

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: PR86-003

Case Officer: Darren McBride

Site Address: The Honest Miller Public House, The Street, Brook, Ashford, Kent
TN25 5PG

Title Number(s): K790474 (Freehold)

Nominating Body: Brook Parish Council

Nomination Validated: 27 November 2020

Deadline Date: 22 January 2021

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Introduction

Under the Localism Act 2011 ('the Act'), the Council must maintain a list of buildings or other land in its area that are of community value, known as its 'List of Assets of Community Value.'

There are some categories of assets that are excluded from listing, the principal one being a residential property. There is, however, an exception to this general exclusion where an asset which could otherwise be listed contains integral residential quarters, such as accommodation as part of a pub or a caretaker's flat.

Generally, buildings or land are of community value if, in the opinion of the Council:

- an actual current use of the building or other land that is not an ancillary use furthers the social wellbeing or social interests of the local community, and
- it is realistic to think that there can continue to be non-ancillary use of the building or other land which will further (whether or not in the same way) the social wellbeing or social interests of the local community¹.

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

¹ Subsection 88(1) of the Act

- there is a time in the recent past when an actual use of the building or other land that was not an ancillary use furthered the social wellbeing or social² interests of the local community, and
- it is realistic to think that there is a time in the next five years when there could be non-ancillary use of the building or other land that would further (whether or not in the same way as before) the social wellbeing or social interests of the local community³.

Buildings or land which are of community value may only be included in the 'List of Assets of Community Value' in response to a community nomination by certain specified bodies such as parish councils or voluntary or community organisations with a local connection.

A valid community nomination must contain certain information, including:

- a description of the nominated building or land including its proposed boundaries
- a statement of all the information which the nominator has with regard to the names of the current occupants of the land, and the names and current last-known addresses of all those holding a freehold or leasehold estate in the land
- the reasons for thinking that the Council should conclude that the building or land is of community value
- evidence that the nominator is eligible to make the community nomination

A valid community nomination must be determined within eight weeks. In this instance, the nomination was validated by the Council on 27 November 2020 and so should be determined by 22 January 2021.

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:

- Brook Parish Council (nominating body)
- Freehold Owner(s)
- Mortgagee(s)
- Cllr G Clarkson (Leader of the Council)
- Cllr P Feacey (Portfolio Holder for Community Safety and Wellbeing)
- Cllr L Krause (Deputy Portfolio Holder for Community Safety and Wellbeing)
- Cllr W Howard (Ward Member)

² Note: the wording of this condition is different to all the other conditions in that it refers to furthering 'the social wellbeing or interest of the local community' rather than 'the social wellbeing or *social* interests of the local community.' However, in *St. Gabriel Properties Limited v London Borough of Lewisham and another (2015)*, Judge Warren held that the word 'social' should be read in here (para. 27)

³ Subsection 88(2) of the Act

- Cllr. N. Ovenden (Ward Member)

If the Corporate Director (Law and Governance) & Monitoring Officer 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 'currently vacant with no permission for change of use' and so the questions and answers state as follows⁵:

Q1. If the land/buildings(s) main use in the recent past furthered the social wellbeing or social interests of the local community please confirm that use and explain how it did that (including dates for when this was)...

A1. 'The pub closed in early 2020 and obviously Covid has caused problems reopening this as a public house but it is very much hoped that the pub will reopen as a pub/restaurant.

'The Honest Miller, when [it was] open, provide[d] a centre for the Village, it [wa]s a hub as the Village has no shop or other pub/restaurants. The local groups including the nearby Museum use[d] the pub as a place for social gathering/Christmas parties.'

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 property was recently purchased and with no change of use application, clearly the intention is to reopen this community asset.

'It is hoped that the pub, with new tenants would provide a social hub to the village again, providing the rurally deprived parish a meeting place and a place to socialise.'

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)

⁵ Some of the nominating body's answers were inserted in the incorrect part of the Community Nomination Form and suggested a current ongoing use. To avoid confusion, I have re-positioned the answers here in response to the correct questions and amended the wording in parentheses to reflect the fact that the use is not currently ongoing.

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.

The building was the subject of a previous successful nomination in 2015. The building (which was then operating as a public house) was included in the Council’s List of Assets of Community Value until that entry expired on 1 May 2020. This latest nomination seeks to return the building to the List.

When this nomination was validated I notified the individuals and bodies mentioned under the heading *Procedure* (above). In response, I have received a letter dated 20 January 2021 from the Freehold Owner’s planning agent⁶ which states as follows:

‘...The Localism Act 2011 confers an ability to nominate land or buildings to be placed on a list of Assets of Community Value (ACV), which impacts property ownership and may also affect the planning position of a building. In accordance with the provisions of the Localism Act 2011, nominated assets must meet the following criteria to be considered valid for community listing:

- **The current use (or use in the recent past) of the building or land furthers the social wellbeing or interests of the local community as its primary purpose.**
- **Future use of the building could reasonably be expected to continue such use within the next five years**

‘On behalf of the landowner, in respect of the first criteria, we would fully agree that the former/past use of the building promotes social wellbeing, community cohesion and supports the leisure and hospitality interests of the local community.

‘Notwithstanding the above first criteria, we seek to **formally object** to the nomination of the building as an ACV on the grounds of failing the second criteria, in that the future use of the building as a Public House (A4 Use) cannot be reasonably be expected to continue within the next five years, based on the past and recent background of the building and given its current condition and status, as a derelict, vacant building in a state of disrepair and which requires substantial investment and works to bring back into a viable use.

⁶ Kent Planning Consultancy

`In regard to the above statement, the following information is provided to set out this position:

`The said Public House (PH) closed in early February 2020 and has been closed and vacant for circa 1 year. The PH, whilst owned by Admiral Taverns, was leased/tenanted on a third-party basis with a lack of meaningful investment. This lack of investment was demonstrated with commentary on the signage of the pub being noted as falling into disrepair, with letters missing etc. The PH had been opened for only 2 years proceeding [sic] February 2020 and closed to the same effect. Prior to this, the PH was placed into new ownership in January 2016, where the operators (Gareth Cox) attempted to turn the PH into a Gastro pub in an attempt to diversify and attract a wider clientele, but this proved unsuccessful. In this regard, the history of the former use as an A4 PH has been chequered and challenging in regard to operating on an economically sound or viable basis.

`The PH in its present condition, is in a poor state of repair and requires substantial improvements and enhancements, to bring the building/premises up to the relevant health and safety standards and to an acceptable standard for hospitality purposes. In particular, there is a lack of comprehensive catering facilities available to provide adequate catering for a viable PH use (i.e., no formal commercial kitchen or modern/useable facilities), there are inadequate cover numbers and the existing toilet facilities are substandard and these, together with the wider premises do not comply with the DDA disabled access standards. Moreover, there is no habitable accommodation above on the first floor, to allow a pub landowner/operator to reside on site (helping the viability of the use) which would require extensive works to alter/restore the first floor into habitable use.

`In light of the above, there is a need for significant expenditure to bring the property up to a modern standard that would be suitable for its intended A4 use, notably in regard to disabled access compliance, the kitchen facilities and the first-floor accommodation and at present, in the absence of these matters being improved, the future use of the building is unviable in its current form and cannot reasonably be expected to re-start and continue in this A4 use over the next 5 years.

`Furthermore, Churchill Property Trading Ltd acquired the property in April 2020 after the previous ACV lapsed, where no offers had been made by local residents, groups or community collectives to acquire the PH or to reimpose the ACV through a nomination. Moreover, the PH had been marketed by 3no. agents on reasonable terms, with no prospective pub operator buyers showing any real interest. We consider that the lack of meaningful uptake by both locals or pub operators during the marketing, is testament to the acknowledgement of the failing pub and its unviable use in its current state.

`To summarise, the PH requires significant refurbishment to bring the building up to a suitable and viable enterprise. Moreover, the village has a small population of only circa 310 persons, insufficient to sustain a PH of this size, where substantial marketing and re-positioning of its status and branding will be required to capture a wider audience to make it viable (i.e., necessary footfall). These issues are further compounded by the uncertainty and decline of country pubs failing and closing more generally and with the advent of the COVID pandemic and its medium and long-term implications.

`In light of the above, the PH in its current state serves as an unviable business or enterprise, without the need for considerable investment and accordingly in the absence

of this, its use and future use as an A4 premises could not be reasonably expected to continue within the next 5 years. We consequently consider the nomination for listing is **not valid** and the qualifying criteria has **NOT** been satisfied.’ [all emphases in original]

The process does not provide for a consultation or for the acceptance of representations. Nevertheless, I have taken on board the comments of the Freehold Owner’s agent.

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 centre and a ‘hub’ for the village, which has no other pubs, restaurants or shops
- Used by locals (including locals groups) as a place for social gatherings and Christmas parties

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

In my view, 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 and I note that the Freehold Owner’s ‘fully agree that the former/past use of the building promote[d] social wellbeing, community cohesion and support[ed] the leisure and hospitality interests of the local community.’

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As mentioned above, the nominated building is ‘currently vacant’ 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.’

⁷ Assets of Community Value – Policy Statement (2011)

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 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 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 ‘early 2020’ and the Freehold Owner’s agent confirms that the pub closed in ‘early February 2020.’ Therefore, at the time of this nomination¹¹, it had been closed for less than nine months.

The nominating party does not state when the public house first opened but according to the relevant listed building entry on the Historic England website¹², the public house dates from the late 18th century. Accordingly, prior to its closure in early 2020, it seems that the building may have been used continuously¹³ as a public house for at least 220 years. In my view, having

⁸ CR/2014/0007

⁹ CR/2014/0005

¹⁰ CR/2014/0010

¹¹ Validated on 27 November 2020

¹² <https://historicengland.org.uk/listing/the-list/list-entry/1232972>

¹³ Although I do acknowledge from the Freehold Owner’s agent’s submissions that there may have been a short break in use between 2016-2018.

regard to the relative concept of 'recent past' as outlined by Judge Lane in *Crostone* (above), early 2020 would be viewed as the 'recent past' when viewed in the context of not less than 220 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 prospect¹⁴.

In this case, the nominating body claims that:

- The property was recently purchased and with no change of use application, clearly the intention is to reopen this community asset.
- It is hoped that the pub, with new tenants would provide a social hub to the village again, providing the rurally deprived parish a meeting place and a place to socialise.
- Covid has caused problems reopening this as a public house but it is very much hoped that the pub will reopen as a pub/restaurant.
- There is no other pub/restaurant or shop in the village.

I do not accept that the lack of planning permission for a change of use of the premises demonstrates a clear intention on the part of new owners to reopen the premises as a public house or as some other form of community asset. Nor does it follow that the new owners intend to reopen the premises as a public house or as some other form of community asset if/when the restrictions imposed to tackle the coronavirus pandemic are eased.

Also, while the restrictions imposed to tackle the pandemic have clearly been disruptive to businesses, it does not seem that these premises were closed (either temporarily or permanently) as a result of the pandemic.

My conclusions appear to be supported by the Freehold Owner's agent's representations which suggest that their client has no intention of re-opening the public house.

The agent claims that:

'...the future use of the building **as a Public House** (A4 Use) cannot be reasonably be expected to continue within the next five years...' [**emphasis added**]

The substance of the Freehold Owner's objection is that because of the condition of the building, its lack of lack of comprehensive catering facilities, its substandard toilet facilities etc. the resumption of its use *as a public house* would be 'unviable.'

¹⁴ See again: *Worthy Developments v Forest of Dean District Council (2014)*(para. 19)

As I will explain shortly, the resumption of the use of the building *as a public house* is not the issue. The issue is 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 (*whether or not in the same way as before*) the social wellbeing or social interests of the local community?

The agent states that the pub's sign has fallen into disrepair 'with letters missing' and even claims that the building itself, which was still operating as a public house less than nine months before the validation of this nomination, is now '*derelict*.' However, no evidence has been submitted in support of this claim and, because of the pandemic, the public house has in effect been closed for little longer than many operating public houses.

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 stance¹⁵ 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.

Also, again, it should be noted that the use would not need to be as a public house and it would not even necessarily need to be economically viable in the sense that it would have to make a profit for its operator. This is because it could be run as a not-for-profit co-operative by local community volunteers as either a public house or for some other non-ancillary community use. Moreover, naturally, such other use(s) may not require the facilities which may be considered necessary to enable a public house use commercially viable.

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*

¹⁵ 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.

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 Corporate Director (Law and Governance) & Monitoring Officer 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.



.....
Corporate Director (Law and Governance) & Monitoring Officer

Date:21/01/2021.....

Heritage Category:	Listing
List Entry No :	1232972
Grade:	II
County:	Kent
District:	Ashford
Parish:	Brook

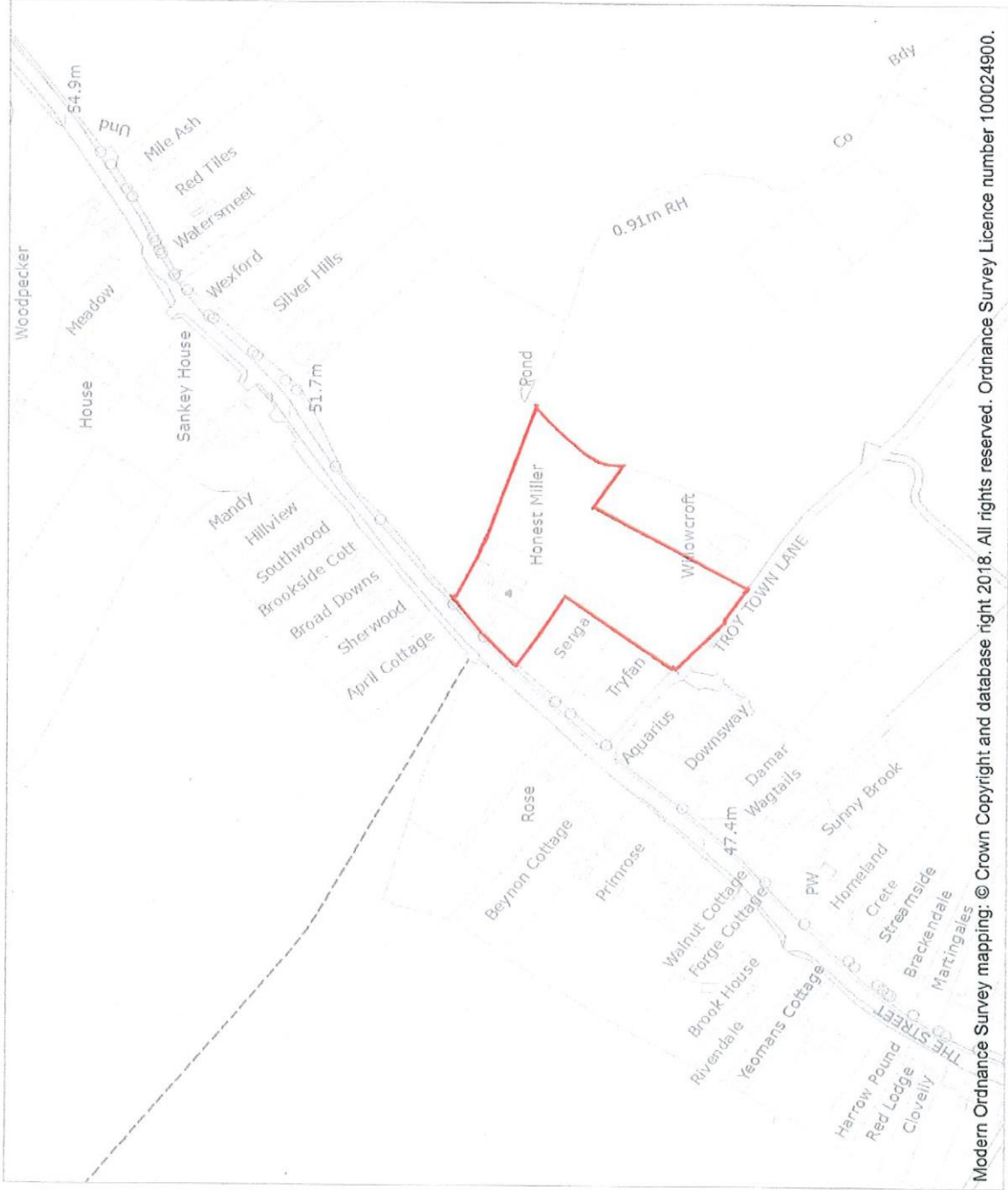
For all entries pre-dating 4 April 2011 maps and national grid references do not form part of the official record of a listed building. In such cases the map here and the national grid reference are generated from the list entry in the official record and added later to aid identification of the principal listed building or buildings.

For all list entries made on or after 4 April 2011 the map here and the national grid reference do form part of the official record. In such cases the map and the national grid reference are to aid identification of the principal listed building or buildings only and must be read in conjunction with other information in the record.

Any object or structure fixed to the principal building or buildings and any object or structure within the curtilage of the building, which, although not fixed to the building, forms part of the land and has done so since before 1st July, 1948 is by law to be treated as part of the listed building.

This map was delivered electronically and when printed may not be to scale and may be subject to distortions.

List Entry NGR:	TR 06884 44635
Map Scale:	1:2500
Print Date:	12 November 2020



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Name: THE HONEST MILLER