

WOKING BOROUGH COUNCIL

The Star Inn, Wych Hill, Woking, Surrey, GU22 0EU

Review of Decision to List an Asset of Community Value

1. Introduction

1.1 On 23 March 2015, Woking Borough Council ("Council") received a nomination under Section 89 of the Localism Act 2011 ("2011 Act") to list The Star Inn, Wych Hill, Woking, Surrey, GU22 0EU as an Asset of Community Value ("ACV"). The nomination was made by the Hook Heath Residents' Association ("HHRA").

1.2 The Council has delegated authority to its Strategic Asset Manager ("SAM") to determine nominations that an asset is an ACV.

1.3 On 18 May 2015, the SAM determined that the Star Inn was an ACV. This resulted in it being included on the Council's List of Assets of Community Value.

1.4 On 20 July 2015, Stark Property Enterprises Limited ("Stark Property"), the owner of The Star Inn, requested a review of the decision to list The Star Inn as an ACV.

1.5 The Council has delegated authority to me, as Head of Democratic and Legal Services, to determine reviews of a decision to list an asset as an ACV.

1.6 In requesting the review, Stark Property stated that it did not consider an oral hearing was necessary. I agree with that view.

1.7 In undertaking my review, I have had regard to the following:

- Localism Act 2011.
- Assets of Community Value (England) Regulations 2012.
- Relevant Guidance.
- Relevant case law.
- The Council's "Asset of Community Value Procedure" (adopted 19 March 2015).
- The Nomination Form submitted by the HHRA.
- E-mail dated 13 May 2015 from Mr Peter Hill (at that time, the representative of the HHRA for the purposes of the nomination) to the SAM.
- Two e-mails from Councillors dated 12 May 2015 and 15 May 2015 respectively.
- Representations to the nomination made on behalf of Stark Property and Co-Operative Group Food Limited, the lessee of The Star Inn.
- The SAM's decision on the nomination, dated 18 May 2015.
- Stark Property's request for a review of the decision to list The Star Inn as an ACV.

1.8 Insofar as findings of fact are concerned, I have determined the review on the basis of the evidence submitted and representations made. For the avoidance of doubt, I

do not consider it appropriate for me to undertake my own research into, for example, the former use of The Star Inn.

2. The Review

2.1 There is no dispute that the HHRA is an eligible nominating body. I agree that it is.

2.2 There is no dispute that the HHRA has a local connection to The Star Inn. I agree that it does.

2.3 There is no dispute that the nomination included the required information about The Star Inn. I agree that it did.

2.4 There is no dispute that The Star Inn is outside the categories that cannot be ACV (as set out in Schedule 1 to the Assets of Community Value (England) Regulations 2012). I agree that this is the case.

2.5 Stark Property contends that the requirements for listing an asset as an ACV, contained in Section 88(2) of the 2011 Act, have not been satisfied in respect of The Star Inn.

2.6 Section 88(2) of the 2011 Act provides that:

“... a building or other land in a local authority’s area ... is land of community value if in the opinion of the local authority –

(a) there is a time in the recent past when the 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.”

2.7 Stark Property’s representations in support of the request for the review can be briefly summarised as follows:

Past Use:

- The Star Inn has been vacant since September 2014, is no longer being used as a pub and is the subject of a fifteen year lease to the Co-Operative Group Food Limited.
- Although a pub is, in principle, capable of furthering the social wellbeing of the local community, it should not be assumed to be the case in all cases; it is not the case in respect of The Star Inn.
- Neither the nomination form submitted by the HHRA, nor the decision notice of the SAM, contained any evidence to support the SAM’s finding that The Star Inn furthered the social wellbeing or social interests of the local community when it was used as a pub.

Future Use:

- There is no evidence to support this contention.
- HHRA and the local community have not demonstrated that they have funding and are able to purchase The Star Inn. Neither have they demonstrated that they would be able to run a pub from The Star Inn.
- The nomination was not supported by a feasibility assessment or business case, nor evidence of how a use which might further the social wellbeing of the local community could viably be delivered from The Star Inn by a third-party.
- The SAM has erred in accepting inconsistent and incorrect comments from Councillors as sufficient evidence of a prospect of continued use.
- The Star Inn has already been leased to the Co-operative Group Food Limited. Stark Property has no intention of releasing the Co-operative Group Food Limited from its fifteen year commitment. The permitted use under the lease is restrictive, and any alternative use needs to be both viable and commercially attractive.
- A Viability Study demonstrated that a pub use was not viable.
- An A3 use, as “floated” in the Nomination, was not capable of furthering social wellbeing.

2.8 I shall first consider whether the statutory requirement for listing is satisfied in respect of the past use of The Star Inn. I shall then consider whether the statutory requirement in respect of future use is satisfied.

2.9 With regard to past use, the requirement of Section 88(2)(a) of the 2011 Act is that there is a time in the recent past when the actual use of The Star Inn, that was not an ancillary use, furthered the social wellbeing or interests of the local community.

2.10 The first question is “What does “recent past” mean?”

2.11 In “Assets of Community Value – Policy Statement” issued by DCLG in September 2011, it is stated:

“With regard to “recent past”, our current view is that we will leave it to the local authority to decide, since “recent” might be viewed differently in different circumstances. For example, “recent” might be taken as a longer period for instance for land which was formerly used by the public until the MoD took it over for live ammunition practice, than for a derelict building. Ten or even twenty years might be considered recent for the former but not for the latter.”

2.12 In *R (Edgar) v Bournemouth Borough Council* (unreported, October 2013), the High Court refused the claimant permission to apply for a judicial review of the Council’s decision not to list a site as an ACV. It did so on the basis that (i) the application had not been made promptly and (ii) the Council had given proper reasons for its decision that the site had not been used for community purposes in the “recent past” (the Council had, in its decision letter, expressed its view that “recent” should, as a general rule, be regarded as more akin to a two-year, rather than a five-year, period,

although it recognised that it should exercise its discretion in each case and should not be fettered by a blanket or fixed policy).

- 2.13 A standard dictionary definition of "recent" is *"having happened, begun or been done not long ago; belonging to a past period comparatively close to the present"* (Oxford Dictionary of English, 2nd Edition Revised, Reprinted 2006).
- 2.14 In order to determine the review, I have to decide what is meant by "recent past" in the context of the previous use of The Star Inn. In making this decision, I have had regard to the matters referred to in paragraphs 2.11 – 2.13 above. I have also had regard to the fact that The Star Inn has been vacant since September 2014 and that it is not disputed that, prior to closure, it had operated as a pub since 1871.
- 2.15 I consider that two years, as referred to in the Bournemouth case, is too short a period to be adopted as a general rule for what is meant by "recent past". My view is that, as a general rule, a period of less than three years would normally constitute "recent past", and a period in excess of five years would not. For the avoidance of doubt, I accept that there could be exceptions to this general rule.
- 2.16 Taking account of all the circumstances of this case, I conclude that "recent past" should be taken to mean "within a period of five years".
- 2.17 I have looked to see whether evidence has been presented that the actual use of The Star Inn furthered the social wellbeing or interests of the local community in the five year period prior to the Council receiving the nomination to list it as an ACV (i.e. since 23 March 2010). This is in the context that I do not accept that just because the authorised use of a site is as a pub, it automatically follows that the use is one which furthers the social wellbeing or interests of the local community. Although this would be an extreme case, it is possible that a pub could open, but not be frequented by any customers. In such circumstances, the actual use of that pub could not properly be said to further the social wellbeing or interests of the local community. A less extreme example, but with the same outcome, would be where a pub is well-used, but not by the local community. It is, therefore, incumbent on a nominating body to present evidence of (i) the actual use of a site nominated as an ACV and (ii) how that use furthers the social wellbeing or interests of the local community.
- 2.18 The Council's standard nomination form contains a section which allows the nominating body to provide evidence of an asset's community value (section 4).
- 2.19 Section 4.2 asks the nominating body to set out any evidence of past or existing community use/importance.

HHRA stated:

"Core Strategy policy CS4 states that: "... the Council will seek to protect and retain local shops and other small scale economic uses such as ... public houses, because of the importance of these uses for meeting the everyday needs of those living locally".

Meanwhile CS19 states that: "The loss of existing social and community facilities or sites will be resisted ..."

The importance of community pubs has recently been expressed in a Government announcement of 26 January (written statement to Parliament) by Kris Hopkins, MP."

This statement does not provide evidence of the past or existing community use/importance of The Star Inn.

- 2.20 Section 4.3 of the nomination form asks the nominating body to set out the extent to which the asset was used by the local community.

HHRA stated:

"The pub does not have an extensive catchment area and was therefore mainly used by members of the local community."

This statement does not provide evidence of the extent of use of The Star Inn by the local community.

- 2.21 In an e-mail dated 13 May 2015 to the SAM, Mr Peter Hill, who was at that time the representative of the HHRA for the purposes of the nomination, stated (amongst other things):

In the 1990s / early 2000s, the pub certainly was a community asset.

It had:

A regular Sunday night general knowledge quiz that was usually a sell-out.

Two quiz teams that used to travel to various pub venues in Surrey to play in the weekly Guinness league.

Its own rock-and-roll band with regular music nights.

The largest Woking Bikeathon Team, numbering over 150 participants who raised £10,000s for leukaemia research (Gary Lineker attended on one occasion to receive the cheque for monies raised).

An annual BBQ and fun day that coincided with the Bikeathon.

A huge number of loyal customers who were both local, and from further afield.

A function room that was used for parties and dinners.

A secure and well maintained garden, with slides and swings, that was a hit with families and children.

It also served excellent beer and food.

In recent years, however, the pub suffered from a lack of investment by Punch Taverns and a succession of managers."

I take Mr Hill's reference to "the 1990s / early 2000s" to mean a period prior to March 2010, i.e. not within the "recent past". His e-mail, therefore, does not provide evidence that the use of The Star Inn, in the recent past, furthered the social

wellbeing or interests of the local community. Indeed, there is a strong implication that this was not the case.

- 2.22 An e-mail from one of the Councillors, although supporting the application to list The Star Inn as an ACV, states (amongst other things):

“Over the last few years, the pub has fallen into decline because it has had a series of short-term managers who tended to cater to younger, rowdy, non-residents of the local area. The property was allowed to fall into disrepair with little or no investment going into the fabric of the building.”

In my view, these comments support those made by Mr Hill. Again, they do not provide evidence that the use of The Star Inn, in the recent past, furthered the social wellbeing or interests of the local community.

- 2.23 An e-mail from another Councillor states (amongst other things):

“ ... the Star Public House was fully operational prior to the purchase by the Co-Op, it had not declined and closed, however it never lived up to its full potential ...”

This e-mail does paint a different picture to what has been said by the other Councillor and Mr Hill. As two persons have either referred to, or implied that there was, a decline in the operation of The Star Inn, it is reasonable for me to conclude that this was the case. In any event, this e-mail does not provide evidence that the use of The Star Inn, in the recent past, furthered the social wellbeing or interests of the local community.

- 2.24 I conclude that no evidence has been submitted that the use of The Star Inn, in the recent past, furthered the social wellbeing or interests of the local community. I, therefore, find that the requirement of Section 88(2)(a) of the 2011 Act has not been satisfied.

- 2.25 I shall now consider whether the statutory requirement in respect of future use of The Star Inn is satisfied, i.e. is it realistic to think that there is a time in the next five years when there could be non-ancillary use of The Star Inn that would further (whether or not in the same way as before) the social wellbeing or social interests of the local community?

- 2.26 The first point to note is that this is a contingent requirement. It can only arise if I have first found that the “recent past use” furthered the social wellbeing or interests of the local community. Despite this, I think it would be helpful if I gave my views on this point.

- 2.27 Stark Property’s representations in support of the request for the review on this point have been briefly summarised in paragraph 2.7 above.

- 2.28 In deciding this point, it is necessary to determine what is meant by the phrase “realistic to think”. In *Patel v London Borough of Hackney & Another [2013] UKFTT CR/2013/0005 (GRC)*, the First Tier Tribunal said that the statutory test:

“ ... should not be confused with the test which courts and tribunals use as the civil standard of proof; a test designed to produce one outcome. The language of the statute is consistent with a number of realistic outcomes co-existing.”

This approach has been followed in a number of other Tribunal cases, including *Evenden Estates v Brighton and Hove City Council & Another [2015] UKFTT CR/2014/0015 (GRC)* in which it was said:

“It is also necessary to emphasise the fact that what is “realistic” may admit a number of possibilities, none of which needs to be the most likely outcome.”

I intend to follow the approach adopted by the First Tier Tribunal in respect of this matter, which approach provides a low threshold for the statutory requirement to be satisfied.

- 2.29 In undertaking this review, I have paid particular attention to the representations made by Stark Property.
- 2.30 The arguments put forward by Stark Property are very similar to those advanced on behalf of the pub owner in the Evenden Estates case. In that case, it was argued (amongst other things) that:
- The recent trading history of the pub had been extremely poor.
 - Beer sales were down.
 - Various tenants had tried and failed to make a go of the pub.
 - When the pub had been on the market, not a single offer had been received from a purchaser interested in running it as a pub.
 - There was no evidence of community support to buy the pub.
 - There were plenty of alternative pubs in the neighbourhood, including those which served the sort of community interests highlighted by the nominating body.
 - The Council's suggested alternative uses were not supported by others.

Despite these arguments, the First Tier Tribunal found that the requirements of Section 88(2)(b) of the 2011 Act had been satisfied.

- 2.31 I accept that each case has to be determined on its own merits, after a proper consideration of the evidence and submissions made.
- 2.32 My view is that, as the requirement in Section 88(2)(b) relates to a prospective state of affairs (i.e. a future use occurring), there is no obligation on the nominating body to submit evidence that they, or another body, can implement a use that would further the social wellbeing or social interests of the local community. It is quite possible that a different group or a third-party could emerge which would be interested in running The Star Inn as a community asset.
- 2.33 I do not accept that just because the recent trading history of The Star Inn was poor, it automatically follows that it could not be operated in the future on a community basis or, perhaps, on a commercial basis. Although Mr Taylor concludes in his viability study that The Star Inn is not a viable business, he does refer to a number of

other pubs in the vicinity. There is no evidence that these pubs are not able to continue trading, in which case (leaving aside other considerations) it is realistic to think that The Star Inn could start trading as a pub again in the next five years.

- 2.34 I have paid particular attention to the terms of the lease of The Star Inn to the Co-Operative Group Food Limited. Although Stark Property may have no intention of releasing the Co-Operative Group Food Limited from its obligations under the lease, the terms of the lease are not wholly restrictive. The user clause does allow the premises to be used for any use subject to the landlord's consent first having been obtained (such consent not to unreasonably withheld or delayed). The lease also allows the property to be assigned or underlet with the landlord's consent (such consent not to unreasonably withheld or delayed), subject to certain conditions being complied with. It follows that if the Co-Operative Group Food Limited are unable to use The Star Inn for their intended purpose, there are circumstances in which either they, or another body, might and could implement a community use within the next five years. This would be as an alternative to leaving the property vacant and paying the rent due under the lease of £82,000 per annum, exclusive of VAT.
- 2.35 Stark Property has referred me to the decision of the First Tier Tribunal in *Spirit Pub Co. Ltd v Rushmoor Borough Council & Another* [2013] UKFTT CR/2013/0003 (GRC). I consider that this decision, which related to The Tumbledown Dick public house in Farnborough, is clearly distinguishable from The Star Inn. This is because planning permission existed for the proposed change of use of The Tumbledown Dick to a MacDonalds restaurant. The application for planning permission to undertake operational development at The Star Inn, to facilitate what was then a permitted change of use to A1(retail) (application no. PLAN/2014/1336), was refused on 22 July 2015. An amended application has been submitted, but is not yet determined.
- 2.36 Although it may not be the most likely outcome, I conclude that it is realistic to think that there is a time in the next five years when there could be non-ancillary use of The Star Inn that would further the social wellbeing or social interests of the local community.

3. Decision

- 3.1 I determine that The Star Inn should not have been included in the Council's List of Assets of Community Value. This is on the basis that the use of The Star Inn, in the recent past, did not further the social wellbeing or interests of the local community. The requirement of Section 88(2)(a) of the Localism Act 2011 has, therefore, not been satisfied.

Signed


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Peter Bryant
Head of Democratic and Legal Services

Date 4th September 2015