

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: PR86-017

Case Officer: Darren McBride

Site Address: Bethersden Post Office and Stores, The Street,
Bethersden, Ashford, Kent TN26 3AD

Title Number(s): K101579 (Freehold) and TT47728 (Leasehold)

Nominating Body: Bethersden Parish Council

Nomination Validated: 17 October 2016

Deadline Date: 12 December 2016

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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 17 October 2016 and so must be determined by 12 December 2016.

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 (the nominating body)
- Freehold Owner(s)
- Leasehold Onwer(s)
- Mortgagee(s)
- Cllr G Clarkson (Leader of the Council)
- Cllr G Bradford and Cllr G Dyer (Portfolio Holder and Lead Member for Highways, Wellbeing and Safety)

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

- Cllr A Pickering and Cllr C Bell (Ward Councillors)

If the Corporate Director (Law and Governance) and 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 Council⁴.

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. The questions and answers state as follows:

Q1. What is the current main use of the land/building(s)?

A1. "Post office and village shop"

Q2. How does the current main use of the land/building(s) further the social wellbeing or social interests of the local community...?

A2. "Bethersden is a local service centre, with two pubs, a school, a bus service and a thriving rural community, which centres on the village and extends out into a rural 'envelope' where people and local businesses also rely on its various amenities. The Post Office and Stores is one of the main hubs of the village, offering essential postal, banking and shopping services, and also providing local information. It displays details of local tradesmen and services, community, sporting and cultural events, and other announcements of various kinds, which is particularly helpful for those older residents who are not on the internet. Parents and their children attending the village primary school regularly use it, as do those who work from home. It serves fresh sandwiches and baked goods all day (there is no longer a village baker), and sells cold drinks, ice creams, wine and beer, fresh local milk and farm eggs, confectionery and newspapers. It provides a vital source of everyday household and grocery items which would otherwise be unavailable, as it is one of only two remaining retail shops in the village (the other being a butcher's). The village is very fortunate still to have the benefit of such an important asset, which is within walking distance for many residents"

⁴ Note: The nomination as originally submitted included an out-of-date plan, but a new plan was subsequently substituted and the nomination was then validated.

Q3. *Why do you consider that this, or some other main use to which the land/building(s) will be put which will further the social wellbeing or social interests of the local community, will continue and over what period...?*

A3. "The Post Office and Stores, which is in the heart of the village conservation area, has been in such use for at least 45 years. Prior to that, a Post Office service was housed in various other buildings in the village, so Bethersden has traditionally had its own Post Office for as long as anyone can remember. It is run by a local family, and the contribution it makes to the welfare of the village and its environs is greatly valued. This is a special asset for Bethersden, on which many depend for their essential needs, and its loss would have a huge impact on the quality and sustainability of village life, as has already happened in many other rural areas. The village and surrounding communities will continue to need its services indefinitely, giving the business unlimited longevity"

Generally, village shops are the type of premises 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 significant percentage of their local community.

The Post Office and Village Shop is currently open and operating. No evidence has been submitted which demonstrates that the business is viable and therefore likely to continue to remain open. However, there is no requirement for the nominating body to demonstrate future viability. The test is simply that it is "realistic to think that there can continue to be non-ancillary use of the building..." The fact that the Post Office and Village Shop is currently open and operating would, in my view, suggest that it is realistic to think that the current use can continue.

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

In this case, the nominating body claims that the Post Office and Village Shop:

- offers essential postal, banking and shopping services, and also provides local information
- displays details of local tradesmen and services, community, sporting and cultural events, and other announcements of various kinds, which is particularly helpful for those older residents who are not on the internet
- is used regularly by parents and their children attending the village primary school
- is used regularly by those who work from home.
- serves fresh sandwiches and baked goods all day and sells cold drinks, ice creams, wine and beer, fresh local milk and farm eggs, confectionery and newspapers
- provides a vital source of everyday household and grocery items

In short, it is claimed that many of the local residents depend on the nominated Post Office and Village Shop for many of their essential needs.

A village shop's primary use is to provide goods for purchase by the local community and a Post Office provides additional, often essential, services. In my view, the examples of goods and services offered by the nominated Post Office and Village Shop are part of its primary use and, as such, would be important in furthering the social wellbeing or social interests of the local community.

Furthermore, the nominated Post Office and Village Shop is "one of only two remaining retail shops in the village (the other being a butcher's)". Given that the butcher's is unlikely to offer many of the goods and services provided by the Post Office and Village Shop then the nominated property is, in effect, the last general stores in the village. In my view, this would increase its importance to the local community.

There is, however, a question about whether the nominated premises are an excluded category and so should not be included in the Council's List of Assets of Community Value.

The nominated premises (shown on the detailed plan submitted with the nomination) is all of the land registered under freehold Title Number K101579. The freehold title includes the large main building (known, I understand, as London House) where the Post Office and Village Shop is located and further buildings and land to the rear.

However, within the nominated premises is a leasehold property registered under Title Number TT47728 known as Village View, London House, The Street, Bethersden, Ashford, Kent TN26 3AD. The 999 years lease of Village View was granted on 26 February 2016 and the leasehold property is described in the freehold register as follows:

First and ground floor flat, garden ground, parking space and garage

On 17 October 2016 I sent a letter to the leasehold proprietors⁵ notifying them that the Council had received this community nomination. On 19 October 2016

⁵ The standard notification letter was sent to all of the persons/bodies listed at the bottom of page 2 and the top of page 3 (above).

one of the leasehold proprietors telephoned the Council and asked me to explain the community nomination process.

During that conversation I asked the leasehold proprietor whether they would clarify the extent of their property and whether they operated the Post Office and Village Shop.

The leasehold proprietor informed me that the Post Office and Village Shop is located within the larger London House building (registered under freehold Title Number K101579). Contained within London House are the Post Office and Village Shop (on part the ground floor) and three separate units on the first floor. The leasehold proprietor said that their residential unit – Village View – is located on the ground floor (part) and on the first floor (part) above the Post Office and Village Shop. They also own the leasehold title to some of the ground at the rear of London House (including a garage). The remaining two units on the first floor are still held by the freehold proprietor.

The leasehold proprietor confirmed that their flat has no connection to the Post Office and Village Shop and that neither of the leasehold proprietors work in or have any interest in the Post Office and Village Shop.

On 28 April 2015 the Council issued an enforcement notice under section 172 of the Town and Country Planning Act 1990 (as amended) in respect of the following alleged breach of planning control at the London House building:

“Without planning permission, the change of use of the first floor of the building from a single flat and disused rooms/offices to three independent flats”

The “single flat” is the lawful flat known as Village View (referred to above).

The enforcement notice required the permanent cessation of the residential use of the two unlawful flats (described as Flat 1B and Flat 1C) and the removal of all domestic fixtures and fittings, bathroom sanitary ware and all other domestic units, appliances and paraphernalia associated with the unlawful residential use of Flats 1B and 1C.

In my view, it is clear therefore that the first floor of the nominated London House building is/has been used for residential purposes and all of those residential uses appear to be unconnected to the use of part of the ground floor as a Post Office and Village Shop. Certain uses may have been unlawful but at least one residential unit (Village View) is lawful and that independent dwelling includes part of the first floor, part of the ground floor and garden ground, a parking space and a garage to the rear. As such, in my view, the Village View dwelling is not a residential quarters integral to the Post Office and Village Shop.

Regarding the other units on the first floor, they may no longer be used for unlawful residential purposes⁶ but it would appear that their uses in the recent

⁶ For the avoidance of doubt, I am not stating that the unlawful use(s) has ceased – which is a matter for the Council in its capacity as local planning authority. The cessation, continuation or resumption of the unlawful use(s) is irrelevant for the purposes of determining this community nomination. The only point of relevance is

past – whether it be as unlawful residential accommodation, disused rooms or office space – may have all been independent from the use of part of the ground floor as a Post Office and Village Shop.

This all suggests that there has been a functional separation in the relationship between the part of the ground floor where the Post Office and Village Shop is located and the remainder of the London House building and, even, much of the associated land and outbuildings.

Paragraph 1, Schedule 1 to the Regs relates to 'land which is not of community value (and therefore may not be listed)' and states that:

(1) Subject to sub-paragraph (5) and paragraph 2, a residence together with land connected with that residence.

(2) In this paragraph, subject to sub-paragraphs (3) and (4), land is connected with a residence if—

- (a) the land, and the residence, are owned by a single owner; and
- (b) every part of the land can be reached from the residence without having to cross land which is not owned by that single owner.

(3) Sub-paragraph (2)(b) is satisfied where a part of the land cannot be reached from the residence by reason only of intervening land in other ownership on which there is a road, railway, river or canal, provided that the additional requirement in sub-paragraph (4) is met.

(4) The additional requirement referred to in sub-paragraph (3) is that it is reasonable to think that sub-paragraph (2)(b) would be satisfied if the intervening land were to be removed leaving no gap.

(5) **Land which falls within sub-paragraph (1) may be listed if—**

(a) **the residence is a building that is only partly used as a residence; and**

(b) **but for that residential use of the building, the land would be eligible for listing. [my emphasis]**

In *Wellington Pub Company v The Royal Borough of Kensington and Chelsea (2015)*⁷ a public house comprised a basement, ground floor and two upper stories. The ground floor was the pub, with the basement serving as storage for the pub. The first and second floors comprised residential accommodation.

The Respondent Council was asked to review its decision to list the public house as an asset of community value under the provisions of the Act. The listing extended to the entirety of the building; that is to say, the basement, ground floor, first and second floors. The outcome of the review was to maintain the listing of the entire premises.

The appellant appealed to the General Regulatory Chamber of the First-Tier Tribunal.

that the unlawful use(s) was taking place and that it was, it would appear, functionally (and, perhaps, physically) unconnected to the use of part of the ground floor of the London House building as a Post Office and Village Shop.

⁷ CR/2015/0007

In October 2012 the Department for Communities and Local Government published a non-statutory advice note⁸ for local authorities concerning the community right to bid provisions of the Act and the Regs. Section 3 of the advice note concerns the list of assets of community value. Paragraphs 3.5 to 3.8 describe land which may, and may not, be listed as such an asset. Paragraphs 3.6 and 3.7 are relevant to this current nomination:

"3.6 There are some categories of assets that are excluded from listing. The principal one is residential property. This includes gardens, outbuildings and other associated land, including land that it is reasonable to consider as part of the land with the residence where it is separated from it only by a road, railway line, river or canal where they are in the same ownership as the associated residence. Details of this are set out in paragraphs 1 and 2 of Schedule 1 to the Regulations. "The same ownership" includes ownership by different trusts of land settled by the same settlor as well as literally the same individual owner.

3.7 There is an exception to this general exclusion of residential property from listing. This is 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."

In *Wellington Pub Company* the appellant's position was that, whilst it had no objection to the ground floor and basement of the building being listed as an asset of community value, it objected to the inclusion in the listing of the first and second floors, comprising the residential accommodation. Since a residence was excluded from the category of land that can be listed (*paragraph 1(1), Schedule 1 to the Regs above*), the appellant contended that, having regard to the fact that a "building" includes "part of a building"⁹, the "exception to the exception" in paragraph 1(5) of Schedule 1 to the Regs (above) was not satisfied.

In short, the appellant claimed that the residential accommodation was not "integral" to that part of the building which comprised the pub.

However, the occupiers of the residential accommodation were the lessees and licensees of the pub and they had leased and operated the pub for the previous 27 years. During that time they lived with their family in the residential flat on the first and second floors. The lease granted covered the entirety of the premises (that is to say, both the pub and the residential accommodation), the occupiers paid rent in respect of the entirety of the demised property, and there was a single account for all utilities provided to the building.

An external means of access to the flat had been installed but the internal means of access from the pub to the residential accommodation above had been maintained.

A manager had been appointed so that the licensees ceased the day-to-day running of the pub but they were still involved and could continue to reach the

⁸ *Community Right to Bid: Non-statutory advice note for local authorities (October 2012)*

⁹ Section 108(1) of the Act.

pub internally from the residential upper floors. Furthermore, one of the licensees was also the designated premises supervisor for the purposes of the licensing regime, making them the point of contact in respect of emergencies.

Judge Lane held that:

- (i) caution should be exercised when interpreting paragraph 1(5) because it is an exception to a general exception;
- (ii) whether or not a part of a building was a separate planning unit was not determinative as to whether paragraph 1(5) applied. Account could be taken of the factors causing a part of a building to be a planning unit but just because a part of a building was a planning unit it did not follow that it was automatically so treated for the purposes of the assets of community value regime. To do so would be to make paragraph 1(5) meaningless.
- (iii) the planning decision in *Henriks v Secretary of State for the Environment and Eastbourne Borough Council (59 P&CR 443)* that identifiable component parts of a building are to be treated as a separate building for the purposes of the General Development Order 1977 did not provide assistance with regard to the operation of the Assets of Community Value regime.
- (iv) the submission that a residential flat can never be regarded as separate for the purposes of the Assets of Community Value regime was firmly rejected;
- (v) for the purposes of the Assets of Community Value regime not every component part would be treated as a separate part. What constitutes a building for these purposes is a question of fact and degree.
- (vi) the test is not whether the part of the building is necessary for the nominated asset to function. This again would rob paragraph 1(5) of any meaning.
- (vii) to be a part of the listed Assets of Community Value there must be a current physical and functional relationship between the residential part and the remainder. The decision has to be based on all the relevant facts as to whether there was a sufficient physical and functional relationship between the residential area and the remainder of the nominated asset.
- (viii) that decision is made against the historical background of the nominated asset;
- (ix) on the facts of the case there was both a physical and functional relationship and in consequence the whole building should continue to be listed.

In *Wellington Pub Company* the appeal was dismissed because it was clear from the facts of the case that there was a sufficient physical and functional relationship between the pub and the residential accommodation.

Returning to this community nomination, however, the relevant facts suggest that there is no physical or functional relationship between the part of the ground floor where the Post Office and Village Shop is located and some or all of the remainder of the London House building and the associated land and outbuildings. Moreover, it would appear that the physical and functional

separation is longstanding¹⁰. There is certainly no evidence before the Council to suggest otherwise and, in fact, there is no evidence to suggest that the first floor has ever been used for purposes integral to the use of part of the ground floor as a Post Office and Village Shop.

Finally, I have considered the decision in *Gullivers Bowls Club Limited v Rother District Council (2014)*¹¹. The judgment confirms that planning law concepts, developed by the Courts for a different purpose, should not readily be imported into decisions under the Act¹² and that each case will turn on its own facts¹³. Importantly, this case also considered whether, where "an actual current use" extends to only an identifiable part of a nominated land, there is power to list only that part of the land i.e. list less than the whole land nominated. This is of potential relevance in this case because I have considered the possibility that merely the part of the ground floor of the London House building where the Post Office and Village Shop is located should be listed, rather than the entire nominated premises.

However, I consider that it would be artificial to make such a separation – especially in the absence of carefully-drawn plans of the relevant part of the ground floor and written evidence focused on the extent and purposes of the use of just that part of the building. At present I am unable to identify with any certainty the relevant part(s) of the ground floor.

Also, it may be that part(s) of the associated land and outbuildings have a use which is integral to the primary use (say for storage purposes) but, again, I am unable to identify with any certainty those relevant part(s) of the associated land/outbuildings.

I prefer the view that it is normally for the nominating body to submit appropriate plans, supported by evidence that the building(s)/land shown thereon is eligible for listing, which I think is "the fair and sensible course" (as stated in *Gullivers*, para 9). Therefore, I feel that it would not be fair or sensible to consider this further under this nomination, and I would dismiss the possibility of partial listing in this case.

Conclusions

In my view, it is reasonable to conclude that the actual current use of part of the ground floor of the London House building as a Post Office and Village Shop does further the social wellbeing or social interests of the local community.

However, from the information I have received, there is insufficient physical and a functional relationship between the part of the ground floor where the Post Office and Village Shop is located and some or all of the remainder of the London House building and the associated land and outbuildings. As such, the "exception

¹⁰ The Design and Access Statement submitted with planning application 14/00233/AS (available to view on the Council's website) suggests that the first floor had been used as independent living accommodation since at least 2004.

¹¹ *UKFTT/CR/2013/009 (GRC)*

¹² Para 7

¹³ Para 8

to the exception" contained in paragraph 1(5) of Schedule 1 to the Regs (above) is not satisfied. As a result, the nominated building(s)/land does not meet the statutory definition and so should not be included in the Council's 'List of Assets of Community Value'.

Recommendation

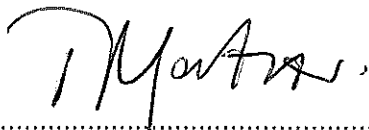
That the Corporate Director (Law and Governance) & Monitoring Officer decline the nomination for this land to be included in the Council's 'List of Assets of Community Value'.

That the Corporate Director (Law and Governance) & Monitoring Officer consent to this 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 land to be included in the Council's 'List of Assets of Community Value'. This land should instead be placed on the Council's 'List of Assets Nominated Unsuccessfully by Community Nomination'.



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Corporate Director (Law and Governance) & Monitoring Officer

Date: *9 December 2016*

Land Registry
Official copy of
title plan

Title number K101579
Ordnance Survey map reference TQ9240SE
Scale 1:1250 enlarged from 1:2500
Administrative area Kent : Ashford



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