

Localism Act 2011 Part 5 – Assets of Community Value

Review of Listing Decision under Section 92

Tumbledown Dick Public House, Farnborough

1. Summary

The Council's Chief Executive has carried out a review of the decision to list the Tumbledown Dick as an asset of community value. It has been found that the Council's original decision was correct and properly made. Therefore the property will remain listed as an asset of community value.

2. Definitions

The following words and phrases have the following meanings:

- 2.1. **"the Act"** means the Localism Act 2011;
- 2.2. **"ACV"** means an asset of community value within the meaning of the Act;
- 2.3. **"ACV List"** means the Council's list of assets of community value maintained pursuant to section 87 of the Act;
- 2.4. **"Bride Hall"** means Bride Hall Holdings Limited (company registration number 1094063);
- 2.5. **"the Lease"** means the lease of the Property for a term from 20 April 1995 to 23 June 2022, dated 21 February 1996 and made between (1) The Public House Investment Company Limited, (2) The Chef & Brewer Group Limited and (3) Scottish & Newcastle Plc (as varied by a deed of variation dated 21 February 1996 and made between the same parties);
- 2.6. **"the Council"** means Rushmoor Borough Council;
- 2.7. **"FTD"** means the Friends of the Tumbledown Dick (an unincorporated association);
- 2.8. **"the Original Decision"** means the Council's original decision made on 1 February 2013 to accept the FTD's nomination of the Property as an ACV;
- 2.9. **"the Property"** means the Tumbledown Dick Public House, 227 Farnborough Road, Farnborough, Hampshire GU14 7JT, the freehold interest of which is registered under title number HP476108;

- 2.10. “**the Regulations**” mean the Assets of Community Value (England) Regulations 2012;
- 2.11. “**Spirit**” means Spirit Pub Company (Managed) Limited (company registration number 5269240), the tenant of the Property pursuant to the Lease (and includes, where relevant, reference to Bride Hall, its appointed representative);

3. Background

- 3.1. The FTD nominated the Property as an ACV on 17 December 2011.
- 3.2. By the Original Decision, the Council decided to accept the FTD’s nomination of the Property as an ACV. Accordingly, the Council added the Property onto its ACV List and notified Spirit of such listing.
- 3.3. On 25 March 2013, Spirit requested a review of the Original Decision in accordance with section 92 of the Act. Spirit appointed Bride Hall to act as its representative in connection with this listing review in accordance with paragraph 5 of Schedule 2 to the Regulations.
- 3.4. Spirit initially requested that the listing review be conducted by way of an oral hearing in accordance with paragraph 7(1) of Schedule 2 to the Regulations. However, this request was subsequently withdrawn by Spirit on 16 April 2013. The Council decided not to hold an oral hearing in accordance with paragraph 7(2) of Schedule 2 to the Regulations. Therefore this listing review was conducted by way of written representations only.
- 3.5. There is no provision in the Act or in the Regulations for requiring the Council to involve the FTD, as the community group which made the original nomination of the Property, in the listing review. However, the Council considered it to be fair and equitable to inform the FTD of Spirit’s request for a listing review and to give the FTD, as well as Spirit, the opportunity to make representations to the Council regarding such review.
- 3.6. The Council wrote to both Spirit, in accordance with paragraph 6 of Schedule 2 to the Regulations, and the FTD on 18 April 2013 setting out the procedure to be followed in connection with the listing review and inviting written representations from each party.
- 3.7. This listing review was carried out and decided by Andrew Lloyd, the Chief Executive of the Council, being a Council officer of appropriate seniority who did not take part in making the Original

Decision in accordance with paragraph 4 of Schedule 2 to the Regulations.

- 3.8. In accordance with section 92(4) of the Act, this is the Council's decision on the review and the reasons for the decision.
- 3.9. In carrying out this listing review the Chief Executive took legal advice from the Solicitor to the Council and had regard to:
 - 3.9.1. part 5 of the Act;
 - 3.9.2. the Regulations;
 - 3.9.3. the Department of Communities and Local Government *Community Right to Bid: Non-statutory advice note for local authorities* (October 2012);
 - 3.9.4. the nomination form dated 17 December 2011 by which the FTD nominated the Property as an ACV;
 - 3.9.5. the Original Decision;
 - 3.9.6. the written representations made by the FTD on 2 May 2013;
 - 3.9.7. the written representations made on behalf of Spirit on 2 May 2013;
 - 3.9.8. the further written representations made by the FTD on 13 May 2013; and
 - 3.9.9. the further written representations on behalf of Spirit on 13 May 2013.

4. The relevant legislation

The part of the Act that is in particular relevant to this listing review is section 88(2). This section provides that a property is to be listed as an ACV following a valid nomination:

“... 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” (emphasis added).

This section 88(2) deals with cases where the relevant property is not currently in use for a relevant community use, as is the case with the Property. Section 88(1) of the Act deals with cases where a property is currently in use for a relevant community use; this is not applicable to the Property which is at present vacant and unused.

5. Spirit’s Representations

- 5.1. Spirit acknowledge that the last use of the Property was one that could make a contribution to the local community. That is, Spirit accepts that the criteria for ACV listing in section 88(2)(a) of the Act is fulfilled.
- 5.2. Spirit however also submit that, “... *the appeal ... is therefore being made on the basis that ... no plausible case has been made to even suggest that there is a realistic chance of the Property actually making a contribution to the local community*”. That is, Spirit’s contention is that that the criteria for ACV listing in section 88(2)(b) of the Act is not met and that therefore the Council was wrong to accept the nomination of the Property as an ACV.
- 5.3. In support of its position, Spirit point out that the Council stated in its Original Decision that there were, “... *‘serious reservations’ about the ability of the Friends of Tumbledown Dick to raise enough money to bring the buildings into a positive use*”.
- 5.4. Spirit has provided some detail as to what it believes to be the likely costs of the FTD’s proposals for the purchase and opening of the Property and state that these are likely to be approaching £4.5 million in total.
- 5.5. Spirit also states that the FTD have not submitted any business plan and concludes that, “... *until such time as a viable and credible Business Plan has been submitted by the Friends of the Tumbledown Dick with some proof of funding and an idea on cost assumptions, then we feel that the Council is duty bound to remove this property from the list as it has not been properly considered against the criteria in the Regulations*”.
- 5.6. In their response to Spirit’s initial representations, the FTD state that their aim is to obtain funding to purchase the Property through grants and lottery funding. The FTD also question Spirit’s valuation of the Property and estimates for its renovation. Critically, the FTD state that whilst they do have a business plan, they not wish to make to publically available at this stage since

they do not believe that it would be in their commercial interests to do so.

6. The FTD's representations

- 6.1. The FTD state that the Property was a, "*successful local music venue for the last 50 years.*" They refer to a number of media articles regarding history of the Property and its operation as a music venue. The FTD have also included a number of statements from local residents, former employees of the Property and others in support of the group's aims and of the listing of the Property as an ACV.
- 6.2. The FTD state that they intend to re-open the Property as a co-operative pub and community hub capitalising on the building's unique historic value.
- 6.3. The FTD state that they have wide public support.
- 6.4. In its response to the FTD's initial representations, Spirit state that the FTD have failed to establish demand for a community led venue, demonstrate requisite skills and experience, produce a credible business plan or clarify their ability to raise the requisite funds.

7. Decision and reasons

- 7.1. The Council notes that there have been no submissions suggesting that Council's procedure in making the Original Decision was improper or that the FTD's nomination of the Property as an ACV was invalid in any way, nor is the Council aware of any such procedural defect. Therefore the Council is satisfied that the making of the Original Decision was procedurally correct.
- 7.2. Turning to the substantive reasons for the Original Decision, section 88(2) of the Act provides for the criteria for listing a property as an ACV, as detailed in paragraph 4 above. There is a two part test. A local authority needs to be of the opinion that:
 - (a) the property was in the recent past actually used for a use that 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 the property could be used for a use that furthered the social wellbeing or interests of the local community.

If both parts of this test are met, then the local authority is obliged to list the relevant property as an ACV, following a valid nomination.

- 7.3. Spirit accepts that the first part of this test in section 88(2)(a) is met in that the Property was previously used for a relevant community use. This is a view that the FTD undoubtedly share.
- 7.4. Spirit's ground of appeal against the Original Decision is essentially the second part of this test in section 88(2)(b) is not met. That is, its position is that the Council was wrong to come to the opinion that it is realistic that the Property could be again used for a relevant community use in the next five years. In support of this position, it is suggested that the FTD do not have a credible business plan. In addition, Spirit appears to suggest that it is incumbent upon the FTD to provide proof of their funding, evidence of market demand for their proposals for the Property and cost estimates to the Council in order the test in section 88(2)(b) to be satisfied.
- 7.5. The Council does not share Spirit's view that the legislation requires a community group to have a detailed business plan, proof of funding or other detailed proposals for a property as a prerequisite for it to be listed as an ACV. Neither the Act nor the Regulations refer to any such information being required, so far as the Council is aware.
- 7.6. The purpose of the ACV legislation, as stated in the relevant DCLG Guidance, is to allow communities more time to raise finance to purchase assets of community value and prepare to bid for them when they are put up for sale. This is the purpose of the six-month moratorium imposed by the Act before the sale of an ACV can be effected. Therefore, it would be inconsistent with this purpose if it were necessary for a community group to provide such detailed business information and to have offers of funding in place at the point of their nomination of a property as an ACV.
- 7.7. In any event, the FTD do claim to have a credible business plan and state they are actively seeking funding. The FTD also state they do not wish their business plan to be made public at the present time because to do so could prejudice their commercial interests.
- 7.8. Further, the Council does not believe that it is required to conduct any detailed financial evaluation of the FTD's proposals for the Property nor that it would be appropriate for the Council to attempt to do so.
- 7.9. To some extent, the Council recognises the doubts that Spirit has raised regarding the credibility and financial viability of the FTD's

proposals for the Property. However, upon the evidence provided by the FTD, the Chief Executive is satisfied that an opinion that it is realistic that the Property could be used for a community use within the next five years is one that the Council is entitled to arrive at. The Chief Executive is accordingly satisfied that the criteria in section 88(2) of the Act are met and that therefore Original Decision was correct.

- 7.10. The Chief Executive's decision in this listing review is therefore to confirm the Original Decision. The Property will therefore remain on the ACV List.

8. Right of appeal

- 8.1. Spirit is advised that it may appeal against this decision in accordance with regulation 11 of the Regulations.
- 8.2. Such appeal must be made to the General Regulatory Chamber of the First-Tier Tribunal. The deadline for appealing is specified in the procedural rules of that Chamber as 28 days from the date on which notice of the decision appealed against was sent to the owner. Appeals may be both on points of law and on findings of fact. The Property will remain listed during the appeal process.
- 8.3. If it wishes to appeal, it should send the appeal in writing to the First-Tier Tribunal at:

Tribunal Clerk
Community Right to Bid Appeals
HM Courts & Tribunals
First-tier Tribunal (General Regulatory Chamber)
P.O. Box 9300
Leicester
LE1 8DJ

Spirit may also send an appeal to the First-Tier Tribunal by email at: GRC.CommunityRights@hmcts.gsi.gov.uk

Andrew Lloyd
Chief Executive
Rushmoor Borough Council

17 May 2013