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UNINCORPORATED BODIES AND ASSETS OF COMMUNITY VALUE

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Successful challenges to nominations of property as an Asset of Community Value ("ACV") have often been a pyrrhic victory. The defects in the nomination will have been highlighted so that the nominators can then correct them in a fresh nomination which will be successful unless the particular property does not qualify as an ACV. If it does not then there is no need to challenge the nomination and the focus of the opposition can be exclusively on the property not qualifying as an ACV.

This has not stopped the First-tier Tribunal having had to consider a number of challenges by owners on the ground that the nomination does not qualify as a community nomination and in particular contentions that the nominators do not satisfy the statutory requirements imposed by regulations 4 and 5 of the Assets of Community Value (England) Regulations 2012. This has been a distinct issue with regard to nominations by branches of CAMRA. If the nominator is not eligible then the nomination is not a community nomination.

In dealing with such challenges the judges of the FTT have adopted a purposive approach taking the view that particular terms in the ACV legislation should have a meaning which is consistent with the overall objective of the regime and not follow meanings adopted for different legislation having a different statutory purpose.

Section 89(2)(b) of the Localism Act 2011 governs who is entitled to make a community nomination and included is a person who is a voluntary or community body with a local connection. In turn regulation 5(1) sets out what is meant by voluntary or community body and includes an unincorporated body with at least 21 individuals amongst the membership and which does not distribute any surplus it makes to its members (reg. 5(1)(c)). Those individuals must qualify as local members (reg. 4(3)).

A common stance has been taken by the judges that an unincorporated body is not the same as an incorporated association. It may be one but it does not have to be one. The meaning of "body" in the Concise Oxford Dictionary is applied. This is "an organised group of people with a common function" (see, for example, Judge Lane in Mendoza v Camden LBC CR/2015/0015 at paragraph 20).

Certain consequences have flowed from the adoption of this definition:-

(i) there must be an organised group – it is not enough that the requisite number of individuals have signed a petition as that does not constitute a group decision. Without a body there can be no members (para. 29 in the judgment of Judge Simon Bird QC in Trustees of the J Marshall SSAS v Arun DC CR/2106/0025).

(ii) if the body has a constitution it need not comply with the requirements applicable to an unincorporated association. For example, not all the members need to be identifiable provided that there are 21 individual members who qualify as local members. In the Mendoza case notwithstanding that there was a rule in the group's constitution that all users of the public house were members this did not prevent the group from being an unincorporated body. Whereas it would have prevented it being an unincorporated association as not all the members could be identified.

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(iii) there is no need for there to be a contract between the members. It is enough that a number of individuals come together "to further a matter of common interest". Unlike with an unincorporated association the crucial issue is not whether there is an express or implied contract between the members but whether there is a group decision authorising the making of a community nomination. In the Trustees of J Marshall SSAS case the learned judge found that the signatories to the petition had not authorised the Second Respondent to serve the nomination but that was his decision alone and so there was no body for the purposes of the ACV regime (para 27 and 28). The real issue is not whether there is a contract but one of authorisation. Did the person making the nomination have the authority of the group or did that person act alone?

This issue of the eligibility of a nominator has arisen again for consideration in Punch Partnership (PML) Limited v Bracknell Forest BC CR/2019/0004 and was one of the grounds for removing on appeal the Rose and Crown in Sandhurst from the ACV list. The course of the nomination and the ACV listing appeared to be standard until after the appeal had been lodged Mr. Bull, the Assistant Borough Solicitor, received unsolicited communications from individuals who the learned judge described as "the three most prominent members of the Group". These informed him that there were differing views and aims within the group and that they personally wanted to prevent a planning application to demolish outbuildings at the rear of the pub and to construct two houses. It was not the intention of those individuals to be part of a community bid for the pub.

Judge Findlay stated that "members of an unincorporated body are governed by a contract between them which may be expressed or implied and may or may not be set out in writing" (para. 26). This differs in approach from other ACV appeal decisions in which it has been accepted that a contract is not needed but that the focus is on whether a nomination has been authorised by a group decision. This difference in approach did not affect the outcome.

A constitution had been prepared for adoption by the community group but was never adopted. The learned judge followed the approach of other judges in holding this was not fatal to the eligibility of the nominators. What was fatal in this case was that on the evidence put forward the judge was not satisfied that the collection of individuals had a common purpose. Although the organisation and function of the group can be informal and still be a "body" for the purposes of the ACV regime the judge stated "there must be a coming together of individuals for a matter of common interest. It has to be more that a collection of individuals who have not considered properly the basis on which they have joined in the association with each other. I find that there was not one common purpose in that some of the members of the Group, and in particular, the three most prominent members, hoped to prevent the planning application"(para. 27).

In consequence the judge was unable to find that "there was a sufficient level of understanding and agreement between the relevant individuals as to the basis on which they were associated with each other that they could properly be described as a "body"" (para. 26). Put another way the judge stated that she was not satisfied on the evidence put before her that there was "the necessary mutuality of bond and shared purpose between the members of the Group" to cause it to be described as a body.

The group were agreed that the nomination should be made but their motives for doing so differed.

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A desire to prevent a planning application succeeding without an intention to make a community bid has previously not been a basis for challenging a nomination (see, for example, Judge Lane in the General Conference of the New Church CR/2014/0013 at para. 32 and in Idsall School v Shropshire CC CR/2014/0016 at para. 13). If the group all have the same motive then that would seem to prevent a challenge to the nomination because they are acting as a body with a common purpose. It is the difference of motives which is crucial to a successful challenge.

If all the individuals have signed up to a formal constitution then that may preclude such a challenge as they have agreed to act as a body upon the terms set out in the constitution.

The nomination also failed on the ground that there was not sufficient evidence to satisfy the judge that the there would not be a distribution of surplus funds to members. Over 50% of individuals who signed a membership application form for the group had said yes to the question whether they would contribute financially if a bid was made. The learned judge was concerned that it was not clear how such funds would be dealt with.

Reliance was also placed on the evidence that individual members of the group had no intention of organising or proposing a community bid to find that the future condition in section 88(1)(b) of the Localism Act 2011 had not been satisfied. This appears not to understand what is required in respect of the condition. Proof that a community bid will be made in the future is not the test. Continuing commercial use in the future will satisfy the test where organised by a commercial concern or community group. It appears from Facebook that the pub was open until lockdown and is reopening in July when the restrictions are lifted. This should by itself be sufficient to satisfy the future condition.

The take away points from this decision are:

(i) Enquiries by the listing authority made in order to ascertain whether the nomination has been made by an unincorporated body are fully justified.

(ii) Differences between members as to what is the objective of the group can prevent the group being an unincorporated body when there is no formal constitution.

(iii) If the group has a formal constitution such a challenge is unlikely to succeed.

(iv) A nominator needs to be able to produce evidence that there will be no distribution of surplus funds which will self-evidently be easier if there will be no funds.

(v) Requests for adjournments by community groups will not automatically be allowed and if ample time has already been given to prepare and present a case will not be.

(vi) The finding as to the failure to satisfy the statutory condition in relation to future use is suspect when dealing with a pub still in use. The correct test is not whether it is realistic to think that a community bid will be made but whether it is realistic to think that there can continue to be a community use.