



**Appeal number:  
CR.2020.0001**

**FIRST-TIER TRIBUNAL  
GENERAL REGULATORY CHAMBER  
(COMMUNITY RIGHT TO BID)**

**Philip James Milton**

**Appellant**

**- and -**

**North Devon District Council**

**First  
Respondent**

**- and -**

**Bratton Fleming Community Benefit Society Limited**

**Second Respondent**

**Before:**

**JUDGE J FINDLAY**

**Determined on the papers, sitting Chambers on 29 September 2020**

**DECISION**

**Decision**

1. The appeal is allowed. There was not 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. The provisions of section 88 (2)(a) of The Localism Act 2011 (“the Act” are not satisfied.

**Mode of Hearing**

2. This has been a paper hearing which has been consented to by the parties. The form of remote hearing was P: paper determination which is not provisional. A face-to-face hearing was not held because it was not practicable and no-one requested the same and all the issues could be determined on the papers. The documents referred to are in an open bundle of 482 pages, the contents of which have been recorded. The decision made is as described above.
3. The Tribunal considered it was fair and just to determine the appeal on the basis of the papers having considered rules 2 and 32 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (as amended).

## **The Background**

4. The Act requires local authorities to keep a list of assets (meaning buildings or other land) which are of community value. Once an Asset of Community Value (“ACV”) 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.
5. A nomination to list the buildings and land associated with The White Hart, Station Road, Bratton Fleming, Devon, EX31 4SA (“the Property”) dated 26 July 2019 was submitted with the First Respondent. The First respondent decided on 14 November 2019 that the Property had been properly nominated and qualified as an asset of community value and was added to the list of Community Assets held by the First Respondent.
6. Mr Philip James Milton and Mrs Helen Milton of Trimstone Manor House, Ilfracombe are the owners of the Property. They became the registered proprietors on 2 June 2014. The Appellant is Mr Milton.
7. The Bratton Fleming Community Benefit Society, the Second Respondent, is a company registered under the Co-operative and Community Benefit Societies Act 2014 and has Rules.

## **The Legislation**

8. 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;

#### *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.

#### *91 Notice of inclusion or removal*

(1) Subsection (2) applies where land—

(a) is included in, or

(b) removed from,

a local authority's list of assets of community value.

(2) The authority must give written notice of the inclusion or removal to the following persons—

- (a) the owner of the land,
- (b) the occupier of the land if the occupier is not also the owner,
- (c) if the land was included in the list in response to a community nomination, the person who made the nomination, and
- (d) any person specified, or of a description specified, in regulations made by the appropriate authority,

but where it appears to the authority that it is not reasonably practicable to give a notice under this subsection to a person to whom it is required to be given, the authority must instead take reasonable alternative steps for the purpose of bringing the notice to the person's attention.

(3) A notice under subsection (2) of inclusion of land in the list must describe the provision made by and under this Chapter, drawing particular attention to—

- (a) the consequences for the land and its owner of the land's inclusion in the list, and
- (b) the right to ask for review under section 92.

## **Submissions and Evidence**

9. The Appellant, Mr Milton, submits the following points:

- a) The First Respondent is required to give written notice to the owner of the land and the occupier of the land if the occupier is not the owner. Mr Milton is not the sole owner and the occupiers have not been given notice.
- b) Mr Milton is appealing an Enforcement Notice under the four year rule as there have been residential tenants in the building 'continuously' since 2014 and this should have been taken into account and the planning outcome confirmed before a second ACV was granted. As the Property has residential elements separate from the commercial parts including separate entrances attracting separate Council Tax accounts, then a universal ACV is not appropriate.
- c) The description of the Property in relation to the upper floor and ground floor is not accurate.
- d) The pub has been closed since December 2012 following the attempts and failures of several managers/owners since 1989 to make a successful income even with the support and expertise of the previous owner, Enterprise Inns. After being advertised for sale for two years, Enterprise Inns sold the Property to the owners in April 2014 at a much lower figure than the original asking price when no one including the local community saw a viable future. Enterprise Inns paid £422,860 (plus VAT) on 27 April 2007.
- e) Given the size of the pub and its running costs it requires considerable patronage and this has not happen in the recent past. The Property was purchased with the

intention of developing the building to provide additional limited cottage housing for the village and giving the best opportunity possible to provide a smaller and sustainable pub back to the centuries-old original footprint and excluding the upper food hall area, restaurant and craft shop/hub. The previous planning application included the provision for a smaller pub as Mr Milton was aware of the wish to have a pub facility in the village. The planning application was rejected. Mr Milton reached out to the community from the beginning, listened to what was wanted and incorporated the community's wishes in the Enabling Development plan. The community group was against the development of the Property.

- f) The proposed community pub/hub is not viable in any form.
- g) The Property was offered for sale to the Community Group at cost price in 2019 when the moratorium period was triggered but the offer made of £150,000 was insulting and was refused. Mr Milton offered to loan the majority of the money until alternative arrangements could be made and to rent or buy the downstairs pub on a lease and for their friends to buy the flats separately as buy-to-lets but this offer was declined.
- h) The rejection of the opportunity to buy the Property shows that there is not a realistic likelihood that it could do so in the future. The Second Respondent has never provided any evidence that they could raise the necessary funds. Seven years has been lost and the Property continues to be an eye sore.
- i) To satisfy the requirements there needs to be realism and viability such as a viable business plan and/or funding to demonstrate real intent and not whimsical wish. The previous application 5 year ago failed to provide a business plan and one has not been provided since.
- j) It is an unviable dream without substance. The Property would cost a significant sum to bring it up to a condition ready to use. £175,000/£250,000 would be required to meet all the regulatory demands for hygiene, safety and fire regulations etc as well as being attractive, redecorated and refurbished ready to receive guests.
- k) Mr Milton has never met Mr Darren Birch or any of his family. Mr Birch has not inspected the White Hart during Mr Milton's ownership of the property.
- l) The Second Respondent informed him that it wished to purchase the Property and to operate it as a community venture. The Second Respondent now says that it would be happy for Mr Birch to purchase the property which is contrary to the ACV application made by Mrs Sparling which states that the reason for the application was to facilitate the ownership and management of the premises by the Society.
- m) Mr Birch has indicated on social media that he is interested in purchasing the Property and has been told on several occasions that it is not for sale. Mr Birch has not provided evidence of his ability to purchase the Property and Mr Milton has not entered at any time into negotiations with Mr Birch.

- n) Mr Birch says he is in possession to two independent valuers' valuations but these were not attached to his communication to Mr Milton. He assumes he is referring to the reports commissioned by the Second Respondent and which were completed without access to the inside of the Property.
- o) The First Respondent agreed in January 2019 to investigate the arrangements, cost and ramifications of a Compulsory Purchase Order if were possible. To date no investigation has occurred.
- p) The recent past test is not met. In recent years the pub failed to provide enough trade to support the then managers and owners for a considerable number of years and could not remain open. Times have changed and while decades ago the local pub was the bub of the community and well used, a wider choice of resource has resulted in a failing consumer interest as shown by the number of signatures. There is no evidence of a successful and vibrant community asset for the recent past.

10. The First Respondent submits the following points:

- 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 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 land that would further (whether or not in the same way as before) the social well-being or social interests of the local community.
- b) Prior to its closure the Property was an important asset for the community, with the public house having been in existence since 1830 and the retention of the pub as a facility is well supported by the local community as evidence by the number of signatures. The Property was used for a wide range of functions primarily during normal pub opening house. The type of functions held at the pub included wedding receptions, birthday parties and funeral gatherings. It was well used by many village groups such as bell ringers and book clubs. It had a significant summer trade and a number of local people used the facilities year round on weekdays and tourist visiting used the facilities as well as workers at the nearby Grange Hill Industrial Estate. The garden was used with marquees to cater for guests. The car park was used by visitors to the Property.
- c) The Planning Inspectorate made a site visit to the Property on 11 June 2019 and Inspector, Steven Rennie, stated that "there is no substantive evidence to show that the White Hart was simply not viable as a business when it was in operation."
- d) It is accepted that the notice of listing was not served on Helen Milton but the failure to comply with this requirement has not disadvantaged the co-owner. Schedule 2 of the Assets of Community Value (England) Regulations 2012 makes clear that the period during which a review can be submitted is 8 weeks from the date on which notice has been given. The same argument applied to any unidentified occupiers of the premises.
- e) There is no definition in statute or in guidance of the term "recent past." There have been a number of court cases involving assets which have been closed for more than a five year period with various outcomes of whether more than a five

year period with various outcomes of whether more than five years is determined as “recent past” and much has depended on the circumstances of each case. Factors that have been taken into account in determining what constitutes the recent past of a nominated asset include the length of period of community use of the nominated asset in the past, the type of asset involved and the nature of the community use of the nominated asset. Given the length of time that the Property had a community use prior to closure, it is considered that the use which last occurred in December 2012 would be in the recent past.

- f) Case law suggests that “the recent past” is a relative term and that it is necessary to compare the period of non-use with the period of use as a community asset. The Property has been used as a public house for 150 to 200 years depending on the source material. Although the Appellant states that prior to the closure in 2012 the owners and managers found it difficult to trade successfully the nomination shows that there was a community use of the Property prior to closure. It is submitted that there has been a community use in the recent past.
- g) In order for section 88(2)(a) to be satisfied there is no requirement for the community asset to have been successful and vibrant. All that is required is that is evidence that “there is a time in the recent past” when the Property was used to further the social wellbeing and interests of the local community. In the case of *ZB Investments v Croyden LBC (CR/2016/0009)* Judge Snelson stated that the question is whether the social wellbeing or social interests of the local community continued to be furthered “to any material extent.”
- h) The community use of the Property was “in the recent past.” Having been in existence since 1830, it is submitted that a period of 7 years must be considered within the ordinary and natural understanding of the expression “the recent past,” in the context of a history of use of 192 years.
- i) Factors such as the length of the period of community use of the nominated asset in the past, the type of asset involved, the nature of the community use of the nominated asset and the degree of connection between the asset and the community are relevant.
- j) In the absence of a statutory definition of the term “recent past” it has fallen on the judiciary to interpret the expression. The following themes have emerged:
- The phrase was deliberately loose in contrast to the 5 years in the second condition – *Scott v South Norfolk DC CR/2014/0007*.
  - It could not have been intended to import the 5 year period from the future condition when Parliament failed to set out a precise period for the recent past condition – *Worthy Developments v Forest of Dean DC CR/2014/005*.
  - The expression “recent past” is a “relative concept,” the implication being that the longer the period of use furthering a community benefit the longer the period which will constitute the recent past – *Crostone v Amber Valley DC CR/2014/010*.
  - Recent decisions, particularly in relation to public houses with a long history, have endorsed a period of over 7 years before the nomination as constituting the “recent

past” – *King v Chiltern DC CR/2015/0025* and *Hawthorn Leisure v Chiltern DC CR/2015/0019*.

k) The First Respondent invites the Tribunal to confirm the listing.

11. The Second Respondent submits the following points:

- a. Mr Milton may never have met Mr Birch but he was present at the appeal hearing in 2019 at which Mrs Birch, Mr Birch’s mother, made a prepared statement about the family’s intentions towards The White Hart and its viability.
- b. Mr Milton has on several occasions refused to allow the Birch family to inspect the premises. Mr Birch acquired the Black Venus and related land in June 2019.
- c. While listing confers a statutory right on any qualifying party to make a bid it does not preclude offers of interest being made or expressed by other parties. Mr Birch’s interest in the White Hart was well known to the Second Respondent at the time the ACV was renewed.
- d. No purchaser is likely to provide proof of funds or access to funds except as a condition of a sale contract or acceptance of offer subject to proof of funds. As The White Hart is not for sale there is no obligation, statutory or otherwise, on Mr Birch to furnish proof of funds or access to funds.
- e. In the event of a decision being made on the Enforcement Notice we ask that this be accepted in evidence.
- f. The Property was an important asset for the community and the entirety of it was well-used primarily during normal pub hours but on extended opening for specific functions. It was used as a dining and socialising venues well as for a wide range of functions including wedding receptions, birthday parties funeral gatherings and by local interests groups like bell ringers and the book club as a gathering place.
- g. The Second Respondent has three aims to provide a flexible multi-purpose community facility that enables participation in social, cultural and leisure activities by the whole community that is sustainable in the future. The title would be owned by the Bratton Fleming Community Benefit Society following a community share offer with profits primarily reinvested in the development of the pub and other village amenities for the benefit of the community. Responsibility for running and maintaining the Property would lie with the management committee which will be elected by members. The vision is to re-establish a village pub with food and drink and a wide range of events and activities for the whole community and opportunities for social interaction to strengthen the local economy, support local jobs and economic wellbeing. Services would be offered including banking, postage and possibly health-related services a library and craft opportunities. The evolving development will complement the existing community facilities such as the village shop and sport club.
- h. The Bratton Fleming Community Benefit Society has been established with advice and a grant from the Plunkett Foundation. The purchase and refurbishment would be funded through a community share offer and combination of grant



funding and a loan facility, enhanced through donations. Previously an offer of a grant funding and a loan had been made by the Plunkett Foundation which has expired due to the passage of time but an assurance has been given that they can reapply. A significant amount of pledges to buy shares and in-kind support has been provided to refurbish and run the pub.

- i. The Second Respondent has been unable to agree a purchase due to significant difference in the views of the value of the Property. The option of a Compulsory Purchase Order has been raised with the First Respondent and the Second Respondent hopes to pursue this.
- j. The Second Respondent has a management committee of 7 volunteers supported by a wider group of volunteers to run pop-up-pub and other events. Following a share issue the management committee would be elected by the shareholders. A paid General Manager would be appointed and would be supported by volunteers.
- k. The Second Respondent has submitted a report by planning4pubs dated 29 March 2020 (pages 142 to 157) which concludes that the recent past test has been satisfied because it is relative to the nature, age and length of use of the asset which has been established as a community pub for 185 years and has only been closed for less than eight years.

### **Issue before the Tribunal**

12. The issue before the Tribunal is whether the legal requirements have been met for the Property to qualify for inclusion in the First Respondent's list of assets of community value.

### **Conclusions**

1. I am satisfied that the parties have been given ample opportunity to address the issues and prepare and present their cases.
2. The Property was constructed in the 19<sup>th</sup> Century and comprises a large stone-built detached pub which has been altered and extended over time. The accommodation comprises a public house, a first floor restaurant, and private living accommodation on the first floor divided into two flats. The pub is freehold and unencumbered. Trading ceased in 2012.
3. The Property was previously owned by Enterprise Inns who purchase the freehold on 25 June 2007 for £422,860. Enterprise Inns traded the Property as a supply-tied tenancy and had a number of unsuccessful licensees.
4. The Property was listed as an ACV on 19 September 2014 and was removed from the list on 19 September 2019. The Premises Licence was suspended indefinitely from 2019.
5. The decision to list the Property was made on 14 November 2019 following receipt of the nomination of the Property by the Second Respondent, Bratton Fleming

Community Benefit Society Ltd on 19 September 2019. On the request of the Appellant the decision was reviewed by the First Respondent on 20 January 2020.

6. A nomination must be made by a Community Nomination which includes a nomination by a community body with a local connection. A Community Body can include an unincorporated body whose members include at least 21 individuals who are registered as local electors at an address in the local authority's area and which does not distribute any surplus it makes to its members. I find that the nomination was valid in that the Second Respondent was an appropriate body as defined.
7. Although Mrs Helen Milton and any occupiers of the Property were not given notice of the inclusion of the Property on the list of assets of community value this does not invalidate the process including the review process taking into account my decision to allow the appeal. I find that there has been no prejudice to any of the parties by this error in the process.
8. I find the Property ceased trading as a pub in December 2012 and was purchased by Philip Milton and Helen Milton for £210,000 on 2 June 2014. The Property was on the market as a pub for two years prior to their purchase and it is likely it was not purchased as a public house as was not a viable business. This is on the basis of the history of the property and the evidence presented. Put simply, the Property would not have been sold at such a considerable loss in 2014 if it were a viable business as a public house.
9. I have attached weight to Mr Cann's email of 26 November 2019 because as a manager of the Property he understood and was aware of the situation from 2007 until 2009 and he presents a measured picture when he states, "there may be an argument that the pub could succeed as a non Enterprise model with low borrowing."
10. I find that there was not 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 section 88(1)(a) of the Act is not satisfied on the grounds that the Property was closed in December 2012 and there have been no activities which could further the social wellbeing or social interests of the local community since the date of the closure. The closure of the Property as a public house in December 2012 is agreed by all the parties.
11. I find that there was not 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 section 88(2)(a) of the Act is not satisfied.
12. It is not necessary for there to have been "a successful and vibrant community asset" in the recent past. It is sufficient if there was a time in the recent past there was 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.
13. I find that prior to the closure in 2012 although the business was failing there was an actual use of the Property which furthered the social wellbeing or interests of the local community. I find, however, that the use was not in the 'recent past.'

14. The term ‘in the recent past’ in section 88(2)(a) is not defined in the Act or in the Regulations. It is my view that Parliament deliberately chose a loose expression and it would not be appropriate to define the term further. It is my view that had Parliament intended a definite period it would have said so.
15. The ‘recent past’ is a relative term and depends on the circumstances of each case. I have been invited to consider that a period of 7 to 8 years is very small in relation to the overall period that the Property has been a public house. I find that although 7 to 8 years is a small portion of the time since 1825 I am not persuaded that something that happened nearly 8 years ago can be described as ‘recent.’
16. In reaching my decision I have relied on the ordinary meaning of the word ‘recent.’ In my view the word refers to something that happened not long ago. I find that something that happened nearly 8 years ago cannot on the straightforward interpretation of the word be said to have been ‘recent.’
17. Notwithstanding that the pub has been in existence since 1825 I do not accept that activities that ceased almost 8 years prior to the listing could be said to have been ‘in the recent past.’
18. The First Respondent has referred me to relevant case law of the First-tier Tribunal. I am bound by decisions of the Upper Tribunal and higher courts but I am not bound by decisions of the First-tier Tribunal in other cases.
19. Accordingly, the appeal succeeds and it is not necessary to make findings relevant to section 88(2)(b) and the other issues.

(Signed) Judge J Findlay

Dated: 29 September

Signed: 19 November 2020