

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: PR86-046

Case Officer: Darren McBride

Site Address: Land lying to the south east of Bethersden Road,
Woodchurch, Ashford, Kent (known as 'Woodchurch
Windmill, Bethersden Road, Woodchurch, Ashford,
Kent TN26 3QJ')

Title Number(s): K896684 (Freehold)

Nominating Body: Woodchurch Parish Council

Nomination Validated: 20 November 2024

Deadline Date: 15 January 2025

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Introduction

Under the Localism Act 2011 ('the Act'), the Borough 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 Borough 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 Section 88(1) of the Act

Buildings or land may also be of community value if in the opinion of the Borough 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 Borough 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 Borough Council on 20 November 2024 and so it must be determined by 15 January 2025⁴.

If the Borough Council accepts a valid nomination then it must be included in the 'List of Assets of Community Value.' If the Borough 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

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 interests 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 Section 88(2) of the Act

⁴ Due to the unavailability of the Solicitor to the Council and Monitoring Officer, the decision in this matter was not made until the morning of 16 January 2025.

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

- Woodchurch Parish Council (nominating body)
- Freehold Owner(s)
- Cllr N Ovenden (Leader of the Borough Council)
- Cllr L Wright (Cabinet Member for Communities, Health & Wellbeing)
- Cllr A Hicks (Ward Member)
- Cllr D Ledger (Ward Member)

If the Solicitor to the Council and Monitoring Officer includes the asset in the Borough 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.

In this case the nominated premises are owned by the Borough Council. When the listing authority owns the nominated property then, clearly, there is a conflict of interest and yet this is not addressed in the asset of community value regime. The situation is forced on the listing authority by the legislation and cannot be avoided. The listing authority is subject to a duty to decide the listing issue raised by the nomination and cannot delegate this decision unless it requests another authority to act on its behalf pursuant to section 101(1)(b) Local Government Act 1972. With applications to register a town or village green it is open to the relevant authority to appoint an independent expert to hold a non-statutory inquiry if there is a conflict of interest. However, it seems that this is not a practice that has been adopted in respect of assets of community value nominations. As the time table (just eight weeks) is so tight and there is the possibility of a review with an oral hearing it is unlikely that such a course could be adopted.

Therefore, the listing authority must take particular care with nominations where there is a conflict. Regarding this matter, I confirm that under the scheme of delegations, the decision maker within the Borough Council (the Solicitor to the Council and Monitoring Officer⁵) has no responsibility for the nominated premises.

Likewise, regarding any potential internal listing review, no express account is taken in the asset of community value regime of the possibility of conflicts of interest. However, again, I confirm that under the scheme of delegations any internal listing review would be made by an officer who does not have any involvement with the nominated premises.

⁵ *Principal Solicitor, Strategic Development and Deputy Monitoring Officer* to substitute where necessary.

Finally on this point, when a valid asset of community value nomination is received the Borough Council sends formal notification to various parties including, of course, the owner of the nominated premises. Ordinarily, formal notice to the Borough Council would be sent to the Solicitor to the Council and Monitoring Officer. However, in this case, to ensure that the said officer is kept at arm's length until the decision itself is to be made, I have sent formal notice to the Assistant Director of Environment, Property & Recreation as the officer having day-to-day responsibility for the nominated premises.

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 Borough Council in writing.

Interim Moratorium

There is then a six week interim period from the point the owner notifies the Borough Council. The Borough 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 Borough 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 seem to allow for claims for loss or expense arising simply as a result of the asset being listed.

The Borough 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 Borough 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.

In this case, however, the Borough Council is a public body and so, notwithstanding that it is the owner of the nominated premises, the compensation provisions would not apply.

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 Borough Council.

The community nomination form asked the nominating body to provide their reasons for thinking that the Borough Council should conclude that the building/land is of community value. The nomination form contains two sets of questions – one set (Q1 – Q3 below) relating to premises currently in community use and one set (Q4 – Q5 below) relating to premises not currently in community use. In this instance, confusingly, the nominating body has answered both sets of questions.

The questions and answers state as follows:

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

A1. 'The Grade II windmill is currently closed for safety reasons, due to Ashford Borough Council inaction at repairing storm damage.'

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

A2. 'It is a landmark in the village of Woodchurch and is an icon that occurs on all the village logos and correspondence. It has also featured on a postage stamp issued by Royal Mail.'

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. 'In the absence of the current owner fulfilling their legal obligation to maintain it as a Grade II listed building. [Its] responsibility is likely to fall on the Woodchurch Community.'

Q4. 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)...

- A4. 'The windmill has been a historical focal point in the village for well over a 100 years. It is part of the social fabric of the community with strong connections to the village's past. [Its] physical presence helps residents to connect with the community and [its] past.'
- Q5. *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?*
- A5. 'It is anticipated that the building will be reopened as a monument to the Woodchurch rural heritage, and continue to attract visitors locally and from around the country.'

Generally, the Borough 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 Borough 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 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. Therefore, I am satisfied that the local community is supportive of this nomination.

Notwithstanding that the nominating body has answered the set of questions (Q1 – Q3 above) relating to premises currently in community use, it seems that the premises are in fact currently closed: *See the nominating body's response at A1 (above)*. Therefore, the Borough Council must consider whether:

- (a) there is a time in the recent past when an actual use of the premises 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 premises 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 premises that was not an ancillary use furthered the social wellbeing or social interests of the local community

First, there is no statutory definition of 'recent past.' The Department for Communities and Local Government's guidance⁶ 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)*⁷, 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)*⁸, 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)*⁹, 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 in community use 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.'

⁶ Assets of Community Value – Policy Statement (2011)

⁷ CR/2014/0007

⁸ CR/2014/0005

⁹ CR/2014/0010

In this case, while the nominating body states that 'the windmill has been a historical focal point in the village for well over a 100 years' they have provided no details at all about when the premises were closed. Therefore, it is impossible from the nomination to establish whether there was a time in the recent past when an actual use of the premises that was not an ancillary use furthered the social wellbeing or social interests of the local community. The nomination therefore fails to satisfy the first element of the test set down in section 88(2)(a) of the Act.

Second, regarding the actual use of the premises, when asked what the main use is (or was) the nominating body states that the windmill was closed '*for safety reasons, due to Ashford Borough Council inaction at repairing storm damage*' and that the windmill '*is a landmark in the village of Woodchurch and is an icon that occurs on all the village logos and correspondence. It has also featured on a postage stamp issued by Royal Mail.*' However, this does not explain the actual previous use of the premises, let alone explain a use which furthered the social wellbeing or social interests of the local community.

The nominating body states elsewhere that the premises '*has been a historical focal point in the village for well over a 100 years. It is part of the social fabric of the community with strong connections to the village's past. [Its] physical presence helps residents to connect with the community and [its] past.*' Also, the nominating body suggests that the premises could become (or return to being) '*a monument to the Woodchurch rural heritage.*' While this suggests that the premises have (or had) some heritage value¹⁰, again, it does not explain the actual previous use of the premises nor does it explain a use which furthered the social wellbeing or social interests of the local community.

The nominating body's remaining comments relate to the owner's alleged failure to repair/maintain the premises. However, once again, these comments do not explain the actual previous use of the premises, let alone explain a use which furthered the social wellbeing or social interests of the local community. The nomination therefore fails to satisfy the second element of the test set down in section 88(2)(a) of the Act.

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

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.

Setting aside that the nominating body has failed to demonstrate a previous use in the recent past which furthered the social wellbeing or social interests of the

¹⁰ A point emphasised by its status as a Grade II listed building.

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

local community, when asked about the future use of the premises the nominating body has stated that *'in the absence of the current owner fulfilling their legal obligation to maintain it as a Grade II listed building. [Its] responsibility is likely to fall on the Woodchurch Community.'*

The anticipated future maintenance of the premises – whether by the current owner or by the local community – is irrelevant for the purposes of the asset of community value regime. The issue here is the future *use* of the premises and the nominating body has failed to explain why it is realistic to think that there is a time in the next five years when there could be a non-ancillary use of the premises that would further the social wellbeing or social interests of the local community.

The nominating body also states that *'It is anticipated that the building will be reopened as a monument to the Woodchurch rural heritage, and continue to attract visitors locally and from around the country.'*

Once again, an actual future use of the premises that would further the social wellbeing or social interests of the local community is not explained and its status as a 'monument' is irrelevant for the purposes of the asset of community value regime.

Accordingly, the nomination fails to satisfy the test set down in section 88(2)(b) of the Act.

Again, the Borough Council cannot list buildings or land on its own initiative. The onus is on the nominating body to give their reasons for thinking that the Borough Council should conclude that the building/land is of community value. Regulation 6(c) of the Regs states that a community nomination must include —

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

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

The focus of the legislation is on the current (or previous) and future *use* of the nominated premises, not on the mere presence/existence of the premises or on whether the premises are a visual focal point or of heritage value.

In this case, some information about how the premises are/were actually used might have helped but the lack of any such information at all means that the nomination does not comply with the requirements of the assets of community value regime.

Conclusions

The nominating body has provided no reasons for thinking that the Borough Council should conclude that the nominated building/land is of community value. The nomination does not therefore comply with the requirements of Regulation 6(c) of the Regs. As a result, the tests set down in section 88(2) of the Act have not been satisfied.

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

Recommendation

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

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

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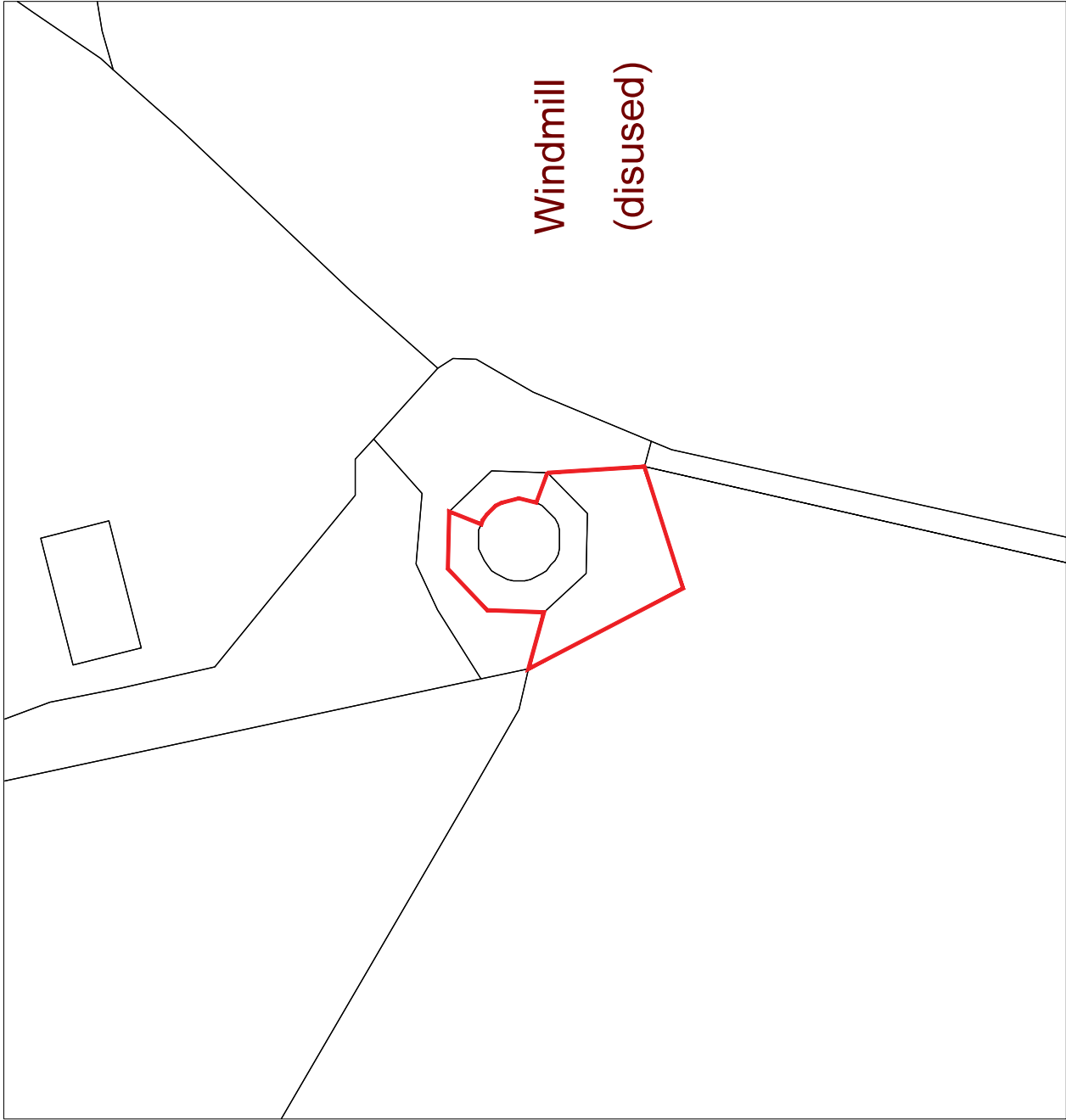
AUTHORITY

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

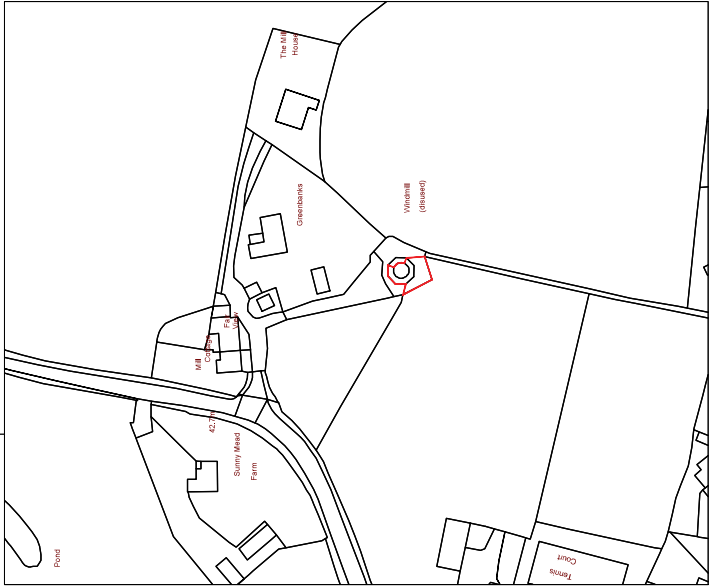


.....
Solicitor to the Council and Monitoring Officer

Date:16/01/2025.....

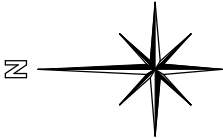


Windmill
(disused)



LOCATION PLAN
SCALE 1:1250

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tel.: 01233 331111

PROJECT WOODCHURCH WINDMILL	
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