



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

Appeal Reference: CR/2016/0022

**Heard on the papers
On 27 April 2017**

Before

JUDGE CHRISTOPHER HUGHES

Between

ADMIRAL TAVERNS LIMITED

Appellant

and

CHESHIRE WEST AND CHESTER

First Respondent

FARNDON PARISH COUNCIL

Second Respondent

DECISION AND REASONS

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. For present purposes, the relevant provisions are:-

Localism Act 2011

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;

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.

2. The Second Respondent (Farndon Parish Council – “the Parish Council”) submitted an Asset of Community Value (“ACV”) Nomination relating to the Farndon Arms, a licensed establishment in its area, to the First Respondent (Cheshire West and Chester Council – “the Council”) on 20 April 2016. The Council sought further information from the Parish Council which provided it in May and, once the information was complete the Council notified the Appellant (who owns the leasehold of the premises) on 17 May 2016. The Appellant’s solicitors submitted arguments on 15 June against listing contending that the listing was an “opportunistic infringement of property rights”. The property was incorrectly described as a “public house and restaurant” and that from 2008 it had been a “restaurant with ancillary bar, with letting rooms above” to describe it as a pub was “a false allegation”. The nomination had failed to disclose credible evidence that the property furthered the

social wellbeing or social interests of the community. By a letter of 8 August 2016 the Council listed the property confirming:-

"In the opinion of the local authority, the nominated asset is not within the categories of assets excluded from listing as detailed in Schedule 1 of The Assets of Community Value (England) Regulations. Regulation 2 states that if a building is a residence, and therefore ineligible for listing, if "it, or a part of it, is a hotel or is otherwise principally used for letting or licensing accommodation or paying occupants." Whilst the nominated asset has five bedrooms for let, these are considered ancillary to the core business of the asset as recorded in the registered lease of the property under clause 6.1(a) and the definition of "Business" contained in clause 1.1.

the nominated asset is a public house with five guest bedrooms within Farndon village which provides a social meeting place for local residents and visitors. The restaurant serves food five days a week though the bar is open seven days a week and beyond restaurant serving times. Major televised sporting events are screened, especially those not available via terrestrial television, so providing additional social benefit to the local community."

3. The Appellant requested a review by a letter of 17 October. This argued that as the Council had made the decision outside the statutory timetable (within 8 weeks of nomination) the Council had no power to list the premises. The Owner also provided further information as to the history and use of the premises arguing that 90% of the ground floor was taken up by the restaurant – the main use of the premises was as a "destination restaurant and hotel – not a public house." It denied that there was screening of sporting events. It argued that to assert it was a public house was *"factually incorrect for the reasons set out above, despite the user covenant contained in the lease, which lies within Admiral's gift to enforce or not. There is no longer any use of the Property as a pub. The very notion that there is any pub use of the Property is false... The Nomination failed to disclose any credible evidence that the Property furthers or furthered the social wellbeing or social interests of the local community, whereas there is clear evidence provided below of other nearby facilities, which substantially further the social wellbeing and social interests of the community and will continue to do so* [the letter disclosed details of public houses and clubs in the vicinity]." The letter further argued that since the Parish Council had no interest in purchasing the premises the nomination was not made in the spirit of the legislation which was to provide time for *"community groups to organise themselves and to raise finance"*. There was no evidence of interest in purchasing the property and therefore the listing process had been improperly used.
4. In its review the Council accepted that the decision had been made out of time, however it considered that this was not fatal to the listing decision. It acknowledged that *"while it is accepted that not all pubs further the social well-being or social interests of the local community, it is also considered that a restaurant could further the social well-being or social interests of the local*

community. In any event, a restaurant does not fall under one of the categories of land that cannot be listed...". The review noted that the bar opening hours were considerably more extensive than the restaurant, it considered that the 5 guest bedrooms did not form a sufficient part of the asset (drawing on a decision of the FTT

5. *Hawthorn Leisure Acquisitions Ltd v Northumberland County Council* CR/2014/0012 where four bedrooms attached to a thriving pub were held not to make it a hotel). It stated that the Council was entitled to rely on the good faith of the Parish Council while acknowledging that:

"The alleged screening of sporting events is considered to be a minor aspect of the application and use of the asset... Your comments are noted however the possible screening of sporting events is not in itself enough to justify delisting the asset. The Council considers that the asset functions as a pub and a restaurant and as such does further the social wellbeing and social interests of the local community. The pub web site advertises the "next quiz" in the bar on 30th Oct 2016. This suggests that the pub does host quiz nights. There is also a list of ales which will be available in the "well stocked bar" and an advertisement for "lazy Sundays" again in the bar. There is no suggestion that the real ales and "lazy Sundays" are aimed only at restaurant guests and the tenor of the web site is that it is open to the community for casual drinking. This therefore indicates that the premises also operates as a pub and one which contributes to social wellbeing".

The review pointed out that the applicant for a listing did not have to prove an intention to acquire the asset; nor did the legislation limit the number of public houses which could be listed in the locality. The review upheld the listing.

5. The Appellant appealed against this decision on three grounds:-

- The decision was based to a decisive degree on the premise that all public houses provide community value within s.88, this premise was disputed.
- The use of the property as a public house was only a minor and ancillary part of the business run from the property and therefore irrelevant to the question of whether s.88 was satisfied.
- The nomination made by the Parish Council provided insufficient reasons to conclude that s.88 was satisfied.

6. In support of these arguments the Appellant has supplied three witness statements.

- The first is from a director of the company which was formerly the Tenant and which owned the residue of a 20 year lease on the property. It took on the lease in 2011 and surrendered it in 2016. She is continuing to run the business until a new tenant can be found. She indicates that trade has deteriorated (in large measure as a result of difficulties in running the restaurant business following the departure of the chef) and the company surrendered the lease to the Appellant landlord in November 2016. She

sets out her perception of how trade has been during the period of her involvement and sets out a framework to separate the income from the business into three separate elements. By aggregating income from the restaurant part and the hotel part and comparing that with the income from the bar the statement shows that the majority of income derives from "restaurant" and "rooms". She states that the income from the bar has declined, a large proportion of its trade was associated with use of the restaurant (when it was open). There are few regulars and their custom is insufficient to cover the costs. In respect of community use she states that the premises have one function room and the use by community groups during her six years was never particularly significant and has trailed off. Quizzes used to be run "every two months or so" attended by around 20-30 people but the quizmaster has very recently died and there are no plans to resume them.

- The second and third witness statements are by employees of the solicitors acting for the Appellant. One statement confirms that there is no television showing the Sky Sports channel. It confirms that the bar is a small part of the ground floor of the premises which in its current configuration is largely devoted to the restaurant and that when the witness visited the premises (a Sunday lunchtime) there were only two men drinking in the bar. The second statement was from a lady who stayed overnight at the premises (eating elsewhere as the restaurant was closed). When she went out for the evening there was no-one in the bar however at a pub nearby people were drinking possibly after watching a rugby match on the television.

7. The Council resisted the appeal. It argued that the Public House use was extensive and that the use as a restaurant was of community benefit. It upheld the legitimacy of its processes and of the Nomination by the Parish Council. It submitted an extensive exhibit containing (inter alia) material from the premises website. This provides significant evidence of how those operating the website present the premises. At page 37 of the exhibit appears a strapline – *"The Farndon... Bar Restaurant and Guest Bedrooms"* above a notice indicating that *"Meals will not be served for the time being.* Below that the text starts *"The Farndon has been refurbished throughout with both the pub and the restaurant restored to their former glory...."* Page 39 lists current bar opening times, the date of the next quiz night, current real ales, and list of future real ales to be available in the bar. Page 40 has the slogan- *"We support local breweries, please support your local pubs"*.

8. The nominating Parish Council in its response (bundle page 272) provided significant information:-

- A sign on the property read *"TO LET – do you want to run this pub?"*
- When refurbished in 2007 it had been advertised and run as a Gastro Pub
- Recently it has *"apart from the guest house been closed on many days"*

- It was realistic to think that in the next five years a non-ancillary use of the building could further the social wellbeing or social interests of the local community. Farndon would expand its population over the next two years by 40% to approximately 2,500 persons and there was only one other pub in the village.

Consideration

8. The first argument advanced by the Appellant in its final submissions is that “The assumption that all public houses provide community value as defined by s.88 of the Act is false and, to the extent that the Decision was based upon that erroneous assumption, it is incorrect.” The actual question for the tribunal is, of course laid down by s88(1) and 88(2) whether an actual current use (or use in the recent past) of the building or other land that is not an ancillary use furthers the social wellbeing or social interests of the local community. The view that pubs can encourage alcohol abuse is of course a proper and legitimate concern, although one more associated with the Temperance Movement than with the owners of pubs; however there is no evidence in this case of any such deleterious social consequences or concerns about failure to uphold the conditions of the licence with respect to these premises. It is recognised (not least in the *Ministerial Forward to the DCLG’s Community Right to Bid: Non-statutory advice note for local authorities (October 2012)*) that pubs have a role to play in contributing to the development of vibrant and active communities. The Appellant recognises that the test must be applied on a case-by case basis to the facts of each nomination. It is clear from the information before me that the premises have been used by local people as part of their social lives, meeting others in a convivial atmosphere for food and drink and furthermore holding some social events, notably quiz nights. I am satisfied that while in the most recent period the business has not thrived as it might it has been used for the social wellbeing of the community and there are reasonable grounds to consider that in the next years (especially with the housing development in the area identified by Parish Council leading to an increased demand for its services) it could support the social wellbeing and social interests of the local community.

9. The documentary evidence in this case provides helpful pointers on what is and is not an ancillary use of the premises. The material from the Farndon Arms own website (discussed above) strongly points to it being a public house, which is consistent with the basis upon which the business is required to be operated. The property is currently held on a lease dated 6 May 2008. The property is called “The Farndon Arms Public House” (bundle page 233). It is held with a trade tie for the sale of beers, cider, flavoured alcoholic beverages (bundle page 235), the first of the Tenant’s covenants (bundle page 244) is that it shall not without consent “use the Property except as a licensed public house with or for the purpose of carrying out the Business...” The Business is defined (bundle page 236) “Business means the business of the sale on the Property of intoxicating and other drinks for consumption on and off the Property and the

provision of food and other refreshments and recreation to the public **with or without ancillary bed and breakfast accommodation**". The lease under which the business of the pub is carried out defines the residential aspect of the business as ancillary. The documentary evidence clearly points to the primary use of the property as being as a public house. While the Appellant has argued that it is up to it, as Leaseholder, to choose whether or not to enforce the requirements of the lease against the Tenant, I find this an unconvincing argument in the circumstances of the case. In the witness statement by the former Tenant on behalf of the Appellant the approach put forward is to aggregate the ancillary bed and breakfast trade with the provision of food and other refreshments so as to create a use which is larger than the identified bar use. This is entirely artificial engineering of figures by the Appellant to create a misleading impression; it is "opportunistic". The lease clearly is of a public house, the business of the public house is the sale of drinks and the provision of food and other refreshments, that is what the lease provides. The use as a pub and restaurant are, it goes without saying, of social benefit to members of the local community who will visit the Farndon Arms Public House for social purposes and enjoy a drink or food as part of that social intercourse. The use as a pub – whether for a drink or a meal is a non-ancillary use which confers a social benefit on the local community. In its submissions the Appellant relies on a Court of Appeal decision *Michael Graham Taylor v Courage Limited 1993 WL 964225*. This case under the Landlord and Tenant Act 1954 turns on the distinction between a public house and a restaurant and the consequences for security of tenure under that legislation. In the Appellant's submission this endorses an analytical approach which means that a restaurant and a public house/bar elements of a business are separable and on that basis the public house/bar is ancillary and not within s.88 of the Localism Act. I find that reasoning unconvincing. Here, rather than the specific statutory definitions of types of premises within Landlord and Tenant or Planning Legislation, Parliament has (with limited exceptions) defined premises by their social consequences rather than their uses. The relevant exception contained in The Assets of Community Value (England) Regulations 2012 Schedule 1 (land which is not of community value) is for premises where "*it, or part of it, is a hotel or is otherwise principally used for letting or licensing accommodation to paying occupants*". Applying that definition of letting or licensing accommodation to paying occupants I am satisfied that this trade (from the evidence of the current licensee amounting to about 20% of trade in a good year- bundle page 315) is ancillary to those non-excluded activities of pub and restaurant which are capable of, and in this case do, confer the required social benefits.

10. The third head of appeal is that the Nomination submitted by the Parish Council was inadequate for the Council to make its listing decision. The role of this tribunal is to assess the case on its merits. In an oral procedure this would be to conduct a full re-hearing of the case on the basis of all the evidence available to the tribunal, not simply the material initially submitted to the Council. The initial nomination form completed by the Parish Council contains very little

information some of which may not have reflected the actual position on the date that it was submitted and some of which may have been irrelevant. This is unsurprising considering that this Parish Council is a small public body with minimal resources consisting of volunteers who are trying to represent the interests of their community. These volunteers are unlikely to have completed such a form before and will have little understanding of the legal framework. However that form is merely the start of the nomination process by which a Council determines whether the criteria for listing as an ACV are met. Furthermore, as the Council properly observed, it was entitled to accept the nomination in good faith. In carrying out a full merits review of the listing I am in a very different position. While I have not had the benefit of an oral procedure (none of the parties considered an oral hearing necessary for the tribunal to fairly determine the issues) I have had the benefit of reviewing a large amount of material subsequently assembled by the various parties. That is sufficient to satisfy me that the listing was correctly made. While the Appellant has argued strongly for its position I find its arguments unconvincing and artificial. The Parish Council appears to have made an error in its original Nomination with respect to televised sport and the Council has properly acknowledged that, the other material before me is sufficient to sustain the listing. In considering whether social benefit has accrued from the pub the Appellant's witness has direct knowledge only of the few years since 2011 of the pub's very long history, that has been, on her evidence, a period of decline; and quite sharp decline over the last months. Despite that deterioration in business; in her evidence she gives details of use by community "*Some local groups have used the Farndon as a meeting place at different points over the last six years.*" While she chooses to evaluate this as "*never particularly significant*" it has occurred and on the material before me I do not consider it de minimis. In listing the Farndon Public House the Council legitimately considered the recent past and there is sufficient evidence of the social benefits derived from the last few years to justify listing.

Decision

11. I am satisfied that the grounds for listing this land are established and the appeal is dismissed.

Judge Hughes

28 April 2017