

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:	PR86-013
Case Officer:	Darren McBride
Site Address:	The Oak Public House (a.k.a. Royal Oak), 5 High Street, Charing, Ashford, Kent TN27 0HU
Title Number(s):	K854773 (Freehold)
Nominating Body:	Charing Parish Council
Nomination Validated:	27 May 2021
Deadline Date:	22 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
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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 27 May 2021 and so must be determined by 22 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:

- Charing 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 and Ward Member)
- Cllr P Feacey (Portfolio Holder for Community Safety and Wellbeing)
- Cllr L Krause (Deputy Portfolio Holder for Community Safety and Wellbeing)

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 28 May 2021. The latest nomination seeks re-inclusion of the premises in the List.

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 building/land is 'currently empty and unused' 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. 'This was an active pub for many years until January 2015; census records mention The Royal Oak as far back as 1871. From the mid-2000s it was the only pub in the actual village of Charing. It also had a restaurant, function room and a number of bedrooms.

'The six years and four months it has been empty is thus a short period of time compared with the length of time it was in use. The previous owner died in April 2005 and the need to obtain probate prevented it being put up for sale until the end of that year. The current owner purchased it in March 2016.

'Prior to its closure and subsequent purchase by the current owner, The Oak was a meeting place for the village, being the only place that was

open every day and evening. The function room provided scope for further gatherings and entertainment as did the restaurant. The bedrooms enabled friends and family of residents to stay in the village if the resident's house could not accommodate them. Charing village had and has no hotels and limited [bed and breakfast] accommodation so this was welcome.'

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. 'The building is still a pub, simply unused. An application (16/00698/AS) for change of use to convert the ground floor to A3 restaurant use only (specifically a coffee shop) was refused in July 2016. The owner appealed but the appeal was dismissed.

'In late 2016 a listed building application (16/01731/AS) was made to enable the manager's flat, previously in the main part of the building, to be moved to the wing which accommodated most of the bedrooms. This was granted. No change of use application was made to accompany the listed building and the new flat therefore remains part of the pub as a manager's flat.

'In 2019 an application (19/01217/AS) was made to convert the main part of the building into four 2-bedroom apartments. This was refused in March 2020 and no appeal was made.

'Thus attempts by the owner to change the legal use of the building have not succeeded.

'In 2020, following the refusal of the 2019 change of use application, the owner started to refurbish the main building which had deteriorated badly and, in particular, started to convert the former manager's flat into letting bedrooms in order to facilitate the use of the building as a pub. (See planning and listed building consent applications 20/01797/AS and 20/01798/AS). We have been informed that his intention is now to let the main part of the building for use as a pub.

'Charing is a large village – a second tier settlement set to grow substantially over the next decade (see Ashford's Local Plan and Charing's Regulation 14 Neighbourhood Plan). Currently there is a micropub in the High Street, with a limited range of alcoholic drinks and no food offering other than snacks, and a sports and social club open only on certain days of the week. There is no full pub and nothing that can offer the range of opportunities for social interaction that [T]he Oak could provide. Currently there is no tea room.

'There is considerable and consistent public support for having The Oak back as a fully functioning pub. For example, a public meeting attended by well over 100 people was held in 2019 when the application to turn the

main building into four separate apartments was submitted. Just four people voted in favour of residential use with nearly all the remaining attendees urging that the application be rejected. The Planning Officer's report also bears witness to the strength of feeling.

'Further, in 2017, a community interest group was formed, supported by the Diocese of Canterbury and the Plunkett Foundation, with the intention of purchasing the building and then running it. In Autumn of that year an offer was made based on a formal valuation and a top line survey. However, the owner rejected the offer out of hand (see separate information).

'Other offers have been made to the owner but rejected as he has held out for a higher price or ignored (see separate information for three examples).'

Elsewhere in the community nomination form, the nominating body states that:

'The Oak was, and could be again, the only full public house in or near the centre of Charing village.'

The nominating body has referred to the nominated premises being the subject of a number of different applications for planning permission and listed building consent, which are summarised as follows:

16/00698/AS

In May 2016, the Council (as local planning authority) received an application for full planning permission for the proposed 'change of use from a restaurant and public house (A3/A4 mixed use) to a sole A3 use.'

On 2 August 2016, the Council refused planning permission for the following reason(s):

- (1) The proposed development would be contrary to policies CS1 and CS18 of the Local Development Framework Core Strategy (2008) Policy SH16 of the Ashford Borough Local Plan (2000) Policies COM1, EMP1 and EMP20 of the Ashford Local Plan (Consultation Draft) 2030 and to Government guidance contained in the National Planning Policy Framework, NPPG and is therefore considered development harmful to interests of acknowledged planning importance for the following reason:
- (2) The proposed loss of the pub would leave the village without a facility of this nature and result in the loss of a designated Asset of Community Value. Charing is a sustainable village and subject to growth. The pub offers one of only a few meeting places, is one of the few night time uses left in the village and is the only remaining pub. Its loss would be unsustainable socially and economically and would be severely detrimental to residents and visitors alike. It would also mean residents and visitors having to use the car to

access similar facilities, failing to reduce the need to travel but exacerbating it, in a manner also unsustainable.

On 26 January 2017, an appeal against the refusal of planning permission was dismissed with the Inspector appointed by the Secretary of State concluding that the proposed development:

'...would conflict with policy SH16 and CS18 of the development plan.

'...could undermine the Asset of Community Value and therefore the nature of the benefits it brings to the community.

'...would result in harm to the social wellbeing of the local community through the loss of the public house, a designated Asset of Community Value. This would conflict with policies SH16 of the ABLP and CS1 and CS18 of the Core Strategy which seek to protect such community facilities....'

16/01731/AS

In November 2016, the Council received an application for listed building consent 'to reconfigure existing interior layout and modification of existing window.'

On 9 March 2017, the Council granted listed building consent for:

'Internal alterations on ground and first floor accommodation facilities to include removal and addition of partition walls and change to existing first floor window.'

19/01217/AS and 19/01218/AS

In August 2019, the Council received an application for full planning permission (19/01217/AS) and an application for listed building consent (19/01218/AS) for the proposed 'change of use from a vacant A3/A4 use building to 4, two-bedroom residential use apartments.'

On 24 March 2020, the Council refused planning permission for the following reason(s):

'The proposed development would be contrary to policies SP1, EMP10, ENV13, HOU3a, and TRA3a of the Ashford Local Plan 2030 and to Government guidance contained in the National Planning Policy Framework (NPPF) and is therefore considered development harmful to interests of acknowledged planning importance for the following reason:

'The proposed loss of the pub would leave the village without a facility of this nature and result in the loss of a valued community facility. Charing is a sustainable village and subject to growth. The pub offers one of only a few meeting places, is one of the few night time uses left in the village and is the only remaining traditional pub. Its loss would be unsustainable socially and economically and would be severely detrimental to residents

and visitors alike. It would also mean residents and visitors having to use the car to access similar facilities, failing to reduce the need to travel.'

On the same day listed building consent was also refused for the following reason(s):

'The proposal would be contrary to policy HOU3a(d) and ENV13 of the Ashford Local Plan to 2030 and to Central Government Guidance in the form of the National Planning Policy Framework and therefore constitutes development contrary to the interests of acknowledged planning importance for the following reasons:

1. The proposed conversion, by reason of the potential loss of historic fabric and significant alteration to the layout and plan form, would result in harm to the significance of the heritage asset without overriding public benefit to outweigh the less than significant harm.
2. Insufficient information has been submitted to allow a full assessment of the implications of the proposal on the asset's historical and architectural significance.'

20/01797/AS and 20/01798/AS

In December 2020, the Council received an application for full retrospective planning permission (20/01797/AS) and an application for listed building consent (20/01798/AS) for the 'conversion of first floor to create additional accommodation rooms.'

The statement submitted in support of these two applications states:

Background

The existing building has been vacant for over 6 years, ceasing use on the 1st May 2014. It was formerly used as a restaurant and public house (a mixed A3/A4 use class at the time), with guest accommodation to the upper floors.

The economic unsustainable nature of the business has meant that despite attempts to market and bring the building back into usage, in its current format this has proved not to be feasible. Various planning applications have also been made to improve financial viability including a change of use to a restaurant and also to residential accommodation, both of which have been refused.

This planning application now seeks to improve the business model and therefore to bring the building back into a state of good repair and usage by enhancing the accommodation element to the upper floors which has historically supported the ground floor commercial operation.

The Proposal

The proposed changes are to the front of the building on the first floor only. Formerly there was a large area which served as self-contained

managers accommodation that is no longer required. It is proposed to partition off the former open plan kitchen and living area to this in order to provide 2 bathrooms. This will create 2 additional ensuite bedrooms to help support the accommodation element of the business.

No other changes are proposed as part of this application. There are to be no changes to the site, the ground floor, or the external elevations of this building as part of the application.

Heritage

The former Royal Oak Public House is a grade II listed building (list entry 1070736). Established as a public house and hotel in C18.

There are no original elements of the building proposed to be removed as part of this application which seeks only the insertion of new partition walls to subdivide the existing space.

The planning application remains outstanding but on 1 April 2021 the Council granted listed building consent granted for:

'Internal alterations to facilitate conversion of first floor to create additional suites for accommodation in connection with commercial use (retrospective)'

Returning to the community nomination form, the nominating body has referred to some 'separate information.' The first is a document from the nominating body which states as follows:

'There have been a number of people interested in buying The Oak and running it as a pub, including a community group. Attached are e-mails and a statement concerning four⁴ of these attempts. In three of these cases the owner indicated he would only sell for an unrealistically high price. The fourth potential buyer was ignored.

'The Community Group was formed in 2017 with the intention of purchasing The Oak and having it run as a pub. The Group was supported by the Diocese of Canterbury and the Plunkett Society. It obtained a formal valuation and a summary survey of The Oak together with a ballpark estimate of likely costs (all information available if needed) in the Autumn of 2017. An offer was made based on that information but was summarily rejected by the owner (see e-mail exchange on the following sheet).

'Since it was clear that the Owner would not accept a price anywhere close to that indicated by the valuation and summary survey, the Group did not trigger the moratorium when the Owner indicated his intention to sell in 2018. The indicated and reserve price at the subsequent auction, which was for the main part of the building only, were also far higher than

⁴ The attachments submitted relate to three attempts.
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were consistent with the valuation and other information the group had obtained and no bids were made.'

The second document is a copy of an e-mail exchange from December 2017 where an offer to purchase the premises was made by the Diocese of Canterbury. The Diocese referred to the 'deteriorating state of the building' and the 'lack of upkeep of the building,' which was reflected in their offer to the owner: £200,000. The owner responded that the offer was 'not acceptable.'⁵

The third document is an e-mail dated 4 May 2021 from a third party to the nominating body explaining how they (the third party) had approached the owner of the nominated premises in September 2019 and discussed the potential purchase of the premises. No offer sum is mentioned in the e-mail but it seems that the owner wanted approximately 50% more for the premises than the third party was prepared to pay. As a result, no deal could be agreed.

The final document is a letter from a local couple who had considered purchasing the nominated premises in, I believe, 2018/2019. They had carried out an internal viewing of the premises and concluded that significant reinstatement/refurbishment works would be required. They state that they:

'...were appalled at the state of disrepair and the work and cost necessary to just reinstate the pub to the level of infrastructure to when it had last been in business. Beyond that, one would have had to incur significant additional expenses to reconfigure the property..., possibly change the perspective of the bar, the lay-out of the function room & the kitchen space, and more generally, update and restyle the property...'

The local couple concluded that 'the work and cost necessary' to reinstate the pub:

'...would not necessarily have been a deal-breaker if the building could have been acquired at an appropriate price but our understanding of what the owner wanted for the property was unrealistic and we severed our interest and moved on to investing capital elsewhere.'

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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:

⁵ I note from the Title Register that the owner had purchased the premises in March 2016 for the sum of £445,000.

“...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”

I note the nominating body’s claim that ‘there is considerable and consistent public support for having The Oak back as a fully functioning pub.’ However, I give little weight to the connected claim that 100+ locals attended a public meeting in 2019 with the vast majority indicating their opposition to a planning application⁶ seeking the conversion of the nominated premises into residential apartments. In my view, the 2019 opposition to an application for planning permission relating to the proposed change of use of the premises does not necessarily translate into support for this 2021 community nomination and/or for the reopening of the premises as a public house.

That said, the nominating body is a parish council and so 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.

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.

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

- Was, prior to its closure in January 2015, the only pub in the actual village of Charing
- Had a restaurant, a function room and a number of bedrooms
- Was a meeting place for the village
- Was the only venue that was open every day and evening
- Included a function room and restaurant which provided further scope for gatherings and entertainment
- Had bedrooms which enabled visiting friends and family of residents to stay in the village if the residents’ houses could not accommodate them

The nominating body also claims that Charing village does not have a hotel and has only limited bed and breakfast accommodation, so the accommodation which was offered by the public house was welcome.

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.

The serving of food in the restaurant is likely to be viewed as non-ancillary to the main use. Also, the use of the function room for gatherings and entertainment – provided that those events were intrinsic to the main use of the

⁶ Relating to application 19/01217/AS (and, I believe, 19/01218/AS)
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building as a public house (for example, quiz nights and live music events) – would also further the social wellbeing or social interests of the local community.

Public houses (especially those located in the countryside) traditionally provided accommodation for travellers. The use of the bedroom facilities by patrons of the pub who were also visiting family and friends in the village would, in my opinion, be non-ancillary to the main use and as such would further the social wellbeing or social interests of the local community.

In my view, on balance, 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 building is 'currently empty and unused' 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 guidance⁷ 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)*⁸, 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

⁷ Assets of Community Value – Policy Statement (2011)

⁸ CR/2014/0007

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)*⁹, Judge Warren (again) stated that:

"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)*¹⁰, 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 was 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 January 2015 and so it would appear that it has been 'empty and unused' for around than 6½ years. However, prior to January 2015, it seems that the building had been used continuously as a public house since at least 1871. In my view, having regard to the relative concept of 'recent past' as outlined by Judge Lane in *Crostone* (above), January 2015 would be viewed as the 'recent past' when viewed in the context of 144 years' of continuous use prior to that date.

Accordingly, as I have already concluded that the actual main use of the building prior to its closure would further 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

⁹ CR/2014/0005

¹⁰ CR/2014/0010

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 prospect¹¹.

In *Patel v London Borough of Hackney (2013)*¹², the owner purchased a public house and closed it with the intention of converting it into residential flats. In the General Regulatory Chamber of the First-Tier Tribunal, Judge Warren held that the owner's intentions should be taken into account but only "as part of the whole set of circumstances":

"After all, they are the current owner's present intentions and the legislation requires an estimate of what will happen over the next five years" [emphasis in original]

Judge Warren considered that there were three planning possibilities in *Patel* and each was realistic, one of which was that the planning application for the flat conversion would be refused and the pub would be re-opened. It was simply enough that there were a number of realistic possibilities and one of them was a community use.

On the other hand, in *Spirit Pub Company Limited v Rushmoor Borough Council (2013)*¹³, Judge Warren (once again) considered that there was no realistic prospect that the building in question would revert to use as a pub or any other community use. The subject former-pub had been closed since 2008. Before the coming into force of the Act, McDonalds had purchased the pub and shortly before the hearing of the listing appeal planning permission had been granted for the change of use of the property to use as a restaurant/takeaway. Judge Warren considered that this should be taken into account and concluded that McDonalds' acquisition of the property together with it securing the necessary planning permission meant that it was now unrealistic to consider that there would be any future use other than as a restaurant/takeaway.

The facts in *Patel* and *Spirit Pub* were different. For example, one pub had been operating and presumably viable before it was closed by its owner whereas the other had been closed for a number of years. Nevertheless, the primary distinguishing factor seemed to be the planning permission which had been secured in the latter.

In this case, since its closure, the nominated premises has been the subject of a number of applications for planning permission and listed building consent (as summarised above). The applications (and an appeal) seeking the change of use

¹¹ See again: *Worthy Developments v Forest of Dean District Council (2014)*(para. 19)

¹² CR/2013/0005

¹³ CR/2013/0003

of the premises to, first, a coffee shop and then to use as residential apartments, have been unsuccessful.

Therefore, in my view, it is realistic to consider that it is unlikely in the short-term that planning permission/listed building consent will be obtained for the conversion of the nominated premises to a use(s) away from its original public house/community use.

Moreover, in my view, it is realistic to consider that the nominated premises could re-open as a public house. This is because in the most recent applications for planning permission (20/01797/AS) and listed building consent (20/01798/AS) for the 'conversion of first floor to create additional accommodation rooms,' the owner appears to be indicating an intention to re-open the premises as a public house. For example, the statement submitted in support of these two applications includes the following:

'This planning application now seeks to improve the business model and therefore to bring the building back into a state of good repair and usage by enhancing the accommodation element to the upper floors which has historically supported the ground floor commercial operation...

'It is proposed to partition off the former open plan kitchen and living area to this in order to provide 2 bathrooms. This will create 2 additional ensuite bedrooms to help support the accommodation element of the business...

'No other changes are proposed as part of this application...'

In my view, this suggests that even the owner seems to consider that the nominated premises can be brought back into use as a public house and that they are, in fact, intending to do just that. This correlates with the nominating body's claim that they 'have been informed that [the owner's] intention is now to let the main part of the building for use as a pub.'

Furthermore, whilst the most recent application for planning permission remains to be determined, listed building consent has already been granted for the proposed works.

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 stance¹⁴ 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.

The nominating body states that:

'Charing is a large village – a second tier settlement set to grow substantially over the next decade...'

Notwithstanding that the public house closed in January 2015 and has remained closed ever since, this does suggest that it is realistic to think that a village the size of Charing could support such a public house.

Also, 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.

Finally, I give little weight to the various unsuccessful attempts to purchase the nominated premises from the owner. Attempts to purchase the premises do not in themselves demonstrate that the nominated land/building(s) main use in the recent past furthered the social wellbeing or social interests of the local community and/or that the 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.

Also, the fact that the owner appears to have rejected a number of offers for the premises and has sought planning permission/listed building consent for alternative use(s) of the nominated premises has little bearing on my conclusions. In my view, it seems entirely reasonable that the owner would dismiss offers for the premises that were less than 50% of the price the owner had paid for the premises in March 2016 and that they would, instead, explore options that would enable them to maximise their investment.

In fact, in this case, the nominating body's claims about the allegedly 'deteriorating state of the building,' the 'lack of upkeep of the building,' the appalling 'state of disrepair,' the 'work and cost necessary' to reinstate the premises etc. undermine the claim that the premises could be returned to a community use in the next five years.

In any event, in my view, these concerns are outweighed by the other factors outlined above, including (but not confined to) the owner's own apparent intentions to bring the nominated premises back into use as a public house.

¹⁴ 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* (above) etc.
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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 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 & Monitoring Officer accept the nomination for this building/land to be included in the Council's 'List of Assets of Community Value.'

*

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.

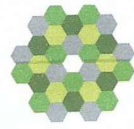


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Solicitor to the Council & Monitoring Officer

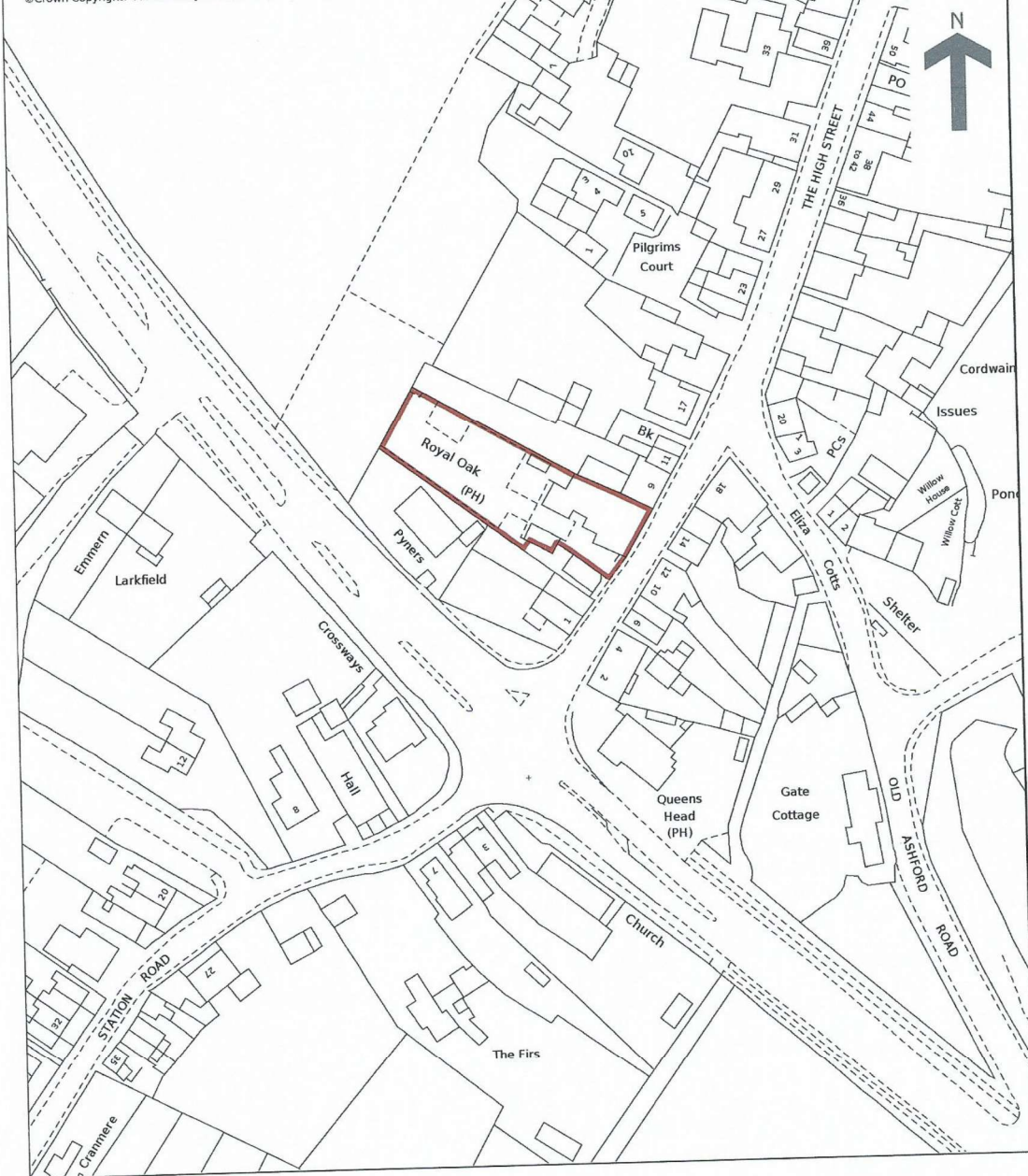
Date:15/07/2021.....

HM Land Registry
Official copy of
title plan

Title number **K854773**
Ordnance Survey map reference **TQ9549SW**
Scale **1:1250 enlarged from 1:2500**
Administrative area **Kent : Ashford**



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