



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

Appeal Reference: CR.2019.0009

Before

TRIBUNAL JUDGE SIMON BIRD QC

Between

ANNAKUT LIMITED

Appellant

and

EAST HERTS COUNCIL

First Respondent

and

ASTON PARISH COUNCIL

Second Respondent

DECISION AND REASONS

A Introduction

1. The Localism Act 2011 (“the 2011 Act”) requires local authorities to keep a list of assets (meaning buildings or other land) which are of community value. 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, a sale cannot take place for six months. The intention is that this period, known as “the moratorium”, will allow the community group to come up with an alternative proposal. However, at the end of the moratorium it remains up to the owner whether the asset is sold, to whom and at what price. There are arrangements for the local authority to pay compensation to an owner who loses money in consequence of the asset being listed.

B Legislation

2. Section 88 of the 2011 Act provides so far as is material to this appeal:

“(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”.

C The Listed Asset

3. This appeal concerns the Rose and Crown, Bennington Road, Aston (“the R&C”) together with its grounds which include a Barn. The references in this decision to the R&C should be taken as extending to the land and buildings as a whole.
4. On 4 June 2019 Aston Parish Council (“the PC”) nominated the R&C for inclusion on East Herts Council’s (“EHC”) List of Assets of Community Value (“LACV”). The PC had apparently sought to nominate the R&C in April 2019, but had sent the requisite form to a discontinued e-mail address and it was not therefore received by the Council.
5. On 10 June 2019 EHC determined that it should be included on the LACV and this decision was affirmed following a review on 18 June 2019.
6. The Appellant appealed to the Tribunal by notice dated 13 November 2019.
7. In reaching a decision on this appeal, I have had regard to all the documentary evidence and submissions comprised in the appeal documentation filed on behalf of the Appellant and EHC. The PC’s submission was included as part of EHC’s submissions and no additional evidence or submissions were submitted. The fact that I do not make specific reference to a particular document or submission does not mean that I have not taken it into account.
8. The parties have agreed that this appeal is suitable for determination on the papers and having considered all of the documents, I am satisfied that I can properly determine this appeal without a hearing.

D Background

9. The recent appeal decision of the Planning Inspector dated 13 August 2019 dismissing the Appellant's four planning and listed building appeals relating to the R&C, together with a marketing brochure produced by Everard Cole, provide a helpful summary description of the R&C and its context.
10. Aston is a small village with a population of around 900 which lies to the south east of Stevenage. The R&C lies at the heart of Aston Village, opposite the cricket ground and within the Aston Conservation Area. It occupies a position described by Everard Cole as "*a prominent roadside position*".
11. The pub building is a listed building, as is the Barn. The pub building comprises a public house at ground floor level with living accommodation above. The internal trade area is split into two parts; the primary bar with a wooden servery accommodation around 30 covers and a dedicated restaurant also capable of serving 30 covers. This is supplemented by an adjacent snug area which was used as a play area when the R&C was last open for trade.
12. The Everard Cole particulars record that the trade areas were supported by a commercial kitchen with a food preparation area, an office and basement cellar.
13. The private accommodation at first floor level, which is accessed from behind the bar servery, consists of two double bedrooms, a large lounge and a kitchen and bathroom.
14. Externally, the Everard Cole particulars record that the property provides 25 car parking spaces, along with a very large grassed trade area. This is described as incorporating a Petanque piste and the Barn which was, at the date the particulars were compiled, used for storage. The Barn is a timber framed and weatherboard clad building which, whilst weatherproof, is in a state of disrepair.
15. The site area of the R&C comprises some 0.3042 ha (0.75 acre).
16. The R&C ceased trading as a public house in 2014 and was put on the market by the brewery, McMullen & Sons Ltd ("McMullen"). The present pub building dates from C17th and its origins were probably as a farmhouse. The premises were owned by McMullen from 1883 until their sale to Haut Limited in late 2014, with their subsequent sale to the Appellant in 2016. The R&C formed part of the McMullen's network of pubs across Hertfordshire and beyond.

17. In support of its nomination, the PC explained that the landlords of the R&C had willingly supported a wide range of community activities at the premises. These included providing a venue for the Tennis Club, Cricket Club and Allotment Society Committee meetings, Bell Ringers' social events, music events, quiz nights, annual fireworks, wakes, wedding and christening celebrations and the provision of a Petanque court. It also played a leading role in Jubilee events as well as acting as a focal point for walkers and cyclists. The PC refer to the importance of the family pub atmosphere, with the extensive play facilities in the garden.

18. As to the commercial success of the R&C, the Appellant's evidence is that, in the period 2000 to 2014 the R&C had had 10 tenants with each lasted only a short while. A report compiled for the Appellant by Young & Smith, licensed property agents, brokers and valuers, sets out that firms' opinion of the reason for the high turnover of tenants:

“Lack of support and trade from the village and lack of facilities to attract customers from the surrounding areas, high brewery rental charges, high charges for brewery tied beer leading to unviable product charges to customers, tied beer leading to lack of choice to customers, lack of investment from the freeholders due to high costs because of the grade 2 listing and local authority anti-development policies, and nearby competition from two other premises”.

19. The R&C was previously included on the EHC LACV following an earlier nomination made by the PC in 2015. The R&C should have been removed from the LACV in 2016 following its disposal to the Appellant but, due to an apparent oversight by the Council, this removal did not occur until 2019, just before the PC's most recent nomination. The disposal to the Appellant followed an invitation to the PC to purchase the R&C made in accordance with the requirements of the Localism Act 2011. A Viability Statement (“the Viability Statement”) prepared by the Forge Design Studio as a supporting document to the Appellant's redevelopment proposals for the R&C, states that:

“...the village and Parish were unable to secure sufficient funding from residents to establish a viable future of the Rose and Crown. Therefore the community protection order was released as the community protection order routefailed to secure a viable future for the Rose and Crown”.

20. The PC explain the failure to make an offer for the R&C differently. In their statement in support of the nomination, they say that the PC *“withdrew its granted Asset of community Value registration so as to enable the purchase by a particularly well experienced pub operator”*. However, this purchase then fell through and the R&C was sold to the Appellant.
21. Subsequent to its purchase of the R&C, the Appellant applied to EHC for planning permission and listed building consent in relation to two alternative redevelopment schemes. The first scheme, which was the subject of applications made in June 2017, proposed the conversion of the pub building to create two 2 bedroom dwellings and a micro pub with associated cellar, upper floor accommodation facilities and pub garden. The applications also proposed the conversion of the Barn to a two bedroom dwelling with associated car parking and amenity space. Planning permission was also sought for the erection of five dwellings in the existing car park and garden.
22. The second scheme which was the subject of applications made in May 2018, proposed conversion of the pub building to three dwellings, conversion of the Barn to a single dwelling and the erection of five dwellings on the existing car park and garden.
23. These applications were supported by the Viability Statement and the Young & Smith report to which I have previously referred. The Viability Statement attached the Everard and Cole sales particulars and a letter dated 12 August 2014 from McMullen addressed to the Parish Council which set out the brewery’s assessment of the background to the closure of the R&C.
24. All four of the Appellant’s applications were refused by EHC and the Appellant appealed the refusals to the Secretary of State for Housing, Communities and Local Government. The appeals were dealt with by means of the informal hearing procedure, with the hearing held by the appointed Inspector on 19 June 2019. The appeal decision was issued on 13 August 2019. Each of the appeals was dismissed. In terms of the appeals determined under section 78 of the Town and Country Planning Act 1990 (“the Planning Appeals”), the Inspector identified that the main issues included:

“..whether the proposed development/works would preserve the special architectural and historic interest of listed buildings known as the Rose and Crown PH and the Barn at the Rose and Crown PH.

.....

Whether the proposal would result in the loss of an important community facility”.

25. In relation to the effect of the appeal proposals on the significance of the Listed Buildings, the Inspector concluded that the works and changes of use proposed would fail to preserve their special interest and would result in less than substantial harm for the purposes of planning policy contained in the National Planning Policy Framework. In relation to the pub building she found that:

“Despite the fact that a small public house function remains in Appeal A, the subdivision and permanent conversion to separate residential units would diminish the significance of this heritage asset”.

26. On the issue of the loss of an important community facility, the Inspector noted that the appeal fell to be determined in the context of policy CFLR8 of the EHC Local Plan which provides that proposals which result in the loss of uses, buildings or land for public community use will be refused unless, amongst other criteria, an assessment has been undertaken which clearly shows that the facility is no longer needed in its current form. EHC’s case at the appeal hearing was that the Appellant had not engaged with the local community and was therefore not able to make a suitable assessment of the community’s needs.

27. In her decision letter, the Inspector noted the Appellant’s view that its evidence sufficiently demonstrated that the facility was no longer needed (para.24) and then moved to address the components of its case. She assessed the nature, extent and location of the competing facilities (para.25) and concluded that these would not provide realistic or comparable alternatives for meeting the social and community needs which the R&C could serve (para.26):

“Whilst I appreciate that these other establishments all compete for a customer base, the appeal site lies at the edge of a large centre of population, which is expanding, and is also located at the heart of a village which has an active and supportive local community, including a large number of social, sport and interest groups. The Rose and Crown has a car park, garden and includes an ancillary building, the Barn, which to my mind add value to the PH. I agree with the local residents that these features provide opportunities to support the Public House facility.”

28. The Inspector concluded on the evidence before her, that there had been an ongoing commitment and interest by the local community to enter into dialogue with the R&C's owners and to explore all available options to secure a means by which it could be retained as a community pub (para.27). She also noted that:

“The Rose and Crown Investment Group has also prepared an outline business plan to demonstrate their intention to re-open a community owned pub with car park and garden, should the opportunity arise for them to purchase the PH part of the site”.

29. On the main issue which she had identified, the Inspector concluded:

“28. I have taken into account the history of the PH, the frequent turnover of tenants who have sought to sustain the business, and the declining barrellage. I have also had regard to the Young & Smith Report submitted on behalf of the appellant. It is clear that the Rose and Crown as a tied PH, coupled with a lack of investment in facilities to attract the local population, high rental charges, and lack of expertise may all have contributed to the inability of the PH to compete with other providers. Furthermore, I have not been provided with any substantive evidence that would suggest that the listed status of the PH has created excessive maintenance costs or hindered any investment proposals. It may well be the case that even with investment, freedom to sell a range of beverages and the appointment of experienced landlords with the ability to provide good food catering, the Rose and Crown would still be unsuccessful. However, given the strength of feeling and commitment demonstrated by the local community to retaining this facility, I am not convinced that at this time it has been demonstrated that the existing facility is not needed.

29. I appreciate that Appeal A would retain a small drinking establishment within the eastern end of the building. This area would have a small bar and could also provide coffee facilities and cold snacks. The appellant has advised that they have agreed heads of terms with a landlord who operates a similar and successful establishment in a neighbouring Parish and who would be keen to invest and develop a similar business within the Rose and Crown. However, the space available would be quite

constrained and the absence of kitchen facilities would mean that the facility would not be able to provide food. The proposal would not therefore provide an enhanced provision in terms of quality which would not outweigh the loss of the existing facility which I have found is still needed.

30. I conclude that the proposal would result in the loss of an important community facility. It would therefore conflict with the development plan and in particular Policy CFLR8 of the LP, the aims of which are set out above. I also find conflict with paragraph 92 of the Framework which seeks to ensure that planning decisions should guard against the unnecessary loss of valued facilities and services”.

E The Issues

30. The issues raised by the Appellant’s grounds of appeal are both procedural and substantive.
31. In relation to the procedural grounds, it contends that EHC failed to comply with the procedural requirements of the Localism Act 2011 and the Asset of Community Value (England) Regulations 2012 (“the Regulations”) and or that it acted unfairly in its handling of the Nomination, the decision to include the R&C on its LACV and in its review of the original decision.
32. Under the substantive ground the Appellant contends that it is not realistic to think that there is a time in the next five years when there could be a non-ancillary use of the R&C that would further the social wellbeing or social interests of the local community.

F The Procedural Grounds

33. The Appellant argues that the procedural failings of EHC resulted in unfairness to it which has the effect of invalidating EHC’s decisions on the nomination. It argues that, in consequence, the nomination should be treated as void. The particular failings upon which relies are:

- (a) The failure to of EHC to supply the Appellant with a copy of the PC's nomination and supporting information, before it made its original decision. It was therefore obliged to make representations on the proposal without sight of the nomination;
 - (b) The timetable for the decision on the nomination was driven by the date of the impending planning appeal hearing, with the object being to pave the way for the R&C to be listed before the planning appeal hearing. The Appellant's reasonable request for deferral was ignored;
 - (c) Neither the Appellant nor its solicitor were informed of the decision to include the R&C on the LACV before the planning appeal hearing on 19 June 2019, notwithstanding that the decision had been taken on 18 June 2019;
 - (d) The review of the original decision was not conducted by an officer with appropriate seniority and the review decision failed to address the procedural failings in the original decision or to approach the review on the basis of a de novo re-consideration.
34. The Tribunal has sympathy with some of the criticisms made of EHC's handling of the nomination and the decision making process which led to the inclusion of the R&C on the LACV.
35. Whilst Regulation 8 of the Regulations is not well worded, its purpose is to ensure that before a decision on the inclusion on the list of a property is made, the owner has an opportunity to advance a reasoned objection. Inclusion of a property on an LACV leads to an interference with the owner's property rights the implications of which, in some circumstances, may lead to the payment of compensation. The notice required to be given under Regulation 8 is one of the safeguards of the system which is there to protect both the landowner and the listing authority from the implications of an inappropriate listing decision.
36. Regulation 8 states:
- “A local authority which is considering whether land nominated by a community nomination should be included in the list must take all practical steps to give the information that it is considering the listing to [the landowner]”*
37. Read literally the regulation can fairly be argued to require only that the fact that a nomination has been received should be provided to the landowner. However, when the Regulation is seen in context, a more purposive approach is warranted, if only as a matter of good practice. The nomination for a building to be included on the LACV should, as a matter of sensible good

practice, be provided to the landowner to enable an informed response to it and also to guide any decision by a landowner as to whether to request a review of a decision to include an asset on the LACV.

38. However, in the context of fairness, what is relevant is the statutory scheme as a whole. This provides two safeguards to mitigate against any procedural unfairness. Firstly, there is the statutory right to request a review of the decision by the authority provided by section 92 of the 2011 Act. Secondly, there is the statutory right of appeal to the First Tier Tribunal under regulation 11(1) of the Regulations. A procedural failing in the handling of a nomination by an authority cannot invalidate the nomination nor, when seen in the context of the statutory scheme as a whole, can it void any subsequent steps taken on the nomination. The right of appeal to the First Tier Tribunal, which involves a full re-consideration of the merits of the decision to include a property on the LACV, coupled with the Tribunal's powers and procedures, provides the remedy for any earlier failings.
39. I note here that the Appellant was provided with the nomination form well before EHC's review of its original decision and therefore, leaving aside the separate criticism of the review process, the earlier decision not to forward the nomination to the Appellant was corrected in time for it to respond to its contents before the review decision was made in October 2019. Further, the Appellant has had the opportunity to supplement its response to the nomination in the appeal to this Tribunal. For these reasons, the Tribunal rejects this ground of appeal.
40. Similarly, in relation to the criticism of the apparently accelerated decision on the nomination, the safeguards of the statutory scheme as a whole provide the Appellant with adequate protection allowing, ultimately, the ability to seek a full re-consideration on the merits by the First Tier Tribunal. Even were the Tribunal to accept the Appellant's view that there was some underlying impropriety, the right to a review and subsequent appeal are the safeguard. This ground must be rejected.
41. As to the criticism that EHC was late in giving notice of the original decision to the Appellant, that may have been discourteous, but it has no bearing on the validity of the original or review decision and, whilst it may have contributed to the Appellant's perception that it had been unfairly treated, the full consideration of the merits which this appeal allows for provides the appropriate remedy and this ground must be rejected.
42. The same reasoning applies to the Appellant's criticisms of the Review decision. The Tribunal does not accept the criticism of the qualifications of the officer who undertook the review. The requirement of paragraph 10(4) of

the Schedule to the Regulations is that a review shall be conducted by an officer of appropriate seniority. That is no doubt intended to ensure that the officer undertaking the review should have the confidence to reach a different decision from the original decision under review. EHC's procedure, which required that such a review be conducted by a "senior manager", is consistent with this requirement. There is no statutory requirement for a review to be undertaken by a legally qualified person. In the event that an officer undertaking a review requires legal assistance that can be sought from the authority's lawyers.

43. Further, and in any event, the right of appeal to the First Tier Tribunal would provide an adequate remedy should a review be undertaken by a person lacking appropriate seniority.
44. That leaves the issue of the approach taken in the review decision itself. I agree with the Appellant that it appears to be little more than a rubber stamp of the original decision, which does not grapple with the substantive points raised by the Appellant or provide any reasoning as to why the decision was being upheld. The benefit of the provision of proper reasons (section 93(3)(b) of the 2011 Act requires the reasons for the decision following a review to be given) is that reasoning demonstrates that the issues have been fully and properly reconsidered.
45. However, as with the other procedural criticisms made by the Appellant, the right of appeal to the First Tier Tribunal, which involves a full reconsideration on the merits, provides the appropriate remedy. The weaknesses in the review decision do not invalidate the decision to include the R&C on the LACV necessitating a fresh nomination or a re-commencement of the decision-making process.

G The Substantive Grounds

The Appellant's submissions

46. The Appellant argues that the criteria contained in section 88(1) and (2) of the Act are not met. The R&C closed and ceased trading in December 2014 and, save for security personnel, it has been vacant since. Whilst the term "*recent past*" as used in section 88(2)(a) is not defined, the R&C has been closed for five and a half years and this long period of closure precludes it from listing.
47. As to whether the R&C has a realistic future for a qualifying purpose, the following matters are relevant:
 - The pub business closed and ceased to trade because it was unviable;

- Aston is already well served by public houses with which the R&C would be unable to compete;
 - Significant capital investment would be required to bring the R&C back into use;
 - No business plan has been produced to show how refurbishment would be funded or how the R&C could operate profitably;
 - The PC had the opportunity to bid for the site, but did not do so.
48. McMullen had owned and maintained the R&C for 131 years prior to its closure and they had worked hard to keep it trading profitably. However, trade had declined from an historic high of 276 barrels per year, to an average of only 100 barrels per year over the last 5 years of trading. Such pubs will only survive if they have a food focus but that requires comprehensive food preparation facilities and enough customer space to offset the higher operational costs. The R&C has neither.
49. The area in and around Aston is overserved by public houses is over-served by public houses. Examples of successful food orientated public houses in the vicinity of the site include the Crown, the Three Horseshoes and the Chequers, all of which are within walking distance and accessible by a short car journey. For the R&C to compete profitably with these establishments would require considerable capital investment and development.
50. Information concerning the period of decline and an assessment of reasons behind the closure of the R&C was included in support of the Appellant's planning application and subsequent appeal. This included the Viability Statement and Young & Smith's report.
51. Whilst the PC contend that the decline of the R&C was due to poor management and lack of support from the brewery, nothing could be further from the truth. McMullen's business model continues to be one of expansion and they dispose of sites only where they have proven unworkable over a long period of time. It would not have disposed of the R&C had it been viable. The Three Horseshoes is an example of a McMullen pub which had flourished as a result of its location and family orientation and with which the R&C could not compete.
52. The Appellant commissioned two pieces of work to assess the level of competition which the R&C would face. Icen Projects assessed the relative levels of public house provision by parish within East Herts District. Entran had mapped the accessibility of public houses and similar facilities within the vicinity of the R&C. The two reports demonstrate that the number of pubs per head of population in and around Aston, is above the district average and

would provide an extremely challenging market for any public house to operate. Were the R&C to re-open, it would have four pubs per 931 people. That is a ratio of 4.3 pubs per 1000 people which is well above the District average of 0.91 per thousand people and higher still than the national average of 0.58 pubs per 1000 people. Given the history of the decline and closure of the R&C, it is unrealistic to consider that it could operate successfully in the face of this well-established competition.

53. The PC has put forward no credible business plan on which it would be possible to conclude that the R&C could be brought back into viable operational use in its current form. A business plan was submitted by the PC with its representations on the Appellant's planning applications but this made no allowance for the necessary capital investment and no explanation was provided of the allowances made for overheads or of how the custom necessary to generate the level of sales envisaged would be attracted.
54. The Appellant in its first planning application, had put forward a credible scheme of development that would ensure that the listed building is brought back into beneficial use. The micro pub proposed as part of the proposal offered an alternative format to the original pub and a gastro pub for which investment and development would be required. A business plan prepared by a successful micro pub operator indicates that the micro pub could operate profitably based on the barrelage recorded over the last ten years.
55. The case for listing of the R&C rests entirely on an unsigned and undated note supplied by the PC. It should be treated with caution and given appropriately limited weight, in so far as it purports to present facts about the R&C and the likelihood of its being brought back into use as a pub. At best, it offers the unqualified views of an unknown author. The note is also contradictory in claiming that the R&C fell into disuse through lack of patronage resulting from under-investment whilst also claiming that there had been extensive patronage from a wide variety of local groups.
56. For all these reasons, the statutory requirements for listing have not been satisfied and the appeal should be allowed.

EHC's Submissions

57. The information provided by the PC indicates that the R&C closed as a result of a lack of investment by McMullen and a desire to sell the site for development. Whilst the pub had closed, that does not mean that it was unviable. At the time, McMullen were engaged in a widespread review of properties and a number of their pubs were sold for development.

58. The PC's information indicated that the R&C provided a different offer to the Pig and Whistle and The Crown, and the presence of other pubs in the area did not mean that the R&C had no realistic prospect of use within the next five years. There is no requirement that a successful nomination be supported by a fully worked out and costed business plan. The PC refers to a consortium of village residents interested in buying the part of the land for a car park and the pub premises to enable continuation as a managed free house pub and restaurant. There is sufficient evidence of an appetite for the R&C to satisfy the statutory requirement.
59. The information provided by the PC states that before the sale of the R&C by McMullen the brewery had failed to support the pub which negated the heroic efforts made by a series of temporary tenant landlords. The failure of the brewery to update the kitchen facilities had led to the slow decline of the pub.
60. McMullen had sold the R&C to Haut Investments, a property development company, which re-marketed it and received a number of offers for the property as a pub. This led the PC to withdraw, so as to enable the purchase by an experienced pub operator. There were at least two other possible buyers who were interested in operating the R&C as a country pub.
61. The pub and grounds were then sold to the Appellant, another property developer. Its planning proposals had been rejected and a micro pub was unlikely to work in this location.
62. In terms of competition, the Pig and Whistle, a Sports Pub, had not proven to provide an alternative venue for the range of village activities which the R&C had been used for. Its clientele is very specific and drawn from outside the village. The Crown is essentially a restaurant only with bar facilities and its clientele is drawn largely from outside the village. That is unsurprising as it is close to outskirts of Stevenage.
63. There is considerable local support for the re-opening of the R&C as a community pub. The annual parishioners' meetings in each of the last five years have voted overwhelmingly to support this. Further, there is a consortium group interested in buying the pub and car park to enable continuation of the use of the R&C as a freehouse and restaurant. The group has substantial financial resources. It has finalised plans to acquire the pub building and some of the car parking with the aim of re-opening the R&C as a community pub, provided that it can be purchased at a realistic price. A business plan has shown that, contrary to the view of McMullen, the pub can be financially viable provided that investment is made in the refurbishment and upgrading of the kitchen facilities. This view is strengthened by the local

plan proposals for the East Herts and Stevenage which show substantial new housing growth in the near future which will broaden the customer catchment.

The Tribunal's Conclusions on the Substantive Issue

The R&C

64. I am satisfied that the evidence before me establishes that the use of the R&C with its Car Park and garden and the Barn in ancillary storage use when it was trading, furthered the social wellbeing and interests of the local community. It provided a venue for members of that community to meet and socialise, whether in groups or individually. The use by a variety of clubs, for christenings and wakes, all demonstrate that the R&C served as a hub for the local community.
65. I am also satisfied that this use was a use of the R&C made in the recent past. The evidence is that a wide range of social and local community use was made of the public house (served by a different and larger car park) during McMullen's period of ownership in the period to 2014, which can fairly be said to be in the recent past.
66. There is evidence of sufficient use during this period, by way of use by clubs and other members of this comparatively small local community, for me to conclude that the statutory requirement contained in section 88(2)(a) is satisfied.
67. The principal issue in this appeal is whether it is realistic to think that there is a time in the next five years when there could be a non-ancillary use of the R&C that would further (whether or not in the same use as before) the social wellbeing or social interests of the local community.
68. The statutory test of "*realistic to think*" has consistently been interpreted by the First Tier Tribunal as a low threshold, to be distinguished from higher thresholds, notably "*balance of probabilities*". "*Realistic*" does not mean "*most likely*"; it permits of a number of possibilities; see Evenden Estates v Brighton and Hove City Council CR/2015/0015). Evenden is also authority for the proposition that evidence of public action/support for a bid, combined with the refusal of planning permission are relevant factors in identifying what is realistic. However, as Judge Peter Lane also said in Evenden:

“it should not be assumed that the requirement of section 88(2)(b) will necessarily be met, merely by a Micawber-like hope that something will turn up. A fact-sensitive analysis is called for”.

69. Thus, I do not have to be satisfied that such a use is the most likely, the more likely or the only use which could occur in the five year period. The test is one which, as the Tribunal has consistently held, may be satisfied notwithstanding that there may be several realistic uses, of which a qualifying use is but one.
70. A number of previous decisions of the Tribunal have considered (a) whether or not it is a pre-requisite of listing that a nominating body should produce a detailed proposal or worked up business plan, demonstrating that the qualifying use is viable and sustainable (see Evenden, Astim v Bury Council CR/2015/022, Spirit Pub Co Ltd v Rushmoor Borough Council CR/2013/0003, Neem Genie Ltd v Telford & Wrekin Council CR/2016/0010); and (b) the relevance of the grant or refusal of planning permission (STO Capital v Haringey CR/2015/0010, Spirit Pub).
71. I do not see those cases as establishing general principles other than that the planning status of the land and the degree of consideration given to the viability and sustainability of a qualifying use of the nominated asset by the proponents of listing, will be material to the decision on whether or not to list that asset.
72. How relevant and therefore the extent to which the absence or presence of a business plan and/or planning permission is to any particular decision, will be highly fact sensitive. For example, in the context of a recently closed public house in reasonable condition with accounts going back over a period of time showing good levels of profitability, there is (all other things being equal), less likely to be a need for a nominating body to produce a detailed business plan to support its nomination.
73. At the other end of the spectrum, there will be cases in which the nominated asset may have failed commercially over some years, been extensively marketed without success, fallen into disuse and disrepair and benefit from a recently granted planning permission for a new non-qualifying use. In such a case a nominating body may struggle to demonstrate that it is realistic to think that a qualifying use could be made nominated asset without a clear demonstration of how, financially, a qualifying use could be delivered in the five year period. These examples represent the two ends of a broad spectrum. Where on that spectrum any given case falls, will inevitably turn on its specific facts.

74. In this case, the Tribunal has been presented with little direct evidence on the future viability of the R&C as a public house. The Appellant invites it to conclude that the high turnover of tenants in the decade leading to its closure, coupled with the decision of McMullen to dispose of it, notwithstanding its wider programme of expansion and the strength of the local competition, justify the inference that the R&C could not be viable as a community pub.
75. In contrast, the Parish Council, reliant on local community support, their alternative assessment of the strength of the competition and the Rose and Crown Investment Group's business plan (the details of which are not before the Tribunal), invites the Tribunal to conclude that it is realistic to think that the R&C could be a successful community pub in the next five years.
76. There is some merit in the Appellant's submission that the Tribunal should not give weight to statements or assertions as to future viability which have no evidential support. As Judge Peter Lane said in the Evenden case, it should not be assumed that the requirements of section 88(2)(b) will be met by little more than a Micawber like hope that something will turn up. Equally, however, the Tribunal should not give weight to assertions as to future unviability based on the past, unless the past financial performance of the asset under consideration and/or other considerations relied upon, can be shown to be a sound guide as to asset's future performance, however it might be operated.
77. In this case the Tribunal, in deciding whether the requirements of section 88(2)(b) are satisfied in this case, has the very considerable benefit of the findings of the Inspector who determined the planning appeals. Whilst the Inspector was concerned with whether or not each of the appeal schemes complied with policy CFLR8 of the East Herts District Plan 2018 and its requirement that the loss of a community use should be refused, unless an assessment had been undertaken which clearly showed that the facility is "*no longer needed*" in its current form, as is clear from the reasoning of the Inspector, implicit in that assessment is consideration of the current and future financial sustainability of the asset.
78. The evidence on which the Appellant relies upon in this appeal, notably the Viability Statement, Young and Smith's report together with the Icení Project and Entran Limited reports, were all before the Inspector. I also note from the Inspector's decision letter, that Forge Design Studio, Icení Projects and Entran Limited, all participated in the appeal hearing held on 19 June 2019.

79. In her decision letter, the Inspector distinguished the R&C from its competition on a reasoned basis and noted that whilst, the other facilities would compete for the customer base with the R&C, none was capable of performing the same community hub role as had previously been performed by the R&C.
80. The Inspector also noted the planned expansion of Stevenage and the locally active community with its large number of social sport and interest groups. This, coupled with the local commitment to the re-opening of the R&C as a community pub, supported by the Rose and Crown Investment Group's outline business plan, persuaded her that the Appellant had failed to show that the pub, with its Barn, was no longer needed.
81. Whilst the Inspector clearly gave weight to the history of tenant turnover and declining barrellage, she was not satisfied that the R&C's past financial performance as a tied public house was a reliable indicator of how it might perform as a community pub. She recognised that *"it may well be the case that even with investment, freedom to sell a range of beverages and the appointment of experienced landlords with the ability to provide good food catering"* it might prove to be unsuccessful, but the strength of local feeling and commitment demonstrated by the local community to the retention of the R&C, left her unconvinced that the pub was no longer needed. It is implicit in that finding that she saw that there was at least a realistic prospect of the R&C being successful as a community pub. In this context, I note that she found that the appeal proposals both conflicted with paragraph 92 of the National Planning Policy Framework which states that planning decisions should guard against *"the unnecessary loss"* of valued facilities.
82. Whilst as I have indicated, the policy test which the Inspector had to apply differs from the statutory test which this Tribunal has to apply, in terms of the evidence and factors which fall to be considered, there is a considerable overlap and it is implicit in the Inspector's findings that there is at least a realistic prospect of the R&C succeeding as a community pub for the reasons she gave. Given that her conclusions followed an informal hearing at which the Appellant and the Parish Council were able to set out their respective positions and the Inspector had the opportunity to test those under the inquisitorial procedure involved, I attach very considerable weight to her conclusions in reaching my decision. There is no suggestion from the Appellant that the Inspector's conclusion involved any error of law or fact or was not one which was not reasonably open to her on the evidence.
83. On the issue of viability, I have been presented with essentially the same documentary evidence as the Inspector on behalf of the Appellant, which I have considered for myself in the light of the Inspector's findings. I am

satisfied for the reasons that the Inspector outlined as justifying the conclusion that the Appellant's proposals would involve the unnecessary loss of a valued facility, that it is appropriate for me to conclude that it is also realistic to think that the R&C could be used as community pub in the next five years. The dismissal of the planning appeals and the finding that it had not been shown that the conversion of the listed buildings to residential use represented their optimum viable use, is likely to require the Appellant to re-consider its plans for their future and on the basis of the community interest and growth in the population of the local catchment identified by Inspector, it is realistic to conclude that this could involve use as a community pub in the next five years.

Conclusion

84. I accordingly find that the requirements of section 88(2) are satisfied in respect of the R&C and this appeal is dismissed.

3 June 2020

JUDGE SIMON BIRD QC