Planning and Borough Development
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Executive Director Planning and Borough Development
Graham Stallwood

THE ROYAL BOROUGH OF
KENSINGTON
AND CHELSEA

My reference:
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Please ask for: Rajvant Kaur

22 January 2016

Dear Sirs

Review of decision to list Kensington Park Hotel, 139 Ladbroke Grove, London W10 6HJ as an Asset of Community Value

I refer to your written request submitted to the Council on 20 October 2015 for a review of the decision to list Kensington Park Hotel ("the Property") as an Asset of Community Value.

On 20 October 2015, the Council made a decision to add the Property to the list of Assets of Community Value following a nomination received from West London CAMRA (Campaign for Real Ale) ("the Applicant").

As part of my review, I have considered all of the written material which has been submitted by the Applicant, the Council in its role as the original decision maker ("the ODM") and the owner SWA Developments Limited ("the Owner") in addition to the submissions made orally by all parties at the review hearing which took place on 11 December 2015.

I have set out below in italics the two grounds for the review of the decision submitted by the Owner, followed by my comments on the grounds.

1. *The nomination by the Applicant is not a community nomination*

Section 89(1)(a) of the Localism Act 2011 ("the Act"), states that land may only be included in a local authority's list of assets of community value in response to a community nomination or where permitted by regulations made by the appropriate authority.

Section 89 (2)(b) defines a community nomination as a nomination made by:

(i) a parish council in respect of land in England in the parish council's area;
(ii) a community council in respect of the land in Wales in the community council's area; or
(iii) a person that is a voluntary or community body with a local connection

Voluntary or community bodies are defined in regulation 5(1) of the Assets of Community Value (England) Regulations 2012 ("the Regulations").

The two community bodies which are of relevance to this decision are those set out in 5 (1) (c) and (e) of the Regulations and are as follows:

(c) an unincorporated body-

(i) whose members include at least 21 individuals and
(ii) which does not distribute any surplus it makes to members

(e) a company limited by guarantee which does not distribute the surplus it makes to its members

"Local Connection" is defined in section 4 of the Regulations. In the context of this case, for a body to have a local connection with land in the Royal Borough of Kensington and Chelsea

(RBKC), its activities must be wholly or partly concerned with RBKC or within the area of a neighbouring authority.

Regulation 4(1) (c) introduces a further requirement for unincorporated bodies and companies limited by guarantee which is that any surplus which they make must be applied wholly or partly for the benefit of the local authority's area or a neighbouring authority's area.

Regulation 5(1) (c) also requires unincorporated bodies to have at least 21 members registered to vote in RBKC or in a neighbouring authority.

In the application form for the nomination, the Applicant in the section entitled "Type of organisation" ticked the box for a Company limited by Guarantee that is non profit distributing. The Applicant provided the company registration number of Campaign for Real Ale Limited ("the Company") in this section. The Applicant also submitted Articles of Association for the Company with the application. The Owner is of the view that regulation 5(2)(e) of the Regulations is not satisfied.

There is no dispute between the parties that the Company is a company limited by guarantee or that the Applicant is a branch of the Company. During the hearing the Applicant advised me that a member of the Company will be allocated to the branch that covers the geographical area in which the member resides.

The Applicant and the ODM seek to rely upon the First Tier Tribunal's decision in the case of ***St Gabriel Properties Ltd v London Borough of Lewisham & Amor [2015] UKFTT CR_2014_0011*** which treats organisations such as the Applicant in a hybrid way***.*** The Owner has sought to convince me that this case was wrongly decided and should be rejected. I agree with the view of the judge in this case which is that "*it seems to be entirely artificial to regard a branch's link with a national organisation as strong enough to prohibit the branch from having an independent existence under Regulation 5(1) (c) and yet not strong enough to permit the branch to take advantage of the national organisations status under Regulation 5(1)(e) (paragraph 20 of decision).* I agree with the hybrid assessment of the Judge that the Applicant is entitled to rely upon the Company's status as a company limited by guarantee which does not distribute any surplus it makes to its members in order to satisfy 5(1) (e). It is then entitled to rely on its own activities to satisfy clause 4(1)(a) and (b) which relate to the local connection and the application of the surplus.

The Owner has submitted that as the Applicant did not make it clear that they were an unincorporated body when the nomination was made that it would be "**wrong in law and irrational to conclude that they nonetheless submitted a nomination as an unincorporated body"**. In the view of the Owner the absence of the relevant information at the time of the nomination cannot be rectified by a party reviewing further information later in the nomination process. The view of the ODM is that the restrictive approach of the Owner is not the approach that judges have taken in First Tier Tribunal ("FTT") decisions concerning ACV appeals. Reference was made to two FTT decisions which appeared to indicate a degree of flexibility with regards to the information which has been accepted. I note that in the St Gabriel Properties Ltd decision referred to above, the Judge made an assessment of whether the nominator fell into the 5(1) (c) or (e) category by considering the evidence

available when determining the nomination. With the current review I have sought to adopt the same approach as the Judge.

The Owner has argued that in determining whether the nomination of KPH was a community nomination I ought not to consider evidence other than that provided at the time of the nomination. Between the date that the Applicant submitted the Application and the date of decision of the ODM, the Applicant provided evidence to the ODM to satisfy him that it was an unincorporated body. This evidence was provided to me in the documents which were submitted for the review. If I accepted the argument of the Owner I would disregard this additional evidence and I would not seek any additional information myself during the course of the review.

In a previous review for a different application to list the Property as an ACV, the Owner questioned the validity of a nomination submitted by KPH United. I note that during the course of that review the Owner did not object to the submission of additional evidence in order to allow me to determine whether the nomination was a community nomination. I have not heard sufficiently persuasive arguments from the Owner to suggest that I should follow a different course of action with the current review. I have therefore reviewed all of the evidence submitted on this issue and taken this into consideration when reaching my view.

Following the hearing, as it was important for me to consider whether in fact the Applicant could be considered to be a body under regulation 5(1)(c), I invited the Applicant to provide additional information to satisfy the Reviewer that CAMRA West London branch meets the tests under sections 4 (local connection) and 5(1) (c) (incorporated body) of the Regulations. In making my request, I accepted that the Nominator may wish to stipulate safeguards to maintain the confidentiality of such information before disclosing it to the Council. Following the response from the Applicant, I allowed the ODM and the Owner time to submit any additional representations in respect of the further information provided. The ODM chose not to provide any additional information whilst the Owner did provide additional submissions which I have taken into account.

The Applicant provided the Council with a list of members of the organisation who live either in the Royal Borough or in neighbouring authorities. I have checked the names against the electoral register and can confirm that more than 21 members were registered in the Royal Borough. On the basis of the information provided by the Applicant prior to the review and following the review hearing I am satisfied that the Applicant is an unincorporated body. I am therefore satisfied that the Applicant would satisfy both sections 5(1)(c) and 5(1)(e) of the Regulations and that the nomination by the Applicant is a valid community nomination.

I note that the Owner has suggested that by not providing the Owner with the name and full address of each of the members provided by the Applicant, the Council is in breach of natural justice and of Article 6 of the ECHR. I do not accept this argument. In his additional submissions dated 7 January and at the hearing, the Applicant expressed legitimate concerns (on data protection grounds) about providing full address details of its members. In the Applicant's submission dated 7 January, a compromise arrangement was proposed whereby the name and postal area of each individual (rather than their full address) could be made public. This option remains available to the Owner if he wishes to check the membership information that the Applicant has provided.

Ground 2: The use of property

The Owner has invited me to accept that a public house will not automatically meet the criteria required to be considered as an Asset of Community Value. Reference was made to paragraph 4 and comments from the Judge in the following case (Patel v London Borough of Hackney & Amor) 2013. I accept this submission.

The Owner has also invited me to accept that in reaching my decision, I need to examine carefully the actual use and character of the pub before reaching any conclusion as to

whether it “furthered the social wellbeing or interests of the community”. I also accept this submission.

In relation to the current nomination, the Applicant has provided a significant amount of evidence to satisfy me that “actual current uses” of the Property which are not ancillary uses of the Property further the social wellbeing or interests of the community for the purposes of Section 88(1)(a) of the Act. Such evidence was attached to the nomination. After the hearing I invited the Applicant to provide further evidence in support of its statement in the nomination that the Property “meets criteria of both section 88(1) and section 88(2) of the Localism Act”. I invited the Nominator to provide further details of the time in the recent past when an actual use of the Property (that was not an ancillary use) furthered the social wellbeing or interest of the local community. I asked for a description of the activities which took place, when they took place and whether they are still taking place. In response to this request, the Applicant provided additional evidence.

Having considered all of the evidence available to me I am satisfied that the use of the pub within the recent past, and also the actual current use of the pub, furthers the social wellbeing or interest of the local community and that the tests in sections 88(1)(a) and 88(2)(a) of the Act have been met.

I am also satisfied that it is realistic to think that there can continue to be a non-ancillary use of the Property which would further the social wellbeing or social interests of the local community (whether or not in the same way); and also that there is a time within the next five years when there could be non-ancillary use of the Property which would further (whether or not in the same way) the social wellbeing or social interests of the local community. I note the contents of an email from one of the directors of the Owner to a representative of the Applicant dated 28 August 2015 in which he made it clear that it was the intention of the Owner that the Property would continue to operate as a pub following the completion of the forfeiture proceedings.

I am therefore satisfied that the tests in section 88(1)(b) and section 88(2)(b) of the Act have been met.

The Owner has encouraged me to disregard the activities which have taken place in the Property since the arrival of Mr Vince Power in 2013 and agree that it would be contrary to public policy for me to consider this when determining whether or not the Property is an Asset of Community Value.

I have reviewed all of the evidence regarding all of the activities which were taking place by members of the local community. I note that the lease has not been forfeited because of any of the activities which are relied upon in the nomination. Rather, forfeiture has resulted from breaches of certain provisions of the lease which were unrelated to any of the activities cited in the nomination.

I note also that there is no suggestion that in carrying out the various activities referred to in the nomination the users of the pub were knowingly acting unlawfully or that users of the pub were even aware of the dispute between the Owner and the leaseholder when undertaking these activities. I accept that actions of the lessor have been found to be in breach of the covenants of the lease. I do not, however, accept that these actions should disqualify as evidence the information provided by the Applicant in support of their nomination.

I note that in the construction of the sections of the Act dealing with Assets of Community Value, and in the associated Regulations, the interests of members of the community are balanced by provisions that take into account the effect of the listing of assets of community value on the interests of property owners. Specifically, Section 99 of the Act makes arrangements for the payment of compensation to owners whose assets are placed on the list of assets of community value.

My view is that, taking into account the reasons behind the introduction of the legislation, the public interest is served by accepting the evidence submitted by the Applicant,

notwithstanding the actions of the leaseholder which have resulted in breaches of covenants of the lease and subsequent forfeiture of the lease.

Decision

I am therefore satisfied that the Property is an Asset of Community Value and that it satisfies both sections 88(1) and (2) of the Act. For this reason, I uphold the decision of the ODM and the Property will remain on the list of successful nominations.

If you are not satisfied with the outcome of this review you have the right to appeal to the First Tier Tribunal against my decision.

An appeal against the listing review must be made to the General Regulatory Chamber of the First-Tier Tribunal. The deadline for appealing is specified in the procedure rules of the Chamber as 28 days from the date on which notice of the decision appealed against was sent to the Owner: see the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009. Appeals may be made both on points of law and on findings of fact. Owners should send the appeal in writing to the First-Tier Tribunal at:

Tribunal Clerk
Community Right to Bid Appeals
HM Court and Tribunals
First-Tier Tribunal (General Regulatory Chamber)
P.O. Box 9300
Leicester
LE1 8DJ

Owners may also send an appeal to the First-Tier Tribunal by email at:
GRC.CommunityRights@hmcts.gsi.gov.uk

Yours faithfully

A. J. Redpath

A J Redpath
Director of Strategy and Local Services