

Battles to convert ACV listed public houses to dwellings

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The significant difference between the market value of a building with an A4 planning use as a public house and one with a C3 use as a dwelling is leading to protracted disputes between owners and local authorities. Hard trading conditions for many pubs and soaring house prices mean many pub owners understandably seek to enhance the building's value by changing the building's use from pub to a dwelling even after the pub has been listed as an asset of community value. This is resulting in some long battles which consume needed resources on both sides. On the planning side this can involve not just repeated planning applications for a change of use but also applications for a certificate of lawful existing use and enforcement proceedings.

1. Pheasant inn Ballinger - An illustration of such a case is King v Chiltern DC (CR/2015/0025) which is a recent decision of Judge Anthony Snelsdon concerning the listing of the Pheasant Inn at Ballinger near Great Missenden. Mrs. King had purchased the Inn in May 2006. At the time it was purchased it was a traditional village pub with a restaurant. In paragraph 18 of the judgement it was described as "a social hub for the village generally and for certain interest groups in particular, including the cricket and football clubs. There were some special events such as musical nights, Christmas carol evenings and so forth. Mr Ellis described convivial Sunday evenings attended by 15-20 'regulars'". The judge found that this clearly established that at the time of the purchase the pub furthered the social wellbeing and social interests of the local community.

After refurbishment Mrs. King opened an 'up-market' restaurant but still welcomed customers wanting a drink only. Mrs King's timing was extremely unfortunately as she was hit by the severity of the recession and her business failed. As she battled to save the business opening hours were reduced. The judge held that notwithstanding the change in character in the business following the purchase by Mrs King it still remained a valuable amenity offering something unique to the village. The reduction in opening hours did not mean that it ceased to further the social wellbeing of the local community but rather affected the extent to which it brought benefit to the community.

In consequence it was held that that the Pheasant Inn continued to further the social wellbeing of the local community. The business had closed towards the end of 2008 and the nomination was made in May 2013. One issue was whether the community use was within the recent past. The learned judge noted that there is no statutory definition of recent past but agreed with the view of Judge Lane in Crostone Limited v Amber Valley (CR/2014/0010) that it is a "relative expression" and "will depend upon all the circumstances of a particular case." In line with that decision and the more recent decision in Hawthorn Leisure v Chiltern DC (CR/2015/0019) the judge considered that although the business shut in November 2008

and the appeal hearing was in July 2016 the community use of the Pheasant Inn was still within the recent past.

A principal issue relied on by Mrs King in her battle against listing was that since the closure of the business she had occupied the Pheasant Inn solely as her home and that in consequence the building was excluded from listing as an ACV because it should be treated as a residence. Whilst the business was running Mrs King had lived on the first floor and the kitchen on the ground floor had been used for both commercial and domestic use.

On shutting the business Mrs King had applied for a change of use from mixed commercial/residential to solely a dwelling. This had been refused and then the appeal dismissed. A second application was made which was refused and the appeal dismissed. These applications faced a fundamental obstacle in the key policies of Chiltern District Council which only permit the loss of community facilities in exceptional circumstances.

To overcome this hurdle Mrs King then applied for a certificate of lawful existing use. This failed and an appeal was withdrawn. This was followed by another such application which also failed and the appeal was dismissed. At the time of the ACV appeal hearing there was pending at third planning application by Mrs King seeking a change of use to solely a dwelling and the evidence was that the authority was considering the commencement of enforcement proceedings against Mrs King if that application failed.

Paragraph 1 of Schedule 1 to the Assets of Community Value (England) Regulations 2012 excludes from the ACV regime “a residence together with land connected with that residence”. In sub-paragraph (5) it is provided that a building land may be listed even though the building is partly used as a residence if it would otherwise qualify as an ACV. In consequence whilst the business was running it was clear that the Pheasant Inn could have been listed notwithstanding the partial residential use as it satisfied both the physical and functional tests suggested by Judge Lane in *Wellington Pub Company v Royal Borough of Kensington and Chelsea* (CR/2015/0007) and applied in *Kicking Horse Limited v Camden LBC* (CR/2015/0012)

Mrs King’s contended that following the closure of her business she had occupied the building as her private residence and this changed the position. Even now the building’s commercial planning use remains primarily as a restaurant with ancillary drinking establishment and ancillary residential use. Her contention raised the issue whether residential use which is not lawful be taken into account when deciding whether the building is a residence and thus excluded from listing? Such a contention if successful could have a significant effect on the application of the ACV regime to listed public houses. It would certainly be a strong encouragement to breaches of planning law.

Unlawful actual use can be taken into account when determining whether there is a qualifying community use of an asset for the purposes of section 88. This point has been recently upheld in the first ACV appeal from the First-tier Tribunal to the Upper Tribunal in *BHL v St. Albans City & District Council* [2016] UKUT 0232 concerning use of a field by members of the local community without lawful permission.

The learned judge held that in paragraph 1(5) “used as a residence” means lawfully used in accordance with the permitted planning use. To construe the phrase otherwise would be to let owners by breaches of the planning law unilaterally prevent the listing of a building by a wrongful act. This construction meant that the residential use of the Pheasant inn remained only a partial use and so paragraph 1(5) continued to apply and thus it was possible for it to be listed. To have held otherwise would have resulted in a significant increase in infringements of planning law and would have seriously weakened the protection introduced last year with regard to listed pubs in relation to the Permitted Development Rights regime.

To date the Pheasant Inn saga has involved Mrs. King in three planning applications for change of use, two applications for CLEUD, three planning appeals, an ACV review and appeal. This has required the submission of expert evidence. For both sides it has required the expenditure of significant money and effort. This is not unique as is shown both by the decision in *Noquet v SSCLG* and *Cherwell DC* [2016] EWHC 209 (Admin) concerning the Bishops End public house at Burdop, Banbury and the ACV appeal in *Gibson v Babergh DC* (CR/2014/0019 concerning the Bull Inn at Thorpe Morieux, Suffolk.

2. Bishop’s End, Burdop - In the first case the owners had applied for a certificate of lawful existing use in respect of the Bishops End public house which had been purchased in 2006 and closed in 2007. An enforcement notice was issued in February 2012 alleging unauthorised use of the pub as a residential dwelling-house. The appeal against the notice was dismissed in October 2012 and the owners were required to cease using the pub as a residence except for residential occupation ancillary to the use as a public house. In February 2013 the ground floor started to be used for the sale of wood burning stoves and fireplace accessories. This A1 use continued until July 2014. Two community nominations were made in 2013 but interestingly were rejected on the ground that it was a residence despite the contention that this was in breach of planning law. The outcome would probably be different after the Pheasant Inn appeal.

Shortly after the sale of stoves stopped the pub was vacated and the owners applied for a certificate of lawful existing use to formalise the change of use from vacant public house (A4) to A1 use. This was on the basis that this is permitted under the Permitted Development Rights regime (the application being before the coming into force of the 2015 Regulations). This application was refused and the appeal dismissed by the Inspector. The application to quash the Inspector’s decision under section 288 1990 Act was then dismissed by Mr Justice Sycamore. The reason for the failure by the owners was that between the A4 use as a pub and the proposed A1 retail use there had been a mixed unauthorised use involving the sale the wood burning stoves with the owners living there. This prevented the PDR regime operating to authorise the change of use. The pub was listed as an ACV in February 2016 and following the giving of notice of intention to dispose of it is now in the protected period.

3. Bull Inn Thorpe Morieux - Miss Gibson had purchased this pub in 2007 confident that she would make a commercial success of it but unfortunately it became another victim of the recession and was closed in February 2009. It was subsequently reopened. Planning

permission had been given to a previous owner to build a dwelling next to the Bull on condition that its use was limited to a person solely or mainly employed or last employed in the business carried on at the Bull. Miss Gibson made two applications to remove the condition. The first failed but on appeal the second succeeded. The intention was to reinvest the capital resulting from the sale of the dwelling in the business.

In May 2013 Miss Gibson started a bric-a-brac shop and in the following year she applied for permission for a change of use to a bric-a-brac shop with living accommodation and this was refused. In August 2013 the pub was listed but removed from the ACV list on review only to be relisted again on a second nomination. This led to an appeal to the First-tier Tribunal which failed in May 2015 so that the pub remained in the ACV list. In the meantime Miss Gibson had applied for permission to convert to a dwelling which was refused by the Babergh DC but was successful on appeal in November 2015 (APP/D3505/W15/3006718). Following this the Bull Inn was removed in March 2016 from the ACV list. The grant of planning permission to convert to residential use may by itself be enough to prevent a pub being listed or if already listed to cause it to be removed from the list (STO Capital Limited v Haringey LBC CR/2015/0010).

4. Conclusions – the chance of enhancing the value of a pub through planning applications is very tempting particularly if funds have been lost through bad luck, the harshness of the recession and unfortunate timing. Whereas previously such efforts were almost exclusively a matter of planning law now community nominations and ACV reviews and appeals will also feature in the sequence of events. The introduction last year of the protection for listed public houses has not stopped such efforts.

The following points come out of the cases so far:

(i) Unlawful occupation as a residence – importantly it has been held in the Pheasant Inn case that to be a residence for the purposes of the exclusion provision in Schedule 1 of the 2012 Regulations the occupation must be lawful complying with planning law. Occupation contrary to planning law will not be taken into account when deciding whether the building is excluded from the ACV regime.

(ii) Closure of business - When the lawful planning use of a public house permits partial residential use ancillary to the main commercial use of the building the closure of the business will not cause the pub to become a residence.

(iii) Enforcement notices – one unfortunate consequence of this is that local authorities will need to be vigilant in ensuring the issue of enforcement notices to prevent residential occupation of a public house becoming lawful through the passing of time. This in turn may mean pub owners having to vacate when the pub business closes.

(iv) Wasted resources – Miss Gibson's success in finally obtaining the required planning permission shows that determination may achieve much. However, that is not always the outcome. In the process the owner may expend significant sums and effort and the local authority may have to employ substantial resources when they are required to

meet other important needs. Is it time to place a restriction on the number of such planning applications that can be made at least within a specified period?

(v) Expiry of five year listing period – any public house listed as an ACV will if nothing happens in the meantime be removed from the list after the expiry of the statutory five year period. What will then happen? In a few years this is problem that local authorities and owners will have to start facing. Will the local community have lost interest? Inevitably fresh community nominations will be made in some cases. Will the community use which caused the pub to qualify as an ACV in the first place still be regarded as in the recent past? If there has been no use of the building during that five year period will this be a factor to be taken into account when determining the recent past for the particular public house. Recent ACV appeal decisions on the recent past such as in Hawthorn Leisure v Chiltern DC (CR/2015/0019) suggest that some at least of the removed public houses will be placed back on the ACV list.

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