

REPORT TO COLIN READ

Application to nominate The White Horse 16 Keyhaven Road Milford on Sea Lymington Hampshire SO41 0QY as an asset of community value

1.0 INTRODUCTION

- 1.1 This report relates to an application made to the Council by the Campaign for Real Ale – Southern Hampshire Branch to nominate The White Horse public house, 16 Keyhaven Road Milford on Sea Lymington Hampshire SO41 0QY (“the Property”) as an asset of community value (“the Application”). The report reviews the Application, the criteria against which a decision has to be made, the result of consultations and makes recommendations.

A copy of the Application is annexed to this report.

2.0 BACKGROUND

- 2.1 The Application to nominate The White Horse public house 16 Keyhaven Road Milford on Sea Lymington Hampshire SO41 0QY as an asset of community value is made pursuant to the Community Right to Bid, arising out of the Localism Act 2011 (“the Act”). If the Council accepts that the nomination meets the criteria set down in the Act, the Property must be added to the Council’s published list of assets of community value, registered as a local land charge and registered against the freehold title to the Property.
- 2.2 If the Property is listed as an asset of community value, the owners must notify the Council if they wish to dispose of the Property. The Council would notify community interest groups of the proposal. If such a group expresses an interest in the Property, a moratorium period of 6 months on the sale is imposed to allow the community interest group to prepare a bid and raise finance. Note however that if the Owner wishes to sell the pub business as going concern, the moratorium on sale provisions of the right to bid are not engaged.

3.0 THE APPLICATION

- 3.1 The Application was made by The Campaign for Real Ale – Southern Hampshire Branch and was received by the Council on 13 November 2015. The Council is the proper decision making authority to determine the Application and delegations have been granted to the Executive Head of Service to make a decision on the matter. The Application is valid under the criteria laid down by the Act and the Property is not within one of the exceptions laid down in the Act.
- 3.2 The appendix to this report explains the legal background to a nomination by a branch of a national organisation. It is accepted that CAMRA – Southern Hampshire Branch is entitled to rely on CAMRA’s national status as a company limited by guarantee which does not distribute any surplus it makes to its members and also then entitled to rely on its own activities in the New Forest District Council area or the area of a neighbouring authority and that any surpluses the branch has are used at least in part within the New Forest District Council area or the area of a neighbouring authority to satisfy the relevant regulations.

- 3.3 The Property is currently owned freehold by Enterprise Inns plc. The Property was until recently used as a public house. The application noted that the Property was closed in September 2015 with a notice from the owner outside and that it was being advertised for let by Enterprise Inns.
- 3.4 However The White Horse reopened for business on 27 November 2015. In the circumstances, and because of the short period of time the Property was closed, the Council has agreed with the applicant and the owners to consider the nomination on the basis that the current and main use of the Property furthers the social well-being or cultural, recreational or sporting interests of the local community and that it is likely to continue to do so in the future.
- 3.5 The applicant provided details about the use of the Property by the local community in the statement accompanying the Application. The applicant says the Property is used as a public house and is important to the social well-being of the local community. In particular the applicant asserts:
- The White Horse is the “preferred village local” of a large proportion of the village population. This appears a bare opinion only.
 - The Property comprises both the bar and restaurant and also a garden room and garden. The car park is used for pub clientele.
 - The pub is popular with families, dog walkers, and organised groups.
 - Community groups who socialise in the pub after events included the Milford on Sea football club, friends and employees of Hurst Castle and various visiting rambler and birdwatching groups.
 - The pub hosted a darts team, regular live music and the very popular “Bob’s quiz”. Various charity events have been organised by the customers.
 - The large car park facilitates customer access to the Lymington and Keyhaven Nature Reserve and Sea Wall, Sturt Pond Nature Reserve, Hurst Castle and the beach.
 - Over 100 local signatories were obtained and have been attached to the nomination. Whilst not required as part of the nomination, the nominators assert this to be “emphatic confirmation” of community value.
 - The nomination includes evidence from a web site “Enjoy Milford on Sea” which references the music and quiz nights, the new children’s play area in the pub garden and referencing the “new owners” (in fact – tenants). The web site is dated 15 November 2013 and the tenants referred to in the web page have now left the property. However in so far as it goes the web page provides some evidence of the new ownership of The White Horse in 2013 being a local news story.
 - The nomination includes a web page dated 10 November 2015 entitled “All Sainly” which indicated that a local church group used The White Horse as a venue until its closure.
- 3.6 In addition, the applicant makes a number of more generic assertions in support of the nomination:
- The British Public House has been proved in several studies to promote social well-being in a manner that cannot be matched by any other facility. The reference to “studies” is unsourced.
 - All pubs are different and have their own loyal clientele.
 - 31 pubs are closing every week in the UK. The applicant asserts that many of these have been trading satisfactorily and have been closed and sold for property development and unchallengeable change of use. However the applicant provides no evidence in support of its assertions.
 - The White Horse is particularly vulnerable as it is a prime location. They say the pub was closed at short notice by the most recent tenants due to a failure in negotiations

with the owner and that such outcomes has also happened in other local pubs. However there is no separate evidence to back up these assertions.

- The nomination says that local sources believe much of the surrounding land to the White Horse has been acquired by a property developer and is perceived to be an imminent threat to the pub. However no evidence has been provided in support of this opinion.

4.0 THE OWNERS COMMENTS

- 4.1 The Owner of The White Horse has been asked to comment on the Application. The Owner's solicitors wrote to the Council on 17 December 2015 objecting to the nomination. Paragraph numbers refer to the numbering used in the letter.
- 4.2 Paragraphs 1 – 9. The owners object to the validity of the nomination. However, as is explained in the appendix, the courts have confirmed that such a "hybrid application made by a local branch of a national organisation" is valid for the purposes of these nominations. Gosschalks make no reference to the relevant case (St Gabriel Properties) and offer no explanation as to why the circumstances of this nomination are different.
- 4.3 Paragraph 10. Gosschalks assert the list of signatures attached to the nomination is "otiose and nothing more than a petition". However the nomination simply attaches the list of signatures as evidence of the "final emphatic confirmation" that the pub has community support and therefore value.
- 4.4 Paragraphs 11 – 13 refer to the validity of the application. However as explained above and in the appendix, the courts have ruled such "hybrid applications" to be valid.
- 4.5 Paragraphs 14. The owners firstly point out and criticise the fact that the nomination includes reference to the previous leasehold title of the former tenants, Mr and Mrs Renouf. However the nomination only requires the nominators to provide the Council with such information about ownership available to them. Since the leasehold title is registered at the Land Registry the nominators cannot reasonably be expected to know the exact status of the Renouf's interest in the land so nothing turns on that point.
- 4.6 Paragraph 14 goes on to submit that a part of the Property (shown edged blue on the attached plan) nominated should not be included in the listing. They argue that the land edged blue on the attached plan to the south of the public house cannot be described as furthering the social wellbeing or interests of the local community. The owners say the nomination does not feature in the submissions and comments in the nomination form. However the nomination does enclose a copy of the owner's freehold title; Appendix A (which forms part of the nomination) refers to the "attractive gardens" and the supplemental "CAMRA" form provided refers expressly to the public house, garden and entire car park. It is clear enough the nomination does include the whole of the freehold title. The "Enjoy Milford" web page (albeit 2 years old) refers expressly to the pub's garden and play area and since the car park and pub garden form part of the pub as a whole it seems reasonable to treat them as one. Gosschalks make no assertion that the car park and the garden are functionally separate from the pub.
- 4.7 Paragraph 15(a). Gosschalks note the nominator's reply to question B2 is incorrect. These comments are noted. However I am aware the pub has re-opened and so appears to be open to the public for business in the usual way.

- 4.8 Paragraph 15(b). The point is made that the “Enjoy Milford” web page is dated 15 November 2013 has already been noted.
- 4.9 Paragraph 15(c). Gosschalks argue that the reference in the nomination to The White Horse” as the “preferred village local” is indicative that similar services are available elsewhere locally and that the objective of the legislation is not to protect people’s preferred destinations but rather to safeguard communities whom may otherwise be left without such services i.e. there is a major difference between a preferred destination and a destination of necessity. However it is not necessary for the Council to decide to list a property only where it is a “destination of necessity”. The Council must be satisfied the nominated property furthers the social wellbeing or social interests of the local community. It is clear that public houses can satisfy that test notwithstanding there are other pubs or restaurants in the area.
- 4.10 Paragraph 16(a). Note that Appendix A was drafted by Peter Simpson rather than Deric Payne. However since Appendix A is attached to and forms part of the application, nothing turns on this.
- 4.11 Paragraph 16(b). Gosschalks make the point that the nominator agrees that the owner has invested in the pub to make it commercially viable, which is noted.
- 4.12 Paragraph 16(c). Gosschalks comment on the nominators points that the pub is frequented by various groups and categories of customers. Gosschalks submit that infrequent use of the pub by local groups is not sufficient to suggest the property should be listed. This is for the Council to decide and it may be the case that such uses and activities, taken together, the property does provide a social function within the local community. The owners do not assert these uses do not take place.
- 4.13 Paragraph 16(d). Gosschalks challenge the nominator’s assertion that various charity events were also arranged by customers. Whilst Gosschalks do not assert these activities did not take place, they say the charities were not specifically local and that there are other local venues where such activities could take place. However it may also be indicative that The White Horse was chosen to host such activities because of its status within the local community.
- 4.14 Paragraph 16(e). Gosschalks refer to the nominator’s assertion that the large car park facilitates customer access to the Lyminster and Keyhaven Nature Reserve and sea wall, Sturt pond nature reserve, Hurst Castle and the beach. Gosschalks assert that the use of the car park for matters unrelated to the pub’s use is not capable of being taken into account in deciding whether to list the property as an ACV. However the nominators refer in this section to “customers” using the car park, rather than it being a public car park. It would appear the car park is an integral part of the pub’s function and so should be treated as one. The Purbeck case referred to by Gosschalks makes the point that the community use of the property must not be an ancillary use. Gosschalks say that the car park is an entirely ancillary and incidental use of the property to its core function that being its operation as a public house. However it does appear that the car park is for the customers of the pub.
- 4.15 Paragraph 16(f). Gosschalks challenge the nominator’s production of the 100 odd signatures. Gosschalks contest that the list of signatures is indicative of deep local feeling within the local community. Gosschalks say, in contrast to the assertion that the pub has deep local support, the pub has not been successfully trading, although they provide no evidence to support that assertion. The Council will need to decide what weight if any to place on the production of the list of signatories.

4.16 Paragraph 17. Gosschalks make various points about “Appendix B” which contains the rather more generic assertions made by the nominators in support of the nomination. In particular Gosschalks challenge the nominator’s assertions that the owner wish to redevelop the property. Gosschalks assert that the owners would much rather have every property within its estate tenanted by successful operators for profit although they also say that the divestment of properties is sometimes unavoidable. In essence, Gosschalks assert that the statements in appendix B are driven more by the “political” agenda of the CAMRA national campaign to register 1000 local pubs than by relevant considerations as to whether or not to list this property as an asset of community value.

As noted elsewhere, the Council is aware that a number of the assertions made in Appendix B are essentially the opinions of the nominator and are not supported by evidence. Gosschalks refute the proposition that the owners have a policy to accelerate the practice of removing tenants. Gosschalks also say the Council should not rely on “hearsay and conjecture” as to the assertion that property developers are acquiring property in the vicinity of the White Horse.

4.17 Paragraph 18. Gosschalks make a number of comments about Appendix C. Again, Gosschalks refute the proposition put forward by the nominators that the owners pressurise tenants into leaving and state there is no evidence the recently departed tenants of the property were pressured into leaving.

4.18 Paragraph 19. Gosschalks invite the Council to consider whether the local community would lose any social interest and/or wellbeing if the property were not listed. In particular they make reference to a number of local pubs and other establishments providing similar services to The White Horse, in particular The Smugglers Inn and The Red Lion. The Council must consider whether, in its opinion, the nomination of The White Horse should be accepted on the basis that it furthers the social wellbeing and social interests of the local community. The fact there are other public houses in the local area does not mean that The White Horse cannot fulfil that test. The legislation does not require that a community is at risk of losing a unique facility and the legislation is very broad as to the range of properties that can be listed. Indeed in some cases it appears all the pubs in a town (e.g. Otley, West Yorkshire) have been accepted for nomination as a “job lot”. At present however this Council takes the approach that each property must be nominated and considered on its own merit.

4.19 Paragraph 20. Gosschalks make reference to a Government report upon the pub sector, making the point there are probably a surplus of pubs in the UK. They advise that the report suggests that the UK has one pub per 1,257 head of population but that a more “reasonable” national requirement for pub stock should be 1 pub per 1,424 per head of population. Gosschalks argue that Milford’s 4 pubs provide a ratio of 1 pub per 1,175 per head of population. The point is that Milford is already well supplied with pubs and the local community will not suffer detriment by a rejection of the nomination.

Gosschalks argue that the purpose of the legislation is to protect the provision of certain services and amenities to local communities where such amenities are not readily available and where the withdrawal of such facilities would have a detrimental effect on the local community

Finally Gosschalks assert that it cannot have been the intention of the legislation to compel property owners to persevere with unprofitable business enterprises and suffer continuing losses when identical services are in plentiful supply elsewhere in the immediate vicinity. However the legislation does not require the owner to sell a listed property to any particular party at a particular price or to give a community interest group a right of first refusal over the property. The legislation allows a community interest group a right to put together a bid for the listed property should it be offered for

sale. The owner does not have to accept any such bid. So apart from a delay in the sale process whilst the moratorium period is worked through, (for which compensation may be available in some circumstances if the owner can demonstrate loss) the owner is not “stuck” with a property or unprofitable business. The legislation does not govern the use of a property since that is for the planning regime and there are a number of exclusions from the moratorium provisions, not least the ability of the owner to sell the property as part of a business sale as a going concern.

5.0 LEGAL POWER AND DELEGATIONS

- 5.1 The Council must consider the nomination and decide whether to list the Property as an asset of community value.
- 5.2 The Council has put in place delegated powers for an Executive Head of Service to make the decision in consultation with the Head of Legal and Democratic Services, relevant heads of service and portfolio holder(s).
- 5.3 The legal criteria to make the decision are laid down in the Act and supporting regulations. The Council must decide whether the Property is of community value.
- 5.4 The land is of community value if, in the opinion of the local authority 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 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. “Social interests” include cultural interests, recreational interests and sporting interests.
- 5.5 In the event of the Council deciding to list the Property as an asset of community value, the owner can appeal against that decision, firstly to the Chief Executive and ultimately to the court (the First Tier Tribunal). The owner is able to claim compensation for loss and expense in relation to the Property which would be likely not to be incurred if the Property had not been listed. This can include delays in entering into a binding agreement to sell the land which is caused by relevant disposals being prohibited by the regulations.

6.0 CONSULTATIONS

- 6.1 A number of consultations have been made as summarized below.
- 6.2 The Owner was informed of the Application as described in section 4 above.
- 6.3 The tenant of the Property shown in the Land Registry papers was asked to comment on the application. They replied that they had no involvement with the business “thanks to Rob Lowe and Enterprise Inns”.
- 6.4 Milford on Sea Parish Council was informed of the Application and was invited to provide comments. They replied:

“Milford-on-Sea Parish Council supports the application by CAMRA – Southern Hampshire Branch, to list the White Horse Public House at 16 Keyhaven Road, Milford-on-Sea as an Asset of Community Value. The Parish Council recognises the contribution public houses make to the vibrancy and vitality of village life and are keen for this to be preserved where possible for future generations of residents and visitors.”

- 6.5 The Head of Planning and Transportation stated there appeared to be no reason not to add the Property to the list.
- 6.6 The Head of Leisure and Employment commented that there would appear to be no reason not to add the nomination to the list.
- 6.7 The Head of Legal & Democratic Services had no comments on the proposal.
- 6.8 Cllr Jill Cleary was informed of the Application as portfolio holder for Housing and Communities and she said that she would leave it to the local Councillors to make any comments.
- 6.9 Cllr James Binns, Portfolio Holder for Health & Leisure stated that he had no objection to the proposal.
- 6.10 Local members Cllr Sophie Beeton and Mel Kendal made no comments on the nomination.

7.0 CONCLUSION

- 7.1 The reasons given by the nominating body set out in section 3 indicate the Property does fulfil the criteria for listing summarized in paragraph 5.4 above.
- 7.2 The Application appears to meet the legal criteria set out in the Localism Act 2011 for the Council to accept the nomination, for the reasons explained in this report.

8.0 RECOMMENDATION

- 8.1 It is recommended that you as an Executive Head of Service of the Council decide this Application pursuant to delegated powers as follows:
- (1) In the opinion of the local authority, the 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 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. It does therefore meet the criteria set out in the Localism Act 2011 to be eligible for listing.

For Further Information Contact:

Background Papers:

Andrew Smith
Solicitor
Tel: 023 80285588
E-mail:
andrew.smith@nfdc.gov.uk

Application
Letter of Objection dated 17
December 2015

APPENDIX

Nomination by CAMRA – Southern Hampshire Branch

1. Land may be included in a list of assets of community value only in response to a “community nomination” See Section 89(1)(a) Localism Act 2011 (“the Act”). In this case, for a nomination to be valid it must be made “by a person that is a voluntary or community body with a local connection”. See Section 89(2)(b)(iii).
2. Voluntary or community bodies are defined in Regulation 5(1) The Assets of Community Value (England) Regulations 2012 (The Regulations”) as meaning:
 - a. A body designated as a neighbourhood forum pursuant to section 61F of the Town and Country Planning Act 1990(1)
 - b. A parish council;
 - 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;
 - d. A charity;
 - e. A company limited by guarantee which does not distribute any surplus it makes to its members;
 - f. An industrial and provident society which does not distribute any surplus it makes to its members;
 - g. A community interest company.
3. “Local Connection” is defined in Regulation 4 of the Regulations. In the context of this case, for a body to have a local connection with land in the New Forest, its activities must be wholly or partly concerned with the New Forest or with the area of a neighbouring authority. See Regulation 4(1)(a).
4. There is an additional condition for those unincorporated bodies within Reg 5(1)(c), (e) and (f) i.e. unincorporated bodies, companies limited by guarantee and industrial and provident societies. Any surplus which they make must be applied at least in part for the benefit of the New Forest area or that of a neighbouring authority. See Reg 4 (1) (b).

The case of St Gabriel Properties Limited v London Borough of Lewisham is directly relevant to an application to list land as an asset of community value by a CAMRA branch.

5. CAMRA (Campaign for Real Ale Limited) is a company limited by guarantee. Article 5 of its Articles of Association prohibits distribution of its income or property to members.
6. Article 4(h) empowers CAMRA, in support of its objectives, “to establish and support branches whose objects are the same as the objects of CAMRA”.
7. The CAMRA – Southern Hampshire Branch confirm that the branch funds are used in the New Forest and surrounding area to set up beer festivals, deal with administrative matters, producing and distributing newsletters to members and pay for venues to hold monthly meetings.
8. In the case of a national company limited by guarantee which also has a network of branches, the judge in St Gabriel confirmed that on a proper application of the regulation the law treats organisations such as this in a hybrid way. CAMRA – Southern Hampshire Branch is entitled to rely on CAMRA’s status as a company limited by guarantee which does not distribute any surplus it makes to its members in

order to satisfy Regulation 5(1) (e). It is then entitled to rely on its own activities in order to satisfy Regulations 4(1) (a) and (b).

9. The Judge in St Gabriel decided that this approach to national organisations with local branches was the proper and realistic approach. However as an alternative the judge accepted the proposition that a CAMRA branch also satisfies Regulation 5(1) (c) as an unincorporated body. "Unincorporated Body" is a broad term which includes community groups of many descriptions. Although the branch constitution does not contain a clause which prohibits distribution of any surplus to members, the Judge stated that there is no requirement for an unincorporated body within Reg 5(1) (c) to even have a written constitution let alone a further requirement that a particular clause be included.
10. Taking into account the branches link with CAMRA nationally and with the evidence of CAMRA – Southern Hampshire Branch as to what it actually does with its money as fact it is considered that CAMRA – Southern Hampshire Branch would satisfy Regulation 5(1)(c) (ii).