

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: PR86-014

Case Officer: Darren McBride

Site Address: The George Public House, The Street, Bethersden,
Ashford, Kent TN26 3AG

Title Number(s): K719657 (Freehold)

Nominating Body: Bethersden Parish Council

Nomination Validated: 29 July 2021

Deadline Date: 23 September 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.

Buildings or land may also be of community value if in the opinion of the Council:

¹ Subsection 88(1) of the Act

- 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 29 July 2021 and so must be determined by 23 September 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:

- Bethersden Parish Council (nominating body)
- Freehold Owner(s)
- Occupier(s)
- Mortgagee(s)

² Note: the wording of this condition is different to all of 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

- 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 A Pickering (Ward Member)
- Cllr J Blandford (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 processes.

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 of 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 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 confirmed that the premises are currently closed 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. 'The George was an active and vibrant village pub until the previous tenants chose to leave after 11 years in October 2020. They left due to a change of circumstances following various Covid-lockdowns, not related to the viability of the business.

Up until then, The George played a key role in the day to day of the village, including:

- Being a hub for the community – a place for casual dining and drinking in the heart of the village
- Providing jobs for members of the local community
- Had a spacious beer garden, where customers could relax and bring their dogs
- Providing offers for senior citizens such as 2 meals for £10 during the week
- Hosting MacMillan coffee mornings and other charity events such as the Ben Hammond Charitable Trust

- Holding a popular annual beer festival bringing in local bands and serving regional beers
- Being used by local sports teams after games, for example the Bethersden Cricket and Tennis clubs
- Hosting private events for birthdays, weddings and funerals

'Members of the village have initiated a questionnaire to understand the level of interest in The George within the community. Based on 191 responses, the key results were:

- 99% of respondents said the village needed The George
- 100% of customers said they would return to the pub if it reopened
- 48% used it daily or weekly when it was open'

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?*

A2. 'There is currently a community business society (CBS) being formed in order to buy the freehold of the public house and run it as a community pub – where profits are reinvested for the benefit of the village rather than investors. This project has the support of the Parish Council.

'By raising sufficient investment from local investors and potentially supported by grants, it is envisaged to be able to re-open the pub as a community business by the end of 2021, which would enable the benefits listed in the previous answer to return to the village.

'In addition, the steering group are then looking at future improvements and bring more social and well-being benefits to the community. Based on the responses provided from the community on the questionnaire, these improvements could include:

- A flexible community area e.g. for private hire, parent & baby and social club use
- Coffee shop (none currently exists in the village)
- Bike repair centre (the area is commonly used by a number of riders and club)
- Pizza oven
- Local cooking classes
- Potential extension to offer accommodation for tourists and visitors to the village
- Click & collect centre for receiving/sending parcels
- Offer library & banking services'

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, even if there was no evidence of the strength of community feeling, it would be 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. However, in this case, the Parish Council has canvassed the views of the local community through its questionnaire and it seems clear that there is significant community support for the nomination.

The building was the subject of a previous successful nomination in 2016. The building (which was then operating as a public house) was included in the Council's List of Assets of Community Value until that entry expired on 6 July 2021. This latest nomination seeks to return the building to the List.

For a building or land to be included in 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.

Setting aside for one moment that this public house is currently closed, the nominating body claims that the public house:

- Was a hub for the community – a place for casual dining and drinking in the heart of the village
- Provided jobs for members of the local community
- Had a spacious beer garden, where customers could relax and bring their dogs
- Provided offers for senior citizens such as 2 meals for £10 during the week
- Hosted MacMillan coffee mornings and other charity events such as the Ben Hammond Charitable Trust
- Held a popular annual beer festival bringing in local bands and serving regional beers
- Was used by local sports teams after games, for example the Bethersden Cricket and Tennis clubs
- Hosted private events for birthdays, weddings and funerals

Generally, a local meeting place of this type would be considered as furthering the social wellbeing or social interests of the local community and the main use of the building as a public house would in and of itself further the social wellbeing or social interests of the local community.

In my view, providing employment for members of the local community is likely to be considered an economic benefit rather than a benefit which furthered the social wellbeing or social interests of the local community. However, the serving of food is likely to be viewed as non-ancillary to the main use. Also, the use of the pub for gatherings and entertainment – provided that those events were

intrinsic to the main use of the building as a public house (for example, beer festivals, live music events, local clubs, charity groups etc.) – would also further the social wellbeing or social interests of the local community.

In my view, the main use of the building as a public house would further the social wellbeing or social interests of the local community.

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As mentioned above, the nominated premises are currently closed and so the Council must consider whether:

- (a) there is a time in the recent past when an actual use of the building/land that was not an ancillary use furthered the social wellbeing or social interests of the local community, and
- (b) 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/land that would further (whether or not in the same way as before) the social wellbeing or social interests of the local community.

There is a time in the recent past when an actual use of the building/land that was not an ancillary use furthered the social wellbeing or social interests of the local community

There is no statutory definition of 'recent past.' The Department for Communities and Local Government's guidance⁴ provides the following comment on the meaning of 'recent past':

'With regard to "recent past", our current view is that we will leave it to the local authority to decide, since "recent" might be viewed differently in different circumstances. For example, "recent" might be taken as a longer period for instance for land which was formerly used by the public until the MoD took it over for live ammunition practice, than for a derelict building. Ten or even twenty years might be considered recent for the former but not for the latter.'

I understand that some authorities have treated the 'recent past' as being the five year period preceding the nomination but in *Scott v South Norfolk District Council (2014)*⁵, Judge Warren in the General Regulatory Chamber of the First-Tier Tribunal said that the phrase 'in the recent past' was deliberately loose in contrast to the five years in the second condition and that it was 'not the Tribunal's role to undermine that by giving the phrase a meaning which is certain.'

In *Worthy Developments v Forest of Dean District Council (2014)*⁶, Judge Warren (again) stated that:

⁴ Assets of Community Value – Policy Statement (2011)

⁵ CR/2014/0007

⁶ CR/2014/0005

“It seems to me illogical to seize on the period of five years, as some suggest, when applying the past condition. This figure is chosen because it is the length of time specified by Parliament over which the future condition is to be assessed. It seems to me, however, that Parliament’s failure to specify the precise period of five years when defining the past condition, cannot be taken as intending that the more precise period used in the definition of the future condition should be imported”

In *Crostone v Amber Valley Borough Council (2014)*⁷, Judge Lane stated that:

“The ‘recent past’ is not defined in the Localism Act 2011 or any relevant subordinate legislation. What constitutes the ‘recent past’ will depend upon all the circumstances of a particular case. To that extent, the expression is a relative concept. In this regard, it is relevant that the Black Swan operated as a public house for almost 200 years, until its closure in 2012...”

Accordingly, although what constitutes the ‘recent past’ will depend on all the circumstances in a particular case, Judge Lane’s conclusion that ‘the expression is a relative concept’ suggests that the length of time that the building had been used as a public house is relevant (in *Crostone* it was nearly two hundred years). Therefore, the implication seems to be that the longer the period of use furthering a community benefit the longer the period which will constitute the ‘recent past.’

In this case, according to the nominating party, the public house closed in ‘October 2020.’ Therefore, at the time of this nomination⁸, it had been closed for around nine-ten months only and, it is claimed, the closure followed ‘a change of circumstances following various Covid-lockdowns’ rather than because the business had become unviable.

The nominating party does not state when the public house first opened but according to the relevant listed building entry on the Historic England website⁹, the public house dates from ‘C18’ i.e. circa 18th century. Accordingly, prior to its closure in October 2020, it seems that the building may have been used continuously as a public house for up to 320 years. In my view, having regard to the relative concept of ‘recent past’ as outlined by Judge Lane in *Crostone* (above), October 2020 would be viewed as the ‘recent past’ when viewed in the context of up to 320 years’ of continuous use prior to that date.

Therefore, as I have already concluded that the actual main use of the building prior to its closure would have furthered the social wellbeing or social interests of the local community, then it follows that in my view there was a time in the recent past when an actual main use of the building that was not an ancillary use did further the social wellbeing or social interests of the local community.

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/land that would further (whether or not in

⁷ CR/2014/0010

⁸ Validated on 29 July 2021

⁹ <https://historicengland.org.uk/listing/the-list/list-entry/1185417>

the same way as before) the social wellbeing or social interests of the local community

The central government guidance is silent on the question of whether there is a realistic prospect that there could again be a community use of nominated building/land. The case law suggests that the test does not require the likely future use of the building/land to be determined but rather to determine whether future community use is a realistic prospect¹⁰.

Regarding future viability, the central government guidance is again silent. In *Worthy* (mentioned above), the Court considered detailed financial appraisals which indicated that it would not be economically viable for the public house in question to return to community use. However, Judge Warren stated that:

“...It is important, however, not to confuse commercial viability with what altruism and community effort can achieve. The calculations advanced by Worthy Developments Ltd do not, in my judgment, ...demonstrate that the committee’s plans are not realistic. Although there was some discussion of the figures at the hearing, it does not seem to me necessary to go into further detail on this point. The legislation does not require a detailed business case at this stage” [emphasis in original]

Other cases appear to support this stance¹¹ and so it does not seem to me to be necessary for the Council to consider the viability of some future community use of the building. The test seems to be simply 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 the social wellbeing or social interests of the local community.

In this case, the nominating body claims that:

- A community business society (CBS) is being formed in order to buy the freehold of the public house and run it as a community pub
- The aspiration of the CBS is to re-open the pub as a community business by the end of 2021
- A steering group is considering a number of potential ‘improvements,’ some of which would be non-ancillary to a public house use (such as the installation of a pizza oven, accommodation for tourists and visitors to the village etc.) and some of which would be unrelated to a public house use but which may provide, albeit in a different way than before, benefits which could further the social wellbeing or social interests of the local community (such as a coffee shop, local cooking classes etc.)
- Other ‘improvements’ are being considered which would likely be viewed as economic/commercial benefits (such as a bike repair centre, click and collect centre, banking etc.) rather than benefits which would further the social wellbeing or social interests of the local community

¹⁰ See again: *Worthy Developments v Forest of Dean District Council (2014)*(para. 19)

¹¹ See for example: *Gibson v Babergh District Council (2015)*(CR/2014/0019); *Sawtel v Mid-Devon District Council (2014)*(CR/2014/0008); *St. Gabriel’s* (aove) etc.

First, the public house closed in 'October 2020' i.e. just nine-ten months before this nomination. As such, because of the pandemic restrictions affecting the hospitality sector over the past year or so, the public house has in effect been closed for little longer than many operating public houses.

Second, although, having regard to *Worthy*, future viability is not a primary concern, I note that it is claimed that the previous tenants '*left due to a change of circumstances following various Covid-lockdowns, not related to the viability of the business.*' As such, it seems reasonable to conclude that a resumption of the use of the premises as a public house may be possible.

Third, I note from the questionnaire responses that every one of the 191 respondents said that they would return to the pub if it reopened. This suggests that it is realistic to think that such a use would be supported by the local community.

Fourth, again, it should be noted that the use would not need to be as a public house and it would not even necessarily need to be economically viable in the sense that it would have to make a profit for its operator. This is because it could be run as a not-for-profit co-operative by local community volunteers as either a public house or for some other non-ancillary community use.

On balance, in my view, it is realistic to consider that the building could re-open in the next five years as a public house or for some other non-ancillary community use.

Conclusions

For the reasons set out above there is, in my view, a time in the recent past when an actual use of the building/land that was not an ancillary use furthered the social wellbeing or social interests of the local community; and it is, in my view, realistic to think that there is a time in the next five years when there could be a non-ancillary use of the building/land that would further (whether or not in the same way as before) the social wellbeing or social interests of the local community.

I have taken into consideration the potentially adverse impact that listing could have on the owner(s) of the building/land (as summarised above under the sub-heading *Consequences of Listing*) but the internal listing review process and appeal do allow the owner(s) the opportunity to challenge the decision to list.

Accordingly, in my view, this building/land should be included in the Council's 'List of Assets of Community Value'.

Recommendation

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

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AUTHORITY

In accordance with the functions delegated to me, I hereby accept the nomination for this building/land to be included in the Council's 'List of Assets of Community Value', for the reasons set out above.

A handwritten signature in black ink, appearing to read 'J. Martin', written in a cursive style.

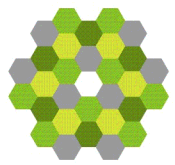
Solicitor to the Council and Monitoring Officer

Date: 27th September 2021

HM Land Registry

Official copy of title plan

Title number **K719657**
Ordnance Survey map reference **TQ9240SE**
Scale **1:1250 enlarged from 1:2500**
Administrative area **Kent : Ashford**



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