



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

Appeal Number: CR/2019/0010 - V

**Heard via the Cloud Video Platform  
On 30<sup>th</sup> November 2020  
Written submissions: 1<sup>st</sup> to 15<sup>th</sup> December 2020**

Before

**UPPER TRIBUNAL JUDGE O'CONNOR  
(sitting as a judge of the First-tier Tribunal)**

Between

**NICHOLAS ROFFE**

Appellant

and

**WEST BERKSHIRE COUNCIL**

First Respondent

and

**WINTERBOURNE PARISH**

Second Respondent

**Representation:**

For the Appellant: In person  
For the First Respondent: Ms P Pattni, of Counsel  
For the Second Respondent: Ms J Hoblin – Chair

**DECISION AND REASONS**

## **Preamble**

1. The hearing was undertaken using the Cloud Video Platform. All parties were able to fully participate.

## **Introduction**

2. This appeal concerns a decision of West Berkshire Council (“the Council”) to include land owned by Rookery Taverns Limited (“the appellant” being the Company Secretary thereof), namely the premises known as The Winterbourne Arms, Winterbourne, Newbury, Berkshire (“The Winterbourne Arms”) on its List of Assets of Community Value under the Localism Act 2011 (“the 2011 Act”).
3. The 2011 Act 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. Broadly, the effect of listing is that an owner intending to sell the asset must give notice to the local authority. A Community 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. This period, known as “the moratorium”, allows 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.
4. Pursuant to regulation 11 of the Assets of Community Value (England) Regulations 2012 (“the 2012 Regulations”), Mr Roffe appeals the Council’s decision of 1 November 2019 to uphold the listing of The Winterbourne Arms. The application for The Winterbourne Arms to be included in the list of Assets of Community Value was made by the second respondent (“the Parish”).

## **Legislation**

5. Section 88 of the 2011 Act provides:

“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.” (emphasis added)

## The Asset

6. The Winterbourne Arms is situated in the centre of the village of Winterbourne. It is a detached property mainly of 19<sup>th</sup> century construction and has a bar, two dining areas and gardens to the front and side. The premises also has a parking area. It was

originally known as the New Inn and was part of the Aldermaston Brewery portfolio from 1835, or thereabouts. It has been known as The Winterbourne Arms since the 1980s.

7. In April 2017, The Winterbourne Arms ceased trading and, as far as I am told, it has not traded since. A planning application for change of use of the premises has been rejected by the local planning authority. The Winterbourne Arms has recently been placed for sale. The Council were notified of this on the 23 October 2020. On 24 November 2020, the Parish notified the Council that it wanted to be treated as a potential bidder.

### **The Appellant**

8. As previously indicated, the appellant is the Company Secretary of Rookery Taverns Limited. Rookery Taverns Limited acquired The Winterbourne Arms in or around August 2018.

### **The Appeal**

9. After two unsuccessful attempts to have The Winterbourne Arms listed as an Asset of Community Value, the Parish made a third such application, which resulted in the listing of The Winterbourne Arms as an Asset of Community Value on, or around, the 17 July 2019. The appellant sought a review of that decision, which the Council carried out after a hearing on 21 October 2019. The outcome of the review, dated 1 November 2019, was that The Winterbourne Arms should remain listed. The appellant appeals against that decision and thus the matter comes before me.

### **The Issues in the Appeal**

10. On matters of procedure, the appellant submits that:
  - (a) The application to nominate did not meet the necessary procedural requirements;
  - (b) There was a failure by the Council to properly notify Rookery Taverns Limited of the application for listing.
11. On matters of substance, it is clear that section 88(1) of the 2011 Act does not apply, because The Winterbourne Arms is closed. Consequently, the appeal falls for consideration under section 88(2) of that Act. The substantive issues for the Tribunal to determine are, therefore, whether:
  - (c) 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 interest of the local community, and;

- (d) 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.

## Discussion

12. In coming to my conclusions, I have considered the documentation contained within the core bundle, which is separated into five tabs and runs from page A1 to page E21. In addition, I have considered an email chain relating to The Winterbourne Arms having recently been placed for sale, documentation submitted by the appellant on 1 December 2020, a written response to the latter documents from both of the respondents, and the appellant's written reply to the aforementioned responses. The fact that I do not mention below particular aspects or features of the evidence or submissions does not mean that I have not taken such evidence or submissions into account when coming to my conclusions.
13. The burden of proof in satisfying the Tribunal that the decision under appeal is wrong, lies with the appellant. Where evidence is disputed, the relevant standard of proof is the balance of probabilities.

### Issues (a) & (b) – Procedural matters

14. It prudent to take these two procedural issues together. The first relates to the requirements of regulation 6 of the 2012 Regulations, which identifies certain features that a community nomination should contain. It is submitted by Mr Roffe that the nomination was defective.
15. The nomination was in the form of an email dated 13 May 2019. There can be no dispute that this email does not fulfil the requirements of regulation 6.
16. In considering this issue I apply the approach adopted by this Tribunal in paragraphs 80 to 82 of the decision in Hamna Wakaf Ltd v London Borough of Lambeth [2016] UKFTT CR/2015/0026, with which I fully concur: *“it would be contrary to Parliaments purpose to ...[require] strict adherence to each of the obligations set out in regulation 6...a local authority has a discretion to waive a requirement in regulation 6, where the authority reasonably concludes that no substantial prejudice would be caused...the process is designed to produce a robust conclusion on the merits regarding matters of substance; in particular whether section 88(1) or (2) is satisfied.”*
17. It is clear that the Council waived the requirements of regulation 6. Looking at the circumstances as a whole I can see no material prejudice to Mr Roffe or Rookery Taverns Ltd as a consequence of the failure of the nomination of 13 May 2019 to comply with the requirements of regulation 6. The nomination of 13 May must, it seems to me, be put in its proper context. That context includes the fact that there had been a number of previous nominations from the same body which did include information

of the type required by regulation 6. There had clearly been some engagement by the owner with an earlier listing application. In addition, as identified below, Mr Roffe played a full part in the review process. The part he played cannot be said to have been hampered in any way by the failure of the nomination to meet all of the requirements of regulation 6.

18. As to the second issue, it is accepted by the Council that it failed to comply with the requirements of regulation 8 of the 2012 Regulations, in that it failed to notify the owner of The Winterbourne Arms that it was considering listing the property. However, the legislation does not envisage the owner playing any substantive part in the initial determination of the nomination. The owner of the land has a right to a review, which in the instant case was taken up. Indeed, Mr Roffe fully participated in the review process. I can see no reason why, on the facts of this particular case, procedural fairness should have dictated that the owner was entitled to play a part in the process prior to listing and I can see no prejudice caused to the owner (Rookery Taverns Ltd) on not being notified of the application of 13 May 2019 at the juncture required by regulation 8.

Issue (c) - Section 88(2)(a) of the Localism Act 2011

19. In my conclusion, the requirements of section 88(2)(a) of the 2011 Act are satisfied.
20. In summary, the appellant submits that insofar as events took place at The Winterbourne Arms they were not 'community events' and that they took place very infrequently. Most 'events' took place more than 10 years ago and did not, therefore, take place in the recent past. It is further asserted that the premises traded as a restaurant for the past 30 years or more and that there had only been 'ancillary' community use of the pub in recent times. In his Response to the Council's submissions of 3 December 2020, Mr Roffe stated that: *"the primary use of the building was as a restaurant, any use by local residents was a usual commercial activity not community use or ancillary use...[the events] did not take place very often but most could not be described as community use."*
21. In support of his submission as to the type and frequency of events that took place at The Winterbourne Arms, Mr Roffe has produced a document titled: *"Activities at the Winterbourne Arms"*. This is a typed note of types of events - with their corresponding dates - that took place between 2008 to 2015. It is said to represent diary entries of events that took place at Winterbourne Arms in those years. I observe that the type of events listed therein include village meetings, quiz nights, Halloween events, a Remembrance Sunday event, Flood Committee meetings, village Christmas drinks and Hennessey Gold Cup events. I further observe that some, although a minority, of the entries specifically identify that an event did not take place in The Winterbourne Arms itself i.e. the Queens Diamond Jubilee and a Hog Roast.
22. The respondents assert that it cannot be established that this list is complete because the appellant has not produced copies of the diaries. It is further said that, in any event, not all events or all use by the community would have been diarised.

23. I accept that the events listed in the document referred to in paragraph 21 above took place at The Winterbourne Arms on the dates identified between 2008 and 2015, save for where the list specifically states that the event did not take place at The Winterbourne Arms. I further conclude that these events can, in almost their entirety, be described as events which are likely to have furthered the social well-being or interest of the local community. The fact that they were commercial events, on Mr Roffe's submission, does not detract from this conclusion. The events are likely to have brought at least parts of the local community together, which I find furthers the social wellbeing or interest of the local community. The frequency of the events described in the document produced by Mr Roffe cannot be said to have been so occasional so as to be irrelevant to my considerations.
24. I now turn to consider whether the aforementioned events took place in the recent past. The term "*in the recent past*" (found in section 88(2)(a)) is not defined in the 2011 Act or in the Regulations. In setting out the 'future condition' (section 88(2)(b)), Parliament chose to provide for a definite period of five years, whereas in legislating the 'past condition' (section 88(2)(a)) Parliament was deliberately imprecise, choosing to restrict the operation of that provision to relevant events falling within the "*the recent past*". It is not for the Tribunal to bring precision to the 'past condition' when Parliament has deliberately chosen to use imprecise language.
25. What constitutes the recent past is a flexible concept and must depend upon all the circumstances of a particular case. In this appeal, the context includes the fact that The Winterbourne Arms had, until its closure in 2017, been operating as a public house or restaurant and bar, either exclusively or in part, for over 150 years in a relatively small community area. Seen in the context of the particular circumstances of this case, I conclude that the events described in paragraph 21 above did occur "*in the recent past*".
26. Moving on, in his letter of 27 February 2019 Mr Roffe asserts that "*Any use of the land or building to further the social well-being or interests of the community was ancillary to its primary use as a restaurant*". This submission misunderstands the requirements of section 88(2)a. The question to be answered is whether the actual use of the land (i.e. as a public house/bar and restaurant) furthered the social wellbeing or interests of the local community. I have found that it did.
27. If it is being said by Mr Roffe that the only 'actual use' of the land or premises that should be considered is its use as a restaurant, because the use of the land or premises as a public house or bar was ancillary, then I reject that contention. The evidence simply does not demonstrate this to the required standard, or at all. The actual use of the premises was as a hospitality venue. This included mixed use as a public house/bar and restaurant. This conclusion is supported to some extent by Mr Roffe's own evidence at B22 of the bundle, wherein he describes The Winterbourne Arms as having traded "*as a gastropub*". As I have already concluded, this 'mixed' use of the venue furthered the social wellbeing or interest of the local community. Even if I am wrong in this, and the bar area is ancillary to the restaurant, it still remains the case that the events took place at the premises and such events furthered the social wellbeing or interest of the local community.

28. All though not now strictly necessary for the determination of this appeal, I observe that my conclusions above are further supported by the evidence produced on behalf of the second respondent. This evidence recalls events at The Winterbourne Arms of the types identified in paragraph 21 above. It further references the premises being the start point or end point or meeting place for social aspects, evidence I accept as likely to be true. It is not only 'community events' which further the social wellbeing or interest of the local community, use of the premises as a meeting place generally for community members is also capable of furthering such social wellbeing or interest. In this case I find that the Winterbourne Arms was such a meeting place for the local community, and that this also furthered the social wellbeing or interest of that community.
29. For all these reasons, I conclude that requirements of section 88(2)(a) of the 2011 Act are met.

Issue (d): Section 88(2)(b) of the Localism Act 2011

30. The question posed by Parliament is whether it is realistic to think that there could be within the next five years non-ancillary use of the building that would further, whether or not in the same way as before, the social wellbeing or social interest of the local community. I am not required to decide what outcome or what use of the building is the most likely, or whether one outcome or use of the building is more likely than another. All I am required to consider is whether one realistic non-ancillary use of the building within the next five years would further the social wellbeing or social interests of the local community.
31. In his submissions, Mr Roffe points to the fact that the property was previously marketed for over nine months and that the local community did not make a bid. He further identifies that Winterbourne parish has another licensed premises within its boundary, six more within a two mile radius and eleven within a three mile radius.
32. There is a dearth of evidence before me about the future of the property. It appears from the documents that I do have that both the appellant (in person) and the Council have undertaken viability assessments. These have not been produced to the Tribunal, but I draw from references made by the respective parties in the documents that the reports reached contradictory positions. I can say little more on this topic in the absence of having had sight of the reports themselves. What I do find is that it has not been demonstrated as being likely that the trading of The Winterbourne Arms in the next five years as a public house or a bar and restaurant is economically unviable. Likewise, the contrary position has also not been demonstrated. In any event, the fact that Mr Roffe has concluded that the Winterbourne Arms is not viable does not, even if accurate, rule out a finding that it is realistic to think that within the next five years the premises will be used in a way which furthers the social wellbeing or social interests of the local community. I observe in particular that it is not said that Mr Roffe's viability assessment included a consideration of the possibility of The Winterbourne Arms being a community run public house/gastropub, or other community run venture.



33. Moving on, whilst regard must be had to the fact that the local community group have not made a bid in the past, I note the terms of the evidence before me to the effect that the Parish continue to attempt to secure funding to purchase the Winterbourne Arms. It is not for me to consider whether a bid from the local community group is likely. Nevertheless, given the information before me which I accept as true, I find that the purchase or lease of The Winterbourne Arms by the local community group remains at least a realistic possibility.
34. I further observe that the documents before me disclose that the appellant (or Rookery Taverns Limited) made an unsuccessful planning application for a change of use of The Winterbourne Arms. Once again, the documents in relation to this are not before me. It is, of course, possible that Rookery Taverns Limited will make a fresh application for planning permission (or be successful on appeal if that appeal has yet to be determined) to put The Winterbourne Arms to a use which will not likely further the social wellbeing or social interest of the local community, and that such permission will be granted. However, even if this were a likely event, which I find it is not given the decisions thus far made and the limited other evidence on this issue before me, this of itself does not preclude the possibility that the premises will be used within the next five years for a non-ancillary use which does further the social wellbeing or social interests of the local community.
35. In summary, I accept that the future of The Winterbourne Arms is fraught with uncertainty, which is only fuelled by the current uncertain trading conditions for such establishments. It is impossible to identify what the likely future of the premises might be. However, as already indicated, the task for me is not to determine the likely future use of The Winterbourne Arms, but to consider and assess whether one realistic non-ancillary use of the property would lead to the furtherance of the social wellbeing or social interests of the local community.
36. In my conclusion, it is realistic to think that the premises will trade as a public house or gastropub within the next five years. I take account, when coming to this conclusion, of the fact that the property is currently 'on the market', that no offers that the owners deem appropriate have thus far been made for the property and that Mr Roffe asserts that the property itself requires substantial investment. There is some dispute as to whether the property is currently being marketed at a realistic value, but as Mr Roffe states the value of the property is determined by "*how much someone will pay and how much we will accept*". I observe that there was no exploration at the hearing of whether Rookery Taverns Limited would countenance selling at a lower price or leasing at a reduced rent, if the only alternative was for the premises to remain closed. Nor was there exploration at the hearing of proposals for the premises if it were not sold. All of this reinforces my view that one realistic possibility is that The Winterbourne Arms will reopen as a public house or gastropub in the next five years, whether this be under the tenure of Rookery Taverns Limited or otherwise. If it does so, I find that it is realistic to think that it will resume its position as a social meeting place or events space for local residents, as was previously the case. The fact that there are alternative premises within, or just outside, the parish where such activities can be carried out,

does not render it unrealistic to think that they would not be carried out in The Winterbourne Arms if it were to be reopened.

37. I, therefore, conclude that it is realistic to think that there is a time in the next five years when there will be non-ancillary use of The Winterbourne Arms that would further (whether or not in the same way as before) the social wellbeing or social interests of the local community. As such, the requirements of section 88(2)(b) of the 2011 Act are met.

### **Decision**

The appeal is dismissed.

Signed

*Mark O'Connor*

Upper Tribunal Judge O'Connor