FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
Community Right to Bid

Tribunal Reference: CR/2015/0028

Appellant: **Henthames Limited**

Respondent: **South Oxfordshire District Council**

Judge: **Jacqueline Findlay**

Decided at York House Leeds Without a Hearing
On 5 August 2016

Date of Promulgation: 16 August 2016

DECISION AND REASONS

A. LEGISLATION

1. For present purposes, the relevant provisions are:-

Localism Act 2011("the LA Act")

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.

(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) and 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 legislation.

B. THE FACTS

2. The appeal concerns a decision of the South Oxfordshire District Council (`the Council') to include land owned by the appellant, Henthames Limited, namely the land at LA Fitness Gym (`the Gym'), Newtown Road, Henley-on-Thames, Oxfordshire, RG9 1HG, on its lists of assets of community value under the LA Act. The appellant appeals against the respondent's decision of 24 November 2015 to uphold the listing of the Gym on review and seeks to have the Gym removed from the asset of community value list.

3. The Tribunal found that the nomination was valid. The Tribunal found that the body making the nomination was an unincorporated community body, with a minimum of 21 members. The individuals within the nominating body are all residents of South Oxfordshire and are on the electoral register. The nominating body satisfies the requirements of the Regulations. The Tribunal finds that the nomination form submitted correctly describes the nominated land, provides the contact details of the owners and sets out the grounds that the site should be added to the register. The boundaries of the site are well established and are not in dispute.

4. The Gym was run by LA Fitness as a sporting/leisure facility. The Gym was closed for business on 14 August 2015. Prior to 14 August 2015 there was a gym and swimming pool on the site and the facilities were used by a membership of around 2,200 people. The activities and facilities on the site included fitness activities using the gym equipment, swimming, including the provision of swimming lessons, massage, injury rehabilitation and therapy and a café.

5. The appellant is the freehold owner of the site of the Gym. The appellant purchased the freehold site with the intention of redeveloping it. On 9 October 2015 the appellant submitted an application for planning permission to change the use of the land from a gym to a care home. The application for planning permission remains outstanding. The building is no longer a gym; it is a vacant building. The gym equipment and fittings have been removed and the swimming pool has been drained. LA Fitness operated the workshop gym until 14 August 2015 after having entered into a Company Voluntary Arrangement ("CVA") on 6 March 2014. Pursuant to the CVA it was determined that the workshop gym could not be operated viably without a substantial rent reduction. Terms were discussed but suitable commercial terms could not be agreed and the workshop gym was subsequently closed on 14 August 2015. Notice of the closure was sent to the 2,200 members on 26 June 2015 and the application to list the building as an asset of community value was submitted on 30 June 2015. The appellant was notified

that the building had been listed as an asset of community value on 3 September 2015. The appellant's representatives submitted reasons opposing the listing as the building as an asset. The appellant's representative applied for review of the decision. The respondent undertook a review but did not change the decision on 24 November 2015.

C. PROCEDURE AND ISSUES

6. The appeal has been determined on the papers. Both parties have agreed to a determination on the papers. Both parties have been given ample opportunity to address the issues and prepare and present their cases and the Tribunal finds no injustice in so doing.

7. The appellant submits that the correct legal test that should be applied is whether or not section 88(2)(b) of the Localism Act 2011 is satisfied namely is it realistic to think that there is a time within the next 5 years when the building could be used in a way that furthers the social wellbeing or social interests of the local community? The appellant submits that although planning permission for the 80 bed care home has not yet been secured this should have no bearing on whether any social wellbeing or community use is viable or likely. The appellant invites the Tribunal to take into account the practical and commercial factors that would be at play should planning permission not be secured. The appellant has indicated that the company intends to exhaust all planning options available to it, that it is a large property company and may seek permission to operate the site with an alternative use to a care home with a far more profitable, non community use than a gym. The appellant submits that the respondent's response is based on a hypothetical situation which is fanciful and has a total lack of consideration for the commercial and practical considerations at play. The appellant submits that it is unrealistic to form the view that the building will be run in a way that furthers the social wellbeing or in the social interests of the local community in the future.

8. The appellant submits that the Gym would not be commercially viable taking into account the fact that Henley has a large number of health facilities. The appellant submits that the report carried out by Nathaniel Lichfield and Partners dated 1 October 2015 shows a considerable oversupply of facilities and that there is no quantative deficiency in swimming pool provision in the Henley area. In short the supply of health facilities in Henley outstrips demand

9. In a letter dated 15 March 2016 the appellant's representative submits the following for consideration:-

- No alternative Gym operators have been willing to take on the facility. This suggests that the facility is commercially unviable;

- All the gym equipment has been removed from the building by LA Fitness and the swimming pool drained. Re-equipping the gym and swimming pool will involve very considerable start-up costs;

- Operating a swimming pool and gym also involves considerable ongoing expense in terms of insurance, equipment maintenance, compliance with licencing regimes, qualification of staff;

- The membership fees would need to be higher than they were under LA Fitness' management to cover the rent and to operate the site viably; and

- A gym operator would have to incur considerable expense to market the site and attract members. There have been a number of new gyms opening in the local area thus increasing competition.

10. The respondent submits that the provisions of the LA Act are wide. The provisions refer to matters of "opinion" and in relation to what will happen in the future the issue is what it is "realistic to think" "could" happen, rather than what will or what is likely to happen. The appropriate question is not "what is the most likely future use." The respondent submits that it is reasonable to expect the building to be able to continue as a leisure facility and that there is a reasonable prospect that the building could further social wellbeing in the next 5 years. The respondent submits that the absence of planning permission for the appellant's proposals is relevant to the consideration of what the Gym might be put to in the next 5 years. If the appellant had permission to build a care home the likelihood of other uses materialising within the next 5 years would be lower and the absence of planning permission would increase the likelihood of the Gym being put to some other use in the next 5 years. The respondent submits that the Tribunal cannot assume that planning permission will or will not be granted and invites the Tribunal to approach the appeal on the basis that both a grant and a refusal of planning permission are realistic. The respondent submits that investment would be required from any community group and/or commercial organisation that decides to pursue a purchase or lease of the Gym but that the absence of any concrete proposals or business plans is not determinative or fatal in relation to what is realistic to think could happen within 5 years. The respondent submits that the task of the Tribunal is not to ascertain the single most likely future use of the Gym but whether it is realistic to think that there could be a community use of it within the next 5 years.

D. DECISION AND REASONS

11. The Tribunal finds that the use of the Gym until August 2015 satisfies the recent past condition in section 88(2)(a) of the LA Act. The evidence shows that the Gym was until August 2015 operated as a gym, fitness centre, swimming pool and café serving the local community and thereby furthering the social wellbeing and interests of the local community.

12. The issue before the Tribunal is whether the requirement in section 88(2)(b) is met. It is necessary when determining this issue to have regard to the present and certain position. The Tribunal has decided that the requirements of section 88(2)(b) is met. It is realistic to think that there is a time in the next five years when there could be non-ancillary use of the Gym that would further (whether or not in the same way as before) the social wellbeing or social interests of the local community.

13. The Tribunal has considered carefully the objective analysis put forward by the respondent of the various possible future uses of the Gym. The Tribunal has considered whether it is realistic to think that the Gym could be re-opened as a gym and/or swimming pool pursuant to a sale or a lease taking into account that LA Fitness was unable to run the business due to the level of rent. It is the view of the Tribunal that it is

possible that if planning permission is not granted the appellant may consider offering a lease to another gym operator with improved terms such as to make the business viable. In the event of the Gym being sold or leased there would be the necessity for capital investment but there is no reason to conclude, taking into account the local support for the facility, that the Gym would not be viewed as an attractive investment.

14. In reaching this decision the Tribunal has attached weight to the following factors:

   a. If planning permission is not granted the appellant will not eave the Gym standing empty but will explore other alternatives.
   b. If planning permission is granted the site is sufficiently large to envisage a care home and a smaller gym which would benefit the residents of the care home and the community. Such an arrangement would be beneficial to care home residents and gym users. It is realistic to suppose that such a venture would be commercially viable.

   c. It is likely that the previous 2000 plus users of the Gym would return to using the facilities if they re-opened taking into account the local support and interest. This is notwithstanding that they may temporarily be using alternative facilities.

   d. Capital investment would be required to re-equip the gym and do refurbishment work but it is realistic to think that this investment could be found by Keep Henley Active ("KHA") working alongside a commercial partner. They are motivated to do so.

   e. The Gym had a long history, since 1996, of serving the community with fitness facilities including at one time a crèche. It is likely that the community will be motivated, loyal and supportive of the facility if given the chance.

   f. It is likely that users of the Gym would be willing to pay more than they did previously to preserve a local community facility this increasing its viability.

   g. Commercial viability depends on the view of the investor and what return is sought. It is realistic to think that there may be an investor who could work with KHA to achieve a more modest return that that required by LA Fitness which was a national company with many outlets and facilities.

   h. Facilities of this sort have to comply with licencing requirements and have adequate insurance. There has to be an adequate number of trained staff. It is unrealistic to expect this to be done by volunteers but it is likely that members who are motivated to keep this local facility will be willing to pay a realistic price to keep that facility thus enabling the above stated requirements to be met.

   i. The fitness and swimming pool market is competitive. People expect value for their money, however, convenience, familiarity and the sense of being part of a community are very important factors for people when deciding which facility to use.

   j. It might be supposed that people may choose not use a gym and swimming pool if the facilities are not well run, properly equipped and serviced. However, users may be willing to accept slightly lower standards to enjoy a community and local facility for which expectations may not be so high.

k. People use sports facilities to become and keep fit, however, they prefer to have facilities that are easy to access and where they have a sense of belonging. The price people pay to use a facility is not the only factor influencing their decision.

l. It is not necessary for the Tribunal to prefer one viable proposal over another, however, taking into account the former use and structure of the building it is realistic to expect the Gym or part of it to be used for gym and swimming facilities.

m. The appellant has indicated that an appeal would be pursued if the application for planning permission were refused and in the event that the appeal was unsuccessful would investigate other commercially viable alternatives such as a reversion to office, light industrial or retail uses. However, taking into account the above factors the re-opening of the Gym as a gym and swimming pool could be one of those commercially viable alternatives.

n. There is no legal requirement for the nominating body or the respondent to produce a worked out business plan. It is not necessary for KHA to provide "factual evidence to suggest that they would be able to take on this facility" as suggested by the appellant in the letter of 15 March 2016. It is sufficient to be realistic.

o. The fact that no commercial operator has come forward is not determinative taking into account that in view of the pending planning permission application this has not been explored. The fact that Pure Gym did not wish to pursue the running of the facility is not indicative that another organisation or company would not wish to do so.

p. The submission that there is a considerable oversupply of facilities and that there is no quantative deficiency in swimming pool provision in the Henley area does not take into account that people prefer to use a facility nearest to their home, people prefer to use a facility where they will meet others that they know and that people wish to support their community projects. The proposition that the supply of health facilities in Henley outstrips demand does not take into account people's preferences and loyalty.

15. Accordingly, the appeal is dismissed.

Judge Jacqui Findlay

5 August 2016