IN THE FIRST-TIER TRIBUNAL (GENERAL REGULATORY CHAMBER)
BETWEEN:

HOWARTH HOMES PLC

Appellant

v

(1) ST ALBANS DISTRICT COUNCIL

(2) 'SAVE THE CAMP'

(the status of which group is in dispute in these proceedings)

Respondents

GROUNDS OF APPEAL ON BEHALF OF THE OWNER

Introduction

1. These are the Grounds of Appeal on behalf of Howarth Homes PLC ("the Owner"), the owner of the former Camp Public House, 149 Camp Road, St Albans AL1 5HR ("the Property") in relation to the forthcoming review hearing in respect of the listing of the Property as an asset of community value ("ACV") under the Localism Act 2011.

2. Following the decision of the listing review, planning permission was granted for the demolition of the former pub at the Property and the construction of 25 flats at the Property. The listing cannot be justified in these circumstances. However, in any event it is submitted that the Appellant's other grounds of appeal should be dealt with, not least because of the general importance of the issues raised.

Background

3. The background to this matter is as follows:

(i) McMullen and Sons, Limited ("McMullen") acquired the Property in 1912. It built a public house at the Property in 1915, which traded as such for 100 years;

(ii) Sales of beer at the pub declined strongly since the late 1980s, such that immediately before the pub ceased trading, sales were around one quarter of the level at which they had been in the late 1980s;

(iii) Despite significant capital investment in 2007, 2008, 2009 and 2013 by McMullen, who not only owned the freehold but knew the business at the Property inside out, the pub was loss-making by 2008, and losses only increased thereafter;

(iv) McMullen decided that continuing to trade at the Property was uneconomic, and sold the freehold to the current Owner. Contracts were exchanged in March 2015, and the sale completed in June 2015. The Owner is now the registered owner of the Property under title number HD433788, having acquired the Property for £1.47m;

(v) The Property ceased trading as a pub in or around mid-May 2015;

(vi) It is understood that the Property was nominated as an ACV under Chapter 3 of the Localism Act 2011 ("the Act") on 11 May 2015 by a nomination form dated 6 May 2015. The stated nominator was a purported group calling itself 'Save the Camp';

(vii) St Albans City & District Council ("the Council") determined the nomination by listing the Property in its list of ACVs and issued a decision notice to that effect, dated 9 July 2015;

(viii) By a letter dated 3 September 2015, the Owner's solicitors sought a review of the decision to list. They subsequently also sought the disclosure of the documentation on which the decision to list was taken, including, but not limited to an unredacted copy of the nomination form;

(ix) A review hearing was held at the St Albans District Council offices on 25 January 2016;

(x) By a decision notice dated 17 February 2016, Mike Lovelady, the reviewer, issued a decision upholding the listing of the Property as an ACV, essentially pursuant to the following three conclusions on the matters in issue:

(a) The nomination that had been made was a valid community nomination made by an incorporated body with a local connection (as per the statutory tests);

(b) The use of the Property in the recent past had met the community interest test set out at s. 88 of the 2011 Act; and

(c) It was "realistic to think" that the Property might be run again as a pub at some time in the next five years, in part due to the uncertain planning position, and notwithstanding the Owner's evidence that it would leave the Property empty if planning permission is not obtained.

(xi) At a meeting of the planning committee of the local planning authority on 22 February 2016, it was resolved to grant planning permission subject to the execution of a satisfactory s. 106 agreement[1], in respect of the development at the Property which was proposed by application ref 5/2015/3468. That development is as follows:

> "Demolition Of Existing Public House And Erection Of Part Three, Part Two Storey Residential Building Of Twenty Five Apartments Comprising Of Thirteen, One Bedroom And Twelve, Two Bedroom Apartments With Associated Parking And Amenity Space"

4. The Owner relies, inter alia, on the points made in its letter dated 3 September 2015, and on the evidence enclosed therewith, namely the letter from McMullen dated 16 June 2015 and the graph showing declining beer sales.

Grounds

5. The Owner submits that the Property should be removed from the list of ACVs for the following reasons:

(i) The purported nomination pursuant to which the listing was made was not a community nomination, contrary to s. 89(1)(a) and (2)(b) of the Act, in that it was not made by a voluntary or community body as defined by the legislation, or alternatively, the nomination did not contain evidence that the nominator was eligible to make a community nomination, as required by reg. 6(d) of the 2012 Regulations; and

[1] i.e. an agreement pursuant to s. 106 of the Town and Country Planning Act 1990.

(ii) It is not realistic to think that the Property will be used for purposes falling within s. 88(2)(b) at any time in the next five years.

Ground (i)

6. The Owner's first objection to the nomination is that it is not a community nomination, contrary to s. 89(1)(a) and (2)(b) of the Act.

7. Under those statutory provisions, land may only be included in a local authority's list of Assets of Community Value in England in response to a community nomination made by a parish council (not applicable here) or "a person that is a voluntary or community body with a local connection." (see in particular s. 89(2)(b)(iii)). If a body is not entitled to make a nomination under the legislation, then the Council simply has no jurisdiction to consider the nomination.

8. Regulation 5 of the 2012 Regulations[2] defines "a voluntary or community body". It is therefore important to note first that the 2012 Regulations do not purport to alter or qualify the initial requirement in s. 89(2)(b)(iii) that the nominating body be "a person".

9. The Localism Act 2011 does not define "person". However s.5 of the Interpretation Act 1978 provides that words used in statutes are to bear the meaning contained at Schedule 1 of the Interpretation Act 1978 unless a contrary indication appears. At Schedule 1, it is stated that the term "person" "includes a body of persons corporate or unincorporated".

10. In addition to that requirement, that person must be "a voluntary or community body", which reg. 5(1) defines as including bodies including charities and certain companies. It is notable that the legislation tightly restricts the nature of persons which can make community nominations. Individuals are not permitted to make community nominations.

[2] The Assets of Community Value (England) Regulations 2012

11. It appears that the provision relied upon by the nominator (and the Council as original decision maker) is reg. 5(1)(c). Clearly no other provision of reg. 5(1) is satisfied.

12. Reg. 5(1)(c) which includes within the definition of "a voluntary or community body" the following:

> "(c) an unincorporated body—
>
> (i) whose members include at least 21 individuals, and
>
> (ii) which does not distribute any surplus it makes to its members;"

13. In ***Williams v Devon CC* [2015] EWHC 568 (Admin)**, the question for the High Court was in essence whether the relevant campaigning organisation fell within the definition of "person". The terms "unincorporated body" and "unincorporated association" appear to have been used interchangeably in that judgment (see paras 33 and 35). In any event, the question was whether the relevant group had sufficient certainty of membership to be able to take part in judicial review proceedings. The court recognised at para 8 that in English law generally an unincorporated association would not have capacity to sue or be sued, but that in judicial review claims a certain flexibility has been shown. It was acknowledged that unincorporated associations "vary considerably" in terms of their characteristics.

14. Importantly, at para 49, the High Court held as follows:

> "49 However it does not appear to me that an identifiable membership by itself can suffice. There needs to be agreement between the members usually as reflected in a set of identifiable rules or a code or a contractual or other bond between them. Such a requirement should not be overly onerous and it bears repetition that such matters are very much fact specific."

15. The term "unincorporated body" is not defined in the legislation. It is clear that it means precisely the same as "unincorporated association", for the reasons that follow. "Unincorporated association" is a term which is familiar in case law, and which has a clear legal definition in case law.

16. The *Oxford Dictionary of Law* (5th Ed., 2002) defines the term "unincorporated body" as follows:

> "An association which has no legal personality distinct from those of its members (*compare* CORPORATION). Examples of unincorporated bodies are *partnerships and *clubs."

17. The same Dictionary defines a "club" as follows:

> "An association regulated by rules that bind its members according to the law of contract. Club property is either vested in trustees for the members (members' club) or owned by a proprietor (often a company limited by guarantee; see LIMITED COMPANY) who operates the club as a business for profit (proprietary club). The committee is usually liable for club debts in the case of a members' club; the proprietor in the case of a proprietary club."

18. It is clear from the above definition of "unincorporated body" that that term has the same meaning as "unincorporated association". Indeed, the Dictionary has no definition of "unincorporated association", obviously considering it to be unnecessary. Given that an unincorporated body is defined as an "association...", it is submitted that the two terms have one and the same meaning.

19. Furthermore, in the tribunal decision in ***General Conference of the New Church v Bristol City Council*** **[2015] UKFTT**, at para 3 Judge Lane said that:

> "The church was nominated as an asset of community value by an **unincorporated association** entitled "Protect Redland and Bishopston from Over-Development" ("PROD")."
> [emphasis added]

20. It is submitted that the term "unincorporated body" in the legislation and the term "unincorporated association" mean the same thing, and have effectively been treated as such by the tribunal.

21. An "unincorporated association" is defined in case law as:

> "two or more persons bound together for one or more common purposes, not being business purposes, by mutual undertakings, each having mutual duties and obligations, in an organisation which has rules which identify in whom control of it and its funds rests and upon what terms and which can be joined or left at will. The bond of union between members of an unincorporated association has to be contractual."
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> (per Lord Justice Lawton in the Court of Appeal in ***Conservative and Unionist Central Office –v- Burrell (Inspector of Taxes)*** **[1982] 1 W.L.R. 522** - at p525.

22. It is the Owner's contention that contrary to the above requirements, the nomination could not have been a successful community nomination because it has not been made by a properly constituted unincorporated body.

23. The Reviewer's task, and the tribunal's task, in relation to the status of the nominating body is to decide whether there was a "community nomination". Thus it is the status of the nominating body at the time of any purported nomination which is crucial.

24. There was no evidence provided within the nomination as to:

(i) How the supposed constitution was adopted;
(ii) Whether and how any persons have joined the unincorporated body;
(iii) Whether the nominating group does or does not distribute any surplus it makes to its members; or
(iv) Whether Mr Bury was authorised to make the nomination on behalf of the group, or whether in reality this is a nomination made solely by Mr Bury. This is especially important, given that the sole aim of the group, as stated in the constitution, is not to list the Property as an ACV, but to save it as a pub. ACV listing does not have the power to achieve this end.

25. Each of the above must be established by evidence in order for a valid listing to be maintained.

26. Only in the middle of the hearing itself did the Council agree to disclose the heading of the page which is understood to have contained the names of those said to be members of the nominating group. Given that there was plainly nothing sensitive or confidential about this heading, the previous refusal was utterly unlawful and unacceptable. In any event, the heading itself made clear that this did not purport to be a membership list at all. It was akin to a petition signed by individual persons, and not members of any group.

27. Further, the oral evidence given on behalf of the supposed group made clear that this petition was touted round by a number of different individuals, and it could not be ascertained what had been said to all individuals who had signed.

28. Even leaving aside regulation 6(d), this approach simply does not satisfy a statutory scheme which prevents nominations being made otherwise than by particular types of entity.

29. Although an appeal is a de novo hearing, the Owner contends that the Council was simply wrong to be satisfied on the evidence, regardless of what names and address may have been present.

Local connection

30. Reg. 4 makes provision as to the requisite "local connection" of a nominating body. By reg. 4(1)(c) there must be at least 21 local members, who by reg. 4(3) are defined as being members who are registered, at an address in the local authority's area or in a neighbouring authority's area, as a local government elector in the register of local government electors. However, it must be noted that this requirement is wholly distinct from the requirement for the nominating body to be a "voluntary or community body" in the first place; it is a common symptom of countless local authority decisions merely to address the reg. 4 question without the prior question as to whether the body is a person which satisfies the prior statutory test.

31. The form indicates that the purported nomination was made by a group calling itself 'Save the Camp'.

32. It is for the nominating group to demonstrate that it is a voluntary or community body, and that it has a local connection in the terms required by the legislation. A document stating that it is the constitution of 'Save the Camp' was contained within the nomination.

33. As to "local connection", the Owner has not been provided with the names which were provided to the Council as evidence of this requirement being met, as stated above.

34. It is inherent in the nature of an unincorporated body that the body has no legal personality save for that of its members. Therefore unless the Owner is told who those members are, it simply does not know who has made the nomination.

35. Those acting for the Owner made repeated requests for full disclosure of the full nomination, in unredacted form, and for disclosure of any other material which the Council considered in deciding to list the Property as an ACV. However, the Council refused to provide the full version of the nomination. The Council unlawfully relied on secret evidence which all parties other than the Owner have had sight of.

36. It was never made expressly clear what rule of law the Council relied upon in refusing disclosure. However, the Council did express the view that the review process was not akin to a court or tribunal process. Given the hearing that took place, at which cross examination was even allowed, and given the right of appeal to the First-tier Tribunal, this assertion is patently wrong. Section 35 of the Data Protection Act 1998 makes clear that information such as that sought in this case is to be disclosed.

37. Although the Owner contends that each and every provision of s. 35 of that Act is satisfied, it is plainly the case (per s. 35(2)) that in the case of a nomination of land as an ACV, the disclosure of a list of names and/or addresses forming part of a nomination is necessary to establish, exercise and defend legal rights, namely those of the Owner.

38. The Owner seeks an order for full disclosure as part of these proceedings, and also reserves the right to make further submissions on this ground as and when any further information is disclosed.

39. The Owner also puts the Council on notice that it will be seeking a costs award against the Council if it refuses to provide full disclosure upon receipt of these Grounds. It is plainly unreasonable conduct to expect the Tribunal to proceed on the frightening and anti-democratic basis of secret evidence.

Regulation 6 and post-nomination evidence of eligibility

40. It is important to note that by reg. 6, a community nomination itself must contain certain information. This is a mandatory requirement. Without the matters referred to at reg. 6 being included, a nomination cannot be a "community nomination", and therefore no listing can occur in respect of it. Reg. 6(d) requires such a nomination to include "evidence that the nominator is eligible to make a community nomination". The absence of such evidence in the nomination cannot be cured later by a party providing further information in *review* or *appeal* proceedings. Either the original nomination was a community nomination or it was not. The Owner contends that it was not.

41. It is accepted that fresh evidence is admissible on certain questions at the review and appeal stages. For example, where the decision-maker is answering the question whether it is "realistic to think" that a certain use could happen in the future, fresh evidence which is relevant to what could happen in the future is admissible. Accordingly, the evidence of the Owner's planning permission is admissible.

42. However, it is incumbent on a nominator to satisfy a decision-maker that reg. 6(d) has been complied with. Fresh material that was not in the original nomination can never be relevant to that question. Evidence which is not relevant is never admissible. At the review and appeal stages there is no longer a "nomination" to be considered. The nomination has already been approved and it is that decision which is under challenge. Therefore the submission of further evidence as to eligibility of the nominating body (including as to the nature and characteristics of the entity making the nomination or its members) cannot be admissible at the review or appeal stages.

43. When the tribunal considers whether the nominating group was eligible under the legislation to make a "community nomination", it must therefore confine itself to what information was contained within the nomination as initially made. That information was not sufficient in this case.

Ground (ii)

44. It is not realistic to think that the Property will be used as a pub at any time in the next five years. No other 'community use' has been suggested which the Property might be used for, and any other such use is equally fanciful.

45. The Council, at the review stage, accepted that the probable use of the land was for housing. Furthermore, the Owner gave evidence that even if planning permission were not to be granted for such development, it would mothball the site for five years, or until a change of policy rendered development possible in planning terms. Despite this, the Council contended that a community use was realistic.

46. Just days later, and consistently with the proposition that housing was likely, planning permission was granted as set out above, for a scheme of residential development. It is the Owner's case that the grant of planning permission, coupled with the Owner's clear resolution and ability to build out the permitted scheme, prevents the Property from satisfying s. 88(2)(b). This is not land of community value; it is a development site on which 25 homes will soon exist.

47. In addition to the words of s. 88(2), Reg. 3 of the 2012 Regulations provides that the land specified in Schedule 1 is not of community value and therefore cannot be listed as a matter of law. Para 1 of Schedule 1 essentially prevents a "residence" together with "land connected with that residence" from being listed. The flats which are to be built at the Property will bring the Property within para 1 of Schedule and therefore out of s. 88.

48. The tribunal has thus far been quick to reject appeals in relation to the future use test under s. 88 where there is no planning decision in the owner's favour. However, in this

case, there is planning permission, and the Owner (a housebuilder) will build out the scheme. This case is therefore akin to the other appeal the tribunal has had to consider where planning permission existed, namely ***Spirit Pub Co. Ltd v Rushmoor Borough Council & Anor*** **[2013] UKFTT CR_2013_0003 (GRC) (22 November 2013)**. The appeal was allowed in that case, and should be allowed in this case.

49. It is submitted that even prior to the planning permission being granted, it was not realistic to think that any qualifying community use could exist at the Property in the next five years. Although such an argument is now academic, the reasons which support it are part of the background which should be considered, and make it entirely clear that s. 88(2)(b) is not satisfied in this case.

50. The letter of 16 June 2015 from McMullen makes it clear that a pub use at the Property is no longer viable. That company invested substantial sums in attempting to keep the pub alive, but ultimately without success. This is not a case in which a tenant with a poor record of managing pubs has been unable to make a success of the business. Neither is it a case in which it can be said that a tenant has been driven out of business by an aggressive pub owning company with unrealistically expensive beer tie requirements.

51. As can be seen from its website, McMullen is a Hertfordshire brewing company which runs over 130 pubs, restaurants and bars. It owned the freehold to the pub, and hence was not beholden to any beer ties or rent rises, and had run it for a century. It is hard to think of a more extreme case in terms of a pub becoming unviable. If this capable and respected local brewer was unable to make the pub viable, then it is not realistic to think that this is a viable pub.

52. The graph showing declining beer sales illustrates the problem. It is fanciful to suggest that a community group could create a markedly different situation without substantial investment or at all, given McMullen's access to supplies of beer at a price that includes no profit element for any third party.

Conclusion

53. For the reasons given above, the Property should be removed from the list of ACVs.

54. If there is no opposition to this appeal following the grant of planning permission, the Owner still contends that the tribunal should exercise its discretion such as to make a decision on each point raised in order to assist with the growing jurisprudence in this area.

8 March 2016