

Decision Maker: Ian Maguire - Assistant Director of Planning and Economic Development (delegated decision)

Date of decision: 29th November 2021

Subject: Nomination for the Groundlings Theatre, Portsea, to be placed on the Register of Assets of Community Value

Report by: Tom Bell - Principal Planning Officer

Wards affected: Charles Dickens

Key decision: No

Full Council decision: No

1 Purpose of report

- 1.1 The Council received an Asset of Community Value ("ACV") nomination in relation to the Groundlings Theatre, Portsea, on 2nd October 2021.
- 1.2 The application is determined against the Localism Act 2011, guidance set out in the Assets of community value: policy statement (2011) and the Council's Policy for Defining Social Interests/ Well-being for determining ACV nominations.
- 1.3 The purpose of this report is to make a recommendation to the Assistant Director of Planning and Economic Development in respect of the determination of the nomination of the Groundlings Theatre as a building or land of community value, that is:
 - a) Where an actual use of the building or other land that is not an ancillary use furthers the social wellbeing or social interests of the local community (either at the time of the application or at a time within the recent past); and,
 - b) It is realistic to think that the use can continue (or that there is a time within the next five years that it would so resume).

2 Background

- 2.1 This application for entry onto the Council's list of Assets of Community Value has been submitted by the Groundlings Theatre Trust ("GTT"), an organisation that meets the eligibility requirement to make a "community nomination", in this case being a charity with a local connection.¹ The GTT has provided the Council

¹ S.89(2) Localism Act 2011; Assets of Community Value (England) Regulations 2012, Reg 5(1)(d)

confirmation that the nomination has been made on the behalf of the trust signed by the trustees.

- 2.2 The Theatre is situated in Portsea within the Council's administrative area and has been put up for sale by the current owner, a Mr Richard Hurdle ("the Owner"), who was formerly involved in the GTT.
- 2.3 The Council acknowledges that the implications of a decision to place land or buildings on its list of assets of community value could represent an interference with the Owner's right to the enjoyment of property under Article 1 to the First Protocol of the European Convention on Human Rights, as incorporated into domestic law by the Human Rights Act 1998. To that end, the Council and indeed the statutory framework of the Localism Act 2011 recognise that such interference must be balanced against the public interest, any interference must be proportionate, and that interference may warrant a claim for compensation by the Owner against the Council.

3 History of the Building

- 3.1 The Groundlings Theatre has been in operation in its current form since April 2020. The theatre is a Grade II Star Listed Building that appears on the Theatres at Risk Register and also on Historic England's Heritage at Risk Register.
- 3.2 The building is believed to date from 1784 and was extended at its north end to nearly double its original length in 1836. It is bounded by a narrow alleyway (Southampton Row) and the south facing Kent Street with Curzon Howe Road giving access to the walled car park. The outside area bordering Curzon Howe Road contains a landscaped carpark for approx. 15 cars, an outside performance area of decking and tiered seating, and a small patio area with tables and seating for patrons. It was originally built as the first non-denominational free school for the poor boys of Portsea with meeting rooms and an assembly hall upstairs, making this one of the oldest places of entertainment in the UK. It was bought by the current owner in 2009 and the ground floor now comprises offices, communal space, Toilets and Kitchen. On the first floor are further toilets, a rehearsal space, Auditorium and dressing rooms. There is a technical room and store above the rehearsal space with stairs from there into the attic.

Theatres in the city

- 3.3 There are a number of theatres in the City the most notable of which are the Kings Theatre on Albert Road and the New Theatre Royal on Guildhall Walk. These theatres predominantly provide for a more commercial offer than the Groundlings Theatre. In addition there are a number of youth theatres and academies including the Big Mouth Theatre; Centre Stage Academy; Abstract Dance and Performing Arts; Stage One Youth Theatre and Stageskool Theatre Arts. The closest theatre to the Groundlings is the New Theatre Royal in the City Centre; none of the other Theatres are within the Portsea area of the city.

4 Summary of the submission

4.1 The GTT submitted its application setting out a number of arguments in favour of the Theatre being listed as an ACV. These included:

- A description of the GTT's role as a Charitable Incorporated Organisation and a copy of the Charity's constitution as supporting documentation.
- A description of the charity's wider programme of outreach in the community, and other community projects including: providing volunteering opportunities, drama classes, Holiday Activities and Food project free school meals, support of other community groups, and holding craft fairs
- A description of the staffing
- A description of the property and its boundaries, including description of the building's architectural features and a land registry document, showing the boundary of the site as a supporting document.
- Confirmation of current occupiers and landowner.
- A statement setting out why the GTT thinks the application should be supported, focusing on its own community role and financial position
- Signed declaration
- Supporting business plan
- Supporting cash flow analysis
- Supporting conservation statement

Summary of the owners' comments

4.2 Following the receipt of the Asset of Community Value application from the GTT the landowner Mr Richard Hurdle was contacted for comment in line with the regulatory requirements. The following comments were received from an agent on Mr Hurdle's behalf.

- Objections were made on behalf of the Owner in response to the Nomination, particularly in relation to the facts that:
 - The ACV nomination, which, if successful, "is an interference with my client's rights under article 1 of protocol 1 of the European convention of human rights, which subsequently exposes the council to compensation claims as my client is 'entitled' to compensation due to this interference".
 - Officer Comment: The rights to compensation if an asset is added to the list of ACVs is acknowledged and the process for this is incorporated in the relevant regulations. This right is not a legitimate reason to not include otherwise relevant land in the list of ACVs.
 - The council has refused to disclose a complete copy of the ACV nomination supporting documents provided by the nominee and we are unable to

- confirm the legitimacy of the nomination or if the nomination has been made as per the regulations;
- Officer Comment: The Council has fully complied with the requirements of the relevant legislation regarding disclosure and notification to the asset's owner. In addition to this further steps were taken to support transparency and secure the release of further information (see below).
 - The local community and the nominee currently have the opportunity to buy the land at public auction which is the only aim of the legislation ;
 - Officer Comment: The fact that an opportunity exists to purchase the site at public auction is not a legitimate reason to not include otherwise relevant land in the list of ACVs. This representation also misunderstands the purpose of the legislation, which is to create moratoria on 'relevant disposals' for limited periods wherein, for example, a community purchase could undertake appropriate fundraising to seek to competitively purchase an ACV.
 - The Nomination appears to be an abuse of the ACV listing regime;
 - Officer Comment: The motivation of an applicant for an asset to be included in the list of ACVs is not relevant to the statutory provisions the Council must consider.
 - The theatre patrons mostly live outside of the local authority area and the property, therefore, does not further the social wellbeing or social interest of the local community;
 - Officer Comment: There is no definition of 'local' in respect of what community an ACV would serve and this is considered to vary depending on the social interests the ACV serves and should be assessed on its own merits. It is noted that the allegation at its highest is "mostly".
 - The nominee has failed to define the proposed boundary of the nomination;
 - Officer Comment: Officers note that a Land Registry plan has been provided in specific response to the section of the provided application form in respect of the definition of the proposed boundary. This is considered sufficient to make clear the boundary of the nomination.
 - Nomination fails to provide reasons why the land is currently of community value;
 - Officer Comment: The nominator has put forward their reasons why they consider the land is currently of community value, summarised in the documents described in paragraph 4.1 above. In addition to that Officers have considered what social interests are furthered by the theatre (see below).
 - Future use for the next 5 years is unrealistic due to the financial position of the current tenant (the nominee);

- Officer Comment: Officers are satisfied that there is a realistic expectation for the use of the site to continue to further social interests. (see below).
- The primary use of the land is a theatre where patrons come from outside the local authority area and
 - Officer Comment: As noted above, whether patrons come from outside a local authority area is not a determinative matter in assessing whether the social interests of a local community are furthered. In any case, no supporting evidence for the Owner's claim has been provided. In the Council's view the claim is not considered credible; it is reasonable to assume that persons within and without the city use the theatre.
- The nominee did not provide evidence that they are authorised to submit the nomination on behalf of the charity.
 - Officer Comment: As noted above Officer's have now secured confirmation that the nomination was duly made on behalf of the charity.

4.3 Following the initial submission the GTT agreed the release of the documents, and the landowner was given an additional two weeks for further comment. Further comments were received which questioned the ongoing financial viability of the theatre and provided details of the grant funding and estimates of what the owner would have expected the theatre's performances to be able to achieve based upon past experience.

Officer Comment: These further representations are not considered to vary the conclusions noted in comments above or discussed below.

5 Should the Theatre be listed as an Asset of Community Value?

5.1 The main legislative tests the nomination must pass are set out in Section 88 of the Localism Act part 5 chapter 3. Based upon the evidence of the applicant GTT and the Owner, the Council forms the view that the legal test in this case is that found in s.88(1):

(1) For the purposes of this Chapter but subject to regulations under subsection (3), a building or other land in a local authority's area is land of community value if in the opinion of the authority—

(a) 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

(b) 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.

- 5.2 Further guidance is set out in the Government's Assets of Community Value: Policy Statement (2011), which states that a building or other land should be considered an ACV if:
- its actual current use furthers the social wellbeing and interests of the local community, or a use in the recent past has done so; and
 - that use is not an ancillary one; and
 - for land in current community use it is realistic to think that there will continue to be a use which furthers social wellbeing and interests, or for land in community use in the recent past it is realistic to think that there will be community use within the next 5 years (in either case, whether or not that use is exactly the same as the present or past); and
 - it does not fall within one of the exemptions which we will be putting in regulations, e.g. residential premises and land held with them.

- 5.3 This report considers each of the points set out in the guidance turn:

Does the current use as the Groundlings Theatre further the social wellbeing and interests of the local community?

- 5.4 As a community theatre and a going concern, the current use of the building provides a clear community benefit. The Theatre provides a cultural and social facility for its users both in the community, in the immediate sense within Portsea (where it is the only theatre), and also as part of the wider cultural offer for the City. It has a different offer from other theatres and performing arts venues in the City, which either put on touring national level performers (Kings Theatre / New Theatre Royal) or are local community performance groups using premises such as community and school halls with limited ability to put on larger performances or performances for the general public. As such if it were to be lost it would be detrimental to the interests of the local community.
- 5.5 Furthermore, and while noting that the current operator of this theatre is a 'community theatre', the definition of "social interests" within s88 of the Localism Act includes cultural and recreational interests. Consequently, even if operated by another lessee as a commercial theatre rather than a community theatre it would still further the cultural and recreational interests, and therefore "social interests" of the local community.
- 5.6 With regard to the Council's 'Policy for defining social interests / well-being', it is considered that Groundlings Theatre "would enhance the social interests and social wellbeing of the local community because in its absence the local community would be deprived of land or a building that is essential to the special character of the local area. This is because the building's historic use is strongly communal since its inception as a school, and this historic use is testified to through its Grade II* listing. Further, Groundlings Theatre provides: "i. a place to meet and socialise," in the context of volunteers and participants in amateur theatre as well as patrons, and is "iii. a recreational" "or cultural facility" by providing theatrical performances and other forms of entertainment.

- 5.7 In terms of defining the local community, the Council is mindful of the First Tier Tribunal decision in *Higgins Homes plc v London Borough of Barnett* [2014] UKFTT CR/2014/0006. In *Higgins Homes*, the owner argued that a finding by the local authority that a bowls club served its local community was not reached by the inspection of specific records of members' addresses, and so the assessment must be flawed. The Tribunal disagreed with this argument, holding that the furtherance of social wellbeing and interests through use of a bowls club was 'obvious'.² Likewise, Portsmouth City Council considers it obvious that a theatre engaging in amateur performances serves its local community. The social wellbeing and social interests of the area are promoted in terms of, for example, opportunities afforded to amateur performers and crew. The benefits to patrons arise in attending performances of any kind. Performers, crew and patrons can be assumed to be from the local area at least in part. The applicant asserts that it works with other local groups and charities such as the Portsea Action Group by allowing them to use the theatre space and providing them with performers. It has been suggested by the Owner that patrons are "mostly" from outside the city, apparently with an implication that outside the city would not be sufficiently local. This mere assertion is not considered good evidence to suggest that the theatre does not serve "the social wellbeing or social interests of the local community." Although the application could be more explicit in specifying the local community, it has done so to an extent and can perhaps be forgiven for regarding the question as 'too obvious'. The Council is satisfied that citizens of Portsea, the wider city of Portsmouth and indeed persons from further afield use Groundlings Theatre to the benefit of their social wellbeing and social interests.
- 5.8 Insofar as the Council's 'Policy for defining social interests / well-being' is concerned with consideration of the local community, the foregoing paragraphs reference the character and heritage of the building in terms of its historic communal functions and statutorily recognised heritage contribution. It is clear that the building hosts events and performances attended by individuals and groups with no formal link to the GTT, promoting community cohesion and a sense of belonging.
- 5.9 In respect of whether the current use of the site would be considered to be ancillary to another use. The application illustrates and the Council understands that the Theatre is principally used for performances, entertainments and theatre-based education. Other uses are likely to be seen as ancillary to the use of the theatre in this way, rather than the inverse. Consequently the Council is satisfied that the current use is not an ancillary use and does further the social wellbeing and interests of the local community.

Is it realistic to think that the theatre will continue to be a use which furthers social wellbeing and interests?

- 5.10 The Theatre has been in operation since 2000 and has been operated by the GTT since April 2020 and evidence has been submitted to support the ability of the GTT to continue to run the theatre. That evidence includes the theatre's business plan and cash flow analysis to show that the theatre has been operating for a number of

² Adamyk, 'Assets of Community Value - Law and Practice' (2017), para 4.21

years, and has the ability to continue to do so. As noted above due to the nature of theatres it is considered there is no reason to believe that even should the current occupier no longer operate the building as a community theatre it could continue to be used as a commercial theatre in a time within the next five years, furthering the social interests of the local community. These conclusions are in accordance with the Council's 'Policy for defining social interests / well-being', which requires the Council to consider " in particular and where it is a matter relevant to that use, the commercial viability of the proposal (including the ability to raise funds) and the sustainability of that use".

6 Recommendations

- 6.1 The Assistant Director is recommended to ACCEPT the Nomination on the grounds that:
Having regard to the Policy for Defining Social Interests/ Well-being, the use of the Groundlings Theatre building furthers the social well-being or interest of the local community, is not an ancillary use, and has shown that it will be able to continue to operate into the future.
Having regard to the European Convention on Human Rights and the Human Rights Act 1998, the public interest in placing the Groundlings Theatre on the list of assets of community value in accordance with the tests of the Localism Act 2011 outweighs the possible interference with the Owner's property rights, which can be considered mitigated by the opportunity for compensation in appropriate cases.

The recommendation(s) set out above were approved³



Signed by:

29th November 2021

Ian Maguire - Assistant Director of Planning and Economic Development

Appendix - Land Registry Details and Title Plan for Groundlings Theatre 42 Kent Street
Portsmouth PO1 3BT

³ Typographical error corrected 03.12.2021 by Ian Maguire