ASSETS OF COMMUNITY VALUE GUIDE

BLIGHTING OF DEVELOPMENT OR BOOSTING THE LOCAL COMMUNITY

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1. INTRODUCTION

The Community Right to Bid was introduced by Part 5 Chapter 2 of the Localism Act 2011 based on a non-statutory guide in the September 2011 ACV Policy Statement. It applies in England but not in Wales although consideration is now being given to introducing it there. It operates in relation to properties which qualify as “assets of community value”. The use of such terms perhaps suggests a greater right than is actually conferred. It seeks to strike a balance between landowners and local communities. In doing so it probably offends both sets of interests. It is neither a right to buy nor a pre-emption right (unlike in Scotland) but a right to bid leaving the landowner free to proceed with a disposal as it wishes. If a community group is interested a moratorium is imposed to allow the bid by a community group to be organised.

This right is part of a parcel of community measures focused on by the 2011 Act – Community Right to Bid; Community Right to Challenge; Community Asset Transfer; Community Right to Reclaim Land; and Community Right to Build. This right seeks to address the concern that properties which are or have been used for the benefit of a local community are being developed and lost to the community. It does so by providing a procedure by which properties may be nominated to be added to a list of community assets maintained by the local authority and then allowing time in which a community group can arrange a bid to acquire the property if the owner intends to dispose of it. At present the period is six months from notification of the intention to dispose of the property if a community group expresses interest within six weeks of notification of
the decision to dispose of the property. Crucially the right does not confer a right to compel an owner to accept such a community bid even if the bid equals or exceeds any other offer unless the owner is a charity or trustee. There is no statutory pre-emption right as under the Landlord and Tenant Act 1987.

In the DCLG plain English guide to the Localism Act (November 2011) it is stated that “Every town, village or neighbourhood is home to buildings or amenities that play a vital role in local life. They might include community centres, libraries, swimming pools, village shops, markets or pubs. Local life would not be the same without them, and if they are closed or sold into private use, it can be a real loss to the community.” The focus was on buildings and amenities which impact the local community if no longer available. To seek to counter such loss when an asset is listed “the Act then gives community groups the time to develop a bid and raise the money to bid to buy the asset when it comes on the market. This will help keep much-loved sites in public use and part of local life.” The intended effect is to make “it easier for local people to take over the amenities they love and keep them part of local life.” In the Ministerial foreword to the non-statutory advice for local authorities (October 2012) it was stated that its aim is helping local authorities to implement the scheme and work with local communities “to protect the buildings and amenities which are of great local significance to the places where people live and work.”

The reality is that the ACV regime has moved on from this in that the range of assets being listed has been greatly extended (see section 3 below) and the consequences of listing can do more than provide a breathing space for community groups to organise a bid (see in particular section 9 below on planning).

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2. CONCERNS

The ACV regime raises concerns with each set of interests affected by it.

(i) **Property owner** - from a property owner’s perspective there are two particular concerns if the owner’s property is listed as an asset of community value. One is that it will deter interest if the owner wishes to sell. This has been expressed as a particular concern by publicans and companies owning chains of public houses. Applications are not infrequently made when the property is being marketed which is calculated to worry any owner. The other specific concern is that it will deter development of the property. There is then the more general concern that the current regime is a starting point and the right will be gradually extended so that once listed the restrictions could be increased in the future as is being sought in Scotland. This is illustrated by two developments. First in a report on ACV a House of Commons committee has proposed that the six month moratorium period be extended to nine months (see section 12 below). The second is the 2015 statutory instrument excluding a listed or nominated public house from the application of the permitted development rights regime. The latter is clearly very significant in the context of pubs because prior to this even if listed as an ACV it was still possible to convert to another use such as a fast food outlet or even a furniture store without the need to obtain a fresh grant of planning permission. Now that is not possible and it is necessary to obtain a fresh planning permission (see section 9 below).

It has been noted that tenants have been actively seeking listing of buildings let to them. One reason for this is that it makes it more difficult for landlords to redevelop the building and to rely on a proposed redevelopment as a defence to claims for enfranchisement. This will add to the concerns of property owners.

(ii) **Local community** - from the local community’s perspective the right merely defers a disposal and does not allow the community to compel a purchase which is why comparatively few listed properties have been acquired for the community. As yet listing does not (save as regards public houses) result in greater control over the use of the property and this is particularly a concern when the character of the property is such that a change in use can occur without the need for a fresh planning permission due to the application of permitted development rights. This
had been particularly prevalent with pubs which had been converting to supermarkets at the rate of two a week in the two year period beginning January 2012. For example, the George IV pub in Brixton was listed but it had been sold to a food retailer prior to listing. The pub was then converted to a supermarket after the listing. Other pubs have been converted to furniture stores or fast food outlets. CAMRA has provided more recent figures which show that in December 2014 there were 54,914 public houses but this had reduced by 1,234 to 53,444 in June 2015 with 598 lost in the suburbs which is a rate of 17 a week being lost.

The launch of the Pub Loan Fund of £1.5 million by the government in September 2015 and the funding of £3.6 million in the Community Pub Business Support Programme “More than just a Pub” in April 2016 may slow that rate of loss and encourage the growth in numbers of community pubs. There is a growing trend for local communities to acquire and run community pubs as shown by the acceptance of the offer to purchase the listed Black Bull in Lowick by a community benefit society in September 2015; the acquisition of the Drovers Inn in Wimborne and the sale of the listed Dog Inn in Belthorn both to community companies; and the purchase in March 2015 by a community company of the Antwerp Arms in Tottenham which was listed in September 2013. This has been encouraged by the success of earlier community pubs such as the Old Crown in Hesket Newmarket in Cumbria started in 2003. Attempts are being made to purchase other pubs for the community such as the Ampleforth Arms in Oxford which use to be frequented by CS Lewis. With the acquisition of the Maybush Inn at Great Oakley (listed as an ACV by Tendring DC in September 2015) by the Great Oakley Community Hub in February 2016 the number of community pubs was brought to 40.

(iii) Local authorities – separate from the owner and the local community is the local authority which is required to administer another regime and which regime most unwelcomely from the authority’s point of view imposes a potential financial burden on it. Not only does the authority have to operate the system but if loss is caused to a property owner by listing then the authority is required to compensate the property owner (see section 11 below).

Local authorities will also be affected as property owners. A number of applications have been made by town councils or local groups in relation to properties owned by the Borough or
District Council administering the list. This can place the Borough or District Council in a difficult position particularly when the property is also on the Council’s list of assets to be disposed of by that Council. One reason for the presence of the asset on that list may be that the authority faces a large bill for works if the asset is to be retained. For example, the Priory in Orpington is owned by Bromley LBC and has until this year housed the local museum in its medieval building. It has been listed as an ACV following an active local campaign to retain the property for the local community. It is estimated that the authority would need to spend £1.7 million on the property. Instead the authority wishes to sell on the open market. Steps are now being taken by a charitable trust, the Orpington Priory Community Hub, to attempt to purchase the property either during a moratorium period once notice of intention to dispose is given by the authority or if unsuccessful on the open market after the expiry of the moratorium period.

In such circumstances there is an actual conflict of interest which is not addressed in the regime. It is forced on the authority by the legislation and cannot be avoided. The authority is subject to a duty to decide the listing issue raised by the nomination and cannot delegate this decision unless it requests another authority to act on its behalf pursuant to section 101(b) Local Government Act 1972. With applications to register a town or village green it is open to the authority to appoint an independent expert to hold a non-statutory inquiry if there is a conflict of interest. This is not a practice that has been adopted in respect of community nominations. As the time table is tight and there is the possibility of a review with an oral hearing it is unlikely that such a course will be adopted. An authority must obviously take particular care with nominations where there is a conflict. If practical it is sensible to choose a decision maker within the authority who has no responsibility for the nominated asset. Each step in the process should be documented and clear reasons given for the listing decision.

Such a conflict of evidence is more acute when the authority has a compensation claim made as a result of the listing. The authority will be obliged to decide whether or not a

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compensation payment is to be made and if it is the amount and then it will be obliged to make that payment.
3. OPERATION OF REGIME TO DATE

The February 2015 report of the Communities and Local Government Committee on Community Rights (“the February 2015 Report”) states that just under 2000 properties had been listed by that time. From the flow of daily news items relating to ACVs the feel is that the pace of nomination is increasing. However, at that time at most 11 had been purchased by the community with the most prominent being the Ivy House pub in Nunhead. In all according to the evidence provided to the Commons Committee there have been 122 community bids of which 60 had failed and 27 were then still outstanding. Since then there have been more purchases of public houses to be used as community pubs. However, the absence of large numbers of purchases has not prevented the making of nominations with increasing enthusiasm particularly in respect of public houses and football stadiums.

The impact can be very significant. For example, the listing of part of the Queens Walk on the South Bank may impact of the proposed Garden Bridge as the land includes the proposed landing site for the bridge in Lambeth. However, by far and away the greatest number of applications have related to public houses as this has been seen as a means by which the continuing wave of closure of pubs can be stemmed and efforts made to revive the pubs. Just over 30% of listed assets are pubs and twenty-two of the so far thirty three First-tier Tribunal appeal reports (including the two costs applications) have related to pubs.

However, notwithstanding the focus of publicity on pubs an extremely wide range of properties have been the subject of applications. The Department of Communities and Local Government has a very useful and helpful map of England which shows a number of Community Rights categories including Assets of Community Value. It can be found at http://communities.maps.arcgis.com/apps/OnePane/basicviewer/index.html?appid=2fe0e278eaf5457497ca35fd4555c44b#! In addition some local authorities such as Braintree and Camden (https://opendata.camden.gov.uk/Your-Council/Assets-Of-Community-Value-Map/mffx-dj3q) have maps of their area showing the listed assets of community value.

The range of listed assets covers both properties which are being used for commercial purposes and those which are already being used for public purposes. Properties nominated
including sports fields and clubs, tennis club (West Norwood), cricket club (Yeadon Leeds), horse club (Lambeth), gyms (Hackney and Henley), dog racing stadiums (Sandy Lane Oxford), village shops, cafés, tea rooms, schools (former Penkhull infants school Stoke), nurseries, playgrounds, outdoor activity centres, post offices, pharmacies, hospitals, health clinics, surgeries, residential care home, former ambulance station, former police station, theatres (such as the Electric Theatre in Guildford and Greenwich theatre), libraries (Rushall library in Walsall), museums (Type Museum Stockwell), golf courses (Western Park in Leicester), swimming pools, dingy park (Seaview), Turkish baths (Newcastle), community centres (Formby Hall Wigan), day centres, bingo hall (Ealing and Tooting), markets (the 112 year old Queens Market in Newham), old corn exchanges (Hadleigh), town halls (Hornsey Haringey), council administrative office (Howden Customer Service Centre) allotments (Coombe Stroud), business start-up centres, art gallery, churches and chapels, scout huts, allotments, car parks, public toilets (Penge), bus shelters, phone boxes, war memorials, fields (such as Pier Field Skegness which is now for sale with bids received under a tender process), windmills, community gardens (at Portishead produced from “eyesore” vacant land), parks such as Dulwich park, public amenity land, a wildlife habitat (Soddy Gap near Cockermouth), woods (Page Woods at Bowers Gifford, Basildon), a lake, city farms (Twerton Hill), public footpaths (two listed by Huntingdonshire DC), cycle tracks, disused railway line, coast guards station (Kingsbridge) and greens.

Strikingly, and imaginatively, successful applications have been made in relation to the Lakeland fell Blencathra and the Undercroft at the South Bank used for skate boards as well as the Stockwell Skate Park. Stick Tarn in the Langdales has also been listed in response to the plan by the Lake District National Park Authority to sell off six beauty spots. Pinewoods comprising 96 acres of semi-natural woodland near Harrogate in Yorkshire has been listed as has been Tunbridge Wells Commons.

The wide range of properties nominated goes far beyond the types of property originally envisaged. It is no longer the sole pub in the village which is being nominated but every pub in town. It is no longer just the sole village shop but a newsagent in busy South London. It is not just football stadiums which are being considered for nomination by supporters’ clubs but also training
grounds. As an alternative to listing each asset individually Stafford BC has adopted the listing of a class of ACV. It has entered all “parks and play areas owned by Stafford BC within the Stone area” following a nomination by Stone Town Council. The listing of all the public houses in Otley has received publicity but others appear to be adopting a similar if less publicised approach. For instance, Bexley has included on its ACV around 35 allotments.

Even if the building has been demolished that will not exclude the possibility of listing. The scouts hut in the Matterhorn Capital case is one example. Another is the demolished Carlton Tavern which following a failed planning application for permission to convert it to flats was pulled down in April 2015. It is now subject to an enforcement notice requiring it to be rebuilt and has been listed in February 2016.

Doncaster MBC has refused to list a memorial known as the Buttercross in the Marketplace Tickhill on the ground that it is an ancient monument rather than a piece of land or building and that separate legislation exists to protect it. A similar approach was adopted in respect of the nomination of the Milestones/Turnpikes in Tickhill as they are considered to be neither land nor a building.

Some authorities have sought to provide some guidance as to the type of asset that may qualify as an ACV by reference to the purpose to which the asset has been put. For example, Runnymede BC states that although not a complete list it will consider nominations where the main purpose of the asset is

(i) Public Services Assets:- Children centres, schools, nurseries, health centres, doctors surgeries, hospitals, day care centres and residential care homes.

(ii) Sport, Recreation & Culture Assets:- Theatres, libraries, cinemas, swimming pools, sports centres, parks, village halls, ornamental gardens, open spaces, museums or play areas.

(iii) Community Services Assets: - Community centres, youth centres or public toilets.

(iv) Local Democracy Assets: - Town, civic or guild halls.

(v) Economic Assets: - Village shops, the local pub, markets, the post office or the local bank.
It is noticeable from viewing the lists of ACV kept by the authorities that there is a great discrepancy between authorities. Some even now have no ACV listed whilst others have over fifty. Some give the impression that there has been a careful assessment of the authority’s area and a variety of assets located over the whole of the authority’s area have been listed. Some give the impression that the focus has been on particular types of assets. This may reflect the character of the area. The focus on the ACV list kept by St Albans is on meadows, open spaces and nature reserves.

It may be that different views are taken as to whether certain types of assets are excluded from listing. For instance, even though a number of allotments have been listed Christchurch BC has taken the view that when it owns an allotment under the Allotment Acts it does so as a statutory undertaker so the allotments cannot be listed as they are excluded land for these purposes (see report on nomination of Roeshot Hill Allotment site). Not all allotments are owned by councils and there have been cases reported in local newspapers of private owners seeking to obtain vacant possession of allotments with a view to development and opposition taking the form of a nomination. One such nomination relating to land at the north side of Infield Lane Darnall was accepted by Sheffield City Council. The decision is on the authority’s web and shows there was evidence that the allotments are used not just for the cultivation of fruit and vegetables but also the flying of pigeons and the keeping of livestock as well as there being a community garden used by people with mental and disability issues. The City Council describes this in the decision as promoting community activity and well-being.

Listing can fail to achieve its objective not just because the community bid is not accepted and the asset sold to a purchaser other than the community bidder. The use of the listed property may be changed notwithstanding the listing particularly if the permitted development rights regime applies to the listed asset. As mentioned above (in section 2(ii)) the George IV pub in Brixton was listed but it had been sold to a food retailer prior to listing. The pub was then converted to a supermarket after the listing as this was before the 2015 Regulations taking listed pubs out of the permitted development regime. This has been particularly prevalent with pubs. It
will be interesting to see whether the need to obtain a new planning permission affects the rate of loss in the long term.
4. QUALIFYING ASSETS

The regime applies to unbuilt-on land and to buildings or to a combination of both unless excluded from listing (as to which see section 6 below). It does not matter who is the owner including the Crown Estate and local authorities. It does not matter whether the asset is owned by a commercial concern or a non-profit making body. It does not have to be in single ownership. The size of the land or building is not material. It does not matter whether there is currently no use made of the asset. Nominations of closed public houses are common.

To qualify statutory criteria must be satisfied. These are set out in section 88 of the 2011 Act (for full wording see attached section at end of paper). Unfortunately, these criteria are formulated in general terms with no definition provided for some important phrases and no real guidance. The official non-statutory guidance in the DCLG Guide indicates that this is deliberate with the intention that each local authority will determine its own meaning for such phrases. There is no requirement that such meanings should be publicised, for example, on the authority’s website. As a matter of practice some authorities do provide such on-line guidance. This is helpful but needs to be regularly reviewed in order to take on board the appeal decisions. In a number of cases judges of the First-tier Tribunal have adopted a different interpretation from that taken by some authorities. What constitutes “recent past” is an obvious example. Some authorities have considered this means the last five years but that has been vigorously rejected by the judges.

Such an approach to the formulation of a regime which adversely affects property rights is objectionable in principle but if adopted should at least require that there is certainty as to the approach adopted by a particular authority.

The potential for uncertainty is increased by the criteria not imposing absolute requirements. The relevant test is not whether the criteria have been satisfied when in such a case the authority cannot adopt an interpretation of the statutory wording which is incorrect. The test is whether in the opinion of the particular authority the criteria has been satisfied. Normally this

5 Judge Lane has stated that the absence of such definitions is, no doubt, deliberate – Pullan v Leeds City Council CR/2015/0011 at para. 10
6 Tesco Stores v Dundee City Council [2012] UKSC 13
would mean that a decision by an authority that the criteria has been satisfied will not be capable of being challenged on the straightforward basis that the decision is wrong. Instead it would be necessary to show that the authority has made a decision that no reasonable authority would have made or there has been an error of law so that judicial review is justified based on the Wednesbury principle.

However, when a decision to list is the subject of an appeal the present approach is that the appeal is a simple rehearing of the matter and so is not limited to considering the narrower grounds of judicial review and should not give significant weight to the Council’s decision (para. 7 in Patel v Hackney BC). At some stage I would expect this approach to be challenged. If correct there is no point in having the reference to the authority’s opinion which is out of line with other legislative areas.

However, that is not the complete picture. At present there is no appeal from a refusal to list. A nominator can only challenge a refusal to list by way of judicial review. This means that in some cases when, say, a nomination has been made by a town council in relation to an asset owned by the listing authority the refusal to list may be met by a threat to commence judicial review proceedings. If such proceedings are commenced in such circumstances will the Wednesbury principles apply even though they do not with listing appeals under the regime? There would not seem to be justification for any approach other than to apply the Wednesbury principle as was accepted to be the case with Shropshire Council’s refusal to allow a claim for a demolition deduction under the Community Infrastructure Levy (“CIL”) regime (R (oao Hourhope Limited) v Shropshire County Council). This was the approach adopted by Sales J. in R (oao Katherine Edgar) v Bournemouth BC in judicial review proceedings in relation to an unsuccessful community nomination. In that case the judge considered the refusal decision to be proper and reasonable and there was no indication of an arguable error of law.

7 CR/2913/0005
8 [2015] EWHC 518 (Admin)
9 CO/2663/2013
5. QUALIFYING CRITERIA –

In deciding whether the statutory criteria are satisfied the authority has to adopt a two stage approach. The first stage is concerned with a consideration of the current actual use of the nominated property and then if the actual use condition is not satisfied the second stage is concerned with a consideration of use in the recent past. If the criteria are satisfied on the first stage that is sufficient and there is no need to proceed to the second stage. It is not enough that it is considered that the asset would be suitable for future community use if there is no current qualifying use and there has been no such use in the recent past. For example, a building which has been empty and in poor repair for a long period and never used for a community purpose cannot be listed because it is considered and proposed that it could be converted to a community use in the future.

In deciding whether there has been use of the nominated land a “common sense” approach is to be adopted.\(^\text{10}\) This is in line with the approach adopted in respect of village green applications when determining whether the whole of the site has been used for lawful sports and pastimes for not less than twenty years.\(^\text{11}\) Specifically in the Banner case use of two narrow public footpaths across a meadow could not as a matter of common sense be regarded as the physical use of the meadow\(^\text{12}\).

5.1 Current actual user (present and future test) –

(a) Conditions - the first stage is for the authority to form an opinion as to whether the following two conditions have been satisfied in relation to the nominated property based on the current actual use of the asset. The first condition is whether there is a current actual use which is a community use. These two conditions in section 88(1) of the 2011 Act are:-

(i) the land or building is currently being actually used to further the social wellbeing or social interest of the local community (“community benefit”) and this use is not an ancillary use;

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\(^{10}\) Judge Lane in Banner Homes v St. Albans (CR/2014/0018) at para. 16
\(^{12}\) This point was not pursued on the appeal to the Upper Tribunal [2016] UKUT 0232 (AAC) at para. 12
(ii) it is realistic to think that there can continue to be use of the land or building which is not ancillary and which will further community benefit. This future use for community benefit is not limited to the current use and so an entirely different community use can be proposed.

(b) “local community” – there is neither a definition of “local community” nor any guidance as to how it is to be determined. Judge Lane considered this to be deliberate “since it will usually be a question of fact as to what the “local community” comprises in any particular case.” \(^{13}\) It does not necessarily equate to the area of the local authority. It may vary from asset to asset. This has led to differing views as to what may constitute a local community. Sheffield City Council considers that the local community for a public house will be a smaller area than that for a major music/entertainment venue. When assessing nominations it has seemed to take the view that it is the residents in vicinity of the public house. In contrast in Pullan v Leeds City Council\(^ {14}\) Judge Lane considered that for the purposes of the appeal regarding the listing of the Old Cock public house the town of Otley must be the local community.

CAMRA has suggested that the phrase should have its ordinary dictionary definition which it says is a “group of people living in the same place or having a particular characteristic.” This still leaves open the extent of the place which is to be used to determine the local community. CAMRA argues that using a common characteristic to determine a community will cover people who regularly use a pub even if they do not live nearby. The liking of the regulars for a particular pub is sufficient to constitute a community. This then leads CAMRA to the conclusion that it is sufficient that the pub has a core of regular customers. This appears not to take into account that it is not sufficient to show there is a community but it must be a local community. In Pullen v Leeds City Council it was not just that the pub had a regular clientele but that far more than a de minimis were people from the town.\(^ {15}\)

Sheffield City Council does not appear to have wholly accepted CAMRA’s argument but has now adopted a less demanding stance with regard to the evidence supporting a community nomination of a public house (see section 7(c)(III) below). Having refused nine out of ten

\(^{13}\) Pullan v Leeds City Council CR/2015/0011 at para. 10
\(^{14}\) Supra at para 12
\(^{15}\) CR/2015/0011 at para. 12
community nominations made by the Sheffield and District branch of CAMRA in July 2015, including the nomination of the Three Tuns in Silver Street, a single fresh community nomination was made by the branch in relation to the Three Tuns. It was successful. However, in doing so the City Council did not accept CAMRA’s argument that it is enough that there are regulars who travel to the pub. In the report to the individual cabinet member the point is made that the Sheffield administrative area is a very large area and the nature of the nominated property should be taken into account in determining the local community of that property. The supporting evidence showed the Three Tuns to be popular with office workers and attracted “a wider community who travel considerable distances to visit the pub. This in itself does not necessarily identify a “local community”. The supporting evidence also referred to the pub being a venue for folk sessions, poetry and book readings and book signings. In respect of this evidence it was considered reasonable to treat the local community for a public house holding such events as being larger than for one which did not. Further on in the report the point is made that the concept of local connection suggests that local community is capable of a fairly wide interpretation. This indicates a slight change in approach by the City Council as such events were mentioned in the report on the earlier nomination. Later in the report on the second nomination it is stated that there is sufficient evidence to determine what the local community is and the degree of use. There is also reference to the “local working community” which suggests that the local office workers who use it as their local meeting place are being treated as a local community. There is clearly a difference between a town such as Otley and a city such as Sheffield so that the approach adopted by Sheffield City Council is not necessarily inconsistent with the judgment of Judge Lane in the Pullen case.

With assets which are being used for a profit-making purpose such as a shop or pub Arun DC suggest that an area within a radius of half a mile from the asset is used unless a different radius is shown to be appropriate. This area is considered to be the likely distance that users will regularly choose to walk. Such a test focuses on the community being a local community.

(c) social wellbeing/social interest - the statutory regime contains no definition of “social wellbeing or social interest of the community” save that “social interests” include in particular cultural, recreational and sporting interests (section 88(6)). Judge Lane considered the absence of
a definition to be deliberate as with the absence of a definition of local community\textsuperscript{16}. Each local authority is to decide what it considers falls within the phrase. In Crostone v Amber Valley DC \textsuperscript{17} Judge Lane described this issue as a “highly contextual question, depending upon all the circumstances of a particular case.”

Runnymede BC in its ACV procedure guide notes that there is no definition in the ACV regime or in general circulation and in the absence of a set definition for social wellbeing adopted that contained in the New Zealand Ministry of Social Development’s Social Report being “those aspects of life that society collectively agrees are important for a person’s happiness, quality of life and welfare”. Basildon DC adopts a similar meaning but differently worded when it states that social wellbeing means “things that people value in their life that contribute to their reaching their potential (economic, social or environmental)”.

Haringey LBC states in the context of defining social value that “‘Community Use’ entails maximising the use of community buildings and spaces to strengthen the capacity of local communities by providing mixed and multipurpose services to predominantly Haringey residents. Community Use involves providing services, which are inclusive, accessible and affordable, and promote equality of opportunity to meet the needs of the borough’s diverse population; supporting community cohesion, care and support. Community Use encourages independence and empowerment, stimulating innovation, partnership and social empowerment, stimulating innovation, partnership and social well-being; in order to inspire local people to share in the vitality of their community.”

The benefit must be for the community and not individuals so that, for example, a nomination of an independent school will fail. In contrast a school serving the local community can be listed. The nomination of All Saints Pastoral Centre in London Colney was refused because it operated as a residential educational facility which was not viewed as being a community use but as a private use. This should be contrasted with local members clubs such as bowling clubs or golf clubs. These are open to the local community and so use by the club may be regarded as

\textsuperscript{16} CR/2015/0011 para. 10
\textsuperscript{17} CR/2014/0010 at para. 17
furthering the social wellbeing and social interest of the local community.\(^{18}\) However, it is not to be expected that all clubs will be treated in this manner.

The reasoning for listing Rushall library in Walsall is an illustration as to how this aspect of the matter is considered. The shutting of a number of libraries was proposed for consideration by Walsall Council. In response a community nomination was made in relation to one of them, Rushall library. It had significant support which in itself is a factor to be taken into account. Over one hundred residents were supportive as well as a number of community groups and a local primary school. The nomination was considered by a listing panel of three officers. It is not stated on the Council’s webpage whether such a panel is the Council’s normal procedure with a community nomination or was adopted with regard to this nomination because it is the owner of the nominated asset. The panel’s decision was to list. It is reported that the express reasons for considering that it furthered social well-being was because it was a valuable learning tool both in terms of library skills and lifelong learning as well as recreational activities taking place there. It was considered that it catered for diverse sectors of society and age groups reducing isolation, addressing disadvantage, and protecting vulnerable groups.

Community centres and village halls are very obvious candidates for nomination. It is very obviously not limited to non-profit making uses but also covers commercial uses. As well as pubs (whether or not in use) football stadiums such as Old Trafford and Oxford City have been listed.

Magistrates’ courts, fire stations and police stations have been refused by some authorities on the basis that they are not within the type of community use required. Bromley rejected a former police station because the public only had access to a small part of the building. In contrast the West Cumbia Magistrates and County Court have been listed on the nomination of Workington Town Council. This is in response to the threat of closure as part of the Ministry of Justice’s cost cutting measures. Other authorities such as Waverley have listed police stations. A nomination of the Westminster Fire Station closed after 100 years of use was rejected on the ground that there was no realistic prospect of future community use but one in Haworth, Bradford

\(^{18}\) As regards bowling clubs see Gullivers Bowls Club v Rother DC (CR/2013/0009) and as regards golf clubs see Haddon Property Development v Cheshire East Council CR/2015/0017
has been listed. Some authorities consider that car parking does not qualify whilst others do. Following the decision in Trouth v Shropshire\textsuperscript{19} it is clear that land consisting only of a car park can be listed as an ACV if the use of it is not viewed as ancillary to the use of a larger unit. Bus depots, Mecca Bingo halls and nightclubs have also been refused as not satisfying the criteria yet at least one authority has listed a bus station. It emphasises that the manner in which the listing regime is operated can vary from one authority to another with different views being held as to what types of property may qualify for listing.

Interestingly in the General Conference of the New Church v Bristol City Council\textsuperscript{20} Judge Lane considered it significant that the list of social interests did not include religious interests. He then went on to hold that “it does not encompass religious observances in a church, mosque or synagogue etc...”. Such a building will only come within section 88 if there is non-ancillary use which furthers social wellbeing or social interests of the local community (as to non-ancillary use see (d) below). Some authorities have listed churches and chapels but possibly on the basis that religious worship is a use for a community benefit.

A nomination which is prompted by a desire to retain a building which is considered to enhance the character of the local area is not sufficient by itself to show a community benefit. The focus should be on the use to which the building is put rather than the physical appearance of the building which should be dealt with exclusively by building and planning law. For example, a nomination of an unused boat house by the side of a canal was refused.

There have been a number of appeals to the First–tier Tribunal General Regulatory Chamber. One concerned the Kassam Stadium which was listed by Oxford City Council and was appealed by the owner in Firoka (Oxford United Stadium) Limited v Oxford City Council\textsuperscript{21}. The core issue was whether the football use should be viewed as ancillary. In deciding this issue Judge Nicholas Warren had to consider condition (i) above. He held that this condition had been satisfied. His justification for this holding started at paragraph 10 of his judgment:-

\textsuperscript{19} CR/2015/0002
\textsuperscript{20} CR/2014/0013
\textsuperscript{21} 9th May 2014 – CR/2013/0010
“Social interests” includes in particular cultural, recreational and sporting interests.

11. It can hardly be denied that one of the current uses of the Kassam Stadium is to provide a home ground for Oxford United FC. Is that an “ancillary” use? It is true that there are only about 25 match days a year. In my judgment, however, the cultural, recreational and sporting interests with which I am concerned extend wider than the hour and a half or so for which 20 – 30 men play a game of football. The role of a football club in the local community goes far beyond that. This point is made in written submissions from OxVox the supporters’ trust which nominated the stadium as an ACV. The existence of a home town club, intrinsically linked to the use of its home ground, fosters community pride; stimulates daily conversations in pubs, work places and online; forges friendships and encourages the mix of generations. It was a recognition of the importance of this, no doubt, which resulted in the planning application for the whole stadium being made in 1996 “on behalf of Oxford United FC”.

In an appeal concerning the Black Bull in Lowick it was argued that the nominated property was really a hotel rather than a pub. This was rejected by Judge Warren who considered that it was a thriving pub with four bedrooms. The community benefit arose from activities such as pub quizzes, over 60s events and fundraising for the local football club. The judge considered that the local pub encouraged friendships, conversation and the mixing of classes and generations. It was not excluded from listing as it was neither a hotel nor was the primary use the letting of guest rooms (para. 20). This requirement was stated to have been satisfied (albeit in respect of the recent past) by Judge Lane in Hawthorn Leisure Limited v St. Edmondsbury BC because it “was a social meeting place, as well as playing a part in village activities.” Evidence had been given that a beer and food festival took place in the pub’s car park and as part of the Beehive reaching out into the community the cooking from the pub was presented at local fetes. An attempt in Pullan v Leeds City Council to show that the Old Cock pub was just a drinking pub with a majority of the pub’s trade not being local failed. The evidence established that the clientele included locals even if they frequented other pubs as well and the evidence did not show that they came only to drink.

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\begin{itemize}
  \item \textsuperscript{22} Hawthorn Leisure Acquisitions Limited v Northumberland CC (CR/2014/0012)
  \item \textsuperscript{23} CR/2015/0018 at para. 23
  \item \textsuperscript{24} CR/2015/0011
\end{itemize}
and not to socialise. Further there were weekly music events and there was no evidence that the audience was drawn solely or predominantly from outside the town.

The types of factor taken into account in determining whether the social wellbeing or social interests of the local community is being furthered by a use is wide. In Matterhorn Capital v Bristol City Council\textsuperscript{25} the judge accepted the submission that the scouts hut had provided an opportunity for members of the local community to volunteer and that was a relevant factor. In contrast it was argued in St. Gabriel Properties v Lewisham LBC\textsuperscript{26} that due to the dangers of alcohol and the need to reduce drinking the Windmill pub in Lewisham harmed the social wellbeing of the local community. This was unsurprisingly rejected.

In Trouth v Shropshire CC supra Judge Lane considered that the car park had been used to further social wellbeing and social interest by “providing convenient means of access (particularly for those with mobility issues) to the wide range of social activities taking place in the village hall.” (para. 24).

These cases illustrate the diverse type of factors to be taken into account, their indeterminate character and the nature of the exercise to be undertaken. It is not possible to evaluate satisfaction of the criteria by scientific means. It signifies that it is not a simple task for local authorities when deciding a nomination. There is plenty of scope for divergence between local authorities in approach and conclusion.

(d) realistic continuation of community use – it has also to be realistic to think that there can continue to be a non-ancillary use of the asset for the community benefit but it need not be the same as the current community use. In the Gullivers Bowls Club v Rother DC\textsuperscript{27} Judge Warren rejected the argument that this required the anticipated community activity to be commercially viable or even to have a foreseeable long-term viability (para. 12). In the Tribunal decisions there is a very marked acceptance that financial problems can be overcome if there is a strong sense of local community especially if it has engaged with the particular property and has available to it

\textsuperscript{25} CRB/2013/0006 at para. 15
\textsuperscript{26} CR/2014/0011
\textsuperscript{27} CR/2013/0009
credible advisers with experience of community projects. This particular aspect is more likely to be a live issue in the context of “recent past” cases than where there is a current actual use which already furthers a community benefit (see section 5.2(d) below).

However, it was an issue in Banner Homes Limited v St Albans\textsuperscript{28} because shortly after listing the owner has fenced off the public footpaths crossing the listed field so that members of the public could not access the field from the footpaths. Evidence was given on behalf of the owner that it intended never to allow such public access again. Judge Lane found that it was not a fanciful to think that there was a future prospect that the owner will allow some access in order to improve relations with the local community. This was challenged on appeal. It was argued that the test was whether it was realistic to think there could be a future community use and not whether it was fanciful to think this but Judge Levenson could not see any difference between the two in this case. Further it was not for an owner to veto a listing but a matter of judgment by the listing authority or on appeal the judge of the First-tier Tribunal on the basis of all the evidence.

It is enough that it is realistic to consider that the current use will continue and there is not a need to prove that it is more likely than not to happen.\textsuperscript{29}

(e) Ancillary – to satisfy the two conditions the relevant community use must not be an ancillary use of the property. For example, if school playing fields are used on a Saturday by a local sports clubs or a club for disabled youngsters uses a farm one morning a month that community use will clearly be an ancillary use.

However, there is no definition or guidance as to what this means and so it is left to each local authority to decide. It is an issue which can cause real problems for local authorities. In a briefing paper for the House of Lords Report Stage prepared by Locality it was stated that ancillary meant “an incidental and minor feature of the use of asset”. I have seen cases in which it is argued on behalf of the nominator that all that is required is that the community use is not supportive of a main non-community use. In my view this is not correct. For example, if a local disabled group comes to a farm once a month that use is not supportive of the principal agricultural use of the

\textsuperscript{28} CR/2014/0018 before Judge lane and then on appeal to the Upper Tribunal [2016] UKUT 0232 (AAC)
\textsuperscript{29} See Haley (Old Boot Inn) v West Berkshire DC CR/2015/0008
farm but that should not cause the farm to qualify as an ACV. In the assessment forms used by authorities such as Hounslow LBC, Mendips DC and West Oxfordshire DC it is stated that a working definition of “non-ancillary” “is that the usage is not providing necessary support (e.g. cleaning) to the primary activities carried out in the asset but is itself a primary, additional or complementary use”. An example is the rejection of the nomination of Basing House by the Three Rivers DC on the basis that the museum occupied less than 20% of the office use of the building.

As mentioned above this was the core issue in the Kassam Stadium case. This was used for 25 matches a year by Oxford United FC. It was also used by the London Welsh Rugby Club. The proportions of stadium revenues derived from the two clubs were 35% Oxford FC and 65% London Welsh. In addition hiring out the conference facilities was said to produce nearly £500,000 a year which exceeded the revenues of either club. The issue was whether the use by the Oxford United FC was sufficient to satisfy the actual user statutory conditions.

Judge Warren made the point that it is not necessary that the community use is the “primary use” (para. 9) which the legislators could have easily provided but omitted to do so. This is in contrast to the view expressed by Locality that a secondary use is ancillary and that the community use must be the principal use.

Nor did the judge accept the submission that the Community Right to Bid regime should be read as part of the general planning law. He accepted that material planning information will form an important part of the factual context but that planning concepts such as “planning unit” should not be imported. This is part of a trend. The CIL regime has a general exclusion of planning definitions from the Planning Acts albeit that the two subjects are linked. In consequence terms used in the CIL regime such as “lawful use” will bear their own interpretation.  

In the Kassam Stadium case Judge Warren held that the use by the Football Club was not ancillary and so because it was a community use the current actual use condition in the first stage was satisfied. It was enough that the Football Club’s use was a significant use even though not the predominant use.

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30 R (oao Hourhope Limited) v Shropshire CC [2015] EWHC 518 (Admin) at para.
Mixed use of a nominated property can arise not infrequently. As mentioned above it can occur with properties owned by local authorities which are in part let for commercial uses and in part used for community purposes. The test does not involve determining which use is the primary use. Rather it is necessary to look at the overall picture to ascertain whether the community use is a significant use in its own right in the context of the particular property and not subsidiary to another major use. All the circumstances will need to be looked at including the history of the building and the nature of the connection with the local community.

In contrast to the outcome in the Kassam Stadium case the judge upheld the appeal against listing in Dorset County Council v Purbeck DC\(^{31}\) on the ground that the community use was ancillary use. School playing fields had been listed on the basis that they were used by two local sports clubs. The school closed and was used temporarily as an arts centre. There was a proposal to sell the school for housing and use the proceeds to purchase replacement fields for two nearby schools. The judge disregarded the statutory provisions governing the control of the playing fields but considered that the reality was that he was dealing with a school and attached playing fields even though the school was closed. He considered that the school closure should be viewed as merely temporary\(^{32}\) and so the significance of the closure was reduced. In consequence the playing fields were ancillary to the school. However, this will not always be the outcome. In Idsall School v Shropshire CC\(^{33}\) the listing of the playing fields of a private school was upheld. In that case there was significant use of the playing field through a community leisure centre which had a formal joint user agreement with the school.

This issue was analysed by Judge Lane in General Conference of the New Church v Bristol CC supra. The original and sole purpose was use as a church and this was the primary purpose on the facts. The building had been used for dance classes, Brownies and other such uses but this had dwindled to only one club on a regular basis. It was relevant that the running costs of the building were not being met by the community use. In consequence “the reality was that the church was

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\(^{31}\) CR/2013/0004
\(^{32}\) At para. 19
\(^{33}\) CR/2014/0016
still a church; not a community or social centre”. In consequence the uses were ancillary and the church should not have been listed.

In those decisions it is emphasised that the issue is “essentially fact-specific” (Judge Lane para. 16 in the Idsall School case supra). An owner of land who allows ancillary use of the land would be well advised to keep records regarding the use in case a nomination is made in respect of the land.

A further issue within the context of ancillary use is whether this is to be decided within the context of the land nominated only or by reference to a larger unit of land. This was addressed by Judge Lane in Trouth v Shropshire CC supra with regard to the car park that had been nominated. The landowner argued that the use of the car park was ancillary to the use of the village hall. Judge Lane considered that whether a use is ancillary must be considered within the context of the unit which includes the nominated land. Dependent on the circumstances the unit may just be the nominated land or it may be a larger area of land. Such an approach is necessary because the land nominated may be defined in such a manner as to exclude a larger area.

The judge cited the example of a café or restaurant used by members of the local community in a garden centre. Such circumstances have been the subject of a subsequent decision in a planning appeal heard by a Planning Inspector, Susan Wraith, who decided that a coffee shop could be set up in a retail warehouse in Humberside without the need to obtain a fresh planning permission as it was not a material change of use.

In the context of the ACV regime the approach in planning law indicated the nature of the issue to be considered and a possible approach to deal with it but the decision emphasises again that the position under planning law does not govern the outcome in the ACV regime.

Judge Lane considered that Parliament could not have envisaged the ACV regime catching the café or restaurant. There was no threshold test which would prevent a nomination being made which limited the listing to the café or restaurant and so reliance had to be placed on the ancillary test. With the example suggested the unit was the garden centre and the use of the cafe and
restaurant would be ancillary to the use of the garden centre. What constitutes the unit for this purposes is a matter of fact and degree.

In the case itself the judge held that the car park was an independent unit rather than being part of a larger unit including the village hall. This was due to the history of different ownership and different uses and objectives of the car park and the village hall.

(f) building – the exclusion of any ancillary use from being a qualifying community use has led to arguments based on this exclusion being put forward seeking to prevent the listing of parts of a building. Section 108 of the 2011 Act defines building as including part of a building and land as including part of a building. In Kicking Horse v Camden LBC\(^34\) it was argued that this meant that each part of a building had to be separately considered as to whether each part qualifies for listing. In that case it was argued that there was no actual community use of the basement or the second floor residential accommodation as their respective uses were ancillary to the use of the pub on the ground floor and so were excluded from qualifying as a qualifying community use. It was accepted by the owner that the use of the ground floor of the pub furthered community benefit and had been properly listed.

Judge Lane rejected this approach of dividing a building up into its component parts. Instead in order to ascertain what comprises the land or building by reference to which the statutory criteria are to be tested he considered it necessary “to adopt a fact-specific investigation”\(^35\) as in both Trouth v Shropshire CC\(^36\) and Wellington Pub v Kensington and Chelsea\(^37\). Rather than determine the elements that go to make up the building the tests of the physical and functional relationship adopted in the Wellington pub case are to be applied to determine what constitutes the whole unit for listing purposes. Judge Lane pointed out that if the argument succeeded it would mean that the ground floor of a public house should be listed but not the cellar where the beer is stored which would defeat the purpose of the legislation. The moratorium provisions would not apply to the cellar but only the ground floor which would carve

\(^{34}\) CR/2015/0012
\(^{35}\) Para. 23
\(^{36}\) CR/2015/0002
\(^{37}\) CR/2015/0007
up the public house in a wholly artificial manner. Applying the two tests (physical and functional relationship) to the facts of the case both the basement and the second floor were held to be part of the public house for the purpose of listing. The same was true of the pub garden which is another place where drink and food purchased in the pub can be consumed.

It may be necessary to consider different parts of a building separately but only if the physical and functional relationship between the parts does not cause them to be treated as one whole unit. For example, a flat above a listed pub which has been sold off on a long lease and has no connection with the pub save that it is physically above the pub will not be included in the listing. It will be a separate part of the building which is not comprised in the pub unit.

On a slightly different point it was argued that the first floor function room of the Sir Richard Steele public house should be excluded from the listing because it had ceased to be used eighteen months previously and if it were to be used again would require significant expenditure to satisfy fire safety requirements. The room was described as a second saloon area with its own separate bar. Judge Lane considered that the current fire risk was not sufficient to destroy the functional relationship with the rest of the pub. In consequence the whole of the pub was properly listed.

It can never have been intended that a listing authority should carry out separate consideration of each part of a building when those parts comprise a single unit from which the qualifying activities are carried on. Such an exercise would require far more information to be provided by the nominator and not all that information would be available to those nominating the asset. The nomination forms would need to be expanded to accommodate such additional information and the complexity of the exercise would be increased. It would be an artificial exercise as it is dependent on dividing the qualifying community use between the principal use and ancillary use whereas the reality is that such uses are all part and parcel of the same overall use. This has become a particular issue in the context of public houses.

5.2 User in the recent past (past and future test) –
(a) **Conditions** - in the event that there is no current actual user of the nominated property which causes the asset to qualify as an ACV then the process moves on to the second stage. If the first stage does not result in the land or building being treated as an ACV then it has to be determined whether the next two conditions in section 88(2) have been satisfied. These two conditions are:-

(i) there was a time in the recent past when an actual use furthered community benefit which was not an ancillary use (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 social wellbeing and social interest but Judge Warren read in the word “social” in the St. Gabriel case at para. 27);

(ii) it is realistic to think that there is a time in the next five years when there could be use of the land or building which is not ancillary and which will further community benefit. As with the second condition of the first stage actual use conditions this future use for community benefit is not limited to the same use as occurred in the recent past.

(b) **Recent past** - With regard to these conditions one question is what is meant by recent past. There is no statutory definition or guidance. Some authorities, such as Thanet DC, have treated the recent past as being the five year period preceding the nomination. Others such as Nottingham, Hounslow LBC and Mendips DC use a three year period as a working test for the purposes. Runnymede BC uses five years as its criteria but with exceptions including when the nominated asset has been disused for more than five years if when it was last in use its principal use furthered the social wellbeing or social interest of the community. This raises an interesting point because it has become apparent particularly with public houses that an owner may stop using such an asset with a view to changing in the future the planning use to another use such as residential. The increase in the price of houses encourages such an approach. The asset may be left vacant for long periods and it raises the point as to how authorities are to treat such long periods of non-use in the context of a community nomination.

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38 Page 4 of Runnymede BC’s Assets of Community Value Procedural Guide.
There have been a number of nominations such as the Brighton Hippodrome which have been refused because the asset has been closed for seven years and so there was no community use in the recent past. The Grand Theatre in Doncaster had been closed for twenty years. With public houses the closure of the River Arms in Cheeseborne for six years and the Cricketeers Rest in Norwich for five and a half years were both considered to be outside the recent past. This was the case with the Kings Head in Diss which had not been in use for five years. More surprisingly the closure of the Farmer’s Arms in Woolsery for two years was considered sufficient to result in the removal of the public house from the list of ACV on review. This was against a background from 2005 until closure in 2012 of a reducing community use until by 2012 it was negligible. However, it seems clear now that there is no specific period beyond which it is definite that it is not included in the recent past.

In Scott v South Norfolk DC\textsuperscript{39} Judge Warren 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 for him to undermine that by giving the phrase a meaning which is certain.\textsuperscript{40} In that case the pub had been closed for six years\textsuperscript{41} and the authority stated that there had been no community use currently or in the recent past. On the basis of that finding it could only result in a decision not to list albeit that the authority did list and this was set aside on the appeal. It is worth noting that as the appeal was a rehearing it was open to the judge to find that the authority’s conclusion in the review decision that the six year period was longer than the recent past was wrong. He did not do so and so must have considered it to be correct in the circumstances of the case. The nomination related to the Kings Head in Pulham St. Mary in Norfolk and parts of the building dated back to the 14\textsuperscript{th} or 15\textsuperscript{th} century but the history of the use of the building as a public house was not stated in the judgment. The likelihood is that there had been a long period of use as a public house. Judge Warren said that in the light of the authority’s conclusions it would be unfair to take a different view.

\textsuperscript{39} CR/2014/0007
\textsuperscript{40} Para. 7
\textsuperscript{41} Para. 2 and 11
This was also the judge’s stance regarding the meaning of the “recent past” in Worthy Developments v Forest of Dean DC\(^\text{42}\) when he stated that it could not have been intended to import the five year period from the future condition when Parliament had failed to set out a precise period for the past condition.

Although there is no automatic rule that the recent past must constitute five years it is still open to the authority in the light of the actual circumstances of the particular nomination to regard the recent past of the nominated asset as five years.

In the official guidance it is suggested that if there has been user of the land for purposes such as use by the Ministry of Defence for live ammunition practice the period could be ten to twenty years. This sheds little light on the type of cases which will normally arise. It is no surprise that with such uncertainty the risk of listing will discourage developers or even ordinary sales.

There is little extra guidance in the appeal decisions. In Crostone v Amber Valley DC\(^\text{43}\) Judge Lane stated that what constitutes the recent past will depend on all the circumstances in a particular case. More helpfully he then went on immediately to say that “the expression is a relative concept”. Following this he stated that in that regard the length of time the Black Swan had been a public house was relevant. The period was nearly two hundred years. The implication is that the longer the period of use furthering a community benefit the longer the period which will constitute the recent past. In Hawthorne Leisure v St Edmondsbury BC\(^\text{44}\) the Beehive had been a public house since 1860 and this was taken into account albeit that the pub had only been closed for two years and so Judge Lane considered that this could not possibly mean that the recent past requirement was not met.\(^\text{45}\) In Hawthorne Leisure v Chiltern DC\(^\text{46}\) the period between 2002 and 2007 was held to be within the recent past with regard to a nomination in May 2015 taking into account the pub’s long history.

\(^{42}\text{CR/2014/0005 at para. 14}\)
\(^{43}\text{CR/2014/0010 at para. 14}\)
\(^{44}\text{CR/2015/0018}\)
\(^{45}\text{para. 23}\)
\(^{46}\text{CR/2015/0019}\)
Sales J. (as he then was) in R (oao Katherine Edgar) v Bournemouth BC\textsuperscript{47} refused to set aside in judicial review proceedings a decision by Bournemouth BC refusing to list as an ACV Boscombe Centre for Community and Arts which was nominated on 11\textsuperscript{th} October 2012 when it had been closed since August 2005. This led the Council to consider that there had been no community use in the recent past and the judge considered this to be a proper and reasonable decision.

The factors which should be considered in determining what constitutes the recent past of a nominated asset include:-

(i) the length of the period of community use of the nominated asset in the past;

(ii) the type of asset involved – it may be considered that the recent past can be longer with an asset such as a school;

(iii) the nature of the community use of the nominated assets;

(iv) the degree of connection between the asset and the community;

(v) whether the asset has been out of use for a period prior to the nomination. For example, Runnymede BC states in its ACV procedure guide that although it regards five years as the recent past if the asset has been disused for more than five years the period will be extended if the last use furthered the social wellbeing or social interests of the community.

(vi) whether the asset was used for a non-community use following acquisition by a compulsory purchase power for use by a public body.

The actual community use in the recent past does not have to be shown to be for a substantial part of that recent past although trivial or very temporary use will be disregarded (para. 15 in the judgment in the Worthy case).

In Reed v Shropshire CC\textsuperscript{48} the Pheasant pub had been listed having closed in March 2012 due to dwindling trade. A nomination was made in April 2013. There was no dispute that whilst

\textsuperscript{47} CO/2663/2013
\textsuperscript{48} CR/2013/0007
open as a pub this furthered the social wellbeing of the local community and was in the recent past.

Periods of seven years non-use have been sufficient to defeat a nomination in respect of pubs but again there is no certainty that will be so in every case. For example, Redlynch Primary School closed in 2006 but was recently listed by the New Forest DC notwithstanding that it had been largely vacant. Non-use for between eight and nine years was not a bar to listing in the eyes of that authority. The school was mentioned in the local newspaper because members of the local community had objected to the giving of temporary permission for a light industrial user of part notwithstanding the listing.

(c) realistic prospect – when relying on community use in the recent past a prime battle issue will be whether there is a realistic prospect that there could be a future community use of the nominated property which is not an ancillary use. The test does not require the likely future use of the relevant building to be determined but rather to determine whether future community use is one of a number of realistic options for the building (the Worthy case – paragraphs 18 and 19). The test is not whether such future use is wholly unrealistic but whether it is realistic to think that there could be such a relevant non-ancillary use in the next five years (Judge Lane at para. 26 in General Conference of the New Church v Bristol CC supra.) In Evenden Estates v Brighton and Hove City Council Judge Lane stated “that what is “realistic” may admit a number of possibilities, none of which needs to be the most likely outcome”49. This approach was repeated by Judge Lane in Gibson v Babergh DC50 who added that the possibility must not be “fanciful” (para. 18). In Crostone supra51 Judge Lane referred to the 2011 Act allowing an asset to qualify as an ACV when there are a “number of realistic outcomes co-existing”.

It is another issue in the ACV regime which is very fact-sensitive. This approach was reaffirmed by Judge Lane in Trout v Shropshire CC in which he held that future community use of the playing field or car park was not a fanciful or unrealistic possibility. Interestingly the playing field had become overgrown and a planning inspector considered that it was likely to provide a

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49 CR/2014/0015 at para. 15.
50 CR/2014/0019 and in Haley v West Berkshire DC CR/2015/0008 at para. 17
51 At para. 22
habitat for birds and animals. This led Judge Lane to suggest that temporary community use might be a possible solution in order to prevent the creation of an obstacle to the grant of planning permission (para. 13).

In contrast although the golf course in Haddon Property Development Limited v Cheshire East Council\textsuperscript{52} was considered to have furthered the social wellbeing of the local community in the recent past Judge Lane did not consider that there was a realistic prospect of this in the next five years. The reason was that the clubhouse only had a temporary planning permission which had been extended once but on that extension it been made clear that there would be no further extensions. The temporary permission had expired and so the clubhouse should have been demolished as it was no longer authorised. There was no evidence as to what would replace it or that players would accept the absence of a clubhouse even if there was a nearby village community hall. Further there was no evidence as to the general viability of the golf course.

The owner’s stated intentions should be taken into account “as part of the whole set of circumstances” (para. 11 Warren J. in Patel v Hackney BC\textsuperscript{53}) but those intentions will not be decisive alone. This is shown by the actual decision in Patel v Hackney. It concerned the Chesham Arms pub which had been purchased by Mr. Patel who then closed it with a view to converting it into flats. There was evidence that there was interest in running it as a pub and that it had been run profitably. Mr Patel’s evidence was that the residential development was going to proceed. The judge considered that there were three planning possibilities and each was realistic. One option was that a planning application would be refused and the pub reopened (para. 16). This shows that it is enough that there are a number of realistic possibilities and one of them is a community use. The making of a planning application when an asset is listed may serve to emphasise the community use to which the asset had been put as was stated by Judge Lane with regard to the Sir Richard Steele public house.\textsuperscript{54} In such circumstances unless successful such a planning application is likely to support the listing of the asset.

\textsuperscript{52} CR/2015/0017
\textsuperscript{53} CR/2013/005
\textsuperscript{54} Kicking Horse v Camden LBC CR/2015/0012 at para. 31
In contrast in Spirit Pub v Rushmoor BC, Judge Warren considered that there was no realistic prospect that the Tumbledown pub would revert to use as a pub or any other community use. This was a pub which although first established in 1600 had been closed since 2008. Before the coming into force of the 2011 Act McDonalds had purchased it subject to a tenancy in favour of Spirit. In consequence a transfer to McDonalds was not caught by the moratorium provisions. Further shortly before the hearing of the appeal planning permission had been granted for use of the property as a restaurant/takeaway. Judge Warren considered that he should take account of these factors. McDonalds had acquired the property and secured the necessary planning permission so no other possibility was realistic particularly as large sums would be required to be raised for a community use and no-one had been motivated to run the pub during the five years of closure. Similarly, the Woolwich Grand Theatre was not listed by Greenwich LBC because the owner already had planning permission for redevelopment.

The Bailey (formerly the Castle) public house on the Holloway Road, Islington was listed in May 2015 but on review was removed from the list. This was because further evidence was provided which showed that it had been leased to a restaurant concern and there was no need for planning permission before it converted as the works had commenced before the introduction of the 2015 Regulations regarding listed pubs and their exclusion from the operation of the permitted development regime. In consequence there was no realistic prospect of it continuing as a public house.

The grant of planning permission to redevelop a site which included Brightwell garden, tennis courts and the former bowling green was the justification for not listing them given by Waverley BC as it was not realistic in the light of the planning permission to think that there would be a future community use of the land. Similarly, a factor in rejecting the nomination of the Swan and Castle in Quainton was the change of use from a pub to financial services (A2 – financial and professional services) and the grant of a tenancy at will to a provider of such services.

55 CR/2013/0003
The Spirit decision has been followed by Judge Lane in STO Capital Limited v Haringey LBC.\textsuperscript{56} This decision concerned the Alexandria public house which was listed on 18th February 2015 and that decision was upheld in June 2015 on review. It had been put on the market in July 2012 when the tenant had left due to poor trade. It was said that no-one wanting to run the pub had shown interest and that by the time the Appellant had purchased it the building was in a semi-derelict condition. The purchaser applied for planning permission to convert the building to a three-bedroomed family house which was rejected and appealed. The Inspector allowed the application whilst noting that the building had been listed as an ACV. Judge Lane stated that in general the grant or refusal of planning permission could materially affect whether a building qualified as an ACV. If planning permission is refused it will be material in deciding whether the asset is put on the market at a price commensurate with its current lawful planning use or if closed even opened and run again. Conversely if planning permission is granted that will affect the price at which it is offered on the open market. The price for a building with planning permission for residential use will be significantly higher than one with a permitted use as a public house. Consequently, it will be highly unlikely that it will be bid for by someone wanting to run it as a public house nor that any community interest group would be able to put in a realistic bid. Accordingly, in this case the appeal succeeded and it was removed from the list of ACV.

In Reed v Shropshire CC supra the judge accepted the evidence of the owner that the business had dwindled and no-one wanted to buy it but the argument on behalf of the Council was that there was more than one possible realistic outcome and one of these possibilities was that in the next five years its use as a pub might resume. In consequence the appeal failed and the pub remained on the list of ACVs.

This point has been repeated more than once. An example is Worthy Developments v Forest of Dean DC supra which concerned another closed pub, the Rising Sun. The owners provided evidence that in the last five years the pub had only been open at the most for eighteen months and that this indicated that there was no realistic prospect that the use could be resumed in the next five years. With regard to such evidence Judge Warren stated that “I accept these

\textsuperscript{56} [2016] UKFTT CR 0010 (GRC)
demonstrate that there are obstacles. It is important, however, not to confuse commercial viability with what altruism and community effort can achieve.” (para. 21). Notwithstanding the financial problems the judge considered that this did not demonstrate that the proposals of the “Save Our Sun” committee were not realistic. Strong backing within the community is a factor that will be taken into account when deciding whether there is a realistic prospect of future community use (see also Gibson v Babergh DC supra).

A similar decision was made in Sawtel v Mid-Devon DC 57 but there the pub was still open and had been functioning for 100 years with no prospect of planning permission to change the use and with an active Parish Council showing a keen interest. The judge considered that notwithstanding the argument that the pub was not viable there was a realistic prospect that it would continue. Such an argument also failed in the St. Gabriel case.

In an appeal concerning the Black Swan pub in Idridgehay near Belper it had been used for nearly 200 years as a “traditional village pub” before being converted to a French-themed pub/restaurant in 1997. In 2012 it was purchased by a developer and the bar and kitchen were removed. Judge Lane refused an appeal on the basis that the wine bar/restaurant was a community use and with an injection of £100,000 it could start up again (Crostone v Amber Valley BC 58). The justification for the judge’s conclusion was that locals used both the restaurant and the pub, going there to meet other locals and for community events thereby satisfying the recent past condition.

A feature of this case as in many cases is that there was no business plan put forward by those supporting the listing. The judges have not regarded this as significant when considering whether future community use in the next five years is a realistic prospect. The absence of such “a fully worked-out business case” did not prevent the appeal failing in Moat v North Lincolnshire DC supra in respect of the Dolphin pub in Althorpe. In that case on the facts Judge Lane considered that “it is realistic to conceive of a future for the Dolphin as a community-run not for profit enterprise.” (para. 14).

57 CR/2014/0008
58 CR/2014/0010
In Haley (Old Boot) v West Berkshire DC\textsuperscript{59} Judge Lane considered that it was possible that a future tenant or staff might reside at the pub reducing costs and that if purchased by a community interest group the costs of purchase would not bear on the continuing profits. In this respect it was stated in the evidence in support of the nomination that in excess of £300,000 had been pledged. Alternatives to the current business model were possible and the judge did not have to prefer one over another.\textsuperscript{60}

Even the failure to operate a pub successfully on a quasi-volunteer basis by the commercial owner will not by itself convince the First-tier Tribunal that there is no realistic prospect of a future non-ancillary use of the nominated asset for community benefit. In the appeal against the listing of the Rose Hill Tavern in Evenden Estates v Brighton and Hove City Council\textsuperscript{61} Judge Lane considered that it leaves open the possibility of “a genuine community-run organisation operating the Rose Hill Tavern on a not-for-profit basis” (para. 14).

In this regard Judge Lane made reference in the Crostone case supra to the Anglers Rest in Bamford in the Peak District. This was the first community pub to be started having been acquired by the Bamford Community Society with funding provided by 328 members. It is a not-for-profit co-operative registered under the Co-operative & Community Benefit Societies Act 2014. It incorporates a pub with a café and a post office. Another example is the Dog Inn in Belthorn which has recently been acquired by a community co-operative. The Ship in South Norwood was converted into flats without the necessary planning permission. There is now an application for retrospective planning permission to include a re-instated pub on the ground floor and basement. A share scheme has been set up to fund a community pub. When considering whether future community use is a realistic possibility these provide an example of an alternative operating model which must be taken into account.

Again it was emphasised in the Evenden Group case that there was no need to support the listing with a worked out business plan. In that case what impressed the judge was that the action group has “committed assistance from individuals with relevant experience” (para. 16). The

\textsuperscript{59} CT/2015/0008
\textsuperscript{60} Para. 20
\textsuperscript{61} CR/2014/0015
expected increase of the population in the ward by just over 430 students and the impact of the introduction of several hundred students on a public house was an additional factor taken into account by the judge in that case.

In Hawthorne Leisure v St. Edmondsbury BC\textsuperscript{62} there was a business plan which was subjected to heavy criticism from a director of the owner with a background in investment banking but which made no impact on the judge. The plan was described by Judge Lane as a “dynamic document” which was prepared to be presented to financiers with a view to raising funds. Judge Lane gave great weight to three factors - the experience of the individuals involved on behalf of the Friends of the Beehive including one having been a managing director of the brewing business of Greene King which had sold the pub to Hawthorn Leisure; their plans for the Beehive being credible; and the pledging of £90,000 in support. The judge also accepted that the current owner’s failure to sell the pub was because it was marketed at a price (around twice the price paid for the pub) which reflected a residential use rather than a pub use which was speculative as there was no planning permission for use as a residence. A report on the prospects for the pub business relied on by the owner was felt by the judge to be generic in nature and lacking in trading information. He considered that tenants had been lost because the landlord had “raised the rent unduly”. This led the judge to conclude that there was a realistic prospect of a pub business being run in the next five years. It illustrates that challenges to the viability of the pub business can face an uphill struggle.

A further decision on this issue is Matterhorn Capital v Bristol City Council\textsuperscript{63}. In this case a scouts hut which had been used for sixty years had been demolished by the developer after listing and after the lease of the hut site had expired. The recent past condition was easily satisfied by the use of the hut for scouts, guides, a martial arts club and providing an opportunity for adults to volunteer. The issue was whether the future condition was satisfied. The point was made that a fresh planning permission would be needed but the judge did not foresee any difficulty in obtaining such a permission. Notwithstanding the increased financial burden due to the demolition the judge considered that it was still a realistic possibility that there could be a

\textsuperscript{62} CR/2015/0018
\textsuperscript{63} CR/2013/0006
community use in the next five years taking into account the past sixty years of community use. The developer had yet to obtain planning permission for a residential development. Planning permission had been previously granted but only on condition that part of the site was available for community use.

However, in General Conference of the New Church v Bristol CC supra Judge Lane stated that although a formal business plan was not required the proposals did need to be realistic and in that case the suggested proposed use was “entirely speculative” (para. 29). There was no evidence to suggest that there was a real interest in the proposed use. One factor in rejecting the nomination of the Westminster Fire Station was that it had been on the market for twenty-one months but there had been no interest in purchase shown by any community group. The suggestions for future community use appeared nebulous. It indicates that there has to be an appetite amongst the local community for the proposed future community use.

Evidence directed at showing that the use is not commercially viable by itself will not be enough to persuade the judge that there is no realistic prospect of non-ancillary future community use. What really has to be shown is that there is no appetite for a future community use or that if there is there are not the means whereby it can be carried on. Kettering BC rejected the nomination of the local football stadium which had been used by the “Poppies” until 2011. The length of time since the team last played there and the closeness to the grant of a lease for a long term of their new stadium led the Council to consider that it was not realistic to think that there would be a community use within the next five years.

This issue is one where the appeal decisions have given helpful guidance as to how it is to be addressed in the nomination process. From the point of view of the authority deciding the nomination it needs to consider:

(i) Whether the owner is in a position to prevent any further community use during the next five years; and if not then

(ii) what are the possible future uses of the nominated assets during the next five years;
(iii) as regards those possibilities which further the social wellbeing or social interests of the local community whether the chances of such use is more than fanciful;

(iv) if it is then whether such use is ancillary or non-ancillary. Such a non-ancillary use will satisfy the second condition of the second stage.

It has to be borne in mind that even if listed the circumstances surrounding the asset may change and such changes may cause the listing to be reconsidered. For example, it is reported that Miss Gibson has been granted planning permission to change the use of the Bull Inn from public house to residential dwelling. The actual use of the building as a dwelling will mean that there is no prospect of the building been used as a public house in the future and so no prospect of future community use. In such circumstances an actual change in use should cause the building to be removed from the ACV list notwithstanding the First-tier Tribunal appeal decision. It may be that the grant of planning permission by itself could be sufficient in the circumstances bearing in mind that it is probable that the sale of the building as a dwelling will achieve a higher purchase price than as a public house and that the Bull Inn has been closed for some time. This conclusion is supported by the decision of Judge Lane in STO Capital Limited v Haringey LBC.64

5.3 Specific points from appeals - in the appeals heard by the First-tier Tribunal a number of specific points have been decided. These include:-

(1) Small sites – in the Kassam Stadium case it was argued that the community right to bid regime is intended to apply only to simple units such as village shops or halls but not to complex situations such as football stadia. This was rejected. It is unfortunate both that there is no guidance as to how the regime should be applied to more complex sites and that there is not the ability to provide for the community facility to be located on a different part of the site. Such approaches can be taken into account in the context of planning applications.

(2) Car parks – in the Kassam Stadium case both the main car park and the overflow car park were included in the listing albeit shared with an associated leisure complex. Both were part of the original planning application. It was held that they were correctly included in the listing

64 CR/2015/0010
The car park of a pub will be included with the pub as part of the land listed as will grassed area used by patrons (Punch Partnerships v Wyre BC CT/2015/0001). Often the car park will be integral to the use of the relevant land allowing the arrival and departure of members of the community.

A submission that the listing should be limited to the areas of the pub where the sale of alcohol or the playing of music is permitted was made in the Punch Partnerships case and rejected as it was “not possible rationally to contend that the community’s relevant use is confined” to those areas (para. 15). In that case the use of the Shovel pub by the community “manifestly extends to the outdoor areas”. This approach is confirmed by the decision in Kicking Horse Limited v Camden LBC65.

This point has become an important one in the context of ACVs. A major trend in the context of ACVs has been the conversion of pubs to other uses. There is a smaller niche trend whereby concerns such as New River Retail seek to retain the pub use but to build a retail unit using some or all of the pub car park. In 2013 New River Retail purchased 202 pubs from Marstons and subsequently another 158 from Punch. With some of these sites the wish is to construct a retail unit on part of the land including the public house. An advantage to the publican is the reduction in business rates but often it results in a significant number of car parking spaces. For example, New River Retail applied to Sandwell Council for planning permission to convert the car park of Halden Cross Inn to a Co-Op supermarket. This was refused and the position of the local community has been strengthened by the pub including the car park been listed as an ACV. The decision in Punch Partnerships v Wyrie supra is particularly important in this respect in that it considers the individual issues concerning the pub car park and the pub’s grassed area. Attempts to split the pub building from the surrounding areas of land such as the car park will be subject to very close scrutiny and the presumption will be that the building and the areas of land enjoyed with the building will be included in the listing.

To be listed a car park does not have to be part of a larger unit. In Trouth v Shropshire CC supra a decision to list a car park was upheld by Judge Lane. It had originally been comprised in an

65 CR/2015/0012
estate which was gifted and sold in parts. The car park was leased to be used as a car park particularly with the village hall. It was held to satisfy the recent past set of conditions. This was on the basis that use of the car park was not ancillary to the use of the village hall (see discussion of ancillary in section 5.1(d) above).

Many authorities have listed car parks as ACV. For example, West Somerset has listed three in Dulverton along with separate listing for public conveniences. A car park and garages in Seaham has been listed. In contrast East Cambridgeshire has not listed a car park on the basis that it is not furthering social wellbeing or social interests of the local community.

(3) Sites awaiting construction – in the Kassam Stadium case part of the property listed including the site on which the west stand was to be constructed. It was held that the use to which the stand once completed was to be put in the future justified its inclusion in the list (para. 18).

(4) Use by Trespassers – Judge Warren has held that use by trespassers can be taken into account. This was in Higgins Homes plc v Barnet LBC which concerned land which had been leased in 1910 to local residents to be used as a private recreation ground. The lease expired in 2006 but the use continued after the purchase of the site by a developer. A village green application had been made but failed. The basis for this decision was that it is “a matter of common sense” that it will not encourage bad behaviour or breed disrespect. This would seem to miss the point that it is reliance on a wrongful act.

This decision was applied by Judge Lane in Banner Homes Limited v St. Albans City and District Council which concerned meadows in respect of which Banner Homes hoped to obtain residential planning permission. An argument on behalf of Banner Homes was that the recreational use of the meadow was a trespass. It was material that there was no evidence of criminal damage or other criminal activity (para. 34) and that the use was equivalent in value to the sorts of games and pastimes envisaged by the town and village green legislation. Judge Lane refused to insert “lawful” before “use” in section 88 but did indicate that many unlawful uses would not further community benefit such as raves. This decision has been the subject of the first

66 CR/2014/0006
67 CR/2014/0018
appeal to the Upper Tribunal. Judge Levenson agreed on the appeal that the word “lawful” had been deliberately omitted. In his judgment the doctrine of in bonam partem did not apply. The crucial issue is whether the statutory criteria in section 88 are satisfied and this provides an in-built protection against unlawful behaviour. Further unlike cases such as Welwyn Hatfield BC v SSCLG [2011] UKSC 15 (concealed construction of a dwelling contrary to planning law) the ACV regime is concerned solely with the provision of public benefit and not private rights. Judge Levenson did differ from Judge Lane in one respect on this aspect. In his judgment in that there could only be one proper construction on this point and it could not vary dependent on the particular circumstances or facts of a particular case. In all cases it is an issue as to whether there is or in the recent past has been use which further the social wellbeing or social interests of the local community.

(5) **Use of easement** – one submission in the Banner Homes case was that the use of two public footpaths across the meadows was sufficient to form the basis for satisfying the user condition in section 88 in respect of the whole of the meadows. This was not accepted by Judge Lane and the point was not raised on the appeal. This is linked in with the issue whether a visual amenity can constitute a community benefit (see (8) below). However, public footpaths have been listed – for example, by Huntingdonshire DC. In contrast the nomination of land at Dudsbury which had part of the Stour Valley Way public footpath crossing was rejected for listing by East Dorset DC as the public footpath would be protected by other legislation.

(6) **Owner’s ECHR rights** – it was argued in the Kassam Stadium case that the listing was a breach of the owner’s rights under Article 1 of the First Protocol. The judge stated without reasons that he was satisfied it was not. In the St. Gabriel case he expressed doubt that the rights are engaged but considered that the issue is not “one to be considered at this level at this stage.” (para. 35).

(7) **Part of nominated property not in use** – merely because part is not in use it does not follow that it should be excluded from the listing. This point was considered in Gullivers Bowls Club

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68 [2016] UKUT 0232 (AAC)
The whole of the Bowls Club had been listed notwithstanding that one of the two bowls greens had been closed along with two small outbuildings alongside that green. This represented about 37% of the site. The Club objected on the basis that there was no current or recent use for that part of the site. Judge Warren considered that it was a feature that sports club may have some facilities that are redundant (para. 8) but it would be artificial to split that part off. He held that it was correct to list the whole site. Interestingly an application for planning permission for residential development and new club facilities has been successful and has withstood a challenge by judicial review (see section 9(b) below).

(8) **Visual amenity** – it was argued in the Gullivers Bowls Club case that the social wellbeing of the local community was furthered by the visual amenity enjoyed by the residential care homes overlooking the bowling greens. Judge Warren doubted that this could ever be possible although if there is a statute or mural that might be a special case (para. 10). A similar point arose in the Banner Homes case. Viewing flowers from a footpath would not have been actual use for the purposes of section 88 which the judge stated requires a physical use (para. 18) otherwise any land would run the risk of being listed merely because it could be viewed from the public highway (para. 19). Judge Lane subsequently repeated this in respect of public footpaths across a golf course.\(^\text{70}\)

(9) **Motive** – nominations with a view to preventing development are not matters which are relevant in this regime but should be addressed in the context of the law relating to development control (para. 32 General Conference of the New Church v Bristol CC supra and para. 13 Idsall School v Shropshire supra).

(10) **Loss arising from listing** – two types of loss may be caused by a listing. The first is loss for which compensation may be claimed (as to which see (11) below). The second is loss which is not covered by the compensation scheme. The suffering of such loss is not a factor which can be taken into account when considering whether to list. In Pullan v Leeds City Council\(^\text{71}\) Judge Lane stated that insofar “as loss may arise that is not within the compensation scheme, Parliament must

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\(^{69}\) CR/2013/0009

\(^{70}\) Haddon development v Cheshire East Council CR/2015/0017 at para. 31

\(^{71}\) CR/2015/0011 at para. 16
be assumed to require such a loss to fall on the owner of the listed asset.” In particular the removal of a public house from the operation of the permitted development rights regime due to listing is not a factor that can be taken into account against listing\textsuperscript{72}.

(11) Compensation evidence – in the St Gabriel case the developer had provided evidence to the authority as to the amount of compensation it would be claiming if the pub was listed. If the review was not successful in having the pub removed from the list a claim would be made of £55,000. This had increased to £124,000 if the appeal failed. The judge deprecated such an approach as it places pressure on a public official. Although there may be pressure from the owner to put in such evidence the sensible step is not to put such evidence or claims forward until the issue of listing has been finally resolved. The local authority is fully aware of the risk of compensation claims and does not need it to be spelt out. However, in some cases it will be hard for the adviser to withstand such pressure as it will be a factor which is upper most in the mind of the owner.

In the St. Gabriel case an attempt was made in the listing appeal to deal with the authority’s refusal to grant compensation. The judge rightly refused to deal with this as the procedure relating to compensation review and appeal had not been complied with (see section 11 below).

(12) Local clubs – evidence of the membership of a local club which makes use of the asset for community benefit is not required. The local authority is not required to investigate the membership register to find out the proportion of members with a local address (para. 15 Higgins v Barnett LBC supra). It had been argued in that case that use by a private members club could not qualify but that argument was abandoned and the judge considered that to be correct (para. 14). In Haddon Property Development Limited v Cheshire East Council\textsuperscript{73} Judge Lane said that there “is nothing in the 2011 Act which requires one to conclude that a private members’ club, such as a golf club, cannot, as such, further social wellbeing or interests.”\textsuperscript{74} It had been argued that the course could not qualify because only paying players could use it and in an area where 62% of the

\textsuperscript{72} Para. 14
\textsuperscript{73} CR/2015/0017
\textsuperscript{74} Para. 18
local population was said to suffer from some form of measurable deprivation a fee of around £17.50 meant that the facility was not available for a sufficiently wide sector of the community. Evidence was given that over 50% of the membership was older than 55 and 73% over 45 years. Judge Lane considered that the fact that the overwhelming majority of golfers were male and middle aged or older is immaterial. It is not a requirement that an asset must be equally valuable to all sectors of the local community before it can be listed. He concluded that the golf course in that case had satisfied section 88(2)(a) by furthering the social wellbeing of the local community in the recent past. The course was described as one for social golfers and it was accepted that a highly exclusive establishment might not have a sufficient relationship with the local community. The evidence showed that local golfers of “moderate means” played on this course. There was a separate reason for treating the statutory requirement as having been satisfied in the recent past which was because the clubhouse had been used “as a social meeting place” and not just by the players.75

(13) Planning matters – terms used in planning law will not apply when interpreting this statutory regime. What constitutes a planning unit will not be determinative of issues under the ACV regime (see, for example Judge Lane in Wellington Pub v Kensington and Chelsea BC76). In that case the Council had four years prior to listing treated the two floors above the ground floor pub as a separate unit with C3 planning use. This did not prevent Judge Lane from holding that the listing authority was correct when including the upper floors in the listing (see discussion of case in section 6 below).

However, the facts underlying the determination of a planning unit and the planning position of the nominated asset will be a relevant and important part of the factual matrix in which the listing decision is made by the local authority and the appeal tribunal. In Moat v North Lincolnshire DC77 account was taken of the decision of the planning inspector on an appeal against refusal to grant a planning permission to use a pub as a residence including the Inspector’s conclusion that “the loss of an important local service is not justified.” In Crostone account was

75 Para. 20
76 CR/2015/0007 at para. 22
77 CR/2014/0014
taken of the authority’s current planning policy set out in its adopted local plan which stated that change of use of existing community facilities will only be permitted where it can be demonstrated that there is insufficient local demand to justify or sustain their existing use\textsuperscript{78}. Such a policy required with regard to a nomination that evidence be put forward on that aspect to show that planning permission would be likely to be granted. In the Crostone case it was absent so the authority and the tribunal proceeded on the basis that there was no certainty that a change of use would be permitted.

(14) Absence of ability to waive or modify operation of ACV regime – a listing authority has no ability or discretion which allows it to waive, modify or disregard the provisions governing the operation of the ACV regime. If an asset qualifies as an ACV then the listing authority is bound to list it and has no discretion. The application of the moratorium provisions to a listed ACV cannot be waived or overridden by the listing authority. Judge Lane made this point in the Chadwick case that there is “no “leeway” that the Council could have given to Mrs. Chadwick, as regards the operation of the 2011 Act and the Regulations. Listing carries certain legal consequences, which are not for a Council to ignore or dilute.”\textsuperscript{79}

(15) Possible subsequent disposal by community interest group – in Hawthorne v St. Edmondsbury BC\textsuperscript{80} it was argued that if the pub was acquired by the Friends of the Beehive that group could seek to change the planning use of the pub and then sell it. The judge was satisfied that this would only be a matter of last resort but that in event this objection is irrelevant as the pub has to be listed if the statutory requirements are met. He also pointed out that if the requirements were still met it would be possible to invoke the listing regime on a threatened sale by the group. By then the pub would have been removed from the ACV list due to the purchase being a relevant disposal and so a fresh nomination would be needed.

If this were to be a real concern of the owner then it would be possible to consider imposing an overage agreement so that if there were a change of use or disposal the uplift in profits from such an event could be shared with the current owner.

\textsuperscript{78} See para. 27  
\textsuperscript{79} CR/2015/0006 at para. 36  
\textsuperscript{80} CR/2015/0018 at para. 29
6. EXCLUDED LAND AND BUILDINGS –

Three categories of land and building are excluded from the operation of the listing regime in accordance with Schedule 1 to the Assets of Community Value (England) Regulations 2012 (“the 2012 Regulations”) (see Second Schedule hereto for full terms of Schedule 1). The principal exclusion relates to residences. The other two exclusions are caravan sites and land held by a statutory undertaking for its operations.

(a) Operational Land - the latter covers transport complexes such as airports, docks and railway stations as well as land used by utility (including gas, electricity, water and sewerage services) and postal services. For example, one of the grounds for refusing a nomination of Plymouth Airport was that there is excluded from the listing regime land regulated by the Civil Aviation Authority. There are now ambitious plans to develop the airport for housing and shops. It was also the reason that the nomination of Audley End railway station was rejected. The nomination of the Seaford Post and Sorting Office was rejected on the basis it constitutes excluded operational land. Attempts to have a traffic island and separately a bridge and lay-by listed were rejected on this ground by Doncaster MBC (nominations of Buttercross traffic island and Stoney Lane). Similarly, the nomination of the Bristol to Bath cycle path was rejected on this ground by South Gloucestershire.

The nomination of the former Museum of Electricity at Bargates was accepted by Chichester BC on the ground that although owned by SSE it was no longer in use as a power station and SSE had no current requirement as the adjoining sub-station was excluded from the nomination. There was a separate nomination of the road providing the access to the Museum. This was on the ground that it provided the only means of access to the sub-station and there are HV cables running under the road to the sub-station. The access road was in consequence required by SSE for the purposes of carrying out its statutory undertaking and so excluded from listing.

It is also the reason that the nomination of the Roeshot Hill Allotments was rejected by Christchurch BC. The Council is the owner of the allotments under the Allotment Acts (1908-1950)

81 Section 262 Town and Country Planning Act 1990
and thus is acting as a “statutory undertaker” which the Council considers means that the allotments cannot be listed. It makes the point in the recommendation not to list that it is under a duty to replace any allotments which are lost through the sale of land under the Allotment Acts.

(b) Residences - the residence exclusion covers not just homes but includes hotels, houses in multiple occupation and holiday dwellings. With hotels there may be community use of the hotel’s bars and restaurants. If there is then the issue is whether such use is ancillary to the use of the building as a hotel. For instance, the nomination of the George Hotel in Waverley was rejected because the community use was determined to be ancillary. In Hawthorn Leisure Acquisitions v Northumberland CC\(^{82}\) (already considered in section 5.1(b) above) Judge Warren stated that there was no sharp dividing line between a hotel and a pub. Often in the past pubs were called hotels although guests rarely stayed. In that case on the limited evidence available to him he took the view that the building was not what would be described in ordinary language as a hotel and the primary use was not the letting of rooms to paying guests. It is material that there were only four guest rooms in that building.

When considering whether a building is a hotel or a pub relevant factors will be the proportions of the revenue arising the different activities; the nature of the activities carried on and whether for guests or non-residents; the extent of the building used for those activities; the manner in which the building is presented in advertisements; and how the building is referred to online in such items as reviews. Often the problem faced by the listing authority or the judge of the First-tier Tribunal is that the evidence is skimpy and then it becomes a matter of impression.

The exclusion of a residence extends to the land connected with it but probably not other buildings save for those ancillary to the residence. The extent of the land excluded does not require an elaborate investigation of what constitutes the house’s curtilage. Instead it will cover all land which with the residence is in single ownership provided that any part can be reached from every other part. If a road, canal, river or railway splits the land then this will not prevent the requirements being satisfied if but for that intervention such access would be possible.

\(^{82}\) CR/2014/0012
An area of open space which was an island site was nominated. There was no right to public access but dog walkers used it. The land formed part of a site which had been a mill but was converted to dwellings. On review the nomination was rejected on the ground that it was excluded land as it was connected with a residence and in the same ownership.83

Importantly the exclusion provisions do not cover vacant land with planning permission for the construction of a residence or even land with an uncompleted dwelling in the course of construction. What is not clear is what happens if a dwelling is built on listed land. Should it then be removed from the listing or does it have to remain? The result of the completion of the work is that it becomes a residence and in consequence it is to be expected that the area of land should be removed from the listing.

(c) Mixed residential and other use - the application of this exemption will be difficult when the asset nominated is used for both residential and other uses. A building which is only partly used as a residence may still be listed if it otherwise qualifies for listing. Paragraph 1(5) of Schedule 1 to the 2012 Regulations provides:-

“Land which falls within sub-paragraph (1) may be listed if—
(a) the residence is a building that is only partly used as a residence; and
(b) but for that residential use of the building, the land would be eligible for listing.”

Crucial to the application of paragraph 1(5) is what will constitute a building or a part of a building for these purposes. This is an issue that has given rise to difficult questions in other areas of law such as rating and sewers. In paragraph 2 of Schedule 1 residence is defined as “a building used or partly used as a residence”. Section 108 of the 2011 Act provides that a building includes a part of a building. In applying para. 1(5) it will be necessary to determine whether there is a part of the building used for residential purposes which for the purposes of the ACV regime is separate from the remainder of the building. This will not be a straightforward task and as with many issues arising under the ACV regime will be very fact sensitive.

In the October 2012 non-statutory guidance given by the DCLG it is stated at para. 3.7 that paragraph 1(5) applies “where an asset which could otherwise be listed contains integral

83 Lot 4 Hoxton Mill Buildings Honiton Cambridge decided by South Cambridgeshire DC.
residential quarters such as accommodation as part of a pub or a caretaker’s flat.” This is intended to cover shops or pubs with integral living accommodation but the scope of this limitation on the residence exclusion could be unexpectedly wide. It is a gloss on the statutory wording and care must be taken not to treat this particular piece of guidance as having the same effect as if contained in a statute.

It is an approach which has been applied by local authorities. For instance, the Tabard pub and theatre in Chiswick has been listed by Hounslow LBC even though it has a flat on the first floor for use by staff. The test applied by the authority was whether (i) the flat is an integral part of the public house; (ii) there is a single owner; and (iii) it is a residential flat. A home with part exclusively used for commercial or professional purposes could take the building outside the residence exclusion.

The issue has now been argued before Judge Lane in Wellington Pub Limited v Kensington & Chelsea BC\textsuperscript{84} who has given general guidance as to how paragraph 1(5) is to be applied. In doing so the learned judge was determined to ensure that the approach adopted gave effect to paragraph 1(5) and that he did not apply a construction which left that provision meaningless.

The appeal concerned the Academy pub (previously called the Crown) in West London which had been a pub since 1851. The whole of the building had been listed. It comprised the pub on the ground floor; pub storage in the basement; residential accommodation in the first and second floors. Until the current licensees took over the access to the upper floors had been solely internally through the pub. The current licensees had a lease of the whole building and their family lived in the upper parts. By the time of the hearing they had a separate lease of the upper parts. To provide greater privacy and security they had had an outside access direct to the upper parts constructed but could still access the pub from the upper parts internally. The rent paid covered the whole building and there was a single account for all utilities provided to the building. A manager was appointed so that the licensees ceased the day to day running of the pub but were still involved and could continue to reach the pub internally from the residential upper floors.

\textsuperscript{84} CR/2015/0007
The argument on behalf of the owner was that the upper floors were a separate part of the building comprising a residence and so could not be listed. This was on the basis that the upper floors were not an integral part of the pub and in this respect it was material that the upper floors were a separate planning unit with a separate planning use. Judge Lane held

(i) caution should be exercised when interpreting paragraph 1(5) because it is an exception to a general exception;\(^{85}\)

(ii) whether or not a part of a building was a separate planning unit was not determinative as to whether paragraph 1(5) applied.\(^{86}\) Account could be taken of the factors causing a part of a building to be a planning unit but just because a part of a building was a planning unit it did not follow that it was automatically so treated for the purposes of the ACV regime. To do so would be to make paragraph 1(5) meaningless.

(iii) the planning decision in Henriks v SSE\(^{87}\) that identifiable component parts of a building are to be treated as a separate building for the purposes of the General Development Order 1977 did not provide assistance with regard to the operation of the ACV regime.

(iv) the submission that a residential flat can never be regarded as separate for the purposes of the ACV regime was firmly rejected;

(v) for the purposes of the ACV regime not every component part would be treated as a separate part. What constitutes a building for these purposes is a question of fact and degree.\(^{88}\)

(vi) the test is not whether the part of the building is necessary for the nominated asset to function.\(^{89}\) This again would rob paragraph 1(5) of any meaning.

(vii) to be a part of the listed ACV there must be a current physical and functional relationship between the residential part and the remainder.\(^{90}\) The decision has to be based on all

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85 Para. 39
86 Para. 22
87 59 P CR 443
88 Para. 25
89 Para.s 26 and 27
90 Para. 39
the relevant facts as to whether there is a sufficient physical and functional relationship between
the residential area and the remainder of the nominated asset. 91

(viii) that decision is made against the historical background of the nominated asset;

(ix) on the facts of the case there was both a physical and functional relationship and in
consequence the whole building should continue to be listed.

A similar point was taken with regard to the Sir Richard Steele public house 92. The building
included residential accommodation on the second floor which is accessed internally from the
ground floor pub. It is used to provide staff accommodation. It was argued on behalf of the owner
that the second floor is a separate part of the building to which the public do not have access and
that, therefore, the use was ancillary to the primary pub use on the ground floor and so did not
meet the statutory requirements in section 88. This was not accepted by Judge Lane. He
considered that the residential accommodation on the second floor “comprises integral residential
quarters for the manager of the pub.” Although non-statutory he considered that para. 3.7 of the
Department’s October 2012 guidance (see above) makes plain what is the effect of para. 1(5)
Schedule 1 2012 Regulations. In consequence the second floor remained within the listing of the
pub.

(d) Other forms of safeguard – although not technically excluded from being assets of
community value some authorities do seek to discourage nominations of assets which will be
protected against disposal in other ways without the need for listing as an ACV. For example, East
Woodhay Parish Council withdrew two nominations relating to a village hall and a sports club. The
reason was that they were held subject to trust deeds and, therefore, it was not necessary to have
them listed as ACV in order to achieve a degree of protection against disposal. Similarly, land at
Dudsbury was nominated by the West Parley PC in part due to its long range views of the Isle of
Wright and its high landscape value. It was concluded on behalf of East Dorset DC that it was used
for private grazing and the only public use was along the public footpath crossing it. Such rights are
protected in other ways and so there was no need for listing as an ACV.

91 Para. 28
92 Kicking Horse Limited v Camden LBC CR/2015/0012
Burnley BC indicates that with assets in community ownership or subject to charitable trusts it is better to discuss future proposals with the owners or trustees rather than to nominate the assets for listing. Similarly, playing fields attached to a school require the consent of the Secretary of State if to be disposed of prior to the expiry of ten years from the closure of the school.
7. COMMUNITY NOMINATION

(a) **Nominators** - to be considered for listing the local authority has to receive a community nomination. This requires that the nomination is made by any one of local parish councils (or in Wales the community council\(^{93}\) or by a voluntary or community body with local connections (section 89(2)). If the nomination is made by a person who does not qualify as a nominator under the ACV regime then it is not a community nomination and the listing cannot proceed even if the asset qualifies as an ACV. If the point has not been picked up at first and the nominated asset is listed then on a review it should be removed as happened with the listing of the Kensington Park Hotel (see discussion below). The qualifications required of a nominator are not identical to those applicable to a community interest group which can make a written request to be treated as a potential bidder of a listed asset (see section 8(e) below).

What constitutes a voluntary or community body and what constitutes a local connection is governed by regulations 4 and 5 of the 2012 Regulations. By reg. 5 it is provided that it covers:-

(a) a body designated as a neighbourhood forum pursuant to section 61F TCPA 1990;
(b) a parish council but no other public or local authority\(^{94}\);
(c) an unincorporated body with at least 21 individual local members which does not distribute any surplus to its members;
(d) a charity;
(e) a company limited by guarantee which does not distribute its surplus to its members;
(f) an industrial and provident society (being a body registered or deemed to be registered under the Industrial and Provident Societies Act 1965\(^{95}\)) which meets one of the conditions in section 1 of the 1965 Act and which does not distribute any surplus it makes to its members.

\(^{93}\) Assets in Wales cannot yet be listed
\(^{94}\) Reg. 5(2)
\(^{95}\) Reg. 5(3)
A body other than a parish council must have a local connection which means that it must carry on activities which are wholly or partly concerned with the local authority’s area or a neighbouring authority’s area. If the body is an unincorporated body, company limited by guarantee or industrial and provident society then not only must it not be able to distribute any surplus to its members but the surplus must be applied in whole or part for the benefit of a local authority’s area or a neighbouring authority’s area. A formal constitution puts the matter beyond doubt but there is no statutory requirement that the body should have a formal constitution. There is a need, however, on the part of the nominator to provide evidence which shows that all these requirements have been satisfied. The onus lies on the nominator and failure to do so may result either in a challenge from the owner or the point may be taken by the listing authority.

(i) **Unincorporated body** - In the case of an unincorporated body it must have at least 21 local members which requires those members to have a registered address on the electoral roll for the local authority area or the neighbouring authority’s area. With community nominations often groups of local residents may have come together informally solely with regard to the particular asset such as a public house. In some cases a point may be taken by the owner that there is no unincorporated body in existence and so the nomination is invalid and cannot result in a listing. This may involve two separate arguments. The first argument put forward may be over what constitutes an unincorporated body. Does it have to constitute an unincorporated association as is sometimes forcefully argued or does the phrase have a wider meaning in the context of this legislation? This can then lead on to the second argument which will be whether the group satisfies the legal requirements so as to constitute an unincorporated association.

(ii) **Scope of Unincorporated body** – in Hawthorne Leisure Acquisitions v Northumberland CC\(^{96}\) it was argued that this phrase meant an unincorporated association and that it would need to comply with the definition applied by the Court of Appeal in Conservative and Unionist Central Office v Burrell\(^{97}\). Judge Warren appeared not to accept this argument. The learned judge took from the Burrell case that it was necessary to construe the phrase against its statutory background and considered the ACV regime to be “a very different statutory context” (para. 11). He did not

\(^{96}\) CR/2014/0012
\(^{97}\) [1982] 1 WLR 522
expressly state that it was possible for there to be an unincorporated body which is not an unincorporated association. He agreed with the reviewing officer that a local action group formed specifically to make a community nomination qualified without a name for the group or a formal constitution or set of rules. Neither of those are requirements for a group of individuals to be an unincorporated association. In the St Gabriel Properties case Warren J stated that “‘Unincorporated body’ is a broad term which includes community groups of many descriptions.” (para. 21) and reiterated that there was no need for a written constitution. As unincorporated associations can come into existence in informal circumstances without a written constitution particularly with campaign groupings (as illustrated by the decision in Williams v Devon CC discussed in section (ii) below) it would seem that there should in practice be little scope for groups which are not unincorporated associations but claim to be entitled to have the status to make a community nomination.

However, the point did arise squarely for decision in Mendoza v Camden LBC\textsuperscript{98} because it was accepted by the appellant that the Carpenters Arms in King’s Cross Road qualified as an ACV and the only ground for the appeal was that the nominator, the Carpenter Arms Supporters (“the Supporters”), was not an unincorporated association and so did not qualify to make a community nomination. The Supporters had 21 local members and had adopted a standard form constitution distributed by CAMRA. Clause 11 of this constitution provided that all users of the pub were automatically members of the Supporters. Based on this provision it was argued that the Supporters were not an unincorporated association because there could not be a list of identifiable members and as it was not an unincorporated association it could not make a community nomination.

This was firmly rejected by Judge Lane. He agreed with Judge Warren that the different statutory context of the ACV regime meant that the interpretation of unincorporated association in the Burrell decision which was concerned with potential tax liability did not assist in the context of the ACV regime. An important distinguishing factor in his judgment is that a nominator making a

\textsuperscript{98} CR/2015/0015
community nomination does not incur any financial liability or obligation\textsuperscript{99} and is not subject to any adverse consequences if the nomination is unsuccessful. The nominator does not have to play any further role in the matter once the nomination has been made. This is considered by the judge to be a sufficient difference which means that there is “no rationale for inferring that the legislation with which we are concerned requires each and every individual comprising the nominating body to be capable of individual identification.”

The absence in the ACV regime to a reference to unincorporated associations when it could have been included is material in his judgment as if it was intended that the body should be an unincorporated association then it would have been stated in the statutory provisions. The judge considered that there is no good reason to introduce such a requirement.

He applied the normal dictionary meaning of body which is an “organised group of people with a common function”\textsuperscript{100}. This includes an unincorporated association but is not limited to it and does not have to arise from a contractual relationship. It is enough that a number of individuals come “together to further a matter of common interest”.

Contrary to an argument on behalf of the owner the judge considered such an approach to be consistent with the DCLG statement in October 212 with regard to unincorporated groups that the statutory requirements “will, for instance enable nomination by a local group formed to try to save an asset but which has not yet reached the stage of acquiring a formal charitable or corporate structure”. It does not require either an unincorporated association with a contractual relationship between the members or an unincorporated body with a membership which is comprehensively identifiable.

The result of this case is that it is sufficient to have a group of individuals who have formed a group to save a local asset provided that the nomination form is signed by 21 members who are local electors and any surplus of the group satisfies the requirements as regards distribution and use for local purposes.

\textsuperscript{99} para. 24
\textsuperscript{100} para. 20
Applying this decision the review decisions relating to the Kensington Park Hotel and the Alexandra are wrong but as the properties are now listed that will not result in a fresh nomination. It will make it harder for challenges to a nomination mounted on the status of the nominator. Judge Lane did state\textsuperscript{101} that there is something deeply unattractive about the proposition that a group can come together without the need for a constitution in order to make a community nomination but if the group adopts a constitution with a clause akin to clause 11 in this case it cannot make a community nomination.

However, it may not be so simple. Is it possible to have a valid prohibition against a distribution of a surplus to members without there being a contract between the members? Similarly, is a contract necessary to satisfy the requirement as regards the application of any surplus for local purposes? Unless there is a contract between members can these requirements be satisfied?

What is clear is that the judges of the First-tier Tribunal favour a strong purposive interpretation of the ACV regime and the requirements relating to a community nomination so that formal and procedural obstacles to listing can be overcome and in cases in which the nominated asset qualifies as an ACV it is listed.

(ii) What constitutes an unincorporated association – the significance of this point is much reduced by the decision in Mendoza v Camden LBC supra. At present it appears only to be a real issue if the nominators have adopted a constitution which includes a provision that all users of the nominated asset are automatically members. If the nominators constitute an unincorporated association then there is no point to be taken. This point as to what is needed to constitute an unincorporated association has been considered recently in the context of more formal litigation. In particular, it has had to be considered in judicial review proceedings in the Administrative Court as a result of increasing challenges by protest groups.

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\textsuperscript{101} para. 27
It has been long recognised that an unincorporated association is not a separate legal entity\textsuperscript{102} and that the relationship between the members is based on contract alone.\textsuperscript{103} For the purposes of judicial review proceedings HHJ Cotter QC in Williams v Devon CC [2015] EWHC 568 (Admin) had to consider what prerequisites need to be satisfied. Importantly the issue concerned whether at the date of the issue of proceedings the group was a “person” for the purposes of the Road Traffic Regulation Act 1984. This in turn took the judge to Schedule 1 of the Interpretation act 1978 which provides that a person includes “a body of persons.... unincorporated”. This is more akin to the phrase “unincorporated body” employed in the ACV regime than the phrase “unincorporated association”. The Council in that case argued that the group of individuals, known as STAG by the time of the hearing, was not a “body” for the purposes of these Acts because it had not long been in existence; had no formal membership; no list of members; no constitution; and no evidence of a defined objective. These facts are similar to those which will apply to the nominators of many community nominations.

The learned judge stated that the issue is “very much fact specific” and satisfaction of the requirements should not “be overly onerous” (para. 49). He defined the issue as being whether or not a body constitutes an unincorporated association (para. 47). Without any express discussion the judge was treating an unincorporated body as being the same as an unincorporated association. In order for a group to constitute an unincorporated association the judge considered that two requirements need to be satisfied. These are

(a) the group has an identifiable membership;

(b) there is an agreement between the members of the group which will usually be reflected in “a set of identifiable rules or code or a contractual or other bond between them.” (para. 49). The wording encourages the view that the agreement need not be contractual but as the consequence of becoming a member is to accept mutual responsibilities the new member will inevitably become a party to a contract which is the basis of the unincorporated association

\textsuperscript{102} O'Connor LJ in Currie v Burton Times 12th February 1998
\textsuperscript{103} Walton J. in re Bucks Constabulary Widows' and Orphans' Fund Friendly Society (No 2) [1979] 1 WLR 936 at page 952

64
What was described in that case as a “loosely assembled group” who had started the litigation was held by the judge to be an unincorporated association. The relevant factors leading to this conclusion were the “single and clear aim” of the group; the existence of a bank account; the money being held for the group’s purpose; retainer of solicitors; and admission to membership of STAG was through a co-ordinator.

With community nominations it is likely that groups similar to STAG will be involved in making the nomination. It will mean that most groups will be unincorporated associations for the purpose of the ACV regime. However, it must be borne in mind that the additional qualifying requirements must be satisfied. This requires not only at least 21 local members but that any surplus cannot be distributed to the members. Such a requirement did not have to be considered in the Williams case. In paragraph 50 the judge considered that if the aim of the group was achieved then all the members could decide to reimburse any surplus or “in all probability” to donate it to a charity. This is a point which needs to be covered with a nominator because there cannot be an ability to reimburse any surplus. Further any such surplus has to be applied in part of whole in the listing authority’s area or a neighbouring authority’s area.

It was pointed out by the judge that the uncertainties could have been avoided by an individual member of the group being chosen as a representative claimant of the group.\textsuperscript{104} Such an approach will not help as regards the question of the validity of a community nomination. A nomination by an individual representing a group will not be sufficient. However, if there is a definite group of 21 local individuals acting together rather than just signing a petition then on appeal the judges of the First-tier Tribunal are likely to accept that there is an unincorporated body. This is less likely to be a live issue than in the context of judicial review proceedings albeit that reliance is being placed on this recent decision in Williams to contest nominations. It is noted in De Smith’s Judicial Review (7\textsuperscript{th} Ed.) at paragraph 2-012 that in judicial review proceedings “a flexible approach is appropriate”. Unincorporated associations have been permitted to be both defendants and claimant in such proceedings. Such flexibility will undoubtedly be followed with regard to ACV nominations.

\textsuperscript{104} Para. 52 following Artistic Upholstery v Art Forma (Furniture) Limited [1999] 4 AER 277
Even if people are automatically treated as joining a group without any proper consideration this will not present a problem unless and until the decision in Mendoza v Camden LBC is overturned. Prior to that decision it is an objection which has resulted in the refusal to list assets which otherwise qualify as an ACV. This was the ground for the removal of the Kensington Park Hotel from the list of ACV on review. After an oral review hearing the review officer held that there was not a qualifying nominator, KPH United, because there was not a valid unincorporated association in existence. In that case the nominator had provided a copy of its constitution and a membership list. The reviewing officer found that there was a local connection; a prohibition on distributing surplus to members; and 21 local members. The issue was whether the group constituted an unincorporated association.

Applying the judgment in the Williams case the reviewing officer considered that there must be an identifiable list of members who have agreed to be members albeit that the agreement need not be contractual. Clause 10 of the nominator’s constitution provided that any user of the Hotel was automatically a member. On the face of it this meant that any patron of the hotel should be a member without any further step being required to be taken. It followed from this that no element of agreement was involved. The nominator argued that clause 10 was only concerned with eligibility and did not automatically make any patron a member. As emphasised in the Williams case the reviewing officer considered this to be factual matter and not a legal question. After investigating the facts he formed the view that no further steps were required as regards membership other than use of the hotel and so there were no identifiable members who had agreed to be members. In his judgment acting on behalf of the group, and in particular signing the nomination form, was not a decision to become a member. In consequence the nomination was invalid and the asset was removed from the list of ACV even though the reviewing officer confirmed that the hotel qualified as an ACV and if a fresh nomination was made by a qualifying nominator it would result in the listing of the hotel. This has in fact happened following a nomination by the West London branch of CAMRA. Bearing in mind the challenges being made to nominations by CAMRA branch it is interesting to note that the Council accepted the validity of a nomination by such a branch.
Another pub has also been removed on review from a List of ACV on the ground that the nominator did not qualify to make a community nomination. It is the Red Lion in Isleworth. There was a challenge on the basis that the nominator did not qualify and there was a procedural irregularity in that the listing authority did not give the owners notice. The nomination was made by a Facebook campaign group described in the nomination form as “a Resident’s forum” called “the Red Lion Future”. It was found that this did not qualify as an unincorporated group satisfying the requirements of the ACV regulations. Without a copy of the review decision it is not possible to know how the nominators failed. It may be that the group did not constitute an unincorporated association. Reliance may have been placed on the signatories of a petition which would not by itself create an unincorporated association. Alternatively, it may be because it did not satisfy the local connection requirement or the need for 21 local electors. Interestingly a second community nomination has been made and the pub has been listed as an ACV again.

Following the Mendoza decision this aspect of community nominations is likely to become less contentious when considered by listing authorities. It may be that at some time the point will be taken further than the First-tier Tribunal.

(II) Local electors – it will be sensible for the listing authority to check that when the nominator is an unincorporated association there are at least 21 individuals signing the nomination form who are local electors. It will not matter that some of those signing are local electors provided that at least 21 qualify. For example, the nomination of the Bull Inn in Wimborne St. Giles was signed by 36 individuals but only 26 were eligible to vote within the boundary of East Dorset DC. This was sufficient to justify the nomination being treated as a community nomination.

In contrast on verification by East Dorset DC it was found that not all the signatories of the nomination of the Sheaf of Arrows in Cranborne qualified as local electors and the number was below the minimum requirement of 21. The authority allowed another 4 to be added and verified. Notwithstanding the strong challenge to some nominations on the ground that the requirements of a community nomination had not been satisfied at the date that it was made this approach by the authority must be correct. The only issue, which normally would not be material, is whether the nomination is to be treated as made when the original nomination was sent or when the
additional signatories are added. The latter should be the case as that is when the requirements are properly satisfied. This could be relevant with regard to the operation of the Permitted Development Rights regime (see section 9 below).

A similar issue arose with the nomination in relation to the Ship in South Norwood made by a group called the Save the Ship. It was listed but on a review of the listing it was discovered that three of the members were not local members and so the unincorporated body did not satisfy the local connection requirement and the nomination was rejected.

In Hawthorn Leisure Acquisitions v Northumberland CC there was a challenge on the ground that it was unclear that this requirement had been satisfied because the owner argued that some of the addresses were too short but the listing authority’s evidence stated that it had verified the addresses and the electors and this was accepted by the judge. An argument that some had moved out of the area after listing and should be disregarded was rejected on the basis that there was nothing in it (para. 14).

(III) Neighbourhood forums – section 61F of the Town and Country Planning act 1990 impose a number of requirements that must be satisfied in order that a body can be such a form. These include that:

(i) the group must be “established for the express purpose of promoting or improving the social, economic and environmental well-being of an area that consists of or includes the neighbourhood area concerned (whether or not it is also established for the express purpose of promoting the carrying on of trades, professions or other businesses in such an area)”;

(ii) it must be open to those who live or work in the area or are local councillors;

(iii) there must be at least 21 members within (ii) above;

(iv) it must have a written constitution.

This will include community groups, civic societies and other groupings provided that the above requirements are satisfied. There can only be one for an area.
(IV) **Other nominators** - In addition to such bodies a voluntary or community body will include charities, companies limited by guarantee which do not distribute any surplus to members, community interest companies which have qualifying local activities and also neighbouring parish councils within reg. 4(2). A nomination has been rejected because it had been made by a company limited by shares and not by guarantee (the listing decision by Croydon in respect of the nomination by Croydon Community Pub Company Limited of Portmanor Pub in South Norwood).

(V) **Approach by First-tier Tribunal** - When a challenge is made in appeal proceedings to the validity of the community nomination the approach adopted by the judges is very relaxed as regards formal compliance with the requirements that must be satisfied by nominators. In Hawthorne Leisure Acquisitions v Northumberland CC supra a group of 25 local residents without a formal constitution was held to be a voluntary unincorporated association. The requirements as to the distribution of any surplus was treated as satisfied because there was no surplus but the judge did indicate that in appropriate cases the authority should seek a written assurance that no surplus would be distributed to members (para. 12).

(VI) **CAMRA branches** - The application of these regulations to branches of national organisations has been considered in St. Gabriel Properties v Lewisham LBC supra. The nomination resulting in a listing in that case had been made by the South East London branch of CAMRA. It was argued that the nomination was invalid because CAMRA had no local connection. Judge Warren held that the nominating body was subject to a hybrid treatment. CAMRA is a company limited by guarantee and this in turn governs the characterisation of the branch and determines whether the requirements regarding distribution of surplus are satisfied. However, the activities of the branch rather than the national activities of CAMRA will determine whether the branch has a local connection. Even if wrong on this Judge Warren accepted that a branch could be an unincorporated body as this is a broad term including community groups of many descriptions. It is not necessary for such a body to have a written constitution containing a rule that any surplus cannot be distributed to members. It was open to the Tribunal to consider the evidence regarding the actual application of the body’s funds in order to decide whether the requirement regarding distribution has been satisfied.
Notwithstanding the decision in the St. Gabriels case nominations by CAMRA branches are still being challenged by owners on the ground that the branch does not qualify or there is insufficient evidence to show that it does qualify. In some cases this is a challenge to Judge Warren’s decision and in others to the manner in which nominations are being made. With some nominations no or insufficient supporting evidence accompanies the nomination establishing that the nominating branch is qualified to make a community nomination. Such evidence needs not only to satisfy the requirements relating to the status of the nominator and the constitutional position regarding the distribution of any surplus but also that relating to the local connection. It is not enough just to state that the nomination is made by a branch of CAMRA. For example, Allerdale BC has rejected two nominations by the Solway branch of CAMRA on the ground that evidence was not provided to show that the nominations were made by persons qualified to nominate. Rushcliffe BC has rejected a number of nominations by a CAMRA branch on the ground that it did not satisfy the requirement that surpluses must be applied in the local area. However, the relisting of the Kensington Park Hotel emphasises that a branch of CAMRA can validly make a community nomination.

In the event that a nomination has been rejected on the ground that it has not been established that the nominator has the status to make a community nomination it is possible for a fresh nomination to be made with the necessary supporting evidence to establish the ability to nominate. This would seem to be a preferable course of action rather than seeking to amend a nomination by adding the required evidence and facing an argument as to whether there is such an ability to amend.

(VII) Nominator’s knowledge - In Punch Partnerships v Wyre BC supra it was suggested that the persons signing the nomination form had not appreciated that it was not intended to close the pub but only to build a retail unit over part of the pub car park and grassed area. Judge Lane stated that there was no legal requirement for the Council to investigate that issue (para. 7) and an asset may be listed even whilst being used for the relevant community purpose.

(VIII) Motivation – owners of pubs sometimes seek to challenge a nomination on the ground that listing is being sought for an improper purpose. The suggestion is that the nomination
is not with a view to seeking to ensure that a community group has the statutory moratorium period in which to arrange a community bid for the asset but for some other purpose. This is not a matter that the listing authority can enquire into and it is difficult to see how it could do so in a satisfactory manner. Undoubtedly nominations can be made with a view to preventing a possible development which is objected to but that is irrelevant. What is important is whether the statutory criteria in section 88 are satisfied. If they are then the asset must be listed. If the nominators are seeking to prevent a particular development that may be relevant as to whether it is realistic to think that there will be a future community use but it will not by itself be a ground for refusing a listing (see Judge Lane at para. 32 in General Conference of the New Church case).

There is no express requirement that the nominator must be able to show that the asset could be acquired for the community. If the nominated asset is currently in use then it would be difficult to provide such evidence. Funding can only be considered when there is an opportunity to acquire and not all nominations will be made at a time when the nominated asset is on the market or has been closed for an indefinite period. In any event the nominator need not be the person who will seek to acquire the asset if the moratorium period comes into operation. In this context it is material to note that not all nominators will qualify as a community interest group entitled to serve a notice to be treated as a bidder. The distinction between those who can nominate and those who can give such a notice serves to highlight the absence of any requirement that there must be an ability to acquire the nominated asset before it can be listed. Support from the local community is an important element in a nomination but that does not mean an existing ability to make an immediate acquisition if the opportunity arose. Listing is intended to provide a period in which the local support can take the initiative and organise such a bid and part of that process is arranging the necessary finance.

(b) **Content of nomination form** – each local authority will normally provide a standard form for nominating an ACV. Care needs to be taken to ensure that the evidence provided covers all the requirements of the ACV regime as an authority’s standard form may not specifically refer to everything that is needed. In particular care should be taken to establish the status of the nominator to make a community nomination. The supporting evidence should cover the character
and constitution of the nominator; how it satisfies the local connection; the prohibition on the distribution of surpluses; and the application of surpluses in the local area. The onus is on the nominator to prove that it has the necessary status to make a community nomination and that the nominated asset qualifies as an ACV. If it fails on these two points the nomination will be rejected. It is not for the listing authority to investigate the status of the nominator or the nominated asset to ascertain the true position. However, there is nothing to stop the authority from making enquiries and taking into account information provided from other sources.

It has been noted by some authorities that with many nominations there has been no contact between the nominator and the owner of the asset prior to the making of the nomination. Such contact is encouraged by authorities because the absence of such contact inevitably results in an angry owner and in some cases the personal circumstances of the owner may be such that this causes genuine distress.

A community nomination must include the following matters: \(^{105}\)

(i) a description of the land including the proposed boundary. In some cases the boundary may be crucially important if the listing is to apply to part only of a holding.

(ii) provide details of the freehold and leasehold owners and occupants;

(iii) give reasons for thinking that the authority should conclude that the land is of community value;

(iv) set out evidence of the nominator’s eligibility to make a community nomination.

There is an emphasis on making such forms easy to complete. The problem with this is that it does not ensure that both the authority and the property owner are provided with a properly particularised statement of the justification for listing. Nor does it compel full supporting evidence to be supplied by the nominator. This can place an owner at a disadvantage in seeking to defeat the application within the specified time limit. It also runs the risk of repeated applications with

\(^{105}\) Reg. 6
repeated attempts to improve supporting evidence. Some applications can be remarkably informal with them being written in manuscript with sparse explanation. This is unfair on landowners.

The inclusion of supporting evidence is important as a number of nominations have failed, particularly with regard to public houses, on the ground that there was not sufficient evidence to show that the nominated asset qualifies as an ACV. Examples are the Red Cow in Walsall, the Penny Ferry Inn in Latchford, the Furze Bush at Hatt Common and the Pensby Hotel in Wirral. South Gloucester has rejected some nominations of public houses on the ground that there was not enough substantive evidence. These serve to emphasise the importance of ensuring that satisfactory evidence is included and accompanies the nomination. It is to be expected that a fresh nomination will be permitted with supplementary evidence to make good the initial flaw in the first nomination. In the decision rejecting the nomination of the Furze Bush public house it was expressly noted that the East Woodhay Parish Council could nominate again. However, it is preferable to avoid the need and the argument that may then be put forward on behalf of the owner that such a renewed nomination should be rejected in principle.

In a number of cases the point has been taken strongly on behalf of owners of nominated public houses that there has to be strict compliance with the requirements of regulation 6 as regards the contents of the nomination form. In the absence of full compliance it is argued that the nomination is not a community nomination and must be rejected by the authority. Such an approach is justified on the ground that the ACV regime is an interference with property rights and so there has to be strict compliance with the requirements of the regime. If there has been a complete failure to comply with a requirement then such an approach may be justified. There is nothing in the regime which bars the authority from requesting further information but it will be argued on behalf of the owner that there is nothing which expressly permits it. The First-tier Tribunal has permitted evidence to be provided on appeal directed at issues regarding compliance with such requirements. It has also approved steps taken by an authority to cover an aspect of compliance with the requirements. This accords with the degree of freedom that has been afforded to local authorities when dealing with and deciding community nominations. It also accords with the character of the ACV regime and the Localism Act 2011 both of which are
concerned with closer involvement by local communities and conferring power on them. Members of local communities cannot be expected to achieve the same standards as with formal applications prepared by lawyers.

The pre-condition for the operation of the ACV regime is the making of a community nomination and not the making of a nomination which is not a community nomination. Clearly if the nominator does not qualify to make a community nomination the application should not proceed. If the evidence does not show that the nominated asset qualifies as an asset of community value the asset should not be listed. However, if the nominator does qualify and the nominated asset qualifies as an asset of community value does the necessary supporting evidence have to be provided at the start or can gaps be filled subsequently? The authority is required by section 90(2) to consider a community nomination. If the provision of information has been staggered that should not prevent the nomination being a community nomination at least when the full information has been provided. It may be that it will affect the timetable which runs from the making of the community nomination and there could be issues as to when that occurs.

If there has been an attempt at compliance but it is open to criticism then rather than being compelled to reject the nomination the authority should have a choice as to whether to reject or seek further evidence including providing an opportunity to respond to the owner’s comments on the nomination. If the latter option is adopted then care will need to be taken to ensure that the requirements of the Data Protection Act 1998 are complied with.

(c) **Evidence** - apart from establishing that the nominator is qualified to make a community nomination (see section (a) above) there are two important areas on which it is crucial to have the necessary evidence if the application is to result in a listing of the nominated asset. The first is whether the nominated asset is or has in the recent past being used to further social wellbeing or the social interests of the local community which is not an ancillary use. The second is whether it is realistic to think that such a use if current may continue in the future or if it was in the recent past may occur at a time in the next five years.

Some authorities have helpfully set out the criteria for considering a nomination for listing as an Asset of Community Value. Wokingham BC is one and it can be found on the authority’s
website. In paragraph 1.6 it emphasises that the nominated asset must play “a significant role in local life” and the relevant community activity supported or previously in the recent past supported at the asset “could not reasonably continue if the building was lost to community use.” It then goes on to say that this “will normally mean that there are no similar or alternative facilities in the local area that could support the existing or proposed activity.” This is reinforced in paragraph 1.10 when it states as regards commercial premises that the Council will proceed more cautiously “and will not normally consider commercial premises for listing if there are similar facilities in the local area that are easily accessible to local people. The Council will only consider commercial premises for listing if the nominating body can demonstrate that their loss to the local area would be a significant loss for the local people in respect of their social wellbeing.”

This is an important point and one on which there is significant variance by authorities. Wokingham has rejected a number of nominations of public houses but other authorities have listed public houses even though there are others nearby. It is consistent with leaving such decisions to local authorities but is it fair to owners when their treatment depends on where their property is located. How will an appeal to the First-tier Tribunal fare when such an asset is list with other such commercial facilities nearby? The decision in Pullan v Leeds City Council\textsuperscript{106} would indicate that the First-tier Tribunal will not place such weight on that factor.

It serves to emphasise that when considering making or opposing a nomination it is necessary to search the relevant authority’s website. Inevitably criteria will differ between authorities and such a search may help to discover the approach that will be adopted by the particular authority. However, different levels of resources have been put into this subject by authorities and some do not publicise their criteria.

(I) Community use - factors highlighted on draft nomination forms prepared by authorities as material in determining whether the use of an asset furthers social wellbeing and social interest of local community include;

(i) Types of activities;

\textsuperscript{106} CR/2015/0011
(ii) Are services referred to in any of Sustainable Community Strategy, Corporate Plan, Local Development Framework, Local Transport Plan, Joint Strategy Needs Assessment, Plans relating to cultural, sporting and recreational interests and other plans and policies;

(iii) Number of people using asset (users/members/customers) and proportion of local community making use of the property;

(iv) Policies/approach of organisation using the asset;

(v) Testimonials of service provided/outcomes;

(vi) Use by local community groups;

(vii) Number of volunteer hours drawn in by the facility;

(viii) Accessability;

(ix) Policies of organisations using the facility;

(x) Equalities impact (impact on different groups within local community);

(xi) Involvement of local community in running or managing the facility;

(xii) Positive impact on (a) health and wellbeing; (b) local natural environment and wildlife; (c) cultural, sporting or recreational activities; (d) specific local communities and areas of need; (e) sustainable living.

(xiii) Impact on (a) local community pride; (b) cohesion; (c) sense of place (for example hosting of community wide events);

(xiv) Community consultation;

(xv) supporting evidence (a) supplied by local stakeholders (such as surveys and petitions\(^{107}\)); (b) showing soundness of process for gathering community feedback and views); (c) from parish or community plan or other local documents;

(xvi) Evidence of local ward members;

(xvii) What will the impact be on the local community if the use of the asset ceases (particularly in the context of uses which are for profit such as a pub or shop)

\(^{107}\) For example, in Blackburn the Hare & Hounds public house nomination was supported by a petition with over 290 signatories and the Hole l’th Wall pub by over 260 signatories. Both were listed.
Local authorities approach this issue in different ways. For instance, County Durham and North East Derbyshire look to see if there is a broad and inclusive use of the asset across the community or use by a part of the community that would not be provided for otherwise (or is underprovided for in the locality such as elderly people or children). In contrast a number of authorities such as South Lakeland and Epping Forest ask whether in the absence of the use of the asset the local community would be deprived of land or a building that is essential to the special character of the local community.

Amongst the factors which are not by themselves justification for listing are the architectural merit of the nominated building or the historical importance of the building. Who is the owner will not matter so that a contract to sell immediately prior to listing will not by itself affect the listing decision. Similarly, if the asset is in single ownership along with other land to which it is physically connected (but is not a residence) this will not be a reason for not listing the asset if it otherwise qualifies even though the moratorium period will not apply to a disposal when the property sold is partly listed and partly not.

(II) Future community used – factors highlighted by authorities as material to the issue of whether the asset may be used for a future community use include:

(i) outline business plans;

(ii) survey reports;

(iii) advice from the Council’s Property Services department;

(iv) marketing evidence regarding the asset including period on market;

(v) market intelligence;

(vi) status and progress for proposals for taking over/managing the asset in the future;

(vii) past business records;

108 The words in brackets come from the published guidance of Telford & Wrekin Council
(viii) evidence as to matters which would make future use unviable such as issues relating to building structure, maintenance, repairs and rent costs.

(III) Public houses – a great deal of the publicity concerning the ACV regime focuses on public houses. In large part this is due to the campaign by CAMRA to have listed as many public houses as possible. CAMRA provides an updated list of pubs which are listed as ACV. There are now around 1500 listed with a current target of 3000. At times the impression has been given that all public houses qualify for listing but that is clearly not the case as was acknowledged in the Patel v Hackney LBC case. Some public houses even if currently in use will not qualify. A high street public house or drinking place is much less likely to be an ACV than a village pub. Similarly, a public house mainly orientated to food is more likely to be treated as akin to a restaurant than a traditional pub. Restaurants can be listed but are less likely to be than a public house.

Matters that have been taken into account when a pub is nominated include:-

(i) as regards customers is there a transient user base or are the customers drawn from the local community. For instance, one of the reasons for rejecting the nomination of the Sheffield Tap was the evidence including a location next to a major transport hub indicated a transient user base.

(ii) has the pub been nominated by an organisation based in the locality (referred to in the Sheffield Tap assessment);

(iii) is there evidence from regular users (as in Haley (Old Boot) v West Berkshire and Pullan v Leeds City Council);

(iv) is the pub a base for sports teams such as football or darts;

(v) do community groups meet at the pub;

(vi) are there special facilities for meetings such as a room or a garden for events;

109 Judge Warren at para. 4
110 CR/2015/0008
111 CR/2015/0011 at para. 12 stating that evidence was that clientele comprised far more than a de minimis local element
(vii) do functions take place at the pub such as quiz nights or musical occasions;

(viii) are family occasions such as birthday parties catered for at the pub;

(ix) what facilities are there at the pub such as games;

(x) is the pub involved in community funding raising for charities;

(xi) is the pub involved in reaching out to the local community as in the Beehive case\textsuperscript{112};

(xii) are there other pubs in the area and have there been closures;

(xiii) is it orientated to providing food;

(xiv) is the pub involved in local community arrangements such as acting as a venue for local trading scheme or community exchange;

(xv) is the pub supplied by local brewers or food producers;

(xvi) length of time it has been run as a pub;

(xvii) what support is there within the local community; what are the skills and experience of those involved on behalf of the community; and what pledges have been made or funds raised.

Examples of completed nomination forms concerning a public house which provide substantial and helpful evidence are those which resulted in the listing of the Kings Arms in Litton and the Full Moon in Lower Rudge by Mendips DC (copies of which can be found on the web)

Authorities take different views in the absence of a clear definition. Sheffield City Council has stated in relation to businesses which serve the public such as pubs that “there needs to be evidence of usage that suggests that the property acts as a hub or focal point for a significant proportion of an identifiable community” to justify listing. Arun DC in respect of profit making assets such as shops and pubs requires that the economic use provides an important social benefit to the local community. This is a better way of looking at the issue than considering whether the community use is ancillary or non-ancillary.

\textsuperscript{112} Hawthorn Leisure v St. Edmondsbury BC CR/2015/0018 at para. 15
The level of evidence required will vary from authority to authority. Sheffield City Council has until recently required a high level of evidence to justify listing. In July 2015 the Sheffield and District branch of CAMRA nominated 10 pubs in Sheffield and it is reported that nine were rejected. The authority helpfully places its decisions on its website. The authority’s approach at that time is illustrated by the rejections of the nominations of the Old Cart and Horses and the Queen’s Ground Hotel (both in use as a commercial public house but the City Council considered that the evidence did not paint a picture of a cohesive section of the community centred around either pub). As regards the Station Tap the public house was considered to have a transient user base and it was not thought possible to establish a local community in respect of the pub. In contrast the nomination of the Plough was accepted by the City Council as a thriving pub serving the residents of Crosspool, Sandygate and Tapton Hill because it is well regarded by the local community and there is no alternative within a reasonable travelling distance. The nomination was supported by a petition signed by over 130. The approach of the City Council has been described by CAMRA as regards the supporting evidence as requiring a “gold-plated” approach to evidence which is too strict. CAMRA’s concern is based on the closure of 46 public houses in Sheffield since 2010. However, there is now a proposal that it should be converted to a Sainsbury’s supermarket.

A fresh nomination has now been made with regard to the Three Tuns which has been successful. There appears to have been a change in approach by the City Council with regard to what constitutes a local community (see the discussion in section 5.1(b)). From a reading of the two reports to the Cabinet Member in relation to the two nominations of the Three Tuns it does not appear that the evidence provided in relation to the second nomination differs greatly from that provided with the first nomination. It appears that the interpretation of the evidence has changed. As regards the first nomination it was stated that there was no evidence as to the extent of the use of the pub whereas with regard to the second nomination reliance is placed on the statement by the applicant who is a regular patron of the pub. It is stated that such evidence should be accepted in “the absence of any observations from the landowner to the contrary”. Whereas with the first nomination there was insufficient evidence with the second nomination it was accepted that there was sufficient evidence that the Three Tuns furthered the social wellbeing
and interest of the local community. The Sheffield branch of CAMRA has as a result made fresh nominations in relation to the pubs previously rejected.

One point that the outcome with the second nomination of the Three Tuns illustrates is the importance of the owner of the nominated asset putting in representations in response to the nomination. This is particularly so if the information set out in the nomination form is incorrect. This does happen and especially if the information has been taken off the website relating to the asset and the activities carried on there. Website’s can be outdated or express wishes that do not happen.

Nottingham has recently publicised the listing of nine public houses emphasising in the summary of the reasons for the listing the community functions taking place at the nominated pub such as musical events, quiz nights, charity events, private parties, meeting place for football supporters and karaoke. Interestingly one nomination was rejected. The reason given for rejecting the Portland is no important social and community functions beyond use as a commercial pub was identified.

The problem facing many owners of public houses is discovering exactly what criteria are applied by the relevant listing authority. By providing its reports and assessments on community nominations Sheffield City Council has sought to provide useful guidance and to be transparent.

(d) Assessment by authority – linked to the issue of evidence is how such evidence is assessed by an authority. Some authorities helpfully place their evaluation criteria on the web (such as Nottingham City Council) whilst others place their individual assessments of a nomination on the web. Hounslow LBC has a link to the officer’s report in a column in the list of ACV. Bath & North East Somerset DC has a link to the individual nominations on the webpage relating to ACV. The report sets out the procedure which is gone through before reaching a decision as to whether or not to recommend the listing. There are four steps in the process with a number of questions to be answered in some of the steps. In the case of Hounslow LBC these steps are as follows:-

Step 1 Determine eligibility of the nominating body and the nominated asset to be an ACV.

Questions
1.1 – is the nominating organisation an eligible body to nominate?

1.2 – does the nominating body have a local connection to the asset nominated?

1.3 Does the nomination include the required information about the asset? – (i) description of the nominated land including its proposed boundaries; (ii) names of the current occupants of the land; (iii) names and current or last-known addresses of all those holding a freehold or leasehold estate in the land.

1.4 is the nominated asset outside of one of the categories that cannot be assets of community value (Schedule 1 2012 Regulations).

**Step 2** – Is the current or recent usage of the asset which is the subject of the nomination an actual and non-ancillary usage.

**Step 3** – Determining whether the usage furthers social wellbeing or social interests

**Questions**

3.1 Who benefits from the use?

3.1.1 Does it meet the social interests of the community as a whole and not simply the users/customers of the specific service?

3.1.2 Who will lose if the usage ceases?

3.2 Is any aspect of the usage actively discouraged by the Council’s Policy and Budget Framework?

3.2 Why is the usage seen as having social value in the context of the community on whose behalf the application is being made?

3.3 How strongly does the local community feel about the usage as furthering their social interests?
Each of the four sections is to be scored out of 25.

If the total is 55 or more out of 100 then the process goes on to the fourth step.

**Step 4** – Determines whether 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.

Questions

4.1 Has the building/land-take/space/legal requirement for this usage changed significantly since its initial use so that the asset is not fit for purpose? and if it has then

4.2 Could the asset be made fit for purpose practically and within reasonable resource requirements and within timescales?

The standard assessment has boxes not just for a summary of the evidence supplied by the nominee but also for feedback from other parties and other information or evidence gained in relation to the particular criterion. The ACV regime does not provide for the gathering of information and evidence from other sources or even the owner of the nominated assets when deciding whether or not to list. It treats both the nomination and any appeal as if an “ex parte” procedure involving only the nominator or the appellant (as appropriate). There are no regulations at this stage equating to those relating to applications to register a town or village green. As stated previously the practice of appointing an independent expert to hold a non-statutory inquiry which is followed with such town or village green applications has not been adopted with regard to community nominations.

Sensibly the “ex-parte” aspect of the procedure is not the approach that has been adopted by many authorities. As regards the process by which the listing decision is reached the Hounslow assessment allows for input from other sources including the owner but also other departments of the Council which may have relevant information regarding the nomination. It is clearly preferable for the listing authority to have as much information as possible upon which to base the listing decision. The drip feed in of information can lead to unnecessary appeals and expense. It has to be
borne in mind that there are tight timetables to be observed by the authority which do not allow for a relaxed gathering of information.

(e) **Timetable** – an authority has eight weeks from receipt of the community nomination to decide whether or not to list (reg. 7). It is open to the listing authority to make a decision at any time during the eight week period and it need not wait to do so. In consequence an owner may be too late if it holds back a response to the nomination until towards the end of the eight week period.

Following receipt of the nomination the authority must take all practicable steps to notify the nomination to the local parish council, freehold and leasehold owners of the land, and any lawful occupants. There is no specific time limit for such notification and it will be important for any owners or occupiers that wish to respond to receive notification as soon as possible because the authority’s eight week limitation will be running.

For the purposes of this regime an owner will be the freeholder if there are no leases with a term which when granted was for a term of not less than 25 years. If there is a lease with such a term of years then the owner of that leasehold interest is the owner. If there is more than one such lease then the owner is the leaseholder most distant from the freehold reversion (section 107).

The provision for notification does not expressly require that the nomination form and supporting evidence should be provided by the authority to the owner. The practice of authorities appears to differ. Some provide such information and some do not. These will be provided on a review. The sooner the information is provided the sooner a full consideration can be undertaken by all the interested parties. Interestingly it is noted in Haddon Development Limited v Cheshire East Council that the nomination form was provided after the appellant had made a freedom of information request to obtain information regarding the background to the listing.

There is no provision stating what is to happen if the authority fails to give this notification. Such failure is most likely if the land nominated is in multiple ownership and that is missed by the

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113 Reg. 8
114 CR/2015/0017 at para. 3
authority. In Higgins v Barnet BC such a failure was described as an administrative error but it was stated that nothing turned on it.\textsuperscript{115} The reason for this is that if the nomination is rejected there is nothing to challenge and if the nomination results in listing then the owner will be able to challenge the listing by a review and if unsuccessful then by an appeal to the First-tier Tribunal as in the Higgins case. A further justification for nothing flowing from a failure to notify the owner of a nomination is that an appeal is by way of a full reconsideration of the issues and so such failure cannot be determinative of the appeal.\textsuperscript{116} However, Suffolk Coastal DC accepted on review that land at Rushmere St. Andrew should not have been listed as the owner had not been notified of the nomination. This followed an unsuccessful appeal to the High Court\textsuperscript{117} by an objector against a Planning Inspector’s decision to grant to the charitable trustee owning the land planning permission for 14 dwellings.

In Sawtell v Mid-Devon DC\textsuperscript{118} one of the grounds for appeal was that although the owner of the nominated public house had received notification of the nomination the authority had not stated in the notification that the owner could make representations if the owner wished to do so. It was held by Judge Warren that this was a bad point because there was no obligation on the authority other than one to give notification of the nomination. From the judgment it appeared that following this issue being raised the particular authority had included a statement to that effect in the notifications now given but there was no statutory obligation on it to do so. This decision serves to emphasise the next point.

There is no statutory procedure providing a means by which a nomination can be opposed. In consequence the process has been described as an ex parte procedure. However, it is to be expected that written representations by or on behalf of the owner will be considered by the authority. It is not the intention that the authority should only take into account information in the application for listing. Not only is such an approach fair to the owner but it is in the interest of the authority to receive the owner’s evidence and representations before listing because if it lists and

\begin{itemize}
\item \textsuperscript{115} Para. 2
\item \textsuperscript{116} Judge Lane in Haley (Old Boot) v West Berkshire DC CR/2015/0008 at para. 7.
\item \textsuperscript{117} Robinson v SSCLG and Suffolk Coastal DC [2016] EWHC 634 (Admin)
\item \textsuperscript{118} CR/2014/0008 at para. 4
\end{itemize}
then removes the asset on receipt of such evidence and submissions it runs the risk of having to pay compensation for loss caused by the listing. It is in no-one’s interest that the relevant information to a listing should be provided to the authority in a piecemeal fashion. It often happens that important information is not supplied until after the asset has been listed and this then results in the removal of the asset from the list. This is undesirable.

If representations are received from the owner should these be provided to the nominator and what role will the nominator play in the process once the nomination has been given to the authority? The ACV regime is silent on this. The advantage of involving the nominator is that it will ensure that the maximum amount of relevant information is provided to the authority. As has been the case with village green applications it will be necessary for authorities to feel their way on this aspect of nominations. The requirements of the Data Protection Act 1992 will have to be borne in mind when exchanging documents or information as this stage of the listing process.

Due to the timetable there is a need for an owner that wishes to oppose the application to focus on the key issue which is whether one or other of the tests in section 88 have been satisfied and to speedily assemble any evidence to support the opposition. From the owner’s point of view it is far preferable to successfully oppose an application because there is currently no appeal from a refusal to list.

In a number of cases there has been a failure by the authority to meet the eight week deadline in regulation 7. In some case the delay can drag on into months. This may result in a challenge from the owner of the asset nominated that the nomination must fail and there cannot be a listing as a result of that nomination. In such circumstances there would be nothing to prevent a fresh nomination in the same form and as a result a listing if appropriate in the circumstances. The failure would not preclude a future listing. Independently from the time limit the authority is under a duty to consider and determine the nomination. If the asset qualifies as an asset of community value then the authority is obliged to add the asset to the list of ACVs and has no discretion in the matter.

Consequently, I would expect an authority to continue with its consideration of the nomination even if it has not met the deadline. In the event that this results in the listing of the
asset the appropriate route of challenge will be by a review and then an appeal. The availability of this route means that there is an alternative to judicial review proceedings which is a reason for not pursuing judicial review. On a review and then a subsequent appeal it is unlikely that failure to meet the deadline would be a reason for removing the asset as it does not relate to the statutory criteria. This might allow an argument that review and appeal are not a satisfactory alternative route and so permit a challenge by judicial review. However, as an identical fresh nomination would in such circumstances result in a listing this in itself might be a ground for withholding consent to the continuation of the judicial review proceedings. As a practical matter it means that it is not worth the asset owner incurring the costs of the proceedings.

Such a failure could give rise to a particular issue when the asset nominated is a public house. The nomination will cause the public house to be taken outside the permitted development regime and before there can be development a fresh planning permission would be needed. Does this mean that once the eight week period expires the public house remains outside the permitted development regime or does it fall back into it? I consider that the answer is that it stays outside the permitted development regime because of the definition of “specified period” in the 2015 Regulations. This is because once nominated it is taken outside the permitted development regime during the specified period which only ends when the nominated asset is entered on either the list of ACVs or the list of unsuccessful nominations. In consequence even if the eight week deadline has expired the specified period will continue and the owner will not be free to proceed with demolition or building works.

(f) **Multiple nominations** - a recent development with nominations is multiple nominations. The Otley Pub Club applied to Leeds City Council for a blanket classification of all pubs in Otley as ACV. The Chairman justified this on the basis that “they are an integral part of our historic town and part of its wide appeal.” Surprisingly the nominations have been accepted and all twenty pubs have been listed in April 2015. It would not seem to be in line with the requirements of the regime. It raises a question mark over the decision to list and whether each pub was considered separately on the basis of the facts and merits applying to each individual pub and a separate

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119 See section 9(a).
judgment made in relation to each. The ACV regime does not provide for classes of asset to be listed collectively. This action has resulted in at least one appeal by the owner of the Old Cock. This was converted to a pub only four years ago and is run by an independent owner. He requested a review and it was argued that as there are other pubs in the town there would be little impact on the local community if it were to close particularly as much of the pub’s trade came from outside the local community. The review decision in August 2015 retained the pub on the list. The matter then went on appeal\textsuperscript{120}. Judge Lane decided the appeal at the request of the parties without an oral hearing and said that the 2011 Act “does not require the potential asset to be unique or even special.”\textsuperscript{121} The sole issue to be decided was whether the use of the asset furthers the social wellbeing or social interests of the local community. This runs counter to the guidance given by a number of listing authorities that with profit making concerns such as shops account is taken of the impact that would occur if the asset were to be closed and whether there would be an alternative available? Such guidance will need to be reconsidered.

A similar approach was adopted in 2015 by the Hampstead Neighbourhood Forum which sought to nominate the 12 remaining pubs in Hampstead. A number have been listed as a result.

In contrast some authorities have rejected a nomination of a single pub on the basis that there are other similar pubs in the locality. The attraction of nominating multiple assets is obvious but has the potential to result in assessments which do not take full account of the individual circumstances of each of the assets. What is to stop such applications being made in respect of other types of buildings such as shops?

There is nothing which expressly allows a nominator to supplement the information set out in the nomination form. To assist the authority in reaching the correct decision it is important that the authority has as much of the relevant information as possible. With that in mind it would be sensible to allow supplemental representations. The regime is disappointingly limited with regard to the provision and obtaining of relevant information and the exchange of such information.

\textsuperscript{120} Pullen v Leeds City Council CR/2015/0011
\textsuperscript{121} Para. 11
(g) **Mandatory listing** – the authority is bound to consider any community nomination and if the nominated asset is in the authority’s area and “of community value” satisfying the requirements of section 88 then the authority must register the nominated asset on the list (section 90(2), (3) and (4)). There is no discretion which would allow the authority to refuse to register the asset. In particular, the possibility of a claim for compensation as a result of the listing cannot be taken into account by the authority and cannot affect the decision on listing made by the authority. In the event that the authority decides that the asset does not qualify then the authority must supply the nominator with written reasons for not including the nominated asset on the list (section 90(6)).

(h) **Partial listing** - one practical issue that has arisen is whether the authority must decide whether to list the whole of the land nominated or reject the whole nomination or alternatively whether the authority has the ability to list only part of the land nominated rather than the whole. This was an issue which was discussed in the Gullivers Bowling Club case because one of the bowling rinks had not been used for some time. However, it did not have to be decided because the judge decided to uphold the decision to list the whole of the club’s land including the disused bowling rink. On this point Judge Warren stated at para. 9 that:

“My conclusion on this makes it unnecessary for me to explore an issue discussed at the hearing as to whether a local authority, or the Tribunal on appeal, can decide to list part of a nominated site. Any such judgment is likely to be very fact-specific. I would comment only that, for myself, I can find nothing in the Act to suggest that Parliament intends to forbid local authorities to take what might appear in some cases to be the fair and sensible course.”

A similar position arose in Punch Partnership v Wyre BC\(^{122}\) with regard to the attempt to exclude part of the car park and grassed area from the listing of the public house. The attempt failed but it appears to be implicit in the consideration of this point that if successful that land would be excluded and the public house listed rather than the whole nomination having to be rejected.

\(^{122}\) CR/2015/0001
Also relevant to this issue is the approach adopted in Trouth v Shropshire supra when dealing with a nomination relating to a field previously used as a playing field and an adjacent car park. In substance this was treated as two separate nominations with each being considered separately and the decision to list being made separately and not being conditional upon the other also being listed. It was implicit in this approach that one could have been listed even if the other was not. Similarly, in the Punch Partnership case by considering whether the car park and the grassed area should be excluded from the listing of the pub it would seem that it was being implicitly accepted that there was power to carve out of the nominated land those parts although such a power was not expressly considered in the judgment.

Whether or not a listing can be amended by the removal of part of the listed asset from the listing was expressly left open by Judge Lane in Wellington Pub Limited v Kensington & Chelsea BC123 but without disapproving of any earlier stance by the Tribunal. The point was not expressly addressed in Kicking Horse Limited v Camden LBC but if any of the attempts to remove a part of the building from the listing had been successful it would have had to be and it seems to have been implicit in the prosecution of the appeal that it was possible to sever parts from the listing.

Some authorities have listed some part but not the whole of the land nominated. For example, the Watchfield Inn in Burnham-on-Sea was listed as regards the public house and the car park but the camp site at the rear was excluded from the listing.

There is nothing in the statutory regime which expressly caters for the possibility of a partial listing. Section 90 provides that a nomination must be accepted if the land nominated “is of community value” (section 90(3)(b)). It does not expressly provide that part of the land nominated can be listed but such an implication would not seem to be too onerous or contrary to the rationale underlying the ACV regime.

It may be an acceptable approach to consider when dealing with a nomination relating to land which only partially qualifies as an ACV that it should be dealt with in stages:

123 Supra at para. 41
(1) **Stage 1** - does the nomination form in substance comprise more than one nomination? This appears to have been the position in Trouth v Shropshire CC supra. There is nothing which expressly prohibits more than one nominated land being dealt with in the same community nomination form (regulation 6). If there are separate nominations then each will be considered and determined separately as was the case in the Trouth case. This also appears to have been the approach adopted in Haddon Property Development Limited v Cheshire East Council\(^{124}\) which concerned the nomination of a community park and adjoining golf course in common ownership. The park was accessible by the public and accepted as properly listed. The golf course had closed and the temporary planning permission for the clubhouse had expired so that it had become unauthorised and should have been demolished. Due to “the significant functional difference between the country park and the golf course”\(^{125}\) each had to be considered separately as in Trouth v Shropshire CC\(^{126}\)

(2) **Stage 2** – if not a nomination of more than one distinct area can the nominated land be split by clear demarcation from information provided in the nomination form. If it is clear to the authority that only part of the land nominated qualifies as an ACV and part does not then the authority cannot list the whole of the land nominated. In reaching such a decision it has to take account of the decision in the Gullivers Bowling Club supra which included a disused area within the land to be listed. Provided that the information in the nomination form is sufficiently clear to allow the two areas to be demarcated without any concern as to accuracy then the authority should be able to list the part of the nominated land that qualifies.

If it cannot do this then it would have to reject a nomination which would then most likely result in a fresh nomination being made relating to the part of the previously nominated land which is considered to qualify as an ACV. In such circumstances the fresh nomination would lead to a listing. A statutory interpretation which avoids the need for a fresh nomination to arrive at the same result would be likely to be applied. It also avoids the oddity of an authority explaining that it has rejected the first nomination even though part qualifies as an ACV.

\(^{124}\) CR/2015/0017
\(^{125}\) Para. 16
\(^{126}\) CR/2015/0002
In cases in which there is not sufficient information contained in the nomination form to allow the authority to accurately define the part of the nominated land that qualifies for listing the nomination should be rejected. The anticipation in such circumstances is that a fresh nomination will be made relating to just the part of the previously nominated land which qualifies but with a more accurate description of that land. As discussed in section 7(j) below there is not an express prohibition in the statutory regime relating to a renewed application.

As stated above some authorities have listed only part of the land nominated. Further examples include Warren Farm in Ealing and Greenhill Gardens in Weymouth. In January 2015 Ealing LBC registered one third only of the land at Warren Farm which had been nominated. A second nomination has now been made seeking to have listed further parts of Warren Farm. Clearly Ealing LBC considered that it has the power to register only part of the nominated land. With regard to the nomination of Greenhill Gardens and Play Gardens Weymouth and Portland BC listed the nominated land save for the chalets and the Council store.

In such circumstances if the land nominated by the first nomination is in single ownership then to list only part will mean that after listing there is the possibility of a part-listed disposal which will not be subject to the moratorium provisions.\textsuperscript{127} For these purposes as well as being in single ownership the two parts (listed and non-listed) must be accessible from each other. This should not be a factor which prevents the asset being listed but it will avoid the operation of the moratorium.

(i) Publicity – the authority must publish two lists. One will be the list of ACVs and the other will be the list of failed nominations (section 94(1)). These will be found on the authority’s website. Copies must be made available for inspection and copies provided free of charge on request. Notice of the inclusion of the asset on the list must be given to the freehold or leasehold owner and occupiers of the land, the nominator and the local parish council (section 91(2) and reg. 5). Such notice must state the consequences for the land and the owner of listing and the right to request a review (section 91(3)).

(j) Renewed nominations – there is nothing in the statutory regime to prevent a renewed nomination for listing to be made if the local authority decides not to list. It was expressly noted in

\textsuperscript{127} See section 8(e)(vii)
Gibson v Babergh that there was nothing in the ACV regime to prevent an asset being listed again when it had been removed from the list as a result of review. 128

This has also occurred with the Compasses pub in Great Totham which has been a pub since 1719. It was originally listed in March 2014 by Maldon DC and then removed on review. It was listed again in June 2015 but again removed on review as it was considered that there was no evidence that it would become a community hub or that the community was poised to step in and support it and run it if required. However, it was listed for a third time in November 2015 and that listing has been upheld on review. This is against a background of planning applications for residential development.

The same is the case with both the Kensington Park Hotel and the Red Lion in Isleworth. The first listing of each was removed on review due to procedural defects. Both have now been listed again on a second community nomination.

The same is true as regards a listing following a rejection. For example, the renewed nomination to list Soddy Gap near Cockermouth in Cumbria was successful in December 2015 and upheld on review. The first nomination related to Broughton Lodge which comprises 483 acres and was rejected because the primary use of the area which is the former site of open cast coal mining is agricultural and forestry and the small community use as a nature reserve was ancillary to that primary use.

Renewed nominations are frustrating for landowners and to a lesser extent local authorities. Some local authorities will not allow a renewed application within five years of the decision not to list. It may be that some will reject an application if it is considered vexatious. That seems to have been the position in one case I saw with a renewed application. That must be justifiable if there is a legal objection to listing which cannot be overcome no matter how many times the application is made. It has been recommended by the House of Commons committee that there should be an ability to renew but only if there is new and material information.

128 See section 10(i) below
(k) **Duration of listing** – the listing will last for a period of five years although the local authority has the ability to remove the asset from the list before the expiry of that period. The removal must be for a good reason as the authority is required not only to give notice of the removal to the freeholders and leasehold owners and occupiers of the property, the local parish council and the nominator but must also state the reasons for removal.

Regulation 2(b) and (c) of the 2012 Regulations provides that an authority must as soon as practicable make entries on the list of ACVs amending or deleting entries so as to exclude any land which:

(i) has been the subject of a relevant disposal which is not an exempt disposal (reg. 2(a)). This will be either a disposal within the protected period or a disposal to a community interest group during the moratorium period. For example, as regards a disposal during the protected period if land has been listed and the owner has given a notice of intention to dispose which has been met by notice of a request to be treated as a bidder by a community group then if the six month moratorium period expires without a disposal to the community group the owner is free to dispose of the asset during the next twelve months and if the owner does so then the asset should be removed from the list. Whereas the removal of the Maybush Inn in Great Oakley is an example of a listed ACV being removed from the list on its sale to the Great Oakley Community Hub.

What is not expressly provided for in the ACV regime is whether a fresh nomination is possible after the removal from the ACV list. To relist the asset will defeat the objective of the removal but it cannot mean that the removal bars a fresh listing in perpetuity. Can there only be a relisting if justified by facts occurring subsequent to the removal. In such circumstances a listing would be justified but the ACV regime does not expressly impose such a limitation on the ability to list in the future after a removal. The New White Bull was removed from the ACV list kept by Broxtowe DC following a relevant disposal and by the time of the planning appeal a fresh community nomination had been made but rejected.

(ii) an appeal against listing is successful (reg. 2(b). This provision would seem to overcome the suggestion that if an appeal is successful then the matter should go back to the authority to decide because it is for the authority to consider that the asset satisfies the criteria for listing. If an
appeal is successful then the authority must make the appropriate amendment or deletion as soon as practical.

(iii) the authority for any reason no longer considers the land to be land of community value (reg. 2(c)). This will allow listing authorities to take account of a change in circumstances subsequent to the listing. Even if there has been no subsequent change it might also allow an authority to change its view but it would have to be for good reason. This perhaps could be that the authority has received further information which is material to the decision. If that is allowed then it would mitigate the stringency of the time limits applicable to requesting reviews and making appeals.

An example of a subsequent occurrence which could result in the removal of an asset from the list could be if there is a successful application to change the permitted use of the asset. Interestingly in this context Judge Lane suggested in Punch Partnerships v Wyrie BC supra at para. 17 that if the proposed planning application was successful and planning permission was granted for a retail unit which would be built partly on part of the pub car park and grassed area then that would constitute a new planning unit and that would be a justification for an application to have that land removed from the ACV list. He did not say whether the removal should be triggered because of the grant of the planning permission or the implementation of the planning permission. The latter would certainly be a good reason for removing the part of the asset subject to the planning permission from the list. However, the grant alone could be a good reason if it means that as a result of the grant there is no longer a realistic prospect of a future community use of that part of the asset. In STO Capital Limited v Haringey LBC supra following a review of the listing decision there was a successful planning appeal against a planning refusal which meant that the Alexandra pub could be converted to two three-bedroom family dwellings. As a result it was held on appeal that the Alexandra should be removed from the ACV list. The existence of the planning permission was sufficient to produce this outcome. Had the decision on the planning appeal been made after the appeal it would have justified the removal of the public house from the ACV list although the authority may have been reluctant to take such a step until the residential development was commenced.
As discussed in section 5.2 above the grant of planning permission to change the use of the Bull Inn from public house to residential may result in the removal of the Bull Inn from the ACV list. This could possibly be as a result of the grant itself or if not then on the actual change of use or the offering of the building for sale as a dwelling.

In general there has been a reluctance to introduce planning concepts into the interpretation of the ACV regime (as stated by Judge Warren in the Gullivers Bowls Club) but this is not applying planning law but rather taking into account the planning position of the relevant asset as part of the factual matrix by which the listing decision is to be made. As with CIL definitions used in planning law have been expressly excluded from applying but the actual planning position will be a relevant and important part of the facts to be taken into account when reaching a decision.

The authority should keep the list of ACVs under review to ensure that when appropriate assets should be removed from the list. There is nothing to prevent a fresh nomination for listing being made on the expiry of the five year period with a view to having the asset relisted.

(I) **Land Registry restriction** – when registered land is listed as an ACV a restriction (Form QQ) should be entered so that a subsequent disposition can only be registered if a conveyancer has certified that the moratorium provisions have been complied with. In the case of unregistered land such a restriction should be entered on first registration (para. 2 Sch. 4 2012 Regulations).
8. MORATORIUM –

(a) General operation of moratorium – if an owner wishes to make a relevant disposal of a listed ACV then written notice must be given to the local authority which will trigger a moratorium (section 95). The local authority has no discretion which will allow the owner to dispose of the listed asset during the moratorium period other than in accordance with the rules imposed by the ACV regime. This is a point which some owners find difficult to understand. In the Chadwick case the claimants acting in person felt that the local authority should have diluted or modified the operation of the ACV regime partly because of the ill health of one of the claimants. In consequence it was expressly emphasised by Judge Lane\(^ {129}\) that listing “carries certain legal consequences which are not for a Council to ignore or dilute”.

This is the case even if the owner has been seeking to sell the asset before listing. Such marketing will not affect the position once the asset is listed. A “subject to contract” purchase agreement will not affect the operation of the moratorium provisions. It is only if there was prior to listing a binding sale and purchase agreement that the moratorium provision will not bite on that disposal and the completion of the agreement will be outside the operation of the moratorium provisions (see section 8(e)(x) below).

This block on disposals during the moratorium applies equally to disposals which would be approved by the nominator other than a disposal in favour of a community interest group. For example, the Red Lion in Bloxham had been listed and an offer to purchase made to the owners, Fullers, by the publicans of one of the two operating pubs in the village with a view to running the Red Lion as a pub. This was in addition to an offer by a community interest group. Fullers could not accept that offer by the publicans at that stage because of the continuing application of the moratorium provisions. The local group opposing the sale of the closed Red Lion for development could not authorise such a sale and as the pub was closed there was no continuing business so it could not qualify as an exempt disposal. In consequence Fullers had to wait for the expiry of the moratorium period before it could accepting the publicans’ offer.

\(^{129}\) Para. 36
The details of the proposed disposal do not need to be provided in the notice. Subsection (2) of section 95 requires that the owner has “notified the local authority in writing of that person’s wish to enter into a relevant disposal of the land”. The wording is such that it does not require that the owner has a particular disposal in mind. It is sufficient that this is the owner’s wish or general intention. There is no requirement that the owner give a confirmation that there is a prospective buyer. If this is correct this will mean that an owner can serve a notice with a view to allowing the six month moratorium period and then setting about selling the asset in the following year. It would appear from the facts in the Beehive case¹³⁰ that shortly after the review decision to retain the listing of the Beehive a notice of intention to dispose was given triggering the moratorium period which expired on 18th February 2016 but the appellant did not have a buyer at that stage.

Once the notice is given in respect of a listed asset an interim moratorium period will start to run in which period a relevant disposal cannot be made unless it is an exempt disposal (see section 8(e) below). This is a period of six weeks from notification to the authority of the owner’s wish to make a relevant disposal (“the notification date”).

If the local authority receives a written request from a community interest group requesting that it be treated as a potential bidder in relation to the listed ACV then the interim moratorium period shall be extended to a full moratorium period which is a period of six months beginning with the notification date. If no such written request is received by the local authority within the interim moratorium period then the owner is free to make the relevant disposal within the protected period which is a period of eighteen months running from the notification date.

In the event that a written request is made triggering the full moratorium period then on the expiry of that period the listed ACV can be the subject of the relevant disposal during the protected period which will be the period of one year from the expiry of the full moratorium period.

¹³⁰ Hawthorn Leisure v St Edmondsbury BCCR/2015/0018 at para. 7
During the protected period the owner may dispose of the ACV upon such terms as it wishes and to whomsoever it wishes without any restriction. Conditional sales may give rise to a problem much as they have when entered into before an asset is listed. The satisfaction of a condition may not occur until after the expiry of the protected period. In such circumstances will the subsequent completion of the contract be permissible under the ACV regime or will it require a notice from the owner triggering another moratorium period? The operation of section 96(4) will provide the solution as the transfer on completion will be treated for the purposes of the ACV regime as occurring when the agreement was entered into rather than the date of the transfer. Anything else would create substantial problems for both the vendor and the purchaser which cannot be justified or have been anticipated when the regime was introduced.

The owner of the listed asset cannot be compelled to dispose of the listed asset to a community group nor can the owner be compelled to negotiate with such a group. It is open to the owner to serve a notice of intention to dispose and then sit out the moratorium period. By way of example, a special school in Shipley owned by Bradford Council was listed but the Council wishes to sell at auction. Having served a notice of intention to dispose of the school it has waited and will put the school into auction once the moratorium period expires. It has pointed out that there is no obligation to negotiate and any community group will be able to bid at auction although whether that is practically possible is another matter. There are no steps that can be taken to compel the owner of a listed asset to engage with the community interest group.

In the event that there is a relevant disposal during the relevant period then the asset should be removed from the ACV list but that is unlikely to prevent a fresh community nomination being made with regard to the asset although the new nomination may not be successful. This is what happened with regard to the New White Bull in Giltbrook but that nomination was rejected and planning permission to change to a foodstore was granted on appeal heard after the rejection.

Once that protected period has expired without such a relevant disposal having been made then if the owner wishes to make a relevant disposal a fresh notice must be given and a fresh moratorium will be triggered operating again in the same way. This has happened recently with Fenton Town Hall which is owned by the Ministry of Justice and was listed in July 2013. The MoJ
gave notice that it intended to sell and the Fenton Community Association requested that it be treated as a potential bidder. The six month period expired with no bid from FCA. Then the eighteen months expired with no disposal by the MoJ. Now it wants to sell and it will have to go through the same procedure again as a new moratorium takes effect.

(b) Relevant disposal – for the purposes of operating the moratorium provisions a disposal is a relevant disposal (section 96) if

(i) a disposal with vacant possession of the freehold estate in the listed ACV;

(ii) a grant of a lease for a term of twenty-five years or more; or

(iii) the assignment of a leasehold estate when the original term was for twenty-five years or more.

A grant or an assignment are not apt to include an agreement to grant or assign and so such an agreement would not appear to be by itself a relevant disposal. There is greater uncertainty as to whether an agreement to transfer a freehold estate is a disposal for these purposes. Even if an agreement does not itself constitute a relevant disposal the moratorium provisions will still bite. It is provided by section 96(5) that a contract to make a disposal within (i), (ii) or (iii) will cause the relevant disposal to be treated as entered into when the agreement “becomes binding”. In consequence a contract to sell during the moratorium period will be an infringement even if completion is after the expiry of the moratorium period as the date of the transfer is backdated to the date of the contract.

Certain types of disposal are exempt by reason of regulation 13 and the Third Schedule to the 2012 Regulations (see section 8(e) below and the Third Schedule hereto for the full terms).

It would appear that a sale of a freehold subject to a lease is not a relevant disposal. The grant of a lease for a term which was less than 25 years when granted will not be caught. For a freeholder to grant a short term lease to A and then sell to A the freehold subject to that lease will run the risk of a sham argument or the application of the Ramsay principle but the wording of section 96 encourages such thoughts. In such circumstances the asset will remain on the list of
ACVs as there will have been no relevant disposal of the asset requiring it to be removed from the list.

(c) **Publicising the owner’s notification** - following receipt of a notification of a wish to make a relevant disposal the authority must update the ACV list by revealing that such written notification has been given, the date of receipt and when the interim moratorium period will end (section 97). The nominator of the particular listed ACV should also be informed in writing of such matters and in addition the authority should publicise such details in the local area. This is necessary to alert interested community bodies to the running of the interim moratorium period and the date by which a written request to be treated as a potential bidder must be received by the local authority.

(d) **Written request** – a written request to be treated as a potential bidder must be given by a community interest group. For these purposes a community interest group is the local parish council and any one of a charity, a company limited by guarantee, an industrial and provident society and a community interest company provided that such body has a local connection (see section 7(a) above). It does not include an unincorporated body in contrast to those that may make a community nomination.

As soon as practicable after receipt of such a written request within the interim moratorium period the local authority must pass on the request to the owner of the listed ACV or inform the owner of the details. So far few assets have been purchased for the community through this process. The purchase of the Ivy House in Nunhead has received considerable publicity. There have been a few others as well such as the Kings Arm at Shouldham which was purchased for £225,000 of which £150,000 was raised by donations and the remainder by grant. It may be that one of the impacts of the 2015 Regulations excluding nominated and listed pubs from the operation of the permitted development regime will be that owners of pubs are more inclined to accept offers from community groups particularly if the pub’s business is no longer commercially viable.

(e) **Exempt disposals** – this is an important aspect of the regime as regards landowners. Not all relevant disposals trigger the operation of the moratorium provisions. A disposal of the type set
out in section 95(5) or Schedule 3 to the 2012 Regulations (their full terms are set out in the Third Schedule hereto) will not be a relevant disposal and so can proceed without triggering the moratorium even if the subject matter is a listed ACV.

In the DCLG Guidance it is advised that if an owner is uncertain whether an exempt disposal will be carried out the giving notice of intention to dispose as a precaution is sensible (see Appendix A). In such circumstances it is advised that although there is no obligation to inform the authority that an exempt disposal has taken place it would be sensible to provide the authority with that information.

This section will focus on those exempt disposals which are more likely to occur. The following disposals are included amongst those which are exempt disposals:-

(i) gifts including a transfer into settlement (sub-section (5)(a));

(ii) distributions by personal representatives in satisfaction of an entitlement under the terms of a will or the rules of intestacy (sub-section (5)(b)) and a sale if to raise funds for one of a number of specified purposes concerned with the administration of the estate such as the payment of taxes or the deceased’s debts (sub-section (5)(c));

(iii) changes in trustees (whether retiring or becoming) (sub-section (5)(g)) or a transfer from a trustee to a beneficiary in satisfaction of an entitlement under the trust or in exercise of a trustee power (sub-section (5)(h));

(iv) disposals between members of a family (sub-section (5)(d)) and this is determined by whether the parties have a common grandparent (sub-section (7)(b)). This will include the owner’s parents but not the grandparents;

(v) changes in membership of a partnership (whether joining or leaving) (sub-section (5)(i));

(vi) as part of a sale of an on-going business (sub-section (5)(f)). This has given rise to criticism as a route by which the moratorium can be avoided. For example, a sale of a pub business together with the pub will not be subject to the moratorium and the purchaser may then convert
the pub to a store although now a planning permission will be required. It has been recommended by a House of Commons committee that this exclusion be removed.

(vii) part-listed disposals (sub-section (5)(e) and para 11 Sch. 3) – a disposal of land which is in part listed and in part not will not be a relevant disposal if both (1) the land is in single ownership (even if not the same registered title); and (2) each part of the land can be accessed from the other without having to cross land owned by a another person (para. 11(1) Sch. 3). Land divided by a road, railway, river or canal will still satisfy condition (2) if it is reasonable to think that the condition would be satisfied if such intervening land were removed and there was no such gap (para. 11(2) and (3) Sch. 3). These conditions are similar to those applicable when considering the extent of a residence excluded from the operation of the regime (see section 6 above). The conditions seek to determine whether the land comprises “one coherent parcel of land all owned by a single owner”.\(^\text{131}\)

For these purposes a single owner means not just the same person (whether sole or joint ownership) but also includes trustees of different trusts which were settled on those trusts by the same settlor.\(^\text{132}\)

This could be particularly relevant if land adjoining a residence in single ownership is listed. The nomination of such land have occurred. In one case where the nominated property and adjoining residence were together on the market. It may be that it was not suspected that the listing would not have stopped a sale from going ahead without any wait. However, the asset would remain on the ACV list as an exempt disposal does not automatically result in the removal of the asset from the list.

There is nothing in the provisions to deal with a case in which the owner of a listed ACV acquires adjoining land which is not listed. If the two conditions are satisfied by the partly listed and partly not listed land now being in a single ownership can the aggregate holding be sold without being subject to the moratorium? It would appear that it can be.

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\(^\text{131}\) Annex 1 to the non-statutory Guidance

\(^\text{132}\) Reg. 1(4)
In such situations it has been suggested that the asset should not be listed but there would appear to be no real justification for such an approach. The provision only applies to an asset which has been listed and a disposal by the owner will not cause the asset to be removed from the list of ACV.

(viii) disposal pursuant to a separation agreement between spouses or civil partners or an agreement between current or former spouses or current or former civil partners relating to the care of a child dependent on one of the parties (para. 2);

(ix) Pursuant to a section 106 planning obligation unless the land was listed before the obligation was entered into (para. 4(1)(a));

(x) disposals pursuant to an option, pre-emption right, nomination, right of first refusal unless the land was listed when the option or right was entered into (para. 4(1)(b)).

An option after listing will not be within this exclusion even if during a protected period. Therefore, an option granted in a protected period but not exercised until after the expiry of that protected period will give rise to a serious problem. Will the retrospective effect of section 96(4) apply to the contract resulting from the exercise so the transfer on completion of such contract will be treated as occurring within the protected period or will it be subject to the ACV moratorium provisions? In the latter case it could mean that there will be a claim for breach of contract.

In contrast a grant of an option when an application has been made but not decided will mean that on the exercise of the option after listing there will be no application of the moratorium provisions and the sale can be completed without having to wait.

This exemption does not expressly cover an exchange of contracts prior to listing. It would clearly be wrong for the ACV regime to interfere with existing contractual obligations and rights. However, this complication is avoided because the completion of such a contract will not trigger a moratorium as the disposal will be treated as having occurred when the contract became binding. Section 96(4) of the 2011 Act provides that a relevant disposal made in pursuance of a binding agreement is treated as entered into “when the agreement becomes binding”. A “subject to

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See owner’s submissions on review of listing of lot 4 Hauxton Mill Buildings Hauxton
contract” contract will not be sufficient for these purposes as it is not binding. The listing of an asset should prevent the owner entering into a binding contract until the owner has given notice of intention to disposes of the asset in compliance with the ACV regime and the appropriate moratorium period has run its course.

An example of this is the Centurion pub in Chester which was listed in January 2015. Contracts for the sale of the pub took place in November 2014 before the listing. The purchaser wants to convert it to use as a care home for which a fresh planning permission will be needed. The Council has advised that as the exchange took place before listing the moratorium provisions will not apply to a completion of that sale. It is a sale conditional on the grant of planning permission. So far no grant has been achieved and in consequence it remains on the list of ACV.

What has been causing concern and problems for owners, developers and authorities is whether this treatment provided for in section 96(4) applies to a conditional contract as well as to an unconditional contract. If there is a contract conditional on the grant of planning permission (as with the Centurion) and before the grant of planning permission satisfying such condition the asset is listed does that mean that completion of the contract can take place without regard to the ACV regime once a satisfactory planning permission is granted or must notice be given and the moratorium provisions complied with? It would be objectionable that there should be such an interference with contractual relationship and if there is to be then it should require explicit statutory wording. Even with a conditional contract the owner will be bound to comply with the terms of the contract. This does not just mean that there will be the obligation to sell if the condition is satisfied. The owner will as a minimum be immediately subject to the obligation not to act in a manner which defeats the contract. It will not be open to the owner to walk away from the sale and in consequence the owner is bound by the agreement even if at the start not bound to transfer the land. Some contracts provide for a sale and purchase but make the obligation to complete conditional. That would certainly seem to be covered by the wording of section 96(4) and if so then so should a sale contract subject to a condition precedent as opposed to a condition subsequent. The exercise of an option may be conditional on, say, the grant of planning permission but that will not prevent a transfer pursuant to an exercise of such an option from
being an exempt disposal. If that is the case then there would appear to be no justification for treating conditional contracts more harshly under this regime.

A nomination by the supporters trust to list Plymouth FC’s Home Park Stadium (including the offices and car park) has been successful. The club is in private ownership but the stadium is owned by Plymouth CC. However, it is reported that the owner of the club has an option to purchase the stadium and so even if the ground is listed will be able to acquire the stadium upon exercising the option without regard to the moratorium provisions.

(xi) certain disposals in relation to compulsory purchase – the transfer back to the original owner after a compulsory purchase (para. 5) and the acquisition by statutory compulsory purchase (including a purchase by agreement which could have been pursuant to a compulsory power\textsuperscript{134} (para. 8);

(xii) a disposal made under or for the purposes of any statutory provision relating to incapacity (para. 3). There is a wide definition of incapacity covering physical or mental impairment and “lack of, or impairment to, capacity to deal with financial and property matters.” This may be temporary or permanent.

(xiii) sale by way of enforcing security (para. 6). Sales by mortgagees or receivers pursuant to powers of sale conferred by the security may in the appropriate circumstances be made without the moratorium regime biting.

(xiv) disposal pursuant to insolvency proceedings\textsuperscript{135} (para. 7).

(xv) inter-group transfer\textsuperscript{136} (para. 10).

(xvi) a disposal pursuant to an order by a court or statutory tribunal (para. 1).

(xvii) grant of agricultural tenancy to a successor on the death or retirement of the current tenant pursuant to Part 4 of the Agricultural Holdings Act 1986 (para. 9);

\textsuperscript{134} See definition of a statutory compulsory purchase in reg. 1(3)

\textsuperscript{135} The definition of insolvency proceedings is specified to be that in rule 13.7 of the Insolvency Rules 1986 which is any proceedings under the Insolvency Act 1986 or the Insolvency Rules.

\textsuperscript{136} Determined by reference to the meaning of “group undertaking” contained in section 1161(5) Companies Act 2006
(xviii) churches closed under Part 6 of the Mission and Pastoral Measure 2011 – Part 6 provides for public consultation which may result in the sale or lease of the building for an agreed purpose or demolition or transfer to the Churches Conservation Trust for preservation. It is then noted that following the outcome it will be once more possible to list the building. This is not wholly consistent with social wellbeing or social interest not including religious worship.

An exempt disposal will not cause the land previously listed to lose that listing and so the transferee will have to abide by the ACV regime. This is in contrast to an asset which is the subject of a relevant disposal after the expiry of the moratorium period and during the protected period. Further notice must be given to the listing authority that the disposal has been made and details must be provided of the name of the person who has become the owner (including in the case of a body corporate its place of registration and registered number) and the address of the new owner. This notice must be given “as soon as practicable” after the change in ownership. The definition of disposal include a binding agreement to make a disposal. It is not clear whether notice has to be given after such an agreement is entered into or only after the agreement has been completed and the change in legal ownership effected.

(f) Infringement – care must be taken to ensure compliance with the obligations imposed by the ACV listing regime. A disposal which contravenes section 95(1) and occurs during the moratorium will be ineffective (reg. 21(1)) unless the transferor having made all reasonable efforts to find out if the land is listed still does not know that it is listed when making the disposal (reg. 21(2)). There is no beating about the bush. The disposal does not take effect even if registered at HM Land Registry and if the purchase price has been paid. Presumably the parties must wait until the expiry of the moratorium and then execute a confirmatory transfer but by then all sorts of problem could have arisen and rights gained priority. If still an agreement which was entered whilst the property was listed one of the parties could back out on the basis that there is no enforceable agreement. One of the parties may have subsequently become insolvent or died. Matrimonial difficulties could have resulted in a spouse becoming interested in the asset. Even if both parties wish and are still able to continue a confirmatory transfer could be ineffective as it

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137 reg. 19(2)
138 reg. 19(3)(b)
could be treated as occurring during the period of listing. Further the listing of the land will also give rise to a local land charge (section 100). The full horror of the consequences of an infringement have yet to be explored.

Unlike the amended legislation relating to the statutory pre-emption right in favour of flat owners in the Landlord and Tenant Act 1987 there is no provision dealing with conditional contracts as discussed above. Knowing that a nomination is to be made or is on foot can an owner enter a conditional contract to sell with a view to circumventing the consequences of a listing? If the owner does and the contract becomes unconditional after listing can the sale be completed without waiting? Is the agreement only binding when it becomes unconditional so that the disposal is treated as made at that date rather than the earlier date that the conditional contract is entered into (section 96(4))? Does this require an analysis of the contract to establish whether the coming into force of the contract is conditional upon a subsequent event or whether it is the completion of the contract that is conditional upon the subsequent event or is such an analysis unnecessary? For the reasons given above (in the discussion in (e)(x) above) I consider that a conditional contract prior to listing is effective to avoid the moratorium provisions in respect of the transfer on completion.

A transfer completing a conditional contract entered into prior to listing will probably not, however, cause the asset to be removed from the list of ACVs. Paragraph 2(b) of the 2012 Regulations provides that if there is a relevant disposal the asset should be removed but this is only if “the land has since it was included in the list been the subject of a relevant disposal”. By treating the transfer as having taken effect when the conditional contract was entered into the land will not have been the subject of a relevant disposal since the listing as it will be treated as occurring before the listing. There is an argument that treating the transfer as taking effect when the contract is entered into is expressed to be for the purposes of section 95 (the moratorium provision) only because section 96(1) states that this “section applies for the purposes of section 95.” However, section 95 and paragraph 2 of the Regulations are so closely connected that it is likely that such an argument would not be successful.
In contrast a disposal pursuant to the exercise of an option granted before the subject matter was listed will definitely not be a relevant disposal which triggers the moratorium provisions (para. 4(1)(b)(i) Schedule 3). Would put and call options be a better solution? The uncertainty regarding this area of the regime is undesirable.

Will a contract to sell a listed ACV entered into after the giving of notice of an intention to dispose on terms providing for a deferred completion fixed for after the expiry of the moratorium period be an infringement and thus ineffective? It will be as it is a contract to sell and when completed the transfer will be a relevant disposal which is backdated to the date of the contract. What is not clear is whether this covers a conditional contract. A contract conditional upon the expiry of the moratorium period will not be a conditional contract but an unconditional contract with a deferred completion date and so will be caught. Further if a conditional contract entered into prior to listing causes section 96(4) to operate to treat any disposal upon completion of such contract as taking effect before listing then any conditional contract during the moratorium period will cause the disposal upon completion of such contract as taking effect during the moratorium period.

A disposal infringing the moratorium provisions should not be registered because of the restriction that will be entered on the title when the asset is listed. However, there is the risk that a null and void relevant disposal could be registered. The restriction might not have been entered against the title or the certificate required by the restriction might have been incorrectly provided. Following this there may then be a further disposition but the new purchaser may then discover that the title guarantee intended to be provided by registration is breached when the land is listed as an ACV and face an application to alter the title back to the original owner. Will such a purchaser take free from such a risk? Will the provisions in the Land Registration Act 2002 such as section 26, 29 and 58 seeking to guarantee the registered title protect the successor? If not on an application to alter the title as the chain is dependent on a null and void disposal will account be taken of the unfairness of such a course of action if in the circumstances it is unfair? If successful will there be a good claim against the Land Registry for an indemnity against loss?
9. **PLANNING**

This is an area which will be increasingly important as regards listed assets. There are two separate issues for the owner of a listed building. First what will be the consequences of listing as regards the planning position? Often listing is not an isolated step but is undertaken in a context which includes a current or threatened planning application. Second will it be possible to circumvent the operation of the listing regime by changing the planning use of the building or even demolishing it? Consideration of the planning position may be the immediate response by the owner to a listing. This may involve the making of a new planning application. This is particularly so with listed public houses. A decision maker will have greater flexibility when determining a planning application than a listing authority when deciding a community nomination. Alternatively listing may encourage the owner to seek to secure a change of use under the Permitted Development Rights regime (“PDR”).

(a) **Control of use** – in the DCLG Guidance (para. 2.20) it is stated that the ACV provisions “do not place any restriction on what an owner can do with their property.” as that is a matter for planning policy. Listing as an ACV brings in controls relating to the disposal of the ACV but not as to the use of the listed ACV. This means in particular that the owner retains the unfettered ability to change the use of the listed ACV in accordance with the PDR regime save now that this regime does not apply to nominated or listed public houses. Until the recent statutory order a pub could be converted to a restaurant, office\(^{139}\), or retail unit without the need for a fresh planning permission\(^{140}\). It was occurring at a rate of two a week. Listing did not, therefore, necessarily achieve the desired objective of saving the asset for the community as exemplified by the George IV pub (see section 2(ii) above).

This point is illustrated by Sunny News which is a newsagent in Southfields. It was listed as an ACV but that had no impact on the outcome of an application for prior approval under the PDR

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\(^{139}\) albeit if not for use for the purpose of financial or professional services within Use class A2 but within Use Class B1 then it will currently be a temporary change for two years.

\(^{140}\) See now Parts 3 and 4 of Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order 2015/596
regime\textsuperscript{141}. The landlord wished to change the use of the building from an A1 shop to a C3 single dwelling. This is possible under the PDR regime without a fresh planning permission but only if the loss of the retail unit will not have an undesirable impact on the adequate provision of services of the sort that may be provided by a building falling with A1 or A2 (Class M.2.(d)(i)). In determining this aspect the listing of the building as an ACV is not taken into account (para. 18 decision of J. Dowling). The test is by reference to the services normally provided and not the community benefits. The Council’s refusal to grant a prior approval was overturned by the Inspector on appeal. Provided that the change takes place in three years from the grant of the prior approval the listing will have had no influence because the building does not have a Class A4 use.

As regards a building with a Class A4 use (principally pubs) with effect from 6\textsuperscript{th} April 2015 first nomination and then listing will prevent demolition, change of use or temporary change of use\textsuperscript{142}. This prohibition covers not just the period of listing but also a period during which such an asset is nominated. Before commencing any development (including demolition) the developer must send a written request to the local planning authority to ascertain whether the building has been listed. This request must include specified details (address of the building; developer’s contact address; and developer’s e-mail address) (Article 3). No development can be commenced before the expiry of 56 days following the request. If the building is nominated for listing as an ACV (whether before or after the request) then the local planning authority must notify the developer as soon as reasonably practical. Once notified the developer cannot carry out the development for so long as the building is subject to nomination or listed. If there is no nomination then after the expiry of the 56 day period the development can commence and must be completed within a period of one year from the date of the developer’s request. CAMRA is still campaigning to have this protection extended to all public houses.

The regulations can be effective. Carlton Tavern was demolished in April 2015 shortly after the regulations came into force and the developer is now being compelled to restore the building. At the time the pub was not listed but has been listed subsequently.

\textsuperscript{141} App/H5960/W/15/3130980
\textsuperscript{142} Town and Country Planning (General Permitted Development) (Amendment) (England) Order 2015/659 replaced as from 15\textsuperscript{th} April by Town and Country Planning (General Permitted Development) (England) Order 2015/596
Also Article 4 directives are being given to remove specified classes of assets from the PDR regime. Wandsworth LBC has introduced such a directive to cover all 121 public houses in its area with effect from April 2016. For the purposes of the planning position this will have the same consequence as if they had been listed as ACV as a fresh planning application will be needed for any new development. Some authorities have made such a directive with respect to an individual public house.

At the beginning of 2016 the Co-Operative Group has agreed a set of guidelines with CAMRA regarding the development of convenience stores on the site of pubs. Amongst the principles agreed is a voluntary commitment to seek planning permissions for such developments rather than rely on the PDR regime. It will also seek to encourage developers to use the planning permission process rather than the PDR regime. This will apply to all pubs and not just listed pubs but if the pub is listed the Co-operative Group will investigate further before deciding whether to purchase or lease. It will not stand in the way of any group seeking to acquire and run a community pub. The need to obtain a fresh planning permission will not mean that pubs will not be lost. In November 2015 planning permission was obtained from Woking BC to convert the Star Inn in Wych Hill into a Co-op store. It had been listed but was removed on a review because there was no evidence that it has furthered the social wellbeing and social interests of the local community and that it had catered for “rowdy non-residents of the local area”.

(b) Material consideration - at present the listing of an ACV is not automatically treated as a material consideration when determining planning applications relating to the listed ACV. That is a matter for the local planning authority to decide (para. 2.20 DCLG Guidance). It is certainly not a guarantee that there will be no planning permissions granted contrary to the community use of the listed asset. In a number of cases planning permission has been granted usually by a Planning Inspector on appeal rather than by a local planning authority although not always. In the appeal to the Upper Tribunal in Banner Homes v St Albans City Council Judge Levenson stated that listing under the 2011 Act did not itself prevent land being developed “but as a matter of planning policy

143 [2016] UKUT 0232 (ACC) at para. 4
any necessary permission is likely to be refused while land is listed.” This is perhaps too sweeping a statement as planning permissions have been granted notwithstanding the listing of the property.

In the Government Policy Statement (September 2011) it states that “…it is open to the Local Planning Authority to decide that listing as an asset of community value is a material consideration if an application for change of use is submitted, considering all the circumstances.” It may be taken into account by the planning authority but does not have to be.

This point was emphasised in R (on the application of East Meon Forge and Cricket Ground Protection Association) v East Hampshire District Council\textsuperscript{144}. The case concerned a planning application for permission to convert the first floor of the Forge to a flat. The Forge in Petersfield had been the site of the ancient village blacksmith and was listed as an ACV as it “has a special resonance for the local community and furthers the cultural interest of the community”. The planning officer concluded in his report that the listing had very little bearing on the proposed development and should be given negligible weight. In the judicial proceedings this conclusion was challenged. Lang J. DBE stated at para. 100 that in so far as this advice “was based upon the inherent limitations of the community asset scheme, it was a matter for the Committee to decide upon in the exercise of its planning judgment. Accordingly, the officer could properly so advise.”

In some areas the listing of an ACV will be treated as a material consideration for planning purposes. A planning application to change the use of the closed and listed Pear Tree pub in Hildersham to residential use has been refused citing the importance of the pub to the community as illustrated by the listing as an ACV. This was despite the pub being converted to a furniture store under the permitted development rights regime. An appeal against this decision failed. Similarly, a planning application\textsuperscript{145} to convert the Angel Hotel public house in Spinkhill into two dwelling and a smaller drinking area was refused by North East Derbyshire because it had been listed as an ACV. The retained smaller pub was stated by the committee not to be a suitable alternative to the significant valuable community asset notwithstanding that the report to the planning committee had stated that the ACV listing was a material consideration but one on which

\begin{itemize}
\item \textsuperscript{144} [2014] EWHC 3543
\item \textsuperscript{145} 13/00681/FL
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limited weight should be placed. Since the rejection the Angel has been sold and is now being run as a pub/restaurant. A planning application to convert the Drover Inn in Wimborne to residential accommodation after listing as an ACV failed and it has since been purchased by the Gussage Community Benefit Society to be operated as a community pub.

However, listing will not always be enough to defeat an application for planning permission. The Friendship pub in Plymouth was the first ACV to be listed in 2013 by the authority. It was sold to a developer and an application for planning permission made for a flat to be constructed on each of the three floors. Permission was granted for the first and second floors but not for the ground floor. On appeal the Inspector overturned the refusal and allowed the conversion of the pub on the ground floor to a flat because there was nothing to show that future use as a pub was viable.

The same point has arisen in respect of the Gulliver’s Bowling Club in Bexhill. The bowling club land and buildings were listed by Rother DC and that listing decision was upheld by the First-tier Tribunal on appeal. Following the listing a planning application was made for planning permission for a development replacing the run down club plus two outdoor bowling rinks (one of which was not used) and one indoor rink with a new outdoor rink, an indoor rink, new club facilities and 37 private sheltered apartments for the elderly. The listing of the club’s land as an ACV was stated in the report to the planning committee to be a material consideration. Notwithstanding this planning permission was granted and challenged by way of judicial review on the ground that the effect of listing had not been correctly explained in that it focused on the club rather than all the land owned by the club and in consequence the planning committee was misled. This challenge was rejected by Mrs. Justice Patterson DBE in R (oao A-M Loader) v Rother DC [2015] EWHC 1877.

In her judgment the advice from the authority’s planning lawyer is quoted. It states that the DCLG guidance is that it is open to a local planning authority to decide whether or not listing as an ACV is a material consideration and that ACV status does not itself impose any restrictions on what an owner of an ACV can do with the property as that is a matter for planning law. It then further states that a planning application has to be determined in accordance with the
development plan unless material considerations indicate otherwise. There is no direct case law on what weight may be attached to the ACV listing and the weight to be given to a material consideration is a matter for the decision-maker subject to this decision being reasonable and rational in all the circumstances. The judge did not comment on this long passage quoted from the advice and the absence of any challenge in argument considered in the judgment indicates an acceptance that this correctly sets out the current position.

However, even if listing is treated as a material consideration to which weight is attached it may be possible to overcome this planning objection by the provision of an alternative community facility. For example, the Queensbury public house in Willesden Green was listed by Brent LBC. On an application for planning permission to demolish and create 53 residential units together with a new pub and communal facilities the Inspector, B. Lyons, took account of the listing in her decision on 23rd March 2015 but did not consider that it was a reason for refusing permission because a new public house was to be provided and so there would be no net loss of community facilities (para. 72). This allows the facility to be replaced possibly at a different location which is not allowed for in the ACV regime. The application was refused on the ground of harm to the character of the area and its impact on the local heritage.

Similarly, in the judicial review challenge against Rother DC concerning the Gulliver’s Bowls Club although the listing of the Club’s land as an ACV was a material consideration this did not prevent the grant of planning permission. An important factor was that the old community facilities were to be replaced as part of the development by new community facilities.

This flexibility in planning law which allows the provision of alternative community facilities to be taken into account when deciding a planning application is not mirrored in the ACV regime. However, it is taken into account to the extent that the planning permission is relevant particularly in the context of the issue whether there is a realistic prospect of future community use. An example of this is Matterhorn Capital v Bristol City Council146. The judge took account of two previous planning permissions obtained by the appellant. One had covered the whole of the site including the area on which the scouts hut had been located and required the provision of

146 Para. 24
alternative community facilities. The other did not have such a requirement but the permission excluded the site of the scouts hut. This indicated to the judge that any planning permission including the scouts hut would require the provision of community facilities so that there was a realistic prospect of a future community use.

Even if the proposed new development does not provide for alternative community facilities a planning permission may be granted which will cause the property to be taken off the list of ACV. For example, although the Seven Stars public house in Sedgley was listed a planning application on behalf of Morrisons to authorise use as a supermarket was successful.

This was also the case with the Alexandra public house which was removed from the list of ACV following an appeal to the First-tier Tribunal in STO Capital Limited v Haringey LBC. This appeal was subsequent to a planning appeal decision of the Planning Inspector (APP/Y5450/W/14/3001921 - 12th May 2015) in respect of a planning application for permission to convert the Alexandra in Haringey into two three bedroomeed dwellings. It had loose associations with the Davies brothers of Kinks fame and had been listed as an ACV. The refusal by the council was overturned by Mr. N Taylor who stated at para. 22 that the “relevant ACV legislation sets out specific tests which are narrower than the planning considerations before me. The primary purpose of ACV listing is to afford the community an opportunity to purchase the property, not to prevent otherwise acceptable development. Accordingly, whilst I afford it some weight in this case it is not determinative.” Perhaps significantly in reaching his decision the Inspector considered that the needs of the community could be met by the other public houses in the area. The Inspector’s decision was sufficient to cause Judge Lane to direct that the pub be removed from the list of ACV.

Another example of planning permission being granted to change the use of a public house is the New White Bull in Giltbrook\(^{147}\). This had been listed as an ACV but Greene King had given notice of an intent to dispose of the pub and the moratorium provisions were triggered. These ran for the full six months but there was no sale to a community interest group. A nearby brewery was interested but Green King sold to a private developer. As a consequence of the relevant disposal the pub was removed from the list of ACV resulting in a new nomination being made on behalf of

\(^{147}\) APP/J3015/W/15/3133491
CAMRA but this was rejected. On the planning appeal seeking to change the pub use to retail use and convert the upper floors to two apartments the Inspector considered that there were grounds for doubting that the pub was a well-used and valued community facility. In paragraphs 16 to 18 the Inspector then considered the significance of nearby public houses and concluded that the loss of the New White Bull will not reduce the community’s ability to meet its day-to-day needs. He also considered the new convenience foodstore to be a community facility “albeit of a different type, in an area where there are not currently any such facilities”. This he felt could improve the level of service provision and provide a clear social benefit to the local community. From the reasoning it would appear that the removal from the ACV list did not affect the outcome and that even if listed the Inspector would have decided to approve the planning application. The reasoning of the Inspector serves to emphasise the greater scope and flexibility there is on a planning application to take into account matters which may not be taken into account when considering a community nomination.

This point is yet further illustrated by the decision to grant planning permission on an application by Hawthorne Leisure to change the use of the Queens Tavern in Puntoe Bedford (16/00265/FUL- decided by planning committee on 21st March 2016) to a convenience store notwithstanding a petition with 330 signatories in opposition. It appears from the planning officer’s report that the possibility of a community nomination had been raised with the authority but not taken forward. The point was noted in the report that the considerations that such a nomination would have raised would not be the same as on the planning application. Need and demand were a consideration but there was evidence that the pub business was not viable including having had four tenants since 2014 and no substantial tenant coming forward to take it on. A community outreach report was obtained by the applicant based on a door to door survey seeking to provide an alternative assessment of the local community’s views. The views of just over 271 local residents were obtained. Again this serves to indicate the different approach that applies on consideration of a planning application to that which applies on consideration of a community nomination.
In contrast in a decision involving the Bittern pub in Southampton Hampshire the Planning Inspector, Mr. Lloyd Rogers, refused an application for permission to convert a listed public house to a drive through McDonalds. He considered that the evidence was not cogent that the pub could not be commercially viable in the future. There was a shortage of alternative facilities in the area and the loss of this pub would reduce the community’s ability to meet day to day needs. The objection of many locals was considered to be a material consideration. Account was taken of para. 70 of the National Planning Policy Framework which provides that planning decisions should “guard against the unnecessary loss of valued facilities and services particularly where this would reduce the community’s ability to meet its day-to day needs”. This had been backed by the core strategy written before NPPF. Such a precautionary approach resisting the unnecessary loss of community facilities will favour the retention of public houses even though such assets are not specifically mentioned in the NPPF.

Similarly, an application by New River Retail to construct a retail unit at the Maypole public house in Halesowen was refused even though the committee was told not to place weight on the listing of the pub. In contrast an application to build three houses on the car park at the back of the listed Holly Bush public house in Brown Edge was allowed.

A planning application to convert the closed but listed Ryeworth Inn in Chalfont Kings was rejected by Cheltenham BC because it still has a potential role to play in enhancing a sustainable local community. The conversion to residential use would result in the loss of a valued community facility when there is a lack of alternative facilities in walking distance.

In each cases it will depend on the individual evaluation of the circumstances and the evidence. Does the particular asset provide a valued facility or service? Will the loss of the asset affect the community’s ability to meet its day-to-day needs? Is the loss unnecessary? The differing outcomes shows that even when the asset is listed there is still everything to play for on each side and that the listing of the asset does not end the possibility of change. It may be that such an application in respect of a listed asset will stand a greater chance of success before a planning inspector than a planning committee.
(c) National Planning Policy Framework (“NPPF”) – separate from listing as an ACV being a material consideration the provisions of the NPPF will also need to be taken into account when determining a planning application. In particular, in paragraph 70 it states that

“70. To deliver the social, recreational and cultural facilities and services the community needs, planning policies and decisions should:

- plan positively for the provision and use of shared space, community facilities (such as local shops, meeting places, sports venues, cultural buildings, public houses and places of worship) and other local services to enhance the sustainability of communities and residential environments;
- guard against the unnecessary loss of valued facilities and services, particularly where this would reduce the community’s ability to meet its day-to-day needs;
- ensure that established shops, facilities and services are able to develop and modernise in a way that is sustainable, and retained for the benefit of the community; and
- ensure an integrated approach to considering the location of housing, economic uses and community facilities and services.”

In order to guard against the loss of a valued community facility which is listed as an ACV a planning application may be refused. However, it is for the decision-maker to decide what weight to give to the site’s public value and this can only be challenged on the ground that the decision is irrational. However, to be “valued facilities and services” within para. 70 NPPF there must be a formal arrangement by which the public is given access to the facility. In Robinson v SSCLG supra on an appeal against the grant of planning permission in relation to land at Rushmere St Andrew the unchallenged evidence regarding the land was that it was in private ownership, its lawful use was agricultural and the public had no right of access. After the decision by the Planning Inspector but before the High Court hearing the land was listed as an ACV as it was used by the local community for the growing of fruit and vegetables; the keeping of bees; and trees had been planted. The ACV listing was not taken into account because it had occurred after the Inspector’s decision. The judge held that due to the unchallenged evidence and notwithstanding the community use it was not “an open space of public value” within para. 74 NPPF. He considered

149 Mr. George QC (sitting as a Deputy High Court Judge) in Robinson v SSCLG and Suffolk Coastal District Council [2016] EWHC 634 (Admin).
150 para. 121 applying R v SSE ex parte Powis [1981] 1 WLR 584 at page 595
151 para. 131
that the absence of any formal arrangement for access and/or use explained why only limited weight was given by the Inspector to the community use of the site. This illustrates the point that determinations of planning matters and a nomination for an ACV listing do not involve the taking into account of identical factors and that there is greater flexibility with regard to planning applications and appeals. Subsequent to this decision the land was removed from the ACV list on review due to the failure to notify the owner of the nomination.

(d) Public houses – Often a public house which has been nominated to be listed as an ACV will have a planning history. The discrepancy between prices achieved for public houses and public houses converted to one or more dwellings will have encouraged this. Once a planning use other than that as a public house has been authorised this will impact on whether the building should be listed or remain on the ACV list.\(^{152}\)

The operation of the PDR regime until the 2015 regulations has further encouraged attempts to change the planning use of public houses. Now fresh planning permissions will be required. In the course of seeking a change of planning use awkward planning issues can arise. The pub business may have been closed leaving the owners in occupation of the closed pub as a residence when the planning use is use as a public house (Use Class A4) with residential occupation ancillary to the use as a public house. This may give rise to the service of an enforcement notice.

An attempt may be made to obtain a certificate of lawful use under section 192 of the 1990 Planning Act to justify use of the public house other than as a public house. In order to rely on the operation of the PDR regime it is not possible to go from no planning use to a use permitted under the PDR regime. It is necessary to move from an existing lawful use within the PDR regime to another use within the PDR regime. For example, in Noquet v SSCLG and Cherwill DC\(^ {153}\) a CLU was refused in relation to the Bishops End public house in Burdrop because the last use had been an unauthorised mixed use of A1 (sale of wood burning stoves) and residential use and so the PDR regime could not be engaged unless and until use as a public house had been revived. In this case

\(^{152}\) as illustrated by the decision in STO Capital v Haringey LBC CR/2015/0010

\(^{153}\) [2016] EWHC 209 (Admin)
if such use was revived now the 2015 Regulations would exclude the building from the operation of the PDR regime because the public house is a listed ACV.

These potential difficulties illustrate the need for care by any owner of a listed public house if seeking to change the planning use. It is possible to incur significant costs when contesting such planning issues.
10. REVIEW AND APPEAL

(a) **Nominator** - a nominator currently has no right to request a review or appeal from a refusal to list. This may come as a surprise to the nominator and supporters. For example, the community nomination of the Horns public house in Crazies Hill was rejected by Wokingham BC to the surprise of locals. The question was then raised as how this decision can be appealed. There is no appeal.

This means that if a nominator wishes to challenge such a decision the only option is to pursue judicial review proceedings. Such a challenge will be governed by the Wednesbury principles and the Court will not consider the listing nomination afresh in contrast with a listing appeal to the First-tier Tribunal. It is obviously more expensive than an appeal to the First-tier Tribunal and there is the risk of an adverse costs order which is most unlikely with a listing appeal.

There has been one such judicial review when Bournemouth BC rejected a nomination to list Boscombe Centre for Community and Arts on the ground that it had not been used for furthering social wellbeing and social interest in the recent past. The Centre had closed in August 2007 and the nomination was made on 11th November 2012. The nomination was refused by letter dated 6th December 2012 and just within the then three month time limitation an application to judicially review the decision was made. The application failed on two grounds. The first was that the application had not been made promptly and the delay in the context of a long running dispute meant that the application should fail. The second ground was that the reasoning of the Council set out in the letter of decision justifying the view that there had not been a community use in the recent past was reasonable and proper and had taken into account the material considerations. The Court did not seek to substitute its own view as to what constituted the “recent past” but applied the usual judicial review test based on the Wednesbury principle. The judge declared that the case was totally without merit and made a costs order against the applicant.

The alternative to commencing judicial review proceedings is to make a second community nomination but to stand a chance of success this will need improved supporting evidence. An
example is the listing of the Three Tuns pub in Sheffield. The City Council rejected the first nomination but with improved evidence supporting the second nomination listed the pub.

(b) **Owner** – there is a two stage procedure by which an owner may challenge a listing decision as is the case with the Community Infrastructure Levy regime. The first stage is to request a review and if that does not result in the removal of the asset from the list it is then possible for the owner to appeal to the First-tier Tribunal. Both stages must be undertaken as with the CIL regime and that has thrown up problems with CIL. The need to have a review may be overlooked with the result that the failure to request a review will also cause the right to an appeal to be lost.

(i) **Review** – a written request must be made within eight weeks of the giving of written notice of the listing of the property (para. 1(1) Sch. 2). The authority has the ability to extend this period. If it is not reasonably practicable for the authority to give that notice and it has to take reasonable alternative steps for the purpose of bringing it to the notice of the owner (section 91(2)) then the eight week period runs from the completion of those steps (para. 1(2) Sch. 2). The review will be conducted by an officer with appropriate seniority but who has not been involved in the original decision (para. 4 Sch. 2). The decision cannot be made by a member of the authority as opposed to an officer. This procedure applies even if the owner is the local authority.

The owner may require an oral hearing and if the owner does not then it is for the local authority to decide whether one is needed (para. 7 Sch. 2). The owner may appoint a representative (para. 5(1) Sch. 2) and documents may be sent by the authority to the representative rather than the owner (para. 5(2) Sch. 2). Representations may be made by both the owner and the representative (para. 8 Sch. 2). It is for the local authority to determine the procedure to be followed and notify it to the owner (para. 6 Sch. 2).

There is no provision for representations to be made by the nominator on the review. To be able to do so properly the nominator would need to have seen those of the owner and there is no provision permitting them to be disclosed. Care should be taken to ensure that there is no objection to providing the owner’s evidence to the nominator if the authority wishes to allow such involvement. It may be necessary to redact part of the information in accord to comply with the requirement of the Date Protection Act. Similarly, there is no express provision allowing the
involvement of the nominator or interested parties at the review hearing if one is held. This is allowed by authorities but the manner in which it will proceed needs to be spelt out.

As with nominations the current regime is unsatisfactory in that it does not make express provision for the involvement of both sides at each stage of the process. Some authorities have prescribed procedures to deal with a review. South Cambridgeshire has a short statement on review procedure. In contrast Arun DC has a detailed “procedure and form for review of decisions of the Council under Part 5 Localism Act 2011 (Assets of Community Value)” which can be found on the Council’s website. This is very helpful for parties involved in a review in the Arun area. It is also helpful for parties involved in a review in another area which has no public procedure as it allows a procedure which is used by an authority to be put forward (whether with or without modification) for adoption in the particular case. Arun’s guidance indicates not just the evidence required but sets out clearly the procedure to be followed. It means that the council can keep greater control over the running of the review and will be better placed to deal with failures to comply by any party. It is necessary to consult the Council’s statement to fully appreciate what is needed but it may assist to refer here to two aspects.

The first is the procedure to be followed and the second is the provisions relating to an oral hearing. The Council’s procedure is

(i) Council gives notice to parties that valid review request has been received together with a copy of the form relating to reviews;

(ii) Parties have 7 days in which to state whether contact details can be shared;

(iii) Council sends bundle of documents containing all communications relating to the listing;

(iv) Parties have 21 days to send statements and documents not already in bundle plus list of any questions;

(v) The Council will add the statements, documents and questions received pursuant to (iv) to the bundle and send it to the parties with a request for a response within 14 days;

(vi) Oral hearing will take place if requested by owner.
(vii) Decision will be sent by Council to parties.

As regards an oral review hearing Arun indicates that “evidence in person at a hearing does not give the Parties the best opportunity to present their case.” It stresses that the hearing is not an adversarial process. Cross examination is only permitted in “exceptional circumstances” and requires the reviewing officer to have agreed in advance in writing. If allowed all questions have to be provided seven clear days to the reviewing officer before the hearing together with an explanation as to the exceptional circumstances requiring these questions to be asked. Those questions will not be shared with the other parties ahead of the review hearing. Item 34 of the Council’s form on reviews sets out the information required from the parties ahead of the oral hearing. The format of the oral hearing is set out in section 6 of the Council’s form.

The decision on the review must be made within eight weeks of the written request for the review (para. 9 Sch. 2) unless the owner agrees a longer period. In practice some decisions are not made within the prescribed time limit. Failure to do so will not invalid the decision and it may be that the owner will agree to an extension so as to as to ensure an appeal to the First-tier Tribunal. The owner and the authority will bear their own costs on a review.

A review can result in the removal of a property from the list. In fact there will often be a chance of this happening because it is likely that the authority will receive fresh evidence if the owner has not played an active part until then. An example is the Farmers Arms in Woolsery North Devon which was removed on review. Another example is the Bailey public house on the Holloway Road which was removed from the list on review due to the supply to the authority of additional evidence which showed there was no realistic prospect of the continuation of the public house.

However, having been removed on a review there is nothing to prevent it being nominated again and added to the list subsequently. In Gibson v Babergh DC\textsuperscript{154} the Bull Inn in Thorpe Morieux Suffolk was removed from Babergh’s list of ACV on a review in January 2014 but was added back in July. On appeal Judge Lane noted that there was no legal impediment to such a fresh listing.

\textsuperscript{154} CR/2014/0019
(ii) Appeal – if the review decision is to retain the listing then the owner or a successor may appeal to the First-tier Tribunal (reg. 11). Matters concerning Community Right to Bid are allocated to the General Regulatory Chamber and the procedure is governed by the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009/1976 (as amended). The time limit is 28 days from the date that notice of the review decision is sent out by the authority (rule 22(1)). There have been a number of such appeals and the majority end with the review decision being upheld but not all. To date there have been twenty-five decisions plus two decisions on costs alone. The listing will not be suspended pending the determination of the appeal and so the moratorium and infringement provisions will apply if the owner wishes to sell before the appeal is decided.

There is a form of notice of appeal (T98) together with a Guide to completing the notice of appeal (T97). If the appeal is out of time then box 4 of the notice to appeal will need to be completed giving reasons why an extension of time is needed. It is possible in box 7 of the notice to appeal to elect for a decision based on the papers or to elect for an oral hearing. There is a standard form of response to be completed by a respondent which it is preferred is used and can be obtained from the Tribunal staff. To assist with completion there is a Guidance note for respondents (T04). Pursuant to rule 23 the response must contain (a) the respondent’s name and address; (b) the name and address of the respondent’s representative; (c) the address to which the Tribunal must send documents; (d) whether the respondent wants the case dealt with at a hearing or on paper; (e) whether the respondent opposes the appeal and if it does on what grounds; (f) if the appellant has not provided it a copy of the decision the subject of the appeal and any statement of reasons for it. The response must be sent within 28 days after receipt of the notice to appeal. Preparation of the bundle of documents for use in the hearing will be the responsibility of the decision maker. There is a guidance note for policy makers (T03) which provides general guidance to decision-makers involved in an appeal. In addition there is a Good Practice Guide 2015 which is a general guide on Hearing Bundles which covers such topics as the contents and timing. An appellant can then serve a counter-reply within 14 days after receipt of the response. These time limits may be varied by the Tribunal. For example, if there is more than
one respondent due to the joinder of an interested party then the counter reply may be directed to come after all the responses are in.

It is emphasised in the relevant guidances provided that the overriding objective of the rules is to enable the Tribunal “to deal with cases fairly and justly”. This is contained in rule 2 which sets out specific requirements such as dealing with cases in a manner which avoids unnecessary formality and seeks flexibility and ensuring so far as is practicable that all parties can fully participate in the proceedings. It is a consequence of this that all parties are expected to cooperate and assist the Tribunal.

The appeal hearing is treated as a rehearing conducted with reference to the facts as at the date of the hearing so that events occurring between the date of the listing and the appeal may be taken into account (Gullivers Bowls Club supra para. 18; para. 9 Spirit Pub v Rushmoor BC supra; STO Capital Limited v Haringey LBC (in both the last two appeals planning permission had been granted after listing); and Patel v Hackney supra at para. 7). Judge Warren has emphasised that this type of appeal is an ordinary appeal and not subject to the narrow limitations applicable to judicial review proceedings applying the “Wednesbury unreasonable” principles (para. 3 of Scott v South Norfolk DC\textsuperscript{155}). In the only case so far involving an appeal from a compensation decision Judge Lane stated that the claimant is not restricted to material provided to the local authority on the claim or on the review but could introduce additional material.\textsuperscript{156}

If it is right that the hearing is to be a rehearing then circumstances occurring between the review decision and the appeal hearing should be taken into account. In the Spirit case Judge Warren relied on Quilter v Maplesdon (1882) 9 QBD 672 and Ponnamma v Arumogam [1905] AC 383. However, those cases do not establish that the appeal hearing should necessarily be a rehearing. Although Judge Warren when considering this point in the Patel case refers to the conditions for listing being prefaced by the words “in the local authority’s opinion” he does not explain what effect is given to them when the appeal is a rehearing.

\textsuperscript{155} CR/2014/0007
\textsuperscript{156} Para. 16 Chadwick case
Statements made at any review hearing by or on behalf of any of the parties may be part of the evidence considered by the appeal judge in the context of the overall information but are unlikely to be treated as a concession (para. 13 the Crostone case).

It is possible for the parties to agree that the appeal will be decided on the basis of written representations without an oral hearing as happened in Spirit Pub Co v Rushmoor BC (para. 6), Dorset CC v Purbeck DC (para. 3), STO Capital Limited v Haringey LBC (para. 5) and Haddon Development v Cheshire East Council (para. 4)). As well as the consent of the parties the First-tier Tribunal judge will need to consider that the matter can be decided in such a manner justly.\textsuperscript{157}

Often the community interest group which has nominated the property for listing will also be joined as an interested party. In the STO Capital case the action committee which nominated the Alexandria was asked whether it wanted to be joined but no response was received. In Mendoza v Camden LBC and Carpenters Arms Supporters\textsuperscript{158} Judge Lane stated that objection had been taken by the appellant to the Registrar joining the Supporters as respondent to the appeal. The objection was on the ground that the Supporters were not a body that qualified to make a community nomination (discussed at section 7(a) above). The judge made the point that even if that had been correct the Supporters could still have been added as a party under the Tribunal’s wide powers to add any person as a party.\textsuperscript{159}

When an interested party is joined it will usually extend the time table as statements will need to be put in and this will probably be after the appellants. If there is a change of ownership of the listed asset after the appeal has commenced the original appellant can continue with the appeal as an appellant for the purposes of the First-tier Tribunal is defined as the person commencing the appeal\textsuperscript{160}. This occurred in Hawthorn Leisure v Chiltern DC\textsuperscript{161} and the original appellant rather than the purchaser continued with the appeal but the point was not argued.\textsuperscript{162}

\textsuperscript{157} Judge Lane in Haley (Old Boot) v West Berkshire BC CR/2015/0008 at para. 4
\textsuperscript{158} CR/2015/0015 at para. 31
\textsuperscript{159} Rule 9(3) of the 2009 Rules
\textsuperscript{160} Rule 1(3) 2009 Rules
\textsuperscript{161} CR/2015/0019
\textsuperscript{162} Para. 6
An appeal can be withdrawn before the hearing and unless the appellant has acted unreasonably in bringing or conducting the appeal no costs order will be made against the appellant (Magic Lantern case – Red Star Express v Walsall MBC\textsuperscript{163}).

If the appeal is successful costs can only be awarded in favour of the successful applicant if the respondent has acted unreasonably (rule 10(1)(b) GRC Procedure Rules). Mr. Scott as a successful appellant sought a costs order against South Norfolk DC. Judge Warren stated that the challenges in a Tribunal against a state decision do not generally attract a costs penalty unlike court proceedings.\textsuperscript{164} This is an advantage to both the authorities and citizen. He did not consider that the authority had acted unreasonably especially taking into account that it is a relatively new jurisdiction “in which local authorities are still finding their way.” (para. 5). This was despite the authority having listed the pub notwithstanding that it had been found as a fact that there had been no community use in the recent past. However, a successful appellant can seek to recoup the reasonable costs of appeal by way of compensation (see section 11 below).

An appeal from a decision in the First-tier Tribunal is to the Upper Tribunal (Administrative Appeals Chamber)\textsuperscript{165}. Unlike with an appeal to the First-tier Tribunal there is not a general right to appeal. The appeal is a genuine appeal and not a rehearing. Grounds for appeal are required showing that the decision of the First-tier tribunal is wrong in law such as failing to apply the correct law or wrongly interpreting the law. Permission must be obtained from either the First-tier Tribunal or the Upper Tribunal. An application for permission to appeal to the Upper Tribunal must be made within 28 days of the receipt of the First-tier Tribunal decision otherwise an extension of time will be needed. The application for permission to appeal is Form T96 and guidance notes on such an application are contained in form T95. Banner Homes v St Albans\textsuperscript{166} is the first such appeal and in that case permission was given on the first ground by the First-tier Tribunal judge and on

\textsuperscript{163} CR/2014/0001
\textsuperscript{164} Para. 3 CR/2014/0007 on 2\textsuperscript{nd} October 2014.
\textsuperscript{165} Section 11 Tribunals Courts and Enforcement Act 2007
\textsuperscript{166} [2016] UKUT 0232 (ACC)
the second by the Upper Tribunal judge. An appeal from the Upper Tribunal is to the Court of Appeal\textsuperscript{167} which will require leave to appeal.

\textsuperscript{167} Section 13 2007 Act.
11. COMPENSATION

A concern for local authorities operating the regime is the potential liability to pay compensation to a landowner. This liability can arise without any fault on the part of the authority and operates as a form of insurance with the listing authority as the insurer. It would appear from the evidence provided to the Committee that by the start of 2015 no payments of compensation have been made. This compensation scheme does not extend to public authorities and bodies but only covers private owners.\textsuperscript{168} Central government will ultimately bear any compensation payments by an authority to the extent which they singly or in aggregate exceed £20,000 in any financial year which means that the Treasury must sanction any payment.

The scope for compensation claims will be much reduced if Judge Lane is correct that any reduction in the value of the nominated asset due to listing cannot be recovered.\textsuperscript{169} This differs from the approach suggested in the October 2012 non-statutory DCLG guidance which stated that although most of the claims are expected to be due to the operation of the moratorium “the wording allows for claims for loss or expense arising simply as a result of the land being listing”.\textsuperscript{170} In the Policy Statement it was stated\textsuperscript{171} that a compensation scheme is provided “enabling private property owners to claim for costs or loss incurred as a direct result of complying with the procedures required by the provisions.” This is a very significant point which will need to be fully argued at some stage. In the Chadwick case it was not material to the issues in the case.

(a) Measure of loss - the local authority is obliged to pay compensation if the owner incurs “loss or expense in relation to the land which would be likely not to have been incurred if the land had not been listed” (reg. 14(2)). Two types of loss are highlighted as being included in this cover by reg. 14(3). One is loss due to a delay in selling due to the operation of a moratorium – for example wasted payments such as interest or rates. As was highlighted by Judge Lane in para. 15 of the decision in the Chadwick case this type of loss must be “wholly caused” by the operation of the moratorium provision. The DCLG Guidance states that it is assumed that most claims will arise

\textsuperscript{168} reg. 15
\textsuperscript{169} Para.17 in Chadwick v Rossendale BC CR/2015/0006
\textsuperscript{170} Para. 10.2
\textsuperscript{171} At page 5
in this way (para. 10.2) but that assumption is questionable. The second is reasonable legal expense incurred in a successful appeal to the First-tier Tribunal in relation to listing, a refusal to pay compensation or the amount of compensation.

However, it is not just loss due to the operation of the moratorium which is covered. Paragraph 14(3) commences by stating that it is without prejudice to other types of claim. It had been considered that loss caused simply by the listing will be covered. As noted above the DCLG non-statutory guidance states that such claims are possible. This would apply if the listing results in a reduction in value although until the property is sold there will be a query as to whether the loss has been incurred. It could arise if, for example, there is an exempt disposal but due to the listing the purchase price is lower than what could have been achieved if the property had not been listed. Such a loss will not have been caused by the operation of the moratorium provisions. It will be loss which is caused because the property was listed.

Judge Lane has stated in the Chadwick case that he does not consider that such a loss is recoverable by a compensation claim under regulation 14 because if it had been intended to be covered then it would have been expressly provided for in regulation 14. As against that if the reduction in value is caused by the listing then such loss falls squarely within the wording of regulation 14(2) as it is a loss which “would be likely not to have been incurred if the land had not been listed.” There is nothing in the regulations which expressly excludes that type of loss. The rationale for the compensation provision is to compensate for loss suffered by an owner as a result of the interference with the rights otherwise enjoyed by the owner. Such loss can be incurred not just by the operation of the ACV regime with regard to a listed asset but by the appreciation that it may operate in the future. To apply a narrow construction of the compensation provisions would seem to go against such a rationale.

If reduction in value is a type of loss that may be claimed for then one answer that may be put forward to such a claim is that there will be no loss of market value because once the moratorium period expires the asset can be sold on the open market and so there is no loss of market value. Specifically, this is clearly not an answer if there is a falling market as a lesser purchase price may be realised after the expiry of the moratorium period than could have been
realised if there had been no moratorium period. Alternatively, the intended purchaser may have been lost due to the wait or been discouraged by the listing.

More generally the expiry of the moratorium may not be a complete answer. Will a purchaser in such circumstances pay the same price as would have been paid if the asset had not been listed? This may depend on what advice may be given to the prospective purchaser with regard to listing and the expiry of the moratorium. It may be that though a sale during the protected period will mean that the asset has to be removed from the list of AVCs there could after completion of the purchase and the removal from the ACV list be a fresh nomination resulting in the asset being placed on the ACV list again. This could result in a reduced purchase price. Is this attributable to the listing of the asset or is it due to the nature and use of the asset? Although there is a loss does it justify a compensation payment?

When determining the value of land listed and not listed is account to be taken of the type and nature of the asset including its current use and the potential for listing such an asset? Even when valuing the asset without listing is account to be taken of the risk of a listing and the chances of a nomination? If account is to be taken of such factors then the difference between the values when listed and when not listed will be reduced. There is plenty of scope for argument as the causation issues that can be thrown up will be difficult.

It should be noted that it is loss in relation to the listed asset. What if the owner has lost an opportunity due to the moratorium which required to be funded by the net proceeds of sale? Will such a loss be outside the compensation scheme because it is not a loss “in relation to the land”? Does that qualification apply if the claim is within reg. 14(3)(a) due to the prohibition during the moratorium on the making of a relevant disposal?

What if the loss includes or relates to adjoining land to the listed asset owned by the same person? In such cases the part listed exception may apply so that a disposal will not be subject to the moratorium provisions. However, notwithstanding this loss could still occur as regards the value of the part of the land not listed but will such a reduction in value of that land be recoverable as compensation.
Nor will it cover loss that has occurred prior to listing. It is not hard to predict arguments on behalf of a local authority that a significant portion of any loss has been incurred as a result of the prospect of listing rather than the actual listing. Will the market value of the asset immediately following a nomination be less than its market value immediately before the nomination? What account should be taken of the possibility of listing? There is no guidance in the provisions. Such an approach should not succeed as it would defeat the intention behind the compensation provisions in the regime.

Legal expenses incurred due to a failed application for listing cannot be recovered nor those incurred in unsuccessfully fighting a nomination.

(b) Claim - there are stringent requirements to be satisfied when making a claim for loss or expense. The requirements are

(i) a written claim must be made;

(ii) the claim must be made within thirteen weeks of the loss or expense being incurred or finished being incurred. There is clearly plenty of scope for disputes as to the date at which the period starts to run and whether this time limit has been complied with. It is a very tight limitation period during which all the necessary evidence gathering will need to be undertaken. With a claim for a loss this will often involve valuations and obtaining such evidence within the time limit will be testing. It is trap for the unwary. Even those who have it in mind will find compliance difficult particularly when the evidence has to address complex causation issues.

There has been one appeal with regard to compensation decisions – Chadwick v Rossendale BC\textsuperscript{172}. In this Judge Lane took the opportunity to emphasise that compensation claims must be properly made and articulated when made to the local authority\textsuperscript{173}. However, he did not preclude further types of loss being subsequently claim but stated that it would be difficult to persuade a Tribunal judge on appeal in respect of a claim or part of a claim that had had not previously featured in the process.

\textsuperscript{172} CR/2015/0006
\textsuperscript{173} Para. 16
(iii) state the amount of compensation claimed;

(iv) be accompanied by the supporting evidence. This means that at this stage the supporting valuations should be provided. It is a harsh time limit as regards the provision of the supporting evidence and will place undue pressure on the owner’s advisers. Consideration will need to be given to the causation and valuation issues that arise so that the appropriate valuation evidence can be put forward. It may be that supplemental evidence will be considered by the local authority. The review could be one point at which additional evidence is provided. Judge Lane has made it clear in the Chadwick case that additional evidence can be introduced on the appeal.

The burden of proof will be on the claimant. In the case of claims for loss due to the operation of the moratorium provisions it will be necessary to prove that the loss was “wholly caused” by the moratorium. It means that the evidence put forward must establish that the only reason for the loss was the delay in being able to sell on the open market. If the evidence shows that this was not the whole cause then the claim must fail. In the Chadwick case the claim was that the operation of the moratorium provision had lost the claimants a sale. However, the evidence from the prospective purchaser showed that it was not the listing and the application of the moratorium provisions which had caused the sale not to proceed. He had not been deterred by that as it was in fact beneficial financially to delay the purchase. The reason for not going ahead was the perceived attitude of the Council. This evidence was fatal to the claim because clearly the lost sale was not wholly caused by the moratorium provisions.¹⁷⁴

Not only must there be evidence showing that the loss is wholly caused by the operation of the moratorium provisions but as is made very clear by Judge Lane’s judgment in the Chadwick case that case will be tested by cross-examination and must be credible both as regards causation and quantum. If the evidence lacks credibility then the claim will be rejected.

(c) **Procedure** – it is for the local authority to determine whether it is liable to pay compensation and if it is the amount of compensation that it will pay. There is no specified period

¹⁷⁴ Para. 26
in which the authority must reach a decision although the DCLG Guidance states that once the authority has all the facts it should reach a decision “as quickly as practical”.

As stated above this procedure places the authority in a position of conflict of interest. It is having to decide whether it makes a compensation payment to the claimant and the amount to be paid. In consequence care will need to be taken to avoid accusations of unfairness by the claimant. In some circumstances this could be a concern and to avoid any such risk an authority could appoint an independent expert along the lines of such appointments with regard to applications to register town and village greens. The authority would have the power pursuant to section 111 LGA 1972.

It is open to the owner of the land to request a review of the decision either not to allow a claim or with regard to the amount determined. The procedure for the review is governed by Schedule 2 of the 2012 Regulations and is the same as with a review of a listing decision (reg. 16). The person requesting the compensation review may appeal the review decision to the First-tier Tribunal (reg. 17).

The point has been made by Judge Lane in the Chadwick case that on an appeal to the First-tier Tribunal the claimant is not restricted to the material produced to the authority whether on the claim or on a review. Additional material may be produced but if the claimant is seeking to introduce a new type of loss then the judge will take some persuading.

\[175\] Para. 16
12. FUTURE CHANGES

The February 2015 Report proposes that certain changes be made to the Community Right to Bid regime. These are:-

(a) Right to buy – there will always be the risk that the right to bid could be converted to a community right to buy. In Scotland there is already a community right to buy which takes the form of a right of pre-emption. The issue was considered by the Committee but no change is proposed in the recent report.

(b) Extension of moratorium – it is proposed that the six month period of the moratorium be extended to nine months as in many cases the six month period is too short a period in which to arrange a community bid.

(c) Permitted development rights – there was a desire to remove all listed ACVs or all pubs (whether or not listed) from the scope of Permitted Development Rights regime but this was opposed strongly by the government. In consequence the proposed change was restricted to pubs that are listed as ACVs. This proposal has been quickly taken up by the government so that if the use of a listed pub is to be changed a planning application will be required and there will be a need for consultation (see section 9 above). Such a planning application will not trigger the Community Right to Bid. CAMRA is still campaigning for the planning protection to be extended to all pubs and not just those that are nominated or listed.

(d) Material consideration – to avoid uncertainty it is proposed that the listing of an ACV should automatically be treated as a material consideration for planning purposes.

(e) Termination of moratorium – if a community bid ends during the moratorium period it is proposed that this should bring the moratorium period to an end rather than the moratorium continuing for the full six month period.

(f) Appeal – it is proposed that the nominator have a right to appeal from a refusal to list an asset which will be likely to increase the number of cases heard by the First-tier Tribunal.
(g) **Going concern disposals** – concern was expressed that sales of an ACV as part of a continuing business were a loop hole allowing the moratorium restriction to be avoided. It was proposed that this be removed but care will have to be taken as this change could result in substantial compensation claims.

(h) **Renewed nominations** – it is proposed that there be a specific ability to renew a nomination that has been rejected by the local authority if there is new and material information.

(i) **Funding** – local authorities are seeking to dispose of assets which are a financial burden and the voluntary section is hard pressed to fund such assets. It is proposed that more funding be made available to assist community bids.
13. CONTINUING ISSUES

A number of issues remain unaddressed with regard to the operation of this regime. The British Property Federation has sought to highlight them in responses to consultations but without success so far. These include

(i) **Relocating site** – it has been suggested that in order to allow a development to progress there should be an ability to substitute an alternative site for the listed ACV. This relocation can pen with planning applications. However, there is no such provision with listed ACVs.

(ii) **Complex sites** – the regime contains no ability to mitigate the consequences of listing when dealing with a large complex or mixed use site. The Courts undoubtedly consider that applying the regime poses no problem when identifying whether the whole or a part should or should not be listed (see the Kassam Stadium case). However, that does not assist with the consequences for the whole site of such a listing.

(iii) **Predominant community use** – there is much to be said for the test of qualifying as an ACV being whether the asset is currently or has in the recent past been predominantly used for community purposes. The present test is much more nebulous.

(iv) **Strengthening nomination process** - there are no requirements as to the evidence or level of particularity that has to be provided by the nominator which can place the owner at a serious disadvantage when seeking to prevent a listing. The bias towards informality means that this has not been addressed.

(v) **Distinction between services and building** – there is a contradiction in the core of the regime. What is sought to be protected for the local community are the services being provided at the building but the regime focuses on the building and the ability to dispose of it rather the services. This has discussed but never addressed and so remains a flaw in the regime.
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Section 88 Land of community value

(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.

(2) 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, 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 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.

(3) The appropriate authority may by regulations--
(a) provide that a building or other land is not land of community value if the building or other land is specified in the regulations or is of a description specified in the regulations;

(b) provide that a building or other land in a local authority's area is not land of community value if the local authority or some other person specified in the regulations considers that the building or other land is of a description specified in the regulations.

(4) A description specified under subsection (3) may be framed by reference to such matters as the appropriate authority considers appropriate.

(5) In relation to any land, those matters include (in particular)--

(a) the owner of any estate or interest in any of the land or in other land;

(b) any occupier of any of the land or of other land;

(c) the nature of any estate or interest in any of the land or in other land;

(d) any use to which any of the land or other land has been, is being or could be put;

(e) statutory provisions, or things done under statutory provisions, that have effect (or do not have effect) in relation to--

(i) any of the land or other land, or

(ii) any of the matters within paragraphs (a) to (d);

(f) any price, or value for any purpose, of any of the land or other land.

(6) In this section--

"legislation" means--

(a) an Act, or

(b) a Measure or Act of the National Assembly for Wales;
"social interests" includes (in particular) each of the following--

(a) cultural interests;

(b) recreational interests;

(c) sporting interests;

"statutory provision" means a provision of--

(a) legislation, or

(b) an instrument made under legislation.
Second Schedule – Excluded Assets

Schedule 1 to 2012 Regulations

SCHEDULE 1

LAND WHICH IS NOT OF COMMUNITY VALUE (AND THEREFORE MAY NOT BE LISTED)

Regulation 3

1 (1) Subject to sub-paragraph (5) and paragraph 2, a residence together with land connected with that residence.

(2) In this paragraph, subject to sub-paragraphs (3) and (4), land is connected with a residence if--

(a) the land, and the residence, are owned by a single owner; and

(b) every part of the land can be reached from the residence without having to cross land which is not owned by that single owner.

(3) Sub-paragraph (2)(b) is satisfied where a part of the land cannot be reached from the residence by reason only of intervening land in other ownership on which there is a road, railway, river or canal, provided that the additional requirement in sub-paragraph (4) is met.

(4) The additional requirement referred to in sub-paragraph (3) is that it is reasonable to think that sub-paragraph (2)(b) would be satisfied if the intervening land were to be removed leaving no gap.
(5) Land which falls within sub-paragraph (1) may be listed if--

(a) the residence is a building that is only partly used as a residence; and

(b) but for that residential use of the building, the land would be eligible for listing.

2 For the purposes of paragraph 1 and this paragraph--

(a) "residence" means a building used or partly used as a residence;

(b) a building is a residence if--

(i) it is normally used or partly used as a residence, but for any reason so much of it as is
normally used as a residence is temporarily unoccupied;

(ii) it is let or partly let for use as a holiday dwelling;

(iii) it, or part of it, is a hotel or is otherwise principally used for letting or licensing
accommodation to paying occupants; or

(iv) it is a house in multiple occupation as defined in section 77 of the Housing Act 2004;

and

(c) a building or other land is not a residence if--

(i) it is land on which currently there are no residences but for which planning permission
or development consent has been granted for the construction of residences;

(ii) it is a building undergoing construction where there is planning permission or
development consent for the completed building to be used as a residence, but
construction is not yet complete; or

(iii) it was previously used as a residence but is in future to be used for a different
purpose and planning permission or development consent for a change of use to that
purpose has been granted.
3 Land in respect of which a site licence is required under Part 1 of the Caravan Sites and Control of Development Act 1960, or would be so required if paragraphs 1, 4, 5 and 10 to 11A of Schedule 1 to that Act were omitted.

4 Operational land as defined in section 263 of the Town and Country Planning Act 1990.
Third Schedule – Exempt disposals

Section 95(5) of the Localism Act 2011 and the Third Schedule to the 2012 Regulations

Section 95(5) Localism Act 2011

(5) Subsection (1) does not apply in relation to a relevant disposal of land--

(a) if the disposal is by way of gift (including a gift to trustees of any trusts by way of settlement upon the trusts),

(b) if the disposal is by personal representatives of a deceased person in satisfaction of an entitlement under the will, or on the intestacy, of the deceased person,

(c) if the disposal is by personal representatives of a deceased person in order to raise money to--

(i) pay debts of the deceased person,

(ii) pay taxes,

(iii) pay costs of administering the deceased person's estate, or

(iv) pay pecuniary legacies or satisfy some other entitlement under the will, or on the intestacy, of the deceased person,

(d) if the person, or one of the persons, making the disposal is a member of the family of the person, or one of the persons, to whom the disposal is made,

(e) if the disposal is a part-listed disposal of a description specified in regulations made by the appropriate authority, and for this purpose "part-listed disposal" means a disposal of an estate in land--

(i) part of which is land included in a local authority's list of assets of community value, and

(ii) part of which is land not included in any local authority's list of assets of community value,
(f) if the disposal is of an estate in land on which a business is carried on and is at the same time, and to the same person, as a disposal of that business as a going concern,

(g) if the disposal is occasioned by a person ceasing to be, or becoming, a trustee,

(h) if the disposal is by trustees of any trusts--

(i) in satisfaction of an entitlement under the trusts, or

(ii) in exercise of a power conferred by the trusts to re-settle trust property on other trusts,

(i) if the disposal is occasioned by a person ceasing to be, or becoming, a partner in a partnership, or

(j) in cases of a description specified in regulations made by the appropriate authority.
SCHEDULE 3

RELEVANT DISPOSALS TO WHICH SECTION 95(1) OF THE ACT DOES NOT APPLY

Regulation 13

1 A disposal pursuant to an order made by a court or by a tribunal established by or under an Act.

2 (1) A disposal made pursuant to a separation agreement made between spouses or civil partners.

(2) A disposal made pursuant to an agreement--

(a) made between spouses or civil partners in connection with their separation, or between former spouses or former civil partners, and

(b) relating to the care of a child dependent on a party to the agreement.

3 (1) Any disposal made under, or for the purposes of, any statutory provision relating to incapacity.

(2) In this paragraph--

(a) "incapacity" includes any of the following (whether temporary or permanent)--

(i) physical impairment,

(ii) mental impairment, and

(iii) lack of, or impairment to, capacity to deal with financial and property matters; and

(b) "statutory provision" means any provision contained in an Act or in an instrument made under an Act.

4 (1) Subject to sub-paragraph (2), a disposal--
(a) to a particular person in pursuance of a requirement that it should be made to that person under a planning obligation entered into in accordance with section 106 of the Town and Country Planning Act 1990; or

(b) made in pursuance of the exercise of a legally enforceable--

(i) option to buy,

(ii) nomination right,

(iii) right of pre-emption, or

(iv) right of first refusal.

(2) A disposal is not within sub-paragraph (1)(a) if it is of land that was listed when the obligation was entered into; and a disposal is not within sub-paragraph (1)(b) if it is of land that was listed when the option or right was granted.

5 (1) A disposal by a transferor, "T", to a former owner, where both the conditions in paragraph (2) are satisfied.

(2) The conditions referred to in paragraph (1) are that--

(a) the land was acquired by T or by a predecessor in title of T by a purchase that was a statutory compulsory purchase ("the original purchase"); and

(b) T has made a first offer of the land to the former owner, in accordance with an obligation to offer back the land to the former owner before disposing of the land on the open market.

(3) In this paragraph--

(a) "former owner" means--

(i) the person, "P", from whom the land was acquired under the original purchase; or

(ii) a successor to P; and

(b) "successor" means the person on whom the land, had it not been acquired by T or a predecessor of T, would clearly have devolved under P's will or intestacy, and
includes a person who has succeeded, otherwise than by purchase, to adjoining land from which the land was severed by the original purchase.

6 (1) Disposal in exercise of a power of sale of the land by a person who has that power by way of security for a debt.

(2) The reference in sub-paragraph (1) to a power of sale includes in particular a power implied by virtue of section 101(1)(i) of the Law of Property Act 1925.

7 A disposal pursuant to insolvency proceedings as defined by Rule 13.7 of the Insolvency Rules 1986.

8 A disposal of land to a person whose acquisition of the land is a statutory compulsory purchase.

9 A grant of a tenancy of the land pursuant to the provisions of Part 4 of the Agricultural Holdings Act 1986.

10 (1) A disposal by one body corporate to another, where the second one is a group undertaking in relation to the first.

(2) In this paragraph, "group undertaking" has the meaning given by section 1161(5) of the Companies Act 2006.

11 (1) A part-listed disposal as specified in section 95(5)(e) of the Act where, subject to sub-paragraphs (2) and (3), the following conditions are satisfied with regard to the land which is being disposed of--

(a) the land is owned by a single owner; and

(b) every part of the land can be reached from every other part without having to cross land which is not owned by that single owner.

(2) Sub-paragraph (1)(b) is satisfied where a part of the land cannot be reached from every other part of the land by reason only of intervening land in other ownership on which there is a road, railway, river or canal, provided that the additional requirement in sub-paragraph (3) is met.
The additional requirement referred to in sub-paragraph (2) is that it would be reasonable to think that sub-paragraph (1)(b) would be satisfied if the intervening land were to be removed leaving no gap.

A disposal of a church, together with any land annexed or belonging to it, pursuant to a scheme under Part 6 of the Mission and Pastoral Measure 2011.

(1) A disposal by any person for the purpose of enabling health service provision to continue to be provided on the land.

(2) In this paragraph, "health service provision" means services provided as part of the health service continued under section 1(1) of the National Health Service Act 2006.

A disposal of land to be held for the purposes of--

(a) subject to sub-paragraph (2), a school as defined in section 4 of the Education Act 1996;

(b) a 16 to 19 Academy; or

(c) an institution within the further education sector as defined in section 91(3) of the Further and Higher Education Act 1992.

(2) For the purposes of sub-paragraph (1)(a), "school" does not include an independent school other than one in respect of which Academy arrangements have been entered into by the Secretary of State under section 1 of the Academies Act 2010.

(3) For the purposes of sub-paragraph (2), "independent school" has the meaning given in section 463 of the Education Act 1996.

A disposal which is subject to a statutory requirement regarding the making of the disposal, where that requirement could not be observed if the requirements of section 95(1) of the Act were complied with.

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