**Review of Listing on the Community Assets Register**

**Bay Café Marine Drive Bigbury-on-Sea TQ7 4AS**

**Date: 11 December 2017**

**Reviewing Officer:** Sue Nightingale Deputy Monitoring Officer South Hams District Council

**Introduction and background.**

The Council made a recommendation to list the Bay Café as an Asset of Community Value by a report dated 23 June 2017 in accordance with Chapter 3 of the Localism Act 2011.

The Cafe Owner, Galion Homes requested a review of the listing within the six week request period.

By agreement between the Council and the Owner the matter was listed for an Oral Review on 11 December 2017.

The owner was represented at the review by Mr Zak Symons Barrister instructed by Ashfords Solicitors for the Owners.

The Council was represented by Ms Alex Reece Solicitor for South Hams District Council (SHDC).

Also in attendance were; Mr David Richardson and Steve Jeffson, Solicitor of Ashfords, Mr Nick Bone representing Galleon,

Mr Brian Carson and Mrs Valerie Scott attended as observers for the Nominating organisation.

Claire Butcher, Case Manager for SHDC and Rob Sekula, Specialist with SHDC in the place making team, Katie Prince Legal Specialist.

There was no formal Statement of Common Ground but the following points are established;

* 1. The Bay View Café was used successfully as a café until its closure by the previous owners in September 2015.
  2. The site is the subject of a Planning application 1826/16/FUL which was refused by SHDC on 11 October 2016
  3. The refusal of permission is the subject of a planning appeal which is to be determined on 19 December 2017.
  4. The owners and the Council do not agree the speculative costs of re-opening the Café and have both submitted their own viability reports in the planning appeal process.
  5. The degree of work required to meet Environmental Health standards for running a café is the subject of dispute between the parties.
  6. The council’s reasons for refusal of the planning application include;
  7. The proposed change of use would result in the loss of a community facility, tourist asset and an employment use without adequate justification contrary to policies DP9, DP12 and DP14 and paragraphs 7, 14, 17, 28, 60, 61 and 70 of the National Planning Policy Framework and;
  8. The loss of the community facility, tourist asset and employment use, together with demolition of a building of local interest considered a non-designated heritage asset fails to address the connections between people and places and leads to the loss of local distinctiveness and the degradation of the sustainability of the settlement in conflict with DP Policies DP1, DP2, DP6, CS7 and CS9 and paragraphs 7, 14, 17, 60, 61, 70 and 135 of the National Planning Policy Framework.

1. The owner’s solicitors submitted amongst other things copies of relevant case law to ‘assist’, a copy of their list of documents is attached. They also submitted copies of a number of the planning appeal documents.

Whilst this review focusses strictly upon Chapter 3 of the Localism Act and any relevant case law and guidance, the planning use and the owner’s plans are *relevant* to the question of whether or not this asset meets the tests in s88(2)(b) of the 2011 Act.

In **STO Capital Ltd and LB Haringey [CR/2015/0010]** Judge Peter Lane states *‘Both the grant and refusal of planning permission for the change of use of a listed asset are capable of having a material effect upon a decision as to whether the S88(2)(b) test is met…’*

In Patel and LB Hackney [CR/2013/0005] Judge N J Warren observes ‘*I think it more reasonable to take into account Mr Patel’s intentions as part of the whole set of circumstances.’*

1. **The Council’s case**

At the review the council confirmed its decision to list the asset and in particular addressed the test at S88 (2 )(b) of the 2011 Act in terms of whether 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 …… that would further (whether or not in the same way as before) the social well-being or social interests of the local community’

In support of its original decision to list the council cited the following points and cases;

* 1. The statutory tests at S88 (2) are based upon **‘*the opinion of the local authority’.***
  2. According to the owner’s submissions at the time of listing and immediately prior to the review there was no dispute that the test at S88 (2) (a) is met ie; *that there is a time in the recent past when an actual use of the building or other land that was not an ancillary use furthered the social wellbeing or interest of the local community*.
  3. At the hearing Mr Symons indicated that he wanted to address that point despite not having previously raised this issue in correspondence and his instructing Solicitor stating in an email on 1st December that there would be no arguments other than those set out in their objections to the listing by a letter dated 22 May 2017.
  4. After a brief adjournment the council agreed to deal with S88 (2) (a) at the review in addition to S 88 (2) (b).
  5. The owner’s intentions should be taken in to account ‘as part of the whole set of circumstances’ (para 11 Warren J. **Patel v Hackney BC [CR/2013/005**] but he did not accept the owners assertion that they should be determinative.
  6. In **STO Capital Ltd v Haringey LBC [2016] UKFTT CR/2015/0010** Judge Lane said that grant of planning permission could materially affect whether a building qualified as an ACV. When permission was granted on appeal for residential development the property was removed from the ACV list.

In the matter of the Bay Café Bigbury, the planning status is uncertain and it is not for the council to speculate as to the outcome of the planning appeal.

* 1. The owner has indicated that he will demolish the Café if planning permission is refused upon appeal. In the case of **Matterhorn Capital v Bristol City Council [CR/2013/0006]** where a Scout Hut had been demolished by a developer the judge considered that there was still a realistic possibility that there could be community use within the next five years taking in to account the sixty years previous community use, even taking in to account the additional financial burden. There was no planning permission for residential development.

In the case of the Bay Café there has been community use since before the First World War and that there are local individuals and experienced caterers interested with funding available.

* 1. The viability report which Mr Symons agrees was prepared for the planning appeal is disputed by the council. The council’s own viability expert (also instructed for the purposes of the planning appeal) submits substantially lower estimates for re-opening a Café at the site. The council considers through its EH Specialist that the owners estimated costs of meeting the required public health standards are inflated. Mr Symons agrees that it is not for the Listing review to determine the actual costs of a refurbishment but the parties acknowledge that there is a significant difference between their estimates.
  2. It is accepted that the proposals for future use must be ‘realistic’ as established by Judge Lane in **General Conference of the New Church v Bristol CC [CR/2014/0013]** and that in **Gullivers Bowls Club v Rother DC [CR/2013/0009]** Judge Warren rejects the argument that future use must be commercially viable, or have long term viability.

In **Worthy Developments v Forest of Dean DC[CR/2014/0005]** Judge warren at para 21 states that ‘I accept that there are obstacles. It is important, however, not to confuse commercial viability with what altruism and community effort can achieve’ and earlier at para 20 that ‘My conclusion is reinforced by the pledges of support and petitions gathered by the Save our Sun Committee’ and at para 21 again ‘The legislation does not require a detailed business plan at this stage’.

* 1. In **Evenden Estates v Brighton and Hove City Council [CR/2014/0015]** at para 15 Judge Lane States ‘that what is ‘realistic’ may admit a number of possibilities, none of which needs to be the most likely outcome’.
  2. In **Reed v Shropshire** the Judge accepted evidence that no one had come forward to buy the pub but there was more than one possible realistic outcome and one was that the pub may re-open in the next five years and in **Henthames Ltd v South Oxfordshire DC CR/2015/0028** Judge Findlay states that it is not necessary to show that the local community support takes the form of a proposal to acquire and run the nominated asset. The possibility of a viable future commercial use *supported* by the local community is sufficient (emphasis added). The case also confirms that ‘there is no legal requirement for the nominating body or the respondent to produce a worked out business plan. It is not necessary for KHA (the Nominators) to provide "factual evidence to suggest that they would be able to take on this facility".
  3. The Nominating Organisation state at Attachment 2 of the nomination that enquiries were made in 2017 by a resident’s action group to the selling agents in response to an advert but they received no response. The residents group state that they have local parties with funding ready to bid for the site should it be out up for sale.
  4. In summary the council’s case is that re-opening of the Cafe remains one of a number of realistic possibilities for the future and that proposal does not need to be the most likely in order to satisfy the S88 (2) (b) test Finally that a number of realistic outcomes can co-exist.
  5. In response to the Owner’s late suggestion that the use which furthered the social wellbeing or interest of the local community was an ancillary use the Council submitted that the Café use and function itself is not ancillary and it furthered social wellbeing for the following reasons ;
  6. An asset promotes social wellbeing if it provides for social interaction between people, strengthening of friendships, if it supports a sense of local identity and serves to counter loneliness and social isolation and that’s what the Bay View Café did in Bigbury-On-Sea. The Planning Officer observed that it was generally accepted that public houses which have seen significant pressure for redevelopment in recent times, present specific community functions which lead them to have a social importance for the communities that they serve. These social benefits are especially pronounced in isolated rural communities such as Bigbury-On-Sea. These social benefits are equally applicable to café uses and the Bay View Café was able, prior to its closure, to provide these community uses for the village, in fact the café was the only example of such a community facility in the village, the pub is closed and the Post Office is closed. People living in the village prefer to use the café that’s in the heart of the village, near to their homes, particularly the elderly. They want to use the facility where they know they’ll meet other residents and this is backed up by the written representations that the local community made in objection to the planning application. The café being used for coffee mornings. Bigbury-On-Sea is an elderly community with no other community facilities for the locals. It wasn’t just a café to them.

1. **The Owner’s case;**

4.1 Mr Symon’s asked what evidence the Council had received about the community proposals and the Council’s Officers confirmed that they had received the nomination with copy emails referring to the residents group who submitted enquiries about the lease terms to the owner’s selling agents. The nomination from at Attachment 3 states that local parties are ready with funding should the site be up for sale and these range from interested local individuals to experienced caterers from further afield. The council stated that they had taken these submissions at face value.

4.2 Mr Symons did not direct me to any specific case law in his submissions although copies of various cases were provided by his instructing solicitor prior to the hearing.

4.3 The owner’s submissions are summarised below;

i) **The owner’s intentions**

Mr Symons submits that regardless of what happens today, regardless of the outcome of the planning appeal next week, the use of this site for, as a café is a matter of history, the use is not going to resume within the next 5 years because of the owner’s intentions for the site as evidenced by his planning applications. Mr Symon’s claims that Galleon Ltd has permitted development rights and those rights include demolition. Galleon’s view is that a café use can’t be viably operated from this site. That the owner’s intentions are not only material but they’re highly material. Gallion say they can be unequivocal as a matter of fact in this case that there is no such prospect.

ii) **Market interest**

In 2015 the site was marketed by Stags, there were 300 enquiries in respect of that marketing campaign, how many were for café use, 0. Then 6 months of marketing occurred this year, 2017. The marketing was conducted by Vickery Holman, it involved placing advertisements on 7 websites and the Western Morning News and in addition, we say that this is telling, it was sent to 72 applicants on Vickery Holman’s books who had registered particular interest in purchasing Devon café sites, that gives you a feel for the degree of marketing that Vickery Holman undertook. The outcome was 19 enquiries, 2 offers withdrawn without any inspection of the premises, 1 offer withdrawn after inspection of the premises, so i.e. 3 offers in total and of those 3, one of them was for a café use. What about the community interest that was generated by this advert, well as you will have seen from the papers the community, a local group of community members, registered an interest in the property in March, Vickery Holman suggested heads of terms to them and details of additional information that would be required by them for, to put forward a formal offer and to have that offer considered in June and there was no response with those details, even as we sit here there’s been no response, I understand the strategy is to wait out, see what happens at the event of the planning appeal, one way or the other but that’s not the point, the point is that, taken together, these chapters of the marketing history demonstrate without any real ambiguity that there just isn’t any realistic market interest, as a market interest that includes the local members of the community, in this site for café use including local residents and this is why I’ve mentioned in the introduction, what the purpose of this regime is supposed to be about, it’s about ensuring in appropriate circumstances, a community right to bid, that’s what the ACV regime is for. They’ve had one, indeed the market at large had one but the community certainly had one and indeed they started to engage along the lines of registering a bid, but have not, they did not take the opportunity they’d been afforded, now that was their right, it’s not a criticism, it’s just recording what the facts actually are, so maintaining this listing, whether or not it meets the statutory test and obviously we say it doesn’t, serves absolutely with respect to the Parish Council, it serves no purpose, because we already know what happens when we market this, these premises for 6 months which is what we’ve just done.

iii) **Realistic Community Interest**

Mr Symon’s submitted as follows; we are told in the part of the nominating form that local residents are ready and willing to step in should the opportunity arise.

The Council take that at face value, but we say that’s telling, wishing it was so does not equate to evidence of underlining realistic, 88.2b, realistic intention, statement, assertion, but not evidence, it’s just not there. I’ve already touched on the community’s failure to engage on making an offer for the site during the marketing process but even if, let’s just say it did and it ended up purchasing the site the community in order to satisfy the statutory test at 88.2b is a tick in their favour, it needs to show more than mere intention. Mere intention to have a café back and to run it themselves or by whomever is not enough, if mere intention were enough, no nomination would be ever turned on review or in the Tribunal because the nominating group always wants to retain whatever the asset is and intends to do so. You need more than mere intention, what you need, that’s language of the statute, is evidence of a realistic prospect that’s actually going to happen, not just an intention but how that intention might realistically be achieved and that’s the point, it emerges from some of the cases in the bundle but I mean I don’t need to take you to them because that focus on realism is in the statute itself, that’s what Judges have said in other cases, to focus on whether or not the intention can be realistically achieved. Now can it. Well we’ve got no business plan, we don’t necessarily need one, I don’t say that it’s some sort of litmus test they’ve got to put in a business plan but they haven’t, but some sort of business plan of some description, whatever that looks like, we’ve got nothing else, be it a business plan or whatever other sort of documentation you might find persuasive, we’ve got nothing else to substantiate the assertions in the form that we’ve looked at, that it’s realistic to think that the community will be able to run this business and to finance it and that is particularly important in light of the fourth of my 5 points.

iv) **The investment required**

Mr Symon’s submits as follows; this is a fight for the planning appeal but whether you take our figure which is £165,000 plus just to convert the premises into appropriate compliant café use, or the Council’s £50,000 plus it’s a significant amount of money that’s required. I raise that because there is a lack of and when I say any evidence this isn’t a hyperbole, I really do mean any evidence at all before you on how this funding, however much it ends up being, is going to be raised or this is the point really, whether or not it’s realistic to think it could be raised. You are not entitled to do that because you need evidence of realism, 88.2b, so assertion without evidence is not enough. It is just not there and it shows that there is no realistic prospect of café use resuming and that leads to the final of the 5

v) **Viability.**

We said the omission in respect of the costs be it £50,000 or £160,000 or whatever, is all the more important when you appreciate that on our case, on our case not the Council’s case, this is a business that’s not going to make any money and you have, we’ve already been through the limited role that you can have in assessing its viability, but at the very least what you can note is that the viability is contested, it is not established, obviously because we’re contesting it, the Council’s taken its own view. So unless this community can raise a substantial amount of money on either side’s case, from volunteers, local investors, whoever it might be, in a case where we say there’s no hope of any return but at any event whoever’s right, the viability position is contested, unless you can show some sort of evidence that is realistic. Well then there’s the 88.2b test has failed and the Council are unfortunately, has not taken any steps to satisfy yourself that there is any evidence that fills that void, such that the 88.2b test can be passed.

**4.4 The Owner’s Summary**

The various points that I’ve taken you through are not in themselves knock out blows, the owner’s intentions are not determinative for example, lack of a business plan not determinative, lack of all these points, you know not in themselves determinative and actually that’s absolutely right. We don’t say that either that any one of these points taken on its own is some sort of knock out blow because that’s not the way the legislation works, but we don’t rely on them solely, we rely on them cumulatively and if you take a step back and ask yourself as you must, is it realistic on the evidence that I have in front of me, that some time in the next 5 years there’s going to be non-ancillary use that serves community interests, when you add together the ingredients that I’ve taken you through, owner’s intention, marketing period, the absence of any evidence on community’s ability to maintain the use, the disputed fit out costs but on either case there are fit out costs and they are significant, we say that you simply cannot satisfy yourself that realistic test has made out, that, to wrap it all up, as I said at the outset none of what I’ve said and I hope I’ve made this absolutely clear, is to disparage in any way at all or to show a lack of respect for the sincerity of feeling that prompted this nomination, because it’s clearly there and it clearly is sincere, but the statutory tests that you have to apply requires an objective and obviously a dispassionate analysis of the evidence that you have, judged against the tests at 88.2a and 88.2b I am sorry to say that the hurdles just aren’t even, not even close to being met, let alone met.

1. **The Review Decision.**

**The Council should maintain the listing of The Bay Café Bigbury on the Community Assets Register.**

**Reasons**

* 1. The use of the Bay Café as a Café by the local community furthered the social wellbeing and / or social interests of the local community and such use was not ancillary but was integral to its operation as a café used for recreational and social purposes. The S88 (2) (a) Localism Act 2011 test is met.
  2. The future use of the Bay Café is uncertain but without permission for residential development it remains a possibility that there could be non-ancillary use of the building that would further (whether or not in the same way as before) the social wellbeing or social interests of the community.
  3. The nominating organisation are not required to produce detailed proposals or to prove viability for the future use or running of the Café at this stage.
  4. The owner’s intentions for this site are relevant but not determinative. At present these include residential development if planning permission is granted and possible demolition if not
  5. There is community support for future use of the site as a café including funding from local individuals and experienced caterers.
  6. The statutory test to be applied is ‘in the opinion of the authority’.
  7. The case law as set out in the Council’s case support reasons 5.2 to 5.4 above. The original nomination form sets out the extent of the interest from the community at Attachment 3 of their nomination and it is reasonable for the Council to rely upon this to make its decision.

**Sue Nightingale**

**17 December 2017**