

Fresh points on Assets of Community Value

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Seven new ACV appeal decisions have been published on BAILLI and provide some further guidance in relation to the ACV regime. This is helpful as there appears to be no signs of an abatement in the making of community nominations. For local authorities it is a regime which can give rise to tricky issues and which is demanding in resources.

(i) Review - this point does not arise from any of these decisions but it is a point which has been cropping up with regard to reviews of listing decisions. Regulation 4 of Schedule 2 to the 2012 Regulations requires that an “officer of appropriate seniority who did not take any part in making the decision to be reviewed (“the reviewer”) shall carry out the review and make the review decision.” Challenges are being made to review decisions on the ground that this regulation has not been complied with. It has been contended that the reviewing officer lacked the necessary seniority or was involved with the original listing decision. Such a challenge to the review decision also probably challenges the jurisdiction of the First-tier Tribunal which is triggered by a valid listing review decision (para. 11 of the 2012 Regulations).

When complying with this regulation it is important to take into account that

(a) the review unlike the listing decision must be carried out and decided by an officer and not a member or committee of members;

(b) the reviewing officer must carry out the review and not just make the decision;

(c) the reviewing officer must not have been involved with the listing decision;

(d) the reviewing officer’s seniority should be such to prevent a challenge.

(ii) commercial gym – the ACV listing of a closed LA Fitness Gym in Henley-on-Thames has been upheld (*Henthames Limited v South Oxfordshire DC* CR/2015/0028). It is noteworthy to have a commercial property which is not a pub or shop and indicates the width of the scope of the regime.

One issue in the appeal was whether it is realistic to think that there could be a non-ancillary use of the premises in the next five years which furthers the social wellbeing or social interests of the local community. Amongst the factors taken into account by the judge in holding that it was were two of general interest:-

(a) it is not necessary to show that the local community support takes the form of a proposal to acquire and run the nominated asset. The possibility of a viable future commercial use supported by the local community is sufficient. With nominations of pubs owners have been arguing that the absence of proposals for a community purchase means that the nomination must fail.

(b) a possibility that planning permission might be obtained for another use with a smaller gym on the site is sufficient to satisfy this condition.

(iii) Costs order – the first costs order in an ACV appeal has been made under rule 10 of the Tribunal Procedure (First tier Tribunal) (General Regulatory Chamber) Rules 2009 on the ground of unreasonable conduct (Collins v Derbyshire Dales DC CR/2016/0005). The appeal was unnecessary because it related to a field at the side of a listed pub which had not been included in the listing but the judge considered that this had not been made clear to the appellant.

With an increase in successful and partially successful appeals this will be more of an issue. Even if there is no costs order the costs of an successful appeal can be recouped as compensation provided that the statutory requirements are satisfied.

(iv) Fire damaged building – the Swan Inn at Waters Upton closed at the end of 2011. Until then it had been used by the local community for a range of activities justifying listing as an ACV. Planning permission to develop part of the land associated with the pub for five dwellings was granted in January 2014. In August and September 2015 the building was seriously damaged by two arson attacks and there was no insurance against arson. In November 2015 a community nomination was made which resulted in a listing decision for the whole pub which led on to an appeal - Neem Genie Company Limited v Telford & Wrekin Council CR/2016/0010.

Use ending five years ago was considered by the judge to fall well within the recent past. This accords with a number of recent “pub” decisions. The real issue was whether the future condition in section 88(2)(b) had been satisfied. There was an absence of detailed evidence on matters such as the costs of restoring the pub. However, the judge considered it implausible that the Swan could be restored without an enabling development or funding from individuals with no commercial return expected. Not surprisingly there was nothing to suggest the latter option would occur. However, the judge considered it possible that within the next five years the ground floor of the Swan could be restored to use as a pub supported by an enabling development at first floor level (para. 20). This was sufficient to satisfy the future condition as regards the ground floor whilst the upper floor was ordered to be removed from the listing. This is in line with the statement of Judge Warren in the Gullivers Bowls Club v Rother DC CR/2013/0009 that consideration could be given to “imaginative partnership schemes” (para. 16).

(v) Ancillary use - an argument that use of land by scouts was only an ancillary use failed in Bay Trust v Dover DC CR/2016/0002 as did an argument that the use was a trespass. The use had been significant and importantly the predominant and non-ancillary use of the land until 2015 was for recreational purposes.

(vi) Greens – a green was created in the middle of a recently built housing estate in accordance with the planning permission for the development. Notwithstanding a disputed argument that it had not been looked after the listing was upheld in the Trustees of Sundorne Estate v Shropshire Council CR/2016/0015. The judge accepted that it was used as a recreational amenity by local children and use was not limited to the footpaths.

(vii) Pub converted to flats without planning permission – the Ship Inn in South Norwood was converted into flats notwithstanding three failed planning applications. In the appeal against listing the argument that it should not be listed because the flats constituted residences was dropped. The judgment in Z B Investments Limited v Croydon LBC CR/2016/0009 included the following points:

(a) Use by the local community up to 2011 when trade started to decline because of a change in the running of the pub from a tenant to managers is within the recent past bearing in mind the Ship had been a pub for at least 150 years (para. 50).

(b) the decline in profitability thereafter did not prevent it satisfying the test in section 88(2)(a) after 2011. The question is whether the social wellbeing and social interest of the local community continued to be furthered “to any material extent”. The judge held that it had been (para. 51). This is in line with the statement of Judge Lane that the protection of the ACV regime is not just for successful pubs (para. 14 *Evenden Estates v Brighton and Hove* BC CR/2014/0015).

(c) in any event a revival under a new manager during the last three months of business would be sufficient by itself to satisfy the test in section 88(2)(a) (para. 52).

(d) the possibility of a re-launched pub aiming for a new market and delivering an entirely different product will satisfy the future condition in section 88(2)(b). The community use need not be the same as in the recent past (para. 54).

(e) the garden/yard formed an integral part of the pub so that even if there were rights of way over it in favour of third parties that would not preclude listing (para. 55).

(viii) timing of planning permission implementation - *Ceresa v Mid Suffolk* DC CR/2016/0001 is an appeal which again concerns the consequence of planning permission being granted. In this case the planning permission was for holiday units to be built on part of the garden of the Cross Keys in Redgrave. The listing of the pub included this area and the owner appealed against that inclusion. The judge defined the issue as being whether the land covered by the nomination can be “conceptually separated into more than one ‘land unit’” which is a fact sensitive issue (para. 16). The judge found that the area was not used as part of the pub so that section 88(1)(a) was not satisfied whereas the pub itself was used for that purpose. He also accepted that the planning permission would be implemented albeit not immediately. This resulted in a finding that it is not realistic to think there will be a future community use of the area notwithstanding the delayed implementation. Accordingly, the judge ordered that the area subject to the planning permission should be removed from the ACV list.

(ix) extension of time to appeal – in *Neem Genie* supra the Council objected to the appeal on the ground that it was made eight days beyond the 28 day period. This failed even though no application to extend and no explanation was given other than the owners having

the belief that it was in time. The judge exercised his discretion in rule 2 of the 2009 Rules to extend time having regard to the overriding objective (para. 8).

(x) strike out – the first reported attempt to strike out an ACV appeal was also made in the Neem Genie case by the nominator, Waters Upton Parish Council. It was contended that the grounds of appeal did not explain why the listing review decision was wrong or why the conditions in section 88(2) were not fulfilled. This failed and the judge waived the defect in exercise of the power in rule 7(2)(a) of the 2009 Rules because the grounds of appeal could be identified from the documents accompanying the notice of appeal.

(xi) Requests for information – a recent development has been the making of requests for information under the Freedom of Information Act 2000 in relation to operation of the ACV regime. Two decisions may assist authorities facing such requests. A decision by the Information Commissioner on 2nd August 2016 (ref FS50621592) upheld a refusal by Torridge DC to comply with a request for information regarding the council's ACV review procedure. The refusal was made on the ground that the request had been made in concert with other requesters to which a comprehensive reply had already been made. These requests had absorbed a disproportionate amount of resources. The Council relied on section 14(1) of the FOIA which allows a request to be refused if it is vexatious. This was upheld notwithstanding that it was the first request by the requester.

In the second decision a request had been made to Derbyshire Dales DC for copies of all e-mails relating to the listing of a pub which was the subject of an appeal to the FTT. The Council withheld some as being exempt from disclosure under section 42 FOIA on the ground that they were protected by legal privilege (both advice privilege and litigation privilege). The Commissioner held on 8th December 2016 (ref. FS50629174) that the e-mails attracted privilege and that the balance of the public interest lay in not disclosing them thereby allowing the Council to obtain legal advice in confidence. It was noted that the public interest in maintaining legal professional privilege is a particularly strong one requiring special circumstances to justify it being outweighed by the public interest in disclosure.