

Delegated Decision

September 2021

Review of the Nomination of The Smiths Arms, Castle Dene as an Asset of Community Value



Report of James Etherington, Deputy Monitoring Officer

Electoral division(s) affected:

Lumley.

Purpose of the Report

- 1 To consider a request to review the decision of the Head of Corporate Property and Land to list The Smiths Arms, Castle Dene as an Asset of Community Value (ACV).

Recommendation(s)

- 2 The Corporate Director of Regeneration, Economy and Growth is recommended to:
 - (a) Uphold the original decision of the Head of Corporate Property and Land.

Background

- 3 Under the Localism Act 2011, community groups have the right to nominate land to the council to be registered as Assets of Community Value.
- 4 Where, in the opinion of the council, “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 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”¹ the council must include the land in their list of Assets of Community Value.
- 5 The fact that land is listed as an ACV shall be noted on both the Local Land Charges Register and at HM Land Registry. The land will no longer have the benefit of certain permitted development rights and the owner can not dispose of the freehold or a long leasehold without giving notice of their intention to do so and giving the community six weeks in which to register their interest in acquiring the land. If the community group indicate their interest, the owner is prohibited from disposing of the land for a further six months, allowing the community group time to explore funding options. The owner is under no obligation to dispose of the land to the community group and is free to enter into legal agreements with third parties at the conclusion of the six-month period.
- 6 On the 12 April 2021, the council received a nomination from The Friends of the Smiths to list The Smiths Arms as an ACV. The nomination was accompanied by evidence of community use.
- 7 The nomination was considered by the Community Right to Bid Working Group (the Panel) which consists of officers from Corporate Property and Land, Legal Services and Neighbourhoods and Climate Change. The Panel met on the 11 May 2021, 20 May 2021 and on the 26 May 2021 and recommended to the Head of Corporate Property and Land that The Smiths Arms be listed as an ACV.
- 8 On the 1 June 2021, the Head of Corporate Property and Land resolved to accept the recommendation of the Panel and list The Smiths Arms.
- 9 By way of email dated 19 July 2021, the owner requested an internal review of the decision and provided reasons as to why The Smiths Arms should not have been listed.

¹ Localism Act 2011, s88(2)

- 10 The representation by the owner is lengthy, running to some 80 pages, but raises five key objections:
 - (a) Inclusion of land not nominated;
 - (b) Invalid nomination;
 - (c) Vexatious nomination;
 - (d) Not realistic for community use in the next five years;
 - (e) Full Moratorium not triggered; and
 - (f) Community Ownership Fund.
- 11 In addition, further information has been submitted by both the owner and the applicant.
- 12 The relevant test as to whether the land in question has community value is set out above and can be broken down as follows

Review

Community Nomination

- 13 The first matter to consider is whether the nomination is valid. The legislation states that a nomination must be made by a “voluntary or community body.” In the instant matter, The Friends of the Smith claim that they satisfy the definition of community body as they are an unincorporated body with at least 21 members who do not distribute any surplus to their members². At least 21 of the members are registered to vote in County Durham and the group’s singular focus is concerned with a pub in County Durham and, in their opinion at least, for the benefit of County Durham.
- 14 The owner contends that the nomination is invalid, initially because no proof had been provided to demonstrate that any surplus would not be distributed to its members and secondly, that the group was not constituted when the application was made.
- 15 The nomination should however be considered valid. The case of *Mendoza Ltd*³ makes it clear that the bar to clear to make a nomination is not a high one. Nothing turns on the fact that the group was not constituted at the time when nomination was made as there was no

² Satisfying the definition in regulation 5(1)(b) Assets of Community Value (England) Regulations 2012

³ *Mendoza Ltd v London Borough of Camden & Anor* (Localism Act 2011) [2016] UKFTT CR-2015-0015 (GRC)

requirement for them to be. Evidence has also been provided that a surplus could not be distributed.

Actual Use in the Recent Past

- 16 There is no definition of “recent past” in either the legislation or the case law but The Friends of The Smiths have provided evidence of actual use for up until the pub’s closure, meeting this definition. Some of the evidence provided involved activities that did not take place at the pub, particularly golf days. Uses such as these were not considered.

Not an Ancillary Use

- 17 There is again no definition of what ancillary use might be and it will always be case specific. A classic example however is of using a farmer’s field for a village bonfire once a year. In that case, the primary use of the field will be farming, and the bonfire will clearly be an ancillary use to that.
- 18 The present case involves the use of a pub. Much of the evidence provided is that of quiz nights, music nights, the use of a function room and as a general place of community gathering. These uses are clearly standard parts of the operation of the pub and are therefore not ancillary uses.
- 19 From the evidence available, it is fair to say that the frequency and nature of use has likely been embellished by the applicant but not to the extent that this definition should not be considered met.

Furthered the Social Wellbeing or Interests of the Local Community

- 20 Again, there is no definition provided but evidence has been provided of a range of activities that have taken place in The Smiths Arms which indicates that this criterion has been met.

Next Five Years

- 21 It must also be realistic to think that there could be non-ancillary use that would further the social wellbeing or social interests of the local community in the next five years.
- 22 The owner’s objection on this ground is that it is very unlikely that either the community or another commercial operator could or would purchase the pub and invest the required sums (said to be more than £200,000) to run the pub as a going concern. The owner also points to the low number of successful community “take-overs” of pubs.

- 23 The applicant for their part state that they are making efforts to fundraise and are working with external advisors.
- 24 A recent planning application for change of use has been rejected and, subject to appeal, the current planning designation is of one as a pub.
- 25 Given the planning status and the efforts of the community there is at least a realistic prospect that at least some of the previous non-ancillary uses (or other non-ancillary uses) could take place once again.

The Review Request

- 26 As for the other objections which have not already been covered, they can be dealt with as follows:
- (a) Inclusion of the land not nominated – the owner complains that the entirety of the land contained within titled number DU179214 is listed as an ACV when application only relates to the pub itself. The owner is quite right in this regard and the listing should be amended to include the pub only.
 - (b) Vexatious nomination – the owner complains that the nomination is vexatious and that the only real desire of The Friends of the Smiths is to prevent planning permission to an alternative use being granted. This is not a valid ground of challenge. The Council is obliged on receiving an application to assess it against the statutory tests. The motive of those making the application is not relevant.
 - (c) Full moratorium period not triggered – the owner argues that the fact that The Friends of the Smiths did not trigger the rule moratorium period when they had the opportunity is indicative of the vexatious nature of their nomination and the lack of realistic prospect of future non-ancillary future use. The point around motive outlined above applies equally to this ground. As to future use, it may be indicative, but it is not determinative for the reasons outlined at paras 21-25.
 - (d) Community Ownership Fund – the owner states that The Friends of the Smiths are not eligible for funding from this pot and without it, they will be unable to purchase and refurbish the pub. This is also indicative and not determinative of whether there will be future use. It can not be terminal because it will not be the only potential funding source available to The Friends of the Smith.

Conclusion

- 27 Whilst the evidence supports the recommendation made by the Panel, it appears that the misdirected themselves as to the test to apply. The Panel incorrectly applied the test at s88(1) of the Localism Act 2011 which refers to *current* use.
- 28 Clearly, given that The Smiths Arms prior to the application being made, there could be no *current* use to consider.
- 29 However, it is clear that the Panel would have made the same recommendation had they directed themselves correctly and that the decision made by the Head of Corporate Property and Land was the correct one

Background papers

- None

Other useful documents

- Nomination of The Smiths Arms Public House as an Asset of Community Value, Susan Robinson, 1 June 2021

Author(s)

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Appendix 1: Implications

Legal Implications

The status of the land as an ACV would not change as a result of this report. The owner may appeal this decision to the First Tier Tribunal.

Finance

Potential for compensation claim in connection ACV listing, in line with the relevant regulations.

Consultation

None.

Equality and Diversity / Public Sector Equality Duty

None.

Climate Change

None.

Human Rights

None.

Crime and Disorder

None.

Staffing

None.

Accommodation

None.

Risk

None.

Procurement

None.