



NCN: [2022] UKFTT 493 (GRC)

Tribunal Reference: CR/2021/0006

First-tier Tribunal
(General Regulatory Chamber)
Community Rights

Before

TRIBUNAL JUDGE SIMON BIRD QC

Between

RICHARD SANDERS

Appellant

and

STAFFORD BOROUGH COUNCIL

First Respondent

and

NEW RED LION SUTTON LTD

Second Respondent

Representation:

For the Appellant: Mr Richard Sanders

Mr Otto de Weijer

For the First Respondent: Mr Alex Pritchard-Jones of counsel instructed by
Robinay Johns on behalf of the First Respondent

For the Second Respondent: Mrs Dale Ingram

DECISION AND REASONS

A Introduction

1. The Localism Act 2011 (“the 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 Act provides, so far as is material to this appeal:

“(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 Nomination and Listing

3. This appeal concerns the Red Lion, Sutton TF10 8DQ (“the Red Lion”).

4. On 3 December 2020 Forton Parish Council nominated the Red Lion for inclusion on the First Respondent's List of Assets of Community Value ("LACV").
5. On 12 January 2021 the First Respondent determined that the Red Lion should be included on its LACV and this decision was affirmed, following a review, on 24 May 2021
6. The Appellant appealed to the Tribunal by notice dated 17 June 2021.

D The Appeal Hearing

7. I conducted a hearing on 31 March 2022 which followed the Case Management Directions made by Judge McKenna on 11 January 2022. Judge McKenna had concluded that the appeal was not suitable for decision on the papers alone and directed that a focussed half-day hearing should take place so that the witnesses for the Appellant and the Second Respondent could be questioned on previously exchanged witness statements and brief oral submissions could be made following the hearing of the evidence. In the event, I heard oral evidence from the Appellant and Mr de Weijer in support of allowing the appeal and from Mr David Frost on behalf of the Second Respondent in support of dismissing the appeal.
8. Judge McKenna also ruled in her Directions that the written submissions contained in the appeal bundle from Mr David Culverhouse and Mrs Ingram (on behalf of the Appellant and Second Respondent respectively) should be treated as argument only, excluding from consideration any portion of them that consists of factual or opinion evidence. This reflected her concerns as to the competence of the witnesses to give expert and factual evidence on the matters addressed in those submissions.
9. The Judge left open for consideration whether to admit the transcripts of recorded telephone conversations which took place in July 2020 between Mr Frost and an employee of Admiral Taverns. Her concern was that the Admiral Taverns' employee had given no consent for the recordings to be made. However, given that the transcripts were relied upon only to evidence the making by Mr Frost of an offer to purchase the Red Lion of £90,000 and there was no dispute by the Appellant that such an offer was made, I have not considered it necessary to have regard to the transcripts in determining the appeal.

10. As to my approach to this appeal, in accordance with decision of the Upper Tribunal in Admiral Taverns v Cheshire [2018] UKUT 15 (AAC), it has taken the form of complete reconsideration of whether the Red Lion should be included on the LACV. In reaching a decision, I have had regard to all the written evidence and submissions comprised in the appeal bundle, the witness statements filed on behalf of the Appellant and the Second Respondent and to the helpful submissions made at the hearing on behalf of the parties. 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.

E Background

11. The property as included on the Respondent's LACV, comprises the Red Lion, its garden and an area of car parking on a site comprising some 3165sqm or 0.85 acre. The Red Lion is believed to date from the C17th and stands on the A519 Newport Road. It operated as a tied public house until August 2020 at which point the then owner, Admiral Taverns, decided to dispose of the freehold and it was then marketed over the period August 2020 to November 2020.
12. There is no dispute that, whilst operating as a public house, the Red Lion provided a meeting venue for local residents to meet up, and regularly hosted parties, re-unions, wakes and village Christmas parties. It also hosted local groups such as the History Society, Rotary and Walkers. Live music was also a feature of the activities at the pub.
13. The evidence before the Tribunal shows that in 2020, prior to deciding to dispose of the freehold, Admiral Taverns, had marketed a five year agreement in respect of the Red Lion at an annual rent of £22,000. No interest appears to have been generated. However, prior to its closure the Red Lion had been occupied and run by Mark Lothian and Mary McKeechan under a tenancy at will paying a rent understood to be £10,000.
14. In response to the marketing of the freehold of the Red Lion, Mr Frost made an offer of £90,000. This offer was based on a valuation undertaken by Mr Chris Armstrong FRICS of Validus Property Consultants contained in a report dated 7 August 2020. This was a Red Book RICS Valuation which assessed the value of the Red Lion as likely to lie in the order of between £90,000 and £120,000 having regard to its condition. Mr Frost's offer was therefore at the lower end of the range and it was rejected by Admiral Homes.
15. Mr Armstrong's valuation identified that the structure, fabric and equipment of the Red Lion required significant works of repair, refurbishment and/or

renewal and the costs of these works were anticipated to be “*significantly in excess of £100,000*”.

16. In October 2020, Mr Frost sought the advice of the First Respondent’s Planning Department on how it might respond to an application for two dwellings on the Red Lion’s garden area in order to enable local residents to offer a higher purchase price and to “*pay for the up to £200,000 worth of structural repair needs to the Red Lion*”. There was therefore early recognition of the likely substantial works of repair/refurbishment which would be required to the Red Lion. The Planning Department’s response to the enquiry was to advise that a proposal for housing other than affordable housing would conflict with the policies of the local plan.
17. Independently of Mr Frost, in September 2020, another local resident, Mr Philip White, had made an offer to Admiral Taverns for the full asking price of £375,000. This appears to have been accepted, although the Memorandum of Sale records that the sale was progressing by “*contract race*” and the sale did not in fact proceed.
18. The Appellant and Admiral Taverns exchanged contracts for the purchase of the Red Lion at a price of £375,000 on 27 November 2020 and the sale completed on 11 January 2021, the day immediately preceding the Council’s decision to include the Red Lion on its LACV.
19. The Appellant purchased the Red Lion for the purposes of development and on 19 February 2021, he applied for full planning permission for development described in the planning application as:

“change of use to convert former public house to residential dwelling with creation of 9 additional dwellings with associated parking and private amenity space”
20. The planning application remains undetermined and the consultation responses received on matters of drainage and density, indicate that there are outstanding objections to the current proposals. Further work has not been undertaken on resolving the outstanding issues due to the ill-health of the Council’s Case Officer and this outstanding appeal.

F The Issue

21. It was agreed at the hearing that the main issue for the Tribunal to determine 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 building or other land that would

further the social well-being of the or social interests of the local community. It was accepted by the Appellant that the use of the Red Lion in the recent past i.e. prior to its closure in August 2020, fell within the scope of s.88(2)(a) of the Act. Having regard to the undisputed use made of the Red Lion provided in the Parish Council's nomination form, that concession was well made.

G The Appellants' Evidence and Submissions

22. The site remains vacant and unoccupied which has been the case since its acquisition in January 2021. The Appellant has no intention of selling the property at present or in the near future and a planning application for residential development was registered with the First Respondent on 9 April 2021. Little progress has been made with that application due to the illness of the original case officer, but an extension of time for the determination of the application has been agreed to allow for the status of the building in respect of its inclusion on the LACV to be clarified.
23. Mr de Weijer had undertaken a visual inspection of the building to ascertain its physical condition on 10 March 2022. No building benefits from being empty and unheated for any long period of time and the general condition of the Red Lion has reached a state where serious remedial works will have to be carried out to avoid a sudden and more rapid deterioration to take place. The rear elevation bulging out needs to be looked at, as a sudden collapse of this section of the building would have significant consequences for the integrity of the whole structure. The more minor signs of movement are of a less serious nature, although their location directly at the back of the public highway does raise concern. The interior of the building needs a complete overhaul to bring it up to current standard.
24. The costs of repairs set out in the Appellant's "*Appeal from the Landowner against the Decision to List the Red Lion PH as an Asset of Community Value*" dated 22 March 2021, which estimated the costs of meeting Premises Licence requirements and of bringing the Red Lion up to a suitable trading standard of £189,500, were likely to be an under-estimate, given the continued deterioration of the building.
25. There is no evidence that the repair costs assumed by the Second Respondent are the product of any investigative work, such as digging down to investigate the need for under-pinning. Whilst the present estimates are based on Mr Weijer's experience, the true costs may be significantly higher.

Without more intrusive survey work, it is difficult to put accurate figures on the costs of repair

26. As to the adverse reaction of the First Respondent's Planning Department to Mr Frost's proposals for two dwellings on the garden area of the Red Lion, the public benefits of the Appellant's planning application are more substantial than those of the two dwellings suggested. What is proposed in the planning application is a quite different proposal. It will deliver affordable housing as well as restoring the historic building. To assume that no planning permission will be granted is crystal ball gazing.
27. The Red Lion is a beautiful building which would make a good family home, however it requires a huge amount of repair work. What happens by way of development depends on what the First Respondent will permit. Drainage and density are the two principal issues raised with the planning application to date. Drainage requires more investigation, but work on that has not, to date, progressed. No issue has been raised to date by officers with the principle of development. Planning is required for the change of use of the existing building and if planning permission is refused, the Appellant will have to reconsider his position. He has no intention of selling, nor is there any requirement that he should, and as the property was purchased with cash, there would be no imperative to sell in the event that the development does not secure planning permission. He could sit on the asset and do nothing.
28. The planning process is one of negotiation and exceptions to policy can be made in appropriate cases. It is not possible to know at this stage whether the conflict with the local plan policy involved in the Appellant's planning application affects its prospects of success.
29. The Appellant has not looked at the potential an enabling development proposal with a small number of residential units funding the repair works to the Red Lion to enable it to continue in pub use, but the space required to deliver a satisfactory relationship between housing and the pub and the impact on highways would make it very difficult. However, this has not been formally discussed as it has not needed to be.
30. The Red Lion was no longer for sale when the nomination for inclusion on the LACV was made and in terms of values, the only value which matters is what someone is willing to pay. This was much more than the £90,000 offered by Mr Frost. Eleven offers were made for the Red Lion between September 2020 and November 2020 and only one, that of Mr Frost, was for licensed use. It would not have been viable to market the pub for the full 12 months required by the First Respondent's local plan policy as interest from operators was at a low ebb given the financial climate.

31. Everard Cole, one of the agents responsible for marketing the Red Lion on the instructions of Admiral Taverns had advised that the common feedback received was that the size of the pub could not be supported by the immediate population of the village and this, coupled with the lack of visibility, did not warrant the investment required to recommence trading. The overwhelming majority of interest came from parties seeking alternative uses, primarily conversion to residential use.
32. The Appellant's Viability Appraisal shows that there are no community uses which would be viable or sustainable in the long term and the capital input required is beyond most potential operators. The Viability Appraisal, which assumes a tied lease of the Red Lion, shows that the business was steadily in decline prior to COVID-19 and the pub had become unviable. The decline was in line with the trend for rural pubs as a whole, resulting in no living wage for the tenant during any of the three periods under examination.
33. Local competition for trade is strong, with 18 other pubs within 3 miles of Sutton and the landlord of The Swan Hotel at Forton has advised that since the closure of the Red Lion, many of its customers now used The Swan. There is insufficient trade to support two pubs and he would be opposed to the Red Lion re-opening.
34. Whilst the Second Respondent may be full of good intentions, how realistic its proposals are and how realistic it is that planning permission will be granted or refused are all crystal ball gazing.

H The Council's Submissions

35. It is obvious the section 88(2)(b) requirement is satisfied. The Tribunal has seen and heard from a very active community group with a wealth of talent and an enthusiasm for the Red Lion. The group has invested time and money in investigating how it can keep the Red Lion open and its evidence is very strong evidence. It is willing to put its money where its mouth is.
36. The surveys of the regular customers of the Red Lion show just how well regarded it was for food and hospitality and what it offered and there is no reason to think that this would not exist in the future.
37. Mr Frost had offered £90,000 for the Red Lion, but with more time and information, the First Respondent has identified other sources of funding including donors, a community share scheme, and kick-starter applications for community funds. The Second Respondent knows the scale of costs involved

in the repair/refurbishment of the pub and the Tribunal can find that that it is realistic to think that there is a community group keen, indeed more than keen to run the pub.

38. There are a number of issues with the Appellant's very negative Viability Appraisal. Firstly, it appears to blame historic events for the 2019 closure. Secondly, it assumes a full profit pub with a significant head lease, although it concedes that when run under a tenancy at will in 2019, the rent was £10,000 generating a modest income for the tenants. However the evidence the Tribunal has from the Second Respondent is that it would not run the Red Lion in a commercial way. It would be run as a community pub and, in consequence, the Appellant's Viability Appraisal, focussing as it does on a different operating model, is of limited weight and value.
39. The Second Respondent has provided forecast turnover figures and it is realistic to think that this community group could run this pub in the next five years for a qualifying use.
40. The Appellant states that this will not happen because he has no interest in selling the pub, but that assertion is entitled to only limited weight. The Tribunal must take into account a broad range of considerations of which the stated intention of the landowner is only one and, of itself, one which cannot be determinative. As the Tribunal found in Patel v London Borough of Hackney CR/2013/0005, to treat such a stated intention as paramount would effectively give the landowner a veto over the statutory scheme.
41. This case is on all fours with Patel in which the landowner was adamant that he would not sell the pub. However, the Tribunal found that there was a range of possibilities one of which was that, if planning permission could not be obtained, the commercial realities were such that one of the realistic options was to sell. The Tribunal should take Mr Sander's assertion that he would just sit on the asset with a pinch of salt. It is unlikely for the owner to allow the asset simply to continue its spiral of decline. It is likely that the pub would be put up for the sale which would trigger the statutory moratorium and enable the Second Respondent to bid for it, by which time the purchase price might have been lowered further by a further decline in the condition of the building.
42. There is also the possibility of compulsory purchase which should not be discounted. There is ample evidence that if compulsorily purchased, the Second Respondent would make a good go of returning it to being at the heart of the community as it has been since 1660.

43. There is a genuine community interest here, there is a range of possible options for the future of the Red Lion and, when reasonable and independent turnover figures and realistic valuations are had regard to, it is realistic to think that in the next five years there could be a qualifying use of the Red Lion as a community run pub. This is a near overwhelming case in favour of listing.

I The Second Respondent's Evidence and Submissions

44. Mr Frost's evidence was that the Red Lion had been run for about 14 years from 2004 to 2018 by Mark Hesbrook and his parents, relying mainly local village custom with a very good reputation for home cooked food. In 2018 his parents retired and the tenancy was ended at the same time. During 2018-2019 the pub had not been well run by two men who had quickly moved on and who were succeeded by Mark Lothian and Mary McMeechan. They ran the pub from 2019 to 2020 and were doing a brilliant job in bringing customers back including from the wider area. They had made the Red Lion a destination pub for its excellent food.
45. It was a shock to learn of Admiral Taverns giving notice in July 2020 and Mary McMeechan had said that she and her partner had been negotiating with the company to take on a five year lease before unexpectedly being given notice.
46. Mr Frost's offer to purchase the Red Lion had been informed by the Validus Valuation and Mr White's offer at the full asking price had been made unbeknownst to him. They subsequently agreed to join forces to purchase the pub. The Validus valuation appeared to them to be about right having regard to the available evidence on comparables and given that it was known that the Red Lion had been offered to Mark Hesbrook for purchase of the freehold at a price of £150,000 in or about 2018.
47. However, the Red Lion was attracting a lot of interest from developers and Admiral Taverns were not interested in Mr Frost's offers. This was the context for Mr Frost's approach to the First Respondent's Planning Department to seek its view on whether the development of two houses on the pub garden might be acceptable if it allowed an increased offer to be made so as to secure the future of the pub.
48. It had been hoped that the ACV nomination would deter developer interest in the Red Lion, but in December 2020, Admiral Taverns disclosed that the pub had been sold.
49. The Second Respondent had been formed following the unprecedented outrage of the local community about what had happened to their only community asset. There was massive written support and pledges of financial

help and the aim of the Second Respondent is to bring the Red Lion back into life as a not for profit, community owned pub/restaurant and community hub.

50. A recent survey of the well-being of the local community had revealed the adverse impact of the closure of the Red Lion, which is unsurprising given that it was the villages only community facility and the nearest local community assets are the Swan Hotel and Village Hall at Forton, located over 1km away and realistically accessible only by car. The Swan is in any event not an adequate replacement.
51. Contrary to the argument advanced in the Appellant's Viability Appraisal, Admiral Taverns had not striven to make the Red Lion successful. There had been under-investment leading to disrepair, making it attractive only to tenants at will with no full repairing covenant. It was then sold at a value well above its commercial value, but at a sufficiently low price for it to be an attractive gamble to housebuilders.
52. The Red Lion was viable and it can be viable again. The Second Respondent is an extremely well-funded and supported community spirited company with a wealth of business experience and a passion for bringing the Red Lion back to life.
53. It is true that considerable investment is required in order to make repairs but the Second Respondent is prepared to take on the task and the foreseeable expenditure had influenced the quantum of Mr Frost's original offer.
54. The Second Respondent, the residents of Sutton and the wider community have a real passion for taking ownership of the Red Lion and turning it into a well-used local pub. The Second Respondent's viability assessment makes it plain that, freed from the shackles of a tie, a freehouse in an area such as Sutton can thrive. The Second Respondent has a well-structured business plan put together by Philip White who is a Fellow of the Institute of Chartered Accountants. The Business Plan is based on local knowledge and the business acumen and experience of the Company's Trustees.
55. Mr White, a Fellow of the Institute of Chartered Accountants has produced viability projections relying on the Appellant's Viability Appraisal but using amended profit margins based on the actual accountancy figures of the Royal Oak, Church Eaton, which is a perfect comparator. The aim of these projections was to better represent the true picture of the performance of a Freehouse Pub to compare to the Appellant's assessment. The projections show an annual profit of £50,561 assuming a rent of £12,000.

56. The Second Respondent already has donors prepared to put up sizeable sums, upwards of £200,000 and it is considering a community share scheme and also looking at a community ownership fund. It has moved on from the concept of enabling development, because it considers that it will have access to sufficient capital to undertake the necessary repairs without it.
57. What it is realistic to think might happen covers a range of alternatives as previous decisions of the Tribunal show. The Second Respondent has every intention of retaining the Red Lion as a local facility and its view is that there is little likelihood of planning permission being granted. As has happened in other cases, where planning permission is refused, pubs have then been sold to community groups or small chains which have then traded successfully.
58. The Second Respondent has done everything it can to formulate a business plan and it has sufficient sums for purchase, repair and re-opening of the Red Lion. The Tribunal is invited to dismiss the appeal.

J The Tribunals Findings

59. The statutory test of “*realistic to think*” as used in section 88(2)(a) has consistently been interpreted by the First Tier Tribunals as a low threshold, to be distinguished from higher thresholds, notably the “*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). In Carsberg v East Northamptonshire Council UKFTT CR 2020/004, Judge Findlay held that the term “realistic” meant having to show “*a sensible and practical idea of what can be achieved*”. I agree with that interpretation.
60. Given that it is rightly accepted by the Appellant that the requirements of section 88(2)(a) are satisfied in this case, given the community use made of the Red Lion when it was last open, the issue I have to decide is whether it is realistic to think that there is a time in the next five years when it might be used for a qualifying use. In this case, the only potential qualifying use which has been advanced is as a pub.
61. The starting point in this case is that the Red Lion is currently owned by a developer who purchased the property as a cash purchaser on the open market and who has stated that he has no intention of selling it or of running a pub from it. However, as was held in Patel v London Borough of Hackney CR/2013/0005, whilst it is reasonable to take into account the Appellant’s stated intentions as part of a general consideration of the circumstances, of themselves, they cannot be determinative. Otherwise the statutory regime for

the protection of Assets of Community Value would be rendered effectively voluntary.

62. In this case, there are factors other than just the Appellant's stated intentions which also bear on whether it is realistic to think that the Second Respondent's proposals for the Red Lion might come to fruition. In particular, the costs associated with restoring the pub to its previous use both in terms of acquisition costs and the repairs which there is no dispute would be required.
63. However, in this case there is not only obvious and strong community support for the Red Lion to re-open to serve both the local community and a wider catchment, the Second Respondent has also taken significant steps towards demonstrating how that could be achieved. It has a business plan which shows that the Red Lion could operate viably as a pub when restored and, on the evidence before the Tribunal, it has both recognised the scale of the repair work which would be required to attain its objectives and is working on the basis of a realistic assessment of the likely costs of that work. Potential funders have been made aware of the likely level of cost burden and have nonetheless indicated commitment to a substantial level of funding, indeed at a level which would broadly meet the present estimates of the likely repair costs.
64. Further, no planning permission presently exists for the Appellant's development proposals for the Red Lion and whilst the density and drainage issues might be capable of resolution, the First Respondent has yet to make any formal decision on the application and it is at least possible that it might decide to refuse to grant planning permission by reason of the loss of the Red Lion as a community facility. I note in that context that the marketing of the Red Lion undertaken by Admiral Taverns did not meet the 12 month marketing requirement of adopted local plan policy.
65. The Appellant has contended that it was not commercially sensible to market the property for longer, given the market conditions at the time. However, it seems to me at least possible that the First Respondent will take a different view, not least because the short period of marketing undertaken by Admiral Taverns was undertaken at a time of very great uncertainty as to the future of the hospitality industry due to the COVID pandemic. For the same reason, I attach little weight to the lack of interest generated by the Admiral Tavern marketing campaign and its earlier marketing of a lease agreement in assessing the prospects of a viable pub use being re-established in the premises. It is unsurprising given the wider COVID context of that campaign that it generated so little interest from potential pub operators.

66. For a pub use to resume at the Red Lion, it would require the property to be sold whether to the Second Respondent or another potential operator. I take into account the Appellant's stated intentions, but in determining the weight that I attach to them, I note that those can only be his current intentions and that, in the event that planning permission is refused for his proposed development which I have found is one realistic outcome of his application, he would have to reconsider his position. Whilst he might decide to sit on the land, it seems to me also a possibility that, as a commercial developer, he would cut his losses and to dispose of the site.
67. The issue is then whether it is realistic to think that the Second Respondent might be in a position to purchase it. The only formal and expert valuation before me of the Red Lion as a pub, is that contained in the Validus report in which Mr Armstrong valued it at between £90,000 and £120,000 having regard to the extent of the repairs/refurbishment required. Given that two local residents involved in the Second Respondent were independently prepared to offer £375,000 and £90,000 for the Red Lion when marketed by Admiral Taverns, it is in my view realistic to think that the Second Respondent would be in a position to purchase it, in the event that planning permission is refused for redevelopment, having regard to the potential sources of funding which have been investigated and the strong local commitment to the re-opening of the Red Lion.
68. Whilst the Appellant paid £375,000 for the Red Lion, that was well above the value as determined by Validus and plainly reflected an element of "hope" value. I agree with the Second Respondent's evidence that the price at which the property was marketed reflected a price which would be likely attract developers prepared to take the risk that planning permission might not ultimately be granted for residential development. In the event of planning permission being refused on the ground that that loss of a community facility has not been justified in accordance with policy, which I have found is a possible outcome of the planning application, any hope value would be likely to be reduced and it is realistic to think that a future sale price would reflect this.
69. Taking all these matters into consideration I am satisfied that it is realistic to think that the Second Respondent could be able both to acquire and to restore the Red Lion to usable pub condition.
70. The next issue is whether it is realistic to think that operation of the Red Lion as a pub could be viable and could occur within the next five years. There are competing views on the viability of a pub use of the Red Lion. The Appellant's Viability Appraisal assessed the past use of the Red Lion as a tied house, pointed to its decline over time and to the fact that, even when occupied under

a tenancy at will, the income available to the tenants was at best basic. In contrast, the Second Respondent has sought to show how, re-working the Appellant's appraisal with profit margins reflecting a comparable free house, a significant annual profit can be generated.

71. Given the fact that when operating under a tenancy at will paying a rent at £12,000 per annum, the last tenants had been able to demonstrate a small surplus, and given the evidence of the Second Respondent's forecast which are based profit margins from an appropriate free house comparator, I am satisfied that it is realistic to think that the Red Lion could be operated viably as a community owned free house. In forming that view, I have taken into account the competition which The Swan Hotel provides, but the evidence indicates that the Red Lion has the potential to be operated in way which provides sufficient market distinction to be successful.
72. I acknowledge that the Second Respondent's proposals would face challenges; the main one in terms of viability being the extent of the repair works. However, in the event that the repair costs prove to be significantly greater identified to date, given the size of the Red Lion's plot 0.85 acres, there is the possibility that some enabling residential development could be accommodated to provide additional sources of funding if required. Whilst as the Appellant contends, this may prove difficult, given the size and layout of the property, there appears to be some scope for this as demonstrated by Mr Frost's initial enquiries of the First Respondent's Planning Department.
73. Drawing all these matters together, my conclusion is that there is a range of possible outcomes in this case. However, on the evidence before me I am satisfied that one of the possible outcomes is that planning permission is refused for the Appellant's proposed development on grounds which go to the principle of the loss of the Red Lion as a community asset and that, in the light of such a refusal, the Appellant decides to sell the property. The Second Respondent has shown that it has sensible and practical proposals for the use of the Red Lion as a community owned pub and how these could be achieved. On the reasonable assumption that the planning application will be determined in 2022 and given the commitment of the local community to the Red Lion, I am satisfied that the restoration of the Red Lion to a community owned pub serving the local community could be achieved within next 5 years. I am also satisfied that it has been demonstrated that such a use has been shown to be capable of being sustained.
74. It is therefore realistic to think that there is a time in the next five years when there could be a non-ancillary use of the Red Lion and its grounds that would further in the same way as its earlier use, the social wellbeing or social interests of the local community.

K Conclusion

75. I find that the requirements of section 88(2) are satisfied in respect of the Red Lion and I therefore conclude that the appeal should be dismissed.

11 April 2022

As amended pursuant to Rule 40

On 28 April 2022 to correct two typographical errors

JUDGE SIMON BIRD QC