



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

Appeal Number: CR/2019/0008 - V

**Heard via the Cloud Video Platform
On 30 November 2020**

Before

UPPER TRIBUNAL JUDGE O'CONNOR

Between

SATWINDER SANDHU

Appellant

and

SOUTH OXFORDSHIRE DISTRICT COUNCIL

First Respondent

and

GORING HEATH PARISH COUNCIL

Second Respondent

Representation:

For the Appellant: In person
For the First Respondent: Mr Michael Lee, of Counsel
For the Second Respondent: Mr Peter Dragonetti - Vice Chair

DECISION AND REASONS

Preamble

1. The hearing was undertaken using the Cloud Video Platform. All parties were able to fully participate and there were no technical difficulties during the course of the hearing.

Introduction

2. This appeal concerns a decision of South Oxfordshire District Council (“the Council”) to include land owned by Mr Sandhu (“the appellant”), namely the premises known as The White Lion, Crays Pond (“the White Lion”) on its List of Assets of Community Value under the Localism Act 2011 (“the 2011 Act”).
3. The 2011 Act 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. Broadly, the effect of listing is that an owner intending to sell the asset must give notice to the local authority. A Community 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. This period, known as “the moratorium”, allows 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.
4. Pursuant to Regulation 11 of the Assets of Community Value (England) Regulations 2012 (“the 2012 Regulations”) Mr Sandhu appeals the Council’s decision of 2 October 2019 to uphold the listing of the White Lion. The application for the White Lion to be included in the list of Assets of Community Value was made by the second respondent (“the Parish Council”).

Legislation

5. Section 88 of the 2011 Act provides:

“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." (emphasis added)

The Asset

6. The White Lion is situated in Crays Pond, South Oxfordshire, which is a hamlet of approximately 90 houses situated around the crossroads of the B471 and the B4526. It is located between the larger settlements of Goring, Woodcote and Pangbourne/Whitchurch.
7. The White Lion - a two-storey property with various extensions, a sizeable parking area and a large garden - is situated next to the crossroads. It has been a public house for approximately 100 years. In his evidence, which I accept, Mr Dragonetti described the layout of The White Lion as having a "*bar snug area to the left*" and a restaurant to the right of the entrance, with the restaurant having been extended to enable better restaurant operation.

8. In August 2013, The White Lion ceased trading. Save for a brief period in 2018, when one room was opened for two evenings per week for the sale of whisky, it has not since traded.

The Appellant

9. Mr Sandhu purchased The White Lion from Greene King in October 2013. Until a date in 2019, he and his family made residential use of the property. On 21 February 2019, Mr Sandhu was ordered by the High Court to cease using The White Lion for residential purposes and he subsequently vacated the property.

The Appeal

10. The White Lion was first listed as an Asset of Community Value by the Council in October 2013. That listing expired in October 2018. On 22 May 2019, the Parish Council nominated The White Lion as an Asset of Community Value. The Council again listed The White Lion as an Asset of Community Value on 4 June 2019. The appellant sought a review of that decision, which the Council carried out at a hearing on 18 September 2019. The outcome of the review, dated 2 October 2019, was that The White Lion should remain listed. The appellant appeals against that decision and thus the matter comes before me.

The Issues in the Appeal

11. The parties agree that Section 88(1) of the 2011 Act does not apply, because The White Lion is closed. Consequently, the appeal falls for consideration under Section 88(2) of that Act. The broad issues for the Tribunal to determine are, therefore, whether:
 - (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 interest 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.

Discussion

12. In coming to my conclusions, I have considered the documentation contained within the 209-page hearing bundle, a skeleton argument drawn on behalf of the Council by Mr Lee, oral evidence from Mr Dragonetti and the oral submissions of the parties. The fact that I do not mention below particular aspects or features of the evidence or submissions does not mean that I have not taken such evidence or submissions into account when coming to my conclusions.

13. The burden of proof in satisfying the Tribunal that the decision under appeal is wrong, lies with the appellant. Where evidence is disputed, the relevant standard of proof is the balance of probabilities.

Section 88(2)(a) of the Localism Act 2011

14. In my conclusion the requirements of section 88(2)(a) of the 2011 Act are made out.
15. The term “*in the recent past*” (found in section 88(2)(a)) is not defined in the 2011 Act or in the Regulations. In setting out the ‘future condition’ (section 88(2)(b)) Parliament chose to provide for a definite period of five years, whereas in legislating the ‘past condition’ (section 88(2)(a)) Parliament was deliberately imprecise, choosing to restrict the operation of that provision to relevant events falling within the “*the recent past*”. It is not for the Tribunal to bring precision to the ‘past condition’ when Parliament has deliberately chosen to use imprecise language. What constitutes the recent past is a flexible concept and must depend upon all the circumstances of a particular case.
16. As previously alluded to, The White Lion operated as a public house for over 100 years and did not cease trading until August 2013. For an unknown period during that time, it also operated as a restaurant. I accept that the restaurant operated during the entirety of the 21st century until the closure of the business.
17. In his skeleton argument Mr Lee helpfully summarises (in the terms which follow) the evidence put forward by the Council in support of the contention that when The White Lion was open and trading it furthered the social wellbeing and/or interests of the community (the references in bold are to pages in the bundle before the Tribunal, and ostensibly comprise of letters and correspondence from members of the local community that were attached to the ACV nomination):
- “16.1. As a village public house, the White Lion served as a social meeting point for members of the local community in Crays Pond, a village which otherwise lacks public space (see **p. 59-60**).
- 16.2. It was used for that purpose, in particular, by elderly residents, as well as by residents of a nearby convalescent home specialising in treating police officers, who could walk to the White Lion to interact socially outside the confines of their residences (see **pp. 59-60**)
- 16.3. The White Lion was used as a meeting place for parents and teachers of a nearby school (see **pp. 59, 62 and 67-68**).
- 16.4. It was also used for meetings of a number of other local groups, including the Woodcote Rally Committee (see **p. 59 and 67**), the Kennet Morris Men (see **p. 60**), the Scouts/Guides (see **p. 63**), and a radio club (see **p. 70**).
- 16.5. Larger community events such as Christmas and New Year parties, and summer barbeques, were organised, whilst the large garden provided a space for children (see **pp. 67 and 70**).

- 16.6. The White Lion was also used by members of the local community to celebrate significant live events such as birthdays, christenings, and engagements (see pp. 62, 64-66 and 70).”
18. For his part, Mr Sandhu does not bring dispute to the individual matters identified in Mr Lee’s skeleton argument. He does, however, submit that the events described therein took place before 2000 and that after that time The White Lion was primarily run as a restaurant, albeit a successful one between 2000 and 2008 and thereafter as a loss-making venture which was not supported by the local community. He asserts as a consequence that the evidence does not show that there was a time in the recent past when the actual use of The White Lion furthered the social wellbeing or interests of the local community, as required by Section 88(2)(a).
19. Mr Dragonetti’s oral evidence touched on this issue. He described The White Lion as a centre for people to meet, including the Woodcote Rally Committee and the residents of the nearby police convalescent house. He also recalled teachers and parents, associated with the local school, meeting there – including for coffee in the mornings. He had visited The White Lion to both drink and eat.
20. Looking at all of the evidence as a whole, I accept that those features of the use of The White Lion set out in the evidence attached to the ACV nomination, and summarised in paragraph 17 above, took place and that they did so, at least to some extent, well into this century. A number of the ‘testimonials’ identify more recent events than those which took place prior to the turn of the century, a position which was also supported more generally by Mr Dragonetti’s evidence and documentation from the Crays Pond Community Group - a group that was formed “*to provide the basis for the recovery of the White Lion back to its role as a pub*”.
21. As indicated above, ‘recent past’ is not a fixed concept and must be taken in the context of the material circumstances considered as a whole. In this appeal, that includes the fact that The White Lion had, until its closure in 2013, been operating as a public house for over 100 years in a very small community area. Given the long history of premises operating as a public house, I conclude that the events described in paragraph 17 above occurred “*in the recent past*”. I additionally conclude that those events furthered the social wellbeing or interests of the local community.
22. For these reasons, I conclude that there has been time in the recent past when the actual use of The White Lion (that was not an ancillary use) furthered the social wellbeing or interests of the local community and, therefore, that requirements of section 88(2)(a) of the 2011 Act are met.

Section 88(2)(b) of the Localism Act 2011

23. It is the dispute as to whether the requirements of section 88(2)(b) of the 2011 Act have been met that forms the substantial disagreement between the parties.

24. The question posed by Parliament is whether it is realistic to think that there could be within the next five years non-ancillary use of the building that would further, whether or not in the same way as before, the social wellbeing or social interest of the local community. I am not required to decide what outcome or what use of the building is the most likely, or whether one outcome or use of the building is more likely than another. All I am required to consider is whether one realistic non-ancillary use of the building within the next five years would further the social wellbeing or social interests of the local community.
25. Mr Sandhu asserts, in summary, that The White Lion will not be used a public house or restaurant within the next five years because (i) it cannot be viably operated as a public house and/or restaurant and (ii) the Crays Pond Community Group have not thus far made a bid for The White Lion, despite it having been for sale and despite the previous ACV having been in place for 5 years, and it is not realistic to think that they will do so. Mr Sandhu submits, in any event, that there are a large number of establishments in the local vicinity which offer the same facilities as The White Lion, and which could be used by the local community.
26. The starting point for my consideration must be that at present the only lawful use of The White Lion is as a drinking establishment. Planning permission to change that use was refused by the Planning Inspectorate, and the High Court have issued an injunction preventing the property being used as residential premises.
27. It is, of course, possible that Mr Sandhu will make a fresh application for permission to put The White Lion to residential (or other) use and that such permission might be granted. However, even if this were a likely event, which I find it is not given the decisions thus far made by the Planning Inspectorate in relation to The White Lion, this of itself does not preclude the possibility that the premises will be used within the next five for a non-ancillary use which furthers the social wellbeing or social interests of the local community.
28. Mr Sandhu asserts that if he does not obtain permission for a change of use for The White Lion, he will leave the premises empty given that the business is not viable. In this regard, he points particularly towards the significant cost of putting the premises back into a position where it would be possible to run it as a drinking establishment (which includes the need to put in a new kitchen facility and most, if not all, of the fixtures and furnishings).
29. In support of his submission that the business is not a viable, Mr Sandhu places great reliance upon two viability assessment reports. The first such report, authored by Andrew Sunderland and dated 28 February 2014, was produced at the request of South Oxfordshire District Council. The Council tasked Mr Sunderland to perform an independent review regarding a possible change of the use of The White Lion. The report runs to five pages and concludes as follows:-

“Whilst an avid supporter of the local pub in this instance I am unable to see how the White Lion would succeed in today’s marketplace. With two good pubs in the next village of Woodcote less than two minutes’ drive away plus a Londis store and the close

proximity of Goring and Pangbourne the area is well-served with licensed premises. All the establishments that I visited the total number of potential customers would probably make one establishment busy but not the entire area ...”

30. I observe that this report was put before the Planning Inspector who considered an appeal by Mr Sandhu against an enforcement notice issued by the Council in July 2014. The Inspector specifically considered, between paragraphs 26 to 43 of the decision of 29 July 2015, *“whether the premises is not economically viable”*, and concluded at [43] that *“I have insufficient information to show that the business cannot be run in a competitive manner”*.
31. The second viability assessment report relied upon by Mr Sandhu is authored by a Mr John Keane and was drawn upon the instruction of Mr Sandhu. The purpose of the instruction was in connection with a proposed planning application by Mr Sandhu for a change of use of The White Lion from a public house to a residential premises. Although the report is not dated on its face, it is recorded in the index to the hearing bundle as having been prepared in 2019. It runs to 29 pages and sets out in some detail, amongst other things, the location and footprint of the property, the historic tenure and tie of the property, the licences of the property, the historic outgoings, an inventory and *“the Business at Present”* (which concentrates on the last year of trading in the year to 31st August 2012). From heading 17 onwards there is an assessment of trade potential, which includes a consideration of, *inter alia*, the local ‘competition’. The conclusion to the report reads as follows:
- “27.1 Anecdotally, The White Lion traded successfully in the early 2000’s, but that was during a very different set of economic circumstances and it would appear that the operators at that time – the Pierreponts – were exceptional.
 - 27.2 In the years between the Pierreponts and the pub being sold The White Lion saw a succession of failed businesses. It is conceivable that some of these may have been poor operators but at least two of them were successful operators of other pubs.
 - 27.3 Crays Pond is a lightly populate village which would be unable to sustain a public house on its own. The necessity to encourage trade from outside the village would lead to The White Lion’s natural position within the market being a food-led destination pub.
 - 27.4 The pub is reasonably well laid out but the restrictive head-height in the kitchen would cause significant operation and legal problems. The pub has traded in the past with that issue but, again, in different economic circumstances and now that the problem is known the operator has a duty to deal with it.
 - 27.5 The Black Lion, The Sun and The Red Lion are all within 1000m of the White Lion. The inspector in a previous appeal held that these pubs do not constitute suitable alternative provision in accordance with Policy CF1(i) but the re-opening of The White Lion would place an additional financial strain on them in what continue to be difficult conditions in the licensed trade.

- 27.4 [sic] The additional expenditure that would be required to re-open the pub would be significant and would result in finance costs that would all but wipe out the FMOP.
- 27.5 [sic] Marketing is one of the criteria by which viability is to be assessed in the LPA's CVFA and the evidence shows that the pub had been extensively marketed by a firm of specialist agents for a period in excess of twelve months. Expressions of interest were elicited for both existing and alternative uses but none proceeded to a satisfactory conclusion.
- 27.6 [sic] Taking the above into consideration, and in particular that the pub has been freely marketed for over twelve months, I consider The White Lion to be unviable as a public house."

32. The fact that the authors of the aforementioned reports conclude that White Lion is not viable as a public house does not rule out a finding that it is realistic to think that within the next five years the premises will be used in a way which furthers the social wellbeing or social interests of the local community.
33. First, I concur with Mr Lee's submissions, found at paragraphs 29 and 30 of his skeleton argument, that the reports rest their conclusions on limited evidence and a number of assumptions as to expected future events. Whilst these events may be likely to occur, that likelihood does not rule out the possibility of other events occurring. The reports do not engage with such other possibilities. That is not to say that the conclusions in the reports are wrong, but it does highlight the fact that the reports were drawn for a very different purpose to the instant proceedings i.e. for the assistance of the planning authorities. The planning authorities/inspectorate were not required to undertaking the sort of nuanced assessment of realistic possibilities that this Tribunal has to engage in. As a consequence, neither of the viability assessment reports engage in such a nuanced assessment.
34. Returning to Mr Sandhu's assertion that he would leave the premises empty if he does not obtain permission for a change of use, given the significant cost of restoring the premises to the standard necessary for it to be run as a public house. I first observe, although it is not necessary for me to do so, that this point was made by Mr Sandhu during the course of his oral submissions, not in oral evidence. It was not therefore susceptible to the sort of 'testing' by way of cross examination that one would normally expect of such a statement. Leaving this aside, however, in his submissions Mr Lee posed the question as to whether, rather than leave the property idle Mr Sandhu might choose to sell the property within the next five years, albeit at a reduced price that would enable a purchaser to refurbish the premises and open it once again as a licensed public house. For reasons which I have already addressed, this is not a point specifically considered in the viability assessment reports. Mr Keane's report, for example, basis its calculations of economic viability on an assumed purchase price of £400,000 (a figure which is said, without further detail, to be the reasonable value for the premises). It did not consider the possibility of Mr Sandhu selling at a lower price or leasing at a reduced rent.

35. In my view, even if there is a possibility that Mr Sandhu will leave the property idle for the next five years, I do not accept that this means that Mr Sandhu selling the premises for a sum which would enable sufficient refurbishment to occur so as to allow it to be reopened as a public house, does not nevertheless remain a realistic possibility. Although Mr Sandhu points out that the property has been idle now for the past seven years, save for a short period in 2018 when it was opened as a whisky establishment, he was of course unlawfully using the property as his family residence during most that time. Consequently, between 2013 and 2019 the premises was being put to a use that was of significant advantage to Mr Sandhu. The property can no longer be put to such use, given the terms of the High Court's order – unless planning permission is granted for a change of use. The circumstances relating to Mr Sandhu's ownership of the property between 2013 and 2019 are therefore significantly different to those which will prevail going forward.
36. In addition, neither of the viability assessment reports consider the possibility of The White Lion being a community run public house, or other community run venture. Mr Sandhu responds to this suggested possibility by observing that the local community group have had ample opportunity to purchase, or lease, the premises in the past but have not made a bid. He further notes that he has not seen a business plan in support of this contention.
37. Whilst some regard must be had to the fact that the local community group have not made a bid in the past, I note the terms of Mr Dragonetti's statement of 13 October 2020 that substantial funding for such a bid has now been promised, and that there is also the possibility of a grant to assist in this regard. I have no reason reject the truth of these assertions, and Mr Dragonetti was untroubled by Mr Sandhu's cross-examination on such matters. It is not for me to consider whether a bid from the local community group is likely, and much I am sure will depend on the terms that the premises is marketed at should Mr Sandhu take the option of selling or leasing it. Nevertheless, given the abovementioned evidence of Mr Dragonetti and the strength of feeling towards the White Lion as shown by the testimonials and letters before me, I find, even when set in the context of the conclusions at paragraph 26.17 of John's Keane's report and the absence of a business plan from the group, that the purchase of The White Lion by the local community group remains a realistic possibility.
38. I accept that the future of The White Lion is fraught with uncertainty, which is only fuelled by the current uncertain trading conditions for such establishments. It is impossible to identify what the likely future of the premises may be. However, as already indicated, the task for me is not to determine the likely future use of The White Lion, but to consider and assess whether one realistic non-ancillary use of the property would lead to the furtherance of the social wellbeing or social interests of the local community.
39. In my conclusion, both scenarios postulated in [34] to [36] above are realistic, and it is realistic to think that one or other of these scenarios will come to bear within the next five years. The evidence demonstrates that it is realistic to think that if The White Lion reopens as a public house – which is realistic – it will resume its position as a social

meeting place for residents involved in the activities identified in paragraph 17 above, or otherwise. The fact that there are alternative premises where such activities can be carried out, does not render it unrealistic to think that they would be carried out in the White Lion if it were to be reopened.

40. I, therefore, conclude that it is realistic to think that there is a time in the next five years when there could be non-ancillary use of The White Lion that would further (whether or not in the same way as before) the social wellbeing or social interests of the local community. As such, the requirements of section 88(2)(b) of the 2011 Act are met.

Decision

The appeal is dismissed.

Signed

Mark O'Connor

Upper Tribunal Judge O'Connor