IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Appeal No. UA-2020-001632
(formerly MISC/855/2020)

On appeal from:
Tribunal: **First tier Tribunal (General Regulatory Chamber)**
Tribunal Case No: **CR/2019/0004**
Tribunal Venue: **N/A decided on papers on 24 January 2020**
Hearing Date: **N/A**
Decision Date: **28 January 2020**

Between:

MR ADRIAN RUSSELL
(FOR THE ROSE AND CROWN PUB COMMUNITY GROUP)

Appellant

- v –

BRACKNELL FOREST BOROUGH COUNCIL

1st Respondent

&

PUNCH PARTNERSHIPS (PML) LTD

2nd Respondent

Before: Upper Tribunal Judge Jones

Hearing date: 28 February 2022
Decision date: 9 March 2022

Representation:
Appellant: Mr Russell and Ms Valerie Goodwin-Higson appeared in person
Respondents: Neither Respondent appeared nor was represented

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal made on 28 January 2020 under number CR/2019/0004 was made in error of law. Under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and remake it. I dismiss the Second Respondent's appeal against the decision of the First Respondent dated 18 April 2019 listing the building and land constituting the Rose and Crown Pub, Sandhurst, as an asset of community value for the purposes of section 89(1) of the Localism Act 2011 and Regulation 2 of the Assets of Community Value (England) Regulations 2012 ("the Regulations"). I confirm the decision of the First Respondent to include the Pub in the list of assets of community value.

REASONS FOR DECISION

Introduction

1. The Appellant, as chairman of the Rose and Crown Pub Community Group ('the Group'), appeals the decision of the First-tier Tribunal (General Regulatory Chamber) ("the FTT") dated 28 January 2020. By that decision the FTT allowed an appeal by Punch Partnerships (PML) Ltd ('PML' or 'the Second Respondent') from the decision of Bracknell Forest Borough Council ('the Council' or 'the First Respondent') dated 18 April 2019.

2. The Council's decision was made following a review of its initial decision dated 19 February 2019. The review decision was to list the building and land constituting the Rose and Crown Pub, Sandhurst ('the Pub') as an asset of community value for the purposes of section 89(1) of the Localism Act 2011 ("the Act") and Regulation 2 of the Assets of Community Value (England) Regulations 2012 ("the Regulations").

3. The FTT, with the consent of the parties, made its appeal decision on the papers without a hearing on 24 January 2020. It provided a decision and reasons dated 28 January 2020. It allowed PML's appeal against the Council's decision and removed the Pub from the list of assets of community value. The FTT refused permission to appeal to the Upper Tribunal on 11 March 2020.

4. The FTT allowed the appeal for two reasons. First, it decided that the Group was not a community group for the purpose of Regulation 5(1)(c) of the Regulations such that it could not make a valid nomination for the Pub to be listed as an asset of community value (see [14]-[28] of the decision). Second,

the FTT decided that the requirement in section 88(1)(b) of the Localism Act 2011 was not satisfied. On the basis of the evidence before it, the FTT found that it is not realistic to think that there could continue to be non-ancillary use of the Pub which would further the social wellbeing or social interests of the local community (see [29]-[30] of the decision).

5. The Appellant's grounds of appeal were enclosed with an application for permission to appeal to the Upper Tribunal and Notice of Appeal (form UT1) dated 15 April 2020. The appeal was prepared and presented by the Appellant as chairman and representative of the Group.

6. On 27 July 2020 Judge Levenson granted permission to appeal to the Upper Tribunal on two grounds, namely whether the FTT erred in law in:
a) deciding that the Group of which the Appellant is chairman, is not an 'unincorporated body' by imposing a requirement of unanimity over its motive, policy and purpose; and
b) concluding that the test in section 88(1)(b) was not satisfied because not all of the members of the Group sought to purchase the Pub.

The parties

7. Valerie Goodwin-Higson, a member of the Group, was the party to the original appeal before the FTT as the Second Respondent. She was the nominated representative of the Group at that stage. On the appeal to the Upper Tribunal Mr Adrian Russell, the chairman of the Group, replaced her as the named Appellant acting on behalf of the Group. To the extent required, I give permission under Rule 9 of the Tribunal Procedure (Upper Tribunal) Rules 2008 to substitute Mr Russell for Ms Goodwin-Higson as a party to the appeal to the Upper Tribunal. Both attended the hearing before the Upper Tribunal and represented the Group making oral submissions further to their written evidence and submissions.

The hearing of the appeal before the UT

8. The hearing of the appeal before the Upper Tribunal took place in person at Field House, London on 28 February 2022. Both the First and Second Respondents were notified of the hearing and, while not required, were invited to attend. They chose not to attend nor participate in the hearing nor lodge any written submissions opposing the appeal.

9. Helen Brewster, the legal services manager on behalf of the First Respondent Council, sent emails dated 13 August, 24 August, 25 October 16 November 2021 confirming it would not attend and did not wish to make any representations save that an application for costs be made in the event that the nomination was relisted. The Council was obliged to pay the sum of £4,000 to Freeth solicitors on behalf of PML pursuant to the compensation provisions contained within Regulation 14 of the Assets of Community Value (England) Regulations 2012 ('the Regulations') arising from PML's successful appeal to the FTT. The Council wished to recoup this sum.

10. The Second Respondent, PML, made no reply to any of the correspondence and notifications sent by the Upper Tribunal regarding the appeal.

The Background

11. Punch Partnerships (PML) Limited, the Second Respondent, is the owner of the Rose and Crown Public House, 108, High Street, Sandhurst, Berkshire, GU47 8HA ("the Pub").

12. The Pub was nominated as an Asset of Community Value ("ACV") under the Community Right to Bid provisions of the Localism Act by nomination made by the Rose and Crown Supporters ('The Supporters'). The nomination form was dated 23 September 2018. The Supporters thereafter became The Rose and Crown Pub Community Group ("the Group").

13. On 19 February 2019 the Council listed that part of the property and land on which the Pub was located as an ACV. Part of the rear of the property was not included in the listing as it had been developed. PML had sought and was granted planning permission for the erection of two detached dwellings with associated access, parking, landscaping and bin/cycle storage following demolition of existing outbuildings to the rear of the Pub.

14. PML requested a review of the decision on 25 February 2019.

15. On 18 April 2019 the Council upheld the decision to list the Pub as an ACV.

16. PML lodged an appeal to the FTT dated 15 May 2019. The Council was the First Respondent to the FTT appeal and Ms Valerie Goodwin-Higson was the Second Respondent, on behalf of the Group.

The FTT's decision

17. The FTT began by deciding the first issue it identified, based on PML's submissions in support of its appeal, namely whether the Group had made a valid nomination for the purposes of section 89 of the Act. This required the FTT to decide whether the Group was a community body for the purposes of Regulation 5(1)(c) of the Regulations. The FTT stated at [14]-[28] of the decision:

> 14. The [Council] accepted the nomination on the basis that the [Group] was a 'voluntary or community body' being an unincorporated body whose members include at least 21 individuals and which does not distribute any surplus it makes to its members.
>
> 15. In considering whether the nomination was valid, I considered whether it would be just and fair to adjourn the case and invite [Ms Valerie Goodwin-Higson] to submit a submission on the question of whether the Group is a 'community body' as defined. I decided that it is not proportionate to do so. This appeal has been outstanding since May 2019, the parties have had ample opportunity to prepare and present their cases and the validity of the nomination was raised by [PML] in the Grounds of Appeal thereby putting the [Council] and [Group] on notice. The [Group] has had ample opportunity to make representations on this point and they have chosen not to do so.
>
> 16.I considered that it would not be proportionate to adjourn to obtain further information for the additional reasons set out in paragraph 29 below.
> ….
> 18.In relation to the issue of validity of the nomination, Mr Bull, Assistant Borough Solicitor and Deputy Monitoring Officer, on behalf of the First Respondent, states (page 214) that at the time he made the decision he believed of the large number of supporters that there were a significant among their number to be considering a community bid and that the application was to preserve a community asset. Since making the decision, however, he had received unsolicited approaches from Mrs Goodwin-Higson and Mrs Fenner which led him to believe that the aim of the bid may have been to frustrate the planning application without an intention to make a community bid to purchase the property. Mr Bull stated that he had been told by Mrs Fenner that there were different views and aims within the Group and that she wanted to prevent the planning application and it was never their intention to buy the property. Mr Bull stated that this been clear to him he may have made a different determination.
>
> 19.Mr Russell, Chairman of The Rose and Crown Pub Community Group, in his letter dated 9 January 2019 (page 355 to 357) states that the Group was formed because "the Rose & Crown pub desperately needs the protection of an ACV." He states that of paramount importance to the local residents is to stop the owners from "impairing the pub's ability to trade" and to keep the pub beer garden as well as the car park. He states: "obliteration of that view and any reduction in the beer garden size will hurt the pub and, in turn, the community – and the current planning application will effectively destroy the beer garden."

20. Mrs Goodwin-Higson, in her letter of 7 January 2019 states that "the owners of the pub have applied for planning permission for 2 houses in the back garden, with road access through the existing car park. If permission were granted it could pave the way for the demise and closure of the pub."

…

23.The Rose and Crown Pub Community Group Constitution (pages 26 to 28) was never adopted.

24. I find that the Group was made up of at least 21 local members who were 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 kept in accordance with the provisions of the Representation of the People Acts.

25. On the evidence before me I am not persuaded that the Group is an 'unincorporated body' within the meaning of regulation 5(1)(c).

26. In my view the members of an unincorporated body are governed by a contract between them which may be expressed or implied and may or may not be set out in writing. Accordingly, it is not fatal, in my view, that the Constitution was not adopted. However, I cannot find that there was a sufficient level of understanding and agreement between the relevant individuals as to the basis on which they were associated with each other that they could properly be described as a 'body'.

27. The Concise Oxford Dictionary defines a 'body' as 'an organised group of people with a common function.' The organisation and function can be informal but there must be a coming together of individuals for a matter of common interest. It has to be more that a collection of individuals who have not considered properly the basis on which they have joined in the association with each other. I find that there was not one common purpose in that some of the members of the Group, and, in particular, the three more prominent members, hoped to prevent the planning application. It is likely that the preservation of the pub and the putting forward of a community bid was not the real intention of the nomination of at least the most prominent members of the Group. I am not satisfied on the basis of the evidence put before me that there was the necessary mutuality of bond and shared purpose between the members of the Group for it to be properly described as a body.

28.On the evidence before me I am not satisfied that the Group is an unincorporated body which does not distribute any surplus it makes to its members. No information has been provided about what funds would be available to the Group and how those funds would be used or distributed. The Membership Application form included the following question:

"At some time in the future, there may be an opportunity for the community to buy the pub. Please indicate if you would be interested in offering financial support." Over 50% of the members indicated that they would be so willing. It is not clear how any funds collected would be used or distributed.

18. As can be seen from [27] & [28], the FTT, assuming the burden of proof was upon the Group, decided that the Group had not established that it was an

unincorporated body and had not established that it would not distribute surplus funds it made to its members.

19. The FTT allowed PML's appeal on a further basis. The FTT decided that the requirement in section 88(1)(b) of the Localism Act was not satisfied on the basis of the evidence before it. The FTT found that it is not realistic to think that there could continue to be non-ancillary use of the building or other land which will further the social wellbeing or social interests of the local community, see [29]-[30]:

> 29. With reference to paragraph 16, even if further evidence were submitted sufficient to satisfy me that the nomination was valid, I would have found that the provisions of section 88(1)(b) of the Act were not satisfied.
>
> 30. On the basis of the evidence before me I would have found that it is not realistic to think that there can continue to be non-ancillary use of the building or other land which will further the social wellbeing or social interests of the local community. The case law on what is "realistic" suggests that the threshold needed to satisfy this test is low. It would not be necessary for the Group to produce a commercial or financial analysis. However, in view of the statements by Mrs Fenner to Mr Bull [of the Council] that there were different views and aims within the Group and that it was never her intention or the intention of, at least, some of the other members of the Group to seek to purchase the Property the "realistic to think" test could not be satisfied. Mrs Fenner is the Secretary of the Group and in that position of responsibility it is likely that she speaks with authority and knowledge. I attach weight to her statement to Mr Bull that her intention as Secretary of the Group and the intention of other members of the Group was never to organise or propose a bid for the Property.

The Law

The Localism Act 2011

20. The FTT correctly described the effect of listing assets of community value under the Localism Act 2011 ('the Act') at [3] of its decision:

> [3]. The 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. 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 a local authority to pay compensation to an owner who loses money as a consequence of the asset being listed.

21. The moratorium is provided by section 95 of the Act:

95 Moratorium
(1) A person who is an owner of land included in a local authority's list of assets of community value must not enter into a relevant disposal of the land unless each of conditions A to C is met.
(2) Condition A is that that particular person has notified the local authority in writing of that person's wish to enter into a relevant disposal of the land.
(3) Condition B is that either—
(a)the interim moratorium period has ended without the local authority having received during that period, from any community interest group, a written request (however expressed) for the group to be treated as a potential bidder in relation to the land, or
(b)the full moratorium period has ended.
(4) Condition C is that the protected period has not ended.
…
(6) In subsections (3) and (4)—
"community interest group" means a person specified, or of a description specified, in regulations made by the appropriate authority,
"the full moratorium period", in relation to a relevant disposal, means the six months beginning with the date on which the local authority receives notification under subsection (2) in relation to the disposal,
"the interim moratorium period", in relation to a relevant disposal, means the six weeks beginning with the date on which the local authority receives notification under subsection (2) in relation to the disposal, and
"the protected period", in relation to a relevant disposal, means the eighteen months beginning with the date on which the local authority receives notification under subsection (2) in relation to the disposal.

22. Sections 87-90 of the Act provide for the nomination and listing of assets of community value, as relevant to this appeal:

87 List of assets of community value

(1) A local authority must maintain a list of land in its area that is land of community value.

(2) The list maintained under subsection (1) by a local authority is to be known as its list of assets of community value.

(3) Where land is included in a local authority's list of assets of community value, the entry for that land is to be removed from the list with effect from the end of the period of 5 years beginning with the date of that entry (unless the entry has been removed with effect from some earlier time in accordance with provision in regulations under subsection (5)).

…

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 nonancillary 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.
…

(6) In this section—

…

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

(a) cultural interests;
(b) recreational interests;
(c) sporting interests;
…

89 - Procedure for including land in list
(1) Land in a local authority's area which is of community value may be included by a local authority in its list of assets of community value only—
(a)in response to a community nomination, or
(b)where permitted by regulations made by the appropriate authority.

(2) For the purposes of this Chapter "community nomination", in relation to a local authority, means a nomination which—
(a)nominates land in the local authority's area for inclusion in the local authority's list of assets of community value, and
(b)is made—
…
(iii) by a person that is a voluntary or community body with a local connection…

…

90 Procedure on community nominations

(1) This section applies if a local authority receives a community nomination.

(2) The authority must consider the nomination.

(3) The authority must accept the nomination if the land nominated—

(a) is in the authority's area, and

(b) is of community value.

(4) If the authority is required by subsection (3) to accept the nomination, the authority must cause the land to be included in the authority's list of assets of community value.

…

23. Once notified pursuant to section 91 of the Act, the owner of the land may request a review by the local authority of the decision to include the land in the list pursuant to section 92. If the review does not lead to removal of the land, the owner may then pursue an appeal to the FTT pursuant to the Regulations as set out below.

The Regulations

24. Regulations 2, 4, 5, 6, 7, 10 & 11 of the Assets of Community Value (England) Regulations 2012 ("the Regulations") relevantly provide for the listing of assets of community value, the interpretation and application of sections 88-95 of the Localism Act 2011 and appeals to the FTT against listing decisions:

List of assets of community value
2. A local authority must as soon as practicable after receiving information that enables it to do so make the following amendments to an entry on the list—

(a) add to the entry—
(i) the information that, during the six weeks beginning with the date of receipt of a notice under section 95(2) of the Act in respect of any of the land to which the entry applies, it has received a request from a community interest group with a local connection to be treated as a potential bidder in relation to land to which the notice relates;
(ii) the name of that community interest group; and
(iii) that restrictions on entering into a relevant disposal of the land to which the notice relates continue to apply during the six months beginning with the date the notice was received, but at the end of that six months will then not apply for a further twelve months;

(b) amend or, as the case may be, remove the entry so as to exclude any of the land that has since it was included in the list been the subject of a relevant disposal other than one referred to in section 95(5) of the Act; and

(c) remove the entry if—
(i) an appeal against listing is successful, or
(ii) the authority for any reason no longer considers the land to be land of community value.

…
Definition of local connection
4.(1) For the purposes of these regulations and section 89(2)(b)(iii) of the Act, a body other than a parish council has a local connection with land in a local authority's area if—
(a)the body's activities are wholly or partly concerned—
(i) with the local authority's area, or

(ii) with a neighbouring authority's area;

(b)in the case of a body within regulation 5(1)(c), (e) or (f), any surplus it makes is wholly or partly applied—
(i) for the benefit of the local authority's area, or
(ii) for the benefit of a neighbouring authority's area; and

(c) in the case of a body within regulation 5(1)(c) it has at least 21 local members.
…
(3) In paragraph (1)(c), "local member" means a member who is 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 kept in accordance with the provisions of the Representation of the People Acts.

Voluntary or community bodies
5.(1) For the purposes of section 89(2)(b)(iii) of the Act, but subject to paragraph (2), "a voluntary or community body" means—
…
(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;

…

Contents of community nominations
6.A community nomination must include the following matters—

(a) a description of the nominated land including its proposed boundaries;
(b) …
(c) the nominator's reasons for thinking that the responsible authority should conclude that the land is of community value; and
(d) evidence that the nominator is eligible to make a community nomination.

Procedure when considering whether to list land
7.The responsible authority must decide whether land nominated by a community nomination should be included in the list within eight weeks of receiving the nomination.
…
Procedure to be followed for listing review
10. Where an owner of listed land asks the responsible authority to carry out a listing review, the review is to be carried out in accordance with the procedure set out in Schedule 2.

Appeal against listing review decision
11.(1) An owner of listed land may appeal to the First-Tier Tribunal against the local authority's decision on a listing review in respect of the land.
(2) The owner referred to in paragraph (1) may be either the owner who requested the review, or a subsequent owner of part or the whole of the land.

25. Most relevantly for the purposes of this appeal, a local authority can only consider whether to include land in its area in its list of assets of community value in response to a 'community nomination' or where permitted by

Regulations. A 'community nomination' can be made by a number of bodies as defined in regulation 5 of the Regulations so long as they have a 'local connection' as defined in regulation 4. These bodies include a 'voluntary or community body' as defined by Regulation 5(1)(c) which is underlined above.

The grounds of appeal for which permission was granted & Appellant's submissions

26. As set out above, permission to appeal was granted by the Upper Tribunal on two grounds of appeal, namely whether the FTT erred in law in:

a) deciding that the Group of which the Appellant is chairman, is not an 'unincorporated body' by imposing a requirement of unanimity over its motive, policy and purpose ('Ground 1'); and
b) concluding that the test in section 88(1)(b) was not satisfied because not all of the members of the Group sought to purchase the Pub ('Ground 2').

27. The Appellant had raised different grounds of appeal in the Notice of Appeal submitted to the FTT dated 27 February 2020 and to the Upper Tribunal dated 15 April 2020.

28. In summary, the Appellant submitted on behalf of the Group that the FTT erred in making its decision because it had no evidence to support its conclusions on the two issues it decided, it failed to take into account relevant evidence in a number of important matters, gave insufficient reasons for its conclusions on each.

29. In particular it was submitted that the FTT tailed to take into account relevant evidence in finding at [27] that the purpose or the intention of the Group was only to prevent the planning application by PML and putting forward a community bid was not the real intention of the Group nomination of the Pub to be included in the list of assets of community value. Further, the Appellant submitted that the FTT erred in its finding at [28] that 'no information has been provided about what funds would be available to the group and how those funds would be used or distributed.'

30. The Appellant also submitted that the FTT failed to provide procedural fairness and breached natural justice when proceeding on the papers, without an oral hearing. In particular he submitted the FTT failed to give the Group the opportunity to provide written and oral evidence rebutting the evidence on which

the FTT relied to make findings at [18]-[20] of the decision that were mixed purposes of the prominent members of the Group and their primary purpose in nominating the Pub was not to list it as an ACV but to block a planning permission application.

31. I permitted the Appellant and Ms Valerie Goodwin-Higson to make oral submissions on each of these grounds during the hearing. This was on the basis, that were I to find that the FTT erred in law, I would have to decide whether to remit or re-make the FTT's decision. The submissions were relevant to the evidence before the FTT and whether the weight of such was sufficient to satisfy the statutory conditions for the listing of the Pub as an asset of Community Value.

32. I address these grounds of appeal and submissions below.

Discussion and analysis

Ground 1 – did the FTT err in deciding the Group was not an 'unincorporated body' by imposing a requirement of unanimity over its motive, policy and purpose

33. The FTT decided that the Group was not a community group for the purpose of Regulation 5(1)(c) of the Regulations such that it could not make a valid nomination for the Pub to be listed as an asset of community value (see [14]-[28] of the decision set out above).

34. Section 89(2)(b)(iii) of the Localism Act 2011 provides that a '"community nomination", in relation to a local authority, means a nomination which—

(a) nominates land in the local authority's area for inclusion in the local authority's list of assets of community value, and

(b) is made—

(iii) by a person that is a voluntary or community body with a local connection…'

35. Regulation 5(1)(c) of the Regulations defines 'a voluntary or community body' and Regulation 4 defines 'a local connection'. There was no dispute in this case that Regulation 4(1)(a)(i) was satisfied - the Group had a local connection with land (the Pub) in the local authority's area as the body's activities were wholly or partly concerned with the local authority's area.

36. Regulation 5(1)(c) provides the definition of a 'voluntary or community body' for the purposes of s.89(2)(b)(iii) as: (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.

37. In compliance with Regulations 4(1)(c) and 5(1)(c)(i) the Group had at least 21 local members – that was not in dispute in this appeal.

38. However, the FTT decided that the Group was not an unincorporated body.

Regulation 5(1)(c) – an unincorporated body

39. The definition of an 'unincorporated body' in Regulation 5(1)(c) is not provided in the Act nor Regulations but is a matter of common law. Lawton LJ's judgment in *Conservative and Unionist Central Office v Burrell (Inspector of Taxes)* [1982] 1 WLR 522, considering the meaning of an 'unincorporated association', is a useful starting point:

> 'I infer that by "unincorporated association" in this context Parliament meant 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 the members of an unincorporated association has to be contractual.'

40. This is consistent with the FTT's decision at [26]-[27] when providing a definition of 'an unincorporated body':

> '26. In my view the members of an unincorporated body are governed by a contract between them which may be expressed or implied and may or may not be set out in writing…
> …
> 27. The Concise Oxford Dictionary defines a' body' as 'an organised group of people with a common function. The organisation and function can be informal but there must be a coming together of individuals for a matter of common interest. It has to be more that a collection of individuals who have not considered properly the basis on which they have joined in the association with each other…'

41. Therefore I am not satisfied that the FTT erred in law at [27] in deciding that in order to constitute 'an unincorporated body' for the purposes Regulation 5(1)(c),

a group of individuals must be associated by means of being identified as belonging to the same body and that the individuals must share at least one common interest, activity or purpose in belonging to that body.

42. Further, there are likely, though not required, to be express oral or written rules as to how membership is identified and how the body is to operate – how its common interest, activity or purpose is to be exercised or achieved. The rules themselves, may place further restrictions requiring specific types of activities, interests of purposes to be shared and performed and the level of agreement (including unanimity) between members of the body.

43. In PML's submissions to the FTT, it submitted that in considering whether a body exists:

    a) There must be something binding the body together;

    b) There must be some form of mutuality to that bond;

    c) Rules either must, alternatively should, exist to both determine how funds held by the body are used and how members of the body is gained or terminated.

44. I agree with submissions a) and b).v Like the FTT, I agree that the identification and operation of membership should be specified by oral or written rules (implied or express). However, I consider that c) is too prescriptive. A body does not necessarily need to hold or use funds in order to constitute an unincorporated body and therefore rules as to the distribution of funds may not always be necessary. While it is very likely that a community body would need funds in order to be able to put in a bid to purchase the ACV during the moratorium period, if it is listed, there is no legal requirement for this.

45. Nonetheless, if the body does collect and use funds then it must comply with the Regulations. The body is not prohibited from making a surplus (or profit) from its activities but this must not be distributed to its members by virtue of Regulation 5(1)(c)(ii). By virtue of Regulation 4(1)(b, any surplus it makes must be wholly or partly applied — (i) for the benefit of the local authority's area, or (ii) for the benefit of a neighbouring authority's area.

46. Further, for the purposes of the Regulations, the body must perform some type of activity which has a local connection. Regulation 4, in imposing a local

connection, requires the body to perform 'activities' which are wholly or partly concerned with the local authority's area.

47. In addition, section 89(2)(b)(iii) of the Act and Regulation 5 must inevitably require that the activities, interest or purpose of the unincorporated body must be of a voluntary or community nature in order to constitute 'a voluntary or community body'.

Errors of law

48. In applying these principles, I am satisfied that the FTT erred in interpreting the definition of a voluntary or community body to require the members of the body to have unanimity over every aspect of its motive, policy and purpose.

49. While the members must identify their belonging to the body and the body have at least one identified and shared common interest or purpose which is expressed through its activities, each member does not have to be unanimous in how any common purpose or interest is to be exercised or achieved, unless the rules of the group require this.

50. Applying these principles is a fact specific decision based upon any express or implied, written or oral rules that the body has. While all members may have to share in at least one of the common purposes, interests or activities of the body (if it has more than one), unanimity in relation to each is not required (unless expressly stipulated by the rules of the body).

51. Therefore, I am satisfied that the FTT erred in the application of its own test as formulated in finding at [27].

> '26…Accordingly, it is not fatal, in my view, that the Constitution was not adopted. However, I cannot find that there was a sufficient level of understanding and agreement between the relevant individuals as to the basis on which they were associated with each other that they could properly be described as a 'body'.
> 27…I find that there was not one common purpose in that some of the members of the Group, and, in particular, the three more prominent members, hoped to prevent the planning application. It is likely that the preservation of the pub and the putting forward of a community bid was not the real intention of the nomination of at least the most prominent members of the Group. I am not satisfied on the basis of the evidence put before me that there was the

necessary mutuality of bond and shared purpose between the members of the Group for it to be properly described as a body.'

52. First, I am satisfied there was an error of law because the FTT did not decide what each of the common or shared purposes of the Group were when deciding that there was 'not one common purpose' of the Group at [27] . Even if it found that the Group had no unanimity of purpose or interest in the preservation of the pub and putting forward of the community bid, this did not prevent it from being an unincorporated body if the members had unanimity in respect of at least one other purpose of the Group.

53. Second, and in any event, I am satisfied the FTT failed to take into account relevant evidence, as submitted by the Appellant, which demonstrates an additional error of law.

54. Even were unanimity of purpose required and there was only one aim or purpose of the Group, there was evidence of such before the FTT that should have been considered in make a factual finding on the balance of probabilities as to whether there was a unanimous common purpose of the group. If unanimity in relation to this purpose was not required, it was relevant evidence of majority support.

55. On the facts of this case, there was undisputed evidence before the FTT of the following: that the Group had 175 members at the relevant time, each of whom had completed a membership form (120 of which were in the bundle before the FTT).

56. The forms began with a typewritten statement to which each member assented by handwritten signature (and dated in various dates in January 2019): 'I would like to join the group formed to protect The Rose and Crown Pub at 108 High St, Sandhurst GU47 8HA….I give permission for my name to be used to support an application for registration of the pub as an Asset of Community Value under the Localism Act 2011'.

57. This was relevant evidence to be taken into account when deciding whether there was unanimity of at least one shared purpose held by each member of the Group (even if not unanimity in all of the purposes) – to support an application for registration of the pub as an Asset of Community Value under the Localism Act 2011. From this evidence, the same shared purpose may be

inferred regards the Rose and Crown Supporters – the community body which made the nomination in September 2018.

58. The FTT failed to take into account and address this evidence in making its decision. This was all the more important, because this was a stated intention in the membership forms of the three prominent members, Mr Russell, Mrs Goodwin-Higson and Mrs Ferrer, whom the FTT decided did not in fact hold that purpose (see [18]-[20] & [27]).

59. As the Appellant submitted, if the FTT was not going to accept this evidence and preferred to find that they did not hold the 'real intention' as stated, then it should have afforded the Group (and the individuals) procedural fairness. He submits that the FTT took isolated parts of correspondence out of context in finding against him and the prominent members of the Group that they did not hold a true or real intention to list the Pub as an ACV despite that being their case.

60. At [15] the FTT decided it was not required to adjourn the case and invite submissions as to whether the Group was a community body. However, this was the central issue on which it decided against the Appellant / the Group. This included considering the Groups purposes. The Group, through its nominated representative, was an unrepresented party which could not safely be inferred to have understood the case which it was required to meet on this point.

61. The FTT proceeded to find against the Group without any submissions of fact or law upon the issue of a) what its purposes were; and b) the level of support of its members for each purpose. It did so without hearing any oral evidence or cross examination suggesting that the prominent individuals did not hold a true intention to list the Pub as an ACV but only to halt a planning application by PML. It therefore erred in failing to provide an opportunity for written and oral submissions and evidence on a central issue – denying the Group natural justice.

62. I accept the Appellant's submission that it could have made a material difference to the FTT's finding at [18]-[20], which relied on correspondence and conversations with Mr Bull of the Council, if they had been able to give written or oral evidence rebutting any suggestion that they were only intent on blocking

planning permission for the Pub and had no intention to list it as an ACV (or thereafter collect funds in order to purchase it if needs be).

63. I am satisfied of a further error of law. The FTT accepted at [26] of its decision that the fact that the Constitution of the Group was not signed (and therefore not formally adopted) did not mean it was irrelevant to its determination.

64. The Constitution of the Group, which was before the FTT, was a three-page document stating that it had been updated in January 2019. While there was no evidence before the FTT regarding the rules or constitution of the 'Rose & Crown Pub Supporters', which was the predecessor community body which made the nomination of the Pub for inclusion in the list in September 2018, it remained relevant evidence.

65. The Group's constitution was titled 'The Rose & Crown Pub Community Group Constitution' whose aims were set out in paragraph 2:

'The aims of the Rose & Crown Pub Community Group are:

To ensure that the Rose & Crown remains trading as a public house

To prevent change of use of the Rose & Crown

To prevent the Rose & Crown from being demolished.'

66. Again, the FTT failed to take into account and address this evidence in making its decision at [26] & [27]. I am satisfied that this failure reveals a further error of law.

67. Even were unanimity of purpose required – this was further evidence of such that could have been sufficient to make a factual finding on the balance of probabilities that there was at least one, if not three, unanimous common purposes of the group.

68. Further and in any event, the Rules of the Group did not require unanimity in relation to each of its decisions, activities or purposes. The Constitution (at paragraphs 7, 9 & 10) did provide relevantly that decisions could be taken by a bare majority of members present at the relevant meetings at which the business of the Group was to be decided (or a two thirds majority for amendments to the Constitution):

'5. Officers and committee

The business of the group will be carried out by a Committee elected at the Annual General Meeting….

…

6. Meetings

6.1 Annual General Meetings

…

The quorum for the AGM will be 10% of the membership or 10 members, whichever is the greater number.

At the AGM:-

- …
- …
- Any proposals given to the Secretary at least 7 days in advance of the meeting will be discussed.

6.2 Special General Meetings

The Secretary can call a Special General Meeting at the request of the committee.

…

The quorum for the Special General Meeting will be 10% of the membership or 10 members, whichever is the greater number.

…

7. Rules of Procedure for meetings

All questions that arise at any meeting will be discussed openly and the meeting will seek to find general agreement that everyone present can agree to.

If a consensus cannot be reached a vote will be taken and a decision will be made by a simple majority of members present. If the number of votes case on each side is equal, the chair of the meeting shall have an additional casting vote.

9. Amendments to the Constitution

…

Any proposal to amend the constitution will require a two thirds majority of those present and entitled to vote

10. Dissolution

If a meeting, by simple majority, decides that it is necessary to close down the group, it may call a Special General Meeting to do so. The sole business of this meeting will be to dissolve the group.'

69. This was relevant evidence which the FTT failed to address at [27] in considering whether only a majority of the Group's members was required to wish to list the Pub as an ACV and therefore it did not matter if a minority of members only hoped to prevent the planning application of PML.

Surplus funds – Reg 5(1)(c)(ii)

70. There was a further reason why the FTT decided that the body was not a community body for the purposes of Regulation 5(1)(c)(ii). At [28] of the decision, the FTT stated:

> On the evidence before me I am not satisfied that the Group is an unincorporated body which does not distribute any surplus it makes to its members. No information has been provided about what funds would be available to the Group and how those funds would be used or distributed. The Membership Application form included the following question: "At some time in the future, there may be an opportunity for the community to buy the pub. Please indicate if you would be interested in offering financial support." Over 50% of the members indicated that they would be so willing. It is not clear how any funds collected would be used or distributed.

71. I am satisfied that the FTT erred in this analysis for two reasons.

72. First, there was no evidence that the Group held or would make any surplus funds (or profits) which it would be required to distribute. The evidence relied upon was that over half the Group stated that they would be interested in offering financial support to buy the Pub. The fact that is not clear how any funds collected would be used or distributed was not evidence that the Group would make a surplus which it was required to distribute to members. It is not apparent how any such financial contribution to purchasing the pub (which is the obvious use for which funds collected would be put) would involve the Group holding any surplus funds or needing rules about this.

73. Second, for the reasons I have set out above, I am satisfied that unanimity between members is not required as to whether to provide financial support to purchase the Pub or how surplus funds would be used or distributed. The Constitution had no rules concerning the collection, use or distribution of funds. Further, the Constitution of the Group does not require unanimity and a bare majority of the membership would suffice in order for it to purchase the Pub (and there being evidence that a bare majority of members would support this) or decide how surplus funds would be used or distributed.

Ground 2 – whether the FTT erred in concluding that the test in section 88(1)(b) was not satisfied because not all of the members of the Group sought to purchase the Pub

74. As a second reason for allowing the appeal, the FTT decided that the requirement in section 88(1)(b) of the Localism Act 2011 was not satisfied. On the basis of the evidence before it, the FTT found that it is not realistic to think that there could continue to be non-ancillary use of the Pub which would further the social wellbeing or social interests of the local community (see [29]-[30] of the decision). Therefore, the Pub could not be of community value nor listed as such.

75. At [30] the FTT concluded that section 88(1)(b) was not satisfied because:

> '..However, in view of the statements by Mrs Fenner to Mr Bull that there were different views and aims within the Group and that it was never her intention or the intention of, at least, some of the other members of the Group to seek to purchase the Property the "realistic to think" test could not be satisfied. Mrs Fenner is the Secretary of the Group and in that position of responsibility it is likely that she speaks with authority and knowledge. I attach weight to her statement to Mr Bull that her intention as Secretary of the Group and the intention of other members of the Group was never to organise or propose a bid for the Property.'

76. I am satisfied that Ground 2 is made out: the FTT erred in concluding that the test in section 88(1)(b) was not satisfied because not all of the members of the Group sought to purchase the Pub.

77. The first error is that which I have already addressed above – neither the common law nor the Rules of the Group's Constitution required there to be a unanimous purpose of all members of the Group to purchase the Pub. There was a bare majority of members who supported this purpose (as evidenced in their membership forms) and that would be all the Constitution required. The fact that some members (or a large number short of a majority) may have opposed this purpose or had other purposes in joining the Group did not undermine the Group being a community body with at least one shared purpose – the one purpose set out in the membership form and the three aims set out in the Constitution.

78. There is a second error in the FTT's analysis. The FTT further erred because the additional purpose of the Group - whether or not to purchase the Pub – was irrelevant to the question of whether section 88(1)(b) was satisfied.

79. The test in law for a building or land to be land of a community value is whether:

(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.

80. The FTT appears to have been satisfied on the evidence that section 88(1)(a) applied – that the Pub's actual or current use that was not an ancillary use, furthered the social wellbeing or social interest of the local community (there was evidence as to the Pub's core uses including hosting community events, singing and quiz nights etc in addition to the consumption of food and alcohol).

81. In its decision at [29]-[30], the FTT failed to address the question of whether there could continue to be non-ancillary use of the Pub (irrespective of whether it might be purchased by the Group) such that it could continue to be of community value whoever was its owner.

82. The fact that the moratorium under section 95 of the Act, if a building is listed, provides that the community group has the opportunity to purchase the land or building is an independent question to whether a building has community value under section 88(1)(b). The FTT conflated the two questions. There could continue to be non-ancillary use of the pub without a change of ownership. The FTT did not address this when deciding the question. It would be sufficient to satisfy section 88(1)(b) if the FTT was satisfied that there could continue to be social wellbeing and social interest core uses for the Pub even if it continued to be owned by PML (which was the most likely factual position given the lack of the evidence that PML was going to sell the Pub).

83. Further and in any event, there was evidence as set out above that a majority of the members had the intention or purpose to purchase the Pub if needs be.

Conclusion on errors of law

84. For all these reasons the FTT's decision must be set aside because of material errors of law pursuant to section 12(2)(a) of the Tribunal Courts and Enforcement Act 2007.

Remaking or remittal

85. I am satisfied that it is in accordance with the overriding objective of justice and fairness to exercise my jurisdiction under section 12(2)(b)(ii) to remake the decision. This is for two reasons. First, this case is already old – the decision of the Council under challenge is three years old and the decision of the FTT is

two years old. Remitting the case would only cause further unnecessary delay. Second, I have all the evidence and submissions from all parties that were before the FTT which decided the case on the papers. In addition, I have the further written and oral submissions on behalf of the Appellant and Group which were made to the Upper Tribunal. I therefore have all the relevant material needed to decide the case and both Respondents had repeated opportunities to make submissions or representations to the Upper Tribunal in response to the Appellant's grounds of appeal and the grant of permission and have lodged nothing further.

86. I will therefore consider whether the Council's review decision of 18 April 2019 to list the Pub as an asset of community value was lawful.

87. I begin by considering section 88(1)(a)&(b) of the Act – whether the opinion of the Council was in error that:

> (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.

88. I begin with the observation of Judge Levenson in *Admiral Taverns Ltd v Cheshire West & Chester Council and Farndon Parish Council (ATL v CW & CC and FPC)* [2018] UKUT 15 (AAC) at [29] when considering the ancillary / non ancillary uses of pubs and whether they further the social wellbeing or social interests of the local community:

> 29. As I have stated above, every case must be considered on its own facts. There is no presumption that a pub comes within the listing provisions of the 2011 Act, or that a business which includes a pub but also other activities does not come within those provisions.

89. Nonetheless, there was sufficient evidence as to the non-ancillary uses of the Pub in this case. I am satisfied that it was rational for the Council to decide that they furthered the social wellbeing or social interests of the community for the purpose of section 88(1)(a) as defined in 88(6) of the Act. Therefore, the Council's decision was not made in error of law (it was a rational conclusion that a properly directed decision maker could have come to on the evidence made available to it). To the extent that I am required to consider the matter afresh (that I have a full-merits rather than a supervisory jurisdiction), I am satisfied of the same.

90. Simon Bull, then assistant borough solicitor and Deputy Monitoring Officer at the Council, provided a witness statement dated 18 June 2019 in respect of the appeal. At paragraph 4 he stated:

> '4. I looked at the public house and asked myself the question: whether it was a community asset rather than just a bare public house as breweries often advance the argument that just being a public house does not make it a community asset. I formed the view from the application forms that the Rose and Crown was used for people from different walks of life and backgrounds to meet and socialise and pursue community and common activities. I was able to form this view as many listed their employment skills when demonstrating what roles they could undertake for the body. The application form also asked people to select which of the following current activities they wished to preserve at the Rose and Crown. The list comprised: open mic night, acoustic care, quiz team, badminton, charity fund raising. Several added the beer festival an annual event at the Rose and Crown. Some commented about how it was a meeting point for older people and various ages and allowed amateur musicians an opportunity to perform. All these pointed to a prima facie current community use contributing to the wellbeing of the local users of the Rose and crown. I concluded the Rose and Crown was both a public House and a community asset within the terms of the Localism Act and not just a bare public house…….'

91. Mr Russell and Ms Goodwin-Higson supplemented these points in their oral submissions to me – that the pub was an all age community venue which hosted a number of activities for community including the elderly and vulnerable such as amateur open mic events, an acoustic café and quiz nights. The venue was a meeting place for older people, including those who did not drink alcohol, for watching televised sports. It hosted various church and community events including wakes following funerals etc.

92. Therefore, I am satisfied that the condition in section 88(1)(a) is and was at the relevant time.

93. There was no evidence to suggest that the use of the Pub would change whoever was its owner (whether it continued to be owned by PML or by the Group). Indeed, there was evidence before the FTT that the Pub had continued operating in the same way in the time since the listing decision was made on 18 April 2019.

94. Thus, for the purposes of section 88(1)(b), it was realistic to think these non-ancillary uses which would further the social interests or wellbeing would continue in the future. Therefore, I am satisfied that section 88(1)(b) was satisfied.

95. To the extent I have a full merits jurisdiction over the same questions, I make a finding that both section 88 of the Act was satisfied on the balance of probabilities.

96. In the proceedings before the FTT, PML had taken an objection that the Group had not complied with Section 89 of the Act and Regulation 6 such that the nomination of the Pub for the list was invalid. It was submitted that there was no evidence supplied by the Group to the Council that Regulation 6(d) was satisfied – that the Group was eligible to make a community nomination. This

was on the basis that there was no evidence whatsoever whether the nominator (the Supporters or the Group) either held or had collected any funds and did not distribute any surplus it makes to its members. Such evidence was neither either requested by the Council or provided by the Group. PML submitted that the regulation 5(1)(c)(ii) requirement could not be waved.

97. I address the regulation 5(1)(c)(ii) requirement below. In short, I find that the Supporters or Group, as nominator, was eligible because it satisfied the requirements of regulations 4 and 5. The same evidence that was available to me was available to the Council (ie. the Membership forms and the draft unadopted Constitution) such that it provided sufficient evidence that it was eligible to be a nominator.

98. I am satisfied, and it was not in dispute, that Regulations 4 (1) (a) (i) and (b)(i) and Regulation 5(1)(c)(ii) were satisfied – the Supporters / Group had a local connection in that its activities were wholly or partly concerned with the Council's area and that any surplus it made is wholly or partly applied for the benefit of the Council's area. This was because there was no evidence that it made or was to make any surplus, that it had collected any funds, or even if it did collect funds and make a surplus, that this would be distributed to members rather than in the purchase of the Pub.

99. I am fortified in this conclusion by paragraph 2 of Mr Bull's witness statement which states:

> '2…Mrs Fenner sent me around 175 application forms. Those forms are headed up as an application to join the unincorporated group seeking to make the Rose and Crown an ACV. The form states that it is free to join and asks in another box whether the Applicant would be prepared at some time in the future to contribute towards the purchase price if they got to the stage of trying to purchase the public house. I took it from these two statements that the unincorporated body had no assets to redistribute. They were just seeking future pledges. The majority said they would make a financial contribution but a significant number also said they would not be prepared to. However…there were far in excess of 21 people who live in the heart of Sandhurst, who wished to undertake duties for the body and were prepared to make a financial contribution if they got to the stage of trying to bid to buy the property.'

100. For these reasons, I am satisfied that the Group satisfied Regulation 5(1)(c)(ii) as it did not distribute any surplus to its members – it had no surplus nor rules suggesting that it would. Regulation 5(1)(c)(i) – was not in dispute – the Supporters / Group clearly had more than 21 members.

101. Therefore, for the reasons set out above when finding that the FTT erred in law, I am also satisfied that Regulation 5(1) & (1)(c) was satisfied and that the Group (and its predecessor the Supporters) was a community body and an

unincorporated body. I am satisfied the Group shared a unanimous purpose of all members (as described on the membership form) to nominate the Pub to be listed as an asset of community value. To the extent required, I also find that each of the members of the Group also shared and held the three aims of the Group as set out in the Constitution.

102. I accept the Group's submissions – they all had a core and shared (unanimous) motive to nominate the PUB as ACV and to protect its community use.

103. I am further satisfied that the FTT erred in deciding that fact that prominent members may have been opposed to planning permission being granted undermined the Group's shared or common purpose. The shared purpose was to preserve the Pub remaining in operation to further its community functions.

104. The evidence from the Council made clear that it understood the difference between the planning permission application and the nomination of the Pub as an ACV. This is supported by M Bull's evidence at paragraph 5 of his statement:

> '5. Whilst it is not a necessity for there to be a trigger event, the application form did not recite either imminent closure or any reason why the application was being made at this point in time. I have experience of other public houses being nominated and they usually are made to block planning applications or to stop closure for sale for conversion to flats. I looked and found a planning application. I determined that the land covered by the planning application should be severed from the rest of the public house and not be subject to the ACV nomination, as doing this allowed all the declared community activities to be preserved, it kept the public house open with a functioning beer garden and car park and allowed the brewery to have their private law right to develop the land determined under the planning process. If the application was aa collateral attempt to block the ACT it did not say so on the face on the application. I felt the balance between the two competing interests fell in favour of accepting the nomination as an ACV of the public house and part of the garden and severing the part of the grounds subject to the planning application on the planning merits……'

105. Mr Bull therefore gave written evidence that he considered separately, or severed, the relevant part of the Pub which was to be listed, ignoring that part in respect of which a planning permission application had been made. Therefore, unlike the FTT, I give weight to Mr Bull's evidence in this respect.

106. Further and importantly, I give weight to the fact that planning permission had already been granted in respect of the rear of the Pub by the time the appeal was heard by the FTT. Therefore, I find that this supports the evidence that the purpose of pursuing the listing of the ACV was independent of and primary to any planning objection.

107. Notwithstanding the grant of planning permission, the Group had still sought to list the Pub as ACV and oppose PML's appeal because the purpose of the Group was preservation of the Pub as a community venue. Therefore, even if

some members of the Group had previously been interested in opposing planning permission, this was not their primary purpose in nominating it as an ACV but was only additional to the primary and unanimous purpose of the Group.

108. Even if the correspondence relied on by the FTT was not taken out of context at [18]-[20] of its decision, the fact that three members of the group had previously expressed an intention to oppose planning permission does not detract from shared common purpose of the Group.

109. Likewise, even if there was a variety of view as to whether to purchase the pub, there was no such variety as to the common purpose of listing it as an ACV. At [18]-[20] of its decision the FTT likewise erred in relying on various views expressed in correspondence from the three prominent members as to whether or not they wished to purchase the pub. They did not undermine the Group's common and core purpose.

110. In any event, as I have also addressed above, there was sufficient evidence for me to find that a majority of the Group intended to support purchase of the Pub if needs be. The FTT erred in deciding at [18] that it was never the intention to buy the property. Indeed, all three prominent members, including Mrs Fenner filled in application forms stating they were willing to contribute financially.

111. As set out above, I am satisfied that a majority of the members of the Group had expressed such a will: 52% of members had indicated that they would support making a financial contribution to buy the pub. The Group's Constitution would have permitted the members of the Group to decide to purchase the pub on that basis. In order to make decisions at an AGM or Special Meeting the Constitution only required a bare majority of those present to pass a vote.

112. Further and in any event, even if there were insufficient members of the Group intending to purchase the pub, that there was no unanimity nor majority of the membership in favour of the proposal at the time of nomination, this does not detract from the shared purpose of the Group in preserving it as an ACV. The Group was not required under the legislation to prove that it would in fact be able to purchase the Pub as an asset at the time the nomination was made. The effect of listing as an ACV would simply be that the Group would have the opportunity under section 95 of the Act to put in a bid to purchase to the Pub during the moratorium period if a sale was proposed by PML.

113. In summary, I agree with the conclusions of Mr Bull, for the Council, that the statutory conditions to list the Pub as an ACV were satisfied. As he stated in his witness statement at paragraph 7:

> 'I would submit that I applied the statutory criteria appropriately. I had no alternative having applied the criteria correctly than to register the property. I undertook my task with diligence and to the best of my ability. I balanced the competing interests when I severed the land and believed that I acted reasonably throughout.'

Conclusion

114. For the reasons set out above, I am satisfied that the FTT erred in law in a material manner in the decision it came to on 28 January 2020. I therefore allow the appeal and set aside the FTT's decision allowing the appeal against the Council's decision to list the Pub as an Asset of Community Value.

115. I remake the decision. I dismiss the appeal of PML against the decision of the Council dated 18 April 2019 to list the building and land constituting the Rose and Crown Pub, Sandhurst, as an asset of community value for the purposes of section 89(1) of the Localism Act 2011 and Regulation 2 of the Assets of Community Value (England) Regulations 2012 ("the Regulations"). I confirm the decision of the Council to include the Pub in the list of assets of community value.

Compensation or Costs

116. In light of this decision, I invite all parties to address me on the Council's application that PML re-pay it the sum of £4,000 if the Pub were re-listed and its original decision of 18 April 2019 confirmed.

117. The Council submits it paid £4,000 in compensation to PML's solicitors arising from PML's successful appeal to the FTT. The Council suggested it paid the sum to Freeth Solicitors, who acted for PML, pursuant to the compensation provisions contained within Regulation 14 of the Regulations.

118. Regulation 14(3)(b)(i) allows an owner of the land (in this case, PML) to claim from the local authority reasonable legal expenses incurred in a successful appeal to the First-Tier Tribunal against the responsible authority's decision to list the land.

119. My preliminary view is that as the FTT's decision is set aside and now re-made and PML's appeal against the Council's listing decision is now rendered unsuccessful, then PML should return the sums paid by the Council because Regulation 14(3)(b)(i) no longer applies. In setting aside the FTT's decision, PML would no longer be entitled to compensation under Regulation 14(3)(b)(i).

120. However, I invite submissions as to my jurisdiction and discretion to make any such direction.

121. There is no power under Regulations 14-17 for the Council to review nor appeal to the FTT regarding the compensation payment it decided to make (there is only jurisdiction for the owner of land to challenge any compensation decision). Likewise, there was no decision by the FTT awarding PML compensation under Regulation 14 nor costs in the appeal proceedings (which direction could only be made if a party had acted unreasonably for the purposes of Rule 10 of The Tribunal Procedure (First-Tier Tribunal) (General Regulatory Chamber) Rules 2009. Neither is any appeal against such decisions before me.

122. My powers to award costs in relation to the Upper Tribunal appeal proceedings are circumscribed under Rule 10 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (and mainly apply where a party has behaved unreasonably in bringing, defending or conducting proceedings before the Upper Tribunal).

123. Therefore, the parties are therefore directed to address me in writing within 28 days of receipt of this decision on whether I have any jurisdiction to make any costs award or a consequential direction to this decision that would reverse the payment of compensation made by the Council given that I am now upholding the Council's decision to list the Pub as an ACV (and effectively dismissing PML's appeal to the FTT).

RUPERT JONES
Judge of the Upper Tribunal
Authorised for release on 9 March 2022