Neutral citation number: [2024] UKFTT 443 (GRC)

Case Reference: CR/2022/0003

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

Heard by Cloud Video Platform
Heard on: 16 May 2024
Decision given on: 30 May 2024

Before

JUDGE NEVILLE

Between

PAVILLION (WATFORD) LIMITED

Appellant

and

THREE RIVERS DISTRICT COUNCIL

Respondent

Representation:
For the Appellant: Mr Sunil Kotecha, director of appellant company
For the Respondent: Mr Matt Lewin, counsel

Decision: The appeal is dismissed

REASONS

1. This appeal concerns 'the Pavillion' and its surrounds, located in Oxhey to the south of Watford town centre, and originally built in the 1930s as the pavilion for Oxhey Golf Course. The golf club closed in 1952, was eventually acquired by Three Rivers District Council, and became the Oxhey Playing Fields. The site boasts football pitches, a multi-use games area, a skate park, a woodland walk, a bowls club and a scout hut.

2. In 1990, Three Rivers granted a lease to Whitbread, who operated a pub. The lease includes the pavilion and its immediately surrounding land, including a 120 space car park that serves the whole playing fields, but excluding two parcels of land to the

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east. The lease contains a number of obligations, including to keep the whole site in good repair, maintain the car park and keep it available for Three Rivers and users of playing fields, and not to use the demised premises other than for a bar/restaurant.

3. The pavilion itself is an L-shaped two-storey building. The eastern part of the pavilion was formerly used as changing rooms that served the playing fields until Three Rivers built replacement facilities in or around 2012. These replacement changing rooms were built on land just to the west of the pavilion, which was transferred back to Three Rivers for that purpose and no longer forms part of the leasehold interest. The western part of the pavilion was operated as a pub, the Pavillion Pub. During the landlord's twelve-year tenure the pub provided the community with a space to socialise and relax, and hosted functions such as firework events, music, themed dinners, birthdays, wakes and the like. There was also a popular children's soft play area.

4. The leasehold interest was acquired by the appellant company on 17 September 2013 for the sum of £540,000. The Pavillion Pub continued to trade, occupied by a tenant of the appellant rather than run by it directly. It is in dispute whether the changing rooms were used in connection with the pub business, for example to store stock. In March 2015, the appellant was granted planning permission for "change of use of existing changing rooms from D1 (assembly and leisure) to B1A (offices)". That project has not been completed.

5. On 25 May 2018, the appellant was granted planning permission for a single-storey front and rear extension of the western part of the pavilion, including internal alterations to expand the restaurant / bar / banqueting areas of the pub. In late 2018, the appellant closed the pub for refurbishment. It has not reopened, and nor did building work ever commence on the extension.

Listing as an Asset of Community Value

6. On 5 October 2021, Watford Rural Parish Council nominated the pavilion as an Asset of Community Value ("ACV"). Pursuant to the Localism Act 2011, listing a building or land as an ACV means that when it is put up for sale, a six-week period begins during which a community group can express an interest in putting together a bid to buy it. If one does, then this triggers a six-month moratorium on sale to give them time to do so. After the moratorium expires however, the ACV can be sold as the owner pleases. There is no requirement that it be sold to the community group or on any particular terms. There is provision in the Act for compensation to be paid to the owner by the local authority for any loss or expense which would be likely not to have been incurred if the land had not been listed. As well the Act, the Assets of Community Value (England) Regulations 2012 set out further procedural and substantive requirements, including who is eligible to make a nomination.

7. In this appeal, the relevant criteria for listing as an ACV are provided by section 88(2) of the Act:

(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.

These are usually termed the Past Condition and the Future Condition.

8. On 19 November 2021, Three Rivers decided that those criteria were satisfied and listed "The Pavilion" as an ACV. The appellant objected to this decision, and exercised its right under regulation 16 to request a review. It raised representations that can be summarised as follows:

a. The nomination was an abuse and had been primarily directed at frustrating future development, rather than affording the community an opportunity to purchase the property. It had been brought by the Parish Council on behalf of the South Oxhey Community Land Trust, that did not itself meet the requirements for a community body under the regulations.

b. On the section 88 criteria:

i. If the basis for listing included that the use of the car park satisfied the section 88 criteria, this was refuted.

ii. The Parish Council's suggested future use furthering the social well-being and social interests of the local community, being essentially further trade as a pub and provision of space for other community activities, was unrealistic given the cost of acquiring the pub and there being no likely purchaser or interested community group.

iii. The appellant still intended to convert the former changing rooms into offices, pursuant to the 2015 planning permission.

iv. The appellant did not intend to implement the 2018 planning permission as the restrictions on opening hours had made its use as a wedding venue commercially unviable, and there was insufficient car parking.

v. The appellant had "resolved to develop the Property for uses not engaging the community value criteria, because of the failure of the public house business". It intended to pursued planning permission for non-community uses and, if unsuccessful, to retain it indefinitely.

c. If the asset remained listed then the appellant would be eligible for compensation under the Act and the regulations.

9. In a decision dated 17 February 2022, Alison Scott, Three Rivers' Finance Director, upheld the listing. Her conclusions can be summarised as follows:

    a. On abuse:

        i. Any underlying motive to the nomination was irrelevant save insofar as it informed whether the future condition was established. In any event, the motive behind the nomination appeared to be a legitimate intention to secure the community value provided by a public house.

        ii. To impute a motive of seeking to frustrate future development was "unsubstantiated against the backdrop in which to all intents":

            "- the Owner's plans were to continue to operate the premises of the licenced bar and restaurant and function rooms and not to implement the change of use of part to offices granted (at that time) some five years before

            - the Owner how to make no planning application or source any other required consents for development other than for those uses and

            - it would appear [that the Owner has] only recently changed their mind about those intentions but done nothing it represents its future intentions to the community at large

            and was in any event implausible.

        iii. There was nothing abusive about the Parish Council bringing the application on behalf of the South Oxhey Community Land Trust.

    b. On the section 88 criteria:

        i. While the nomination did refer to the current use of the car park, it primarily concerned the previous use of the building as a public house and connected community provision and the realistic possibility that it would again (or provide an alternative community use) in the next five years. Ms Scott was able to maintain the decision to list without taking any account of the car park providing community value.

        ii. Use as a public house in 2018 both stood as the "recent past" for the purposes of section 88 and furthered the social wellbeing or interests of the local community. Neither appeared to be in dispute.

        iii. Contrary to the factual representations put forward on behalf of the appellant, the future condition was met for these reasons:

            1. The appellant's still had 93 years left to run. This was prohibitively short for residential development.

2. The lease's terms restrict both development and change of use, and residential or office use would require consent from Three Rivers as freeholder to proceed. Residential use is specifically prohibited. No application for consent or waiver had been received by Three Rivers and there was no basis upon which to find it realistic to suppose that it would be given. There were likewise restrictive covenants with the London Borough of Bromley from which release would need to be secured. The car park was subject to easements securing its use for the playing fields (and, I infer, might therefore providing insufficient parking for residential accommodation).

3. While planning consent had been granted 7 years previously for change of use of the changing rooms to offices, this had not taken place. No further planning application had been received. In 2020 the appellant had advised Three Rivers that it no longer proposed to convert the changing rooms to offices and would use them for storage instead.

4. Residential development permission was made further unlikely by the pavilion being in the Green Belt.

5. The assertion that the appellant would refuse to sell to a community group was inconsistent with previous correspondence between it and the South Oxhey Community Land Trust where an offer to sublease the Pavilion for use as a pub had been made. Further, the Community Ownership Fund had been established the previous year, to offer community groups up to £250,000 of matched funding to purchase pubs at risk of loss to the community.

6. The market conditions for pubs were improving following the end of restrictions arising from the pandemic.

7. Ms Scott rejected both that appellant had, or has had, any intention since at least 2020 to use the changing rooms as offices on my seven years having elapsed since the grant of permission, even giving the appellant the benefit of the doubt that permission had not lapsed. Likewise, the appellant claimed to have spent £600,000 refurbishing the property for hospitality use.

8. In conclusion, considering the above matters and that no other realistic or viable use for the Pavilion had been established, it was realistic to think that it would provide community use in the next five years.

c. Save for the abuse point, no issue had been raised concerning whether the parish council was an eligible nominating body. The nomination contained the information required by the regulations.

d. Compensation is a separate issue outside the scope of the review decision.

The appeal

10. I need not summarise the initial grounds of appeal or the subsequent amended grounds, as the issues had been significantly narrowed by the time of the hearing.

11. The appeal was initially decided without a hearing by Judge Simon Bird KC. On 21 December 2022, he set aside his decision under rule 41 due to an outstanding application to adduce expert evidence having been overlooked by the Tribunal when the documents had been sent to the Judge to consider.

12. The subsequent progress of the appeal has been slow. As is regrettably often the case when proceedings are subject to delay, the litigation has been beset by procedural disputes and become defined by the parties' attitude to one another. The appellant, now without legal representation and its case argued by its director Mr Sunil Kotecha, has become overly preoccupied with addressing perceived unfair or oppressive treatment by the respondent and the Tribunal. Perhaps through attrition, the respondent has likewise not always acted promptly and in compliance with directions when undertaking preparation for the appeal. In the week leading up to the hearing, I refused two application by the appellant that I recuse myself. These were without merit, for reasons that were issued separately in writing.

13. The hearing of the appeal nonetheless ran smoothly. The documents to be considered were explicitly confirmed as exclusively comprising a hearing bundle (in 8 PDF files plus an index, together all totalling 1096 pages), a supplementary bundle filed by Mr Kotecha ending at page 47, and skeleton arguments from Mr Kotecha and Mr Lewin. A list of 14 hyperlinked authorities had also been provided by Three Rivers but not sent to Mr Kotecha. He was concerned that he would be unable to properly read and consider all those authorities in time to undertake the hearing. I established that Mr Lewin sought to rely on no authorities other than those cited in his timeously-served skeleton argument, that Mr Kotecha had been able to access those authorities and prepare accordingly, and that I had not myself yet paid any regard to the list of authorities. It was therefore agreed that the list of authorities would simply be discarded, and Mr Kotecha confirmed that he was content with that course of action. I am satisfied that no unfairness arises.

14. Mr Kotecha gave evidence, confirming his two witness statements upon which he was then cross-examined by Mr Lewin, and then made his submissions. Mr Lewin made submissions on behalf of Three Rivers to which Mr Kotecha was able to reply. I shall set out the relevant parts of the evidence and submissions during my own consideration of the issues in the appeal, but only so far as necessary to explain my conclusions.

15. During the parties' closing submissions, I raised the issue of when the five-year period at section 88(2)(b) starts – is it to be taken from the date of listing, of the review decision, or of the appeal hearing? As it was agreed that the Pavilion is still not being used at all at the date of hearing, and was listed almost 2½ years ago, this might be material to the outcome of the appeal. Permission was given to the parties to make written submissions on the legal position. Mr Kotecha confirmed that he had no objection to me requiring that any submissions be provided by 5pm the following day. I made clear that he could have longer if he wished, but he told me that he had no intention of making any legal submissions on the point and was content to rely on my interpretation. Mr Lewin did provide written submissions.

Issues

16. The issues have narrowed somewhat since the appeal was lodged, and I explicitly confirmed with the parties during the hearing that they are as follows:

    a. Should the changing rooms be included in the listing, and does their inclusion affect the validity of the nomination?

    b. Should the appeal be allowed on the basis that the nomination was abusive or invalid? These reasons are put forward:

        i. It was done to frustrate otherwise permissible development;

        ii. It was done by the Parish Council as a proxy for South Oxhey Community Land Trust; and/or

        iii. There is a conflict of interest in Three Rivers being both the listing authority and the freeholder of the land.

    c. Should the appeal be allowed because the changing rooms do not meet the Past Condition at section 88(2)(b)? Apart from that, it is common ground that the Past Condition is met.

    d. Is the Future Condition met by the Pavilion as a whole and the changing rooms in particular?

17. It was common ground at the hearing before me that these questions are considered by the Tribunal afresh. Appropriate weight should still be placed on the views of the local authority as the body with the institutional competence and relevant expertise in making such decisions.

18. After drafting this decision I have dealt with another appeal in which I concluded that the correct approach to an appeal under regulation is not purely *de novo*, and is akin to that expressed by Lane J in Cook v General Medical Council [2023] EWHC 1906 (Admin):

    "20. The relevant legal principles this court must follow in deciding an application of this kind are essentially as follows. The court must disturb

the decision of the IOT only if satisfied that the decision is "wrong". This does not mean that the court is confined to acting only if a public law error is identified, such as would be the position on judicial review. The way in which the principle operates so as to prevent an unconstrained "merits" review is by requiring this court to give weight to the views of the specialist Tribunal.

21. Although arising in a different statutory context, it is instructive to note what Andrews LJ has said recently in Waltham Forest LBC v Hussain & Ors [2023] EWCA (Civ) 733 at paragraph 64:

> " 'Wrong', as Upper Tribunal Judge Cooke explained in Marshall v Waltham Forest LBC [2020] UKUT 35 (LC) means in this context that the appellate tribunal disagrees with the original decision despite having accorded it the deference (or 'special weight') appropriate to a decision involving the exercise of judgment by the body tasked by Parliament with the primary responsibility for making licensing decisions. It does not mean 'wrong in law'. Put simply, the question that the FTT must address is, does the Tribunal consider that the authority should have decided the application differently?"

19. I have not found it necessary to seek further legal submissions on the effect of any difference in that approach – even if it differs in principle, I am satisfied that it would make no difference to the outcome of this appeal. Finally, neither party has suggested that the issue of compensation is relevant to the appeal.

Should the changing rooms be included in the listing, and does their inclusion affect the validity of the nomination?

20. As already noted at paragraph 2, the changing rooms are part of the same building as formed the Pavillion Pub. Mr Kotecha's first argument is that they were specifically excluded from the nomination and should likewise have been excluded from the listing. I agree that the Act permits nomination of part of a building, and that Three Rivers may only list what has been nominated: see sections 108(1) and 90 respectively. Mr Kotecha's second argument is if the changing rooms were included, then the nomination is invalidated by it removing 'access rights' to the new changing facilities built to the west.

21. Mr Kotecha has cautioned me against placing reliability on assertions by the Parish Council and Three Rivers on this issue due to some matters he puts forward as calling into question their credibility.

22. A previous nomination had been made by the Parish Council in respect of the pavilion in February 2020, Three Rivers requiring a clearer plan before the nomination could be taken forward. No action was taken by the Parish Council until the present nomination was made on 5 October 2021. The pro forma used for the nomination, under the heading "Which asset do you wish to nominate?" asks for the "Name of property" followed by the address. It is answered by the Parish Council as

"HD273185 land parcel containing the Pavillion". I disagree with Mr Lewin's submission that this conclusively defines the land nominated as everything falling within the title registered at the Land Registry under the reference HD273185, because question 6 of the form later asks "What do you consider to the boundary of the property? Please give as much detail as you can and include a plan if possible." This plainly gives an opportunity for a nominator to restrict the nomination to part of the property, for example "Fourth floor", "Playing fields excluding factory building", or something of that nature. This does not offend against any provision in the Act, and the landowner would be free to sell other non-listed parts of the title, for example the third floor, or the factory building, without triggering the moratorium provisions.

23. In this case, the Parish Council wrote "See below OS Map with the site boundary outlined and shaded in blue." Mr Kotecha argues that the map attached invalidates the nomination as it is not the official Ordnance Survey map. I agree that it appears to be a screenshot of Ordnance Survey's public mapping service, so not an Ordnance Survey map and less clear than if it were, but disagree that this invalidates the nomination. There is no requirement in the Act or regulations for an Ordnance Survey map to be provided.

24. The map provided with the application clearly includes the entire pavilion building within the boundaries of the nomination, including the former changing rooms. The Parish Council also provided a Land Registry office copy entry for the leasehold interest, which itself includes a filed plan showing the extent of that leasehold interest. That second plan does not appear to reflect the subsequent transfer of land to Three Rivers upon which it built replacement changing facilities, so has a wider boundary at the south-western edge. Following receipt of the nomination, on 11 October 2021 an officer at Three Rivers asked the Parish Council to confirm which of the two plans showed the land that was included in the nomination. She pasted the submitted Question 6 map in the body of her email. The clerk to the Parish Council replied as follows:

> "The nomination DOES NOT include all the land on the HD273185 as TRDC latterly took back some of this land to rebuild a bespoke changing room building.
>
> I can confirm that the OS map below, contained within the application, and with the changing room land removed, is the land we are interested in making an asset of community value."

25. The "OS map below" approved by the clerk is the one submitted at Question 6 of the form. I find, beyond any doubt, that map includes the *former* changing rooms that form the western part of the pavilion building. The only land that the Parish Council intended to exclude was the *new* changing room facilities built and operated by Three Rivers, which are physically quite separate. There is no basis upon which to think that the exclusion was not respected when the listing decision was made, especially as it therefore respected the boundaries of the actual title, and I find that the map filed in response to Question 6 and contained in Three Rivers' email of 11 October

2021 shows what was listed. It includes the entire pavilion building including the former changing rooms.

26. On the hypothesis that the land with the new changing rooms is excluded, as I have now found that it was, Mr Kotecha's skeleton argument then puts forward the following:

> 9. The [new] changing rooms can only be accessed by going over the appellant's property and therefore, under this nomination boundary, if a purchase was made of the property by a 3rd party, this boundary would become a point of contention as it would need correction and therefore, the nomination should be rejected.

27. This argument is misconceived. The ability to cross the appellant's land in relation to the changing rooms and the bowls club has been the subject of controversy, both between the parties and more publicly. I need not reach any finding on who can access what and by which route, because those matters are entirely unaltered by listing any part of the property as an ACV. Nothing in the statutory scheme alters the rights and obligations that attach to any listed land, which will bind a subsequent purchaser in the usual way. Insofar as Mr Kotecha may put disputes over boundaries as relevant to the Future Condition, as opposed to validity of the nomination, I shall turn that issue in due course.

28. My findings above take into account Mr Kotecha's concerns on credibility, such as accusations of lying about whether land registry plans were available at certain times and so on. None of them can possibly bear upon what is a very straightforward course of events that can be readily deduced from the application form and the correspondence that immediately followed it.

29. On this issue, the listed land plainly includes the entire pavilion structure including the former changing rooms. Nothing in the way the nomination was made in this respect undermines its validity.

Abuse and invalidity

<u>Frustration of otherwise permissible development</u>

30. In their representations submitted for the review decision, the appellant's former solicitors Freeths argued:

> "9. The ACV listing regime was categorically not made by Parliament to provide another means by which those opposed to development may seek to hinder otherwise acceptable development. Please see paragraph 22 of the Planning Appeal Decision APP/Y5420/W/14/3001921 in relation to The Alexandra public house, Fortis Green, which summarises the position succinctly in this way:

> "The primary purpose of ACV listing is to afford the community an opportunity to purchase the property, not to prevent otherwise acceptable development."

10. Accepting a nomination intended to prevent acceptable development would be an improper use of the Council's powers, which are "designed to ensure that we do not have vexatious, silly or inappropriate nominations included on the register (Hansard, HC Public Bill Committee, 12th Sitting, cols 505 and 506 (10 February 2011))."

31. I entirely and independently agree with Ms Scott's analysis already summarised at paragraph 9 above, without repeating it, and would add the following.

    a. First, in the cited Planning Appeal Decision, the Inspector found that being listed as an ACV should not prevent a subsequent grant of otherwise acceptable development, for the reason quoted. This is irrelevant to whether it should be listed in the first place.

    b. Second, Freeths' argument in the next paragraph is misconceived. A local authority has no discretion as to whether or not land is listed. If the nomination complies with the Act and regulations, and the land meets the section 88 criteria, then section 90 provides that the local authority must accept the nomination and list the land.

    c. Third, the citation of Hansard is actively misleading (even were it admissible). The full entry ascribes that purpose to the process of nomination and listing, not the way in which powers to list are then used.

    d. Fourth, nothing in the evidence reveals any possible motivation other than securing the community value recently provided by the Pavillion Pub as a public house. Inevitably that use is secured against an alternative, and here it is any development by the appellant that would not provide community value.

Parish Council as a proxy for South Oxhey Community Land Trust

32. Section 89(2)(b) sets out who can submit a nomination. At (i) is "a parish council in respect of land in England in the parish council's area." This is without any qualification or fetter. A parish council is democratically accountable for its decisions and I see no reason why it should not decide to take up another's cause. Even if the parish council had committed some sort of public law error in making the nomination, and I see no basis for thinking it did, then the nomination would still have to be a nullity in order for the appellant's argument to succeed. Nothing put forward can justify such a conclusion.

Conflict of interest

33. Even if there were a conflict of interest in Three Rivers making the listing decision when it is the freeholder of the land, this could not relieve it of its statutory duty to consider the nomination and accept it if well-founded. It would also do nothing to nullify the nomination, and once the nomination is valid the Tribunal makes its own decision on whether the land should be listed.

The Past Condition

34. It is common ground that the Past Condition is met in respect of the part of the pavilion building that was formerly used directly as a pub. Mr Kotecha argues that the former changing rooms might be part of the same building, but their use as changing rooms was too long ago to be in the 'recent past' as required by section 88(2)(a).

35. I consider that the former changing rooms meet the Past Condition, but not because their use as such was in the recent past. Mr Kotecha asserted in evidence that while the pub was open the changing rooms were never used for storage in connection with its business. Whether or not that is correct, Mr Kotecha's case required evidence that they cannot have been used for storage. These were, in the end, empty locked rooms in a pub building, and formed part of the same title. Section 88(2)(a) is concerned with "an actual use of the building or other land". This was part of the building. In some cases a distinction between different parts of land or a building might need to be made. But in this case I see no reason why these rooms should be severed from the rest of the building, any more than if there are other rooms in the building, or an attic or a cellar, or a piece of lawn at the front, that went unused by the pub business. In the absence of evidence to the contrary, I find that they could have been so used.

36. The rest of the building being conceded as meeting the Past Condition, I find likewise with the changing rooms.

The Future Condition

37. For the above reasons, I consider the whole building rather than taking the former changing rooms separately.

Principles

Meaning of 'realistic to think'

38. In R. (TV Harrison CIC) v Leeds School Sports Association [2022] EWHC 130 (Admin), Lane J reviewed several authorities concerning section 88(1)(b), including as follows:

    30. In Gullivers Bowls Club Ltd v Rother District Council and Anor (CR/2013/0009), Judge Warren heard an appeal by Gullivers Bowls Club Ltd, the owner of land used as a bowls club, which appealed against the

inclusion of its land in the statutory list, following nomination by a Community Association. Judge Warren held:

> "11. Turning to the future condition in Section 88(1)(b) Mr Cameron [representing the Bowls Club] submits that the existing bowls club has no realistic prospect of continuing. He points to the poor state of the buildings and the finances and relies on a report prepared by GVA. This finds that Gullivers is not commercially viable. Mr Cameron submitted that since listing lasts for five years, my starting point in considering whether the future condition was satisfied, should be whether the bowls club could continue in existence for that length of time.
>
> 12. I do not accept that the statute requires me to foresee such long-term viability. Indeed, it seems in the very nature of the legislation that it should encompass institutions with an uncertain future. Nor, in my judgment, is commercial viability the test. Community use need not be and often is not commercially profitable.
>
> 13. On this issue, I accept the submissions made by Mr Flanagan. Gullivers may be limping along financially but it still keeps going and membership is relatively stable. Of course it is possible that something could go drastically wrong with the buildings and Gullivers would not have the capital to repair them; but that has not happened yet and, in an institution that has lasted for 50 years, it would be wrong to rule out community spirit and philanthropy as resources which might then be drawn on. In any event, should the site cease to be land of community value, Rother would have power to remove it from the list."

31. In Worthy Developments Ltd v Forest of Dean District Council and Anor (CR/2014/0005), Judge Warren dismissed the appeal of a developer, which had bought a former pub known as the "Rising Sun" outside Chepstow, and wished to build two four-bedroomed houses on the site. A planning application to that effect had been refused but was likely to be appealed. The respondent accepted nomination by the "Save our Sun Committee" of the land and building comprising the pub. On the issue of section 88(1)(b), Judge Warren held:

> "17. In respect of the future condition, Worthy Developments Ltd asked me to have regard to their intention to develop the plot to provide two houses. I take that into account although I balance it with the fact that they have not yet obtained the necessary planning permission. I also take into account the remoteness of the public house which must compound the general malaise affecting public houses nationally.

> 18. The written submissions ask me to consider which was the more likely to happen, that planning permission should be obtained and houses be built, or that the building be revived as a pub? In my judgment, however, to approach the issue in this way is to apply the wrong test.
>
> 19. I agree with the council. The future is uncertain. Worthy Developments Ltd may or may not obtain their planning permission. They may or may not sell the land. The Save our Sun Committee may or may not see their plans reach fruition. It remains still a realistic outcome that The Rising Sun might return to use either as a traditional pub or as a pub/shop/community centre as envisaged by the committee.
>
> 20. My conclusion in this respect is reinforced by the pledges of support and petitions gathered by our (sic) Save our Sun Committee. It is true that they have not yet made an offer with a firm completion date but their proposals are not fanciful. It is enough that return to use as a pub or some other venture furthering the social wellbeing or interests of the local community be realistic."

39. Lane J held that Judge Warren's interpretation of "is it realistic to think" was correct, emphasising that the legislation does not require a potential future use to be more likely than not to come into being, in order for it to be realistic.

The five year period

40. I consider that the five year period runs from the date when the property was listed as an ACV, rather than the date of hearing. Regulation 11 gives a right of appeal against the review decision. Section 92 of the Act specifies that review as being of "the authority's decision to include the land in the list", and at section 92(4) describes the procedure that should be followed if the decision on a review "is that the land concerned should not have been included in the authority's list of assets of assets of community value", including that that "the nomination becomes unsuccessful". This phrasing can be seen to retrospectively confirm or nullify the decision to list as of the time it was taken, and it is that review which is appealed. Furthermore, under section 87(3) entry on the list "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". For the making of an appeal to extend that period would be inconsistent with the statutory language, and it is unlikely that Parliament intended the two five year periods to end at different times.

41. Finally on this point, I should mention the judgment of Lewison LJ in Waltham Forest London Borough Council v Hussain & Ors [2023] EWCA Civ 733, at [101]. The adverse consequences of adopting the date of hearing as the relevant date he describes would apply equally to regulation 11 appeals.

42. It follows that I reject Mr Lewin's submissions that the period runs from the date of hearing. The only other submission with which I must deal is that if time runs from listing then this could frustrate the purpose of the legislation by enabling an unscrupulous landowner (not suggested to be the appellant) to 'run down the clock'. That admitted possibility is insufficient to outweigh the factors pointing the other way, as identified above. An appeal does not suspend the listing decision, and a landowner can set their face against further community use whether or not there are ongoing proceedings. The situation at the date of hearing will form part of the factual matrix considered by the Tribunal, and nothing in the legislation excludes the effect of proceedings as a relevant fact when deciding the Future Condition.

Consideration

43. In Mr Kotecha's witness statement of 3 August 2023, he stated as follows:

> "In terms of the future condition, the appellant has intentions to carry out one of the following options:
>
> 1) Carry on with plans to convert the changing rooms that are part of the property into offices under planning 15/0090/FUL which has been maintained. And then, to extend the pub (under planning 16/1517/FUL) and to refurbish it with the intention of running it as a pub and function venue.
>
> 2) Carry on with plans to convert the changing rooms that are part of the property into offices under planning 15/0090/FUL which has been maintained. Then plan to extend and refurbish it with the intention of running it as a function and events venue. The intention has always been to offer the local community block out days and special rates for the venue. This would require planning permission and a discussion with the freeholder.
>
> 3) Reorganise the layout of the property to allow community parking facing the park, a new pub and changing rooms and community facility, and substantial affordable housing on the existing car park based on a design made by the Savills' Urban Design Studio which, at pre-planning, has positive sentiment around it from the planners that would allow further exploration. The plan is with TRDC, the freeholder, and we are awaiting a response. Should the council wish to take it further we will engage with them, and jointly determine if we should take it further in planning."

44. Mr Lewin's first question in cross-examination was whether those proposals remain current. Mr Kotecha confirmed that they do. As a consequence of my decision that the changing rooms should not be severed from the rest of the building, and Mr Kotecha agreeing that the pub previously afforded community value to meet the Past Condition, it follows that each proposal would resume the community value that was previously offered by the pub. Were that not the case, I would entirely and independently agree with Ms Scott's analysis in the review decision, without

repeating it. All that has changed since then is that the appellants arguments to the contrary (such as entirely residential development) have slipped away, to the point where he is now committed to development plans that include a community-focused pub. If anything, Ms Scott's analysis has been vindicated by the passage of time. I likewise find that the third proposition is fanciful, as found by Ms Scott there is no basis upon which it is realistic to think that housing development would be allowed on the site.

45. In evidence, Mr Kotecha was at pains to tell me that the office conversion of the changing rooms was on the verge of being started, the affixing of already-agreed signatures from Three Rivers and Bromley being the only obstacles. After this he will be in a position to proceed very quickly. I accept this, and like Ms Scott give the appellant the benefit of the doubt that the 2015 planning permission has not lapsed. Office use will only rule out a finding that the Future Condition is satisfied for the whole building if it renders the pub business an ancillary use. I find that it is the office use that will be ancillary, rather than the pub business. The offices will occupy a minor part of the structure with likely less much less footfall and operating hours than the pub business. I should add that I was referred to a report by Brasier Freeth, both parties relying on it to support their case. Ultimately nothing in the report alters the above conclusions.

46. The real question is therefore whether it is realistic to think that a community-focused pub business, as put forward in the first and second proposals, will commence by 19 November 2026. In Mr Kotecha's witness statement he describes why the previous pub businesses failed but states his ideas for making it a success:

> "As businesspeople, we have understood the issues that may have caused the business to fail in the past. The site is very large and can accommodate a lot of people and would need a lot of staff. We have already converted - to a high standard - the dilapidated accommodation into a two-bedroom manager's flat and a connected residential building into 5 ensuite bedrooms, which can result in the attraction of skilled staff. The rear garden has great views of the park and whilst this is good, we have grown conifers since 2018 to make it more private and intimate of an experience. Overtime these have grown to over 6ft, and we have achieved our aim. The internal children's play area, we felt, has less potential and making this side an area dedicated to functions and weddings with a garden would result in more revenue.
>
> The property is in the right hands and as a commercial venture is viable. We have potential partnerships with local businesspeople who have had success in similar situations."

47. Much of the rest of this first witness statement, and of the second, descends into recriminations against Bromley and Three Rivers for what Mr Kotecha sees as their delaying behaviour, and other ancillary disputes. The evidence overall nonetheless justifies the following findings of fact:

a. First, the three proposals are seen as all-or-nothing by Mr Kotecha. They include not just their individual parts but how the whole would be a viable business. In that sense, opening of a pub business is likely contingent on real progress with the offices. I find that this is for psychological reasons, as well as financial. During the hearing, Mr Kotecha became sufficiently upset that a short break was necessary. This was in connection with what he sees as unfair media coverage, instigated by Three Rivers, over the access disputes with the Bowls Club and the Scouts. My assessment of Mr Kotecha, especially when considering the correspondence in the bundle and the way he has pursued this appeal, is that he has become so mired in disputes over offices and access rights that he is incapable of focusing on reopening the pub business until they are resolved. He is not presently approaching the reopening of the pub in a rational and commercial way.

b. Second, I find that the disputes over offices and access rights will soon be resolved. I accept Mr Kotecha's evidence that the necessary consents from Three Rivers and Bromley are shortly forthcoming, and he has provided correspondence showing the ongoing negotiations. Once this hurdle is crossed, as I find it will shortly, it is realistic to think that Mr Kotecha will begin to take a rational businesslike approach to reopening the pub business.

c. Third, the parking obstacles to a pub business will either soon be resolved or do not operate as a serious barrier to the pub business reopening. Beyond doubt the appellant is entitled to use it for both the offices and the pub business. The lease also requires it to be made available for those using "the Multi-Sport Surfaced Area and visiting the Park for recreational purposes". It is difficult to see how this includes the Scouts and the Bowls Club, but of course I do not decide the point. Even if matters are more complicated than that, without further evidence I cannot accept that use by the Scouts and the Bowls Club of a 120 space car park operates as a discrete and insurmountable obstacle to it being a viable pub business. I find that Three Rivers will rationally engage with Mr Kotecha on the point and that he, once the delay to office reconstruction is removed, will rationally engage with them.

d. Fourth, little building work or renovation needs to be done to the pub part of the building for the business to reopen. Mr Kotecha has described the work done already, as set out above.

e. Fifth, I accept Mr Kotecha's evidence, contained in his witness statement, that lessees are available to take on the pub business who will run it successfully. I find that it is only Mr Kotecha's distress arising from the offices not yet being secured, and the barrier he perceives this puts in his way, that has stopped him progressing this.

f. Sixth, like Ms Scott I note the previous offer to lease the pub to a community group and find that should such a group make a reasonable offer then it would be accepted. I do nonetheless take account of the fact that no community group

has shown itself to have the funds and intention to purchase the pub, a privately run pub that offers community value is a more realistic possibility.

48. Taking all the above matters together, I conclude that the likelihood of the pub reopening is sufficient to meet the 'realistic to think' threshold. Unlike many appeals, here the landowner actively wishes to resume the community value use. Either the first or second of Mr Kotecha's proposals would satisfy the condition, and he has provided positive evidence that each is a realistic possibility in the next 2½ years. Nothing is left to do once the parties actually cooperate, and it is realistic to think that they will.

Conclusion

49. The pub was validly nominated and meets both the Past Condition and the Future Condition. The review decision was right to so conclude, and the appeal must be dismissed.

Signed — Date:

Judge Neville — 29 May 2024