



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

Appeal Reference: CR/2018/0007

Heard at: Hertford County and Family Court
On 8 February 2019

Before

JUDGE CHRISTOPHER HUGHES

Between

TOP CO STOCKING PELHAM LIMITED

Appellant

and

EAST HERTFORDSHIRE COUNCIL

First Respondent

STOCKING PELHAM PARISH COUNCIL

Second Respondent

Appearances:

Appellant:

Adrian Jeremiah

First Respondent:

Anthony Gill

Second Respondent:

Jonathan Wills

DECISION AND REASONS

Introduction

1. The Localism Act 2011 requires local authorities to keep a list of assets (meaning buildings or other land) which are of community value. Once an asset is placed on the list it will usually remain there for five years. The effect of listing is that, generally speaking an owner intending to sell the asset must give notice to the local authority. A community interest group then has six weeks in which to ask to be

treated as a potential bidder. If it does so, the sale cannot take place for six months. The theory is that this period known as “the moratorium” will allow the community group to come up with an alternative proposal – although, at the end of the moratorium, it is entirely up to the owner whether a sale goes through, to whom and for how much. There are arrangements for the local authority to pay compensation to an owner who loses money in consequence of the asset being listed.

Legislation

2. The Localism Act 2011 provides:-

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

- (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;

The property

3. There was for many years a pub in the village of Stocking Pelham called The Cock (records indicate the pub already existed in the 1840s). A substantial part of the inn was destroyed in a fire in February 2008 shortly after a £150,000 refurbishment. In 2010 a planning application was made to replace the inn with two houses and a new public house. This was contrary to planning policy, however planning permission was granted with the two houses being an enabling development to secure the re-provision of the public house. The s106 agreement dated 14 February 2012 between the Council and the owner contained covenants preventing the occupation of the second house until after the public house was in a state where it was capable of being granted a premises licence and requiring the public house to be in that condition within 12 months of the occupation of the first house. In 2015 permission was granted for the letting of rooms within the public house and a premises licence was issued in July 2015, it is currently suspended and the public house remains a shell. The property was sold to the current owners in December 2016. There have been further planning applications and appeals against refusal of planning permission or non-determination, the first for conversion of a vacant public house into a five bedrooomed house (refused on appeal June 2018) and the second, for conversion to four residential dwellings (refused on appeal on 16 November 2018). Both Inspectors considered continued use as a public house could be viable. The Inspector on the second occasion noted that the owners now benefitted from the occupation of both permitted dwellings, that various offers to purchase the Cock Inn had been made:-

“16 ...The fact that the site has not been sold could be attributed to a range of factors, not least that the offers made have not met with the seller’s expectations. This in itself does not automatically lead to the conclusion that the public house is redundant or financially unviable.

17 The appeal building has been registered as an Asset of Community Value (ACV). From the Parish Council’s representation to this appeal I am satisfied that there is a local commitment to securing the future of the public house, including the preparation of a

business plan which will support funding applications and allow a formal offer for the freehold to be made. The ACV carries significant weight in my determination of this appeal since it provides further confirmation regarding the community's desire in respect of the public house

... 23 [the proposed development] would substantially reduce the scale of community facility provision for Stocking Pelham."

The listing process

4. The Stocking Pelham Parish Council (the Parish Council) on 2 January 2018 nominated the Cock Inn to be listed as an ACV by East Hertfordshire Council (East Herts). In support of its nomination it drew attention to the level of local support, the large number of signatories to a petition supporting the continued use of the site as a pub and the existence of individuals in the community prepared to buy the building and operate it as a pub. East Herts accepted the officer report of 26 April 2018 and approved the nomination. In that report the test in s88(2)(b) was correctly set out, however it was subsequently referred to as ss88(3)(b). The owner by a letter of 7 June 2018 sought a review of the decision arguing that the test in s88(2)(b) (which it incorrectly identified – following the misdescription in the report as s88(3)(b)) was not met and that East Herts was relying on speculative and unrealistically low offers to purchase the property and a refusal of planning consent to satisfy the test – *The evidence is that the Property is not viable as a pub. If it were, it would be open as a pub and trading as a pub.* The owner argued that East Herts, in coming to its decision, had ignored the owner's evidence, considered irrelevant matters and come to an unreasonable decision.
5. The Deputy Chief Executive of East Herts reviewed and upheld the original decision (pages 367-369). She adopted the incorrect numbering of the test but from her letter was clearly considering s88(2)(b) when she wrote: *"If the public house was finished as had been described in the original and subsequent planning applications and marketed at a reasonable level, I can find no evidence to indicate that would not be realistic for the Cock Inn to be a viable and welcome community hub for the village".* She indicated that the owner's expectations of price for the property might be excessive commenting with respect to a valuation report commissioned by the owners *"The author indicates that a developer should not be expected to make a loss on the site, however, profit is not guaranteed and should not be relevant in the standing of the public house as an asset of community value."*

The grounds of appeal and resistance

6. The Appellant argued that East Herts had not properly applied the test in section 88(2)(b). It had not due weight to evidence that the pub was not viable. It also raised an argument with respect to a withdrawn completion notice with respect to non-domestic rates (this argument was abandoned at the hearing). In a witness statement in support of the appeal a director of the appellant company argued that there was no evidence that East Herts had considered the test in s88(2)(b) since the decision referred to s88(3)(b), that East Herts had not properly considered the report submitted by the Appellant as to the viability of a public house (Mr C Whirledge July 2016 bundle pages 529-603) and concluded that it was not viable, that East Herts had not, despite numerous requests, met to discuss alternative uses of the property, East Herts had not sought to compulsorily purchase the property and that the owners would consider any reasonable offer.

7. In resisting the appeal East Herts confirmed that it had properly weighed the submissions of the Appellant in the officer decisions, it had properly recognised that the owner's intentions should not block listing, it affirmed East Herts' stance with respect to planning permission and noted the interest from the Parish Council in purchasing the pub. East Herts submitted a witness statement from a planning consultant Mr W Richards. This addressed the test in s88(2)(b) and endorsed the reasoning of the second Planning Inspector who had refused the change of use finding the continued use as a public house could be a viable business. The statement rebutted the claim that East Herts had not given due consideration to the Appellant's expert evidence noting that East Herts also obtained an expert report on viability which had considered the Appellant's report and come to contrary conclusions (Mr A J Wheeler bundle pages 605-658). Mr Richards concluded (bundle page 690):-

I respectfully submit that in planning terms that no use, other than community use, would be permitted within at least the next five years in the listed asset. My view is supported by the decisions of two independent Planning Inspectors, who consider a future community use to be both possible and viable."

8. The Parish Council resisted the appeal. It confirmed that it had the intention of acquiring the property and had commissioned a valuation of the premises by a chartered surveyor which valued it at £140,000. They were preparing a business plan and were seeking borrowing approval from central government for a loan. It confirmed details of two local residents who both intended to operate the premises as a pub and had made unsuccessful offers for the Cock Inn of £205,000 and £145,000. The Parish Council submitted that the future use condition in s88(2)(b) was therefore met. The parish council submitted that:-

"10 The Appellant's reluctance to utilise or to enter into negotiations to dispose of the premises as a pub/community hub, must not subvert the clear purpose of the Act which is to give community interests groups an opportunity to acquire the premises for its lawful use."

The hearing

9. The Appellant sought an adjournment on the basis that negotiations were under way between the Appellant and the Second Respondent which could obviate the need for a hearing. This application was resisted by both Respondents and I concluded that the hearing should proceed since the question of listing as an ACV was distinct from any arrangement to which some of the parties to the appeal might, at some time, come to.
10. The Clerk to the Parish Council, Miss Jenny Lucas gave oral evidence. Funds in the sum of £142,000 had been raised by the Save the Pub action group and were available to purchase the acquisition. The Parish Council had prepared a detailed business plan and applied to the Ministry for Housing, Communities and Local Government for approval for a loan of £600,000 to support the project and was currently negotiating the loan. The funds would be sufficient for the acquisition, fitting out and operating capital for the Cock Inn. Two members of the local community had also made offers for the pub.

11. Counsel for East Herts submitted that the grounds of appeal were ill-conceived as the tribunal heard appeals de novo. He submitted that the decision to list the Cock Inn as an ACV was properly made. The test for the tribunal under s88(2)(b) was whether there was a realistic possibility of a community use in the next five years. Unusually in this case the community use was the most likely option and the opposition of the owners was not determinative of whether a listing should be upheld.
12. Counsel for the Parish Council submitted that the jurisprudence of the tribunal was consistent in its analysis of the future use test and this approach had been upheld by the Upper Tribunal. There was only one lawful planning use for the premises and there was no right to deviate from that use. There was no credible evidence to support the proposition that the use as a public house was not viable. The planning history was relevant, the building of two houses as part of the reinstatement of the public house had been for the purpose of ensuring the re-provision of the public house. The Cock Inn had not re-opened because the developer had chosen not to re-open it. It had been an important community facility until fire caused the closure. The viability of the public house had been explored and tested in recent planning appeals which had concluded that the pub was viable and in the light of the decisions it was hard to imagine that a local authority would deviate from them.
13. The Appellant submitted that it had consistently sought meetings with East Herts in order to explore options for the future. The property was not viable as a public house and the Appellant did not want to lose money. The decision-making had been flawed in that it relied on s88(3)(b) and not s88(2)(b) and therefore the appellant had had no option but to appeal.

Consideration

14. The Appellant has raised various criticisms of how East Herts has handled this matter. Since I am hearing this case afresh and not as a judicial review they are not germane to the appeal. There is one issue of substance in this appeal the s88(2)(b) test, whether:-

“ 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.”

15. From the information before me there is strong evidence of community involvement and commitment to re-opening the Cock Inn. I am satisfied that there are two realistic bids from individuals as well as a properly formulated business case from the Parish Council, backed by £142,000 cash and the prospect of a substantial loan. Given the recent planning history and the emphatic decision of the most recent Planning Inspector who examined the matter three months ago there is no realistic prospect of another lawful use within the next five years. The attitude of the Appellant is not determinative, otherwise, as a former President of this Chamber observed, the ACV scheme would be voluntary. The fact of negotiations between the Appellant and the Parish Council which formed the basis for the Appellant's application for an adjournment suggests that the Appellant is prepared to contemplate some community use. The evidence before me is sufficient to lead me

to conclude that future use as a public house is a realistic possibility. I am therefore satisfied that this appeal must fail.

16. The appeal is dismissed.

Judge Hughes
13 February 2019