Council, far more would be needed from the appellant in order to begin to amount an arguable case that the nomination, if otherwise valid, should be treated as a nullity.

14. I turn to the issue of whether the requirements of section 88(2) are met. I find as a fact that there was a time in the recent past when the Royal Hunt furthered relevant interests, as required by section 88(2)(a). The pub was functioning in the way described by the nominator until February 2015. Although the appellant criticises the terseness of the nominator's statement regarding the Royal Hunt being a "community public house", no evidence has been adduced to show that this statement is incorrect. Furthermore and in any event, since the Royal Hunt was the last remaining pub of five in the area, it is more likely than not that it served the function of a meeting place for residents to socialise.

15. The real issue is whether the requirement in section 88(2)(b) is met. What is realistic may admit of more than one answer. In other words, more than one scenario may, simultaneously, be a realistic one.

16. The appellant has not drawn my attention to any evidence to show that the Royal Hunt was in terminal decline as a pub, prior to its closure in early 2015. The appellant's grounds of appeal merely say that when "the previous tenant's lease was due for renewal in February 2015, it was decided by mutual consent not to renew the lease and the property was subsequently closed".

17. Much is sought to be made by the appellant of the fact that, according to it, in March 2015 the Royal Hunt became a retail convenience store. Until 15 April 2015, general permitted development rights in England permitted the change of use of restaurants, cafés, takeaways and pubs to retail, without the requirement to obtain specific planning permission. On 15 April 2015, the position changed as a result of the coming into force of the Town and Country Planning (General Permitted Development) (England) Order 2015 (SI 2015/596). A change of use from that of a pub, etc. to a shop, etc. is no longer permitted without express planning permission, *inter alia* if the building in question is listed under section 87 of the 2011 Act as an asset of community value.

18. The appellant contends that a change of use from pub to shop occurred before 15 April 2015. The appellant, accordingly, applied to the respondent (as local planning authority) for a certificate of lawful existing use pursuant to section 191 of the Town and Country Planning Act 1990. The respondent refused to issue such a certificate and the appellant has appealed against that refusal.

19. I consider that it is necessary, in determining whether section 88(2)(b) is met, to have regard to that present, uncertain position. The fact that any use of the premises as a retail store may not, in the event, be lawful (at least without express planning permission), coupled with the absence of any planning permission for any use other than as a pub, leads me to conclude that resumption of pub use is one of the realistic scenarios. There is no evidence to show that the appellant would be willing and able to leave the Royal Hunt as an economically unproductive asset for a significant period of time. Of course, the appellant *may* do so; but that does not render unrealistic the scenario just described.

20. I have, in any event, come to the conclusion that, even if the appellant is correct in its assertion that shop use of the Royal Hunt is already legally possible, the requirement of section 88(2)(b) is still met. Even if what the appellant did between mid-March and 15 April 2015 was legally sufficient to constitute use as a shop, the evidence before me wholly fails to show that the retail store operation has any realistic future.

21. The appellant makes much of the fact that it has entered into an agreement for a lease of the premises to the Southern Co-Operative Limited. That agreement is, however, heavily redacted and I am unable to give it any material weight. My attention has not been drawn to any evidence from the Co-Op as to its plans for running its own retail business from the Royal Hunt. That point is, in fact, underscored by the fact that a Jamie Thomas was given a tenancy at will by the appellant on 25 March 2015 to use the premises "as an A1 shop". The tenancy at will was for a nominal sum of £1 per month including VAT, with termination on one week's notice. Ms Lynn Bollingbroke was employed by Mr Thomas to run the convenience store, apparently on her own, between 09:00 and 17:00 hours Monday to Saturday. Ms Bollingbroke is said to be paid £200 per week.

22. At pages 265 and 266 of the bundle, one finds a "trading report 25 March-15 August 2015" for the convenience store. Leaving aside the sale of six stools, one chair and five garden/indoor tables from the pub, the total value of sales over this period of almost five months was a mere £324.30. This does not begin to cover Ms Bollingbroke's stated salary.

23. It is also noteworthy that the evidence discloses the convenience store was seen to be closed on a number of occasions, which is attributed by Ms Bollingbroke to her having a twenty minute break during each day.

24. There are a considerable number of copy black and white photographs showing items for sale in the store, such as toilet rolls and bottles of sauce. Many of these items appear to be placed on shelves that are inconveniently close to the floor. The general impression one gets from these photographs is of a distinctly temporary-looking and unappealing establishment.

25. Overall, it is wholly unrealistic to expect this retail enterprise (if such it be) to continue for any significant period of time. There is no evidence to suggest that Mr Thomas has any plans to develop and/or improve his business. Likewise, there is an absence of evidence to show that, were that business to cease, it is realistic to expect some other retail food establishment to take its place. I note that there are already existing food stores in the area supposedly served by the Royal Hunt. There is also no evidence to show that it is realistic to expect any other, different kind of shop to be established at the Royal Hunt.

Decision

26. For these reasons, I find that the evidence shows on balance that it is realistic to think that there is a time in the next five years when the Royal Hunt could resume its role as a community pub. I note what the respondent says regarding shop use potentially falling within the scope of section 88. However, the current retail store use has not been shown to have the relevant social character and, as I have just found, it is not possible to conclude that any other shop use, bearing such a character, will realistically emerge within the relevant period.

27. This appeal is dismissed.

Judge Peter Lane

Date: 23 June 2016