

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: PR86-029

Case Officer: Darren McBride

Site Address: The Crown Inn (also known as The Crown Inn and the Bungalow at The Crown Inn), The Street, Stone-In-Oxney, Tenterden, Kent TN30 7JN

Title Number(s): K940542 (Freehold)

Nominating Body: Stone-Cum-Ebony Parish Council

Nomination Validated: 5 December 2019

Deadline Date: 30 January 2020

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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

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 5 December 2019 and so should be determined by 30 January 2020.

If the Council accepts a valid nomination then it must be included in 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:

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

- Stone-Cum-Ebony Parish Council (nominating body)
- Freehold Owner(s)
- Mortgagee(s)
- Cllr G Clarkson (Leader of the Council)
- Cllr J Gideon (Portfolio Holder for Community Safety and Wellbeing)
- Cllr L Krause (Deputy Portfolio Holder for Community Safety and Wellbeing)
- Cllr M Burgess (Ward Member)

If the Head of Legal and Democracy includes the asset in 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.

Permitted Development Rights

Another consequence of listing is that a building which is used, or was last used, as a drinking establishment which is listed as an asset of community value loses certain permitted development rights for the specified five year period⁴. As a result, planning permission would be required for the change of use or the demolition of the building.

Assessment

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

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

The community nomination form asked the nominating body to provide their reasons for thinking that the Council should conclude that the building/land is of community value. In this case, the nominating body confirmed that the building/land is 'not currently in use for community benefit' 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. 'How and when did it further the social wellbeing or social interests of the local community[?]

'The pub was a venue for eating and drinking and a thriving hub where people from all walks of life met together and felt part of a supported rural community. Many groups had meetings to organise events such as the

⁴ Classes A and B of Part 3 and Class B of Part 11, Schedule 2 to the Town and Country Planning (General Permitted Development)(England) Order 2015 (SI 2015/596)

fete and recreation groups but many people met there and discussed local events and news and also a place to find out if a member of the community needed help – where it was usually provided.

'As it is situated in the heart of the village it was a central place for people to meet. The nearest alternative pub is a mile away in an isolated position and not within walking distance for many as there are no paths or street lights. It was central to many special community events such as an annual bonfire, cricket match between The Ferry⁵ and New Year's Eve. It was also vital in times when heavy snow made the village cut off and when storms left no electricity for days. Many local funeral wakes were held there offering an approachable way for villagers to pay their respects.

'Between 2010 and 2014 the pub was under the direction of the current owners who ran it as a bistro style restaurant and sought to attract a different client group – less welcoming of local residents and families. They refused to serve children after 7pm and then not at all which led to them losing much support and turned walkers away with muddy boots (the pub is on the Saxon Shoreway) and less welcoming of those who just wanted to drink. Gradually the hours were reduced as the client base narrowed. This resulted in the closure in March 2014. It has stayed closed and empty since then. Only in the last few months has someone been staying there.

'The Crown is a much missed community asset that if reopened could provide the usual public house offering of food and drink and reinstate the uses mentioned above but could also develop an ancillary use – maybe a take away, community shop, lending library, coffee shop or a fresh produce swap shop and be seen again as a meeting place offering shelter and a sense of belonging.

'The population of Stone-in-Oxney is 650 and consists of families, couples, single parent families, retired and elderly residents. As an area of rural social deprivation with only 4 buses a week and the nearest railway station 4 miles away it is vital that there is a place for people to meet up and socialise to avoid loneliness and isolation. There is no village shop, school or community centre or other meeting place. The only way to get out is by car which some people do not have access to.

'Local residents have recognised how the village has missed the facility of a local pub over the last year when a 'pop up pub' has been organised in the memorial hall 3 times over the summer and autumn months which has demonstrated a local appetite for a community pub in the village with over half of all residents attending and many who live alone and some for the first time.'

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?*

⁵ The Ferry Inn is a nearby public house in Stone-In-Oxney

A2. '[No answer provided here]'

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

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

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

In this case, the nominating body is a parish council and so, although there is no evidence of the strength of community feeling, it is reasonable to assume that the Parish Council is representing the views, or is expressing the general wishes, of a reasonable percentage of their local community.

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

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

- A venue for eating and drinking.
- A place where many groups had meetings to organise events such as the fete and recreation groups.
- A place where many people met and discussed local events and news.
- A central place for many special community events such as an annual bonfire, a cricket match and New Year's Eve celebrations.
- A venue where many local funeral wakes were held.

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.

Also, the serving of food in the restaurant is likely to be viewed as non-ancillary to the main use and so would likewise 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 have furthered the social wellbeing or social interests of the local community.

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As mentioned above, the nominated building is 'not currently in use for community benefit' 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 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:

⁶ Assets of Community Value – Policy Statement (2011)

⁷ CR/2014/0007

⁸ CR/2014/0005

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

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

In this case, according to the nominating party, the public house closed in 'March 2014'. However, information on-line suggests that the public house was still operating in 2016. For example, whatpub.com surveyed the premises on 6 April 2016 (and updated its information page on 30 October 2016) and a Tripadvisor review refers to a stay at the premises in July 2016.

Therefore, it would seem that the public house probably closed in late-2016 and so has now been empty and unused for around 3½ years.

The nominating party does not state when the public house first opened but according to an on-line article in the Express newspaper (published on 9 November 2013), the public house was around 300 years old. Accordingly, prior to its closure late-2016, it seems that the building may have been used continuously as a public house since circa 1713. In my view, having regard to the relative concept of 'recent past' as outlined by Judge Lane in *Crostone* (above), late-2016 would be viewed as the 'recent past' when viewed in the context of approximately 300 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 have furthered the social wellbeing or social interests of the local community, then it follows that in my view there was a time in the recent past when an actual main use of the building that was not an ancillary use did further the social wellbeing or social interests of the local community.

It is realistic to think that there is a time in the next five years when there could be non-ancillary use of the building/land that would further (whether or not in the same way as before) the social wellbeing or social interests of the local community

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

future use of the building/land to be determined but rather to determine whether future community use is a realistic prospect¹⁰.

In this case, although the nominating party has not answered Q2 they have in effect provided information in support of their claim that 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 building/land that would further (whether or not in the same way as before) the social wellbeing or social interests of the local community. For example, the nominating body claims that the former public house:

- Is a much missed community asset that if reopened could provide the usual public house offering of food and drink and reinstate the uses mentioned above.
- Could also be used as a take away, a community shop, a lending library, a coffee shop, a fresh produce swap shop etc.

According to the nominating body, there is no village shop, school, community centre or other meeting place¹¹ in Stone-In-Oxney and the nearest alternative public house is located one mile away in an isolated position with no paths or street lights along the route.

Following the introduction of a 'pop up pub' in 2019, the local residents appear to have a renewed appetite for a local pub.

On balance, in my view, it is realistic to consider that the building could re-open as a public house in the next five years.

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 stance¹² 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.

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

¹¹ Although I note that in 2019 a 'pop up pub' was hosted in the 'memorial hall', which suggests that there may be a meeting place for the local community.

¹² 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.

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 such as the mooted community shop, lending library, coffee shop etc.¹³

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'.

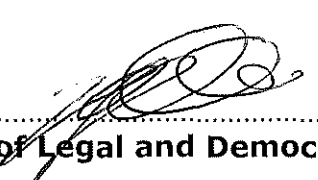
Recommendation

That the Head of Legal and Democracy accept the nomination for this building/land to be included in the Council's 'List of Assets of Community Value'.

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AUTHORITY

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

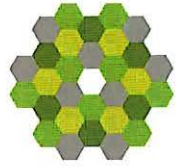

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Head of Legal and Democracy

Date: 28 01 2020

¹³ Although, contrary to the nominating party's suggestion, such use(s) could not be ancillary.

HM Land Registry
Official copy of
title plan

Title number **K940542**
Ordnance Survey map reference **TQ9327NE**
Scale **1:1250 enlarged from 1:2500**
Administrative area **Kent : Ashford**



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