FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
Community Right to Bid

Appeal Reference: CR/2015/0018

Heard at Cambridge County Court
On 16 March 2016

Before

JUDGE PETER LANE

Between

HAWTHORN LEISURE LIMITED

Appellant

and

ST EDMONDSBURY BOROUGH COUNCIL

First Respondent

FRIENDS OF THE BEEHIVE

Second Respondent

DECISION AND REASONS

Introduction

1. The Localism Act 2011 requires local authorities to keep a list of assets (meaning buildings or other land) which are of community value. Once an asset is placed on the list it will usually remain there for five years. The effect of listing is that, generally speaking, an owner intending to sell the asset must give notice to the local authority. A community interest group then has six weeks in which to ask to be

treated as a potential bidder. If it does so, the sale cannot take place for six months. The theory is that this period, known as "the moratorium", will allow the community group to come up with an alternative proposal – although, at the end of the moratorium, it is entirely up to the owner whether a sale goes through, to whom and for how much. There are arrangements for the local authority to pay compensation to an owner who loses money in consequence of the asset being listed.

Legislation

2. Section 88 of the 2011 Act provides as follows:-

> "88 Land of community value
> (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.
> (3) The appropriate authority may by regulations –
> (a) provide that a building or other land is not land of community value if the building or other land is specified in the regulations or is of a description specified in the regulations;
> (b) provide that a building or other land in a local authority's area is not land of community value if the local authority or some other person specified in the regulations

considers that the building or other land is of a description specified in the regulations.

(4) A description specified under subsection (3) may be framed by reference to such matters as the appropriate authority considers appropriate.

(5) In relation to any land, those matters include (in particular) –

(a) the owner of any estate or interest in any of the land or in other land;

(b) any occupier of any of the land or of other land;

(c) the nature of any estate or interest in any of the land or in other land;

(d) any use to which any of the land or other land has been, is being or could be put;

(e) statutory provisions, or things done under statutory provisions, that have effect (or do not have effect) in relation to –

(i) any of the land or other land, or

(ii) any of the matters within paragraphs (a) to (d);

(f) any price, or value for any purpose, of any of the land or other land.

(6) In this section -

"legislation" means –

(a) an Act, or

(b) a Measure or Act of the National Assembly for Wales;

"social interests" includes (in particular) each of the following –

(a) cultural interests;

(b) recreational interests;

(c) sporting interests;

"statutory provision" means a provision of –

(a) legislation, or

(b) an instrument made under the legislation."

The appeal

3. The Beehive is a grade 2 listed building, with gardens and a car park, situated in the village of Horringer, Suffolk. The building dates from the eighteenth century and has been a pub since 1860. The Beehive closed to the public in 2014. In June 2014, the appellant acquired the Beehive from its owners, Greene King plc, as part of a portfolio of 275 licensed premises acquired by the appellant from Greene King. Having decided that the pub business was no longer viable, the appellant closed the Beehive after the departure of its last tenant.

4. In February 2015, the first respondent refused the appellant's application for planning permission for change of use of the Beehive from a pub into a dwelling house. On 7 May 2015, the second respondent nominated the Beehive and its

curtilage as an asset of community value under the 2011 Act. On 9 June 2015, the first respondent accepted the nomination and listed the premises. On 14 August 2015, the first respondent concluded, as a result of a review held at the request of the appellant, that the Beehive should remain listed.

5. The appellant appealed to the First-tier Tribunal. A hearing took place at Cambridge County Court before me on Wednesday, 16 March 2016. Ms K Evans of TLT Solicitors, appeared on behalf of the appellant. She called as a witness Mr Gautam Chhabra, a Director of the appellant and Vice-President of Corporate Development. Mr Chhabra had not previously produced any witness statement.

6. The first respondent was represented by Ms J. Orton, solicitor, but did not take part in the hearing. The second respondent was represented by Mr J. Adams, Managing Director of Connect Books and Executive Director of Connect Group plc. From 2005 to 2011, Mr Adams was Managing Director of the brewing business of Greene King, where he also sat on the main board and on its executive committee. The second respondent was also represented by Mr P. Crofts. Mr Crofts worked as a town and country planner in local government for forty years, becoming Corporate Director of Braintree District Council, as well as being seconded to the Cabinet Office in order to carry out inspections of various businesses. Mr Adams and Mr Crofts spoke to the appeal statement of the Friends of the Beehive (bundle, pages 18-22) and to the Beehive business plan, produced by the Friends in connection with the proposal to raise funds to make an offer to purchase the Beehive from the appellant.

The witnesses and submissions

7. Mr Chhabra said that the appellant was founded in 2014. His background was in investment banking. The appellant had a financial model for each of the properties it acquired. The Beehive had been put on the market in February 2015 but only one offer had been received, from the second respondent; but they did not have the requisite funding, so Mr Chhabra did not take their offer to his board. Of the 25 enquiries made about the Beehive, all but one were interested in the property only if there were to be a change of use. The "moratorium" under the 2011 Act was begun on 18 August 2015, with the result that the appellant was (as of 18 February 2016) free to sell. The appellant did not, however, have a buyer at this stage.

8. Mr Chhabra considered that the Beehive Friends' business plan was not so much a business plan as a "pitch" to investors. More detail would be expected in a business plan. Issues such as opening hours, insurance, licensing fees and other matters, were not dealt with in the plan. The last tenant was supposedly paying a rent to Greene King of £23,000 per annum but Greene King was paying the tenant around £450 a week just to stay. Accordingly, the property was, in effect, on a nil rent. 99% of tenants would, according to Mr Chhabra, not accept the position shown on page 17 of the business plan.

9. The business plan stated that the Beehive was worth £200,000, but the Friends had offered the appellant £210,000. This was, in any event, unacceptable to the appellant. No account appeared to have been made in the business plan of a requirement to pay stamp duty and VAT, as well as professional advisors' fees.

10. Mr Chhabra considered that there was a lack of consistency in the business plan, concerning how the Beehive would be run. In some places, the plan assumed that the Friends would let a tenant run the pub whereas, elsewhere, reference was made to such things as a tea shop and a parcel drop-off point. A landlord could not, however, interfere with a tenant's business. This was, according to Mr Chhabra, a fundamental flaw in the plan. He did not consider that any commercial lender would lend 40% of the value of a property, which had been closed for the past two years. The listing of a property as an asset of community value affected its viability.

11. Mr Adams, in his evidence, said that he understood the nature of the challenges faced by the Friends. He confirmed that the business plan was, indeed, primarily drawn up with a view to raising finance for the purchase of the Beehive. The primary aim was to obtain the pub and let it to an entrepreneurial tenant, who would create his or her own viable business plan. Mr Adams had spoken with the business director of Greene King, as well as others in the pub business. As a result, Mr Adams had formed the view that the recent history of the Beehive involved a number of unfortunate errors on the part of the former owners. Because – contrary to the claim made by the appellant – the recent tenants had been operating successful businesses, Greene King had raised the rent which, in retrospect, had been unwise. Mr Adams said that it was easy to "poke holes" in the Friends' business plan but the clear objective was to keep the Beehive open. Mr Adams had spoken to potential operators. Whilst he accepted that the pub had a small "footprint" and was not the easiest establishment to run, there was a huge number of examples of such pubs, which were succeeding.

12. According to Mr Adams, it was entirely unsurprising that there had been no offers, when the Beehive had been for sale, because the appellant's asking price was £475,000. That was, he said, plainly based on residential use. By contrast, Greene King had put the property on the market with a guide price of £200,000 to £230,000.

13. Although the Friends could not guarantee a viable long-term future for the Beehive, he was aware of a "failed" Greene King pub that had been taken on by others and turned around. Mr Adams said when the husband and wife team of Gary and Di was running the Beehive, it was busy all week and, as a Greene King director, Mr Adams would often take people there.

14. Mr Crofts challenged the appellant's contention that the most recent use of the Beehive had been not as a pub but as a Thai restaurant. Mr Crofts said that it was a pub and restaurant. (I note from page 94 of the bundle that the appellant's solicitors refer to the premises as "Beehive & Thai Kitchen").

15. Mr Crofts said that the Beehive was of significance to the local community and was used actively by it. A beer and food festival took place in the Beehive car park and the tenants had also presented their cooking from the pub at village fetes. This was an example of the Beehive "reaching out into the community." Mr Crofts said that the report prepared by Savills on the viability of the Beehive took a purely generic view, rather than being focused on the particular premises. Savills had not even made any real effort to examine the upper floor of the Beehive. Mr Crofts emphasised that the last sets of tenants had not been compelled to leave as a result of insolvency. Both the last two sets of tenants had gone on to flourish elsewhere, as they had been doing at the Beehive.

16. The appellant's marketing process had, according to Mr Crofts, been negligible. Planning permission had been refused for change of use. Only some fifteen to eighteen months after Greene King had sold for £235,000, the property was being marketed at £475,000. This was deliberately designed to deter anyone who had a genuine interest in it. The unrealistic nature of the price being sought by the appellant for the Beehive was brought into sharp focus by comparing the sales particulars of nearby pubs. There were many examples of community owned pubs operating successfully. The Friends could offer ownership that was not geared to profit and which had the scope for such things as volunteer assistance. The imagination of the village had been captured.

17. The Friends' business plan had been prepared in February 2016. The share offer was now live, having been launched on 8 February. On 10 February a formal offer for the Beehive had been made in the sum of £210,000, based on professional advice. The Friends had been provided with advice that indicated some £45,000 would be needed for bringing the Beehive back into an operational state, in the wake of the appalling condition in which it was being left by the appellant.

18. Mr Crofts agreed with Ms Evans that sales of beer had declined during the time that the Thai kitchen had been running. During the ownership of Greene King, the Beehive had suffered from being "over-rented;" but this did not mean that it could not succeed in the future. The business plan was in the nature of a "moving feast" and Mr Crofts expected it to be further refined and improved as matters developed. This included looking at such issues as contingencies, which the appellant thought had been under-estimated.

19. Mr Crofts was asked about the "exit strategy" element of the business plan. He said that if the plan proved to be unviable, the exit strategy of the Friends would be to take appropriate advice, including from "key village organisations," before deciding whether to sell the Beehive as a pub or seek planning permission for a change of use. Ms Evans suggested it was unfair for a community group to use the 2011 Act in order to purchase the property from the appellant, and then sell it with permission for a change of use. Mr Crofts said that this was definitely not the wish of the Friends but that the business plan needed to make provision for an exit strategy. It was important to note that the strategy envisaged that the assets would

be transferred to a prescribed community benefit society, a community interest company, a registered social landlord, a charity or a body equivalent to any of those persons. This was in contrast to the position of the appellant, which would keep for itself any gain obtained as a result of selling the Beehive with a change of use.

20. Ms Evans questioned Mr Crofts about the questionnaire that the Friends had produced for the use of villagers. Some 40% of the responses (coming from around half of the villagers) stated that they would only visit the Beehive occasionally. She asked how the business could be made viable in these circumstances. Mr Crofts said that the Friends already had pledges to the tune of £90,000. The Beehive also drew people from further afield. The Friends stood by the accuracy of the compilation of responses from the questionnaire, set out at page 70 of the bundle.

21. In answer to questions from the Tribunal, Mr Crofts and Mr Adams said that there was a range of skills available in the village, which would assist in the refurbishment of the Beehive. The ideal was to bring in an entrepreneur/tenant and volunteers from the village could provide relevant assistance. The Friends could be more flexible in this regard, as they were not in it for profit. The Friends would provide the Beehive with the best chance of success.

22. In her closing submissions, Ms Evans said that the second respondent had not produced evidence that the pub had served the wellbeing of the local community since 2009. Accordingly, the "recent past" test in section 88 of the 2011 Act was not met. The second respondent's business plan was fanciful, their scheme was not "realistic," as required by section 88. The "exit strategy" would be operated at the expense of the appellant by giving the community the opportunity of changing the use of the Beehive.

Discussion

23. Despite Ms Evans putting forward the best case that could be made for the appellant, I am in no doubt that the requirements of section 88(2) of the 2011 Act are satisfied. I accept the evidence of the second respondent that, until the departure of the proprietor of the Beehive & Thai Kitchen, the Beehive served the social wellbeing and interests of the local community. It was a social meeting place, as well as playing a part in village activities. Although there is another pub in Horringer (The Six Bells), the evidence before me shows that this is not regarded locally as having the community importance of the Beehive. Given that the Beehive has been a pub since 1860, the fact that it has been closed to the public for some two years cannot possibly mean that the requirements of section 88(2)(a) are not met, so far as concerns use "in the recent past."

24. I turn to section 88(2)(b). Mr Chhabra's general critique of the second respondent's business plan failed to hit home. Mr Adams and Mr Crofts were in agreement with Mr Chhabra that, despite its nomenclature, the plan was prepared

primarily in order to raise finance, as to which it is, I find, already proving successful. I note the evidence of Mr Crofts that some £90,000 had been pledged by 16 March 2016. Mr Crofts also said that the Friends were in discussion with a commercial lender, which somewhat undermines the belief of Mr Chhabra that such a lender would not countenance lending in the present circumstances of the Beehive.

25. I agree with the second respondent that the enormous rise in the asking price for the Beehive, as marketed by the appellant compared with that of Greene King only eighteen months or so earlier, is problematic. It was, I consider, either deliberately designed to produce as little interest as possible from those seeking to run the Beehive as a pub, or else to reflect its potential for conversion to a dwelling, which must be viewed as speculative, given the recent refusal of planning permission. In the light of the planning position, it cannot, in my view, be said to be unrealistic to envisage that the appellant may, within the next five years, decide to put the Beehive on the market for a price which reflects its current permitted use. Certainly, I heard nothing from Mr Chhabra to the contrary.

26. I do not consider that Mr Chhabra's detailed criticisms of the business plan take the appellant's case anywhere. I accept the evidence of Mr Crofts that the business plan is, in effect, a dynamic document. This can be seen from the decision to offer the appellant £10,000 above the value set out in the plan. The way in which Mr Adams and Mr Crofts envisage the community purchasing the Beehive, letting it to a suitable tenant and providing cost-effective help in the form of renovations and volunteer work, struck me as entirely credible.

27. One of the problems for the appellant is that the CVs of the board members of the Friends of the Beehive, as set out at pages 49 and 50 of the bundle, make extremely impressive reading. In particular, Mr Adams' experience as a director of Greene King, coupled with his detailed knowledge of the Beehive, is a formidable asset. The same is true of Mr Crofts' professional background and experience. Overall, it is hard to imagine how a community group of this kind could be better served.

28. By contrast, the materials put forward by the appellant are somewhat threadbare. I agree with the second respondent that, in particular, the first report by Savills is largely generic. It also suffers from the fact that the writer was not "provided with any trading information" (bundle, page 107). The later Savills' report (May 2015) strikes me as equally generic. Although reference is made to "negligible" interest from pub and restaurant users "in view of the trading history" (bundle, page 117) it is unclear what, if any, trading history the writer of the report saw. I accept the evidence of the second respondent that the reason for the loss of tenants was because Greene King raised the rent unduly, in view of the success being made of the Beehive. I am fully satisfied that the second respondent would not follow such a course, having regard to its objects and the reason why it was formed.

29. The appellant objected to the possibility that, if the Friends acquired the Beehive, they could dispose of it with the benefit of a change of use to a residence. I am satisfied that the Friends would take such a course only as a last resort and that the listing provisions of the 2011 Act could be invoked, if the requirements were still met. The fundamental point, however, is that this objection of the appellant is irrelevant. If the requirements of the 2011 Act and its Regulations are satisfied, the Beehive must be listed. That is what Parliament requires.

30. Standing back and considering all the documentary and oral evidence, as well as the submissions, I find that the requirements of section 88(2)(b) are met. It is realistic to think that, in the next five years, the Beehive can return to furthering a relevant social interest. Its current planning use is as a pub. The Friends have demonstrated that there is a realistic future for the Beehive as a pub. In view of this, it is realistic to think that the appellant will either begin to run it as such, or else sell it to someone who will.

31. In view of my finding at paragraph 23 above regarding section 88(2)(a), it follows that the Beehive meets the requirements for listing as an asset of community value.

Decision

32. The appeal is dismissed.

Signed

Judge Peter Lane

Chamber President

Date: 26 April 2016