IN THE MATTER OF:

BISHOPS END BURDROP BANBURY OXFORDSHIRE OX15 5RQ AND AN APPEAL UNDER SECTION 78 OF THE TOWN AND COUNTRY PLANNING ACT 1990

HEARING STATEMENT ON BEHALF OF THE APPELLANT

LPA REF: 12/00678/F

PINS REF:

Introduction

1. This is an appeal against the refusal of planning permission by Cherwell District Council for a change of use of a vacant public house to C3 residential use.

2. The sole reason given for the refusal of planning permission was that

"The proposal would result in the loss of a village service which on the basis of the application and the contributions received is not conclusively demonstrated as being no longer viable. As such, the loss of the service would lead to unacceptable impact on the character of the area and the local community and would therefore be contrary to policy S 29 of the adopted Cherwell Local Plan 1996, Policy S 26 of the non-statutory Cherwell Local Plan 2004, Policy BE5 of the South East Plan 2009 and government advice on supporting a prosperous rural economy and promoting healthy communities contained within the National Planning Policy Framework."

3. Although reference is made in the reason for refusal to impact on the character of the area, none of the policies cited relate to or govern the impact of development on the character of the area, and neither did the local planning authority officer's report justify the reason for refusal on the basis that the change of use would bring about an unacceptable change in the character of the area. In the recent appeal against the enforcement notice (see below) the Council confirmed that it was not resisting the Ground A appeal on the basis of unacceptable impact on the Conservation Area.

4. Policy S 29 of the Local Plan (which is carried forward in identical terms as policy S 26 of the non-statutory Cherwell Local Plan 2004) states that:

"Proposals that will involve the loss of existing village services which serve the basic needs of the local community will not normally be permitted".

5. The supporting text to the policy confirms that the council

"recognises the importance of village services, particularly the local shop and pub, to the local community and will seek to resist the loss of such facilities whenever possible. However, it is also recognised that it will be difficult to resist the loss of such facilities when they are proven to be no longer financially viable in the long-term."

6. The only other policy cited in the reason for refusal is Policy BE5 of the South East Plan 2009. This is a "high-level" policy that provides little guidance on how this appeal should be determined. It is a policy that is geared towards providing guidance on the preparation of local development documents, rather than providing guidance on the determination of individual planning applications. It is accepted however that to the extent that it requires positive planning to meet the local needs of rural communities for businesses and services, it chimes with policy S29 of the

Local Plan and that the *avoidable* loss of a business which serves local needs would be contrary to policy BE5.

7. In light of the key relevant policy, namely policy S 29, the issues raised by this appeal are whether, firstly, the loss of the public house would involve the loss of an existing village service which serves the basic needs of the local community, and secondly, if the answer to the first question is "yes", whether the appeal should nonetheless be allowed because the public house use has been "proven to be no longer financially viable in the long-term."

Relevant Planning History

8. There has since 1996 been a history of unsuccessful attempts to change the use of the public house to a private dwelling, such attempts being made through applications for certificates of lawful use and applications for planning permission.

9. For the purposes of this appeal the most relevant aspect of this planning history is that on 9 February 2012 an enforcement notice was served alleging a material change of use of the land from a public house to a residential dwelling house. This notice was the subject of an appeal, and this appeal eventually proceeded upon the basis of Ground A only (namely that planning permission should be granted for the change of use alleged in the enforcement notice). The appeal was heard at public inquiry over 4 days (14-17 August 2012) before Inspector Mrs Sara Morgan LLB (Hons) MA, and dismissed by decision letter ("DL") dated 4th of October 2012. It follows that the merits of a change of use as sought in the current application were considered at that appeal. The reasons why the appellant has nonetheless decided to pursue the current application to appeal are explained below.

Case for the Appellant

10. The previous inspector's decision is a material planning consideration. Consistency in decision-making dictates that insofar as this appeal raises the same issues as those considered at the previous appeal, those issues should be determined in the same way unless material circumstances have changed or there is new evidence that would support a different decision. If there is new evidence, regard *must* be had to that new evidence.

11. The ambit of the appellant's case in this appeal is constrained by the decision of 4 October 2012. Inspector Mrs Morgan found that policy S 29 was engaged, and that the loss of the public house to a private dwelling would result in the loss of an existing village service that was serving the basic needs of the village (DL para.17). The inspector also found that the public house facility was a valued facility, and in accordance with paragraphs 28 and 70 of the National Planning Policy Framework its unnecessary loss should be guarded against (DL Paras 18 and 19).

12. Planning policy relevant to this appeal has not changed since Mrs Morgan's decision, and accordingly the appellant accepts that policy S 29 is engaged, and that the loss of the public house would conflict with this policy and the policies in the Framework identified by the previous Inspector.

13. This being the case, the sole issue for determination in this appeal is whether planning permission should be granted for the change of use sought on the basis that there is new evidence that proves that the public house use is not financially viable in the long-term. This issue was considered at the previous inquiry, *and on the basis of the evidence available to her*, the previous Inspector concluded that this had not been proved and she dismissed the appeal.

14. It is vitally important to note that the only evidence on viability presented at the previous appeal was that presented by the local planning authority. This took the form of a viability assessment report by an expert on viability, Mr John Keane. The appellant presented no expert evidence on viability. The appellant was reliant upon his own assessments of profit and overheads, and called evidence from Mr Allman, who gave evidence on marketing but did not purport to be (and was not presented as) an expert on viability. This is recorded at paragraph 36 of the DL, and at paragraphs 38, 40 and 49 (in particular) the Inspector placed great weight on Mr Keane's expertise and the fact that he had used a standard industry methodology for assessing viability, and that this evidence (whilst challenged) had not been countered by any expert evidence to the contrary.

15. In the light of that approach to evidence of viability, the appellant has commissioned and relies upon the evidence of Mr Barry Voysey, an expert on public house viability. His report is appended to this hearing statement, and represents a detailed and comprehensive assessment of whether the premises the subject of this appeal have any prospect of being viable as a public house in the long-term. His qualifications and experience are set out within the body of his report, and it can be seen that he is eminently qualified to reach a conclusion on whether or not the public house is viable in the long term.

16. He has reached a clear conclusion that the public house is *not* viable in the long term.

17. The appellant submits that this evidence clearly supports a different conclusion on viability to that reached by the previous Inspector. There cannot be (and at the previous appeal there was not) any dispute between the council and the appellant that if the public house is not viable in the long

term planning permission should be granted for the change of use sought.

18. The Inspector at this appeal is requested to study the report of Mr Voysey in detail. On the basis of this new evidence, the appellant puts his case in the following way:

    a. the reason for refusal states that it has not been "conclusively" demonstrated that the public house use is not viable in the long term. The local plan provides no guidance as to what evidence of viability or non-viability is required, and there is no reference in the policy to "conclusive" proof being required. It is submitted that a change of use should be permitted if non-viability has been demonstrated on the balance of probabilities. The standard of proof on a planning appeal is always on the balance of probabilities, and there is no reason why a different standard of proof should be required in respect of non-viability.

    b. At the previous appeal the appellant relied upon a number of marketing exercises. The previous inspector found that these marketing exercises were flawed. Accordingly the appellant no longer relies upon those marketing exercises. However, it is submitted that it is not necessary to carry out a marketing exercise in order to demonstrate non-viability:

        i. Policy S 29 does not mandate a marketing exercise;

        ii. At the previous appeal, the local planning authority's expert, Mr Keane, gave evidence that an unsuccessful marketing exercise would not be sufficient to demonstrate non-viability (DL paragraph 20);

iii. Paragraph 38 of the DL clearly contemplates that viability or non-viability can be demonstrated through a commonly used methodology of the type deployed by Mr Voysey and that a marketing exercise is not necessary. Had the previous inspector considered that a non-flawed marketing exercise was mandatory in order to demonstrate non-viability she would (a) have said so and (b) not considered the matters set out at paragraphs 35 to 48;

iv. Previous inspectors' decisions confirm that it is not necessary to carry out a marketing exercise in order to demonstrate non-viability. In this regard attention is drawn to the following decisions, copies of which are appended to this hearing statement: the Hostry Inn, Monmouthshire (26th of March 2002), paragraph 21; the Tontine Inn, Shropshire (6th of October 2006), paragraph 7 (to be read in the light of the marketing history set out in the previous inspector's decision); in the Black Horse, Leicestershire (31st July 2007).

c. The appellant's viability report (at paragraph 8.4) demonstrates that there is very low usage by the village itself of the one public house in the village, that there is virtually no lunchtime trade during the week days, and that there are 29 pubs within a five-mile radius, 10 of which have changed hands in the last 2 years, 3 of which are closed and offered up for sale, 3 of which are offering new lets and one of which is closed with seemingly no future at all. Applying a common-sense approach, this provides fairly good evidence that pubs within the locality are plentiful and suffering.

d. Mr Voysey, like Mr Keane (whose report is also appended to this Hearing statement), has adopted a commonly accepted industry

methodology for assessing long-term viability, using the concepts of Fair Maintainable Trade ("FMT") and Fair Maintainable Operating Profit ("FMOP"). A comparison of the findings of the 2 experts demonstrates the following:

i. Mr Keane (paragraph 23.6 of his report) estimates a FMT of approximately £200,000; Mr Voysey of £180,000 (para 9.4.8). It is submitted that Mr Voysey's evidence on this is to be preferred: it is based on comparables of 10 pubs and is grounded in reality. It is also a figure which sits comfortably with the last annual trading figure for the subject pub, when regard is had to the considerable reduction in pub trade since 2006 (a matter on which both experts are agreed).

ii. the overheads on profit are more or less agreed (Mr Keane, paragraph 23.8, uses a figure of 36.3% and Mr Voysey, paragraph 9.51, uses a figure of 36.9%).

iii. there is no significant dispute as regards the market price for the subject property. Mr Keane (paragraph 21.7) gave evidence that a reasonable sale price was between £240 and £275,000. Mr Voysey estimates a reasonable sale price as one which falls within this bracket (£262,500). Moreover, Mr Voysey's estimate of the reasonable sale price is backed up by a range of comparable is and a knowledge of the local market. He rightly makes the point that a fair market price is one at which a willing seller is prepared to sell, and not just one at which a willing buyer is prepared to buy. One cannot assume a "market price" which is well below the price of comparable pubs because that would not be a "market price", and the vendor would not be willing to sell (see paragraph 9.5.6 of Mr Voysey's

report).

iv. In terms of working out the cost of capital, Mr Voysey's evidence is clearly to be preferred, not least because because Mr Keane's evidence is inconsistent. Mr Keane (at paragraph 23.10) assumes total capital required of £250,000. Given his reasonable market price of between £240 and £275000, this takes no account of his accepted refurbishment costs of £20,000 (paragraph 6.12 of his report). Although the previous inspector accepted this figure of £20,000 as a reasonable, that was in the absence of any countervailing evidence from a suitably qualified expert. That evidence is now available, and Mr Voysey has allowed £30,000 for refurbishment, stock and working capital (paragraphs 5.5.1 and a 9.5.7 of his report). It is submitted that this is a perfectly reasonable allowance and any sensible and cautious purchaser would factor in this sort of overhead.

v. It therefore follows that the total capital required is £292,500 (Voysey para. 9.5.7). Mr Keane applied the cost of capital to only £150,000, arguing that a purchaser would not expect a return on the cash injection of their own money. In the absence of any evidence to the contrary, this was accepted by the Inspector (para.40). It was submitted to the previous Inspector that this was simply not credible, and that submission is now made good by the evidence of Mr Voysey who explains at para. 9.5.3 why a professional viability assessment must take account of the cash that has been injected into the business and why that cash has to be rewarded with a return in order to cover both the risk and the loss of opportunity to invest that

cash elsewhere.

vi. At paragraph 23.10 Mr Keane assumes a loan will be available at 5%. In the absence of any evidence to the contrary the previous inspector accepted that a loan would be available at this rate. Mr Voysey takes a much more realistic view of the commercial lending market and the risks of a pub venture, for the reasons he explains at paragraph 9.5.7 of his report, and factors in an interest rate of 6.5% over 15 years.

vii. Mr Keane at paragraph 23.10 assumed a FMOP of £40,000 per annum. Mr Voysey calculates FMOP of £38,500. Given the uncertainties of any form of commercial prediction the difference is marginal. Mr Keane gave evidence, and it is set out at paragraph 23.9 of his report, that after paying all overheads an operator would have to have a remuneration of £27,000 per annum for a pub to be considered viable. Assuming the cost of capital at only £12,000 (because he wrongly assumed that only £150,000 would need to be borrowed, that the purchaser would expect no return on the cash injection, and that a mortgage would be available at 5%), he calculated that overall remuneration of £28,000 would be available at the end of the year making the pub viable (para.23.10).

viii. Mr Voysey at paragraph 9.5.8 accepts the £27,000 figure is the minimum remuneration required for viability purposes. However he rightly makes the point that this is to give the benefit of the doubt to Mr Keane, because it is difficult to understand why a couple would take on the stresses, strains uncertainties and risks of self-employment to earn what they could earn working at a minimum wage, without investing any

of their own money.

ix. moving forward with the £27,000 figure, if the true cost of capital at £30,000 is factored in, only £8,500 is left as remuneration (or £10,000 if one assumes Mr Keane's FM OP of £40,000). This clearly demonstrates that the pub is not viable.

x. Even if it is assumed (and there is no good reason to make this assumption) that only half of the £292,500 required is borrowed from the bank, and that the purchaser is prepared to forego any return on the £146,500 of their own money invested in the business, the cost of capital at 6.5% remains at approx. £15,000 leaving a remuneration figure of £23,500 (i.e. below the minimum £27,000).

xi. Even if one assumes that (a) finance is available at 5% (and there is no good reason to make such an assumption given the present lack of commercial finance and the high-risk nature of the pub trade) (b) that the cost of capital was to be applied to only half the total sum required (cost of capital) £14,000 and (c) a FMOP of £40,000 as assumed by Mr Keane, this leaves a remuneration figure of only £26,000 (i.e. still below the minimum £27,000).

e. Looking at the totality of the evidence, there can be only one reasonable and rational conclusion: the subject premises are not viable in the long-term as a public house. As set out in his report, Mr Voysey has considerable experience of these matters and he has carried out an in depth analysis of the matter and has concluded that the pub cannot survive as a pub because it would generate a remuneration for a couple of only £8,500. Even on Mr Keane's own

figures the pub cannot deliver the minimum remuneration required to make it viable. Mr Keane manages to get to a figure of £28,000 (barely above the minimum required) only by factoring in nothing at all for the cost of refurbishment, assuming that only £150,000 would need to be serviced by way of a loan, and further assuming that a loan would be available 5%. As Mr Voysey demonstrates, none of this is realistic. Further, the LPA takes no account of that fact that pub trade is declining (Voysey para.9.7.1(d) – 32% decline over last 7 years). There is no "fat" in Mr Keane's calculations to take account of this risk.

19. Unlike the previous appeal, where the inspector had no choice but to give primacy to the only expert evidence of viability before her, on this appeal the inspector is requested to approach the viability evidence with a completely fresh mind, to look at the two expert viability reports and to reach a conclusion as to whether, on the balance of probabilities, the subject premises are likely to be able to trade viably as a public house.

20. It is accepted that there is a policy preference for keeping local services and not allowing them to change into alternative uses. It is also accepted that this planning application is strongly opposed by local people, for understandable reasons. However, it is submitted that the merits of a planning permission for a change of use to a dwelling house should not be judged on the basis of how popular or unpopular such a change would be with the local community. In an ideal world, every small village would have a choice of pubs, shops and local facilities. It is not an ideal world, and policy S 29 fully accepts and incorporates within it a proviso, namely that businesses which are not viable cannot be forced to carry on trading. Viability must be divorced from local and national sentiment. The viability evidence, if considered fairly, demonstrates that this public house simply cannot generate sufficient trade to deliver even the most minimal remuneration to those expected to run it.

21. By way of conclusion, it is submitted that the exception set out in policy is 29 (i.e. non-viability) is proven and this appeal should be allowed.

Other Matters

22. The grounds of appeal in this matter make reference to the fact that the appellant has, relying upon permitted development rights, changed the use of the premises from a public house to A1 retail.

23. It is submitted that this has no bearing on the matters that fall to be considered as part of this appeal, and the appellant does not in anyway rely upon that change of use in support of this appeal.

24. A planning application was made for change of use from public house to C3 residential. This was refused on the basis that non-viability of the public house has not been proven. The appellant has a right of appeal from the decision of the local planning authority, and to submit evidence to demonstrate that non-viability has been proven. It is important that this issue which divides the parties is determined by the Inspector. Legal and/or planning issues that may arise from the change that has taken place in the use of the premises since the appeal was submitted are not issues for this appeal. It is understood that the LPA agree that that this appeal should confine itself to the application for a change of use from a public house to a residential dwelling.