

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:	PR86-044
Case Officer:	Darren McBride
Site Address:	The Red Lion Public House, 14 High Street, Biddenden, Ashford, Kent TN27 8AH
Title Number(s):	K341988 (Freehold) and K926577 (Leasehold)
Nominating Body:	Biddenden Parish Council
Nomination Validated:	18 January 2024
Deadline Date:	14 March 2024

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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 Section 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 18 January 2024 and so must be determined by 14 March 2024.

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:

- Biddenden Parish Council (Nominating Body)
- Freehold Owner(s)

² Note: the wording of this passage of the legislation is different to all the other passages 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 Section 88(2) of the Act.

- Leasehold Owner(s)
- Cllr N Ovenden (Leader of the Council)
- Cllr L Wright (Cabinet Member for Communities & Health)
- Cllr N Bell (Ward Member)

If the Solicitor to the Council and Monitoring Officer includes the asset on the Council's 'List of Assets of Community Value' then the owner has the right to request, within eight weeks from the date when written notice of listing is given, the Chief Executive to review the decision.

If the owner is not satisfied with the outcome of the internal listing review then they have the right to appeal to the General Regulatory Chamber of the First-Tier Tribunal against the review decision.

The property will remain listed during the review and appeal process.

Consequences of Listing

If an asset is listed nothing further happens unless and until the owner decides to dispose of it. If the owner does decide to dispose of the asset then, unless an exemption applies, the owner must first notify the Council in writing.

Interim Moratorium

There is then a six week interim period from the point the owner notifies the Council. The Council must then inform the nominating community group who may then make a written request to be treated as a potential bidder. If they do not do so in this period then the owner is free to sell their asset at the end of the six week period.

Full Moratorium

If a community interest group does make a request during this interim period, then a full six month moratorium will operate. The community group does not need to provide any evidence of intention or financial resources to make such a bid.

During this full moratorium period the owner may continue to market the asset and negotiate sales, but they may not exchange contracts (or enter into a binding contract to do so later). There is one exception: the owner may sell to a community interest group during the moratorium period.

Protected 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 appear to 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 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 has confirmed that the public house premises are currently closed 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. 'The Red Lion was the last pub in Biddenden village before the previous tenants decided to wind down and retire after 33 years, starting 14 December 1990 and closing 11 March 2023. The Red Lion has served the community as a pub since the 16th/17th century with a historical list of landlords on display by the fireplace next to the bar.

'During this time, it has been a huge community asset and:

- A much-needed place for casual dining and drinking within walking distance of the village
- A popular venue for live entertainment such as Kar[a]oke, music, singing and quiz nights
- A meeting point for local groups such as the church Bell ringers
- A focus for significant celebrations such as New Year's Eve, coronations and national anniversaries
- A venue for public meetings at election times

'Polls were run on the village's two main Facebook groups and the Nextdoor platform asking the question "Does Biddenden benefit from the Red Lion being open?"

'The responses were:

Biddenden Info

Yes	217
No	2
Don't know	2

Biddenden Community

Yes	293
Absolutely	40
No	3
Don't know	4

Nextdoor

Yes	101
No	10
Don't know	17'

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 hope and expectation is that the Red Lion will reopen as a pub.

'If the current owner were to find a new tenant who successfully ran the Red Lion as a pub with broad local access then that would be a good outcome.

'Notwithstanding that, informal but serious representations of interest have been made to the local borough councillor that lead him to believe that should the property be put up for sale a pause in proceedings might well allow local resources to be put together for a community or local purchase.'

When this nomination was validated I notified the individuals and bodies mentioned under the sub-heading *Procedure* (above). In response, the Freehold Owner's solicitors (Gosschalks LLP) contacted me asking that, before the nomination is determined, the Council accept their representations on behalf of their client. On 1 March 2024, I received a letter from Gosschalks which states as follows (*all emphases in the original*):

We refer to your letter dated 18th January 2024, in which you confirmed to Our Client that the Property had been nominated for listing as an ACV.

Having reviewed the nomination submitted by the Biddenden Parish Council ("the Group/Nominator") we believe that it is invalid. We shall

refer to this Nomination for the remainder of this letter as “the Nomination”.

The Property is not a building or land of community value and is not eligible for listing as an ACV because:-

- a) It does not have a **current** non-ancillary use which furthers the social wellbeing or social interests of the local community.
- b) There has not been a time in the **recent past** when an actual use of the Property (that was not an ancillary use) furthered the social wellbeing or social interests of the local community.
- c) It is not realistic to think there is a time in the next five years when there could be a non-ancillary use of the Property that would further (whether or not in the same way as before) the social wellbeing or social interests of the local community.

We therefore invite you to reject the Nomination.

Eligibility to nominate and validity of nomination

1. The Localism Act 2011 (hereinafter described as ‘the 2011 Act’) is clear that land may only be included in a local authority’s list of ACV’s as the result of a valid community nomination. Under regulation 6(a) of the Assets of Community Value (England) Regulations 2012 (‘the 2012 Regulations’)
2. Land may only be included in a local authority’s list of ACVs as the result of a community nomination made by a Parish Council or a voluntary or community body with a local connection (Section 89(1)(a) and (2)(b) of the 2011 Act).
3. **It is a mandatory requirement of regulation 6(d) of the 2012 Regulations that any community nomination must include “evidence that the nominator is eligible to make a community nomination”.** This express requirement is included so that the local authority may assess whether or not any nomination made is in fact a valid community nomination. If a nominating group or body fails to provide appropriate evidence to show that they are eligible to make a community nomination then the nomination cannot be valid. In these circumstances such a nomination **must** be unsuccessful, and the nominated property must be added to the council’s list of unsuccessful nominations (Section 90(5) of the 2011 Act).

We must assume, given the contents of the council’s nomination form, and the council’s notification of the Nomination to Our Client, that the council is totally satisfied that the Nomination is made by a valid nominating body and that such evidence has therefore been provided. We would further note that no resolution passed by the Nominator has been provided in evidence that the Nomination has been made in accordance with a democratic consideration by the Group.

Section 88(1) of the 2011 Act – current actual use of the Property

4. Section 88(1) of the Act states that:-

(1) For the purposes of this Chapter but subject to regulations under subsection (3), a building or other land in a local authority's area is land of community value if in the opinion of the authority—

- (a) 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*
- (b) 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 community.*

Section 88(1) does not apply to the Property as the Property is currently closed, and has been closed for some time.

S. 88(2)(a) of the 2011 Act - Use of the Property in the recent past

5. Section 88(2) of the 2011 Act states that:-

For the purposes of this Chapter but subject to regulations under subsection (3), a building or other land in a local authority's area that is not land of community value as a result of subsection (1) is land of community value if in the opinion of the local authority—

- (a) 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 interests of the local community.*
- (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 or other 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 no statutory guidance on what constitutes 'recent past' for the purposes of section 88(2) of the 2011 Act. However it is settled law that:-

- It depends on the facts of the individual case (*Scott v South Norfolk DC [CR/2014/0007]*)
- It is not necessary to show lack of use for a period of 5 years or more or this would be explicitly set out in Section 88(2) of the 2011 Act (*Worthy Developments v Forest of Dean DC [CR/2014/0005]*).

The Property has been closed continuously for very nearly 12 months. A pub/restaurant business relies on regular trade to ensure repeat custom.

Therefore 'recent past' in relation to a public house is shorter than it may be for other types of premises e.g. a community centre.

We refer you to the High Court case of *R (Edgar) v Bournemouth Borough Council* (unreported, October 2013). A copy of a commentary on the case can be supplied, should this be required⁴. In this case the Court upheld Bournemouth Council's decision to reject a nomination of Boscombe Centre for Community and Arts due to lack of community use of the property in the recent past.

The council's position was that the most relevant factor had to be the length of the period that had elapsed since the community had last used the site. The ordinary dictionary meaning of "recent" was "*lately, or that has just happened, belonging to a past period of time comparatively close to the present, not long past*". They concluded that recent past may be less, even much less, than five years ago.

The Court upheld the council's decision. It concluded that there was no error of law by the council, and the reasons given in their decision letter were proper and reasonable.

We submit that the requirements of part (a) of Section 88(2) are not met. There has not been a time in the recent past when an actual use of the Property that was not an ancillary use furthered the social wellbeing or interests of the local community. The local community has not used the Property, for any purpose, for a significant period of time. For that reason, there can be no goodwill in the business formerly carried on at the Property and as a result, it cannot and has not furthered the social wellbeing or interests of the local community.

The Nomination

We have considered the reasons given by the Nominators pursuant to which they believe the Property should be listed as an ACV.

A brief note of their reasons, and our comments thereon, are set out below:-

- *"The Red Lion was the last pub in Biddenden village... The Red Lion has served the community as a pub since 16th/17th century..."* As the council are aware, the length of time the Property (or any property) may have been used for a certain commercial purpose is not indicative of that property being an asset of community value. Any historical significance (were this to be evident, and not simply perceived/claimed) is and should be protected by the listing of the site (if appropriate). This is evidently the case in this instance, as the Property is Grade II listed on the basis of it being a circa 16th century timber framed building. The obligations and protections that this listing affords to the Property remain, irrespective of whether or not the Property were listed as an ACV. The historical architectural

⁴ A copy of the commentary was subsequently requested and supplied.

value of the building should not be conflated with the issue of whether or not the Property is an ACV. Beyond this, the simple fact is that the architectural heritage of the Property is of no relevance to the determination of whether or not the Property is an ACV. The primary function of the building is unrelated to the fact that the building (or parts of the buildings currently standing on the Property) may have stood for circa 500 years, and it is not the role of the 2011 Act to seek to list any building for such a reason.

- The Nominators go on to claim that the Property has been “...a huge community asset...” and goes on to list a number of ‘reasons’ for this claim. The claims made include nothing which is not already offered by alternate venues which are (and have remained through the Property’s period of closure) operating to provide exactly the community ‘services’ that the Nominators claim are (or have recently been) offered and/or provided by the Property. Under the 2011 Act (and 2012 Regulations), any nomination must be determined based solely upon the actual primary use of the property in question, and must be made with all focus on the primary use of that property and whether this satisfies the criteria set out in both the 2011 Act and 2012 Regulations. The Property was a commercial public house until the former occupational tenants ceased trading it as such circa twelve months ago, and it has been closed in all respects since then. We would also note that the community have not been negatively impacted (and this would be to assume that the Property did indeed provide all of those functions that it is claimed within the Nomination that it did) by the significant period of closure, and this is demonstrated by a number of facts. The Biddenden Village Hall already cater for a huge number of community groups and uses. On their website, the village hall proudly confirms that their regular users are: Art Group; Badminton Groups; Biddenden Strummers; Ladies Keep Fit; TaDah Theatre Company; Biddenden Local History Society; Biddenden Baby and Toddlers Group; Biddenden Horticultural Society; Biddenden Village Rifle Club; Fun Train; Weald of Kent Computer Club; Yoga; with the village hall also being used by: All Saints Church; Biddenden Parish Council; U3A – Canasta Group; and Tractorfest (and we would note that this is not an exhaustive list, but rather a number of groups using the hall regularly enough for the hall themselves to publicise this fact). The Council will note from this extensive list that it is very evident that the Village Hall is in fact the social hub of the community, and also that it provides all of the social meeting space which is demanded to serve the community’s needs.

Further to the above, and with specific regard to occasional uses (such as the quoted uses of “*significant celebrations such as New Year’s Eve, coronations [of which we would note one has taken place since 1953 – and this was during the time in which the Property was closed], and national anniversaries*”) we would note that, as was made clear during the passage of the 2011 Act through Parliament, with specific regard to “...*the extent to which it will be appropriate for the local authority to consider occasional or periodic*”

use of a particular site as meeting the definition of an asset of community value..." it was stated, by Baroness Hanham, that *"there is a large difference between the use of a field once a year as a car park for the annual village fete and the licensing or leasing of a barn to a local group to run a playgroup"*. The principle here is clear, and has been reiterated by the decision of the Tribunal in the case of *Idsall School V Shropshire Council [2015] UKFTT CR/2014/0016 (GRC)*, in which the tribunal rejected the assertion that the quantum of use cannot be determinative. Highly occasional (indeed annual or even less frequent than that) events cannot be adduced as evidence of a property providing a vital community benefit sufficient to secure an ACV listing.

- The Nominators close their submissions by quoting the results of polls that they have run on Facebook groups (being social media groups with no checks or balances with regard to membership, location, etc). In response to the figures provided, we would note a couple of key points. Having researched the matter, the two largest Facebook groups for the Biddenden community have circa 3.1k members and 1.1k members (taken from a village with a population of circa 2,500 people). Even if it were assumed (which could not safely be done) that the figures are taken only from qualifying people (being actual members of the community), the figures presented represent a tiny proportion of both the village population as a whole, but also a small proportion of the membership of those groups. It is clear that quite aside from being a strong indicator of support for the property, which we would also note is not the same as actually having used the Property at any time when it was open, this actually demonstrates that there is not a great deal of interest nor support for this nomination.
- The Nominators then state that *"...informal but serious representations of interest have been made to the local borough councillor that lead him to believe that should the property be put up for sale a pause in proceedings might well allow local resources to be put together for a community or local purchase."* It is an indisputable fact that the Property is listed (and has been listed thorough its period of closure) as available with Our Client (on their website). If the Nominators (or indeed any local group) were indeed interested in taking on the Property, they could (and would) have made an approach to Our Client in order to establish the parameters for doing so. They have done no such thing, at any point. We would also reiterate the point that the Property has been closed for circa 12 months, which constitutes a 'pause' by any definition, and still the Nominators are yet to make any approach to Our Client, this notwithstanding the fact that they state that they simply need a 6 months pause to give them the time to put together a proposal for the Property. It is crystal clear that there is no intention whatsoever of the Nominat[ors] taking the Property on (either as a freehold or a leasehold) and this is simply an attempt to misuse the 2011 Act to attempt to blight Our Client's title to the Property.

The Nomination fails to posit any evidence of a qualifying non-ancillary use of the Property in the recent past. The requirements of section 88(2)(a) of the 2011 Act have therefore not been satisfied.

We must be very clear in noting that it is the role of the 2011 Act (and 2012 Regulations) to protect communities that are at real risk of the loss of an asset, without which community wellbeing would be detrimentally affected. Were it the legislature's intention to do so then both the 2011 Act and the 2012 Regulations would simply have designated all pubs ACVs. Neither the legislation nor the regulations are drafted in this manner. As a result, when nominating pubs for listing, like any other nominated property, the burden is on nominators to posit evidence of a non-ancillary use which furthers the sporting, cultural or recreational interests/social wellbeing of the local community. Simply being a pub is not enough to show that the section 88 test is met. This position has been reinforced by the decision in *Admiral Taverns Ltd. v Cheshire West and Chester Council and another* ([2018] UKUT 15 (AAC)) in which the Upper Tribunal confirmed that "There was no presumption that a pub came within the listing provisions of the 2011 Act...". Simply stating that the property is a pub and thus must be listed is not an accurate or equitable use of the 2011 Act.

Further to the above, a desire to list the Property as an ACV is insufficient to satisfy the requirements of Section 88 of the 2011 Act. It must be **realistic** to think there can continue to be a relevant non-ancillary community use of the Property in the next five years (*General Conference of the New Church v Bristol City Council* [CR/2014/0013]).

S. 88(2)(b) of the 2011 Act - Is it 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 community?

Notwithstanding the Property's failure to meet the requirements of section 88(2)(a), we will briefly consider the requirements of section 88(2)(b).

A desire to list the Property as an ACV is insufficient to satisfy the requirements of Section 88(2)(b) of the 2011 Act. It must be **realistic** to think there can continue to be a relevant non-ancillary community use of the Property in the next five years (*General Conference of the New Church v Bristol City Council* [CR/2014/0013]). In the context of the 2011 Act, the Nomination has failed to show that this is the case.

The Nomination's lack of evidence of any community use of the Property suggests that the Group are nominating the Property not because they believe it is a real asset used (or, in this case, recently used) by the community, or because they actually wish to bid for the Property in the future (notwithstanding any claims to the contrary). Instead, it would appear that the Group simply want to restrict the ability of Our Client to deal with the Property in the future and they are attempting to use the

ACV regime to prevent this. We submit that this is a gross misuse of the ACV regime, a regime which was established to protect communities which were in real danger of losing assets without which they could not function, which this community have already demonstrated is not the case.

Summary

We have shown that the Nomination provides **no** evidence of a non-ancillary use of the Property in the recent past which meets the requirements of section 88(2)(a) of the Act nor is it possible for there to be any use which meets the requirements of section 88(1) of the 2011 Act. The tone and contents of the Nomination are clear and unequivocal – the Property does not perform a qualifying function, and no amount of describing or opining about a desire for such functions can change this.

When a property is listed as an ACV, this severely hampers the ability of the owner (in this case our client) to deal freely with the property and can cause financial loss/hardship to the owner. The decision that the council have made to list the Property should therefore be considered very carefully, in light of the above, and a decision in this appeal [*sic*] should not be taken lightly.

The Council is entrusted with a quasi-judicial function under the 2011 Act and the 2012 Regulations and must decide both the validity of the Nomination and, if the Nomination is valid, whether or not to list the Property based on the evidence presented. The Nominators have failed to show that the requirements of Section 88 of the 2011 Act are met.

We have shown conclusively that the Property does not meet the section 88 test and is ineligible for listing as an ACV. We look forward to hearing from you with confirmation that the Nomination has been rejected and the Property entered onto the list of unsuccessful nominations.

The process does not expressly provide for a consultation or for a request for representations from the owner of the nominated premises. Nevertheless, Gosschalks' representations have been submitted and so have been taken on board.

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.

Validity/Eligibility

Before turning to the substance of the community nomination, Gosschalks has questioned its validity. They state (emphases in original) that:

'It is a mandatory requirement of regulation 6(d) of the 2012 Regulations that any community nomination must include "evidence that the nominator is eligible to make a community nomination"'. This express requirement is included so that the local

authority may assess whether or not any nomination made is in fact a valid community nomination. If a nominating group or body fails to provide appropriate evidence to show that they are eligible to make a community nomination then the nomination cannot be valid. In these circumstances such a nomination **must** be unsuccessful, and the nominated property must be added to the council's list of unsuccessful nominations (Section 90(5) of the 2011 Act).

'We must assume, given the contents of the council's nomination form, and the council's notification of the Nomination to Our Client, that the council is totally satisfied that the Nomination is made by a valid nominating body and that such evidence has therefore been provided...'

The Council is satisfied that the nomination is valid. Gosschalks seem to be suggesting that the nominating body – a parish council – is required to provide evidence that it is a parish council thus demonstrating its eligibility to make a community nomination. If so, the Council rejects such a claim.

Section 89 of the Act relates to the 'procedure for including land in list' and states that:

- (1) Land in a local authority's area which is of community value may be included by a local authority in its list of assets of community value only—
 - (a) in response to a community nomination, or
 - (b) where permitted by regulations made by the appropriate authority.
- (2) **For the purposes of this Chapter "community nomination", in relation to a local authority, means a nomination which—**
 - (a) nominates land in the local authority's area for inclusion in the local authority's list of assets of community value, and
 - (b) **is made—**
 - (i) **by a parish council** in respect of land in England in the parish council's area,
 - (ii) by a community council in respect of land in Wales in the community council's area, **or**
 - (iii) **by a** person that is **a voluntary or community body** with a local connection.
- (3) Regulations under subsection (1)(b) may (in particular) permit land to be included in a local authority's list of assets of community value in response to a nomination other than a community nomination.
- (4) **The appropriate authority may by regulations make provision as to—**
 - (a) **the meaning in subsection (2)(b)(iii) of "voluntary or community body";**
 - (b) the conditions that have to be met for a person to have a local connection for the purposes of subsection (2)(b)(iii);
 - (c) the contents of community nominations;
 - (d) the contents of any other nominations which, as a result of regulations under subsection (1)(b), may give rise to land being included in a local authority's list of assets of community value.
- (5) The appropriate authority may by regulations make provision for, or in connection with, the procedure to be followed where a local authority is

considering whether land should be included in its list of assets of community value. [**my emphasis**]

Regulation 5 and 6 of the Regs (the latter relied upon by Gosschalks) state as follows:

Regulation 5

(1) **For the purposes of section 89(2)(b)(iii) of the Act, but subject to paragraph (2), "a voluntary or community body" means—**

- (a) a body designated as a neighbourhood forum pursuant to section 61F of the Town and Country Planning Act 19901;
 - (b) **a parish council**;
 - (c) an unincorporated body—
 - (i) whose members include at least 21 individuals, and
 - (ii) which does not distribute any surplus it makes to its members;
 - (d) a charity;
 - (e) a company limited by guarantee which does not distribute any surplus it makes to its members;
 - (f) a co-operative or community benefit society which does not distribute any surplus it makes to its members; or
 - (g) a community interest company.
- (2) A public or local authority may not be a voluntary or community body, but this does not apply to a parish council.
- (3) In this regulation "co-operative or community benefit society" means a registered society within the meaning given by section 1(1) of the Co-operative and Community Benefit Societies Act 2014, other than a society registered as a credit union. [**my emphasis**]

Regulation 6

A community nomination must include the following matters —

- (a) a description of the nominated land including its proposed boundaries;
- (b) a statement of all the information which the nominator has with regard to—
 - (i) the names of current occupants of the land, and
 - (ii) the names and current or last-known addresses of all those holding a freehold or leasehold estate in the land;
- (c) the nominator's reasons for thinking that the responsible authority should conclude that the land is of community value; and
- (d) **evidence that the nominator is eligible to make a community nomination.** [**my emphasis**]

Subsection 89(2)(b)(i) and (iii) of the Act make it clear that a 'community nomination' means a nomination which is made by a 'parish council' **or** by 'a voluntary or community body' with a local connection. The use of the word 'or' clearly differentiates a parish council from other categories of voluntary or community bodies⁵.

⁵ Regulation 4 (relating to local connection) also differentiates parish councils from the other categories of voluntary or community bodies.

Subsection 89(4)(a) then makes it clear that the Regs will make provision as to the meaning in subsection 89(2)(b)(iii) of 'voluntary or community body' and those provisions are contained in Regulation 5(1)(a) of the Regs.

Regarding the emphasised passages in Regulation 6, the Council considers that the 'evidence' of eligibility which is envisaged by Regulation 6(d) is that which may be required by the various 'voluntary or community bodies' outlined in Regulation 5(1)(a) of the Regs to demonstrate that they are eligible to make a community nomination. Whereas as the eligibility of a parish council is explicitly set out in the legislation and its status is self-evident and known to the Council (in whose borough the parish council operates), some of the other 'voluntary or community bodies' are likely to be unknown to the Council. It follows, therefore, that those bodies would need to provide evidence to the Council that they are a compliant 'voluntary or community body' with a local connection. For example, a nominator claiming to be an unincorporated body would need to demonstrate that its members include at least 21 individuals, and that it does not distribute any surplus it makes to its members; or a company limited by guarantee would need to demonstrate that it does not distribute any surplus it makes to its members etc. Unlike a properly constituted parish council which operates in the Borough, the Council would need to be certain that the other 'voluntary or community bodies' satisfy the requirements of Regulation 5(1)(a). This is where the 'evidence' of eligibility would be required.

There is no doubt that a parish council is entitled to make a community nomination and it would be unreasonable to require a parish council to prove its parish council status to the Council (in whose borough the parish council operates) each time that it (the parish council) nominates an asset in its own area or in a neighbouring parish.

Gosschalks continue:

'...We would further note that no resolution passed by the Nominator has been provided in evidence that the Nomination has been made in accordance with a democratic consideration by the Group.'

The Council does not require a parish council to provide a copy of its resolution to make a community nomination. Provided that a nomination received from a parish council contains the requisite information and relates to premises in that parish council's own area (or in a neighbouring parish) then it is accepted. When a nomination is submitted, it is not the Council's responsibility to interrogate or scrutinise the rigours of the parish council's democratic processes. Nevertheless, in this case the nominating body did formally authorise the submission of the nomination⁶.

Therefore, the community nomination is valid and the nominating body is eligible to make that nomination.

⁶ See item (6) of the minutes of the Biddenden Parish Council meeting held on 9 January 2024: <file:///C:/Users/dmcbribe/Downloads/APPROVED%20Minutes%20of%20BPC%20meeting%2009%2001%2024%20-%20Website.pdf>

Before moving on, Gosschalks also questions the motives behind the community nomination:

'... the Group are nominating the Property not because they believe it is a real asset used (or, in this case, recently used) by the community, or because they actually wish to bid for the Property in the future (notwithstanding any claims to the contrary). Instead, it would appear that the Group simply want to restrict the ability of Our Client to deal with the Property in the future and they are attempting to use the ACV regime to prevent this. We submit that this is a gross misuse of the ACV regime, a regime which was established to protect communities which were in real danger of losing assets without which they could not function, which this community have already demonstrated is not the case...

The Council cannot look into the motives of the nominating body. Instead, the Council must simply accept the valid nomination on its face and determine it accordingly.

Moving on, 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 nominated premises are 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 sizeable percentage of their local community. In this case, on-line polls have also been conducted which suggest that there is some support for the nominated premises to be maintained for community use. However, the poll numbers indicating support cannot be verified as being the views of members of the local community. I therefore give the poll results little weight and instead rely on the fact that the democratically elected nominating body will have a good understanding of the strength of community feeling.

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

- Had served the community as a pub since the 16th/17th century
- Closed on 11 March 2023
- Was the last pub in Biddenden village
- Was a much-needed place for casual dining and drinking within walking distance of the village

- Was a popular venue for live entertainment such as Karaoke, music, singing and quiz nights
- Was a meeting point for local groups such as the church bell ringers
- Was a focus for significant celebrations such as New Year's Eve, coronations and national anniversaries
- Was a venue for public meetings at election times

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 may in and of itself further the social wellbeing or social interests of the local community.

In this case, the main use of the premises for the enjoyment of casual drinking as part of a general social intercourse would have conferred a social benefit on the local community.

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

In addition, the hosting of live music, quiz nights etc. is likely to be viewed as part of the main use and, again, would have furthered the social wellbeing or social interests of the local community.

The use of the premises as a meeting point for local groups and as a venue for meetings or gatherings would have conferred a social benefit. However, I do agree with Gosschalks that 'highly occasional events' such as coronations should not be considered as furthering 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 premises are currently closed 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 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 facts and 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.'

⁷ Assets of Community Value – Policy Statement (2011)

⁸ CR/2014/0007

⁹ CR/2014/0005

¹⁰ CR/2014/0010

In this case, according to the nominating body, the public house closed on '11 March 2023' – just over ten months before the submission of the community nomination.

The nominating body states that the premises had 'served the community as a pub since the 16th/17th century' and that there was even an 'historical list of landlords on display by the fireplace next to the bar.' Accordingly, prior to its closure in March 2023, it seems that the premises may have been used without any material interruption as a public house for anything between 300 and 500 years.

In my view, having regard to the relative concept of 'recent past' as outlined by Judge Lane in *Crostone* (above), March 2023 would be viewed as the 'recent past' when viewed in the context of between 300 and 500 years of continuous use prior to that date.

Gosschalks state that there 'has not been a time in the recent past when an actual use of the Property (that was not an ancillary use) furthered the social wellbeing or social interests of the local community.' They explain:

'The Property has been closed continuously for very nearly 12 months. A pub/restaurant business relies on regular trade to ensure repeat custom. Therefore 'recent past' in relation to a public house is shorter than it may be for other types of premises e.g. a community centre.'

Pausing here, I see no reason why the 'recent past' period for a 300/500 years old public house use would be shortened to less than one year simply because it would have relied on regular trade.

Gosschalks continue:

'We refer you to the High Court case of *R (Edgar) v Bournemouth Borough Council* (unreported, October 2013)... In this case the Court upheld Bournemouth Council's decision to reject a nomination of Boscombe Centre for Community and Arts due to lack of community use of the property in the recent past.

'The council's position was that the most relevant factor had to be the length of the period that had elapsed since the community had last used the site. The ordinary dictionary meaning of "recent" was "*lately, or that has just happened, belonging to a past period of time comparatively close to the present, not long past*". They concluded that recent past may be less, even much less, than five years ago.

'The Court upheld the council's decision. It concluded that there was no error of law by the council, and the reasons given in their decision letter were proper and reasonable.'

Pausing again here, the *Edgar* case is unreported but Gosschalks have kindly provided me with a copy of a commentary on the case. I need not set out the facts of that case here as the only point of note is that it was accepted that, on

the facts of its case, Bournemouth Borough Council was entitled to conclude that a two-year period constituted the 'recent past.' The Court held that 'recent past' is a matter for the Council to determine having regard to the relevant facts and circumstances of the case and it was acknowledged that 'recent past' could conceivably be much less than five years (as it was in *Edgar*) or much more than five years.

This simply reiterates what the government guidance states and what the established case law has already concluded on the meaning of 'recent past.'

Having regard to the relevant facts and circumstances pertaining in our case, I feel that the closure of the premises in March 2023 would be considered the 'recent past' when viewed in the context of a continuous use spanning between 300 and 500 years prior to that date.

Gosschalks continue:

'We submit that the requirements of part (a) of Section 88(2) are not met. There has not been a time in the recent past when an actual use of the Property that was not an ancillary use furthered the social wellbeing or interests of the local community. **The local community has not used the Property, for any purpose, for a significant period of time. For that reason, there can be no goodwill in the business formerly carried on at the Property and as a result, it cannot and has not furthered the social wellbeing or interests of the local community.**'
[my emphasis]

Regarding the emphasised passage, and with respect, I do not understand how any 'goodwill' in the former public house business is relevant to the question of whether 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.

Accordingly, as I have already concluded that the actual main use of the premises 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 premises that was not an ancillary use did further the social wellbeing or social interests of the local community.

Before moving on to 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 nominated premises that would further (whether or not in the same way as before) the social wellbeing or social interests of the local community, Gosschalks have made a few other comments on the nomination which I shall briefly address. They state:

'[The nominating body states that] "*The Red Lion was the last pub in Biddenden village... The Red Lion has served the community as a pub since 16th/17th century...*"

'... the length of time the Property (or any property) may have been used for a certain commercial purpose is not indicative of that property being an asset of community value...'

Perhaps but if that 'commercial purpose' i.e. 'use' does/did further the social wellbeing or social interests of the local community then that use (and the length of time it has been/was being carried on) would be relevant.

Gosschalks:

'Any historical significance... is and should be protected by the listing of the site (if appropriate). This is evidently the case in this instance, as the Property is Grade II listed on the basis of it being a circa 16th century timber framed building. The obligations and protections that this listing affords to the Property remain, irrespective of whether or not the Property were listed as an ACV. The historical architectural value of the building should not be conflated with the issue of whether or not the Property is an ACV...'

The nominating body has made no reference to the architectural value of the nominated premises, which is a separate matter. There has been no conflation of the Grade II listed building status of the nominated premises and their use for the purposes of the asset of community value regime.

Gosschalks:

'...the simple fact is that the architectural heritage of the Property is of no relevance to the determination of whether or not the Property is an ACV. The primary function of the building is unrelated to the fact that the building (or parts of the buildings currently standing on the Property) may have stood for circa 500 years, and it is not the role of the 2011 Act to seek to list any building for such a reason...'

I agree but the nominating body has made no such claim about the architectural heritage of the nominated premises and the age of the building is not, in and of itself, the issue. The apparent use of the premises as a public house since the 16th/17th century is the key point here and the fact that the building is circa 500 years old is relevant to at least entertaining the claim of the longevity of the said use. Also, the historical list of landlords displayed next to the bar appears to support the claim of a lengthy use of the premises as a public house.

Gosschalks:

'The Nominators go on to claim that the Property has been "...a huge community asset..." and goes on to list a number of 'reasons' for this claim. The claims made include nothing which is not already offered by alternate [*sic*] venues which are (and have remained through the Property's period of closure) operating to provide exactly the community 'services' that the Nominators claim are (or have recently been) offered and/or provided by the Property...'

The fact that other premises in the locality may provide for uses which further the social wellbeing or social interests of the local community is irrelevant. The question for the Council is whether the actual non-ancillary use of the nominated premises satisfies the tests sets down in section 88(2) of the Act.

Gosschalks:

'...We would also note that the community have not been negatively impacted... by the significant period of closure, and this is demonstrated by a number of facts. The Biddenden Village Hall already cater for a huge number of community groups and uses. On their website, the village hall proudly confirms that their regular users are: Art Group; Badminton Groups; Biddenden Strummers; Ladies Keep Fit; TaDah Theatre Company; Biddenden Local History Society; Biddenden Baby and Toddlers Group; Biddenden Horticultural Society; Biddenden Village Rifle Club; Fun Train; Weald of Kent Computer Club; Yoga; with the village hall also being used by: All Saints Church; Biddenden Parish Council; U3A – Canasta Group; and Tractorfest... it is very evident that the Village Hall is in fact the social hub of the community, and also that it provides all of the social meeting space which is demanded to serve the community's needs...'

Again, it is irrelevant that other premises in the locality may provide for uses which further the social wellbeing or social interests of the local community. Nevertheless, Gosschalks claim that alternative venues in the locality "provide exactly the community 'services' that the Nominators claim are (or have recently been) offered and/or provided by the Property."

However, the examples provided relate to Biddenden Village Hall which does not appear to provide the local community with a public house-type experience and it is unclear how the nominated premises would ever have hosted, say, badminton groups, keep fit groups, baby and toddlers groups, yoga classes etc. as part of its main use.

There appears to be little duplication in terms of the nature of the community uses provided at Biddenden Village Hall and the community use(s) which were, until recently, offered at the nominated premises.

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.

In this case, the nominating body has stated that they hope and expect that the nominated premises will reopen as a pub. They consider that it would be a good

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

outcome if a new tenant could be installed to run the premises as 'a pub with broad local access.' However, it is stated that:

'...informal but serious representations of interest have been made to the local borough councillor that lead him to believe that should the property be put up for sale a pause in proceedings might well allow local resources to be put together for a community or local purchase.'

Gosschalks challenge this claim:

'It is an indisputable fact that the Property is listed (and has been listed thorough its period of closure) as available with Our Client (on their website). If the Nominators (or indeed any local group) were indeed interested in taking on the Property, they could (and would) have made an approach to Our Client... We would also reiterate the point that the Property has been closed for circa 12 months... and still the Nominators are yet to make any approach to Our Client... It is crystal clear that there is no intention whatsoever of the Nominat[ors] taking the Property on (either as a freehold or a leasehold) and this is simply an attempt to misuse the 2011 Act to attempt to blight Our Client's title to the Property...'

Pointedly, Gosschalks do not challenge the principle that 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. Instead, it is the motives of the nominated body which are challenged – something that the Council cannot possibly know.

On balance, in my view, it is realistic to consider that the premises could re-open as a public house in the next five years. This view is supported by the fact that the premises have been closed for a relatively short period of time and so should not have materially deteriorated since the closure.

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

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.

of the premises. 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, 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.

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 and Monitoring Officer accept the nomination for this building/land to be included on 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 on the Council's 'List of Assets of Community Value,' for the reasons set out above.



Solicitor to the Council and Monitoring Officer

Date: 13/03/2024.....

