

Further development of the Asset of Community Value regime

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Further First-tier Tribunal FTT appeal decisions and the first appeal to the Upper Tribunal have highlighted some interesting points with regard to the ACV regime. Inevitably many relate to public houses but not exclusively. A golf course has been considered for the first time raising points on the composition of the membership of the golf club that had previously used the course.

1. Public houses –

1.1 Qualification as an ACV - the recent FTT appeal decisions relating to public houses emphasise that the appeal judges when deciding whether the pub qualifies as an ACV do not apply criteria which does not appear in section 88 of the 2011 Act. Some listing authorities have sought to give guidance as to how the regime will be applied by the authority by spelling out criteria which should be satisfied. The judges are concerned to ascertain whether the pub is “a place for local residents to meet and socialise” (Judge Lane at para. 20 in *Kicking Horse v Camden LBC* CR/2015/0012). Evidence of a group of regulars will be important. In *Pullan v Leeds City Council* CR/2015/0011 it was argued that the majority of the customers were not local. Judge Lane considered that it was enough that a significant number were from the town and the pub’s clientele “comprise far more than a de minimis local element” (para. 12). The fact that there other nearby public houses will not prevent a listing. In the *Pullan* case all the public houses in Otby had been listed. In *Haley v West Berkshire Council* CR/2015/0008 there was another pub in the village and a large number of other pubs within close proximity of the village. In neither case did this prevent listing.

1.2 Ancillary use – there have been determined attempts to have removed from the listing of a public house parts in which it is argued the use carried on is ancillary to the pub use and so that part does not qualify as a non-ancillary community use. Such arguments have been robustly rebutted. In *Kicking Horse v Camden LBC* CR/2015/00121 the owner sought to sever from the listing of the Sir Richard Steele pub the basement, garden, closed first floor function room and second floor used for staff accommodation. Each argument failed. Just because they are separate parts of the building it does not mean that their uses are segregated. Each part had a physical and functional relationship with the reminder of the building as in the *Wellington* case. Each part was being used for the overall use of a public house.

2. Nominator – linked particularly to nominations of public houses is the issue who qualifies as a nominator. One of the first grounds of challenge to such a nomination is often that the nomination is not a community nomination because the person making it does not

satisfy the requirements relating to a nominator. Such challenges are made to nominations made by CAMRA branches notwithstanding the decision in *St Gabriel Properties v Lewisham LBC* CR/2014/0011. Part of the argument is that to be an unincorporated body within reg. 5 of the Assets of Community Value (England) Regulations 2012 (“2102 Regulations) the group has to be an unincorporated association which in turn requires a list of identifiable members and an agreement between the members applying the decision in judicial proceedings in *Williams v Devon CC* [2015] EWHC 568. This was rejected by Judge Lane in *Mendoza v Camden LBC* CR/2015/0015 which concerned a nomination by a group of local people seeking to support the continuation of the Carpenters Arms as a public house. The group adopted a standard form of constitution published by CAMRA which contained a provision that any user of the pub would automatically be a member. It was argued that this prevented the group being an unincorporated body and so did not have the necessary status to make a community nomination. It was the only issue as it was accepted that the pub qualified as an ACV. A similar clause had resulted in the rejection of the first nomination of the Kensington Park Hotel on review. Judge Lane held that in the context of the ACV regime the term “unincorporated body” had a different meaning to that in different statutory contexts such as tax. It was not limited to unincorporated associations and could include “a number of individuals coming together to further a common interest” (para. 20). There was no need for an agreement between members because a nominator took on no financial burden. Nor is there a need for the membership of the body to be capable of being comprehensively identified. This is an issue which is likely at some time to be appealed to the Upper Tribunal unless and until it is the number of successful challenges to the status of the nominator should be reduced.

3. Procedural defects – there is a marked trend against allowing procedural flaws to defeat the listing of an asset which qualifies as an ACV. In *Haley v West Berkshire Council* the owner had not been informed of the listing of his pub but Judge Lane stated that this was not determinative of the appeal because on the appeal there is a full reconsideration of all the issues. Frequently owners seek to challenge a nomination or listing relying on a failure by the listing authority to comply with the ACV regime in one or more respects. There are two real issues to be addressed at each stage of the listing process. The first is whether the nomination has been made by a person who qualifies as a nominator. The second is whether the nominated asset qualifies as an ACV. Failures to comply with the procedural requirements will normally not be regarded as reason for refusing a nomination. In particular, the failure to meet a time limit will not justify terminating the listing process. For instance, if the listing authority fails to make a listing decision within the eight week period the authority must continue and decide the nomination.

4. Change in ownership – for the first time in *Hawthorn Leisure v Chiltern DC* CR/2015/0019 the FTT was faced with a change in ownership of the listed pub after the appeal had started. No point was taken by the Council so the point was not argued. The appeal continued as Hawthorn Leisure continued to be an appellant in accordance with rule 1 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009.

5. Golf clubs/local clubs - Haddon Property Development v Cheshire East Council CR/2015/0017 is interesting not just because it is the first appeal concerning a golf course to reach the FTT but for the discussion concerning the significance of the composition of the membership. The nominated golf course had closed but it was accepted that whilst the club was operating it qualified as an ACV. 95% of the club's members were male. 73% was aged over 45 and 50% were over 55. The annual membership fees at the time the club closed were £300 and green fees were £17.50 in an area where 62% of the local population were said to suffer from some form of measurable deprivation. It was argued that the golf course was not an ACV because the club's membership did not represent a wide enough sector of the local community. This argument was rejected and the relationship of the club with the local community in the recent past was sufficient for it to qualify as an ACV. Judge Lane stated at para 18 that the "fact that the overwhelming majority of golfers were male and middle aged or older is immaterial". If the club had been a highly exclusive establishment then there may not have been a sufficient relationship.

6. Realistic to think will be future community use - the nomination in the Haddon Property Development case failed because it was held that it was not realistic to think that the golf course would be used for community purposes in the next five years. The clubhouse had only a temporary permission which had been extended once but had expired and there was going to be no further extensions. This meant that the continued existence of the clubhouse was unlawful. The judge did not consider that former members who had joined other clubs would return for a club which did not have a clubhouse.

On this issue as to the possibility of future community use the decision in STO Capital v Haringey CR/2015/0010 reiterates the point previously made by Spirit Pub v Rushmore BC CR/2013/0003. If the owner has the ability to block future community use of the nominated asset then it should not be listed as it is not realistic to think that there will in the future be a non-ancillary use that furthers the social wellbeing or social interests of the local community. In the STO Capital case planning permission for the residential development of the Alexandra pub had been granted by a planning inspector after the review decision but before the appeal hearing. This caused the appeal against listing to succeed. With such planning permission the pub will be marketed at a price reflecting a residential and not a pub use and so it is not realistic to think that the pub would re-open in the next five years. The planning permission was a block to future community use which meant that the pub should not be listed.

It is much harder for an owner to succeed on this point if the argument is based not on the blocking ability of the owner but the community use of the nominated asset not being commercially viable. In the St. Edmondsbury BC case this was the line taken by the pub owner but the judge accepted that the pub business had become unviable due to over-renting by the previous owner. Further it was accepted that the pub could not be acquired by a community entity on the open market because it was offered for sale at a price which reflected a residential use.

In the Haley case it was also argued that use as a pub was no longer a viable business. However, as with earlier appeal decisions it was considered that a different mode

of operation making use of staff accommodation and with community involvement it could be viable.

7. Recent past – it is for the listing authority to decide what constitutes the recent past. In *Hawthorn Leisure v Chiltern DC supra the Kings Head in Prestwood* was nominated in May 2015. There was unchallenged evidence from previous tenants establishing that between 2002 and 2007 the activities carried on at the pub caused it to qualify as an ACV. Taking into account its long history as a pub Judge Lane regarded this period as within the recent albeit ending around eight years before nomination. This may be important particularly when the pub has been closed for some time.

From 2013 until its closure in April 2015 it has been run as an Indian restaurant but which also welcomed local drinkers. This ability of locals to socialise there until the closure was a further and separate reason for the pub being listed.

8. Does use have to be lawful use? – the first appeal to the Upper Tribunal from the FTT relating to an ACV has been decided. In *BHL v St. Albans City Council [2016] UKUT 232 (AAC)* the issue concerned the use of a field by the local community. It was crossed by a public footpath but there was no right to go off the path into the field. The argument on behalf of Banner Homes that only lawful use could be relied on to establish an ACV had failed in the FTT and it failed before Judge Levenson. The omission of the word “lawful” was held to be deliberate. The absence of a right to use the field did not prevent account being taken of the use when determining whether the nominated asset qualified as an ACV. Judge Lane had kept open the possibility that in some cases the principle of statutory interpretation known as *construere in bonam partem* (in good faith) could be relied on but was not accepted by Judge Levenson.

9. Planning – Judge Levenson in the BHL appeal stated (at para. 4) that listing “under the 2011 Act does not of itself prevent land being developed but as a matter of planning policy any necessary permission is likely to be refused whilst land is listed.” Although listing may be taken into account on a planning application it will not automatically result in a planning refusal. On a planning appeal the planning inspector granted permission to convert the Alexandra pub to dwellings (APP/Y5450/W/14/3001921) notwithstanding the pub being listed. In this respect the planning regime is more flexible than the ACV listing regime.

For a fuller discussion of the recent appeal decisions an updated Guide to ACV can be found at <http://www.christophercant.co.uk/assets-of-community-value/>