FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
COMMUNITY RIGHT TO BID

Tribunal Reference: CR/2015/0025

Appellant: Jane Carol King

First Respondents: Chiltern District Council

Second Respondents: Great Missenden Parish Council

Judge: Anthony Snelson

DECISION NOTICE

Introduction

1. The Pheasant Inn at Ballinger in Buckinghamshire ('the pub') served the local community without interruption from the middle of the nineteenth century until 2008. The Appellant, Mrs Jane King, purchased it in May 2006 for £610,000 inclusive of £100,000 attributed to goodwill. At that stage it consisted of a traditional pub together with a restaurant which had more restricted opening hours. After refurbishment, she opened an 'up market' restaurant on the site called 'Hatters', but the pub business continued to run in parallel and customers were welcome to drop in for a drink only, rather than to eat. Unfortunately, the venture was not a success and, in November 2008, the entire business closed. The property, which has living accommodation on the first floor, was and remains her residence.

2. This is Mrs King's appeal against the decision of the First Respondents, Chiltern District Council ('CDC'), given in a document dated 12 November 2015, to refuse her request for a review of their decision of July 2013 to include the pub in their list of assets of community value. CDC have rightly apologised to her for the extraordinary delay in determining the review.

3. The Second Respondents, Great Missenden Parish Council ('GMPC'), the local parish council, nominated the pub for inclusion in CDC's statutory list.

4. In *BHL v (1) St Albans City & District Council (2) Verulam Residents Association* [2016] UKUT 0232, Upper Tribunal Judge Levenson offered this pithy summary of the nature and effect of the assets of community value ('ACV') legislation:

> **3. The Localism Act 2011 requires each local authority to keep a list of land (including buildings) in its area which is of community value. The effect of listing (which usually lasts for five years) is that generally speaking an owner of listed land wishing to sell it must give notice to the local authority after which any community interest group has six weeks in which to ask to be treated as a potential bidder. If any such group does so the sale cannot take place for six months, during which the group may come up with an alternative proposal. At the end of the six months it is up to the owner whether to sell and to whom and on what terms. There are arrangements to compensate owners who lose out financially in consequence of the listing.**

5. The appeal came before me at Milton Keynes Magistrates Court on 7 July this year. Mrs King appeared in person but with some assistance from her daughter, Ms Abigail King. CDC were represented by Mr Christopher Cant, counsel. Councillor Anne Hewett spoke briefly on behalf of GMPC.

6. I heard oral evidence from Mrs King. Mr Cant called two CDC employees as witnesses: Mr David Stowe, an Assistant Landscape Officer in the Estates Team, and Mrs Tracey Francis, a Principal Planning Officer. Two local residents, Mr Bob Kelly and Mr Roger Ellis, also gave evidence. In addition to hearing from 'live' witnesses, I read a statement dated 20 June 2016 in the name of Ms Lynda Jackson, Assistant Clark to GMPC.

7. A bundle of documents running to 290 pages was produced and I also had the benefit of Mr Cant's useful skeleton argument, chronology and list of authorities, together with a bundle of legal materials.

The Primary Facts

The premises

8. The ground floor comprised a kitchen, a bar/lounge area, men's and women's toilets and a conservatory, where meals were served. There is a cellar where the

beer was stored. The kitchen served the private accommodation upstairs as well as the pub/restaurant. Access to the first floor accommodation is from the ground floor.

9. Recently Mrs King removed the commercial kitchen equipment and the bar area furnishings.

Planning history

10. The lawful use of the pub premises is mixed Use Class 3 (Dwellinghouse) and Use Classes A3/A4 (Restaurant/Café and Public House). The primary use class is A3. It might be necessary to apply for planning permission to change the use back to A4, but CDC have indicated that as a village pub would be regarded as a community facility, such an application would conform with their planning and development policies.

11. Mrs King has made a series of unsuccessful applications to change the lawful use to wholly residential. The fundamental obstacle on each occasion had been the fact that her understandable ambitions for the property (the change of use which she seeks would greatly enhance its value on the open market) have not been seen by CDC (the local planning authority) as compatible with their key policies. Policy GB24 in the Chiltern District Local Plan states:

> **In the Green Belt the Council will not allow the redevelopment or change of use of a building or land which is in use, or was last used for, local community purposes … unless**
>
> **(i) a replacement building or land can be provided in an equally convenient location …**
>
> **or**
>
> **(ii) it can be demonstrated to the Council that the facility is no longer required for any other community use in the village and adjoining area where the facility is located.**

Policy CS29 in the Core Strategy for Chiltern District stresses the importance of preserving inclusiveness in local communities. That priority finds expression in a policy:

- **Only to permit the loss of community facilities in exceptional circumstances.**

12. In 2013 Mrs King applied for a Certificate of Lawfulness of Existing Use but that application also failed and her appeal was withdrawn.

13. Yet another application for change of use to wholly residential is pending.

14. In the meantime, CDC is contemplating enforcement action based on the fact that the pub is not being used in accordance with the lawful use.

The pub as a community asset

15. The ward of Great Missenden has a population of about 2,000 people. Ballinger is a village of some 300 souls.

16. There is no other pub in the village. There is a village hall for which occasional liquor licences are obtained for special events. Mrs King told me that it is rumoured that the village cricket club plans to apply for a licence, but a statement by Mr Paul Brannigan, a member of the cricket club's committee, appended to Ms Jackson's statement, says otherwise. I am not persuaded that there is any likelihood of the cricket club obtaining a liquor licence in the foreseeable future.

17. As I have said, the pub has existed since the nineteenth century. Until it was purchased by Mrs King in 2006 it operated throughout as a traditional village pub.

18. It was not in dispute that, prior to Mrs King's acquisition, the pub had furthered the social wellbeing and social interests of the local community. That fact is documented in the review decision under appeal, para 5.2 and in numerous statements and other materials before me. The pub represented 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 music nights, Christmas carol evenings and so forth. Mr Ellis described convivial Sunday evenings attended by 15-20 'regulars'. I accept his evidence.

19. After Mrs King purchased the property, there is no doubt that her priority was the restaurant. That said, I am satisfied that the facility continued to operate as a drinking establishment for those who wished to patronise it for that purpose only and the internal configuration continued to serve that purpose, with a bar and

informal seating being retained. However, the opening hours were steadily reduced. Sunday evenings were an early casualty. Over time, as the business struggled, opening hours reduced further.

The community initiative

20. Some members of the Ballinger community greatly regretted the loss of the pub and got together to try to do something about it. A 'community interest company', Ballinger Community Group CIC ('BCG'), was formed. Mr Kelly gave unchallenged evidence concerning the membership of BCG. It counted among its number many professional people and individuals who held, or had held, high-ranking positions in business. One supporter was a retired publican. Trading plans were drawn up and agreed on the strength of which two offers were made to Mrs King to purchase the pub with a view to running it as a traditional village pub. The first, in July 2013, was for £465,000; the second, in March 2015, for £365,000. Both were rejected. Mrs King made one counter-offer, in March 2015, to sell the property to BCG for £550,000 subject to certain conditions. It was not accepted.

Miscellaneous

21. Mrs King places reliance on the undisputed fact that CDC charges her Council Tax on the pub on the footing that it is her residence.

Expert evidence

22. Included in the bundle of documents were two expert reports. The first, by Mr Stuart Sayer, a Registered Valuer and Director of Christie & Co, Chartered Surveyors, was prepared on behalf of Mrs King in connection with her most recent application for change of use, and is dated 2 February 2016. It concludes that the pub is not, and does not have the potential to become, a viable trading entity. The second report, prepared on the instructions of CDC, is the work of Mr Andrew Boulter, a partner with Underwoods LLP, Chartered Surveyors, and is dated 23 May 2016. His conclusion is that it would be feasible to operate a successful business on the site but only if it could be acquired at a very modest

price, so as to allow for suitable investment before opening. Mr Boulter's analysis does not correspond with the aspirations of BCG: he envisages a 'gastro restaurant', not a traditional village pub. Neither expert gave evidence before me.

The Legislation

23. Section 88(1) of the Localism Act 2011 ('the 2011 Act') provides as follows:-

> **(1) For the purposes of this Chapter but subject to regulations under subsection (3), a building or other land in a local authority's area is land of community value if in the opinion of the authority –**
>
> **(a) an actual current use of the building or other land that is not an ancillary use furthers the social wellbeing or social interests of the local community; and**
> **(b) it is realistic to think that there can continue to be non-ancillary use of the building or other land which will further (whether or not in the same way) the social wellbeing or social interests of the local community.**
>
> **(2) For the purposes of this Chapter but subject to regulations under subsection (3), a building or other land in a local authority's area that is not land of community value as a result of subsection (1) is land of community value if in the opinion of the local authority –**
>
> **(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.**

In the present case, it is common ground that the issue is whether the pub falls within section 88(2).

24. The "recent past" is not defined in the 2011 Act or any relevant subordinate legislation. In *Crostone Ltd v Amber Valley BC* (CR/2014/0010) Judge Peter Lane, President of the General Regulatory Chamber ('GRC'), sitting in the First Tier Tribunal ('FTT') observed (para 14):

> **What constitutes the "recent past" will depend upon all the circumstances of a particular case. To that extent, the expression is a relative concept.**

The remark is not binding upon me but it is plainly persuasive. Moreover, I respectfully agree with it.

25. The word 'realistic' in s88(2)(b) was considered in *BHL v St Albans City and District Council* [2016] UKUT 0232. The FTT had equated that word with 'not fanciful' and, while the Upper Tribunal remarked (para 38) that it is always wiser to stick to the statutory language, it found no error of law at first instance. There is no "empty space" between what is 'not fanciful' and what is 'realistic'.

26. Under the 2011 Act, s90(2) and (3) a local authority must consider any 'community nomination' and must accept it if the land nominated is within the authority's area and is of community value (under s88). If the nomination is accepted the authority must cause the land to be included in its list of assets of community value (*ibid*, subsection (4)).

27. By the Assets of Community Value (England) Regulations 2012 ('the 2012 Regulations'), made under powers contained in the 2011 Act, s88(3), it is provided (inter alia) as follows:

> **3. A building or other land within a description specified in Schedule 1 is not land of community value (and therefore may not be listed).**

Schedule 1, entitled "Land which is not of community value (and therefore may not be listed)", includes these provisions:

> **1. – (1) Subject to sub-paragraph (5) … a residence together with land connected with that residence**
>
> **…**
>
> **(5) Land which falls within sub-paragraph (1) may be listed if –**
>
> **(a) the residence is a building that is only partly used as a residence; and**
> **(b) but for that residential use of the building, the land would be eligible for listing.**

28. The 2011 Act, s92 makes provision for the right of owners of land included in a local authority's list of assets of community value to seek a review of the listing decision. The 2012 Regulations, reg 11 includes:

> **(1) An owner of listed land may appeal to the First-tier Tribunal against the local authority's decision on a listing review in respect of the land.**

In *Gullivers Bowls Club Ltd v Rother District Council* (CR/2013/0009) Judge Nicholas Warren, immediate past President of the GRC, held (Decision Notice, para 18) that appeals under reg 11 take the form of a complete rehearing. The same judge held in *Dorset County Council v Purbeck District Council* (CR/2013/0004) that the Tribunal's determination of the issues must be made as at the date of its decision (Decision Notice, para 19). Again, I respectfully agree with this guidance and adopt it.

The Issues

29. The issues in this appeal are:

(1) Is the pub excluded from the scope of the ACV listing regime by the 2012 Regulations, reg 3, read with sch 1(1) and (5)?

(2) Did the pub further the social wellbeing or interests of the local community in the recent past (the 2011 Act, s88(2)(a))?

(3) Is it realistic to think that there is a time in the next five years when there could be non-ancillary use of the pub that would further (whether or not in the same way as before) the social wellbeing or social interests of the local community (the 2011 Act, s88(2)(b))?

Secondary Findings and Conclusions

Issue (1)

30. It is, in my view, plain that, prior to the closure of the pub in November 2008, it was "only partly used as a residence" within the meaning of para 1(5)(a) of sch 1 to the 2012 Regulations. The living accommodation was accessed through the interior of the pub and was served by the pub kitchen. The 'physical relationship' and 'functional relationship' tests suggested in the FTT decisions in *Wellington Pub Company v Royal Borough of Kensington and Chelsea* CR/2015/0007 and *Kicking Horse Ltd v Camden LBC* CR/2015/0012 are satisfied. (The arguments unsuccessfully pursued by the appellants in those cases would not in any event have availed Mrs King because they only sought to challenge the ACV listing of

certain parts of pub premises (mainly the living accommodation), rather than the entire properties.)

31. Does the closure of the pub in 2008 and the fact that Mrs King has treated it as her private residence ever since affect the analysis? In my judgment it does not. I agree with Mr Cant that 'used as a residence' in para 1(5)(a) must be interpreted as referring to the lawful use of the land in accordance with planning law. If it were otherwise, any landowner could flout the law and be rewarded for doing so. It is of course right that in the *BHL* case, the Upper Tribunal held that the FTT had been correct in finding that 'use' in the 2011 Act, s88(1) and (2) may include unlawful use, but that is no assistance to Mrs King. Apart from anything else, in s88 the word 'use' is qualified by 'actual'. That adjective is nowhere to be seen in para 1(5)(a) of sch 1 to the 2012 Regulations.

Issue (2)

32. In my view it is very clearly established that the pub furthered the social wellbeing and social interests (including sporting interests) of the local community up to Mrs King's acquisition of it in 2006. My primary findings above (para 18) speak for themselves.

33. Although the character of the business changed under Mrs King's ownership, I am also quite satisfied that it furthered the social wellbeing of the local community until its closure in November 2008. It was not in dispute that 'Hatters' attracted patrons from the village and from a little further afield and the fact that it ultimately failed does not begin to justify the conclusion that the restaurant ceased to further the social wellbeing of the local community after Mrs King took it over. Moreover, as I have found, the Pheasant continued, albeit on a smaller scale, to fulfil its historical function as a traditional pub. Until its closure, it remained a valuable amenity for those who wished to visit just for a drink. As such, it offered something unique to the village. The reduction in the opening hours may have affected the *extent* to which it brought benefit to the community, but I am quite unable to accept that social wellbeing ceased to be furthered at all.

34. Did the pub further the local community's social wellbeing and/or social interests in the "recent past"? I am satisfied that, given its history which dates back to Victorian times, the statutory language is satisfied. The listing decision was taken in 2013, less than five years after the closure of the business. The unreasonable delay in dealing with the review application is, as I have noted, much to be regretted. But I am clear that in context, even if one takes the relevant interval as being between November 2008 and the hearing before me in July 2016 (a little over seven and a half years), the earlier date can and should be regarded as falling in the "recent past". It seems to me that this view is in line with the FTT decisions to which I have been referred (*Scott v South Norfolk DC* CR/2014/0007, *Hawthorn Leisure v Chiltern DC* CR/2015/0019 and the *Crostone* case, already mentioned).

Issue (3)

35. In my view it is realistic to think that, in the next five years, there could be non-ancillary use of the pub that would further the social wellbeing or social interests of the local community. Mrs King's current planning application may fail. It is hard to see that the material circumstances have changed. CDC's policies (cited above) have not changed. The planning history to date does not suggest to me any particular likelihood of her hopes of achieving a change of use being fulfilled. It is, to put the matter at its lowest, a realistic possibility that they may not. In that event, she may well find herself facing enforcement action.

36. Mrs King is a pensioner and has had health problems. She is anxious to leave Ballinger and find suitable accommodation elsewhere. She told me that she may be driven to simply vacating the pub and boarding it up. Given the frustration and disappointment which she feels at the turn which events have taken, that evidence is understandable. But it seems to me realistic to think that she *may* after further reflection decide that the best (or least bad) option is to rid herself of the property at the best price available. If she comes to that view, BCG (or the community in some other manifestation) *may* be a possible buyer. I do not accept that the idea of re-opening the Pheasant as a community pub is unfeasible. Rural pubs certainly face difficult trading conditions, but some succeed. The extent to which

the local community is behind a rescue is likely to be a crucial factor. There is evidence of strong backing in the village for BCG's plans. Moreover, the group includes hard-headed people with commercial and professional backgrounds and is clearly not fuelled by sentiment alone. And the offers already made are testament to the fact (as I find it to be) that it has the means of raising a substantial sum.

37. It is also worth saying that the BCG proposal is not necessarily the only possible solution to the present unhappy impasse, although on the evidence it appears the most promising.

38. The test under s88(2)(b) is not a demanding one. Parliament has chosen to set the bar low. For the reasons stated, I am clear that the statutory language is satisfied.

Result

39. Although I am not at all without sympathy for Mrs King, it follows that the appeal must be dismissed.

Anthony Snelson

Dated **22 July 2016**