



IN THE FIRST-TIER TRIBUNAL

Appeal No: CR/2015/0024

**GENERAL REGULATORY CHAMBER
(COMMUNITY RIGHT TO BID)**

Appellants: Fernwick Limited and Mr R Hammond

Respondent: Mid Suffolk District Council

Second Respondent: CAMRA Ipswich and East Suffolk Branch

Date of Decision: 21st July 2016

Date of Promulgation: 22nd July 2016

Before

Simon Bird QC

Judge

DECISION NOTICE

A Introduction

1. The Localism Act 2011 (“the 2011 Act”) requires local authorities to keep a list of assets (meaning buildings or other land) which are of community value. 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, a sale cannot take place for six months. The intention is that this period, known as “the moratorium”, will allow the community group to come up with an alternative proposal. However, at the end of the moratorium it remains up to the owner whether the asset is sold, to whom and at what price. There

are arrangements for the local authority to pay compensation to an owner who loses money in consequence of the asset being listed.

B Legislation

2. Section 88 of the 2011 Act provides so far as is material to this appeal:

“(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”.*

C The Listed Asset

3. This appeal concerns the Henley Cross Keys Public House (“the Cross Keys”) which is situated on the junction of Main Road and Bells Cross Road in the parish of Henley. The Cross Keys lies approximately 700 metres north of the settlement boundary for the village of Henley as defined in the Local Plan. The building was constructed in the early 20th Century as a public house but closed to the public in 2014. By nomination dated 9 June 2015 the Second Respondent (a nominating body for the purposes of the 2011 Act) successfully applied to the First Respondent for the Cross Keys to be added to its List of Assets of Community Value (“LACV”). A review of that decision took place at the request of the Appellants in October 2015 when the Council decided to maintain the Cross Keys on the LACV.
4. The Appellants appealed to the Tribunal against that decision by notice dated 4 December 2015. All parties have consented to this appeal being determined without a hearing and I am satisfied that I can properly determine the issues without one. I do so by means of a full reconsideration.

D The Issue

5. There is no dispute in this appeal that the Cross Key was, until its closure in 2014, in a use which furthered the social well being or social interests of the local community and that this is sufficiently recent to fall within the recent past for the purposes of section 88(2)(a) of the 2011 Act. The issue in dispute is whether the future condition contained in section 88(2)(b) is satisfied i.e. *is it 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 well being or social interests of the local community.*

E The Background

6. The Cross Keys was purpose built as a public house in the early 20th Century. It has a car park to the south of the building and, save for a dwelling s short distance beyond and a farmhouse diagonally opposite, it lies in the open countryside. The road from the village of Henley to the Cross Keys has no footpath or street lighting and has an unrestricted speed limit.
7. The Cross Keys is the last public house in the vicinity of Henley, however within the village (i.e. within its settlement boundary) there is a Village Hall which provides a range of facilities for the local community including licensed alcohol sales. These sales are only available at limited opening times staffed by volunteers.
8. There are alternative pubs and restaurants available within a relatively short driving distance of Henley including The Swan at Westerfield, The Fountain at Tuddenham and the Sorrell Horse at Barham.
9. Fernwick Limited purchased the Cross Keys on 1 October 2013 having made an initial offer for the premises in March 2013. It did so as a vehicle for Mr Roy Hammond and his wife, daughter and son-in-law to operate as a family venture. The purchase price was £190,000 net of VAT. The Cross Keys was open for business in March 2013 but closed before Easter of that year. It appears to be undisputed between the parties that the public house had had a chequered recent history with a number of landlords struggling to make a go of the business.
10. Mr Hammond had previous experience in the pub trade, having been the tenant of The Jolly Sailor in Orford for two years. The purchase of the Cross Keys was a family venture which sought to replicate the family' success at Orford. Following their purchase of the premises, the kitchens were upgraded, other improvements were effected and the building was decorated both inside and out to a total cost of some £73,657.

11. Following the works of renovation and improvement the Cross Keys re-opened to customers on 20 November 2013 with the re-launch extensively advertised and promoted. Whilst the works were being undertaken, the Appellants had also applied to First Respondent for planning permission to demolish an outbuilding, to extend the pub car park and to erect a new dwelling for use in conjunction with the Cross Keys. The intention was that the existing accommodation within the pub would be upgraded to provide accommodation for visitors and one of the chefs with the new dwelling to provide accommodation for the Hammond family tied to the public house use. This application had the support of the Henley Parish Council but it was refused by the First Respondent on 27 May 2014.

12. Following this refusal of planning permission, Mr Hammond met with the First Respondent's Case Officer on the planning application in July 2014 to consider options which included the option of applying for planning permission for the change of use of the Cross Keys to a dwelling. The First Respondent has a Supplementary Planning Document entitled "Retention of Shops, Post Offices and Public Houses in Villages" which it adopted in 2004. This states that the change of use of a village pub to an alternative use will not be permitted unless:
 - (i) At least one other public house exists within the settlement boundary or within easy walking distance if it;
 - (ii) It can be demonstrated by the applicant that all reasonable efforts have been made to sell or let the property as a public house and that it is not economically viable; and
 - (iii) There is no evidence of significant support from the community for the retention of the public house.

13. On 31 July 2014 Fleurets Leisure Property Specialist were instructed to market the Cross Keys as a pub at an asking price of £350,000 with the fixtures and fittings in place. Over the two month period to 3 October 2014 they reported a good response with 117 expressions of interest from people requesting the sales particulars but this did not translate into requests to view the property from anyone nor were any offers for the premises received. An application for planning permission to change the use of the Cross Keys to a dwelling was then made to the First Respondent with the pub closing to customers in November 2014, trade having tailed off from the Spring of 2014. The Trading and Profit and Loss Account for Fernwick Ltd for the period 20 November 2013 to 31 August 2014 shows sales of £169,520 with a profit of £1,238 once the costs of sales and other expenditure had been allowed for.

14. During the consultation period on the planning application two identical offers of £230,000 were made for the freehold of the premises and adjoining land. One of the offers was made by a group of 6 local people, with the other made by one of those six persons. Both offers were made on the basis that there should be no overage clause within any sale agreement allowing the Appellants to recoup any uplift in value

attributable to any subsequent grant of planning permission for conversion of the Cross Keys to a dwelling.

15. The First Respondent's planning officer expressed concern at the asking price for the Cross Keys within the marketing and, in consequence, the planning application was withdrawn (on 22 January 2015) with the marketing continuing in February 2015 at the reduced price of £295,000. Marketing at this price was undertaken until July 2015.
16. On 20 May 2015 the Appellants applied once again for planning permission for the change of use of the pub to a dwelling and also for removal of part of the existing car park. Henley Parish Council objected to the proposed development believing that the building should be retained as a pub/restaurant as it was an asset to the village and could have a future as a business. There were also 14 letters of objection to the proposed change of use of the premises with comments which included that the advertised asking price was too high, that alternative management could retain the pub, infrequent opening hours and reduced quality of food had led to the falling sales, the development on the Ipswich Fringe could increase customers in the future and further marketing at a reasonable price was required.
17. Notwithstanding these comments, at a meeting of the First Respondent's Development Control Committee on 2 December 2015, the Council's officers recommended that planning permission be granted. Applying the criteria of the First Respondent's Supplementary Planning Document, they concluded that:
 - (i) the existence of the Village Hall meant that it would be unreasonable to regard the Cross Keys as the only reasonable alternative for drinking, dining and community social events in the vicinity of Henley;
 - (ii) that an eight month marketing period was acceptable given the comparatively recent marketing which had led to the Appellants' purchase and, whilst there was no evidence of a formal valuation the asking price of £295,000 should be viewed in the context of the purchase price of £190,000 and the costs of repairs/improvements of £73,657; and
 - (iii) Whilst there was community support for the retention of the pub, the evidence submitted with the planning application did not show there was sufficient in the form of trade to make the business viable.
18. At the meeting of the Development Control Committee, Henley Parish Council spoke and advised that the Cross Keys had been a problem over the years with landlords unable to make a success of the business. For that reason the Parish Council had supported the earlier application for which would have enabled accommodation for guests to be provided. The refusal of the application had led to the pub being put on the market and a change of use being applied for. The Parish Council stated that the business had not appeared to be failing before this with cars in the car park and food on offer. In its view, there was a sufficiently large catchment and with investment, the business could succeed. It appeared that the business had not been given a chance, it was closed down

while on the market and not sold as a going concern and the Parish Council felt that the price was not appropriate to achieve a sale.

19. The Appellant's agent advised the Committee that the marketing of the property had continued but that no offers had been received. This included within the six week interim period following inclusion of the Cross Keys on the LACV and notification of marketing. The asking price reflected the valuation by Everard Cole Ltd who were experts in the sale of public houses.
20. The First Respondent's Committee refused the application on ground that it had not been satisfactorily demonstrated that the public house had been appropriately marketed with a clear independent valuation and failed satisfactorily to demonstrate that the business was not viable. Coupled with the significant community support, the proposed change of use was concluded to be contrary to the Council's supplementary planning document.

F The Appellant's contentions

21. The Appellants contend that the Cross Keys should be removed from the LACV because:
 - (a) The property has been marketed at a reasonable price and for a reasonable time and the Council's officers were satisfied of this;
 - (b) The location of the pub is not a realistic one for a community facility given it is not within the village, it has a poor linkage to the existing settlement in contrast to the Village Hall and it is not within reasonable walking distance of the village. The First Respondent's argument that proximity to the village of Barham is relevant is strongly disputed;
 - (c) The Appellants gave notice of intention to dispose of the pub, triggering a six week interim moratorium period during which community interest groups were able to express an interest so as to invoke the six month moratorium period. No such expression of interest was received. The Parish Council has explained that it did not (and will not) do so because it is committed to supporting the Village Hall and would not wish to acquire or incur expenditure on what would be a competing second community facility;
 - (d) It must logically follow that there is no realistic prospect of a non-public house community use in the Cross Keys which would, in any event, be contrary to the First Respondent's planning policies given its unsustainable location; and
 - (e) The body genuinely representing the community neither nominated the pub as an ACV nor expressed an interest in taking it over and it is unrealistic in any event to think that they could raise the funds to acquire and operate a second community facility within the five year period or at all.

G The First Respondent's contentions¹

22. The First Respondent argues principally that:
- (a) It is relevant that the Cross Keys is in proximity also to the village of Barham which is within walking and cycling distance. It is also within driving and cycling distance of Claydon;
 - (b) It is not accepted that the Cross Keys was marketed at a realistic price for a reasonable period of time before seeking to establish residential development;
 - (c) Different considerations apply to the consideration of planning applications than to the decision to list assets of community value;
 - (d) An offer to purchase the Cross Keys was made by a local syndicate albeit not at the asking price;
 - (e) The improvements undertaken by the Appellants were business expenses off-settable against Corporation Tax and which should not add to the value of the Cross Keys and (in the alternative) not every property transaction makes a profit;
 - (f) The building is perfectly adequate to accommodate a multi-use community facility;
 - (g) The Appellants' have demonstrated only one allegedly failed model for community use of the Cross Keys; the local community may have greater imagination and have been denied the opportunity by the unseemly rush to off-load the property.

H Findings

23. I find as a fact that the requirement contained in section 88(2)(b) is not satisfied. It is not "*realistic*" to think that there is a time in the next five years when there could be non-ancillary use of the Cross Keys that would further (whether or not in the same way as before) the social wellbeing or social interests of the local community.
24. The undisputed evidence is that the Cross Keys has struggled under more than one landlord. The Hammond family came to pub as experienced operators clearly with the best of intentions but despite significant investment in the premises, struggled to make profit. A scheme to make the business more attractive commercially through the provision of accommodation but reliant on the construction of a new dwelling, proved unacceptable to the First Respondent and there is nothing in the submissions made on its behalf in this appeal to indicate that there is any prospect of that position changing in the next five years.
25. The evidence of the marketing of the premises over the period October 2014 to December 2015 shows that the Cross Keys has no commercial attraction. Taken as a whole the overall marketing period is a substantial one. There is therefore no evidence that this pub, in this location is likely to have any attraction to those with a different business model to that of the Appellants in the future even allowing for sources of trade as broad as the First Respondent contends for.

¹ The Second Respondent made no substantive representations on the appeal

26. Whilst I note the concerns expressed by the First Respondent and others about the Appellant's asking price, save for two offers of £250,000 from local residents, there is no evidence of any interest in the pub at lower values. Those two offers were conditional on there being no overage clause allowing the Appellants to claw back the increase in value of the premises in the event that planning permission were subsequently granted for residential conversion of the pub. Further, there is nothing before me to indicate that the interest was maintained. They provide scant support to support the argument that there would have been genuine interest from potential operators of the pub, particularly those who might operate on a non-commercial basis, had the asking price been lower. I therefore attach little weight to those offers in my conclusions.
27. Whilst there is community support for retention of the Cross Keys as a pub, that has to be seen in context. The support is for the continued protection of the use rather than any clear support in the form of willingness to take on the Cross Keys and to attempt to run it as a going concern. On the evidence, the Parish Council's priority is, understandably, the Village Hall. It has no apparent interest in acquiring or assisting in the running of another licensed premises to serve the Parish. Likewise, the Second Respondent as nominator for inclusion in the ACLV, acted to protect and not to involve itself in the acquisition and/or operation of this pub.
28. Taken together, the inability of the Appellants to make a success of the business despite significant investment, the absence of any commercial or any meaningful voluntary sector interest in running this public house in this location and the absence of any evidence that proposals which might improve the viability of the Cross Keys being acceptable to the First Respondent in this location lead me to conclude that it is not realistic to think that public house use could be made of the building within the next five years.
29. I also conclude that it is not realistic to think that the building could be used for any other use that would further the social well-being or social interests of the local community. Whilst the building might be of a form and/or design which might be suitable for such a use, there is no evidence that there are any realistic proposals for such uses or that there is any prospect of such proposals emerging in the next five years. Whilst there is no requirement that there be business plans or similar to support suggested uses which might be made of buildings, there must be more than mere speculation to support a finding that it is realistic to think that they could materialise in the next five years in a building located some distance from the settlement(s) it would principally serve. There is no such evidence in this case.
30. For these reasons the appeal succeeds.

SIMON BIRD QC

21 July 2016