

Localism Act 2011

The Assets of Community Value (England) Regulations 2012

The Star Inn, Selling Road, Old Wives Lees, Canterbury, CT4 8BH

Owner: Mr Idris Barry Gregory

Review of Assets of Community Value Listing

1. I have been appointed by Ashford Borough Council to review the recommendation made on 10th September 2015 by Darren McBride (Planning Lawyer) and the decision taken by Terry Mortimer (Head of Legal and Democratic Services) on behalf of the Council to include The Star Inn, Old Wives Lees, in the list of assets of community value, maintained by the Council under section 87 of the Localism Act 2011.
2. I am required to conduct the review under the provisions of the Act and Assets of Community Value (England) Regulations 2012.
3. The request for a review was received by the Council on 22nd September 2015, within the eight weeks permitted time frame. The period of time in which the Council is required to complete the review was extended by agreement with the owner of The Star Inn as permitted by regulation 9 of the Assets of Community Value (England) Regulations 2012.

The Land

4. The buildings and land subject to the listing is The Star Inn, Selling Road, Old Wives Lees CT4 8BH.

Approach to this Review

5. As the Review Officer I am required to consider both the decision to list the asset and the landowner's points that have in essence argued that listing was not appropriate in this case.
6. An extension of the timescale to determine this review was agreed with the owner (via his nominated representative, his daughter Mrs Metland) and a new deadline of 1 February 2016 set. This was to allow more time to seek clarification from the owner and his representative and to take account of relevant decisions taken by councils and tribunals on similar listings.
7. The law determining the right to bid, the listing conditions and the review process is variously set out in:
 - a) The Localism Act 2011, Part 5, Chapter 3, Section 88 (land of community value). This section places a responsibility on a local authority to form its opinion (my underlining) on whether a building or other land in its area should be viewed as land of community value. Section 88 then includes the general criteria against which a council should form its opinion.
 - b) The Assets of Community Value (England) Regulations 2012 – SI 2421. These Regulations contain the details to give effect to Section 88, and contain details of processes to be followed, definitions of local connection, voluntary and community bodies and community interest groups, the content that must be included on nomination forms, and various schedules including one covering the review procedure.
8. Supporting the 2011 Act and the 2012 Regulations is a non-statutory advice note from DCLG published in October 2012.

9. The legislation and the non-statutory advice note are written in general terms, leaving several important terms undefined, and a review and appeal process that entitles the landowner to make representations, but not the nominator. This may be deliberate, recognising that over-prescription of how authorities should proceed to implement the Act cuts across the requirement for councils to form their opinion on whether land or buildings have community value.
10. As there have been a large number of listings up and down the country and a significant number of appeal decisions taken by the First Tier Tribunal, it has been my approach to consider relevant examples in helping with this review.
11. A particularly valuable reference source was that compiled by Christopher Cant, a property specialist barrister of the Stone Buildings Chambers, Lincoln Inns Field. This reference source is publicly available¹.
12. I shall now set out my review of the listing and of the arguments put forward by the owner and his representative. This is a lengthy summary as it is important to fully explain my reasoning and conclusion.

The Nomination for Listing

13. On 28th July 2015, the Canterbury, Herne Bay and Whitstable branch of CAMRA (Campaign for Real Ale Limited) nominated the Star Inn to be included in the list of Assets of Community Value, which the Council is required to maintain by virtue of section 87 of the Localism Act. The Council accepted that a local branch of CAMRA covering the area was entitled to make the nomination under section 89(2)(a)(i) of the Localism Act, and I agree with this decision noting the decision contained in *St Gabriel Properties v Lewisham BC*.
14. In support of their nomination for listing, CAMRA stated in answer to the question on the pre-printed application form “What is the current main use of the land/building(s)?”
The building is a public house with adjoining car park and beer garden.
15. In response to the further question on the pre-printed nomination form “How does that current main use of the land/building(s) further the social wellbeing or social interests of the local community (defined in s.88(6) of the Act)?” CAMRA replied:
 - *There is a beer garden attached to the pub which is used and enjoyed by local people*
 - *There is free parking available which is accessed by the wider community*
 - *This is the only pub in the village*
 - *Live music events are often hosted at the pub*
 - *The pub was previously closed by Shepherd Neame, left to ruin, but was saved by a spirited campaign by villagers with support by CAMRA and reopened as a free house – proving its value to the community*
16. In response to the question on the pre-printed nomination form... “ Why do you consider that this, or some other main use to which the land/building(s) will be put which will further the social wellbeing or social interests of the local community, will continue and over what period (defined in s.88(6) of the Act)?” CAMRA stated:

¹ <http://www.christophercant.co.uk/wp-content/uploads/2015/11/Assets-of-Community-Value-guide-12-11-15-Third-version.pdf>

“As the last public house in the village the building is the only place that the community can access the services it provides, therefore contributing to its popularity with local residents, who already invested time and energy in keeping the building open as a public house when it came under threat.”

The Decision to Include the Land in the List of Assets of Community Value

17. On 10th September 2015 the nomination for listing was considered by the Council. He concluded that the Star Inn was an asset of community value within section 88(1) of the 2011 Act. It therefore accepted the nomination and The Star Inn was included in the Council’s list of assets of community value from that date.
18. In a Decision Notice dated 10th September 2015 recording its decision, the Council set out his reasons for its decision in the following terms:-

“In this nomination there are certain current uses which are likely to be viewed as ancillary. For example, the “free parking available which is accessed by the wider community” would not, in my view, be the current main use of the building/land.

However, the nomination does refer to the pub and beer garden being “used and enjoyed by local people” and to live music events that are often held at the pub. These uses are likely to be viewed as non-ancillary to the main use.

According to the nomination, the pub was previously closed by Shepherd Neame and left to ruin. There is no explanation as to why it was closed, but it is likely that it had become unviable.

That said, the pub is currently open and operating again. No evidence has been submitted which demonstrates that the business is now viable and therefore likely to continue to remain open. However, there is no requirement for the nominating body to demonstrate future viability. The test is simply that it is “realistic to think that there can continue to be non-ancillary use of the building...” The fact that the building is currently open and operating as a public house would, in my view, suggest that it is realistic to think that its current use can continue.

In this case, the nominating body claims that the public house is the “only pub in the village and the “the building is the only place that the community can access the services it provides”. In my view, this further suggests that the public house does further the social wellbeing and social interests of the local community.

Conclusion

In my view, it is reasonable to conclude that the actual current use of the building/land as a public house does further the social wellbeing and social interests of the community.

I have taken into consideration the potentially adverse impact that listing could have on the owner of the building/land but the internal listing review process and appeal do allow the owner the opportunity to challenge the decision to list.

Accordingly, in my view, this building/land should be included on the Council’s ‘List of Assets of Community Value’.”

The Request for a Review

19. In a letter dated 22nd September 2015, the owner requested a review of the decision pursuant to section 92 of the Act.
20. As is likely with a review request, additional information is made available that would not have been available at the time of the original listing. I shall refer to this later.

The Grounds for a Review and the Owner's Evidence

21. The owner's ground for review was that the Star Inn is 'no real Asset to the Community'.
22. He pointed out that when he purchased the pub from Shepherd Neame (in 1998), it was run down and derelict and clearly not of any value to the brewery or the local residents, as with village support it would never have closed. He went on to say that to his knowledge there had never been any type of campaign to save the pub, as stated by CAMRA.
23. The owner did not provide a detailed history of the pub since he purchased the premises. In a subsequent letter from his representative dated 3 November, it was pointed out that the pub re-opened about six months after its purchase. However, there were no consistent opening times, as there were no customers to support the trade. The representative added that the Star Inn is a distance away from a main road so could only be supported by the minority of residents in the village.
24. We are told that the pub was open at random times and was closed on some days; customers were very few and far between. We are also told that the owner would aim to open the door of the pub between 4pm until 7pm, but not on a regular basis.
25. The owner's ill health (which has been verified to me by his GP) is a ground that he put forward in contesting the nomination and listing. His health condition would not have been known to the Council at the time of handling the nomination.
26. We were informed that the owner, who is now 74, fell ill and needed a triple heart bypass late in December 2014/early 2015 and was hospitalised through to February 2015. At that point he was assisted by two local residents, who on two separate days of the week kept the pub open albeit sporadically. This arrangement had to be terminated.
27. At the time the nomination was made, the owner's representative has confirmed that the pub was open, albeit for very limited times. However and after taking further medical advice and terminating the staff arrangements in September/early October the pub was closed. On 9 October 2015 the owner's representative e-mailed the Council stating that she (on behalf of her father) wished to surrender the premises licence because of her father's ill health and on the advice of his doctor. The premises licence was then formally surrendered on 13 October 2015.
28. In response to requests for further information, the representative stated that the owner purchased the pub in 1998 with the intent of running it as a pub while also being his main residence. He had invested a significant sum of money bringing it back to a usable state.

Review of the Evidence

29. It is not my responsibility to seek further evidence from the nominating body and so only sought to gain clarification on points raised in the review appeal letter from the owner. Also it is not my responsibility to undertake a search for added evidence that either supports the nomination or supports the owner's case. I am required to consider the evidence presented.
30. One of the owner's principal points concerns his ill health; this I have described above.

31. I wrote to the owner (c/o his representative as per his instructions) on 21st October to clarify some points and to ask for medical evidence regarding his health condition.
32. In his representative's reply dated 3rd November, she enclosed a letter from her father's GP doctor confirming his ill health and in her letter she states:
- "My father purchased the pub from Shepherd Neame in 1998 as a run down, derelict public house that has been closed for business for quite some time.
...the pub was not purchased for residential use [as the owner originally had stated].
The pub reopened about 6 months after the purchase date (1998). However there were no consistent opening times, as there were no customers to support the trade. The public house is a distance away from the main road so could only be supported by the minority of residents in the village.
Until my dad's ill health the pub usually opened from 4pm till about 6/7pm however not on a regular basis.
In the last 6/12 months the pub has been closed. In November 2014 my father was admitted to St Thomas's Hospital and remained there until February 2015.
I can also confirm that the public house has now been de-licenced through your licensing dept. "*
33. As there were still some inconsistencies in the information provided, I wrote again on 17th December asking for clarification on the pub's opening hours over the previous 12 months and asking to extend the deadline for a review decision until 1st February.
34. In the owner's representatives reply dated 4th January, she agreed to the extension and stated:
- "The inconsistency regarding opening hours was due to the fact in my opinion it would be classed as closed due to the minimal hours and inconsistency of actual opening times. Before my fathers admission to hospital he had 2 members of staff, either of which would on occasions open the pub. Keys were originally handed to these members of staff when he was taken by ambulance to hospital and they opened the pub up until Christmas Eve 2014.
There were no set dates or times when the pub opened as they were not regular. The only days that could possibly be seen as regular are Tuesdays and Thursdays only due to a small pattern of the pub being open on these days by the two members of staff, each doing one day.
Before my fathers health deteriorated he would open the doors and sit watching television which would allow customers to come in, but they were very few and far between. He only opened the doors during the day, usually closing around four o'clock and as his health deteriorated further, the pub began to close earlier.
As mentioned before the only two days the pub would remain open until approx. eight o'clock were the two days that the members of staff opened, not only that, we would have to employ someone who holds a personal licence to sell alcohol and the business is not there to support the funding of such a person.*
35. I am sympathetic to the owner's health condition; however under legislation there is no ground available for the Council to remove a correctly listed asset on compassionate grounds. Neither have I found a comparable situation being dealt with and decided on at a tribunal that helps in this case.

The matter of residency

36. This is not a property that would fall to be exempt from listing under the residency criterion. The main function of the premises was as a public house, even though the owner used part of the premises as his residence. There is no need in my view to dwell on this particular point.

'Current actual use' or 'use in the recent past'?

37. The legislation and regulations refer to two qualifying criteria. Either a property is in current use and has some community value, or the property is out of use but has some community value in the recent past.
38. At the time the nomination was made the Star Inn was open, albeit sporadically and for limited times. On this basis it was correctly considered as being in current use.
39. However, since its listing the pub has closed and no longer has the benefit of a licence. Its status under the 2011 Act has therefore changed and I am required now to consider its community value status 'in the recent past'. There is no statutory definition of the 'recent past', or any extensive definition of 'community value/benefit' other than furthering the social wellbeing or social interest of the local community and this not being an ancillary use. However, tribunal decisions are relevant here and have been used to assist with this review.
40. I should add that it is legitimate for a review to consider more recent circumstances and take account of information that would not have been available at the time of considering the original nomination.

Community benefit

41. By its nature a local pub should be conducive to promoting social well-being, merely by providing opportunities for local people to gather and socialise. Pubs were always seen by government as potentially a key asset for local communities and a principal target for the legislation. Nevertheless each individual circumstance must be considered and in this case the council must be satisfied that in its opinion, the Star Inn provided some community benefit.
42. My initial view of the nomination was that it provided scant information on which to make a clear judgement of community benefit and whether this was ancillary to the main purpose of the pub or, and more importantly, whether it was non-ancillary.
43. The nomination referred to a beer garden which is used and enjoyed by local people. It referred to free parking which was accessed by the wider community. It stated the Star Inn is the only pub in the village, that live music events are held and that closure was saved by a spirited campaign by villagers with support from CAMRA and re-opened as a free-house, proving its value to the community.
44. In deciding to list, the Council dismissed the issue of free parking, but largely accepted the other points made as indicating the pub provided non-ancillary community benefit to local people. At that time the Star Inn was not closed.
45. In answer to the nomination form question about continuing use and furthering the social wellbeing of the local community, CAMRA stated the building is the only place the community can access the services it provides, therefore contributing to its popularity with local residents,

who already invested time and energy in keeping the building open as a public house when it came under threat.

Change of status and the question of 'the recent past'

46. At the time of the nomination the Star Inn was trading, albeit for only two days and with limited opening hours. The question then was, whether the pub provided community benefit and in the opinion of the council it was realistic to think there can continue to be non-ancillary use of community benefit.
47. Since nomination the pub has now closed and the owner has relinquished the licence. It is necessary for me to apply the second test therefore as set out in Section 88(2)(b) of the Localism Act. This reads:

"...a building...is land of community value if in the opinion of the authority-

- a) There is a time in the recent past when an actual use of the building or other land that was 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 a non-ancillary use of the land that would furthers (whether or not in the same way as before) the social wellbeing or social interests of the local community."*

48. There is little by way of statutory definitions that prescribe how councils should form their opinions on these two tests. The council's procedures and nomination form also do not add to the statutory questions, which some other councils do (which appear uncontested by a tribunal or judicial review) and therefore do not seek further information that may assist.
49. In terms of (a) above the nomination contained brief references only to a beer garden, free parking accessed by the wider community, the pub being the only pub in the village, live music events often hosted by the pub, and to a spirited public campaign to save the pub. I can only assume that this refers to a period between its closure by the brewery and its purchase by the current owner in 1998.
50. In his evidence the owner denied knowledge of a local 'campaign' to save the pub or to have it re-opened. CAMRA's nomination provided no supporting evidence. The owner's first letter implied a lack of local support over a long period of time, not just more recently. His representative did make reference to knowledge of some involvement by CAMRA to support a 'bid' for the pub presumably at some point before her father was considering its purchase.
51. Clarity on the position of a 'campaign' is not assisted therefore by conflicting information and lack of supporting evidence.
52. However, I agree with the Council that one of the points put forward by CAMRA does not point to evidence of non-ancillary use. Parking, in my view was a necessary support for the pub and not provided for general community use.
53. A beer garden could be argued as ancillary, but also may be regarded as non-ancillary as it is a part of the pub and in my view provided to support the function of a pub, but I agree is provided for the enjoyment of people using the pub and therefore could further social wellbeing.

54. By its nature a pub should promote social wellbeing and social interest for part of the community. The fact that people will go to a pub and meet their friends and neighbours provides opportunities for furthering social well-being. The fact that live music events were held on occasions is also another opportunity for promoting social interest, though no strong evidence was provided on this point.
55. In the case of the Star Inn the number of local people using the premises was seemingly dwindling and small; Mr Gregory uses this to suggest the pub was not important locally to furthering community value.
56. In terms of (b) the evidence put forward make this even more difficult to assess.
57. The threshold to be applied is not particularly high. According to the decision of the First-tier Tribunal in *Patel v London Borough of Hackney* Tribunal Reference: CR/2013/0005, the correct test is “whether it is realistic to think” not the “balance of probabilities”. I accept this view. Accordingly, there may be a number of different possible outcomes which are realistic. I am not required to consider which one may be probable and do not do so.
58. Nevertheless, and here I apply the view expressed in the Tribunal Decision (General Conference of the New Council v Bristol CC) that the concept of it being “realistic to think” engages a need to at least consider that something is reasonably possible, as opposed to being purely aspirational or fanciful (*Gibson v Babergh DC*).
59. I am satisfied that on the evidence put before me by the Owner, that it is unlikely he would have the capacity to re-open the Star Inn and for it to be viable as a commercially run public house. It was left to become derelict by the previous owner, a brewery and the current Owner has had little sign of support or much trade from the local community.
60. Whether it is realistic to think there could be some other means by which the property could possibly further the social wellbeing or social interests of the local community is not clear to me.
61. It is my view that the evidence supplied by CAMRA to ‘show a measure of community support, suggesting also the pub furthers the social wellbeing of the local community’ is too superficial. In my view the case is not supported or substantiated with sufficient evidence of genuine local support or backing. In the Council’s original decision he stated:
 - i. *“The nominating body has provided no evidence of the strength of community support for the pub to be maintained for community use. If the nominating body was, say, a Parish Council then it might be reasonable to assume that as a locally elected body it was representing the views, or expressing the general wishes, of a reasonable percentage of its local community. However, in this case, the nominating body is not a Parish Council and so it is unclear whether the nomination has the support of the local community.”*
62. I agree. It was not necessary for CAMRA to have included a business case supporting its nomination and I am aware that financial obstacles to future viability have not been considered of paramount importance to overcome in some tribunal decisions. However, without evidence of strong local backing including of how the local community may mobilise and adopt a strategy to return the building so as to provide non-ancillary community benefit, it makes any assessment of realism most difficult. It is not for me as reviewer to compensate for this lack of evidence by speculating as to what may be reasonably possible, and whether this has genuine local support.

Conclusion

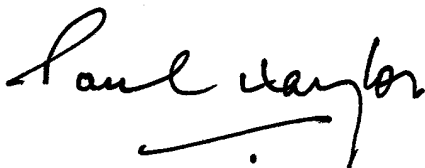
63. Having looked at all the facts, the owner's ill health is not, in my opinion, a relevant factor to the second test except concluding that the owner himself is most unlikely to have the capacity to re-open the business and for such a business to be commercially viable. Also, low and dwindling use of the pub are not in themselves deciding factors. The main factor in reaching my decision is the evidence of the original nomination, which in my opinion was weak and was not supported by sufficient evidence of local support. It was not convincing on the point of community benefit for the purposes of assessing this under the test of 'in the recent past', though I consider that as the pub was only recently closed it did in some limited way contribute to furthering social interest, merely as its operation as a pub albeit one with limited opening times. The evidence is less clear as to the future and consequently provides no real basis on which to substantiate a conclusion that it is realistic to think there is good local appetite and a time in the next five years when there could be a non-ancillary use of The Star Inn building that would further (whether or not in the same way as before) the social wellbeing or social interests of the local community.

Formal Decision

64. In conclusion, and for the reasons set out above, I uphold the owner's review appeal. It is therefore my decision that The Star Inn is to be removed from the list of Assets of Community Value maintained by the Council.

What Happens Next?

65. The review appeal is upheld. The Star Inn will be removed from the Council's list of Assets of Community Value.
66. There are no further rights of appeal to the council. There is a right of appeal to the First-tier Tribunal (General Regulatory Chamber, HM Courts and Tribunals Service, PO Box 9300, Leicester. LE1 8DJ. Email: grc@hmcts.gsi.gov.uk Telephone 0300 123 4504) if the owner does not agree with the decision. There is no right of appeal to the council or the Tribunal for the nominator.
67. Although the decision is to remove the Star Inn from the council's list there is nothing in law preventing a fresh nomination at any future time.



Paul Naylor (Reviewer)

Deputy Chief Executive

28 January 2016