



**FIRST TIER TRIBUNAL  
GENERAL REGULATORY CHAMBER  
COMMUNITY RIGHT TO BID**

**Appeal Reference: CR.2020.0005  
& CR.2020.0004**

**Decided without a hearing  
On 20 November 2020**

**Between**

**(1) GRAEME JOHN CARSBURG**

**First Appellant**

**(2) M&A KNIGHTSBRIDGE PROPERTIES LIMITED**

**Second Appellant**

**and**

**EAST NORTHAMPTONSHIRE COUNCIL**

**Respondent**

**DECISION AND REASONS**

**Before:**

**JUDGE J FINDLAY**

**Determined on the papers, sitting Chambers on 20 November 2020**

**Decision**

1. The appeal is allowed. 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. 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 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. The conditions of section 88(2)(b) of The Localism Act (“the Act”) are not satisfied.

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## Mode of Hearing

2. This has been a paper hearing which has been consented to by the parties. The form of remote hearing was P: paper determination which is not provisional. A face-to-face hearing was not held because it was not practicable and no-one requested the same and all the issues could be determined on the papers. The documents referred to are in an open bundle of 215 pages, the contents of which have been recorded. The decision made is as described above.
3. The Tribunal considered it was fair and just to determine the appeal on the basis of the papers having considered rules 2 and 32 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (as amended).

## The Background

1. The Act requires local authorities to keep a list of assets (meaning buildings or other land) which are of community value. Once an Asset of Community Value (“ACV”) 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. Two Nominations to list the buildings and land associated with Samuel Pepys Public House, Slipton (“the Property”) were submitted with the Respondent, by the Friends of Slipton, the First Nominator, on 27 November 2019 and by the Lowick and Slipton Parish Council, the Second Nominator, on 6 December 2019. The Respondent decided on 30 January 2020 that the Property had been properly nominated and qualified as an ACV and was added to the list of Community Assets held by the First Respondent. The review was concluded on 19 May 2020.

## The Legislation

3. The relevant sections of The Localism Act 2011 provide as follows:-

### *87 List of assets of community value*

- (1) A local authority must maintain a list of land in its area that is land of community value.
- (2) The list maintained under subsection (1) by a local authority is to be known as its list of assets of community value.
- (3) Where land is included in a local authority’s list of assets of community value, the entry for that land is to be removed from the list with effect from the end of the period of 5 years beginning with the date of that entry (unless the entry has been removed with effect from some earlier time in accordance with provision in regulations under subsection (5)).

### *88 Land of community value*

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(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.

(6) In this section— ....

“social interests” includes (in particular) each of the following— (a) cultural interests;

(b) recreational interests; (c) sporting interests;

*Assets of Community Value (England) Regulations 2012*

Appeal against listing review decision 11

(1) 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.

(2) The owner referred to in paragraph (1) may be either the owner who requested the review, or a subsequent owner of part or the whole of the land.

*91 Notice of inclusion or removal*

(1) Subsection (2) applies where land—

(a) is included in, or

(b) removed from,

a local authority's list of assets of community value.

(2) The authority must give written notice of the inclusion or removal to the following persons—

(a) the owner of the land,

(b) the occupier of the land if the occupier is not also the owner,

(c) if the land was included in the list in response to a community nomination, the person who made the nomination, and

(d) any person specified, or of a description specified, in regulations made by the appropriate authority,

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but where it appears to the authority that it is not reasonably practicable to give a notice under this subsection to a person to whom it is required to be given, the authority must instead take reasonable alternative steps for the purpose of bringing the notice to the person's attention.

(3) A notice under subsection (2) of inclusion of land in the list must describe the provision made by and under this Chapter, drawing particular attention to—

- (a) the consequences for the land and its owner of the land's inclusion in the list, and
- (b) the right to ask for review under section 92.

### Submissions and Evidence

4. The First Appellant submits no points. The Second Appellants submits the following points:

- a) In relation to the procedure, Ms Banks of ALB Planning, on behalf of Mr Dickins, Director of the Second Appellant submits that the Second Appellant is the main owner and was not notified of the nomination in writing as required. The Respondent was notified in February 2020 about the long-term commitment and agreement of binding sale between the First Appellant and the Second Appellant. At that point the Respondent should have written to the Second Appellant to provide the opportunity to request a review of the decision. As this did not happen the Second Respondent has been denied their rightful say in the matter.
- b) In relation to the recent past test, the Second Appellant submits that the Property has not benefitted in the manner claimed despite the efforts prior to 2016 and in 2017. The community did not support or use the facility. If the community had done so then the Property would have been a viable business for landlords.
- c) In relation to the future test, the Second Appellant seeks to rely on the Report Concerning the Economic Viability of the Reintroduction & Sustaining of Public House use prepared by Anthony R Barnes of Fleurets Birmingham who states:

*“For a public house to be economically viable, its owner as an individual or partnership, must be able to drive a satisfactory living from operating the public house after having met all the costs and liability associated with ownership and trading the business. If the operator is a corporate concern, the company must be able to achieve a sufficient profit from the operation in order to justify in commercial terms, the investment required for its purchase and as remuneration for its subsequent continued operation.*

*Even in a much improved economic climate, in the absence of a sustained level of proven trade and profits, very often lenders are not prepared to provide funding unless an operator is prepared to offer alternative security. Banks are generally averse to lending against leasehold interests. The larger multiple or corporate public house operators will generally need to raise finance for individual property acquisitions however, such operators will only acquire sites where there is potential to generate sales in excess of £20,000 per week, net of VAT. The Samuel Pepys does not possess any of the characteristics which would enable it to be able to generate such levels of turnover and would not be of interest to corporate pub companies.*

*On consideration of the known recent trading history of the Samuel Pepys and the challenges faced by its operators and factoring in the period of closure for trade and the level of the established local competition, I conclude that the reintroduction of public house trading in the*

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*property presents a highly risky venture with a high probability of business failure. Based upon my assessment of the credible Fair Maintainable Trade and profit performance of the Samuel Pepys, it is my opinion that the public house is no longer economically viable and does not warrant a prudent operator in taking a decision to seek the reintroduction of pub trading. My detailed trade appraisal and viability assessment set out above, demonstrate that the property will unlikely be capable of generating a satisfactory profit to fund capital investment in the venture or for it to be viable or sustainable, after accounting for the capital required to achieve acquisition and reopening for trade.*

*I am of the opinion that the property is of a style and in a location which for public house trade use will cause it to be almost entirely reliant upon achieving a destination based custom for food. Given the range of other existing already trading competing public houses/pub-restaurants located in the surrounding local district, the reintroduction and sustainability of trading at the Samuel Pepys will present such significant challenges and uncertainties that it cannot credibly be demonstrated that the public house can provide an operator with a satisfactory return on capital; or for the risks of undertaking the proposition; or for the entrepreneurial skills and endeavour which would be necessary for the property's acquisition; renovation and reopening.*

*I therefore conclude, that the reintroduction and subsequent sustaining of public house trading at the Samuel Pepys is not an opportunity or undertaking that is economically viable for any party who is subject to the norms of profit motivation and market led commercial costs of finance in the current or expected future economic and financial circumstances. Should a party nevertheless undertake such a risk and investment, in my opinion they would be subject to an above average risk of business failure.”*

*For a purchaser to acquire and use the Property, it would require access to £480,000. Whatever “aims” the local community have, and however noble and well-meaning those might be, they have no realistic basis or prospect of coming anywhere close to fruition, particularly in this very troubled time in the light of the current public health crisis with all its consequent economic effects.”*

5. The Respondent submits the following points:
- a) In relation to the points regarding the procedure, the Respondent submits that it is under a duty to notify the landowner, local parish council and occupants of the premises. There is no specific timescale provided as to when this notification should take place. It is for the Respondent to undertake appropriate steps to identify the land owner and a check of the Land Registry is sufficient. On the basis of the case law a failure to notify is not fundamental. The landowners’ opportunity to request a review is their opportunity to put forward representation. The Second Appellant has requested a review indicating an awareness of the nomination and the decision to list.
  - b) Upon receipt of a nomination the Respondent has 8 weeks to decide whether to list the asset or not under regulation 7 of The Asset of Community Value (England) Regulations 2012, however, the listing authority can make a decision at any time during that 8 week period. Therefore, the Respondent did follow due diligence.
  - c) In relation to the recent past test, the application is supported by over half of the local community and the activities set out in the nomination of the Property being in the past used as a public house and venue for community activities are sufficient to show that there is a time

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in the recent past when an actual use of the property furthered the social wellbeing or interests of the local community.

- d) In relation to the future test, it is realistic to believe that the Property could continue to function for a range of purposes including those detailed within the nomination forms as it has done so in the recent past. There is no evidence to suggest that the Property couldn't successfully function as a public house and social meeting place within the heart of Slipton Village as it had done so previously, especially with the local support that has been shown to retain the asset. It is therefore realistic to assume that it could continue to further the social wellbeing and interests of the local community as it has done so previously.
- e) The Respondent acknowledges the conclusion of Mr Barnes' report prepared in July 2019 and, in particular, the conclusion "that the reintroduction of public house trading in the property presents a highly risky venture with a high probability of business failure..." The Respondent submits that this is considering the future trading of the Property on a commercial basis but submits that no consideration has been given to the treating of the public house as a community venture and there has been no suggestion by the nominating groups of an intention for the community to run the public house in future.
- f) In response to the Second Appellant's submission that the Nominators have not indicated that they desire to acquire the Property and their hopes to use the Property for inter alia a library and for coffee mornings and book clubs and a shop are "so unlikely to come to fruition, in the light of the Appellants' intention, as to be hopeless", the Respondent submits that the Second Appellant's intentions have to be seen in the light of the strong reasons for refusing planning permission.
- g) The Respondent submits that it is not the moment for the Nominators to have proved their intentions. First comes the listing, then the opportunity for a community interest group to indicate that they wish to make a bid, and that only becomes relevant once an owner informs the local authority of its intention to sell the Property. The aims for the Property within the local community are tolerably clear.
- h) There is a realistic prospect of the use continuing in the future, albeit on a non-commercial basis and the requirements of section 88(2)(b) are satisfied.
- i) The Respondent submits that the listing should be confirmed.

### **Conclusions**

1. I am satisfied that the parties have been given ample opportunity to address the issues and prepare and present their cases. There is no prejudice to the Second Appellant, as a consequence of any irregularities in the review procedure, on the basis of my decision to allow the appeal.
2. The Property is located in the village of Slipton in Northamptonshire. The Property comprises a detached building, the original parts of which are believed to date from the late 18<sup>th</sup> Century. The original buildings has been extended by incorporation of an adjoining single story former outbuilding and by two other single storey additions with rendered wall construction beneath pitched tiled and flat felted roofs.
3. The First and Second Appellants exchanged unconditional contracts for the sale of the Property from the First Appellant to the Second Appellant which was assigned to the Second Appellant

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by way of a Licence to Assign. The completion date specified for the transfer is the 16 January 2021. The Second Appellant wishes to develop the Property for residential use. The agreement for sale may be relevant to the moratorium provisions, but does not go to the issue of the correctness or otherwise of the listing itself. The Property is correctly listed if the statutory requirements are met.

4. The Property has been closed since January 2019.
5. The Property was nominated as an ACV under the Community Right to Bid provisions of the Act by The Friends of Slipton, the First Nominator, by way of a nomination form dated 27 November 2019 and by The Lowick and Slipton Parish Council, the Second Nominator, by way of a nomination form dated 6 December 2019.
6. The First Nominator states in the nomination form that the principle for the group is to retain the Property as a community hub and social gathering venue for local community groups and residents. To share the vision of current council policy in preventing the erosion of village services. All excess monetary funds and assets accumulated by the group will be invested back in to the community of Slipton to further social wellbeing and interests.
7. The First Nominator states in the nomination form that in the recent past the pub has been the only community facility in the village. It was a core part of the village, a lifeline for local farmers and villagers to meet and socialise with one another to reduce isolation and that as a community asset local villagers would like to maintain all of the wellbeing and interests described above plus being able to run social groups and amenities from the Property, e.g. library, coffee mornings, book clubs, polling booth, shop etc. It is intended to host events for social groups outside the village thereby increasing the variety of interests available to the community as well as having the space to gather as a village. Maintaining the Property as a pub prevents isolation of individuals within the village and local community, aiding social and wellbeing.
8. I find that because the Property closed in January 2019 there is not 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 the requirements of section 88(1)(a) are not satisfied. This is not in issue between the parties.
9. I find that there was 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 section 88(2)(a) of the Act is satisfied.
10. The Property traded as a public house and was a community hub prior to closure in January 2019. As a public house it provided a meeting place for the community, was a community asset which provided a place for people from the local area to interact with each other and was used for community activities. The use of the Property for the sort of coming-together of the community which is described in the nomination forms is something which furthers the social interests of the local community. I accept the evidence provided in the nomination forms in relation to the use of the Property prior to its closure in January 2019.
11. The term ‘in the recent past’ in section 88(2)(a) is not defined in the Act or in the Regulations. It is my view that Parliament deliberately chose a loose expression and it would not be

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appropriate to define the term further. It is my view that had Parliament intended a definite period it would have said so.

12. I find that something that happened a year ago is something that happened not long ago and is 'recent' using the straightforward ordinary and common-sense meaning of the word.
13. In relation to the requirements of section 88(2)(b), the issue before me is whether 'it is realistic to think' that there could be such use at a time in the next five years. This is not the same as saying that the use will resume only that it is realistic to think. What is realistic may admit a number of possibilities none of which needs to be the most likely outcome. Whether something is realistic does not mean that it must be more likely than not to happen. The presence of one possibility does not exclude the possibility of others.
14. The term 'realistic' is not defined in in the Act or in the Regulations. It is my view that Parliament deliberately chose this expression and it would not be appropriate to define the term further. The Department for Communities and Local Government's Non-statutory Advice Note offers no guidance.
15. I find that the term 'realistic' should be interpreted as it is used in everyday conversation and language and I rely on The Oxford English Dictionary definition of 'realistic' as having to showing a sensible and practical idea of what can be achieved or expected and representing things in a way that is accurate or true to life.
16. I find that neither Nominator has stated that it had an intention to bid to acquire the Property notwithstanding that the First Nominator stated that the group wished to maintain the Property as a public house with the additional functions of a library, coffee mornings, book clubs, polling booth, shop etc. No details or plans has been put forward to explain and support how any of these aspirations would be achieved.
17. I find that the Property is in some disrepair and would by necessity require some investment to achieve the stated wishes. No plans or details have been provided about how any funds could be found to undertake the necessary building and refurbishment work.
18. On the basis of the evidence before me I find that it is unrealistic to consider that the Property could be run as a public house with the additional functions of a library, coffee mornings, book clubs, polling booth, shop etc. I find that it is unrealistic to consider that the Property could be run as a community hub or venue for any of community activities mentioned in the nomination forms.
19. It is important when considering this issue not to concentrate on the hard-headed commercial or financial analysis and a detailed business case is not required, however, it is necessary to show a sensible and practical idea of what can be achieved or expected.
20. No plan or proposal has been formulated and submitted and there is no evidence of any attempts to raise funds or plans setting out, even in a skeleton form, how the aspirations could be achieved through community effort, enthusiasm or otherwise. Although there is no requirement for a business case and the case law suggests that the 'realistic to think' test is a low one, to satisfy the requirements of section 88(2)(b) there has to be at least some indication that the



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aspirations are realistic. I am not persuaded that there are any means to implement and carry out the aspirations of the community.

21. It is unclear from the wording of the Act what length of anticipated future use must be contemplated. The use does not need to be substantial but it does need to be a use that is more than trivial or temporary. It is necessary to consider whether the use can continue for a period of time which is reasonable having regard to the nature of the use and the purpose of the listing. I find that without a plan any envisaged use could only be very temporary.
22. Accordingly the appeal is allowed. 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 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 and section 88(2)(b) of the Act is not satisfied.

(Signed) Judge J Findlay

Dated: 20 November 2020  
Signed: 23 November 2020

