



**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
Community Right to Bid**

Tribunal Reference: CR/2014/0015

Appellant: Evenden Estates

Respondent: Brighton and Hove City Council

Second Respondent: Rose Hill Tavern Action Group

Judge: Peter Lane

DECISION NOTICE

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.

2. Evenden Estates ("Evenden") owns the Rose Hill Tavern, Rose Hill Terrace, Brighton. The Rose Hill Tavern had been a public house for 144 years, prior to its closure as a result of its sale by Enterprise Inns to Evenden in 2014. The Rose Hill Tavern Action Group, a nominating body for the purposes of the 2011 Act, successfully applied to the Council for the Rose Hill Tavern to be placed on the list of assets of community value. A review of that decision, at the instance of Evenden, took place in July 2014, when the Council decided to maintain the Rose Hill Tavern on the list. Evenden appealed that decision to the Tribunal.

3. The hearing of the appeal was held at Field House on 17 February 2015, when Evenden was represented by Mr Rory Clarke and the Council was represented

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by Mr Michael Lee. I also heard from Mr Dave Boyle, advisor to the Rose Hill Tavern Action Group. I am grateful to all three for their submissions.

4. 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;

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- (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 legislation.”

5. The case advanced by Mr Clarke was that it was not realistic to think there could be a non-ancillary use of the Rose Hill Tavern that would further the social well being or social interests of the local community within the next five years. The recent trading history of the Rose Hill Tavern had been extremely poor. Figures produced showed that sales of beer by volume for the year ending September 2013 were some 80% lower than those for 2004. Each year had shown a decrease on its predecessor (apart from a small increase in 2007 and one of 34% in 2011). Various tenants had tried and failed to make a go of the establishment. In its last phase, in 2013, Enterprise Inns had been supplying beer to the tenant at a free trade price. The rent had only been £520 per annum and the figure for wages (£9,100) was plainly not commercial. Even with all this assistance, a loss of £7,576 had occurred. If one factored-in a salary for the tenant, then the loss would have been in the region of £35-36,000. In effect, the pub had not been viable even on a “volunteer” basis analogous to that which might be expected if a community group took it over.

6. When the Rose Hill Tavern had been on the market, not a single offer had been received from a purchaser interested in running it as a pub. All three offers, including Evenden’s, were based on it being converted to residential use.

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7. The nominating body had been active in seeking community support, including trying to raise £350,000 + VAT needed to buy the property. There was no evidence that anything had come of this. Only a handful of people had turned up for the closing party for the Rose Hill Tavern. There were plenty of alternative pubs in the neighbourhood, including those which served the sort of community interests highlighted by the action group (such as Morris dancers). The Council's suggested alternative uses, such as a community café or community shop, had no public support and were not supported even by the action group. The Council's suggestion that demographic changes could increase the potential clientele was misconceived.

8. Mr Lee said that the Council's case was straightforward. Given that Evenden's application for planning permission for change of use had not been determined, the future of the Rose Hill Tavern was uncertain; and it could not be said that relevant community use within the next five years must be regarded as unrealistic. The Rose Hill Tavern had been a pub, plainly serving relevant community interests, until it ceased trading in May 2014. The case of Spirit Pub Co Ltd v Rushmore Borough Council and Friends of Tumbledown Dick (CR/2013/0003) relied upon by Evenden, was distinguishable on the basis that in that case McDonalds Restaurants had already obtained planning permission for change of use of the property.

9. The fact that other public house facilities exist in the area did not mean that the Rose Hill Tavern, re-opened as a pub, would not further the social well being or social interests of the local community. Other possible uses, within the building's permitted development rights, include its becoming a café or a shop. Compared with letting the property stand idle, those alternative possibilities could not be discounted as unrealistic.

10. On behalf of the action group, Mr Boyle said that he had considerable experience of working with those raising funds for community ventures. He had been encouraged by lottery operators to write a guide on how to run community enterprises. Mr Richard James, the Chair of the Rose Hill Tavern Action Group, had a background as a professional pub manager in both London and Brighton. Their joint experience was that pubs, such as the Rose Hill Tavern, could, in fact, be turned round. It was too early to say the Rose Hill Tavern was "an ex-pub". "Pub Cos" such as Enterprise Inns, had faced criticisms in Parliament over their relationship with their licensees, and were regarded as being more in the nature of property companies. A conversation with the last landlady of the Rose Hill Tavern suggested that she had been doing better than suggested by Evenden.

11. The Action Group's current efforts were being concentrated on the pending planning application for conversion of the Rose Hill Tavern. The point had not yet been reached when, for instance, it would be appropriate to register the group with the Financial Conduct Authority. Brighton and Hove had been identified as number four in the UK in terms of areas with the most ability to

carry out community projects, such as the Exeter Street Hall, where £160,000 had been raised in some six months. A cooperative had raised £55,000 in share capital, together with grants and donations, in order to secure the future of the Bevenden Public House. Mr Boyle was aware of various funds that existed in order to help organisations such as the Action Group, both as regards feasibility studies and grants.

12. Mr Boyle said that it was quite possible that a different group would emerge to bid for the Rose Hill Tavern or that, owing to the interest generated by a community bid, a third party would purchase the property as a pub. Mr Boyle was aware of such an outcome having occurred elsewhere.

13. The issue in the present appeal is whether the requirement in section 88(2)(b) of the 2011 Act is satisfied; namely, whether it is realistic to think that there is a time in the next five years where there could be a non-ancillary use of the Rose Hill Tavern that would further (whether or not in the same way as before) the social wellbeing or social interests of the local community. In reaching my conclusion I have had regard to all the documentary evidence into the submissions which have been made, both orally and in writing.

14. The recent trading history of the Rose Hill Tavern, whilst material, is plainly not determinative. If the pub industry had, as a general matter, been in robust health, then there would have been little point in Parliament placing public houses within the ambit of the 2011 Act. Of more significance in the present case is the submission on behalf of Evenden that the Rose Hill Tavern could not run successfully, even on what might be described as a quasi-voluntary basis. However, the evidence in that regard is both narrow in time (2013) and somewhat self-assertive. In any event, it comes at the end of a downward spiral in terms of the commercial operation of the Rose Hill Tavern and, as such, is not sufficiently indicative of what might be achieved by a genuine community-run organisation, operating the Rose Hill Tavern on a not-for-profit basis.

15. There is no legal requirement for the nominating body or the council to produce a worked out business plan. By the same token, however, it should not be assumed that the requirement of section 88(2)(b) will necessarily be met, merely by a Micawber-like hope that something will turn up. A fact-sensitive analysis is called for. 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.

16. With these points in mind, I have concluded that, in the present case, the requirements of section 88(2)(b) are met. The recent history of the Rose Hill Tavern, set against its long history as a pub, is not determinative, whether alone or in conjunction with other factors relied upon by Evenden. Whilst I consider that the Rose Hill Tavern Action Group would have preferred to be further along the road of raising financial support than appears to be the case, it is plain that, in

the shape of Mr Boyle and Mr James, the group has committed assistance from individuals with relevant experience. In particular, I pay regard to the expertise demonstrated by Mr Boyle. I find that the group's decision to concentrate on the planning aspects of its campaign to save the Rose Hill Tavern is not only understandable but demonstrates a degree of professionalism, which is likely to stand the group in good stead, should the opportunity arise to put together a bid for the Rose Hill Tavern.

17. I agree with Mr Lee that the current uncertain planning position is relevant in deciding whether the "realistic to think" test is satisfied at the present time. If planning permission should be refused for conversion to residential use, it is plainly not unrealistic to assume that Evenden would look to do something with the Rose Hill Tavern. At that point, putting it on the market - whether as a pub or for some other currently permitted use that would further social wellbeing/interests - is, I find, far from being fanciful.

18. I have had regard to the evidence and submissions the pending residential development of the Open Market (87 units) and the Co-op building (accommodation for 351 students) Evenden seeks to categorise these as insignificant, representing only a 2% increase of the population of the ward. However, it seems to me realistic to assume that the introduction of several hundred additional students could well have an impact on a public house, such as the Rose Hill Tavern, whether trading exclusively as such or in conjunction with hosting music events and the like.

19. This appeal is dismissed.

Judge Peter Lane

Chamber President

Dated 24 March 2015