

CHAPTER 3, PART 5 OF THE LOCALISM ACT 2011
ASSETS OF COMMUNITY VALUE (ENGLAND) REGULATIONS 2012

NOMINATION OF BUILDING OR LAND TO BE INCLUDED IN
LIST OF ASSETS OF COMMUNITY VALUE

DELEGATED REPORT

Reference: PR86-012

Case Officer: Darren McBride

Site Address: The Oxney Gourmet Pie and Burger Bar (Formerly The Swan Inn), 1 Swan Street, Wittersham, Tenterden, Kent TN30 7PH (in the Borough of Ashford)

Title Number(s): K341975 (Freehold)

Nominating Body: Wittersham Parish Council

Nomination Validated: 28 May 2021

Deadline Date: 23 July 2021

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Introduction

Under the Localism Act 2011 ('the Act'), the Council must maintain a list of buildings or other land in its area that are of community value, known as its 'List of Assets of Community Value.'

There are some categories of assets that are excluded from listing, the principal one being a residential property. There is, however, an exception to this general exclusion where an asset which could otherwise be listed contains integral residential quarters, such as accommodation as part of a pub or a caretaker's flat.

Generally, buildings or land are of community value if, in the opinion of the Council:

- 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 community¹.

¹ Subsection 88(1) of the Act
DMC BRIDE / PR86-012 / 00600563

Buildings or land may also be of community value if 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 social² 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 community³.

Buildings or land which are of community value may only be included in the 'List of Assets of Community Value' in response to a community nomination by certain specified bodies such as parish councils or voluntary or community organisations with a local connection.

A valid community nomination must contain certain information, including:

- a description of the nominated building or land including its proposed boundaries
- a statement of all the information which the nominator has with regard to the names of the current occupants of the land, and the names and current last-known addresses of all those holding a freehold or leasehold estate in the land
- the reasons for thinking that the Council should conclude that the building or land is of community value
- evidence that the nominator is eligible to make the community nomination

A valid community nomination must be determined within eight weeks. In this instance, the nomination was validated by the Council on 28 May 2021 and so must be determined by 23 July 2021.

If the Council accepts a valid nomination then it must be included on the 'List of Assets of Community Value.' If the Council does not accept that the asset nominated meets the statutory definition, or if it is one of the excluded categories, then the valid nomination must be placed on a 'List of Assets Nominated Unsuccessfully by Community Nomination.'

Procedure

Information about this community nomination has been sent to the following:

- Wittersham Parish Council (nominating body)
- Freehold Owner(s)

² Note: the wording of this condition is different to all the other conditions in that it refers to furthering 'the social wellbeing or interest of the local community' rather than 'the social wellbeing or **social** interests of the local community.' However, in *St. Gabriel Properties Limited v London Borough of Lewisham and another (2015)*, Judge Warren held that the word 'social' should be read in here (para. 27)

³ Subsection 88(2) of the Act

- Mortgagee(s)
- Cllr G Clarkson (Leader of the Council)
- Cllr P Feacey (Portfolio Holder for Community Safety and Wellbeing)
- Cllr L Krause (Deputy Portfolio Holder for Community Safety and Wellbeing)
- Cllr M Burgess (Ward Member)

If the Solicitor to the Council & Monitoring Officer includes the asset on the Council's 'List of Assets of Community Value' then the owner has the right to request, within eight weeks from the date when written notice of listing is given, the Chief Executive to review the decision.

If the owner is not satisfied with the outcome of the internal listing review then they have the right to appeal to the General Regulatory Chamber of the First-Tier Tribunal against the review decision.

The property will remain listed during the review and appeal process.

Consequences of Listing

If an asset is listed nothing further happens unless and until the owner decides to dispose of it. If the owner does decide to dispose of the asset then, unless an exemption applies, the owner must first notify the Council in writing.

Interim Moratorium

There is then a six week interim period from the point the owner notifies the Council. The Council must then inform the nominating community group who may then make a written request to be treated as a potential bidder. If they do not do so in this period then the owner is free to sell their asset at the end of the six week period.

Full Moratorium

If a community interest group does make a request during this interim period, then a full six month moratorium will operate. The community group does not need to provide any evidence of intention or financial resources to make such a bid.

During this full moratorium period the owner may continue to market the asset and negotiate sales, but they may not exchange contracts (or enter into a binding contract to do so later). There is one exception: the owner may sell to a community interest group during the moratorium period.

After the moratorium – either the interim or full period, as appropriate – the owner is free to sell to whomever they choose and at whatever price, and no further moratorium will apply for the remainder of a protected period lasting 18 months (running from the same start date of when the owner notified the Council of the intention to dispose of the asset).

Compensation

Private owners (not public bodies) may claim compensation for loss and expense incurred through the asset being listed. This may include a claim arising from a period of delay in entering into a binding agreement to sell which is wholly caused by the interim or full moratorium period; or for legal expenses incurred in a successful appeal to the First-Tier Tribunal. The assumption is that most claims will arise from a moratorium period being applied; however, the wording of the legislation does allow for claims for loss or expense arising simply as a result of the asset being listed.

The Council is responsible for administering the compensation scheme, including assessing and determining compensation awards.

As with the listing itself, an owner may request an internal review of the Council's compensation decision. If the owner remains unsatisfied then they may appeal to the General Regulatory Chamber of the First-Tier Tribunal against the review decision.

Assessment

The nominating body is 'a voluntary or community body' with 'a local connection,' as defined in Regulations 4 and 5 the Assets of Community Value (England) Regulations 2012 ('the Regs').

The community nomination contains the information required by Regulation 6 of the Regs for it to be considered by the Council.

The premises were previously included in the Council's 'List of Assets of Community Value.' The previous listing expired on 9 May 2021. The latest nomination seeks re-inclusion of the premises in the List⁴.

The community nomination form asked the nominating body to provide their reasons for thinking that the Council should conclude that the building/land is of community value. In this case, the nominating body has confirmed that the building/land is currently not in use and so the questions and answers state as follows:

Q1. If the land/buildings(s) main use in the recent past furthered the social wellbeing or social interests of the local community please confirm that use and explain how it did that (including dates for when this was)...

A1. 'Public House and Restaurant until 2018, then shut awaiting sale as a going concern.'

Q2. How do you anticipate that the land/building(s) will be returned to that use or put to some other main use which will further the social wellbeing or social interests of the local community and when do you consider this will happen?

⁴ The previous nomination was submitted by a different community body and was made at a time when the nominated premises were open and operating as a public house.

A2. 'Great enthusiasm to see The Swan reopened as a Public House and Restaurant either within a Community Benefit Society or within more confident commercial ownership. The Community Benefit Society was registered and a sale agreed before COVID-19 halted fundraising.'

Generally, public houses are the type of buildings which the Community Right to Bid Scheme is designed to protect. However, the Council cannot list buildings or land on its own initiative – they must be nominated. Therefore, the onus is on the nominating body to give their reasons for thinking that the Council should conclude that the building/land is of community value.

There is little guidance on the criteria a local authority should consider when deciding whether an asset is of community value. When the Act was at the Bill stage, the Minister stated that:

"...We have suggested that one of the criteria for assessing what is an asset of community value could be evidence of the strength of community feeling about supporting the asset's being maintained for community use"

In this case, the nominating body is a parish council and so, although there is no evidence of the strength of community feeling, it is reasonable to assume that the Parish Council is representing the views, or is expressing the general wishes, of a reasonable percentage of their local community. Also, I note the nominating body's claim that there is '[g]reat enthusiasm to see The Swan reopened as a Public House and Restaurant.'

For a building or land to be included on the 'List of Assets of Community Value' its main use – not 'an ancillary use' – must further the social wellbeing or social interests of the local community.

I acknowledge that when premises are open and operating as a public house, the main and non-ancillary uses – and its benefit to the social wellbeing or social interests of the local community – are often self-evident. However, in this case, the nominating body has provided no information at all about how the main use of the premises in the recent past furthered the social wellbeing or social interests of the local community. For example, there is no information about whether the public house had a beer garden; whether it served food; whether it hosted quiz nights, live music events etc.

Instead, the nomination form simply states that the nominated premises closed in 2018 and have remained 'shut awaiting sale as a going concern.'

Also, when asked to provide information about how it is anticipated that the nominated premises will be returned to 'that use or put to some other main use which will further the social wellbeing or social interests of the local community,' the nominating body has provided no specific information. Instead, the nomination form merely states that there is 'enthusiasm' to see the premises 'reopened as a Public House and Restaurant either within a Community Benefit Society or within more confident commercial ownership.'

The nomination form concludes: 'The Community Benefit Society was registered and a sale agreed before COVID-19 halted fundraising.'

No information has been provided about the 'Community Benefit Society' and no details have been provided about the agreed sale. However, the fact that the COVID-19 pandemic halted fundraising does suggest that any sale which may have been agreed would still have been contingent on the 'Community Benefit Society' securing further funds.

There is no indication from the nominating body about how much further funding would need to be raised and/or when the agreed sale would be likely to take place.

Again, the Council cannot list buildings or land on its own initiative. The onus is on the nominating body to give their reasons for thinking that the Council should conclude that the building/land is of community value. In my view, the lack of any supporting evidence at all showing that the nominated premises qualifies as an asset of community value is problematic. Whilst this could, perhaps, be overcome by the self-evident benefits of an operating public house, Regulation 6(c) of the Regs states that a community nomination must include —

'The nominator's reasons for thinking that the responsible authority should conclude that the land is of community value'

Depending on the circumstances, the reasons or evidence in support of a nomination may not need to be extensive or overwhelming. Nevertheless, they should still offer a convincing basis for the Council to conclude that the nominated premises should be added to the 'List of Assets of Community Value,' especially given the potential interference that listing could have with the property rights of the owner of the nominated premises.

The previous nomination, submitted in 2016 by a different community body and made at a time when the nominated premises were open and operating as a public house, did contain the previous nominator's reasons for thinking that the Council should conclude that the premises were of community value at that time. However, in my view, it would be inappropriate for the Council to 'carry over' those 2016 reasons to bolster the latest nomination, especially as the latest nomination is made by a different community body and at a time when the previously open and operating premises have now been closed for some three years or so.

Again, in arriving at this view I have had regard to the potential interference that listing could have with the property rights of the owner of the nominated premises.

Accordingly, in this case, the lack of any reasons means that the nomination does not comply with the requirements of the Assets of Community Value regime.

Conclusions

The nominating body has provided no reasons for thinking that the Council should conclude that the nominated building/land is of community value. The nomination does not therefore comply with the requirements of Regulation 6(c) of the Regs.

Accordingly, the nominated building/land should not be included in the Council's 'List of Assets of Community Value'.

Recommendation

That the Solicitor to the Council & Monitoring Officer decline the nomination for this building/land to be included in the Council's 'List of Assets of Community Value.'

That the Solicitor to the Council & Monitoring Officer consent to this building/land being placed instead on the Council's 'List of Assets Nominated Unsuccessfully by Community Nomination.'

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AUTHORITY

In accordance with the functions delegated to me, and for the reasons set out above, I hereby decline the nomination for this building/land to be included in the Council's 'List of Assets of Community Value.' This building/land should instead be placed on the Council's 'List of Assets Nominated Unsuccessfully by Community Nomination.'



Solicitor to the Council & Monitoring Officer

Date: 22 July 2021

H. M. LAND REGISTRY

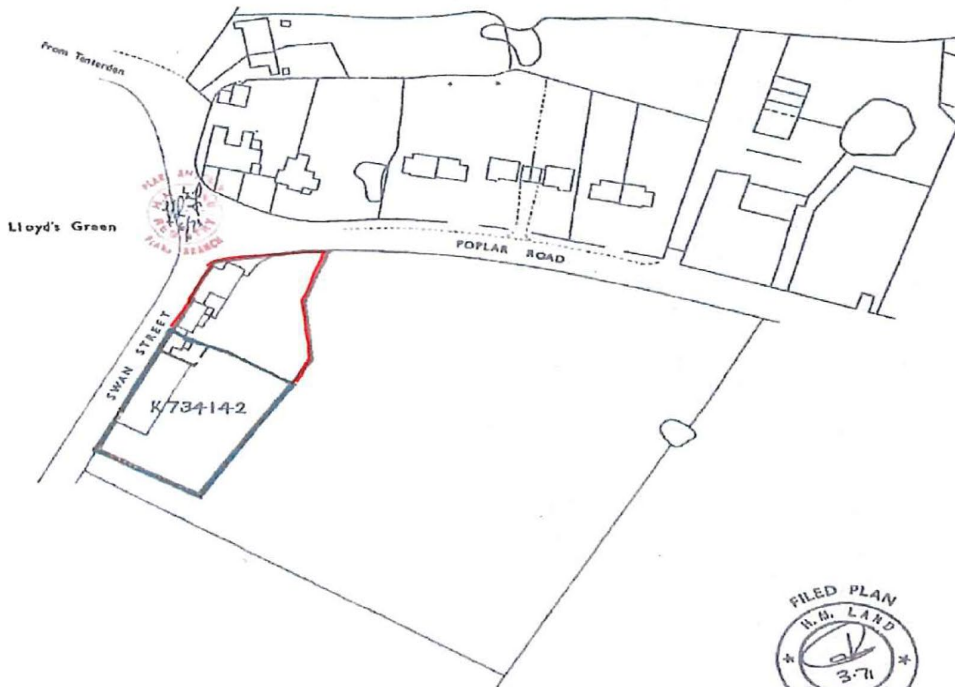
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Enlarged from 1/2500

WITTESHAM PARISH

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PLANS ON THE DEEDS AND ARE
SUBJECT TO REVISION ON SURVEY.



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