



Neutral citation number: [2023] UKFTT 946 (GRC)

Case Reference: CR/2022/0007

**First-tier Tribunal
General Regulatory Chamber
Community Right to Bid**

**Heard remotely by CVP
Heard on: 26 July 2023
Decision given on: 6 November 2023**

Before

JUDGE NEVILLE

Between

DRAGONFLY ARCHITECTURAL SERVICES LIMITED

Appellant

and

BRIGHTON & HOVE CITY COUNCIL

Respondent

Representation:

For the Appellant: Mr C Southall, director of the appellant company

For the Respondent: Mr J Fitzsimons, counsel

Decision: The appeal is dismissed.

REASONS

1. This appeal concerns the Montreal Arms, in Hanover, Brighton. Like many pubs, and after nearly 140 years of mostly uninterrupted trading, it sadly closed its doors in early 2020. It is now owned by the appellant company (“Dragonfly”) who wishes to convert it to residential accommodation. Brighton & Hove City Council has decided to include the property in its list of Assets of Community Value, and Dragonfly has appealed against that decision.

Background

2. On 1 April 2022, following local controversy about renovations, a group called the ‘Friends of the Montreal Arms’, which I shall call FMA, nominated the pub as an Asset of

Community Value under the Localism Act 2011. The consequences of an asset being listed include a moratorium on any sale, to enable a community group to make its own offer.

3. I agree with Mr Fitzsimons' summary of the written arguments made by FMA in support of its nomination. First, it argued that the Montreal Arms was of:
 - a. architectural, design and artistic importance, bearing in mind it is a good example of a regional approach to public house frontage design;
 - b. historic and evidential interest in light of the green-tiled frontage which is indicative of the 'United Breweries', a local brewery company who owned a number of pubs in the area;
 - c. townscape interest bearing in mind how the building contributes to the street scene; and
 - d. intactness as the building retains its design integrity, despite replacement windows.
4. Next, FMA set out how the pub had been part of the local community prior to its closure, being:
 - a. An establishment where many local people socialised, played traditional games and supported each other within the community for many years;
 - b. An iconic building with historic interest which gave architectural pleasure to the neighbourhood on Albion Hill, a landmark, part of the street colour and history; and
 - c. A place where celebrations, weddings, and wakes have been held by members of the community.
5. Explaining why it was realistic to think that there is a time in the next five years when there could be a principal use of the Montreal Arms that would further the social wellbeing or social interests of the local community, FMA argued that:

ACV status would provide a realistic platform for thought and communication which could transition into a new reformed venue and could bring together the diverse talents and creativeness of people living here and offer a means to exchange and connect through opening the public space again to be a vibrant and friendly venue appealing to diverse community members and offering social activities, educational and vocational learning of subjects and multi-use of inclusive arts and crafts, Social Prescribing, activity for supporting wellbeing, fringe theatre and live music events, works and meeting space as well as offering food and beverages and celebrating the history and exchange of stories between people and multi-generational activities.

6. On 20 April 2022, Dragonfly's director Mr Southall made representations opposing the nomination. He observed that the pub had failed as a business while owned by the Stonegate Group, a large national company. Attempts to sell it as pub in 2021 had failed, and no community group had tried to buy it then. He argued that there were several other pubs in the immediate local area that could provide the community value argued by FMA, and every reason to think that this pub could not do so on a commercially viable basis. He also questioned the motive of the nomination; this refers to local ill-feeling and activism

concerning Dragonfly's ownership of the pub, that I have not found necessary to directly address in this decision.

7. The Council decided to include the pub in its list of Assets of Community Value with effect from 13 May 2022. Dragonfly sought a review. After considering written representations and holding an oral hearing, the review officer upheld the decision. Dragonfly exercised its right of appeal to the Tribunal.

The appeal

8. The Council and the Tribunal wrote to FMA inviting it to apply to be joined to the proceedings so that it could present its case, but there has been no reply. The appeal was heard remotely, the documents before the Tribunal consisting of an agreed hearing bundle, a twenty page supplementary bundle, and skeleton arguments from Mr Southall and Mr Fitzsimons. Both made well-structured and helpful oral submissions.
9. Mr Southall called oral evidence from Mr Patrick Walker, who describes himself as a specialist valuer with extensive experience in the licenced trade, in Brighton in particular. He also has what he describes as personal and relevant insight into the running of the Montreal Arms in particular, having acted for all the previous tenants and landlords since 1980. Most recently, he had acted for Stonegate in securing the property following the departure of its landlady in August 2021.
10. There was some discussion at the hearing of whether Mr Walker should be treated as an expert witness. I treat him as a witness of fact, yet will place reliance on his opinion evidence where I consider it to be appropriate. The Tribunal's decision was reserved. I apologise for the subsequent delay in promulgating this decision.

Legal Framework and Issues

11. Section 88 of the Localism Act 2011 provides that (so far as relevant):

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.*

12. Section 89 goes on to provide that (so far as relevant in this case) land may only be listed by a local authority in response to a community nomination. Procedural requirements for nomination and listing are contained in the Assets of Community Value (England) Regulations 2012. Relevant to the arguments in this appeal is regulation 6:

6. A community nomination must include the following matters—

- (a) *a description of the nominated land including its proposed boundaries;*
- (b) *a statement of all the information which the nominator has with regard to—*
 - (i) *the names of current occupants of the land, and*
 - (ii) *the names and current or last-known addresses of all those holding a freehold or leasehold estate in the land;*
- (c) *the nominator’s reasons for thinking that the responsible authority should conclude that the land is of community value; and*
- (d) *evidence that the nominator is eligible to make a community nomination.*

13. Regulation 11 gives a right of appeal to the Tribunal.

14. Arising from the parties’ submissions and the legal framework, the Tribunal must decide the following issues:

- a. Was FMA’s nomination valid?
- b. Was there a time in the recent past when an actual use of the pub (that was not an ancillary use) furthered the social wellbeing or interests of the local community?
- c. Is it realistic to think that there is a time in the next five years when there could be non-ancillary use of the pub that would further (whether or not in the same way as before) the social wellbeing or social interests of the local community?

15. If the answer to any of the above is ‘no’, the appeal will be allowed. If the answer to all three is ‘yes’, then the appeal will be dismissed.

Was FMA’s nomination valid?

16. In his skeleton argument, Mr Southall puts his case as follows:

The nominator failed to provide any relevant and valid supporting information in the COMMUNITY RIGHT TO BID NOMINATION FORM, as required by Section 3 of the form itself. The nominator did not answer the questions regarding how the current or past use of the nominated building furthers the social wellbeing or social interests of the local community, and instead expressed personal fondness for the building's architectural features. Their motivation for the nomination appears to be preventing development and stopping a developer from doing anything to the building, rather than the value of the space as a community asset. Additionally, the applicant mentioned another successful ACV application in the area to illustrate their desire to prevent the conversion of buildings into houses in multiple occupation (HMOs). However, this information does nothing to constitute a reason for the nomination, and it is argued that the council should have recognized the lack of relevant supporting information in the nomination.

17. This, argued Mr Southall at the hearing, means that the nomination does not meet the requirements of regulation 6, there was no valid nomination, and the Council had no power to list the pub as an ACV.

Consideration

18. I find that the nomination was valid. First, the regulation requires the nominator's reasons for thinking that the responsible authority should conclude that the land is of community value. It does not require that those reasons accord in any way to the actual statutory test. If they are the nominator's reasons then they suffice, even if they are entirely misconceived. It is then for the responsible authority to make its own decision based on such circumstances as it consider relevant. Second, reasons *are* given in the nomination, as set out at paragraph 5 above. There was argument before me on whether they are included in the right section of the Council's nomination form, but I agree with Mr Fitzsimons that provided the information is given it does not matter where in any particular form it is found. Nor does the legislation require the use of any particular form in the first place.

19. The answer to this issue is yes, the nomination was valid.

Community value in the recent past

20. There is no binding authority on what constitutes the 'recent past' for the purpose of s.88(2) (a). Mr Fitzsimons referred to several previous decision by this Tribunal where the term was taken to depend on the circumstances. I agree. That contextual approach means that special account does need to be taken of the consequences arising from the Covid-19 pandemic. Especially with regard to hospitality venues, it was an exceptional interruption of the ability of a community to come together.

21. In its nomination form FMA argued that the Montreal Arms was used in the recent past as:
- a. An establishment where many local people have socialised, played traditional games and supported each other within the community for many years; and
 - b. A place where members of the community held celebrations, weddings, birthday, wakes and a place for family, friends and neighbours to share stories and exchange neighbourly support and skills.

22. Mr Fitzsimons put this forward as evidence, but even if it can properly be so called then it is entirely unsubstantiated. Mr Walker pointed out in his evidence that the pub has never had (and for structural reasons could never have) a kitchen, making it unlikely that it had hosted such events. Asked by Mr Southall whether he thought that the pub was “a highly valued community space” Mr Walker replied not, qualifying his answer with “but if you didn’t want a crowded pub on a Saturday night you could go in there and play darts”. Evocatively, he also described it as “a drinking man’s boozier”; its little trade came from “old boys who liked to sit and drink a pint in an old-style pub”. He said that by the time it had closed the last landlady, Lorraine Pendry, had used it more as a place to live than to make a profit.
23. In further support of section 88(2)(a) not being satisfied, Mr Southall argued that the pub has been closed since early 2020 and had been in the doldrums for years, doing very little business. Mr Walker’s report showed that its turnover in its final year was only £52,992, including VAT. It was one of many pubs in the local area and cannot be said to have furthered the social wellbeing or interests of the local community. It had negative reviews from members of the local community, some of whom had objected to previous planning applications that involved it carrying on in business as a pub. He pointed to the evidence of local outrage over alterations to its frontage, suggesting that the FMA were using the ACV procedure as a proxy for other concerns.

Consideration

24. I do not set out all the other evidence put forward under this topic, but have taken account of it. What the above does show is that prior to 2020, and despite the failure of several attempts to revive its fortunes, the doors stayed open until the pandemic hit. This is, I consider, the “recent past” for the purposes of section 88(2)(a).
25. I find that the Montreal Arms did provide value to the local community, but not in the way put forward by FMA. It is most unlikely that it played host to wedding receptions, live music, fringe theatre or as a place “to share stories and exchange neighbourly support and skills” as “a realistic platform for thought and communication”. Instead, it provided a place where the type of person described by Mr Walker could escape such commotions and sit quietly with a pint of beer in a “drinking man’s boozier”, with nothing more frenetic around him than the occasional game of darts. Its value to the community’s social wellbeing lay in the oasis of calm it provided *away* from “spaces for creative activity” and the like. Indeed, that is why Mr Walker sometimes went there.
26. The answer to the first question is therefore yes, there has been a time in the recent past when the Montreal Arms furthered the social wellbeing or interests of the local community.

The future

27. Applying section 88(1)(b), is it realistic to think that there is a time in the next five years when there could be non-ancillary use of the pub that would further (whether or not in the same way as before) the social wellbeing or social interests of the local community?
28. In R. (TV Harrison CIC) v Leeds School Sports Association [2022] EWHC 130 (Admin), Lane J reviewed several authorities concerning section 88(1)(b), including as follows:

30. *In Gullivers Bowls Club Ltd v Rother District Council and Anor (CR/2013/0009)*, Judge Warren heard an appeal by Gullivers Bowls Club Ltd, the owner of land

used as a bowls club, which appealed against the inclusion of its land in the statutory list, following nomination by a Community Association. Judge Warren held:

"11. Turning to the future condition in Section 88(1)(b) Mr Cameron [representing the Bowls Club] submits that the existing bowls club has no realistic prospect of continuing. He points to the poor state of the buildings and the finances and relies on a report prepared by GVA. This finds that Gullivers is not commercially viable. Mr Cameron submitted that since listing lasts for five years, my starting point in considering whether the future condition was satisfied, should be whether the bowls club could continue in existence for that length of time.

12. I do not accept that the statute requires me to foresee such long-term viability. Indeed, it seems in the very nature of the legislation that it should encompass institutions with an uncertain future. Nor, in my judgment, is commercial viability the test. Community use need not be and often is not commercially profitable.

13. On this issue, I accept the submissions made by Mr Flanagan. Gullivers may be limping along financially but it still keeps going and membership is relatively stable. Of course it is possible that something could go drastically wrong with the buildings and Gullivers would not have the capital to repair them; but that has not happened yet and, in an institution that has lasted for 50 years, it would be wrong to rule out community spirit and philanthropy as resources which might then be drawn on. In any event, should the site cease to be land of community value, Rother would have power to remove it from the list."

31. *In Worthy Developments Ltd v Forest of Dean District Council and Anor (CR/2014/0005), Judge Warren dismissed the appeal of a developer, which had bought a former pub known as the "Rising Sun" outside Chepstow, and wished to build two four-bedroomed houses on the site. A planning application to that effect had been refused but was likely to be appealed. The respondent accepted nomination by the "Save our Sun Committee" of the land and building comprising the pub. On the issue of section 88(1)(b), Judge Warren held:*

"17. In respect of the future condition, Worthy Developments Ltd asked me to have regard to their intention to develop the plot to provide two houses. I take that into account although I balance it with the fact that they have not yet obtained the necessary planning permission. I also take into account the remoteness of the public house which must compound the general malaise affecting public houses nationally.

18. The written submissions ask me to consider which was the more likely to happen, that planning permission should be obtained and houses be built, or that the building be revived as a pub? In my judgment, however, to approach the issue in this way is to apply the wrong test.

19. I agree with the council. The future is uncertain. Worthy Developments Ltd may or may not obtain their planning permission. They

may or may not sell the land. The Save our Sun Committee may or may not see their plans reach fruition. It remains still a realistic outcome that The Rising Sun might return to use either as a traditional pub or as a pub/shop/community centre as envisaged by the committee.

20. My conclusion in this respect is reinforced by the pledges of support and petitions gathered by our (sic) Save our Sun Committee. It is true that they have not yet made an offer with a firm completion date but their proposals are not fanciful. It is enough that return to use as a pub or some other venture furthering the social wellbeing or interests of the local community be realistic."

29. Lane J held that Judge Warren's interpretation of "is it realistic to think" was correct, emphasising that the legislation does not require a potential future use to be more likely than not to come into being, in order for it to be realistic.

30. The Council's reasoning on this topic, when making its decision, is worth setting out in full:

The owner's representations set out the funding that would be required for a community group to purchase and renovate the property. No information was submitted with the nomination of how any funds to take on the property would be raised. The owner has advised that were the property to be listed as an ACV it is "highly likely it will sit empty for years".

However, it is "not fanciful" to consider that having purchased the property the owner may ultimately not wish to allow it to remain empty. Planning permission to convert the property to residential use may be applied for and granted: alternatively, permission for residential use may not be granted. Policy DM10 of the submission City Plan Part 2, currently at examination stage, gives protection to public houses, stating that planning permission will not be granted for redevelopment / change of use except in certain circumstances; Even where an alternative use can be justified priority will be given to the use of the site for alternative community facilities. Although not adopted policy the LPA is currently giving the policy "significant weight".

Although the owner states that the business failed as a public house, the legislation does not require that the future community use needs to be the same use as the previous use. Moreover, as above, planning policy would give priority to "alternative community facilities" should the use of the property be considered not to be viable/needed.

Moreover, in order to satisfy s88(2) the future use does not have to be undertaken following a successful bid by a community interest group. A realistic option may be that if planning permission for residential use were refused that the owner may seek to sell the property. It is possible that a purchaser could be found to continue the use of the property as a public house or some other community facility, possibly with the input of the local community – and as noted above, a FMA member has offered their services and expertise in running a pub and brewery.

It is not therefore fanciful to consider that there could be a community use of the property in the next five years.

31. I accept that the case for inclusion is supported by there being a real chance that change of use to residential accommodation will be refused permission, and by priority being given in any event to any community use (whether or not as a pub). I do not accept that the chance of community use is increased by the offer of services by the FMA, whose lack of engagement with this appeal makes it unlikely that their prior activism will turn into future action. Nonetheless, the Council has pointed in its evidence to another pub called ‘The Bevy’ that benefited from community ownership to overcome its unattractive commercial prospects.
32. In opposition to those points, Mr Southall has adduced detailed evidence on the pub’s parlous financial state when it closed, the need for significant renovations and repair before it could reopen, including putting in disabled access and (perhaps) toilets, problems applying for a new premises licence due to the density of local residential dwellings and scarce nearby parking. He has estimated the necessary cost of refurbishment as a pub at £300,000. As to ‘The Bevy’, Mr Southall provided a recent newspaper article showing that it is both Brighton’s only community-owned pub and is still in imminent danger of closure.
33. I also take account of Mr Walker’s evidence. While I do not treat him as impartial – he does appear to have an interest in Dragonfly succeeding in its goals – his evidence was frank and grounded in practicality. I do not set out all of his viability report but have taken it into account. The key considerations, as well as those already set out above when dealing with s.88(2)(a), include: the declining turnover and barrellage pictures over the last few years of operation; the many competing pubs open in the immediate area, as well as cafes restaurants and takeaways; and wider sector challenges such as rising energy costs, beer and food prices and rates, together with a wider reduction in consumer spending on going out.
34. In response to questions asked in evidence, Mr Walker developed these points. He said that 90% of his work is now dealing with the closure of failed pubs. Food is an essential part of commercial survival, and the Montreal Arms has nowhere to put a kitchen – this was tried once and failed in the face of community objections and practical obstacles. A busier nearby pub, ‘The Hanover’, had recently closed. Locally, the demand for pubs had been reduced by a change in demographics. Hanover used to have more students, but they had gone elsewhere in light of increasing obligations surrounding House in Multiple Occupation licences. There are other community spaces that people can use to meet, including a nearby church hall.
35. Mr Walker’s viability report is accompanied by a survey from a structural engineer that raises significant concerns over the suspended timber ground floor, the ingress of damp in the cellar, dry rot elsewhere, corroded steel angle lintels on the frontage and damp and mould. A report has been provided in response by the Council’s Senior Building Control Surveyor, Mr Mike Sansom MRICS. He disagrees that the issues noted by Dragonfly’s report show systemic failure of the external walls or require significant work to address in the short term. He does agree that the suspended wooden floor and other parts of the building are deteriorating and that in the medium to long term they might result in the building falling into such a condition as to require action under the Council’s Dangerous Structures powers.

Consideration

36. I pay tribute to the meticulous and constructive way in which Mr Southall, on behalf of Dragonfly, has pursued this appeal. There is some force to his submissions that the original nomination was motivated, at least in part, by irrelevant concerns such as the building’s

appearance and views on residential development in general, and even personal animus. I take FMA's lack of present involvement as making it unlikely that there is any current real proposal to purchase and operate the Montreal Arms.

37. The evidence is finely balanced, and it is certainly *unlikely* that the Montreal Arms will see any use in the next five years that would further the social wellbeing or social interests of the local community. I nonetheless reach the conclusion that it is *realistic*.
38. While detailed and comprehensive, Mr Walker's evidence takes a somewhat myopic view of what a pub would look like. This is understandable, as he is in the business of acting for breweries and pubs that aim to be successful commercial enterprises. If the question posed was whether the Montreal Arms could be such a pub in the next five years, I would agree that it is unrealistic. Yet the downturn in fortunes for tied houses and chain pubs has also seen opportunities for smaller, independent and even hobbyist establishments. While the Montreal Arms was unprofitable before its closure, it still did not close until forced to do so by the pandemic. Just as it was sustained then by a landlady who was happy to treat it just as somewhere to live, it is realistic to think that it might likewise be opened in the future by a person or group that does not need it to turn a profit, or even to pay its own way. Not only might a community group or individual be willing to bear a pub as a loss-making venture, some pubs are opened as a retail outlet for micro and small breweries. While these face similar challenges to the larger chains of the sort Mr Walker describes, they have been less hard hit. Likewise, some small and independent pubs strike deals with local takeaways and restaurants rather than run their own kitchens – the notion that a kitchen is necessary to survive is not representative of the many and varied pubs operating in the UK. There is a realistic chance that the use I have described would add value to the community distinct from that offered by other nearby pubs and the local church hall. While 'The Bevy' has faced existential commercial obstacles, it has still operated for a while – that is all s.88(2)(b) requires.
39. The rival structural engineering reports do not disclose any major works that must be concluded before the building could open as a pub at all, and if Dragonfly is unsuccessful in obtaining planning permission for residential use then the medium and long term works will be squarely reflected in a reduced purchase price. If facing significant delay in achieving its ambitions Dragonfly might equally decide to cut its losses by renting out the pub to the type of operator I describe in the above paragraph, even though it has set its face against it in this appeal. I am unwilling to accept in the absence of clearer evidence that obtaining a premises licence would be impossible without unrealistic additional renovations.
40. In conclusion, while the prospects are slim that the Montreal Arms will see any use in the next five years that would further the social wellbeing or social interests of the local community, it is still realistic to think that it could.

Signed

Date:

Judge Neville

3 November 2023