ASSETS OF COMMUNITY VALUE GUIDE

(5TH EDITION)

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The Assets of Community Value Regime as at 3rd June 2017.
ASSETS OF COMMUNITY VALUE GUIDE

BLIGHTING OF DEVELOPMENT OR BOOSTING THE LOCAL COMMUNITY

Christopher Cant
9 Stone Buildings

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 the owner 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 recently 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 statutory 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. Under the general law if the operation of the moratorium results in such an offer and the owner is a charity or trustee then the offer might have to be accepted. 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 consequences).

Understandably the number of community assets listed varies greatly from authority to authority. This is not just down to differences in the size of an authority’s area but is also dependent on factors such as the character of the authority’s area and the composition of the

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local residents. For example, Uttlesford DC has listed over 180 assets whilst Herefordshire Council has listed around 80 assets with nominations reported by a local newspaper to be still coming in including another six nominations recently by Ross on Wye Town Council (including the town’s Quaker meeting house, a local trail and Gresley village green) and further nominations by the local CAMRA branch.
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. With the removal of most rights under the Permitted Development Rights regime from all public houses it may be that an ACV listing will have less impact now on publicans. 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. In the Upper Tribunal Judge Levenson stated that listing under the 2011 Act did not itself prevent land being developed “but as a matter of planning policy any necessary permission is likely to be refused while land is listed.” This is not automatically the case as the criteria used in deciding planning applications is different to that applied with regard to nominations. As is discussed in section 9 below planning applications relating to a listed ACV can be successful notwithstanding the listing just as the listing may be a reason for refusing planning permission.

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 proposed that the six month moratorium 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 was 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. From April 2015 that was not possible and it was necessary to obtain a fresh planning permission (see section 9 below). With

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4 Banner Homes v St. Albans City Council [2016] UKUT 0232 (ACC) at para. 4
the changes in 2017 it is no longer necessary for the public house to have been nominated and then listed as an ACV.

In the House of Commons debate on the Neighbourhood Planning Bill concerning the removal of rights under the Permitted Development Rights regime Lord Kennedy referred to the problem that listing may affect the ability of the owner to raise capital because the financiers may have a problem with the ACV listing.\(^5\) This was a point raised in Lounge India Restaurant v Central Bedfordshire Council\(^6\) by the appellant owner but it did not influence the judge or affect the outcome of the appeal.

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 may merely defer a disposal as it 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 prior to the 2017 changes to the Permitted Development Rights regime) 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 regime. 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

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\(^5\) 8\(^{th}\) February 2017 vol 778  
\(^6\) CR/2016/0020 at para. 8
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. This number has increased to nearer 70 including the New Inn in Norton Lindsey, the Duke of Marlborough in Somersham and the Fox in Garboldisham (listed in 2014 and closed since 2007). The first was funded by just over £340,000 through share subscription and a £50,000 loan from the Plunkett Foundation. It will not just be a pub but will offer other services as well. The second was funded by share subscription and loans. The third was funded by 66 locals subscribing £85,000 for shares in a community interest company and loans of £95,000. Another pub, the Compasses in Great Totham, has been saved after listing by a private purchase.

Another trend is for local communities to involve a person with suitable trade or financial experience with the objective of the pub being retained as a pub but not necessarily owned by the local community. Such an approach complies with the objectives of the ACV regime.\(^7\)

\(^7\) Henthames Limited v South Oxfordshire DC CR/2015/0028 at para. 14n and also India Lounge Restaurant v Central Bedfordshire Council CR/2016/0020 at para. 18
(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 which takes up time and resources 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). There is a marked trend in 2017 for compensation claims to be made or raised in letters objecting to a nomination whereas previously few had been made.

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\textsuperscript{8}. 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
compensation payment is to be made and if it is the amount and then it will be obliged to make
that payment. In such circumstances unless the claimant obtains the full amount claimed it is
almost inevitable that the claimant will feel hard done by and treated unfairly.

\textsuperscript{8} See Arden LJ at para. 32 in R (Whitney) v Commons Commissioners [2004] EWCA Civ 957 considered by Stewart J. in
Somerford PC v Cheshire East BC [2016] EWHC 619 (Admin). Such an appointment is in exercise of the powers
conferred by section 111 LGA 1972.
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. The number must be significantly higher now. CAMRA has set a target for listed public houses of 3000 and over 2000 have been listed so far.

However, at the time of that Report 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 might have impacted 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 two thirds of the so far fifty three First-tier Tribunal appeal reports (excluding the two costs applications) have related to pubs. As regards the appeals 35 concern public houses; 8 fields and open spaces; 2 bowling greens; 2 allotments; 1 each sports stadium, church, conservative club, golf club, scouts hut and a gum.

However, notwithstanding the focus of publicity on pubs an extremely wide range of properties have been the subject of nominations. 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=2fe0e278eaf
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 clubs (West Norwood), bowling greens, cricket clubs (Yeadon Leeds), horse clubs (Lambeth), gyms (Hackney and Henley), health hydros (comprising swimming pool, gym and turkish bath) (Milton Road Swindon), football stadiums (Faraday Road), football fields (Ashdon), dog racing stadiums (Sandy Lane Oxford), village shops (West End Stores Fownhope), cafés, tea rooms, schools (former Penkhull Infants School Stoke and Walmer Science College in Deal), nurseries, playgrounds, children’s adventure playgrounds (Oasis Lambeth), skate bowls (Mayflower Park), ice rinks (Rye Arena on Isle of Wright), outdoor activity centres, kart tracks (Oasis Lambeth), post offices (Post Office Bromyard), pharmacies, hospitals (Southwold Hospital and Bovey Tracey Hospital), health clinics, surgeries (Great Chesterford), residential care home (Edenside in Appleby), former ambulance stations, former police stations (East Street Saffron Walden), theatres (such as the Electric Theatre in Guildford and Greenwich theatre), cinemas (Granada in Tooting), music venues (Passing Clouds Dalston and Boileroom in Guildford), libraries (Rushall library in Walsall, North Kensington, Walkley Carnegie library and Higham Hill Library in Waltham Forest), museums (Type Museum Stockwell), golf courses (Western Park in Leicester), swimming pools, dingy parks (Seaview), Turkish baths (Newcastle), community centres (Formby Hall Wigan, Wormley and Calders Wharf in Tower Hamlets), day centres, bingo halls (Ealing and Tooting), markets (the 112 year old Queens Market in Newham and the Buttermarket in Hereford), market squares (Totnes), old corn exchanges (Hadleigh), town halls (Ealing, Hornsey and Haringey), council administrative offices (Howden Customer Service Centre), allotments (Coombe Stroud), business start-up centres, art galleries (Saffron Walden), churches and chapels, church halls (St Mary’s Church Hall Mistley), scout huts, cadets halls (Drill Hall Sandwich), car parks (nine listed in Ross on Wye), public toilets (Penge), bus shelters (High Easter), phone boxes (Horse River Green), post boxes (Wenders Ambo), village sign (High Easter), war memorials, fields (such
as Pier Field Skegness which is now for sale with bids received under a tender process), community orchards (Dartmouth), windmills (Ashdown), community gardens (at Portishead produced from “eyesore” vacant land and Holgate community gardens in York), parks such as Dulwich park, public amenity land including grassed play areas in centre of residential estate (De Quincy Fields in Upton Magna), a wildlife habitat (Soddy Gap near Cockermouth), woods (Page Woods at Bowers Gifford, Basildon), a lake (Chipstead Lake Chevening and Bodenham Lakes), city farms (Towerton Hill), public footpaths (two listed by Huntingdonshire DC), cycle tracks, disused railway line, coast guards station (Kingsbridge) and village greens (Hadstock and Hempstead).

Striking and imaginative applications have successfully 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. Stickle 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. The owner’s appeal against the enforcement notice failed.⁹

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 reading the lists of ACV kept by local 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. By way of example, the focus on the ACV list kept by St Albans is on meadows, open spaces and nature reserves.

⁹ APP/X5990/C/15/3130605
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. This approach has been confirmed by Judge Jacqueline Findlay in the Trustees of the Duke of Northumberland’s Charity v Hounslow LBC\textsuperscript{10} who took account of the recognition of the social utility of allotments by Parliament in the Allotments Act 1925 and the general community benefits discussed in the Thorpe Report of 1971. The judge took note of the resultant improved air quality, biodiversity and visual amenity. Although the allotments were removed from the ACV list as it was not realistic to think that use as an allotment would resume in the future Judge Lane did state in New Barrrow Limited v Ribble Valley BC\textsuperscript{11} that there is no question but that use as an allotment satisfies the test of furthering social wellbeing or social interests of the local community\textsuperscript{12}.

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

\textsuperscript{10} CR/2016/0007 at para. 38  
\textsuperscript{11} CR/2016/0014  
\textsuperscript{12} Para. 19
converted to a supermarket after the listing as this was before the 2015 Regulations taking listed pubs out of the permitted development rights regime. This has been particularly prevalent with pubs. It will be interesting to see whether the need to obtain a new planning permission now extended to all public houses 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 as it applies to all including the Crown Estate and local authorities. It does not matter whether the asset is owned by a commercial concern\(^{13}\) 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. It is not only well maintained assets which can be listed. For example, in the Trustees of the Sundorne Estate v Shropshire\(^{14}\) it was suggested that the nominated grassed area was in an unkempt state and had only recently been cut. It was held that even if correct that did not call into question the listing of the asset.\(^{15}\)

To qualify statutory criteria must be satisfied. These are set out in section 88 of the 2011 Act (for full wording see Schedule 1 at end of this guide). Unfortunately this criteria is formulated in general terms with no definitions 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\(^{16}\). 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 been reached now on a regular basis. In a number of appeal 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.

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\(^{13}\) For example the closed LA Fitness gym in Henley has been listed and the decision upheld on appeal – Henthames Limited v South Oxfordshire DC CR/2015/0028

\(^{14}\) CR/2016/0015

\(^{15}\) Para. 14

\(^{16}\) 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
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. 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 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). This approach was challenged in the Trustees of Sundorne Estate v Shropshire CC in an appeal decided on paper but firmly rebutted by Judge Anthony Snelson. At some stage it is possible this approach will be more strongly 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.

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

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17 Tesco Stores v Dundee City Council [2012] UKSC 13
18 CR/2913/0005
19 CR/2016/0011 at para. 9
20 At para 21
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 Wednesday 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.\textsuperscript{21} This was the approach adopted by Sales J. in R (oao Katherine Edgar) v Bournemouth BC\textsuperscript{22} 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.

\textsuperscript{21} [2015] EWHC 518 (Admin)
\textsuperscript{22} CO/2663/2013
5. QUALIFYING CRITERIA –

In deciding whether the statutory criteria is 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. In each of the stages (first stage current use and second stage recent past) there are two tests which have to be satisfied. In the first test the current use or use in the recent past (as appropriate) have to satisfy the statutory requirement as to community use. Then if that first test is satisfied the second test in both stages concerns future use.

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. 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. 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.

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 when

\[23\] Judge Lane in Banner Homes v St. Albans (CR/2014/0018) at para. 16
\[25\] This point was not pursued on the appeal to the Upper Tribunal [2016] UKUT 0232 (AAC) see para. 12
considering the current actual use of the asset. The first condition is whether there is a current actual use which is a community use and the second is whether there will be in the future. The two statutory 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 interests of the local community ("community benefit") and this use is not an ancillary use;

(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”\(^\text{26}\). It does not necessarily equate to the area of the local authority. Judge Jacqueline Findlay has made the point that “there is nothing in the 2011 Act which suggests that a facility has to be equally valuable or equally accessible to all sectors of the local community”\(^\text{27}\). This was in an appeal concerning allotments. The judge then went on to state that the phrase should be given its natural meaning in the English language.\(^\text{28}\)

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. It considers that the usage should suggest that the property acts as a hub or focal point for a significant proportion of an identifiable community. In contrast in Pullan v Leeds City Council\(^\text{29}\) 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.

\(^\text{26}\) Pullan v Leeds City Council CR/2015/0011 at para. 10
\(^\text{27}\) The Trustees of the Duke of Northumberland’s Charity v Hounslow LBC CR/2016/0007 at para 27
\(^\text{28}\) Para. 34
\(^\text{29}\) Supra at para12
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.\footnote{CR/2015/0011 at para. 12}

Sheffield City Council does not appear to have wholly accepted CAMRA’s argument but has now adopted a less demanding stance than previously 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 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 the phrase “the 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. Following this decision a further seven pubs have been listed by Sheffield Council including the Cherry Tree and the student pub called the University Arms which was rejected in September 2016 but then listed in March 2017 after a further nomination.

There was clearly a difference between a town such as Otley and a city such as Sheffield. This means that the earlier approach adopted by Sheffield City Council is not necessarily consistent with the judgment of Judge Lane in the Pullen case. However, as nearly all the pubs nominated by Sheffield CAMRA have now been listed it would appear that the approach of Sheffield Council has moved closer to that of other authorities.

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. Each local authority is to decide what it considers falls within the phrase. In Crostone v Amber Valley DC Judge Lane described this issue as a “highly contextual question, depending upon all the

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31 Another example of an authority’s view of what constitutes the local community is the decision by Herefordshire Council to refuse to list the Unisex hair salon in Fownhope because the majority of the customers came from outside the community.

32 Pullan v Leeds City Council CR/2015/0011 para. 10

33 CR/2014/0010 at para. 17
circumstances of a particular case.” Judge Jacqueline Findlay considered that both phrases should be given their natural meaning in the English language.\(^3^4\)

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

\(^3^4\) Para. 34 the Trustees of the Duke of Northumberland’s Charity CR/2016/0007
furthering the social wellbeing and social interest of the local community.\textsuperscript{35} 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. Even Boots the chemist in Starcross has been listed as an ACV by Teignbridge DC. This was considered to be justified because it is available to the whole of the local community and due to the lack of other facilities functions as a meeting point for local people thereby fulfilling a social function. A nomination has been made in respect of Lloyds Bank in Lymm by the Parish Council because it is the last and is shortly to be closed. The property is leased so it is hard to see that this will achieve the desired outcome.

\textsuperscript{35} As regards bowling clubs see Gullivers Bowls Club v Rother DC (CR/2013/0009) and Astim Limited v Bury Council CR/2015/0022. As regards golf clubs see Haddon Property Development v Cheshire East Council CR/2015/0017
There has been a divergence of view with regard to hospitals. This is an issue which has arisen because of reforms to the hospital system and the desire to close and dispose of some hospitals which are no longer accommodated within the new plans. Many are owned by NHS Property which has sought to challenge nominations of such hospitals. It is contended that the concepts of social wellbeing and social interest does not apply to a building used to provide health services. The argument in support of this is that social wellbeing is limited to the interaction of people and relationships with each other within a community and in a hospital there is no such social interaction. As regards social interests these are limited to leisure activities and similar activities which again do not include the operation of a hospital. Such an argument was accepted on the review of the listing of the Saffron Walden Community Hospital. In contrast on a review of the decision to list the Southwold Hospital the Strategic Director of Waveney DC did not accept those arguments and decided that it should remain on the ACV list. Statements from those involved in the medical care provided at the hospital were provided in support of the nomination. These evidenced the importance of local associations and connections for those who are ill and particularly those who are terminally ill. In his written decision given on 15th June 2016 Mr. Charvonia setting out the reasons for upholding the listing stated:

“15. I conclude that an asset will promote social wellbeing if it provides for interaction between people, the formation or strengthening of friendships and social networks, particularly within an identifiable community, and supports a sense of local identity, and serves to counter negative factors such as loneliness and social isolation.” and

“17. The existence of the Hospital has enabled many in the community to be treated or cared for in a location where it is easier for family or friends to visit, particularly if they do not have their own transport. Social interaction and wellbeing will have arisen through patients being served by staff who might be neighbours or local friends/acquaintances.”

In the review of the nomination of the Saffron Walden hospital although deciding on the review that the hospital should be removed from the ACV list it was accepted that as a matter of principle a hospital could be an ACV if the facts justified a listing. The justification put forward for
this was that para. 13 Schedule 3 of the Assets of Community Value (England) Regulations 2012 ("the 2012 Regulations") exempted a disposal from any moratorium if a disposal for the purpose of enabling continued health service provision. If in principle a hospital cannot be listed as an ACV there would be no need for such an exempting provision.

At least five other authorities have listed hospitals whilst a number have not. It is likely to be an issue which arises again as is illustrated by the current campaigns to save Bovey Tracey Hospital and Leek Memorial Hospital.

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. Southwark LBC has refused to list both Rotherhithe and East Dulwich police stations. In contrast the West Cumbria Magistrates and County Court have been listed on the nomination of Workington Town Council. This is in response to their threaten 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 was listed only for it to be removed on review. Some authorities consider that car parking does not qualify whilst others do. Following the decision in Trouth v Shropshire 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 and others have listed bingo halls. 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 Judge Lane considered it significant that the list of social interests did not include religious interests. He

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36 2012/2421
37 CR/2015/0002
38 CR/2014/0013
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. For example, subsequent to that appeal decision in August 2016 Sheffield Council listed the Horizon Methodist Church which had been taken over and run by the Well Sheffield Baptist Church. In the assessment which the Council helpfully places on its website the current uses referred to include Sunday services, morning prayers and church meetings. These would not cause the building to qualify as an ACV on the basis of the General Conference of the New Church decision. The current uses of that Methodist Church also included breakfast and after school play group and occasional public events and community events. There was no express discussion of the General Conference of the New Church decision and from the uses set out it seems a very borderline case.

Whether social interests includes religious interests will have to be considered by Herefordshire Council when determining the nomination by Ross on Wye Town Council of the Religious Society of Friends (Quakers) meeting house in the town which dates from 1668 and has at the rear a burial ground.

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 on that ground.

There have been a number of appeals to the First–tier Tribunal General Regulatory Chamber which have had to consider these statutory phrases. 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 Council39. The core issue was whether the football use should be

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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:-

““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\(^40\) 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\(^41\) because it “was a social meeting place, as well as playing a part in village activities.” Evidence had been given that a

\(^{40}\) Hawthorn Leisure Acquisitions Limited v Northumberland CC (CR/2014/0012)
\(^{41}\) CR/2015/0018 at para. 23
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 fêtes.

In Collins v Derbyshire Dales DC\textsuperscript{42} Judge Jacqueline Findlay considered this statutory requirement to be satisfied by the Three Stags Heads pub because

“The Tribunal finds that the building is currently in use as a public house and is a venture which provides somewhere for village residence to meet and socialise. It acts as a place when people to interact with others from the local area to ensure a cohesive community and a village pub of this type meets the statutory test.”

Similarly in Neem Genie v Telford & Wrekin Council\textsuperscript{43} Judge Simon Bird QC considered that the Swan Inn at Waters Upton “was plainly actively and well used by the local community for a range of activities ranging from darts and dominos to the holding of wakes.”\textsuperscript{44}

In Admiral Taverns Limited v Cheshire West and Chester\textsuperscript{45} the owner argued that the Farndon Arms was only listed as an ACV based on the premise that all pubs provide community value within section 88. As regards this pub Judge Hughes found that it “is clear from the information before me that the premises have been used by local people as part of their social lives, meeting others in a convivial atmosphere for food and drink and furthermore holding some social events, notably quiz nights.” This was sufficient to establish that its use further the social wellbeing of the local community.

An attempt in Pullan v Leeds City Council\textsuperscript{46} 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 and not to socialise. Further there were weekly music

\textsuperscript{42} CR/2016/0005 at para. 10
\textsuperscript{43} CR/2016/0010
\textsuperscript{44} Para 29
\textsuperscript{45} CR/2016/0022 at para. 8
\textsuperscript{46} CR/2015/0011
events and there was no evidence that the audience was drawn solely or predominantly from outside the town.

Such an approach is reflected in Henthames Limited v South Oxfordshire DC\textsuperscript{47} which concerned a closed LA Fitness gym. Judge Jacqueline Findlay found that operating as a gym, fitness centre, swimming pool and café further the social wellbeing and interests of the local community.\textsuperscript{48}

Similar points were made by Judge Jacqueline Findlay in the Trustees of the Duke of Northumberland’s Charity v Hounslow LBC\textsuperscript{49} with regard to the use of allotments. It was not just their use by local people for growing vegetables and fruit but also their providing a place to take friends and family to enjoy the outdoors and to meet with others. The judge also considered that the local community benefited from the land being a natural habitat for wildlife, birds and insects which improved the biodiversity of the area and the air quality. This last point is more contentious. Logically it would mean a private wildlife habitat not visited by any section of the public could qualify as an ACV and that seems unlikely. If this were correct how is a line to be drawn to exclude private gardens?

The coming together of local residents was also a strong factor in the decision in the Trustees of Sundorne Estate v Shropshire CC\textsuperscript{50}. For example, the holding of the annual village fete engaged recreational interest and “involve a bringing-together of the community”. The judge rejected the argument that it lacked significance because it was only annual because an “annual village fete is an important part of rural life and is looked forward to, planned and reflected on for the many months before or after the event.”

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

\textsuperscript{47} CR/2015/0028  
\textsuperscript{48} Para. 11  
\textsuperscript{49} CR/2016/0007 at para. 36  
\textsuperscript{50} CR/2016/0011 at para 23
City Council\textsuperscript{51} 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{52} 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 – to satisfy the second statutory test as regard the future use of the nominated asset 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. As there is a current community use this is normally unlikely to be a real issue. Often the current use which furthers the social wellbeing or social interests of the local community will be continuing and that is sufficient to satisfy the future condition. There is no period specified during which the community use must continue.

In the Gullivers Bowls Club v Rother DC\textsuperscript{53} 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

\begin{footnotesize}
\textsuperscript{51} CRB/2013/0006 at para. 15
\textsuperscript{52} CR/2014/0011
\textsuperscript{53} CR/2013/0009
\end{footnotesize}
especially if it has engaged with the particular property and has available to it credible advisers with experience of community projects. This particular aspect is more likely to be a live issue in the second stage 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\(^{54}\) 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 that 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.\(^{55}\) The First-tier Tribunal has emphasised that it will not treat the declarations of owners as to the future use of a nominated asset as conclusive. To do so would be to confer a unilateral power on the owner to prevent an ACV listing. Consequently even though an owner takes action to cause the current use to cease and states that there will be no further use of the nominated asset which furthers the social wellbeing or social interests of the local community it is still necessary to consider whether it is possible that such a use may despite the owner’s declarations resume. In most case the First-tier tribunal has decided that it is realistic to think that such a resumption is possible. However, that is not always the case and it is possible that the owner’s proposals for the future use of the nominated asset are such that it precludes such community use in the future.

\(^{54}\) CR/2014/0018 before Judge lane and then on appeal to the Upper Tribunal [2016] UKUT 0232 (AAC)

\(^{55}\) See Haley (Old Boot Inn) v West Berkshire DC CR/2015/0008
This is illustrated by the decision in New Barrow Limited v Ribble Valley BC\textsuperscript{56}. In that case planning permission for a residential development of 504 dwellings had been granted in relation to a large area of land which included within it an area used as allotments but on which the construction of houses had not then been authorised. The allotments were added to the ACV list. By the date of the appeal hearing before the First-tier Tribunal notice to vacate had been given to the allotment holders association but had not expired. Crucially on the date of the hearing a five year licence to occupy the allotments was granted by the owner to the developer, Redrow Homes, permitting the allotments to be used as the site compound where materials would be stored and cars parked. This would require the topsoil to be removed and a stone surface laid with a security fence erected round it. A permanent compound was more cost effective than one that moved round the development site. In any event the trackway to the allotment was to be used for construction traffic which would have raised health and safety issues if other users were to continue to go along the trackway. The development was likely to take six to seven years Judge Lane accepted that the allotment area would be used as a compound for that period and that there were sound commercial reasons for this. It was not, therefore, realistic to think that there could be a community use of the allotment area whilst used as a compound.

Until the grant of the licence Judge Lane considered that it was correct to regard the allotments as an ACV. However, with the grant of the licence that ceased to be the case and the land had to be removed from the ACV list. This was so even if there was a possibility that use as an allotment would resume after the completion of the development. When dealing with assets in respect of which there has been a community use in the recent past the test as regards future use in section 88(2)(b) is whether it is realistic to think “that there is a time in the next five years” when there could be a non-ancillary community use. In contrast when dealing with an asset which has a current community use there is no such period specified. The test in section 88(1)(b) is whether it is realistic to think that a non-ancillary community use will continue. Notwithstanding what appears to be the deliberate omission of any express period in contrast with section 88(2)(b) Judge Lane took account of the five year period during which the listed asset remains on the ACV

\textsuperscript{56} CR/2016/0014
list\textsuperscript{57} and imposed a finite restriction on the possible moratorium period that could affect the owner’s ability to dispose of the asset. In the light of this Judge Lane considered it difficult to see how the resumption of a community use after the expiry of the five year period could be sufficient even if likely.\textsuperscript{58}

In any event the judge considered that there was a strong likelihood that the allotment use would not resume because once the development had been completed the limit of 504 dwellings in the current planning permission would not have been reached and so the strong expectation would be that planning permission would be granted for the construction of further houses on the allotment land. Consequently, it was not realistic to think that the allotment use would resume even though no actual grant of planning permission had been made.

This decision indicates that although declarations by an owner as to future use will not be conclusive it is possible for an owner to take action which may mean that it is not realistic to think that there will not be a future community use in the next five years. This will encourage owners to give thought as what steps might be taken to achieve such an outcome. If it is possible to show that not only has the community use been stopped but that for a sound commercial reason unconnected with the ACV listing it will not resume during the five year period then that should be sufficient to either prevent listing or if listed to cause the removal. From the logic applied by Judge Lane it is the five year period during which the asset remains on the ACV list which is material rather than the five year period running from the review date or the hearing of an appeal.

The other point of interest is the account taken of professional advice that planning permission for the residential development of the allotment land would be granted once the development of the larger site had been completed. It suggests that it is not just grants of planning permission which may prevent an ACV listing but also professional judgments as to the future grant of planning permission by those with the appropriate experience may suffice for such a purpose.

\textsuperscript{57} Section 87
\textsuperscript{58} Para. 22
The outcome in this case illustrates a hardship in the operation of the ACV regime for listing authorities. Judge Lane made it clear that until the licence agreement was entered into on the date of the appeal hearing it had been perfectly correct on the part of the listing authority to have the land listed as an ACV. The removal exposes the listing authority to two possible compensation claims. One is in respect of the legal costs of the appeal. The other is for any loss caused by the ACV listing (as to which see section 11 below). Yet the listing authority had acted perfectly correctly and properly.

(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. In contrast the weekly use by a Scouts Group of a field held by a trust for recreational purposes was a non-ancillary use.⁵⁹

However, there is no definition or guidance as to what “ancillary” and “non-ancillary” 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 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.

⁵⁹ The Bay Trust v Dover DC CR/2016/0002
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.60

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.

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

60 R (oao Hourhope Limited) v Shropshire CC [2015] EWHC 518 (Admin) at para.
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 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 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 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 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). The judge then went on to say that if use A is supportive
or otherwise served the purpose of use B then use A is ancillary to use B. 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.

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64 Followed by Judge Jacqueline Findlay in the Trustees of Sundorne Estate v Shropshire CC CR/2016/0011 at para. 18
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.

This approach appears not to have been followed by Judge Jacqueline Findlay in the Trustees of Sundorne Estate v Shropshire CC\textsuperscript{65}. In that case the field next to the Upton Magna Memorial Hall was nominated but not the Memorial Hall. There is no gate providing access from the public highway to the field. The owners argued that the uses of the field were ancillary to the use of the Memorial Hall but the judge rejected this on the basis that only the field had been nominated and it did not matter whether the field was part of the same land unit or planning unit as the Memorial Hall. Such an argument by the owners was only sustainable if the field had been nominated with the Memorial Hall. The judge considered that the uses of the field had to be looked as the field’s own uses and as a whole rather than individually. In doing so the judge found the uses of the field as a car park for the Memorial Hall, the annual village fete, a site for wedding marquees, a site for cub and scout camping, a site for study days and a site for general camping were furthering the social wellbeing or social interests of the local community.

In the example given by Judge Lane of the garden centre the use of the larger unit was not considered to further the social wellbeing of the local community. In contrast in this case it may be that the Memorial Hall also did but it was not felt by the local residents to be at risk. If the use of the larger unit furthered the social wellbeing or social interests of the local community but not all is listed should that cause the nominated part to fail to qualify. For example, if a pub with a beer garden would qualify as an ACV but only the beer garden is nominated should that nomination be refused because the principal part of the unit is the pub. By splitting does it inevitably mean that the use of the nomination of the beer garden only must fail as the use of the beer garden is ancillary to the use of the pub. If nominated together the use of the beer garden will not be regarded as ancillary to the use of the pub\textsuperscript{66} but rather part of that use. The same may have been true in the case of the field by the Upton Magna Memorial Hall. The approach of Judge Lane

\textsuperscript{65} CR/2016/0011 at para. 20
\textsuperscript{66} Kicking Horse Limited v Camden LBC CR /2015/0012
should not be applied if the larger unit qualifies as an ACV so as to prevent the listing of part if the nomination relates to a part rather than the whole.

(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(1) 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\(^{67}\) 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”\(^{68}\) as in both Trouth v Shropshire CC\(^{69}\) and Wellington Pub v Kensington and Chelsea\(^{70}\). 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 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

\(^{67}\) CR/2015/0012
\(^{68}\) Para. 23
\(^{69}\) CR/2015/0002
\(^{70}\) CR/2015/0007
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.\(^7\)

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.

\(^7\) In Z B Investments v Croydon LBC (CR/2015/0009) it was argued on appeal that the garden/yard of the Ship should be excluded from the listing. The judge rejected this on the basis that it formed an integral part of the public house. It was claimed that there were rights over the garden/yard but the judge stated that this did not prevent the ACV listing of the space (para. 55).
In this context the approach adopted by campaigners seeking to prevent the Prince of Orange public house in Yatton from being developed is educative even though it was unsuccessful. This is an Enterprise pub which it had decided did not have a long term future in its estate. In 2015 it applied for outline planning permission for four houses in the beer garden. In February 2016 a group of villagers nominated the car park and pub garden at the rear but listing was refused on 15th March 2016 by North Somerset Council on the ground that the use of these areas was ancillary to the use of the pub. A nomination was then made in May 2016 of the Prince of Orange pub and the car park and pub garden. This was also refused on the ground that the evidence failed to demonstrate that the pub furthered the social wellbeing or social interest of the local community and the use of the car park was ancillary to the use of the pub. If the pub had qualified as an ACV would the first refusal have been wrong? If an integral part of the pub it would have qualified even though the nomination failed to include the whole of the land qualifying as an ACV.

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 interests of the local community rather than social wellbeing and social interests 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. It may be an entirely different
community use or the same in character as that carried on in the recent past but carried on in a different manner.\textsuperscript{72}

(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, Enfield LBC, 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\textsuperscript{73}. 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.

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

\textsuperscript{72} For example, in ZB Investments Limited v Croydon LBC (CR/2016/0009) the judge considered that it was possible that the Ship could be reinstated having been converted into flats and a new public house relaunched which might aim for a new market and “deliver an entirely different “product”” (para. 54). This would be sufficient because it is not necessary for the future community use to further social wellbeing or social interests in the same manner as before.

\textsuperscript{73} Page 4 of Runnymede BC’s Assets of Community Value Procedural Guide.
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{74} 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{75} In that case the pub had been closed for six years\textsuperscript{76} 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. 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. It is apparent from more recent cases that there is no difficulty in finding that six years is within the recent past when the circumstances are appropriate. This decision is not really a great deal of help as a specific guide as to what period constitutes the recent past but the general guidance is relevant.

A similar approach regarding the meaning of the “recent past” in Worthy Developments v Forest of Dean DC\textsuperscript{77} was adopted when the judge 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.

\textsuperscript{74} CR/2014/0007
\textsuperscript{75} Para. 7
\textsuperscript{76} Para. 2 and 11
\textsuperscript{77} CR/2014/0005 at para. 14
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 use 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\textsuperscript{78} 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\textsuperscript{79} 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.\textsuperscript{80} A similar approach was taken by Judge Simon Bird QC in Astim v Bury Council with regard to a bowling green dating from before the 1840s when he held that a last use in 2011 is “in the recent past when seen in the context of a use which commenced in the middle of the nineteenth century”.\textsuperscript{81}

Sales J. (as he then was) in R (oao Katherine Edgar) v Bournemouth BC\textsuperscript{82} 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 11th October 2012 when it had been closed since August 2005. This led the Council to consider that there had been no

\textsuperscript{78} CR/2014/0010 at para. 14
\textsuperscript{79} CR/2015/0018
\textsuperscript{80} para. 23
\textsuperscript{81} CR/2015/0022 para. 19
\textsuperscript{82} CO/2663/2013
community use in the recent past and the judge considered this to be a proper and reasonable decision.

As a result of this approach there is a noticeable trend pushing back the date at which the recent past ends. For example, in Hawthorn Leisure v Chiltern DC the Kings Head in Great Missenden had been a pub since the nineteenth century and the unchallenged evidence of the publicans from 2000 to 2007 established that during that period the pub qualified as an ACV. Judge Lane held that given the long history of the Kings Head as a pub the use during that period ending in 2007 occurred in the recent past. This period ended over seven years before the nomination. Subsequent use of the building including as an Indian restaurant also allowed locals to socialise there which would have been sufficient but did not detract from the separate finding as regards that earlier period.

This trend is corroborated by the decision in King v Chiltern DC which concerned the Pheasant at Ballinger which had been a pub since the middle of the nineteenth century. It was purchased in 2006 by Mrs King having been a traditional village pub up until then which qualified as an ACV. Mrs King sought to convert it to an “up-market” restaurant but the business was unsuccessful and closed at the end of 2008. The listing decision was taken less than five years after the closure which was clearly within the recent past. However, the review was delayed and the period between closure and the appeal hearing was a little over seven and a half years. This was still regarded as being within the recent past. In Neem Genie v Telford & Wrekin Council the judge taking account of the history of the pub since 1843 considered that five years ago fell well within the ordinary and natural meaning of the words “recent past”.

An attempt to argue in Z B Investments Limited v Croydon LBC that the recent past did not include the period ending with the change-over in 2011 from the Ship at South Norwood being

\[^{83}\text{CR/2015/0019 at para. 9}
\[^{84}\text{CR/2015/0025 at para. 34}
\[^{85}\text{Cr/2016/0010}
\[^{86}\text{Para. 29}
\[^{87}\text{CR/2016/0009}\]
leased to being run by a manager was firmly rejected. Account was taken of the public house having existed for over 150 years and possibly two centuries.\(^88\)

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). For example, in ZB Investments v Croydon LBC supra it had been argued on behalf of the owner that when a manager ran the Ship it was less profitable and the community benefit was de minimis. This was not accepted by Judge Anthony Snelson who stated that the question is whether the social wellbeing or social interests of the local community continued to be furthered “to any material extent”\(^89\). The judge then went on to state that in any event there was a three month period when the Ship was under a new manager who through energy and imagination revived the spirit of the pub and that period of community

\(^{88}\) Para. 50
\(^{89}\) Para. 51
benefit would alone have been sufficient even though the recent past would have been a three month period.90

In Reed v Shropshire CC91 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 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 –

(I) general - 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 building92. 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”93. This approach was repeated by Judge Lane in Gibson v Babergh DC94 who added that

90 Para. 52
91 CR/2013/0007
92 Worthy Developments Limited v Forest of Dean DC CR/2014/0005 paras 18 and 19
93 CR/2014/0015 at para. 15.
the possibility must not be “fanciful” (para. 18). In Crostone supra 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”.

Instead of holding that it was realistic to think there could be a future community use Judge Lane stated that in Banner Homes Limited v St. Albans City and District Council that it was not fanciful to think that there could be a future community use. This was challenged on appeal and Judge Levenson stated that it was preferable to use the statutory language but that in that case “I cannot envisage any empty space between what is “not fanciful” and what is “realistic”. In Hamna Wakaf it was argued that something could be more than fanciful but less than realistic and that Judge Levenson was wrong. This argument was rejected by Judge Lane who drew attention to two dictionary meanings of fanciful as including “unreal” and “unrealistic”. Even if not to be used fanciful still plays a significant role in determining whether or not the second condition of the qualifying criteria is satisfied.

This second condition is another issue in the ACV regime which is very fact-sensitive. This approach was reaffirmed by Judge Lane in Trouth 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 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.

In contrast although the golf course in Haddon Property Development Limited v Cheshire East Council was considered to have furthered the social wellbeing of the local community in the

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94 CR/2014/0019 and in Haley v West Berkshire DC CR/2015/0008 at para. 17
95 At para. 22
96 CR/2014/0018 at para. 38
98 Para. 13
99 CR/2015/0017
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 were 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 Judge Warren in Patel v Hackney BC\textsuperscript{100}) but those intentions will not be decisive alone. If the owner’s intentions were determinative then listing would become a voluntary process with the owner having the ability to prevent listing.\textsuperscript{101}

(II) role of planning - this is illustrated 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{102} In such circumstances unless successful such a planning application is likely to support the listing of the asset.

In contrast in Spirit Pub v Rushmoor BC\textsuperscript{103} Judge Warren considered that there was no realistic prospect that the Tumbledown pub would revert to use as a pub or any other community

\textsuperscript{100} CR/2013/005
\textsuperscript{101} Para. 14 Singh v Leeds CC CR/2015/0023
\textsuperscript{102} Kicking Horse v Camden LBC CR/2015/0012 at para. 31
\textsuperscript{103} CR/2013/0003
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.

Despite a campaign strongly supported by local residents two nominations to list the Green Dragon in Winchmore Hill were refused by Enfield LBC because it was not realistic to think it would be used at any time in the next five years to further the social wellbeing of the local community. The ground floor of the closed pub had been converted to a retail use involving the sale of
household goods. This conversion of use was probably under the Permitted Development Rights regime before the 2015 changes came into effect. The rejection was based on the owner having no intention to reopen the pub or to sell to someone who wishes to do so. By itself this should not be enough but in this case the owners had lawfully commenced a retail use of the ground floor. The owner could not be compelled to convert back to a pub. This is not always sufficient. It requires a detailed consideration of the facts of the case as is illustrated by Hawthorn Leisure v Bracknell Forest BC.\textsuperscript{104} In that case there were doubts both as to the lawfulness of the retail use and the permanence of the retail business.

Similarly the Pear Tree Inn in Hildersham is still on the ACV list notwithstanding it had been converted into a furniture shop. In the planning appeal the Planning Inspector acknowledged that planning permission would be required to convert it back to a pub but such an application would be supported by the Council. The Planning Inspector, Gary Deanes, considered that in the planning context the focus should not simply be on its use as a shop as this could “be a way of circumvent policy restrictions that seek to prevent the loss of public houses as community facilities”\textsuperscript{105}. With regard to the planning application the potential contribution to the social amenity of the local population is an important consideration and in this regard the Planning Inspector noted that interested parties refer to the role that the Pear Tree Inn played as a meeting place to socialise with others, “which is underlined by its ACV status.”

The Spirit decision has been followed by Judge Lane in STO Capital Limited v Haringey LBC.\textsuperscript{106} This decision concerned the Alexandria public house which was listed as an ACV on 18\textsuperscript{th} 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

\textsuperscript{104} CR/2015/0020
\textsuperscript{105} Para. 10 APP/W0530/W/15/3010681
\textsuperscript{106} [2016] UKFTT CR 0010 (GRC)
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.

A similar outcome to that in the STO Capital case occurred in Hamna v Wakaf. Planning permission for a residential development of the upper floors of the Grosvenor public house was granted after the review decision but before the hearing of the appeal. As a result the upper floors were removed from the listing as the appellant was determined to proceed with the development. A similar outcome was reached in Ceresa v Mid Suffolk DC107. Planning permission had been obtained to construct and use three holiday lets on the ground of the Cross Keys public house. This area was held by Judge Lane not to have been used with the rest of the pub and so had not furthered the social wellbeing of the local community. The judge considered that the part of the grounds subject to this planning permission could be regarded as a different “land unit”. As he accepted the evidence of the owner that there was an intention and ability to implement the planning permission within the three year period he held that it was not realistic to think that that area of ground could be used for a community purpose in the future. In consequence the area of land subject to the planning permission was removed from the listing leaving the pub and beer garden. This decision indicates that a planning permission which is not to be implemented immediately may suffice to prevent the asset qualifying as an ACV.

107 CR/2016/0001
In contrast in Singh v Leeds CC\(^{108}\) a former pub was leased to a charity whose activities included community events. It was accepted that the building occupied by the charity qualified and as a new lease was being negotiated it was realistic to think that it would in the future. However, the garden of the former pub had been deliberately excluded from the lease because the owner had acquired the property with a view to carrying out a residential development of the garden. A licence was granted to the charity but this was an act of kindness pending the grant of planning permission. The licence had ended and there had been unpleasantness so that the owner was not prepared to allow the garden to be used again. Planning Permission was granted for the residential development of the garden but notwithstanding this Judge Lane held that the garden should remain in the listing. No time scale for the development had been put forward and so the judge held that there was the possibility of a temporary and informal licence. The judge considered that the owner would want to allow this pending development so as to discourage trespassers and to produce a positive effect on the amenity of the immediate locality.

A grant of planning permission to develop the listed building does not, therefore, automatically result in the removal of an asset from the ACV list or prevent its listing if the grant is prior to the listing decision. The grant needs to be allied with both the ability and the determination to implement the planning permission. Will funding be available and does the owner or proposed developer intent to carry out the development immediately or wait?

If there is an outstanding planning application the appeal judges normally take the stance that it is not for them to speculate as to the outcome.\(^{109}\) This may have been encouraged if there has been a history of failed planning applications as in King v Chiltern DC.\(^{110}\)

Just as a grant of planning permission will be a material factor with regard to this specific issues so will a refusal of an application for planning permission. A refusal will mean that as regards the future it is a possibility that the planning permission wanted by the owner will not be achieved and so consideration will need to be given to what may happen if it is not. In such

\(^{108}\) CR/2015/0023
\(^{109}\) Judge Jacqueline Findlay in the Trustees of the Duke of Northumberland’s Charity v Hounslow LBC CR/2016/0007
\(^{110}\) CR/2015/0025
circumstances the owner will need to consider other options which may include seeking an alternative planning permission which includes a future community use or the owner deciding to sell or even to resume the former community use. It is not necessary to show that the owner will probably adopt a course which results in a future community use. It is enough that it is realistic to think that the owner could even if it is not the most likely outcome. Failure by the owner to achieve the desired planning permission will mean that there will be a number of possibilities as regards the future and so it is easier to conclude that it is realistic to think that one will result in future community use.

An example is Astim Limited v Bury Council\textsuperscript{111} in which a planning application in relation to a closed bowling green to develop it for retirement homes had been refused by the Council. This was despite the recommendation of the planning officer. The ground for refusal was that the bowling green had Protected Recreation Provision under the Council’s Unitary Development Plan. This refusal was upheld on appeal because the loss of a recreational facility was not balanced by the offer to fund alternative facilities in a different location. The reasons for the refusal were such that there was a material doubt as to whether planning permission for development could ever be obtained.\textsuperscript{112} This failure to obtain planning permission for the development of the green meant that it was possible that the owner would conclude that it will not be possible to carry out any development and so decide to sell for a community use. Alternatively, the owner may conclude that the only way to achieve a planning permission for a development of the site would be to include recreational use on the site.\textsuperscript{113}

In some cases the planning position may be materially affected by the operation of the Permitted Development Rights regime. With public houses this became less likely as a result of the limitations introduced in 2015 (see section 9 below) but was still possible if the public house had not been nominated for listing. With the changes in April 2017 the scope for changing the use of a public house under the PDR regime has gone save for a change to the new use class AA. Such

\textsuperscript{111} CR/2015/0022
\textsuperscript{112} Para. 23
\textsuperscript{113} Para 23
changes of use of a public house in the past were subjected to close scrutiny. For example, in Hawthorn v Bracknell Forest BC\textsuperscript{114} the owner claimed to have changed the use of the Royal Hunt public house from a pub to a shop about a month before the introduction of the changes made to the Permitted Development Rights regime in 2015. There was a continuing dispute between the owner and the Council as to whether use as a shop was legally possible. However, assuming that it was an authorised use it was still necessary to consider whether such a retail use has a realistic future. The owner substantiated this by two pieces of evidence. First, a heavily redacted lease with the Co-Op was produced but which was not accompanied by evidence from the Co-Op as to its plans for the building. Second, a tenancy at will with a rent of £1 per month to the person running the store accompanied by a trading report. This report showed that the receipts over a five month period, £324.30, were less than the employee’s wages. No evidence was given as to the plans for developing this business. It was, therefore, held to be unrealistic to expect either this business to continue or a new retail business to be started. This in turn meant that it was realistic to think that the pub business could be resumed in the next five years.

A further decision on this issue is Matterhorn Capital v Bristol City Council\textsuperscript{115}. It indicates that the possibility of a future planning permission including a community use can be taken into account when determining whether it is realistic to think that there may be a future community use. 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 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

\textsuperscript{114} CR/2015/0020
\textsuperscript{115} CR/2013/0006
permission had been previously granted but only on condition that part of the site was available for community use.

(III) not financially viable - a deteriorating business has often been put forward in opposition to the nomination of a public house but usually unsuccessfultly. 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. This was accepted and the appeal failed and the pub remained on the list of ACVs. It will be necessary for an owner to put forward strong evidence on this point to succeed. An indication of the strength of the evidence required is given in Curtis Sloane Limited v Bassetlaw DC116 in which Judge Lane stated that there was “no reliable evidence to show that the pub was in permanent decline at the time of its closure”.

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 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). In Astim Limited v Burt Council Judge Simon Bird QC stated

116 CR/2015/0021 at para 21
that it “would be wrong to rule out community spirit and philanthropy as resources which might be drawn upon to bring forward such uses”.117

A similar decision was made in Sawtel v Mid-Devon DC 118 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 119). 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).

In Haley (Old Boot) v West Berkshire DC 120 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

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117 Para. 26
118 CR/2014/0008
119 CR/2014/0010
120 CT/2015/0008
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.¹²¹

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 Council¹²² 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. 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 position was similar in King v Chiltern DC¹²³ as the local community group included hard-headed people with commercial and professional backgrounds. Further in Evenden the 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

¹²¹ Para. 20
¹²² CR/2014/0015
¹²³ CR/2015/0025 at para. 36
judge in that case. Although a business plan is not essential some evidence is necessary to show that the prospect of future community use is more than “mere speculation”.124

In Hawthorne Leisure v St. Edmondsbury BC125 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.

One appeal has been successful on this ground. Fernwick Limited v Mid Suffolk DC126 concerned the Cross Keys public house in Henley. Judge Simon Bird QC accepted both that the pub business was not financially viable and would not be in the next five years and that there was not local support to take on the running of the pub. Interestingly he drew a distinction between the community’s support for the continued use of the building as a pub rather than a desire to run it as a community pub. Accordingly notwithstanding the refusal of planning applications to convert to residential use the appeal against the ACV listing was successful on the ground that it was not

124 Para. 29 Fernwick Limited v Mid Suffolk DC CR/2015/0024
125 CR/2015/0018
126 CR/2015/0024
realistic to think there would be a use which furthered the social wellbeing or social interests of the local community in the next five years. It is relevant that this pub was outside the village with a poor connection to the village and not in walking distance. Further there was a competing village hall which was the focus of the parish council’s attention even though it had nominated the Cross Keys. There was no intention on the part of the parish council to run the pub and the evidence of the pub’s marketing showed a lack of interest in the pub as a pub.

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. If there is evidence of such support amongst the local community that will make it very hard for an owner to successfully challenge a listing.

This is illustrated by the decision in Henthames Limited v South Oxfordshire DC\textsuperscript{127} in which the only real issue was whether it is realistic to think that in the next five years there could be a non-ancillary use furthering the social wellbeing or social interests of the local community. There was at that time an outstanding planning application to construct an eighty bed care home with landscaped gardens on land including this site which was being strongly opposed. The owner argued that it was not realistic to think it would be so used in the next five years relying on evidence that there was an oversupply of health facilities in Henley outstripping demand; no other gym operator had been interested in taking it on; all the equipment had been removed; operating a swimming pool and gym was high cost as was the marketing; and to be commercially successful the membership fees would have to be increased. The argument failed and the judge helpfully set

\textsuperscript{127} CR/2015/0028

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out a number of factors which influenced her. An important factor was that the judge considered the local community to be “motivated, loyal and supportive of the facility if given the chance” with a preference for using a facility nearest to their home even if there is an oversupply. The local community did not have to show that it would be able to take over the facility as it is enough that it is realistic to think that there could be a future commercial use supported by the local community. This is particularly relevant in the context of nominated public houses because it will often be contended on behalf of an owner that the local community has not shown that it has proposals for taking over and running the pub. Even if it is not able to do so that is not conclusive of this issue.

The judge also considered that one possibility was that a planning permission could be granted for a care home with a smaller gym which could be used by residents of the care home and the local community. This would be sufficient even though it did not involve the resumption of use of the full facility. This chimes with the statement of Judge Warren in the Gullivers Bowls Club case that account could be taken of the possibility of “imaginative partnership schemes” which would conserve a substantial part of a site for community use. In fact on 20th December 2016 planning permission was granted for the care home and no provision for a community facility. In the officer’s report recommending the grant of planning permission in the section concerning the ACV listing it was stated that this was not a significant material consideration because the property would remain on the ACV list irrespective to the determination of the planning application and if planning permission is granted the ability of a community interest group to purchase the site will still remain. This appears to be contrary to regulation 2(c) of the 2012 Regulations.

128 Para. 14
129 Paragraphs 13, 14e and 14p
130 Para. 14n supported by the same judge’s decision in India Lounge Restaurant v Central Bedfordshire Council CR/2016/0020 at para. 18
131 Para. 14b
132 CR/2013/0009 at para. 16
133 P15/53385/FUL
134 See below
These cases illustrate that 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 has twice 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.

The decision in Henthames Limited supra chimes with a recent trend which is for the local community to support a third party who will run the business not as a community business but as a business which benefits the community.

(IV) damage to the asset - a further issue is the effect of damage to the asset nominated. How will this impact on a decision whether to list? It has to be taken into account because it will have long term consequences with regard to the costs of building works and will affect those who continues to be interested in the property. This point arose in Neem Genie Company Limited v Telford & Wrekin Council\textsuperscript{135} with regard to the Swan Inn at Waters Upton. Having closed in late 2011 it had been the subject of two arson attacks which had left it seriously damaged. A community nomination was subsequently made. Prior to that planning permission had been granted for five dwellings on land associated with the pub. On the appeal the real issue was whether the future condition in section 88(2)(b) had been satisfied. If the pub had not been damaged then there would be little hesitation in considering the condition satisfied. However, it had been and was a fire damaged building requiring substantial structural works. There was an absence of detailed evidence on matters such as the costs of restoring the pub. However, the judge considered it implausible that the Swan could be restored without an enabling development or funding from individuals with no commercial return expected. Not surprisingly there was nothing to suggest the latter option would occur. However, the judge considered it possible that

\textsuperscript{135} CR/2016/0010
within the next five years the ground floor of the Swan could be restored to use as a pub supported by an enabling development at first floor level which would help fund the pub (para. 20). This was sufficient to satisfy the future condition as regards the ground floor whilst the upper floor was ordered to be removed from the listing.

(V) summary - this issue of the future condition 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 and those making such nominations it is necessary 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 realistic (which still can mean 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. There is also the point that once converted to a residence it ceases to be an asset which is capable of being listed as an ACV.

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 (para. 15/17). 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

\[136\] CR/2015/0010

\[137\] In Singh v Leeds CC CR/2015/0023 a former pub was occupied by a charity which carried on community activities. It had the use of four spaces in the car park. There was an expectation that current negotiations would result in a new lease of the building and continuing use of the carpark. This was sufficient to justify the inclusion of the car park in the listing (para. 17).
extends to the outdoor areas”. This approach is confirmed by the decision in Kicking Horse Limited v Camden LBC\textsuperscript{138}.

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 being 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 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) Land comprised in single title – merely because land is in the same title it is not follow that all of it should be included in the listing. In New River Trustee 7 Limited v Wyrie Forest DC the Swan public house in Blakedown was listed which comprised the car park and rear garden but also included a small area of woodland. The woodland was in the same registered title at HM Land Registry. It is fenced off from the public house and there is no access from the public house to the woodland. The judge applied the two tests as to whether the there is a sufficient physical and functional relationship between the area of woodland and the public house. These are the tests applied in cases concerning whether to include in a listing of a public house parts of the building such as the upper floors. As there was neither a physical relationship nor a functional relationship the woodland area was removed from the ACV list leaving just the public house. It was suggested that the woodland acted as an acoustic barrier between the Swan and a railway line. This was rejected because there was no evidence to support this and in any event the remainder of the woodland not owned with the pub provided a much greater degree of acoustic screening. It would seem to follow from this that land actually acting as an acoustic screen would fulfil the function test but it is not clear why it should actually have to be effective at that role.

(5) 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

139 Wellington v Royal Borough of Kensington and Chelsea CR/2015/0007 and Kicking Horse v Camden LBC CR/2015/0012
140 CR/2015/0023 at para. 17
141 Para. 14
142 CR/2014/0006
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\(^{143}\) 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 appeal to the Upper Tribunal\(^{144}\). 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.

(6) **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

\(^{143}\) CR/2014/0018
\(^{144}\) [2016] UKUT 0232 (AAC)
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 (9) below). However, notwithstanding this public footpaths have been listed – for example, by Huntingdonshire DC. In contrast land at Dudsbury which had part of the Stour Valley Way public footpath crossing it was nominated but was rejected for listing by East Dorset DC as the public footpath would be protected by other legislation. If the land is crossed by public footpaths but the remainder is also used by the local community then the footpaths are merely a part of the overall picture. For instance in the Trustees of Sundorne Estate v Shropshire Council the planning permission for a residential estate in Upton Magna provided for a village green within the development. It was mostly grassed with some trees. A path crossed it and children played on the grass. The owners’ contention that the use of the footpath alone was not sufficient to justify listing failed because the judge accepted that it was used as a general play area by local children.

(7) **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).

(8) **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 v Rother. 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

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145 CR/2016/0015
146 CR/2013/0009
permission for residential development and new club facilities has been successful and has withstood a challenge by judicial review (see section 9(b) below).

(9) 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.\textsuperscript{147} It appears to be one of the reasons for Guildford BC refusing to list the old Wisley Airfield (nominated under the name Three Farm Meadow).

This point has also been confirmed by Judge Simon Bird QC in Astim v Bury CC\textsuperscript{148}. On review the Council had confirmed the listing of a bowling green dating back to the nineteenth century. It did so on the basis that it was an important part of the civic area and had historic and architectural interest which furthered the cultural interests of the local community. The judge considered that this was extending the meaning of cultural interest in a manner not intended. The enjoyment of a historic environment from a public vantage was not within cultural interests within section 88.\textsuperscript{149} The decision by Worthing BC not to list the Luxor cinema notwithstanding it being a local landmark due to its iconic art deco exterior is in line with that decision. Similarly, the view enjoyed by members of the local community from the garden of a public house looking at a woodland owned with the pub will not be sufficient.\textsuperscript{150}

\textsuperscript{147} Haddon development v Cheshire East Council CR/2015/0017 at para. 31 
\textsuperscript{148} CR/2015/0022 
\textsuperscript{149} Para. 6 
\textsuperscript{150} New River Trustee 7 Limited v Wyrie Forest DC CR/2015/0013 at para 18
However, a sharply different approach is contained in the judgment of Judge Jacqueline Findlay in the Trustees of the Duke of Northumberland’s Charity and Others v Hounslow LBC. This appeal concerned the listing of allotments. One of the reasons that the judge considered that they furthered the social wellbeing or social interests of the local community was because they represented a natural habitat for wildlife, birds and insects thereby improving the air quality, biodiversity and visual amenity of the area for the benefit of the local community. When combined with an active use of the land which furthers the social wellbeing or social interest of the local community this does not present a problem. Such advantages of visual amenity and biodiversity can be achieved on private land which members of the public are not allowed to use. Can such land be listed as an ACV and if it can where is the line drawn between what can be listed and what cannot be listed?

(10) Motive – sometimes the owner’s representations in response to a nomination will allege that the nomination is not in accord with the purpose of the ACV regime and is made for the wrong reason. Nominators may be seeking to block a change in use of the nominated asset. This can happen not just with local residents keen to prevent change in their neighbourhood. Nominations can be made by town councils seeking to prevent change. For example, the Drill Hall on the Quay in Sandwich had been on the market for some time. It was proposed that a funeral parlour acquire the building. This did not fit in with the Town Council’s plans to improve the Quay as a tourist attraction and so Sandwich Town Council nominated the Drill Hall and Dover BC listed it to the shock of the proposed purchaser.

Whether or not nominations are made with a view to preventing a 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). The fundamental issue to be decided when a community nomination has been made is whether the nominated asset qualifies as an ACV.

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151 CR/2016/0007
152 Para. 38
The motive behind the making of the nomination is not material. However, if the community support is for the retention and protection of the nominated asset’s existing planning use but there is not clear support for the community to take on and run the nominated asset or community support for a third party’s involvement then that may be a reason for holding that it does not qualify as an ACV because it is not realistic to think that there may be a community use in the future.\textsuperscript{153}

A desire on the part of tenants to prevent a landlord being able to prevent a renewal of a business tenancy on the grounds of redevelopment might be a factor that would be taken into account.

(11) 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 section 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\textsuperscript{154}. In Pullan v Leeds City Council\textsuperscript{155} Judge Lane stated that insofar “as loss may arise that is not within the compensation scheme, Parliament must 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{156}.

(12) 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

\textsuperscript{153} Judge Simon Bird QC at para. 27 Fernwick Limited v Mid Suffolk DC CR/2015/0024
\textsuperscript{154} Para. 22 and 23 of Lounge India Restaurant v Central Bedfordshire Council CR/2016/0020
\textsuperscript{155} CR/2015/0011 at para. 16
\textsuperscript{156} Para. 14
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).

(13) **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 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.” 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 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 to 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

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157 CR/2015/0017
158 Para. 18
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.\textsuperscript{159}

(14) **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 BC\textsuperscript{160}). 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 DC\textsuperscript{161} 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 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{162}. 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

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\textsuperscript{159} Para. 20  
\textsuperscript{160} CR/2015/0007 at para. 22  
\textsuperscript{161} CR/2014/0014  
\textsuperscript{162} See para. 27
would be permitted. Local planning policies covering the nominated asset such as a public house will be taken into account.\(^{163}\)

(15) 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 substantive 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.”\(^{164}\)

In Hamna Wakaf v Lambeth LBC\(^{165}\) Judge Lane held that strict adherence to the requirements regarding the contents of a community nomination contained in regulation 6 of the 2012 Regulations is not required. He considered that a listing authority has a discretion to waive a requirement in regulation 6 if it reasonably concludes that no substantial prejudice would be caused.\(^{166}\) However, this discretion does not extend to the eligibility requirements contained in regulations 4 and 5 of the 2012 Regulations.\(^{167}\)

(16) Possible subsequent disposal by community interest group – in Hawthorne v St. Edmondsbury BC\(^{168}\) 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 any 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

\(^{163}\) as in King v Chiltern DC CR/2015/0025
\(^{164}\) CR/2015/0006 at para. 36
\(^{165}\) CR/2015/0026
\(^{166}\) Para. 81
\(^{167}\) Para. 84
\(^{168}\) CR/2015/0018 at para. 29
being a relevant disposal to a community interest group and so a fresh nomination would have been needed to put it back on the ACV list.

However, in Neem Genie Company Limited v Telford & Wrekin Council Judge Simon Bird QC stated that “it was not the objective of the legislation that property should be able to be brought on the cheap.”\textsuperscript{169} 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. In Fernwick v Mid-Suffolk DC\textsuperscript{170} the judge gave little weight to two offers to purchase the nominated pub because the offers were conditional on their being no overage clause allowing the current owner to claw back any increase in value in the event of the grant of planning permission for residential conversion.\textsuperscript{171}

\textsuperscript{169} CR/2016/0010 at para. 27(e)
\textsuperscript{170} CR/2015/0024
\textsuperscript{171} Para. 26
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 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\(^\text{172}\).

(a) **Operational Land** (para. 3 Sch. 1)- the latter exclusion covers transport complexes such as airports, docks and railway stations as well as land used by utility undertakings (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.

Other nominations which have been refused on this ground include Audley End railway station, Fownhope Fire Station, Seaford Post and Sorting Office, Aldenham Reservoir, and the Bristol to Bath cycle path. 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).

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 opposed 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.

\(^{172}\) Section 262 Town and Country Planning Act 1990
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) 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.

An interesting nomination in this context was the nomination of the area surrounding Guildford Railway Station. A joint venture involving National Rail Development and Kier has proposed a large development of the railway station including more than 400 dwellings. This is opposed by the Guildford Society\textsuperscript{173} which nominated not the railway station but the area around it including taxi ranks, bus stops, cycle storage, disabled facilities, car parks and path. The objective was to achieve an ACV listing so that it would be a material consideration on the planning application. In December 2016 Guildford BC refused to add the nominated asset to the ACV list on the ground that it constituted operational land. There are likely to be more joint ventures relating to railway stations and it will be interesting to see how other authorities respond to community nominations.

(b) Residences (para. 1 Sch. 1) - the exclusion covers “a residence together with land connected with that residence.”\textsuperscript{174} A residence is defined “a building used or partly used as a residence”.\textsuperscript{175}

(i) buildings which are or are not residences - there is clarification in paragraph 2 of Schedule 1 as to whether a building is or is not a residence building for the purposes of the residential exclusion.

(a) Para. 2(b) provides that “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;

\textsuperscript{173} But strikingly that opposition to a brownfield development is criticised by the Guildford Greenbelt Society as leading to increased pressure on the greenbelt around Guildford.
\textsuperscript{174} Para. 1(1)
\textsuperscript{175} Para. 2(a)
(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(1).”

A house which is empty and on the market will be within (i) above of this provision. What constitutes a hotel rather than a public house with guest rooms is considered in section (iii) below.

(b) Paras. 2(c) provides that “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”

These two provisions serve to emphasise the importance attached to uses being lawful uses for the purposes of this exclusion which is considered in (ii) immediately below.

(ii) unlawful use as residence — one issue which has arisen in particular with regard to public houses is whether the occupation of the pub notwithstanding that it is without planning permission causes the pub to be excluded from the ACV regime under paragraph 1 of Schedule 1 to the 2012 Regulations. Some authorities appear to have taken the view that even though an unlawful use such occupation of the building as a residence will prevent it being listed as an ACV. For example, the Bishops End pub (also known as Bishops Blaize) in Burdop was nominated in 2013 and 2014 and both times this was refused because it was occupied as a residence. This was notwithstanding that an enforcement notice had been served in 2012 prohibiting the use of the
building solely as a residence following the closure of the pub. This enforcement notice was upheld on appeal and the failure to comply resulted in a criminal prosecution. Rejecting the nominations on this ground was wrong as has been established in King v Chiltern DC 176. The Bishops End pub was listed in 2016.

There are two possible situation that may arise in the context of this issue. Whilst the pub is running the lawful use may be only use as licensed premises (Class A4). When the pub business closes subsequent residential occupation will be a clear breach of planning law. Often the principal use may be as licensed premises but with an ancillary residential use. Unfortunately continuing to live in the pub after its closure may also be a breach of planning law even though it has a lawful ancillary residential use.

In order to fall within para. 1(1) of Schedule 1 of the 2012 Regulations the use of the building as a residence must be a lawful use. If the building is occupied as a residence but contrary to planning law then this will not exclude the building from listing. It means that it is not open to the owner of a public house to avoid the operation of the ACV regime by living in the closed pub. Judge Snelson stated that this was “plain” in the King case 177. The facts were slightly unusual in that case. There was living accommodation on the first floor and the pub area on the ground floor and the cellar but the common kitchen was on the ground floor. If the business had continued there would have been no doubt that the pub/restaurant qualified as an ACV under paragraph 1(5) (see section (v) below). After the closing of the pub/restaurant business at the end of 2008 Mrs King had expanded her living accommodation to include the ground floor. A number of failed attempts had been made to change the lawful use of the building. A failed application for a Certificate of Lawfulness of Existing Use had been made. All appeals had failed. Mrs King contended that by occupying the building as a residence the building had ceased to be subject to the ACV regime.

176 CR/2015/0025. In ZB Investments Limited v Croydon LBC CR/2016/0009 the greater part of the building which had been the Ship in South Norwood had been converted to flats without obtaining planning permission. The contention that this excluded those parts of the building from the ACV regime was dropped.

177 King v Chiltern DC CR/2015/0025 at para. 30
The judge accepted that the phrase “used as a residence” in paragraph 1(5) “must be interpreted as referring to the lawful use of the land in accordance with planning law.” To adopt the alternative construction would allow the owner to flout the law and be rewarded for doing so. Although “actual use” in section 88 may include unlawful use, the phrase in paragraph 1(5) does not include the word “actual”.

The result is the same whether the unlawful use as a residence relates to the whole of the building or a part only. The same phrase “used as a residence” occurs both in the definition of residence in paragraph 2(a) and in paragraph 1(5) when dealing with mixed use buildings. This decision also makes it clear that with those pubs which include living accommodation the closing of the pub business will not have the effect of converting the building to a residence for the purposes of the ACV regime.

(iii) hotels and other multiple occupation buildings - 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 (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.

Judge Simon Bird QC considered that whilst hotels can provide permanent residential accommodation for long term residents the more typical use “is the provision of accommodation

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178 Para. 31
179 BHL v St Albans [2016] UKUT 0232
180 CR/2014/0012
and board on a temporary and short term basis for guests who may be away from their principal or main home for various purposes.”\textsuperscript{181}

When determining 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 on the web; 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 operation of the residence exclusion as regards hotels has been more fully analysed in the Trustees of J Marshall Limited SSAS v Arun DC\textsuperscript{182} by Judge Simon Bird QC. The judgment also helpfully considers the issue of evidence relating to this topic. The appeal related to the Seaview Hotel. On the ground floor it had a bar and bar/dining area open to the public and residents. There are five en-suite guest bedrooms on the first floor and a terrace only for the resident guests. The manager had living accommodation on the ground floor. It is rated as a hotel. Two separate issues arose for decision. The first was the correct test that had to be satisfied before the building would qualify as a hotel. The second was whether the facts of the case satisfied what was considered to be the correct test.

(I) test - It was argued on behalf of the appellant that to qualify for exclusion it was enough that the building satisfied one of four possibilities taken from para. 2(b)(iii) of Schedule 1 of the 2012 Regulations which possibilities are:

(i) the building is a hotel;

(ii) part of the building is a hotel. In order to seek to overcome the problems of statutory construction it was argued on behalf of the appellants that this should only apply to a material part of the building;

\textsuperscript{181} Para. 36 in Trustees of J Marshall Limited SSAS v Arun DC CR/2016/0025
\textsuperscript{182} CR/2016/0025
(iii) the building is principally used for letting or licensing accommodation to paying occupants;

(iv) part of the building is principally used for letting or licensing accommodation to paying occupants.

If correct it would mean that many public houses would be excluded from the ACV regime because they have rooms which are let for accommodation and thus would be within (ii) above. The judge considered this to be so at odds with the clear intent of Parliament that it should be rejected unless compelled to give effect to the literal approach because there is no reasonable alternative interpretation.

The answer the judge held is to apply the exception to the exclusion contained in para. 1(5) of Schedule 1. This exception requires land to 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. He held that residence for these purposes is wide enough to include a hotel. By doing so it led to the conclusion that the building will only be excluded from an ACV listing as a hotel if it otherwise qualifies “where the nature and extent of the hotel use of the premises or its letting or licensing accommodation to paying occupants (whether this is the whole or part of the premises) is such that, taking the premises as a whole, the accommodation use is the main purpose of the building i.e. any social or community use is secondary or ancillary to it.” This avoids the need to imply the word “material” in relation to a part of the building.

(II) application of test – the judge took account of the turnover figures and the user covenant in the lease of the premises. The evidence showed turnover being 22-25% hotel and 75-78% public house/restaurant. The user covenant restricted use to a public house with ancillary accommodation. Set against this was the rating of the building as a hotel and the appellant’s evidence that 61% of the building’s internal floorspace is used for the hotel use and 39% for pub/restaurant. The significance of the area evidence was reduced because it did not show the extent of user of the respective parts. The judge considered the main use to be that of a public
house and the accommodation use to be very much secondary. Accordingly, the Seaview Hotel remained on the ACV list.

A similar outcome was reached by Judge Hughes in Admiral Taverns Limited v Cheshire West and Chester.\textsuperscript{183} In that case there were five guest rooms and the income from letting amounted to 20\% of the total income. An attempt to argue it was a hotel because the income from the restaurant and the rooms was 80\% of the total was firmly rebutted as artificial. As with the Trustees of J Marshall Limited SSAS case importance was attached by the judge to the user clause in the lease which defined the residential aspect of the business as ancillary. The evidence was such that the judge concluded that the use of the property as a public house was not an ancillary use but the primary use with the use of the guest rooms being ancillary to the activities of the pub and restaurant.\textsuperscript{184}

Had the outcome of these two cases been different it could have had a very significant effect on the number of listed public houses. As it is these decisions limit significantly the likelihood of a building being excluded on the ground that it is a hotel.

(iv) \textit{land connected with a residence} - 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\textsuperscript{185}. 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.\textsuperscript{186}

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

\textsuperscript{183} CR/2016/0022  
\textsuperscript{184} Para. 9  
\textsuperscript{185} Para. 1(2) Sch. 1 2012 Regulations  
\textsuperscript{186} Para. 1(3) Sch. 1 2012 Regulations
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.\(^{187}\)

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.

(v) 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(1) 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 residential quarters such as accommodation as part of a pub or a caretaker’s flat.” This is intended

\(^{187}\) Lot 4 Hoxton Mill Buildings Honiton Cambridge decided by South Cambridgeshire DC.

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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 BC188 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.

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188 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

(a) caution should be exercised when interpreting paragraph 1(5) because it is an exception to a general exception;\(^{189}\)

(b) whether or not a part of a building was a separate planning unit was not determinative as to whether paragraph 1(5) applied.\(^{190}\) 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.

(c) the planning decision in Henriks v SSE\(^ {191}\) 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.

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

(e) 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.\(^ {192}\)

(f) the test is not whether the part of the building is necessary for the nominated asset to function.\(^ {193}\) This again would rob paragraph 1(5) of any meaning.

(g) to be a part of the listed ACV there must be a current physical and functional relationship between the residential part and the remainder.\(^ {194}\) The decision has to be based on

\(^{189}\) Para. 39
\(^{190}\) Para. 22
\(^{191}\) 59 P CR 443
\(^{192}\) Para. 25
\(^{193}\) Para.s 26 and 27
all 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.\textsuperscript{195}

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

(j) 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\textsuperscript{196}. 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.

(c) 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

\textsuperscript{194} Para. 39
\textsuperscript{195} Para. 28
\textsuperscript{196} Kicking Horse Limited v Camden LBC CR/2015/0012
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.

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. This point was made by the City of York Council when the nomination of the playing fields of the Osbaldwick Primary school for listing was refused.

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197 Academies require the consent of the Secretary of State to a disposal of school land or land which has been used as a school in the last 8 years under Schedule 1 of the Academies Act 2010 and playing fields owned by a local authority require consent under section 77 Schools Standards and Framework Act 1998. There is a non-statutory guide provided by the Department for Education under the title “Disposal or change of use of playing field and school land” (May 2015) and Annex B to that guide sets out the legal framework.
7. COMMUNITY NOMINATION

The trigger for the start of the listing process is the giving of a community nomination. An authority has no power itself to list an ACV or to initiate the nomination process. A community nomination is a key element and owners opposing a listing may seek to challenge the validity of the nomination. There have been three principal grounds on which nominations have been challenged. The first is that the persons giving the nomination do not qualify as nominators (see (a) below). This has given rise to a considerable number of disputes particularly when the nominator is a branch of CAMRA. The second ground is that the nomination has not complied with the requirements of reg. 6 (see (b) below). The third is that the statutory requirements in section 88 have not been complied with. Most such challenges on the first and second grounds have ultimately failed but can take up significant time in investigation and consideration.

This area has been explored in the arguments and decision in Hama Wakaf v Lambeth BC\textsuperscript{198} which has given useful guidance and should unless and until upset on an ACV appeal to the Upper tribunal or beyond reduce significantly the number of such disputes.

(a) **Nominators** –

(1) **Eligibility** - before a local authority can consider an asset for listing it has first to have received a community nomination and such a nomination must be made by a qualifying nominator. Section 89(2)(b) provides that it must be made by one of the following:-

(i) by a parish council in respect of land in England in the parish council’s area,

(ii) by a community council in respect of land in Wales in the community council’s area\textsuperscript{199}, or

(iii) by a person that is a voluntary or community body with a local connection.

\textsuperscript{198} CR/2015/0026
\textsuperscript{199} Assets in Wales cannot yet be listed although the introduction of the ACV regime into Wales is under active consideration
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 if raised on a review the asset 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).

To qualify as a nominator each voluntary or community body must have a local connection. What constitutes for these purposes a voluntary or community body and a local connection is governed respectively by regulations 4 and 5 of the 2012 Regulations.

Regulation 5 provides that a voluntary or community body means:-

(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;
(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 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.

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200 reg. 5(2)
201 reg. 5(1)(c)
202 reg. 5(1)(d)
203 reg. 5(1)(e)
204 reg. 5(3)
205 reg. 5(1)(f)
What constitutes a local connection varies under reg. 4 dependent on what type of nominators makes the nomination. The requirements which must be satisfied are:-

(i) all voluntary or community bodies other than a parish council must carry on activities which are wholly or partly concerned with the local authority’s area or a neighbouring authority’s area (reg. 4(1)(a))

(ii) if the body is an unincorporated body within reg. 5(1)(c), a company limited by guarantee within reg. 5(1)(e) or an industrial and provident society within reg. 5(1)(f) 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 the local authority’s area or a neighbouring authority’s area. A formal constitution with the appropriate provisions puts the matter beyond doubt but there is no statutory requirement that the body should have a formal constitution. The importance of evidence showing compliance of this statutory requirement was emphasised by Judge Simon Bird QC. although he accepted that this could be provided subsequent to the making of the nomination.206

(iii) if the body is an unincorporated body within reg. 5(1)(c) there is the additional requirement that it has at least 21 local members (see (III) below). Judge Jacqueline Findlay has stated that there is no requirement that all members of the nominating group have entered the nominated asset or used its facilities207. That was in the context of a nominated pub/restaurant with rooms over which had been a pub since 1760 until it closed in August 2015 and which was found by the judge to have been used for many community activities in the recent past.

(iv) a parish council can nominate any land in the parish council’s area pursuant to section 89((2)(b)(i) and is entitled separately as a voluntary or community body to nominate land to which it has a local connection which for these purposes it will have as regards land

(a) in another parish council’s area have a common boundary with the nominating parish council (reg. 4(2)(a));

206 Para. 30 Trustees of J Marshall Limited v Arun DC CR/2016/0025
207 India Lounge Restaurant v Central Bedfordshire Council CR/2016/0020 at para. 17
(b) in a listing authority’s area which also includes the parish council’s area (reg. 4(2)(b)(i));

or

(c) in a listing authority’s area which has a common boundary with the parish council’s area (reg. 4(2)(b)(ii))

Not only must the person making the nomination qualify as a nominator but there is also a requirement that the nominator provides evidence that the nominator is eligible to make a community nomination208. The onus lies on the nominator and failure to do so may result either in a challenge from the owner or the point being taken by the listing authority. If a nomination is made by a nominator which is not eligible then it is not a community nomination and the nomination cannot proceed.

(2) **Waiver or relaxation of eligibility requirements** - the requirements imposed by regulations 4 and 5 are mandatory and must be satisfied. These requirements cannot be relaxed or waived by the listing authority in contrast to the requirements as regards the contents of a nomination form required by reg. 6.209 For example, a nomination by a company limited by shares will not be a community nomination and cannot be accepted by a listing authority as one. If made it cannot proceed.

(3) **Qualifying date** – the date at which the eligibility requirements in regulations 4 and 5 have to be satisfied is the date that the nomination is made. If the nominator did not satisfy those eligibility requirements at that date but does subsequently that is unlikely to be held to cause the nomination to be validated. If for instance there are not 21 local members of an unincorporated body which is the nominator at the date that the nomination is made that nomination will be invalid and will have no force. Such a nomination should not be capable of subsequently being brought to life by a later increase in the membership of the nominating body satisfying the local membership requirement. It is particularly important that this should be the position with public

208 Reg. 6(d)
209 Judge Lane in Hamna Wakaf v Lambeth BC supra at para. 84.
houses because of the planning restrictions that until May 2017 have been triggered by the making of a community nomination.

Although the eligibility requirements cannot be waived or relaxed the same is not the case with the requirement that evidence of eligibility be included in the nomination. The Hamna Wakaf case supra shows that this requirement is less stringent in application. In that case the South West London CAMRA branch had nominated the Grosvenor public house in Southwark. In the nomination form the box was ticked stating that the nomination was by a company limited by guarantee and in the box relating to activities a detailed account was given of the branch’s activities in Lambeth and CAMRA’s activities in South London. Adopting the “hybrid approach” set out by Judge Warren in the St. Gabriels properties case the authority accepted when making the listing decision that the branch qualified as a nominator. However, in the review decision it accepted that the CAMRA company had not authorised the branch to make the nomination in its name and so reliance could not be placed on that approach. This was accepted as correct by Judge Lane. However, the Council on the review followed a respected silk’s advice that the branch could qualify as a nominator not as guarantee company but as an unincorporated body on the basis of the evidence in the nomination form even though the correct box as to status had not been ticked. The Council retained the listing on review and the owner challenged this on appeal to the First-tier Tribunal.

The owner’s argument was that whether or not a nomination was a valid community nomination had to be determined “once and for all” at the date the nomination is made. Having made the nomination as a guarantee company it was not possible to reformulate the nomination as one by an unincorporated body. This was linked with an argument that a CAMRA branch could not qualify as an unincorporated body within reg. 5(1)(c) (see (9) below). Whilst accepting that the eligibility requirements could not be waived or relaxed (see (2) immediately above) Judge Lane held that it was possible to correct a nomination form which stated the wrong capacity for the

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210 Para. 87
nominate justifying the making of a nomination provided that the nominator was eligible to make a nomination at the date it was made.

In consequence although it stated that the nomination was being made by a guarantee company as it qualified as an unincorporated body the nomination was valid. Not only can such a change be made but evidence can be supplied subsequent to the nomination to prove such eligibility. In that case it was found to be acceptable for the list of 21 local members to be provided after the making of the nomination. This was not essential because it was stated in the nomination that there were 358 branch members living in Lambeth and it would be reasonable to infer from this that it was more likely than not that at least 21 of these would be local members. Although not the basis of Judge Lane’s decision on this issue that did meant that there was sufficient evidence in the nomination to establish the legibility of the CAMRA branch as a nominator.

(4) Adoption of nomination - the point was expressly made in the judgment in the Hamna Wakaf case supra that a nomination made by a person not eligible to do so could not be adopted by a person qualifying as a nominator. The example given is that if a company makes a nomination as a guarantee company when it is actually a company limited by shares it is not possible for a different guarantee company to adopt the nomination and thereby validate it. As it is open to that guarantee company to make its own nomination this is not a major issue.

What was not discussed in the Haman Wakaf case is whether a nomination such as the one in that case can be validated by ratification. What if the CAMRA company had ratified the making of the nomination by the branch? An effective ratification is retrospective. Could a ratification have been effective in the circumstances of that case? It has operated with writs issued without authority (for example, in Alexander Wood & Co Limited v Samyang Navigation Co. [1975] 1 WLR 673). There are limits so it will not be effective if it unfairly prejudices a third party. If it can be

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211 Para. 86
212 Para. 90
213 Para. 84
effective there will then be the issue whether this will be subject to a time limit so, for instance, it is only effective if occurring prior to the listing decision?

(5) Unincorporated body – the majority of disputes concerning the eligibility of a nominator have related to nominators claiming to be an unincorporated body within reg. 5(1)(c). Community nominations often comprise a group of local residents who have come together quickly and informally solely with regard to the particular asset such as a public house. In a number of cases this has led to the opposing owner seeking to challenge the nomination on the ground that such a grouping does not satisfy the eligibility requirements (see (1) above). It may be argued that there is no qualifying unincorporated body in existence and so the nomination is invalid and cannot result in a listing. Alternatively, it may be argued that the unincorporated body has not satisfied the eligibility requirements. The first argument will involve issues over what constitutes an unincorporated body for the purposes of an ACV nomination and in particular does it have to be an unincorporated association as is sometimes forcefully argued or does the phrase have a wider meaning in the context of this legislation? Inevitably such an approach then leads on to a consideration of what constitutes an unincorporated association.

Such challenges to nominations have in the main failed and unless and until the approach adopted by the First-tier Tribunal is upset or varied on appeal the force has gone out of them. It is still necessary for groups to satisfy the eligibility requirements but any grouping of individuals should normally be accepted as constituting an unincorporated body notwithstanding the decision in Trustees of J. Marshall Limited SSAS v Arun DC.²¹⁴

(i) Scope of Unincorporated body – one of the voluntary or community bodies permitted to nominate is an unincorporated body with at least 21 members (reg. 5(1)(c)). What is meant by an unincorporated body has been the subject of sustained argument.

In Hawthorne Leisure Acquisitions v Northumberland CC²¹⁵ it was argued that this phrase meant an unincorporated association and that it would need to comply with the definition applied

²¹⁴ CR/2016/0025
²¹⁵ CR/2014/0012
by the Court of Appeal in Conservative and Unionist Central Office v Burrell\textsuperscript{216}. 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 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{217} 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.

\textsuperscript{216} [1982] 1 WLR 522
\textsuperscript{217} CR/2015/0015
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 community nomination does not incur any financial liability or obligation\(^{218}\) 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 was 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”\(^{219}\). 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.

\(^{218}\) para. 24
\(^{219}\) para. 20 applied in the Trustees of the J Marshall Limited SSAS v Arun DC CR/2016/0025 at para. 26
The result of the Mendoza 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.

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{220} 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 the Mendoza 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?

This issue was considered again in the Haman Wakaf case supra in which the appellant argued that the nominator had not only to be an unincorporated body but also a person because section 89(2)(b)(iii) requires the community nomination to be by a “person that is a voluntary or community body”. Judge Lane rejected the argument that this added a restriction on how “unincorporated body” is to be construed\textsuperscript{221} and reiterated as in the Mendoza case that it should bear its ordinary dictionary meaning of an organised group of people with a common function\textsuperscript{222}. For these purposes it is possible to distinguish a CAMRA branch from the CAMRA national

\textsuperscript{220} para. 27
\textsuperscript{221} Para. 71
\textsuperscript{222} Para. 72
company so that the branch can be a nominator on the basis that it had an identity as an organised group with a branch constitution.\textsuperscript{223}

What is clear is that the judges of the First-tier Tribunal favour a strong purposive interpretation of the ACV regime and the statutory 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. In particular arguments that campaigning groups do not constitute an unincorporated body will not succeed.

These decisions make it clear that to be an unincorporated body the group does not need

(a) a constitution;
(b) a name;
(c) a contract between the members;
(d) to constitute an unincorporated association;
(e) membership which is comprehensively identifiable.

However, notwithstanding the informality that is permitted there must be a “body” of individuals. It is not enough that a number of individuals only sign a document supporting the ACV listing of an asset such as a public house. There has to be a degree of organisation so that the individuals are members of a “body”. It was on this ground that Judge Simon Bird QC held in the Trustees of the J Marshall Limited SSAS v Arun DC\textsuperscript{224} that the Seaview Hotel should be removed from Arun DC’s ACV list. The necessary number of individuals had signed the nomination form but had not formed an organised group\textsuperscript{225} so that it “was simply a list of signatures of persons obtained in support of listing organised by one person with minor assistance from another.” By signing the individuals were merely indicating their support and not joining an organised group “or signing up to an objective of an organised group.” This was notwithstanding the use of the name “the Supporters of the Seaview Hotel”. In consequence there was no body and so the individuals could not be members. Without a body the nomination was invalid and so the Seaview Hotel had

\textsuperscript{223} Para. 89
\textsuperscript{224} CR/2016/0025
\textsuperscript{225} Para. 27
to be removed from the ACV list even though it qualified as an ACV and was not exclusion on the ground that it was a hotel within Schedule 1 of the 2012 Regulations.

In that case the nomination and the obtaining of the signatories was the act of one individual alone. The crucial point perhaps was that the individual gathering the signatures had no authority to act on their behalf. This was clear because that individual believed that it was enough that evidence of local support was provided and the formalities could follow the listing by which he meant it seems the setting up of a group. No decisions were taken collectively or with the authority of a group. The list of signatures and the selection of the name were the decision of the individual alone. There had been no meetings; no constitution; no consideration of funding; no officers; and no authority for the active individual to speak on behalf of others. It can back to the issue of authorisation as considered in the Haman Wakaf case.

This will mean that with some nominations particularly of public houses local authorities will be faced with the not straightforward task of establishing whether or not there is in existence a body. It cannot assume from the existence of a list of signatures under a group name that there is in fact in existence a body for the purposes of ACV. Judge Simon Bird QC emphasised that nothing in his conclusion detracted from the earlier appeal decisions “that there can be a degree of informality in the setting up and administration of unincorporated bodies.” By way of example the judge refers to there being no need for a formal constitution. He contrasted the facts of this case with those in Hawthorn Leisure Acquisitions v Northumberland CC in which formalities were addressed after the making of the nomination but the individual organising it was acting as spokesperson for the group and not solely on her own.

The judge then went on to state that “there must at least be a group which is organised and capable of taking group decisions to further the objective of listing, whether through meetings or other less formal means of group decision taking.” The crucial point is that there is a group acting together and the nomination is made with their authority. As the judge stated in the

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226 Para. 28
227 CR/2014/0012
228 Para. 8
Marshall Trust case it “is the absence of any group decision making which prevented the requirements for a valid nomination being met.” Consequently a local authority needs to focus on there been a group acting together and the nomination being made with the authority of the group rather than being the act of a single individual who has collected signatures to support that individual’s nomination. Provided that before the nomination is made the group existed and had authorised the making of the nomination evidence of this can be provided after the nomination is made as shown by the Hama Wakaf case. It is preferable that the individuals involved with the making of the nomination should address this issue before making the nomination. It will be assisted by a written statement confirming that the individuals are acting as an organised group and the individual making the nomination is acting on their behalf. A formal constitution is a distinct advantage in overcoming this particular hurdle.

(ii) What constitutes an unincorporated association – the significance of this point is much reduced by the decision in Mendoza v Camden LBC supra and then the Hamna Wakaf decision. Even when the constitution that the nominators have adopted includes a provision that all users of the nominated asset are automatically members that is no longer going to give rise to a real issue unless and until the decision in Mendoza is overruled. It is not necessary that for a group of individuals to be a nominator they must constitute an unincorporated association. However, if the nominators do constitute what is clearly an unincorporated association then there is no point to be taken on their status and everyone can focus on the real substantive issues as to whether the nominated asset qualifies as an ACV.

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. Some listing authorities have in the past applied these decisions in deciding whether or not a group of nominators qualified to make a community nomination. Now

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229 Para. 31
these decision are still of some interest but will not determine whether a group of individuals qualify as nominators for the purposes of the ACV regime.

It has been long recognised that an unincorporated association is not a separate legal entity\(^{230}\) and that the relationship between the members is based on contract alone.\(^{231}\) 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 before an unincorporated association comes into existence. 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 contrast the ACV appeals have had the same debate and reached the opposite conclusion.

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;

\(^{230}\) O’Connor LJ in Currie v Burton Times 12\(^{th}\) February 1998
\(^{231}\) Walton J. in re Bucks Constabulary Widows’ and Orphans’ Fund Friendly Society (No 2) [1979] 1 WLR 936 at page 952
(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.

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 the groups making such nomination will vary in character. Some such groups will have a bank account and a degree of organisation similar to that of STAG but a number will not. The group may not have a bank account as a deliberate decision may have been made not to have funds but to leave fund raising to a separate entity such as a community company. Some nominators will be unincorporated associations like STAG but others will not be.

Regardless as to whether or not the group constitutes an unincorporated association it must be borne in mind that the additional qualifying requirements contained in the 2012 Regulations must also be satisfied. This requires not only at least 21 local members but that any surplus cannot be distributed to the members. Such requirements 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 specific point needs to be covered by a nominator because there must not be an ability to reimburse any surplus to members of the group. Further any such surplus must be applied in part or whole in the listing authority’s area or a neighbouring authority’s area.

It was pointed out by the judge in the Williams case that the uncertainties could have been avoided by an individual member of the group being chosen as a representative claimant of the
group.\textsuperscript{232} This is in the context of court proceedings with opposing parties. With an ACV nomination there will be an individual named in the nomination with whom the authority will communicate on behalf of the nominators but there will still need to be proof of a group satisfying the ACV qualifying requirements. Usually as regards membership this will be proved by the list of nominators signing the nomination. This is not the only means of proof and so it is possible that a nomination can be made by an individual in the name of the group with extrinsic proof that the group satisfies the ACV requirements. Such an approach is likely to be acceptable if the proof is sufficient but there is no formal procedure provided as in court proceedings to achieve such an outcome.

Now this is less likely to be a live issue than in the context of judicial review proceedings albeit that reliance has been 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 accepted as both defendants and claimant in such proceedings. Such flexibility will undoubtedly be followed with regard to ACV nominations.

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 was an objection which has resulted in the refusal to list nominated assets which otherwise qualified as an ACV. This was the ground for the removal of the Kensington Park Hotel from the authority’s list of ACV on review. After an oral review hearing the review officer held that the group making the nomination, KPH United, was not a qualifying nominator because the group was not a valid unincorporated association. 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 to qualify there

\textsuperscript{232} Para. 52 following Artistic Upholstery v Art Forma (Furniture) Limited [1999] 4 AER 277
must be an identifiable list of members who have agreed to be members albeit that the agreement need not be contractual. Clause 10 of that 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 considered to be 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. In the light of the Mendoza decision this removal of the hotel from the ACV list was wrong.

Another pub has also been removed on review from an ACV list 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 body as was held in the Trustees of J Marshall Limited SSAS v Arun DC supra. Alternatively, it may be because it did not satisfy the local connection requirement or
the need for 21 local members. Interestingly a second nomination has been made as a result of which the pub has been listed as an ACV again.

Following the Mendoza decision and the Hamna Wakaf decision this aspect of community nominations is likely to be much 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 but until that happens the task of listing authorities is less onerous save for ensuring that there is an organised body which has authorised the nomination rather than being the act of a single individual.

(iii) **Local members** – to qualify as a nominator it is necessary that an unincorporated body has not just at least 21 members but 21 local members\(^{233}\). To be a local member the member must be registered at an address within the authority’s area or in a neighbouring authority’s area as a local government elector in the register of local government electors kept in accordance with the provisions of the Representation of the People Act\(^{234}\). The test is not whether the member is capable of voting because that will not depend exclusively on registration on the electoral register alone but also on personal circumstances such as mental capacity. The test is simply whether the member is registered on the electoral register with an appropriate address.

It will be sensible for the listing authority to check that when the nominator is a group there are at least 21 individuals signing the nomination form who are local electors. It will not matter that some of those signing are not 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

\(^{233}\) Reg. 4(1)(c)

\(^{234}\) Reg. 4(3)
of a community nomination had not been satisfied at the date that it was made this approach by the authority must be correct provided that the added local members were members at the date of the making of the nomination. The only issue that this approach could throw up, 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. This could be relevant with regard to the operation of the Permitted Development Rights regime in the case of a nominated public house prior to the changes in May 2017 (see section 9 below). The Hamna Wakaf case would indicate that if the added members were members at the date of the making of the nomination that will be the relevant date. If they became members after the making of the nomination then either the nomination is invalid or as a practical answer the date of their addition should be the date that the nomination is validly made.

A similar issue arose with the nomination in relation to the Ship in South Norwood made by a group called 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. A fresh nomination was made and has resulted in the listing of the ground floor and basement of the Ship.

There is no requirement in reg. 4 that a list of 21 local members must be supplied with the nomination. In Hibbert v Wycombe DC CR/2015/0014 the local members’ requirement was treated as satisfied because in a different nomination at about the same time the nominator, a CAMRA branch, had produced a list establishing that the requirement was satisfied by that branch. In the Hamna Wakaf case Judge Lane was prepared to infer that from the number of members of the CAMRA branch stated in the nomination to live in the listing authority’s area that the requirement was satisfied.

It is the normal practice for the local members’ requirement to be satisfied by the supply of a list. In the Hibbert case at para. 13 it is stated that “such a list is often supplied to the local authority, which then makes the list available to the appellant (usually with addresses redacted for

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data protection purposes), having satisfied itself that the requirements of regulation 4(1)(c) and (3) are met”. That represents “best practice.” If no such list is supplied with the nomination then Judge Lane has indicated that the authority should request the names and addresses of 21 local members so as to avoid a repetition of the dispute in the Hibbert case before the First -tier Tribunal.

The redacting of personal information from the list can give rise to complaints by the owner but there is no provision entitling the owner to personally verify that this requirement has been satisfied. If there is a dispute on this aspect and the listing goes on appeal then the listing authority can deal with this by a witness statement from the officer who verified the names on the electoral register. Some individual nominators on the list may object to the disclosure of their names and addresses. A listing authority must exercise caution in this regard and ensure that the data protection requirements are not infringed. Some authorities do not disclose any information unless and until there is an appeal on foot.

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 provided in the list 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).

(6) Neighbourhood forums – many fewer nominations have been made by neighbourhood forums but some have been. Section 61F of the Town and Country Planning Act 1990 imposes a number of requirements that must be satisfied in order that a body can be such a forum. 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.

(7) 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 LBC in respect of the nomination by Croydon Community Pub Company Limited of Portmanor Pub in South Norwood). Parish Councils have made a number of nominations but usually in circumstances where there is a group of local residents supporting the nomination.

(8) 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 body. 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).

(9) CAMRA branches - the application of these regulations to branches of national organisations has given rise to a number of challenges by owners. It was first considered in St. Gabriel Properties v Lewisham LBC supra but the approach adopted in that case has been revisited and changed in the Hamna Wakaf case.
In the St. Gabriel Properties case 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. As discussed above 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 have 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 the requirement 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 CAMRA on the ground that it did not satisfy the requirement that surpluses must be applied in the local area. The Council makes the valid point that the surplus of CAMRA is not provided to local branches and, therefore, does not benefit the local authority area/neighbouring area. This would not preclude a
nomination by the CAMRA branch itself. However, the relisting of the Kensington Park Hotel emphasises that a branch of CAMRA can validly make a community nomination as is confirmed by the Hamna Wakaf decision.

The hybrid approach adopted in the St. Gabriels Properties case has been revised in the Hamna Wakaf case. In that subsequent case the CAMRA branch had ticked the box stating that the nomination was made by the CAMRA company but it was accepted by the Council on advice that this could not be the case because the branch was not authorised by the CAMRA company. However, as discussed in (5)(i) above it was held that the branch constituted an unincorporated body with at least 21 local members so that it qualified to make that nomination even though the box relating to unincorporated bodies had not been ticked. It is open to the listing authority and then if there is an appeal the First-tier Tribunal to look at the actual facts regardless of how the matter is presented in the nomination. What is important is that at the date of the nomination there is in existence an unincorporated body satisfying the statutory requirements.

What was not made explicitly clear from the Hamna Wakaf decision is whether the hybrid approach of Judge Warren in the St. Gabriel Properties case can still apply if the CAMRA company has authorised the nomination. CAMRA has prepared a letter to be used which seeks to provide authority for the branch to make the nomination on behalf of the CAMRA Company. If such a letter accompanies the nomination then will it be possible to apply the hybrid approach? Such an approach was not applied in Hamna Wakaf because of the absence of authority. The submissions of both the appellant and the Council went wider than just the issue of authority. Both adopted the same stance that it was wrong to conflate the status of the company and the branch when determining whether the statutory requirements including the need for a local connection have been satisfied. Judge Lane stated at para. 87

“What I have just said is, of course, predicated on the basis that, as both Mr Elvin and Mr Adamyk submitted, CAMRA South West London Branch did not have authority to make the

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236 Para. 63 in Hamna Wakaf decision
237 Para. 48 as regards the appellant’s submissions and para. 62 for the Council’s submissions.
nomination on behalf of the Campaign for Real Ale Limited. I accept all that has been said (as recorded above) on this issue. Insofar as what the Tribunal said in the St Gabriel case conflicts with the law of agency and company law, I accept it must be regarded as wrong.”

This seems to focus on the absence of authority but then goes on to seemingly cover all the submissions which were not so restricted. This would conform with the CAMRA company and the CAMRA branch being treated as separate so that either may make a nomination. This in turn should mean that the activities of the branch are not the activities of the CAMRA company. Similarly the surplus of a branch should not be part of the surplus of the company and so applications of a branch’s surplus within the relevant area will not be an application by the CAMRA company for the purposes of reg. 4(1)(b).

Following this decision it is to be excepted that nominations will be made either by CAMRA branches either in the alternative relying on the CAMRA guarantee company combined with the features of the local branch and alternatively on the branch being an unincorporated body or possibly more simply just by the branch. It is noteworthy that in both the St Gabriel Properties case and the Hamna Wakaf case the nomination was made by the branch and the second respondent in each of the ACV appeals was the branch and not the CAMRA company. What will give rise to an issue is if the nomination is made by the branch but exclusively on behalf of the CAMRA company. The letter of authority provided by the CAMRA company may encourage such an approach and if adopted there must be a serious risk that the nomination will be treated as invalid and not a community nomination because the CAMRA company has not satisfied the requirements in reg. 4(1) showing a local connection.

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.
(10) **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\(^{238}\) and an asset may be listed even whilst being used for the relevant community purpose.

(11) **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. Even if the asset is no longer in use it is still not essential in all cases that it be shown that funding is available. Astim Limited v Bury Council\(^{239}\) concerned a bowling green which had closed in 2011. The nominator, the Ramsbottom Heritage Society, had no detailed proposals and had not identified any possible sources of funding for future use as a bowling green. This was understandable because following the refusal of planning permission on appeal to a planning inspector it was uncertain how the owner would decide to

\(^{238}\) para. 7
\(^{239}\) CR/2015/0022
proceed. Judge Simon Bird QC considered that there was no evidence to suggest that finding funding for an activity which includes “low key recreational uses” would be difficult.\textsuperscript{240} In reaching that conclusion the judge took into account the importance of community spirit and philanthropy as resources that could be drawn on.

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. It may be that the local community will seek to support a third party’s acquisition of the asset with a view to it being run commercially but supported by the local community. Such a possibility has been accepted as relevant in Henthames Limited v South Oxfordshire DC\textsuperscript{241} and Lounge India Restaurant v Central Bedfordshire Council\textsuperscript{242}

Unfortunately the ACV regime does provide another weapon in the hands of those whose principal aim is to prevent a development rather than to acquire the property for the community. When the regime is used in such a way it can have a paralysing effect. Interestingly in this context Judge Simon Bird QC drew a distinction in Fernwick Limited v Mid-Suffolk DC between local support for the continued use of the nominated asset as a pub and local support for taking on and running the asset as a pub. There was evidence of the first but not the second and this was not sufficient to retain the pub on the ACV list.\textsuperscript{243} This is a hopeful sign for developers and owners that nominations seeking only to preserve the current planning use but not with a view to the asset

\textsuperscript{240} Para 26
\textsuperscript{241} CR/2015/0028 at para. 14
\textsuperscript{242} CR/2016/0020 at para. 21
\textsuperscript{243} CR/2015/0024 at para 27
been acquired for the community or being run in manner which the local community supports will not necessarily be successful. This decision contrasts with the decision in Curtis Sloane Limited v Bassetlaw DC\textsuperscript{244} in which Judge Lane accepted that there was evidence of local support both for the re-opening of the Robin Hood public house in Elkesley and the use of it rebutting the owner’s accusation that the Parish Council’s nomination was simply to prevent redevelopment.

(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 statutory requirement of a 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.

With many nominations forceful challenges are made on behalf of the owner that there is a lack of supporting evidence and that the nominations merely contain bald assertions. In Admiral Taverns Limited v Cheshire West and Chester\textsuperscript{245} Judge Hughes made the point that that the nomination “is merely the start of the nomination process by which a Council determines whether the criteria for listing as an ACV are met”. The Council is entitled to accept the contents of the nomination “in good faith”. The standard of proof required by listing authorities will inevitably vary and practices will differ. What is clear is that the standard attempted to be set in some challenges to nominations by owners are set far too high.

\textsuperscript{244} CR/2015/0021
\textsuperscript{245} CR/2016/0022 at para. 10
The evidence does not have to be in documentary form but can be contained just in statements including the nomination. The first nomination of the Black Swan in Lower Withington was rejected by Cheshire East council reportedly on the ground that there was insufficient documentary evidence which is surprising if the statements provided have covered the necessary points.

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:-

(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. However, in cases in which it is clear what asset is being nominated the absence of a statement of the boundaries will not invalidate the nomination. On the review of the listing of the Saffron Walden Community Hospital one of the owner’s objections was that the boundaries were not correctly identified. The reviewer found that the obligation was mandatory but only made the nomination voidable and not void. It could be a subject to a judicial review but any listing decision made stood. If a mandatory obligation has not been complied with then it should be a matter to take into account. However, in the light of the Hamna Wakaf decision regulation 6 does not impose a mandatory obligation which must be complied with at the date of the making of the nomination.

Incorrect description of the boundary in the nomination form was one of the instances given by Lambeth’s Queen’s Counsel in Hamna Wakaf v Lambeth LBC in support of his argument

\[246\] Reg. 6
\[247\] In Hawthorn v Bracknell Forest BC (CR/2015/0020) the Royal Hunt public house was nominated by Winkfield PC. One of the grounds of appeal was that no details of the boundaries of the nominated asset had been included. This challenge was rejected because it was obvious that the Royal Hunt was the public house and curtilage (para. 11). There was no part which was to be excluded so the use of the name combined with the postcode was adequate.
\[248\] CR/2015/0026 at para. 58
that the listing authority has a discretion regarding compliance with regulation 6. Judge Lane in that case held that the listing authority may receive subsequent information to supplement the nomination form or waive compliance with regulation 6 if the authority reasonably concludes that no substantial prejudice would be caused.\textsuperscript{249}

(ii) provide details of the names and addresses of the freehold and leasehold owners and occupants to the extent known. If the details are not known then they cannot be given in the nomination;

(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 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

\textsuperscript{249} Para. 81
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 at the date that the nomination is made. In the absence of full compliance at that date 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. In a number of appeals 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.

This issue was fully argued before Judge Lane in the Hamna Wakaf case who concluded that the validity of the nomination was not to be construed “on a strict and “once and for all” basis as regards each and every requirement, as at the date when the purported nomination was made.” In particular strict adherence to each of the obligations set out in regulation 6 is not

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Para. 82
required. A listing authority can either accept evidence subsequent to the nomination which makes good the failure or if to do so would not cause substantial prejudice waive the need for compliance.

In the Hamna Wakaf case supra both sides had relied on the Court of Appeal decision in R (oao Warden and Fellows of Winchester College) v Hampshire CC. Judge Lane applied the judgment of Dyson LJ on the second issue in that case (which did not need to be decided). The case concerned whether rights for mechanically propelled vehicles had been extinguished by section 67 of the Natural Environment and Rural Communities Act 2006. The second issue was whether defects in a certificate of service not complying with paragraph 2(3) of Schedule 41 to the Wildlife and Countryside Act 1981 rendered invalid a decision made pursuant to paragraph 3(2) of that Schedule 14. Dyson LJ held adopting the approach of Lord Steyn in R v Soneji that a defect in such a certificate did not cause the authority’s decision to be invalid. He considered that the enquiry to be carried out is whether the defects are serious and have caused real prejudice. Judge Lane considered that the issue he had to decide was a matter of statutory construction and that a failure to comply with regulation 6 did not automatically cause the nomination to be invalid nor a listing decision made in response to it.

That ability to waive a statutory requirement or subsequently supplement the nomination is separate from the issue as to what will actually satisfy the requirement in regulation 6. The answer is that the bar is set very low as regards satisfaction. This is illustrated by the nomination in Hawthorn Leisure v Bracknell Forest BC which gave as the reason for nominating the Royal Hunt public house in Ascot that it was the last remaining of originally five pubs in the area and there is a need for a community pub. One of the grounds for challenging the nomination was that it did not include a reason why the nominator believed the asset to qualify as an ACV. It was held that

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251 Para. 81
252 [2008] EWCA Civ 431
253 [2005] UKHL 49 and see section 7(b) above
254 Para. 70
255 CR/2015/0020
stating that there is a need for a community pub was a reason and satisfied reg. 6. Whether this suffices is a different point. In that case no contrary evidence was provided so it was reasonable to accept the sparse statement. This happens not infrequently with community nominations. The owner vigorously challenges the nomination but puts in no or little opposing evidence and seeks to establish a failure to comply with the statutory requirements. After decisions such as this one and Hamna Wakaf such an approach may be less likely to be adopted.

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 may qualify and the nominated asset may qualify as an asset of community value then the necessary supporting evidence may be provided subsequently? The authority is required by section 90(2) to consider a community nomination. If the provision of information has been staggered the Hamna Wakaf decision should not prevent the nomination being a community nomination at least when the full information has been provided. Judging the line between the two on receipt of a nomination will not sometimes be easy. Does the nomination have to indicate that with supplemental information it may result in a listing or will the ability to provide further evidence be available in all case other than those in which the nominator or asset clearly does not qualify?

What has not been addressed is whether the provision of further information by the nominator affects the timetable which runs from the making of the community nomination. Does the listing authority have the discretion to extend the period in which to make a listing decision? There is no express provision in regulation 7 Schedule 1 permitting an extension of the eight week period.

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256 Para. 10
257 Para. 14
(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 listed with other such commercial facilities nearby? The decision in Pullan v Leeds City Council\textsuperscript{258} would

\textsuperscript{258} CR/2015/0011
indicate that the First-tier Tribunal will not place such weight on that factor. When an authority takes this factor into account and decides not to list there will be no appeal to the First-tier Tribunal which will serve to embed the disparate treatment between authorities in a manner which was probably not intended.

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) Furthering social welfare or social interest of the local community - 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 the local community include;-

(i) Types of activities;
(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) Accessibility;
(ix) Policies of organisations using the facility;

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259 This is reinforced by the decision of Judge Jacqueline Finlay in India Lounge Restaurant v Central Bedfordshire Council CR/2016/0020 who stated that at para. 20 that it is not necessary for the nominated pub to be “unique or special”.

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(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\textsuperscript{260}); (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)

Different 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\textsuperscript{261}). 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

\textsuperscript{260} 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.
\textsuperscript{261} The words in brackets come from the published guidance of Telford & Wrekin Council
qualifies even though the moratorium period will not apply to a disposal when the property sold is partly listed and partly not.

When the nominated asset is a public house there will often be a considerable amount of information on the web. The pub may have a Facebook page or a Twitter account. There may be an online calendar giving dates for events. The website for the pub may contain information about the type of pub it is and the events that taken place there. In some cases a visit to that website may show very clearly that the pub is a community pub. Some listing authorities take account of such information even if not supplied by the nominator. An exhibit put forward on behalf of the listing authority, Cheshire West and Chester Council, in the appeal concerning the Farndon Arms contained material from the pub’s website which assisted the judge in forming a view as to the character of the particular pub.262

(III) Future use furthering social welfare or social interests of the local community – 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;

(viii) evidence as to matters which would make future use unviable such as issues relating to building structure, maintenance, repairs and rent costs.

262 Admiral Taverns Limited v Cheshire West and Chester CR/2016/0022 at para. 7
(III) **Public houses** – a great deal of the publicity concerning the ACV regime focuses on public houses. In 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 2000 listed with a current target of 3000. It appears that the rate at which public houses are changing to other uses has slowed. In a survey carried out by Fleurets it found that the number of pubs sold for non-pub use had reduced by 25% in 2016 (such sales in 2015 had been 50% of all sales whereas in 2016 they were 37.6%).

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\(^\text{263}\). 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. Similarly, not all closed public houses will be listed. Fernwick Limited v Mid Suffolk DC\(^\text{264}\) shows that it is possible to establish that a pub which is no longer financially viable does not qualify as an ACV although it is not an easy task. The test must be applied on a case-by-case basis to the facts of each nomination.\(^\text{265}\)

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 the original rejection of 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);

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\(^{263}\) Judge Warren at para. 4

\(^{264}\) CR/2015/0024

\(^{265}\) Admiral Taverns Limited v Cheshire West and Chester CR/2016/0022 at para. 8.
(iii) is there evidence from regular users (as in Haley (Old Boot) v West Berkshire\textsuperscript{266} and Pullan v Leeds City Council\textsuperscript{267}) although this is not essential\textsuperscript{268};

(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;

(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{269};

(xii) what is the location of the pub; 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;

\textsuperscript{266} CR/2015/0008
\textsuperscript{267} CR/2015/0011 at para. 12 stating that evidence was that clientele comprised far more than a de minimis local element
\textsuperscript{268} Para. 17 in Lounge India Restaurant v Central Bedfordshire Council CR/2016/0020
\textsuperscript{269} Hawthorn Leisure v St. Edmondsbury BC CR/2015/0018 at para. 15
(xviii) how has the pub business fared in the last years; what business model has been operated; would alternative models make a difference; and how many publicans have there been;

(xix) has the pub been on the market for sale and if it has for how long, in what manner has it been marketed, by whom, what interest has been shown and what offers received;

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 on interpretation 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.

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

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270 For failing to meet this criteria Sheffield Council on 27th September 2016 refused to list the University Arms which was described as a “student pub”. It similarly refused to list the Red Deer public house on 2nd December 2015 due to insufficient evidence.
271 Herefordshire Council adopted a similar approach when refusing to list a butchers shop in Fownhope on the ground that it was primarily a specialist wholesale supplier.
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.

A fresh nomination was then made with regard to the Three Tuns which was 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 which has led to their being listed.

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 nomination of the Portland pub is stated to be that 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 authorities such as Sheffield City Council has sought to provide useful guidance and to be transparent.

(d) Assessment by authority – linked to the issue of evidence is the question as to 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?

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

3.4 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 of information into the process can lead to unnecessary appeals and expense. It should 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.

There is a divergence between authorities as to who makes the listing decision. In the case of a review of a listing decision the review decision has to be made by an officer of the authority. There is no similar requirement in the ACV regime as regards the listing decision. Some authorities such as Sheffield have the decision made by the councillors. In York a senior councillor decided to list the Grey Horse Inn in Elvington whilst rejecting the nomination of the...

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272 Para. 4 Sch. 2 2012 Regulations.
playing fields of Osbaldwick Primary School. In contrast many authorities leave the decision to an appropriate officer. For, instance the listing decision is delegated by Kettering DC to officers but following the refusal of the second nomination of the former football ground at Rockington Road a motion was put to a council meeting that this should be revoked so that listing decisions could be made by the councillors. The difficulty is that listing decisions are legal decisions and not political decisions.

(e) Timetable –

(1) Eight week limit - 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. An owner may be too late if it holds back a response to the nomination until towards the end of the eight week period.

(2) Notification of owner - 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 on this point 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

273 Reg. 8
be undertaken by all the interested parties. Interestingly it is noted in Haddon Development Limited v Cheshire East Council\textsuperscript{274} 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 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{275} It was one of the objections taken on the review of the listing of the Saffron Walden Community Hospital and the reviewer decided that the obligation was directory as there was no time limit; no provision for the giving of representations on behalf of the owner and no obligation on the authority to consult with the owner. The decision is in line with the Higgins case.

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 a review and then an appeal are both by way of a full reconsideration of the issues and so such failure cannot be determinative of the appeal.\textsuperscript{276} 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{277} by an objector against a Planning Inspector’s decision to grant to the charitable trustee owning the land planning permission for fourteen dwellings.

\textsuperscript{274} CR/2015/0017 at para. 3
\textsuperscript{275} Para. 2
\textsuperscript{276} Judge Lane in Haley (Old Boot) v West Berkshire DC CR/2015/0008 at para. 7.
\textsuperscript{277} Robinson v SSCLG and Suffolk Coastal DC [2016] EWHC 634 (Admin)
(3) **Representations by owner** - In Sawtell v Mid-Devon DC\textsuperscript{278} 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 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.

\textsuperscript{278} CR/2014/0008 at para. 4
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 the statutory requirements 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.

(4) Failure to meet eight week deadline - 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.

For a challenge to a listing decision made after the expiry of the eight week period to succeed it will be necessary to argue that failure to comply invalidates the decision. This is an issue of statutory construction. Traditionally the outcome depended on two issues - first whether the matter concerned a statutory duty or a statutory power and second whether the statutory requirement was regarded as mandatory or directory. If the statutory requirement was considered to be directory then failure to comply with it would not invalidate a decision. However, a further distinction was introduced as regards directory statutory requirements between those which if not complied never invalidated a decision and those which did not invalidate a decision but only if there had been substantial compliance.

In London and Clydeside Estates Limited v Aberdeen DC279 Lord Hailsham said that in such cases the Court is faced with a spectrum of possibilities. At one end a fundamental obligation may have been so outrageously and flagrantly ignored that any decision can be ignored. At the other

279 [1980] SC(HL) 1
end it may be so nugatory as not to be of any importance. In between those two ends there would be many possibilities. This led to a more flexible approach focusing on whether Parliament would have intended the consequences of non-compliance to be total invalidity.\(^{280}\) In consequence the emphasis is on the consequence of non-compliance\(^{281}\) and it is necessary to consider the purpose of the legislation, the effect on third parties, the degree of public inconvenience and the detriment suffered by the person challenging the administrative act.

It is relevant that a statutory duty is concerned rather than a statutory power. Strict compliance is more likely to be required if the statutory requirement concerns a statutory power and not a duty.\(^{282}\) The ACV regime imposes an emphatic duty on the listing authority to consider a community nomination. It is not just the nominators who will be affected by a failure to do so but the local community. The owner of the nominated asset will not be significantly prejudiced by a late listing decision.

Consequently, I would expect an authority to continue with its consideration of the nomination even if it has not met the deadline and for a listing decision to be valid even though outside the eight-week period. It is noteworthy in this respect that the listing decision with regard to the Farndon Arms was made outside the statutory eight week period. This was put forward as one of the grounds for objecting to the listing on review but Cheshire West and Chester Council considered that this was not fatal. On appeal this was recorded as part of the history of the listing but no point was made by the appellant based on the failure.\(^{283}\)

In the event that the decision outside the statutory period 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

\(^{280}\) Lord Steyn in R v Soneji [2005] UKHL 49 at para 15
\(^{281}\) Para. 23 Lord Steyn in R v Soneji supra
\(^{282}\) See Cullimore v Lyme Regis Corporation [1962] 1 QB 718
\(^{283}\) Admiral Taverns v Cheshire West and Chester CR/2016/0022 at para. 3 and 4
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. Prior to the changes in May 2017 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.

(5) Impact of owner’s insolvency – if the corporate owner of the nominated asset is in liquidation or administration at the time the nomination is made or after nomination but before the listing decision there is no statutory provision which makes clear whether the moratorium imposed by the insolvency legislation applies or the nomination must be processed by the authority in accordance with the ACV regime. The same is the position if the owner is an individual who is bankrupt or against whom there is a pending bankruptcy petition.

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284 See section 9(a).
285 Section 130(2) Insolvency Act 1986 as regards a company in compulsory liquidation and para. 43(6) Schedule B1of the Insolvency Act 1986 as regards a company in administration.
286 Section 258(2) and (3) of the Insolvency Act 1986
As regards a company in administration para. 43(6) Schedule B1 of the Insolvency Act 1986\(^{287}\) provides that

“No legal process (including legal proceedings, execution, distress and diligence) may be instituted or continued against the company or property of the company except—

(a) with the consent of the administrator, or

(b) with the permission of the court.”

This provision catches not only court proceeding but extends to proceedings before tribunals, arbitrations, construction adjudications and quasi-judicial proceedings.\(^{288}\) Will this provision catch the operation of the listing process and in particular the making and processing of community nominations. At present there is no clear cut answer. Will the Court view it as an adjudicative process similar in character to that considered by Norris J. in Hudson v Gambling Commission\(^{289}\) or more akin to an administrative process as in Railtrack plc (in railway administration) Winsor v Bloom?\(^{290}\)

If the provision applies then there is the further issue whether the Court will give leave to the listing authority to proceed. The discretion conferred by the Court’s power to give leave will be exercised in accordance with the guidance given by the Court of Appeal in Atlantic Computer Systems plc\(^{291}\). An important factor in such an application for leave will be the exclusion of any disposal pursuant to insolvency proceedings from the operation of the ACV moratorium provisions\(^{292}\). It is to be expected that the public interest in the operation of the ACV regime will weigh heavily with the Court when considering such an application for leave to continue with the nomination process.

\(^{287}\) Inserted by Schedule 16 Enterprise Act 2002
\(^{288}\) Sir Browne-Wilkinson VC (as he then was) in Bristol Airport plc v Powdrill [1990] Ch. 744 at page 765
\(^{289}\) [2010] EWHC 1229 (Ch)
\(^{290}\) [2002] EWCA Civ 955
\(^{291}\) [1992] Ch. 505
\(^{292}\) Para. 7 Schedule 3 to the 2012 Regulations – see section 8(e)(xiv) below
(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 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. 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.” 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

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293 Pullen v Leeds City Council CR/2015/0011
294 Para. 11 which has been reaffirmed by Judge Jacqueline Findlay in Lounge India Restaurant v Central Bedfordshire Council CR/2016/0020 at para. 20
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.

(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\textsuperscript{295} 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.

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
BC\textsuperscript{296} 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.

\textsuperscript{295} CR/2015/0001
\textsuperscript{296} Supra at para. 41
Following the Hamna Wakaf decision it is now clear that part of the listed asset can be removed from the ACV list although the point was not expressly considered in the judgment. The appeal related to the Grosvenor public house in Stockwell. Due to the grant of planning permission for the residential development of the upper floors of the building it was held that the upper floors should be removed from the ACV list although the remainder of the building was retained in the ACV list. It is eminently sensible that such a course of action should be possible.

However, in ZB Investments v Croydon LBC\textsuperscript{297} which was subsequent to the Hamna Wakaf decision Judge Anthony Snelson stated that it is a moot point whether the First Tier-Tribunal has power to amend an ACV listing.\textsuperscript{298} It was not necessary in that case to consider whether the power exists because the argument against the inclusion of the garden/yard of the Ship failed.

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. When listing the Foxton Post office and Stores the South Cambridgeshire officer was careful to exclude the residential elements, outside store building and associated garden and to limit the listing to the post office, shop and delivery area. In contrast one of the grounds for refusing to list a nominated asset given by some authorities appears to be that the claimed community use relates only to part of the nominated asset. For example, Guildford BC refused to list land south of Ash Lodge Drive because away from the public footpaths the use was only occasional and over part of the nominated land only.

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.

\textsuperscript{297}CR/2015/0009
\textsuperscript{298}Para. 56
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:

(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 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” each had to be considered separately as in Trouth v Shropshire CC

(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.

299 CR/2015/0017
300 Para. 16
301 CR/2015/0002
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.

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.\(^{302}\) For these purposes as well as being in single ownership the two parts (listed and non-listed) must be accessible from each other. This

\(^{302}\) See section 8(e)(vii)
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)). In the review of the listing of the Saffron Walden Community Hospital one of the owner’s objections was that notice had not been given. This is a point that has been taken with regard to other listings. The reviewer took the view that as it was after the listing and the time limit for a review can be requested within eight weeks of receipt of notice failure to give notice should not affect the listing.

(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 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.³⁰³

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.

³⁰³ See section 10(i) below
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.

This is also the position with 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.

In contrast the renewed nomination of the Rockingham Road football ground was rejected just as the first nomination had been on the ground that it has not been used to further social wellbeing in the recent past and it is not realistic to think that it will be in the next years.

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.

(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. 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.

Some authorities have taken the view that for this purpose a relevant disposal can include a contract made during the protected period and even a conditional one. For example, the Suffolk Punch had been listed by Milton Keynes Council but during the protected period the owner had entered a contract to sell it to a developer conditional upon the grant of planning permission. The Council then removed the pub from its ACV list on the ground that there had been a relevant disposal. Section 96 defines a relevant disposal as including a disposal of the freehold estate in land if with vacant possession. It is entered into when it takes place unless there is a preceding binding agreement to make it when it is treated as entered into when the agreement became binding. However, the retrospective effect of sub-section (4) is triggered not by the entry into the binding agreement but by the making of the disposal of the freehold estate. The removal of the listed asset from the ACV list should not occur until the completion of the agreement. If this is not so then it would mean that in the case of a conditional contract there may be no completion if the condition is not satisfied yet the asset will have been removed from the

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304 Sub-section (2).
305 Sub-section (5)
306 Sub-section (4).
ACV list. If this were correct it would allow a loophole by which owners could obtain the removal of their asset through the entry into conditional contracts which are never completed. How would authorities be able to determine which are shams and which genuine?

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 resulted 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.

This point arises with regard to the closed LA Fitness gym in Henley. Just over four months after the appeal decision upholding the listing planning permission was granted for an eighty bed care home but no community facilities. As mentioned above in the officer’s report recommending the grant it was stated that the determination of the planning application would not affect the listing of the asset as it would stay on the ACV list and in the event that planning permission is granted the ability of a community interest group to bid for the site would still remain. This is inconsistent with the cases mentioned immediately above. If the planning permission is implemented there would seem to be no prospect of a community use in the next five years and so it ceases to qualify as an ACV.

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.

(l) 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).

(m) Requests for information – the operation of the ACV regime by authorities has given rise to requests for information under the Freedom of Information Act 2000. These may seek information in relation either to a particular listing decision or to the procedure adopted by an authority with regard to the ACV regime. Such requests may be an effective means of obtaining relevant information. On the other hand dealing with these can use up significant local authority resources. There have been at least two decisions by the Information Commissioner concerning such requests which indicate that there is some protection for local authorities.

The first concerned a refusal by Torridge DC to comply with a request to be sent a copy of the internal review of the Council’s ACV listing review procedure.\(^{307}\) This was following the removal of a pub from the ACV list on a review. The Council considered the request to be a repeat of a previous request made by a local action group and following an internal review continued to refuse to comply relying on section 14(1) of the FOIA. The Council considered that there had been

\(^{307}\) 2nd August 2016 ref DS50621592
numerous requests; these had been comprehensively addressed; the issue had absorbed a disproportionate amount of resources; previous identical requests had been made by other members of the group albeit that this was the first request from this member; the requester was considered to be acting in concert with the local action group. A complaint had been made to the Local Government Ombudsman who found no fault with the Council’s decision. The complainant relied on this been her first request which she considered to be separate from the communications with the local action group; she considered it to be reasonable and proportionate; it was made for a valuable and serious purpose so she could make a submission to the DCLG which was reviewing the ACV regime.

The Commissioner concluded that the Council was correct to apply section 14(1) and to refuse to comply with the request because the request was vexatious. There is no definition of vexatious in section 14 but in Information Commissioner v Devon CC and Dransfield\(^{308}\) it was concluded that ““vexatious” could be defined as the “..manifestly unjustified, inappropriate or improper use of a formal procedure”.\(^{309}\) In the Commissioner’s guidance in relation to persons acting in concert it is stated at paragraph 94 that if the requests are genuinely directed at gathering information about an underlying issue then an authority will only be able to rely on section 14(1) “where it can show that the aggregated impact of dealing with the requests would cause a disproportionate and unjustified level of disruption, irritation or distress.” In this case the Commissioner found a clear and identifiable connection between the complainant’s request and the local action group previous communications. It was noted that the request was nearly identical to previous requests, the close connection with the local action group and the previously refused request from another member of the group. This request was considered to be a continuation of the earlier communications and justified the refusal.

Further it is open to an authority to withhold information if protected by legal privilege pursuant to section 42.\(^{310}\) The request was for all e-mails relating to the listing of a pub which was

\(^{308}\) [2012] UKUT 440 (AAC)

\(^{309}\) Para. 29

\(^{310}\) Derbyshire Dales DC decision 8\(^{th}\) December 2016 ref: FS50629174
the subject of an appeal to the First-tier Tribunal. The legal privilege claimed was both advice and litigation privilege due to the appeal. The Commissioner concluded that the balance of the public interest lay in not disclosing thereby allowing the Council to obtain legal advice confident that it will not be disclosed. It was noted that the public interest in maintaining legal professional privilege is a particularly strong one requiring special circumstances to justify it being outweighed by the public interest in disclosure.
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\(^{311}\) 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 accept the publicans’ offer.

\(^{311}\) 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 expire and then setting about selling the asset in the following year. It would appear from the facts in the Beehive case\textsuperscript{312} 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 18\textsuperscript{th} 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 a relevant disposal during the protected period which will be the period of one year from the expiry of the full moratorium period.

\textsuperscript{312} 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 wished to sell at auction. Having served a notice of intention to dispose of the school it has waited with the intention of putting 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 protected 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 will take 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. Few assets were purchased for the community initially 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. The pace of purchases has begun to pick up and community groups are receiving increased assistance. 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 and the 2017 changes excluding all public houses from the PDR (other than with regard to use class AA) 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), regulation 13 of the First Schedule 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.

Regulation 13 confers a privileged status on community interest groups in bidding for assets of community value without delay. It allows a disposal to a community interest group by the owner within a period of eighteen months beginning with the receipt of notice of intention to dispose of the asset from the owner. In consequence such a disposal can be made without regard to the running of any moratorium period. Surprisingly this regulation has been challenged as ultra vires and considered by the Court. This arose in R (oao Jenny O’Neill) v Lambeth LBC and Garden Bridge Trust\(^{313}\) which was concerned with the proposed landing station for the Garden Bridge project on the south bank of the Thames which is not now going ahead. The area has been listed as an ACV by Lambeth LBC. The area is leased to Coin Street Community Builders Limited and Lambeth LBC has decided to vary the terms of the lease so as to enable a sub-lease to be granted to Garden Bridge Trust and part of that land to be used for the landing station. This decision was challenged by way of judicial review and one ground was that Lambeth LBC had failed to consider properly the status of the land as a listed ACV. This failed because both the lessee and the proposed sub-

\(^{313}\) [2016] EWHC 2551 (Admin)
lessee qualify as a community interest group so that the sub-lease can be made pursuant to regulation 13 once the owner has given the requisite notice. The proposed contract to vary a right is not itself a disposal. It was argued that regulation 13 is ultra vires as outside the scope of the enabling provision, section 95(5)(j). Patterson J. held that the provisions did not allow for competition between community interest groups and that regulation 13 is lawful.

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 being the payment of taxes or the deceased’s debts or the costs of administering the estate or to pay a legacy or satisfy an entitlement under the terms of the will or intestacy (sub-section (5)(c));

(iii) changes in trustees (whether retiring or becoming a trustee) (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. It includes the owner’s spouse or partner;

(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.

314 Patterson J. at para. 13 applying the dicta of Glidewell LJ in R v Thurrock BC ex parte Blue Circle Industries plc [1995] Env LR 307 at page 313
(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 listed 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 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”.

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.

This could be particularly relevant if land adjoining a residence in single ownership is listed. There have been nominations of such land. In one case where the nominated property and adjoining residence were together on the market for sale. 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.

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

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315 Annex 1 to the non-statutory Guidance
316 Reg. 1(4)
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 of the option 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 the operation of section 95 and 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

317 See owner’s submissions on review of listing of lot 4 Hauxton Mill Buildings Hauxton
becomes binding”. A “subject to 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 dispose 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. Further such a possibility would result in compensation claims for amounts which far exceed the estimates made when the ACV regime was introduced.

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.

(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.

(xiv) disposal pursuant to insolvency proceedings\(^\text{319}\) (para. 7). The impact of insolvency law on the operation of the ACV regime has not been properly explored as yet and at some stage will probably have to be considered by the Courts. One issue is whether a nomination can be made if

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\(^{318}\) See definition of a statutory compulsory purchase in reg. 1(3)

\(^{319}\) 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.

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the owner of the nominated asset is in administration or liquidation or be pursued if the owner goes into administration or liquidation after the nomination has been made. 320.

(xv) inter-group transfer 321 (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);

(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.

(xix) a disposal pursuant to a court order to by a tribunal established by or under an Act (para. 1);

(xx) a grant of a tenancy pursuant to the provisions of Part 4 of the Agricultural Holdings Act 1948 (para. 9);

(xxi) a disposal which is subject to a statutory requirement regarding the making of the disposal which requirement could not be observed if the requirements of section 95(1) of the 2011 Act were complied with (para. 15).

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

320 See discussion at section 7(e)(5)
321 Determined by reference to the meaning of “group undertaking” contained in section 1161(5) Companies Act 2006
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. The need for such an express provision indicates that without it a disposal does not for the purposes of the ACV regime cover a contract. 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 even 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 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 ACV listed assets. There are two separate issues for the owner of a listed building. First what will be the consequences of an ACV listing as regards the planning position? Often the ACV 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 ACV 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 an ACV listing. This may involve the making of a new planning application. This has been particularly so with listed public houses although it will no longer be the case after the changes introduced on 23rd May 2017 which remove all public houses from the PDR regime save as regards class use AA. A decision maker will have greater flexibility when determining a planning application than a listing authority when deciding a community nomination. Alternatively an ACV listing may encourage the owner to seek to secure a change of use under the Permitted Development Rights regime (“PDR”).

(a) Control of use –

(i) General – There are two conflicting view as to the affect of an ACV listing on the use of the land and neither is correct. 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 much of this regime does not apply to public houses. This is a correct statement of the content of the ACV regime but only provides an partial answer on an important aspect. In the Upper Tribunal Judge Levenson stated that listing under the 2011 Act did not itself prevent land being developed “but as a matter of planning policy any necessary permission is likely to be
refused while land is listed.” That is not correct as many planning decisions permitting the change of use and development of an ACV listed property show.

(ii) Permitted Development Rights regime –

(I) General - until the introduction in 2015 of the restriction in the statutory order a pub could be converted to a restaurant or café (A3), offices relating to financial and professional services (A2), retail unit (A3), temporary flexible use and temporary state-funded school without the need for a fresh planning permission. This was occurring at the 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 general point as regards the operation of the PRD regime is illustrated a newsagents in Southfields London known as Sunny News. It was listed as an ACV due to its services for the elderly and it being a focal point for the local community. The nomination and listing decision occurred between the making of the application for prior approval for a change of use to residential and the authority’s refusal. The listing may have had an influence on the authority’s decision. However, ultimately the ACV listing had no impact on the outcome of an application for prior approval under the PDR regime.

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 M2(d)(i)). In determining this aspect the listing of the building as an ACV was not taken into account by the Planning Inspector (para. 18 decision of J. Dowling). In judicial review proceedings challenging the

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324 Banner Homes v St. Albans City Council [2016] UKUT 0232 (ACC) at para. 4
325 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.
326 See now Parts 3 and 4 of Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order 2015/596
327 App/H5960/W/15/3130980
Inspector’s decision Ouseley J. stated that this was an error.\textsuperscript{328} However, this error made no difference because regardless of the ACV listing local value was in any event at the heart of the case regarding the impact of its loss on the provision of services. The judge considered that the ACV listing did not add anything to that argument but merely was a different way of making the point that had already been made\textsuperscript{329}. The Council’s refusal to grant a prior approval was overturned by the Inspector on appeal and confirmed by Mr. Justice Ouseley. 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.

Another example is the Formby Halls in Atherton Lancashire. This community hall was sold by the council in 2014 but listed as an ACV in August 2015. An application was made for prior approval of the demolition of the building in advance of the grant of planning permission for a new use. It is not a building with an A4 planning use and so the permitted development rights regime applies to the premises\textsuperscript{330}. This requires an application for prior approval to be made if the demolition work is not urgent. In deciding an application for prior approval no account is taken that the demolition will involve the loss of a community facility or that it is a listed ACV. The material issues are restricted to the method of demolition and the restoration of the site. The application was called-in by the Secretary of State due to the local interest in the decision. The Inspector deciding the matter expressed extreme surprise that it should have been called-in due to the restricted issues to be considered in the determination. The Inspector decided that prior approval should be given emphasising the restricted nature of the issues.\textsuperscript{331} The extent to which listing as an ACV has no significance in this context is summarised in the following paragraphs from the Inspector’s decision:

\textsuperscript{328} R(oao) Sunil Kumar Banislal Patel v Secretary of State for Communities and Local Government and Billy Johal [2016] EWHC 3354 (Admin) at para. 57
\textsuperscript{329} Para. 58
\textsuperscript{330} Class B of Part 11 in Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order 2015/596
\textsuperscript{331} Decision of Mr. Martin Whitehead on 22\textsuperscript{nd} August 2016 in App/V4250/16/3143845 and note para. 13 stating that neither value to community nor designation as ACV material to decision.
“21. Schedule 2 Part 11 Class B of the GPDO provides that any building operation consisting of the demolition of a building is permitted development but, before commencing any demolition, the developer must apply to the LPA for a determination as to whether prior approval of the LPA will be required as to the method of demolition and any proposed restoration of the site. Due to, amongst other things, the proximity of residential properties to the site the Council considered that prior approval was required. The prior approval issues are the two issues that the Council’s Planning Committee could consider and were asked to consider, and they are the only issues for the Inquiry to consider.

22. It is not within the Inquiry’s remit to consider whether Formby Hall should, or should not, be demolished, how or why the Council came to sell Formby Hall, any covenants relating to the use of the building, its status or whether it is an asset to the local community.”

When applying for prior approval a site notice is also required during at least 21 days in the 28 day period prior to the application.\(^{332}\) This will not really assist those seeking to preserve the asset as a community facility because there is no scope for arguing that this is a factor which can justify refusing the application for prior approval.

(II) Public houses between 6\(^{th}\) April 2015 and 23\(^{rd}\) May 2017 - however, after 6\(^{th}\) April 2015 and up until 23\(^{rd}\) May 2017 if the asset is a public house then nomination which results in an ACV listing has been a means of protecting the public house. An example is the Greyhound pub in Bromsgrove. An application for prior approval of its demolition was made with a view to a roundabout being constructed to assist access to a large residential development. The planning committee adjourned the hearing of the application and before the next meeting the pub was listed as an ACV with the result that the application for prior approval of the demolition could not proceed.\(^{333}\) A similar situation arose in respect of the Acorn in Haringey which when an application for prior approval to demolish became known was nominated for listing as an ACV. This

\(^{332}\) Para. B2(b)(iv) of Part 11 Second Schedule. This was not complied with prior to the demolition of the Battle of Britain pub in Northfleet and as a result Gravesend Council refused an application for prior approval. Following the demolition a community nomination was made but refused. The owner has not been required to rebuild the pub because the view had been taken that if there had been compliance then prior approval would have been granted.

\(^{333}\) App. 16/0832 decision date 11\(^{th}\) November 2016
nomination resulted in the listed of the Acorn by Haringey LBC in October 2016 which should have halted any such application under the PDR regime.

As regards a building with a Class A4 use (principally pubs) with effect from 6\textsuperscript{th} April 2015 and up until 23\textsuperscript{rd} May 2017 first nomination and then listing will prevent demolition, change of use or temporary change of use without the grant of a planning permission\textsuperscript{334}. This prohibition covers not just the period of listing but also a period during which such an asset is nominated.

In addition there is a 56 day period which applies to all such premises whether or not nominated or listed. 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. There is no requirement that such written request must be publicised by the local authority. In consequence although the request is made local residents and community groups will not necessarily be alerted so that when the proposed development occurs after the expiry of the 56 day period it comes as a shock and may be described as a change having occurred overnight.

An example of this is the Dyke Pub and Kitchen in Brighton which was described in the local press as having changed overnight into a furniture store. The owners had complied with the requirement to make a request to the local authority notifying it of the proposed change of use from A4 to A2 but locals were unaware of this. A Save the Dyke Group has been formed and is seeking to have the property listed as an ACV which possibility is not barred by the change of use. The nomination can be based on use in the recent past. Similarly a notice of change of use from A4

\textsuperscript{334} 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. As regards demolition para. B.1(c) of Class B of Part 11 of the Second Schedule excludes a listed building with A4 planning use from the operation of Class B. If nominated such a building cannot be demolished during the nomination period (para. B2(b)(vi)). If not listed nor subject to a nomination then a written request must be made to the local authority enquiring whether it has been nominated or listed and during the 56 day period there can be no demolition and after the expiry of that 56 day period if there is no nomination or listing then demolition must take place within one year from the written request (para. B.2(x)).
to A3 (restaurant and café) was given in respect of the eighteenth century Kings Arms in Desborough. No nomination has been made so that the use can change under the PDR regime to a Costa Coffee branch subject to obtaining consent for the alteration of the listed building.

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 it must be completed within a period of one year from the date of the developer’s request.

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.\(^\text{335}\) At the time the pub was not listed but has been listed subsequently.\(^\text{336}\)

(III) Public houses after 22\(^{\text{nd}}\) May 2017 – notwithstanding the 2015 changes CAMRA and other bodies campaigned strongly for the extension of the 2015 protection to all public houses and not just those which had been nominated and listed as an ACV. At the beginning of 2016 the Co-Operative Group agreed a set of guidelines with CAMRA regarding the development of convenience stores on the site of pubs. Amongst the principles agreed was a voluntary commitment to seek planning permissions for such developments rather than rely on the PDR regime. The Co-Operative Group was also to seek to encourage developers to use the planning permission process rather than the PDR regime. This applied to all pubs and not just listed pubs but if the pub was listed the Co-Operative Group was to investigate further before deciding whether to purchase or lease it. Further it would not stand in the way of any group seeking to acquire and run a community pub. The need to obtain a fresh planning permission has not prevented pubs being lost. In November 2015 planning permission was obtained from Woking BC

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\(^\text{335}\) The owner’s appeal against the enforcement notice failed (APP/X5990/C/15/3130605). The Planning Inspector, Mr. Dudley, considered the nomination of the pub to be a material consideration (para. 43).

\(^\text{336}\) In contrast the Battle of Britain pub in Northfleet was demolished without there first being full compliance of all the statutory requirements. The pub was then unsuccessfully nominated. The Council has not required the rebuilding of the pub.
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.

CAMRA did not feel the agreement worked well and so it pressed for statutory protection. The 2015 changes to the PDR have now been extended to all drinking establishments including public houses regardless of whether they have been nominated or listed as an ACV. This means that before there can be a change of use or demolition of any public house there must first be the grant of a planning permission. It is no longer a pre-condition that the public house should have been nominated or listed as an ACV. It will not be possible to exercise the rights conferred under the PDR regime in relation to any public house save for the new rights contained in reg. 3(b) of the 2017 Order. This permits a change of use from public house (A4) to public house (A4) mixed with a use falling in A3 (restaurants/cafes) to be known as drinking establishments with expanded food provision (new Class AA) and also permits a change from such a drinking establishment with expanded food provision (AA) to a drinking establishment (A4). Demolition of a drinking establishment with expanded food provision (AA) will require the grant of a planning permission and cannot be achieved by the exercise of a right under the PDR regime.

During the course of the debate in the House of Commons the Minister for Housing and Local Government, Mr. Gavin Barwell, stated that at “the same time as making these changes, we also want to protect local planning authorities from any compensation liability arising from the removal of national permitted development rights. We will do this by amending the compensation regulations to limit to 12 months the period of any potential liability on local planning authorities when the rights are removed.” The possibility of claiming compensation due to the withdrawal of these rights under the PDR regime is limited to planning applications refused within twelve months of the withdrawal. The possibility of such compensation if the new rights under PDR

337 Regulations 3 and 4 of the Town and Country Planning (General Permitted Development) (England) (Amendment) (No. 2) Order 2017/619
338 Reg. 4 of the 2017 Order amending para. B.1(c) Part II of Schedule 2 of the 2015 Order.
339 Hansard 28th March 2017 col 153 House of Commons Debates
340 Section 108 TCPA 1990
concerning drinking establishments are withdrawn by an Article 4 directive has also been limited to twelve months from the withdrawal. As a result of the changes it will be necessary for planning permission to be obtained if the change is to be from pub (A4) to restaurant (A3). It has been confirmed by the DCLG that the protection policies contained in local policies and para. 70 of the NPPF will apply to drinking establishments with expanded food provision.

There are transitional provisions. In a case in which a written request has been made to the local authority for confirmation whether the public house has been nominated or listed as an ACV more than 56 days before 23rd May 2017. When the public house is not listed as an ACV and no nomination is made during that 56 day period then the owner will have planning authorisation under the PDR and the right to carry out a development (including demolition) in accordance with the PDR will not have been taken away. When the request is made less than 56 days before 23rd March 2017 the rights under the PDR regime will be lost.

(IV) Article 4 directives – separately from the denial of rights under PDR in respect of public houses local authorities have had the power to exclude specific or all public houses and other assets in the authority’s area wholly or partly from the operation of PDR. For example, Wandsworth LBC has introduced such a directive to cover 120 public houses in its area with effect from 14th August 2017. Southwark LBC decided on 7th March 2017 to introduced an Article 4 directive for all its 188 public houses with immediate effect. This will have the same consequence as the 2017 change to the PDR (see III immediately above) as a fresh planning application will be needed for any new development. Some authorities have made such a directive with respect to an

341 Reg. 2 of the Town and Country Planning (Compensation) (England) (Amendment) (No. 2) Regulations 2017/620
342 Letter dated 18th May 2017 from DCLG to Planning for Pubs Limited.
343 Reg. 5 of the Order 2017/619
344 ACV listings remained a means by which interim protection could be provided to pubs in Wandsworth pending the Article 4 directive taking effect. For example notice of intended demolition was given by the Wellington Pub Company in relation to the 200 year old Stag pub in Battersea. The proposed demolition would not have been prevented by the Article 4 directive or the change in the PDR position. Following the giving of notice of intended demolition the pub was nominated as an ACV and Wandsworth Council added it to the Council’s list of ACV. In consequence the owner could not proceed with the demolition but would need to first obtain planning permission for the demolition. Nominations in response to a notice of intended demolition have occurred elsewhere. For example, the Fiddlers Arms in Lower Gornal (a pub since 1860) has been nominated following the owner, NewRiver Retail, giving notice of intention to demolish reportedly with a view to building a new Co-op convenience store.
individual public house rather than covering all public houses. The 2017 changes will overtake any Article 4 directives as regards public houses save as regards the introduction of the new rights under PDR regarding changes to and from drinking establishments with expanded food provision (AA)\textsuperscript{345} which will not take effect until 23\textsuperscript{rd} November 2018.\textsuperscript{346} This gives an authority which has already made an Article 4 direction time in which to consult and decide whether or not to make an appropriate Article 4 direction. On the expiry of the time limit the old Article 4 direction will not prevent an exercise of the new rights under the PDR relating to AA use.

(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. It has been proposed as a consequence of an ACV listing but the proposal has not been accepted. Whether an ACV listing is a material consideration is a matter for the local planning authority to decide (para. 2.20 DCLG Guidance). Listing is certainly not a guarantee that there will be no planning permissions granted for a use 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\textsuperscript{347} Judge Levenson stated that listing under the 2011 Act did not itself prevent land being developed “but as a matter of planning policy any necessary permission is likely to be refused while land is listed.” This is too sweeping a statement as planning permissions have been granted notwithstanding the ACV 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.

\textsuperscript{345} Reg. 3(1)(b) Order 2017/619
\textsuperscript{346} Reg. 5(3) Order 2017/619
\textsuperscript{347} [2016] UKUT 0232 (ACC) at para. 4
This point was emphasised in R (on the application of East Meon Forge and Cricket Ground Protection Association) v East Hampshire District Council\textsuperscript{348}. 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 review 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.”

It is not just a question whether it is taken into account as a material consideration but also the weight to be attached to it if it is. For example, in the planning appeal concerning Mansfield Bowling Club in Camden the Planning Inspector did not attach much weight to the ACV listing because the moratorium period had expired without a purchase by a community interest group.\textsuperscript{349}

(i) **Planning Permission refused** - 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 ACV listed Pear Tree Inn 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\textsuperscript{350}. This was despite the pub being converted to a furniture store under the permitted development rights regime which was recognised by the Council issuing a lawful development certificate for the use of the building as a shop (A1). An appeal against this decision failed.\textsuperscript{351} The Planning Inspector, Gary Deane, recognised that such a change of use could pose problems particularly when planning permission would be needed to change the use of the building back to a pub. He stated that even

\begin{footnotes}
\item[348] \[2014\] EWHC 3543
\item[349] APP/X5210/W/16/3153454 at para 45
\item[350] In October 2016 the owner gave notice to dispose of this property to South Cambridgeshire Council and a community benefit society having giving notice to be treated as a bidder is now seeking to raise the necessary funds.
\item[351] APP/W0530/W/15/3010681
\end{footnotes}
“so, assessing the use of the premises solely as a shop is, to my mind, too narrow and simplistic. As objectors point out, if the last use was taken as the sole determinative criterion, changing a use from a public house to a shop through the exercise of permitted development rights could be a way of circumvent policy restrictions that seek to prevent the loss of public houses as community facilities. DPD Policy SF/1 itself notes that in addition to considering the established use of the premises, regard must also be had to its potential contribution to the social amenity of the local population. In this regard, interested parties refer to the role that The Pear Tree Inn played as a meeting place to socialise with others, which is underlined by its ACV status.”

Similarly a planning application to convert the Angel Hotel public house in Spinkhill into two dwellings 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 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. A planning application to convert the Penny Farthing pub in Timberland Lincolnshire into two dwellings with two additional dwellings in the car park was refused on appeal because it would involve the loss of a valued community facility. The strength of local opinion was stated to be further evidenced by the listing of the pub as an ACV in June 2015.

A planning application to convert the listed Bittern pub in Southampton Hampshire to a drive through McDonalds was refused by the Planning Inspector, Mr. Lloyd Rogers. He considered that the evidence was not cogent that the pub could not be commercially viable in the future.

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352 Para. 10
353 13/00681/FL
354 APP/R2520/W/16/315073 at para. 14 of the decision of Mr. David Troy
355 Para. 12
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\cite{356} 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.

(ii) **Planning permission granted** - however, an ACV listing will not always be enough to defeat an application for planning permission. Even if no alternative community facilities have been included in the planning application planning permission for the conversion of the listed building to a different use may be granted resulting in the removal of the asset from the ACV list. This has been a particular issue with public houses.\cite{357} For example, although the Seven Stars public house in Sedgley was listed as an ACV a planning application on behalf of Morrisons for conversion to use as a supermarket was successful.

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

\footnote{356}{16/00166/FUL}

\footnote{357}{On the CAMRA website it helpfully has a list of planning applications headed Planning Appeal issues with the various outcomes.}
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 ground floor, basement and rear garden/yard of the building formerly the Ship in South Norwood was listed as an ACV. The upper floors had in the past been occupied as living accommodation in connection with the pub and the lawful use was residential use ancillary to the pub. The upper floors were not included in the ACV listing. The building was converted without first obtaining planning permission to seven flats and a small office area. Croydon LBC served an enforcement notice requiring the building to be restored to a pub on the ground floor and basement. The appeal against this enforcement notice was running at the same time as the appeal against the ACV listing. Notwithstanding that the owner’s ACV appeal to the First-tier Tribunal failed\textsuperscript{358} retrospective planning permission was granted by the Planning Inspector on the appeal against the enforcement notice.\textsuperscript{359} The Inspector stated that while the ACV listing was a material consideration it did not outweigh the advantages of the development in providing additional housing and securing a viable future for the building.\textsuperscript{360}

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\textsuperscript{361}. This ACV appeal was decided subsequent to a planning appeal decision of the Planning Inspector (APP/Y5450/W/14/3001921 - 12\textsuperscript{th} May 2015) in respect of a planning application for permission to convert the Alexandra in Haringey into two three bedroomed 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

\begin{footnotes}
\item[358] ZB Investments v Croydon LBC CR/2016/0009
\item[359] APP/L52140/C/16/3145967
\item[360] Para. 27
\item[361] CR/2015/0010
\end{footnotes}
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.

This difference between the ACV tests and planning considerations was highlighted again in the planning appeal relating to the Ostrich Inn in Longford Derby. The Planning Inspector, Rachel Walmsley, stated that the

“Inn is designated as an Asset of Community Value (ACV). The threshold for designating an ACV is relatively low with the local authority needing to have a realistic belief that the facility has a community use that could continue. The weight I attach to the designation of the premises as an ACV, therefore, is limited. Notwithstanding this, the ACV refers to a variety of activities that have taken place at the Inn in the past, including British Legion meetings, local bonfire night celebrations and being host to dominoes teams and the local elections. These activities have now ceased; in part as a result of changing tenancies. At the time of the hearing a pub quiz was imminent with seven people expected to attend. Beyond this, little in the way of community activities were taking place; instead there was hope that the activities would return if the premises could be invested in.”

On the basis of the evidence the Planning Inspector concluded that in all the evidence did not indicate that the Inn is an important facility.

Another example of planning permission being granted to change the use of a public house is the New White Bull in Giltbrook. 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

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362 APP/P1045/W/16/3163696  
363 Para13  
364 Para. 17  
365 APP/J3015/W/15/3133491
the pub was removed from the list of ACV resulting in a new nomination being made on behalf of 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.

Further illustration of this point is given 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.
(iii) Planning permission for part only of listed asset – instead of a planning application relating to the whole of the ACV listed asset it may relate to only a part with an increased chance of success. An excellent example is the appeal decision concerning the Duke of Wellington pub. The public house occupied the ground floor, basement and beer gardens whilst the two upper floors and the roof space comprised ancillary accommodation. It was listed as an ACV by Tower Hamlets LBC in 2015. In the following year an application was made to convert from a public house to a public house/hotel with the ground floor and basement retained as a public house and the upper floors used as hotel accommodation. The Council refused the application. The appeal was allowed by the Planning Inspector, Mr. AJ Mageean, and planning permission granted for the hotel development on the upper floors. The Inspector accepted that the Duke of Wellington “is a well-established and much valued community facility” and “is a traditional public house which is a valued community asset as recognised by its ACV status”. Although the proposed changes would impact on day to day management of the existing pub he did not consider that it would threaten the viability and retention of an A4 use.

In contrast a planning appeal in relation to the Carpenters Arms in Camden seeking to convert the upper floors and roofspace of the public house to flats was dismissed. The whole of the building was listed as an ACV. The Planning Inspector, AA Philips, noted the pub “played an important social role for members of the local community”.

Importance was attached to the ACV listing as the pub “provided an environment distinctive from other drinking establishments in the area according to the Council’s reasons for why the pub meets the definition of an ACV.” It was, therefore, an important material consideration. The proposed development would mean the loss of the commercial kitchen on the first floor and the other ancillary uses on the upper floors which were found to be important for the day-to-day functioning of the pub as a community facility. The pub would have to become a lock up pub and not have the manager/landlord live on

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366 APP/E5900/W/16/3150733
367 Para. 8
368 Para. 41
369 APP/X5210/W/16/315219
370 Para. 10
371 Para. 13
site. The Inspector concluded that the loss of the kitchen would prejudice the important catering function and the development would prejudice the long term retention of the public house which is an ACV.\textsuperscript{372}

This illustrates that even with a listed asset which is strongly supported by the local community there is still scope for a proposal to develop part if this will not affect the viability of the use of the building or land which furthers the social wellbeing or social interests of the local community. Obvious candidates for such a proposal are the upper floors of public houses which are little used. Another possible example is parts of pub car parks or outbuildings which are not needed for the viability of the pub business.

(iv) **Planning permission with alternative community facility** - even if the ACV 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. This point arose 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\textsuperscript{373}. 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 a number of grounds including one that the effect of the ACV 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 the 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

\textsuperscript{372} Para.32
\textsuperscript{373} CR/2013/0009
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.

The decision was appealed but not with regard to the guidance given to the committee with regard to the ACV listing. The Court of Appeal upheld the judge’s decision that the Council had correctly interpreted para. 74 of NPPF concerning open spaces but allowed the appeal on the ground that although the Victorian Society had not been consulted the planning committee was misled into understanding that it had been but had no comment to make on the application374.

Another bowling green listed as an ACV has been the subject of a successful planning appeal against the refusal of a planning application for a proposed development of a new publicly accessible open space with enhanced tennis facilities and playing area; community and leisure facilities; new community garden; and new building providing 21 residential dwellings.375 The Planning Inspector, Kevin Gleeson, considered that it would not be reasonable to dismiss the appeal on the ground that the asset is listed as an ACV because the owner had given notice of intention to dispose of the asset and the moratorium period had expired “notwithstanding the significant value which the local community places upon the site.”376

A further example is the Queensbury public house in Willesden Green which 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

374 R (oao Anne-Marie Loader) v Rother DC [2015] EWHC 1877 (Admin)
375 APP/X5210/W/16/3153454
376 Para. 45

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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.

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, the possibility that planning permission including provision for an alternative community facility may be granted or has been granted is relevant particularly in the context of the issue whether there is a realistic prospect of future community use. An example of such a possible grant of planning permission being taken into account is Matterhorn Capital v Bristol City Council. 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 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.

The possibility of a grant of planning permission being obtained in the future which includes provision for a community facility has also been taken into account in two other ACV appeals. In Neem Genie Company Limited v Telford & Wrekin Council the judge considered it was possible that planning permission could be granted for a pub on the ground floor and an enabling residential development on the first floor of the fire damaged building. Whilst in Henthames Limited v South Oxfordshire DC the judge considered it was possible that planning

377 In the Trustees of the Duke of Northumberland’s Charity and Others v Hounslow CR/2016/0007 at para. 45 Judge Jacqueline Findlay considered the appellants’ invitation to consider that there was an alternative allotment site for the allotment holders. This consideration was in the context of whether it meant that support for the use of the nominated allotments would be lost and concluded that it would not be.
378 Para. 24
379 CR/2016/0010 at para.44
380 CR/2015/0028 at para. 14b
permission could be granted for the demolition of a closed gym and the construction of a care home with a smaller gym.

(v) **Adjoining land** – planning applications may be affected by an ACV listing if the application relates to land which adjoins a listed building. Planning applications to authorise the conversion of a pub car park to retail or residential use have increased in number. The Full Moon in Lower Rudge, Frome is an ACV listed public house. Before it was listed planning permission was granted in 2002 for the construction of three buildings to provide self-contained holiday letting units and a swimming pool as additional ancillary letting accommodation to support the viability of the pub business. Subsequent to the ACV listing a planning application was made to change these buildings to seven dwellings for permanent residential accommodation. At the time the pub business was in administration and the intention was that the proceeds from the residential development would be used to reduce the indebtedness. The Planning Inspector, David Richards, found that the viability of the pub business was more likely to be achieved if the debt was reduced and then it could be sold at a realistic price to a pub operator. In consequence planning permission was granted on the appeal.

In contrast a planning application for permission to construct a four bedroom house on part of the car park of the ACV listed Cherry Tree Inn in Wicklewood was refused on appeal. The reduction in the size of the car park was not the problem but the concern accepted by the Planning Inspector, Claire Searson, was that it would result in complaints regarding noise and disturbance which would affect the viability of a business which was currently not profitable.

A variation on this is when the adjacent land is in different ownership to the listed building. For example, the application may seek planning permission for a residential development on a former car park which adjoins an ACV listed car park when they are no longer in the same ownership. This was the case with regard to the former car park of the Buller’s Arms Hotel in Marhamchurch Cornwall. It raised concerns locally that if successfully it would permanently harm

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381 APP/Q3305/W/16/3166097 at para.24
382 APP/L2630/W/16/3164793
the continued viability of the public house/hotel. The car parking had been included originally in the listing but was removed following the purchase of the Bullers Arms Hotel without the adjoining car park. Thereafter the car park has been unavailable for customers of the public house/hotel. The Planning Inspector, Jane Miles, had to decide whether the viability of the adjacent public house/hotel was a relevant planning consideration. The argument that the former car park and the Bullers Arms Hotel should be treated as a single planning unit was rejected because of the separate ownership which meant that there was not a single unit of occupation. On the evidence it was found that the former car park could not be regarded a community facility in its own right.\(^{383}\) The Planning Inspector also did not consider that in the circumstances, and in particular the split ownership, the viability of the adjoining business could be a relevant planning consideration.\(^ {384}\) As was stated in the decision this factual context is very different from one in which the development will separate a car park from a public house whilst in the same ownership.

(vi) *Planning application after removal from ACV list* – it is possible that a public house may be removed from the ACV list but still be regarded as a community facility by the local planning authority. The removal does not mean that it excludes the asset being regarded as a community facility.\(^ {385}\)

Generally in each case 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.

\(^ {383}\) Para. 15
\(^ {384}\) Para. 17
\(^ {385}\) Kensworth Builders Limited v SSCLG [2016] EWHC 1732 (Admin)
(c) National Planning Policy Framework ("NPPF") – separate from consideration of 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.”

Additionally in para.74 NPPF it is provided that open space should not be built on unless clearly shown to be surplus to requirements. Failure to comply can result in the quashing of any planning permission in breach of his policy.\(^\text{386}\)

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.\(^\text{387}\) 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


\(^{387}\) Mr. George QC (sitting as a Deputy High Court Judge) in Robinson v SSCLG and Suffolk Coastal District Council [2016] EWHC 634 (Admin).
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 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.

The operation of the PDR regime until the changes in the 2015 regulations has further encouraged attempts to change the planning use of public houses. Under the PDR regime the use of public houses has been changed to shops or restaurants/cafes without the need for planning permission. Following the 2015 changes owners of public houses have sought to use rights under the PDR regime to convert the public house to another use and avoid an ACV listing. With effect from 23rd May 2017 (but in reality 56 days prior to that date) it will be necessary to obtain a fresh planning permission as rights under the PDR will not be exercisable in relation to public houses.

388 para. 121 applying R v SSE ex parte Powis [1981] 1 WLR 584 at page 595
389 para. 131
390 as illustrated by the decision in STO Capital v Haringey LBC CR/2015/0010
391 Town and Country Planning (General Permitted Development) (Amendment) (England) Order 2015/659 replaced as from 15th April by Town and Country Planning (General Permitted Development) (England) Order 2015/596
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 authorised 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.

The situation may be even more complicated as is shown by the planning history of the Yew Tree Inn in Chew Stoke Bristol. The pub was listed as an ACV in 2014. At the end of that year planning permission was granted for change of use from public house (Class A4) with ancillary residential use of the first floor to wholly residential use (C3). This resulted in Bath and North Somerset Council deciding to remove the pub from the ACV list on the ground that a residence cannot be listed. However, the planning permission was subsequently quashed. This caused the Council to take the view that the decision to remove the pub from the ACV list was also invalid and so the pub was restored to the ACV list. However, the appellants having received the grant of a residential planning permission had set about occupying the whole of the building as a single dwelling. When the planning permission was quashed that use of the building reverted to being unlawful but they continued to occupy the building for that residential purpose. Following the quashing of the planning permission the Council refused the revived planning application and served an enforcement notice and both were appealed. Both appeals were dismissed which meant that the A4 use continued and the enforcement notice could be served.

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 a CLU was refused in relation to the Bishops End public house in Burdrop because the last use had been an

392 Applying the decision in Boddington v British Transport Police [1992] 2 AC 143 at page 155
393 APP/F0144/W/16/3147896
394 [2016] EWHC 209 (Admin)
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 if such use was revived the 2015 Regulations would have excluded the building from the operation of the PDR regime because the public house is a listed ACV and the 2017 changes would exclude it even if not listed as an 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 and to make a difficult position worse.
10. REVIEW AND APPEAL

The ACV regime provides for an owner to have the listing decision reviewed and then if on review it is retained on the ACV list the owner may appeal to the First-tier Tribunal (General Regulatory Chamber). There is no such right for the nominator if the nomination is refused.

(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 an ACV 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 statutory 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.

Although most challenges by an owner will go down this two stage statutory procedure it is still possible in some circumstances that an owner may need to consider commencing judicial review proceedings. For instance, if the authority fails to produce a listing review decision then the owner would have to consider such an option. This is most unlikely although there have been cases of long delay. What might be more likely is that a listing review decision is made by an officer who has been involved in the original listing decision or who does not have appropriate seniority as required by paragraph 4 of the Second Schedule to the 2012 Regulations. In those circumstances an appeal to the First-tier Tribunal will not be able to consider and determine such a challenge to the validity of the decision.\(^{395}\) This will require judicial review proceedings. The

\(^{395}\) In Trustees of the Duke of Northumberlands Charity and Others v Hounslow LBC CR/2016/0007 Judge Jacqueline Findlay stated at para. 15 that any “concerns about the way in which the first respondent ran the process under the 2011 Act do not give rise to matters which fall within the scope of this appeal”. 
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existence of the two-stage statutory procedure of review and appeal will not preclude the possibility of judicial review proceedings in appropriate circumstances.\textsuperscript{396}

(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 shall be carried out and the review decision made by an officer with appropriate seniority but who has not been involved in the original decision (para. 4 Sch. 2). Unlike with the original listing decision it is not possible for a listing review decision to be made by a member of the authority as opposed to an officer. In the Trustees of the Duke of Northumberland’s Charity and Others v Hounslow LBC\textsuperscript{397} the listing review decision was made not by the Director of Corporate Resources as stated in the authority’s procedural guidance but by the managing director of a trading company wholly owned by the authority. The judge could see no failure to comply with regulation 4 in nominating this individual.

This review procedure applies even if the owner of the asset is the local authority. No express account is taken in the ACV regime of the possibility of conflicts of interest.

Failure to comply with regulation 4 has been the basis for a number of challenges to listing. It is framed in mandatory terms and consequently compliance is required. The officer must not only make the decision but must carry out the review. Merely approving a decision which has actually been made by a different officer will not be sufficient for these purposes. There is no guidance as what will be regarded as appropriate seniority. In cases in which the owner is vigorously challenging the listing a point may be taken on whether there has been compliance with

\textsuperscript{396} As was the case in Melton v Uttlesford DC conjoined with and R (oao Melton) v Uttlesford DC [2009] EWHC 2845 (Admin) involving a refusal of a private hire vehicle drivers licence from which there is a statutory right of appeal to magistrates but complaints about the conduct of the officer dealing with the matter needed to be dealt with by judicial review. Mr. Melton went down both routes and failed in each.

\textsuperscript{397} CR/2017/0007
this regulation. To avoid such a claim it is safer for the authority to have the review carried out by officers whose seniority cannot be seriously challenged and who have not played a role in the original listing decision. In Hawthorn v Bracknell Forest DC it was contended that a person involved with the nomination had played a part in the review but this was rejected.\textsuperscript{398}

If regulation 4 has not been complied with there will then be the issue as to what are the consequences of this. Such a failure may have unexpected consequences. There would seem to be no reason for it adversely affecting the nomination or the original listing decision. The review decision should be a nullity as it has not been made by an officer complying with regulation 4. This should mean that the review process has to be undertaken again but with an officer complying with reg. 4. If the failure is discovered before an appeal is made to the First-tier Tribunal that will not present a problem but what if the appeal has commenced? A review decision is a precondition to the making of such an appeal. If there is no valid review decision does the appeal have to stop so that a fresh review can be carried out? Will the First-tier Tribunal continue with the appeal? If it did it would not have power to order a new review\textsuperscript{399}. Such an order would require judicial review proceedings. However, as the appeal is not a review of the review decision but a fresh re-hearing the failure to have a proper review will not affect the ultimate outcome on appeal and to carry on with the appeal would avoid wasted costs and time. This is a conundrum which has yet to be considered by a judge.

The owner may require an oral hearing but 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).

\textsuperscript{398} CR/2015/0020 para. 12
\textsuperscript{399} The FTT has no jurisdiction to decide concerns about the way in which the authority ran the process under the 2011 Act – see Judge Jacqueline Findlay in the Trustees of the Duke of Northumberland Charity and Others v Hounslow LBC CR/2016/0007 at para. 15.
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 Data 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.

One aspect of the review which was considered in the review decision relating to the Southwold Hospital was the weight to be given to decisions of other listing authorities. In that case the owner provided two decisions by listing authorities which had accepted arguments on behalf of NHS Property Services that hospitals did not qualify as ACV. On the evidence provided at the review it appeared that five hospitals had been listed and three nominations rejected so there was no firm consensus. It was considered that the decisions of other authorities were not persuasive. A decision of the First-tier Tribunal was persuasive but unlike the Upper Tribunal it is not a court of superior record.⁴⁰⁰

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⁴⁰⁰ Section 3(5) Tribunal Courts and Enforcement Act 2007.
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{401} 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.

(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 the 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 for making an appeal is 28 days from the date that notice of the review decision is sent out by the authority (rule 22(1). There is a power to extend the time for appealing. It was exercised in Neem Genie Company Limited v Telford & Wrekin Council\textsuperscript{402} when the appeal was made eight days too late and the appellants were unaware of this. There was no application for an extension and no good reason given for an extension but the judge did extend time taking

\textsuperscript{401} CR/2014/0019
\textsuperscript{402} Cr/2016/0010
into account the overriding objective in rule 2. No party claimed in the case that the extension would cause any prejudice.

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 fifty-three decisions plus two decisions on costs alone. The ACV 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. An application to strike out the appeal in the Neem Genie case was made pursuant to rule 8(3)(c) because the grounds of appeal did not explain why the listing review decision was wrong or why it is not realistic to think that there could be a community use in the next five years. This was dismissed on the ground that although not stated in the grounds of appeal it was possible to identify the required information from the documents accompanying the appeal.

As regards an application for an extension of time there is a well-established approach. As a general rule Morgan J. stated that the court or tribunal will ask the following questions:

(i) what is the purpose of the time limit?
(ii) how long was the delay?
(iii) Is there a good explanation for the delay?
(iv) What will be the consequences for the parties of an extension of time?
(v) What will be the consequences for the parties of a refusal to extend time?

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403 Para. 8
404 Para. 9
405 Data Select Limited v The Commissioners for Her Majesty’s Revenue and Customs [2012] UKUT 187 (TCC) at para. 34
When considering the answers to those questions the court or tribunal account will also be taken of the overriding objective and the matters listed in CPR r 3.9.

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. 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 may be that the respondent fails to serve the response directly on the appellant and this requires time to be extended. It is for the parties and not the Tribunal to serve their documents on the other parties.

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.

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 DC406). 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.407

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 for such an approach on Quilter v Maplesdon (1882) 9 QBD 672 and Ponnamma v Arumogam [1905] AC 383. However, those cases do not establish that the ACV 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.

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 has happened in many appeals such as in Spirit Pub Co v Rushmoor BC (para. 6), Dorset CC v Purbeck DC (para. 3), STO Capital Limited v Haringey LBC

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406 CR/2014/0007
407 Para. 16 Chadwick case
(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. Insisting on an oral hearing has been contended to be unreasonable behaviour justifying an order for costs against that party. The application failed because oral evidence had been heard at the appeal hearing which changed the result. There was no suggestion in that costs judgment that insistence on an oral hearing could never be unreasonable behaviour so that it remains open for such an application to be successful if the oral hearing adds nothing to the evidence or arguments on which the decision is based. Often the party joined as an interested party will be the person who insists on an oral hearing. It is unlikely that a costs order will be made against such a party.

Usually 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 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)(5)(i) 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.

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.

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408 Judge Lane in Haley (Old Boot) v West Berkshire BC CR/2015/0008 at para. 4
409 Separate costs decision at end of judgment in New Barrow v Ribble Valley BC CR/2016/0014
410 CR/2015/0015 at para. 31
411 Rule 9(3) of the 2009 Rules
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{412}).

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{413} 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).

One award of costs has been made. Collins v Derbyshire Dales DC\textsuperscript{414} concerned the Three Stags Heads at Darley Bridge. Mr. James Collins owned the pub and appealed but withdrew his appeal. His father owned an adjoining field which he believed had been included in the listing. He had not had notice of the nomination. Despite attempts to clarify the situation he was not provided with a copy of the listing decision or informed that his field was not included in the listing. The appeal was dismissed but an order for costs was made in favour of the father on the ground that the authority had acted unreasonably in not clarifying the position regarding the adjoining field.\textsuperscript{415}

Even if no costs order is made it is open to a successful appellant to seek to recoup the costs of the appeal by way of compensation.\textsuperscript{416} There have been some successful appeals now but there will be difficult issues when the appeal is partly successful resulting in the removal of part of

\textsuperscript{412} CR/2014/0001
\textsuperscript{413} Para. 3 CR/2014/0007 on 2\textsuperscript{nd} October 2014.
\textsuperscript{414} CR/2016/0005
\textsuperscript{415} Para. 15
\textsuperscript{416} Regulation 14(3)(b) of the 2012 Regulations
the property from the ACV listing but not the whole of the listed asset. To make a successful claim in respect of the costs the requirements in the ACV regime must be complied with including the time limits.

An appeal from a decision in the First-tier Tribunal is to the Upper Tribunal (Administrative Appeals Chamber). 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 is the first such appeal and in that case permission was given on the first ground by the First-tier Tribunal judge and on the second by the Upper Tribunal judge. An appeal from the Upper Tribunal is to the Court of Appeal which will also require leave to appeal.

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417 Section 11 Tribunals Courts and Enforcement Act 2007
418 [2016] UKUT 0232 (ACC)
419 Section 13 2007 Act.
11. COMPENSATION

It was recognised when introducing the ACV regime that there will be financial consequences for owners of assets which are listed as an ACV. Accordingly, it was considered appropriate to provide for compensation but a real difficulty with the regime is that the compensation provisions are ambiguous and in particular lack clarity as to the type of loss which may be recouped by a compensation payment.

The estimates as to the potential cost of compensation provided when the Localism Bill was being considered may be too low and possibly by a substantial amount. This will be dependent on the type of loss which can be recovered by way of compensation. One of the reasons for public houses being lost is that the capital value of the building is so much greater if used wholly for residential purposes than when used as a public house. A nomination for the ACV listing of a public house may have been made with a view to saving it as a pub and preventing it being converted to solely residential use. If successful it may have been the cause of the owner losing out on an uplift in the building’s market value. Such a loss could be substantial and if recoverable by way of compensation will seriously upset the estimated average cost of a compensation claim of £2,000.

It would appear from the evidence provided to the House of Commons Select Committee which reviewed the operation of the ACV regime that by the start of 2015 no payments of compensation have been made. The focus has been on issues relating to whether or not an asset qualifies as an ACV. Few serious compensation claims have been put forward. One factor in discouraging them may be Judge Warren’s forceful statement in the St Gabriel case\(^{420}\) deprecating the threat of a compensation claim whilst listing is an issue as it places pressure on the officer making the listing decision. However, notwithstanding this there has been a noticeable trend recently for reference to be made to potential compensation claims in letters opposing an ACV listing. In addition there appears to be an increase in the making of such claims. This may require greater thought to be given to the funding of the ACV regime and to whether para. 14 of the 2012

\(^{420}\) St Gabriel Properties Limited v Lewisham LBC CR/2014/0011 at para. 37
Regulations needs to be amended to better express the precise scope of the compensation provisions.

(a) **Government intentions** – the starting point in seeking to determine the precise scope of the compensation provisions are the official statements made whilst the introduction of the ACV regime was being considered. These official statements are enigmatic and provide little assistance. There is no real clarity as to what the government considered to be the scope of the compensation provisions when introducing the ACV regime. At one stage it was considered limiting compensation to expenditure incurred only because of the listing of the asset. However, that was changed by extending the scope of compensation to include incurred loss as well as expenditure. This is referred to in the Explanatory Memorandum to the 2012 ACV Regulations. It mentions that consideration was given to limiting compensation to expenses incurred such as the security and overheads of maintaining and empty building. However, in the consultation there was a significant level of support for allowing compensation for loss of value of an asset due to listing especially any delay in sale due to a moratorium period. Consequently both loss and expense are covered but without any guidance as to the scope of the loss covered.

In the DCLG non-statutory advice it was accepted that the ACV regime would “have some financial impact on owners and provides a compensation scheme for private property owners.” In the section on compensation it states that private owners “may claim compensation for loss and expense incurred through the asset being listed or previously listed.” This takes no further forward the guidance as to the scope of the compensation provisions.

Prior to those statements there was a little more detailed consideration of the issue in the DCLG Impact Assessment of the Localism Bill. The cost of the ACV regime to asset owners was summarised as direct costs incurred by owners due to delay in sale caused by the moratorium (such as additional maintenance, security and utility costs) which were estimated to total

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421 Para. 7.36
422 Community Right to Bid: Non-statutory advice note for local authorities October 2012
423 Para. 2.16
424 Para. 10.1
425 January 2011
nationwide £51,000 per year and which would be recoverable by way of compensation. This is a clear indication that the expectation was that compensation claims would principally relate to expenses incurred solely because of the ACV listing. Other key non-monetised costs as regards the asset owner were stated to include possible lower receipts from sale after the moratorium due to fluctuation in the property market “but this will depend as much on property market which may go up or down.” In addition there is included any impact of listing on saleability of the asset “though this again is unpredictable and subject to other factors such as planning considerations.”

In a separate impact assessment relating only to the Community Right to Buy provisions the DCLG estimated in the context of Option 2 (provide a moratorium on a sale of a listed assets which proposal was subsequently enacted) compensation claims for direct costs to be in the region of £2,000 per annum. No estimate was attempted with regard to the other costs mentioned which were in identical terms to the non-monetised costs in the impact assessment relating to the whole Localism Bill referred to immediately above.

Further in para. 34 of the CRB Impact Assessment it was acknowledge that an ACV listing could result in the loss of a sale if the buyer is deterred by the prospect of purchasing assets of community value. Reference was also made to notional loss or gain of income as a result of market fluctuations during the moratorium period. How these were to be dealt with was left over to the consultation on the Localism Bill as prediction “of possible market fluctuation and the effect which designation of an asset would have on the value of an asset would be difficult to determine.” The possible costs to an asset owner of an ACV listing are then summarised very concisely

(i) Could disrupt property market;
(ii) Length of moratorium could restrict operation of market;
(iii) Owners could incur costs through the delay of sale and may lose the opportunity of selling quickly at market value at that earlier time.

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426 Page 9 Annex A
427 January 2011 policy Option 2
That CRB Impact Assessment then considered the level of annual compensation claims in the context of costs to the local authorities in relation to Option 3 which proposed a community right of first refusal. In that context para. 44 contained a table of the potential cost of claims. The estimates in it were based on the Scottish experience which showed a successful claim for every 4.5 transfers as there had been nine transfers over six years and two successful claims so the numbers were small. The total paid out in Scotland by then only amounted to £895. Using these figures it was estimated that local authorities would face 30 successful claims a year if there is a high take up of community purchases being 136. This would amount to a total of £61,000 based on an average of £2,000 per claim. A low take up was estimated as being 94 and a mid-range 115.

Although these estimates are in the context of a community right to require a sale if the owner wants to dispose of the asset there is no account taken in those estimates of claims for losses due to failed sales or lost receipts. Interestingly in para. 48 when considering the costs to private owners it was baldly stated compensation will not be provided for the change in asset value due to the moratorium. Whether compensation will be paid is to be a matter for consultation but if paid it will be on same grounds as in Scotland which is if the owner can prove that extra costs have been incurred as a direct result of the legislation which so far had been rare.

More recently a Briefing Paper has been prepared for the House of Commons\(^{428}\) has stated that owners of property “can claim compensation if they can demonstrate its value being reduced.”\(^{429}\) It later states that provisions exist “for compensation to be paid if the owner applies and the local authority accepts that listing has had a detrimental effect on the value of the property.”\(^{430}\) Both these statements if correct would mean the scope of compensation is wide ranging and will result in substantial compensation claims. There are real doubts as to whether these statements can be justified.

\(^{428}\) No. SN06366 dated 18\(^{th}\) December 2015  
\(^{429}\) Page 3  
\(^{430}\) Page 5
Unfortunately, there has been no consistent statement as to the scope of the operation of the compensation provisions and it is possible to cherry pick from the statements to support a number of different arguments.

(b) Compensation pursuant to Regulation 14 – in the 2012 Regulations para. 14 governs compensation payments. There is a general provision in para. 14(2) immediately followed by two specific classes of compensation in para. 14(3). The inclusion of both provisions creates ambiguity as to the type of loss covered.

(i) General authorisation for compensation payment – regulation 14(2) contains the general authorisation for compensation. The elements to be established to justify a compensation claim are:-

(a) the claim is made by the owner of an asset which is or has been listed as an ACV;

(b) the claim relates to loss or expense in relation to the asset;

(c) the loss or expense has been incurred;

(d) the loss or expense has been incurred when the land is listed as an ACV;

(e) the loss or expense “would be likely not to have been incurred if the land had not been listed”.

There is no express description of the type of loss or expense which is within this provision. The main qualification is that the loss or expense must be an incurred loss or expense. I consider that this will be a significant limitation. The ACV regime only provides for a moratorium without an ability to compel the owner to sell the listed asset. It does not confer rights on third parties to compel the acquisition of the listed asset from the owner. This is important because it is not akin to compulsory purchase. The owner can decide to retain the listed asset or can sell it upon terms and to whom the owner the wishes free from any compulsion provided that the moratorium provisions are complied with. This should significantly restrict the extent of loss that can be incurred by the owner of a listed asset. The owner does not have to sell to a community group and
is free to sell at the open market value. There will be no claim that the asset has been sold for less than the actual market value at the date of the disposal. There may, however, be claims that the open market is not as much as it should be due to the ACV listing and that is going to be a difficult issue which will have to be considered and decided at some stage.

(ii) **Specific classes of compensation** - reg. 14(3) provides for two specific classes of compensation but is expressed to be for “the avoidance of doubt” and “without prejudice to other types of claim”. The two classes of claim are:

(a) **Delay due to moratorium** - a claim may be made “arising from any period of delay in entering into a binding agreement to sell the land which is wholly caused” by the operation of the interim or the full moratorium period.\(^{431}\) This will cover a loss or expense as it is implicit that “a claim” in reg. 14(3)(a) means a claim within reg. 14(2). In consequence it will cover a loss or expense caused by delay due to the operation of the moratorium provisions provided that the loss or expense has been incurred. However, there is an additional requirement in reg. 14(3)(a) that the claim must be wholly caused by the operation of the moratorium provisions. The absence of such wording from reg. 14(2) in contrast to its express inclusion in reg. 14(3)(a) strongly suggests that a claim within reg. 14(2) but not within reg. 14(3)(a) does not have to be wholly caused by the ACV listing. In those circumstances what has to be proved in order to have a successful claim is that the loss or expense incurred would be likely not to have been incurred if the land had not been listed. This is an aspect of compensation which will need to be explored further in the appeal decisions.

From the government statements discussed in section 1 above the expectation is that reg. 14(3)(a) will result in claims for expenditure such as maintenance, security or rates which would have been avoided but for the listing of the property as an ACV. It may be that listing of a property as an ACV will cause a sale which was about to happen not to proceed. If it can be shown that the sale would definitely have gone ahead but for the listing then there is the potential for a compensation claim. Is it possible to prove that the proposed sale would have definitely

\(^{431}\) Reg. 14(3)(a)
proceeded to a binding sale agreement? If a property is nominated then prior to nomination there normally would be a risk that such a nomination would be made. For example, if the property is a public house then prior to the changes in May 2017 to the PDR regime it was to be expected that the prospective purchaser would have been aware of the risk. If there is a risk then the nomination could occur after exchange of contracts. Will the prospective be prepared to run such a risk when if the nomination occurs first the prospective purchaser’s reaction is to withdraw. Why should a prospective purchaser believe that because the property has been purchased a nomination will not be made? Without such a belief would the prospective purchaser have gone ahead and exchanged? There seems considerable scope for arguments and uncertainty with regard to such a claim.

Further the owner will still own the asset and will be free to sell once the moratorium period has expired. What will be the amount of the loss? Will it be the difference between the lost sale price and the market value of the listed property? By reference to what date will that market value be determined? Will it be the date that the withdrawal from the sale is communicated to the owner or a later date? In order to be an incurred loss will the property have to first be sold?

The operation of the moratorium provisions may give rise to an alternative factual situation. Instead of a lost sale the sale may proceed but at a reduced price due to a fall in the property market during the moratorium period. The sale going ahead means that the loss has been incurred and will be the difference between the price at which the property would have been sold but for the ACV listing and the actual sale price. Attention will focus on whether the sale would have taken place earlier and if it did at what price. There may also be an issue as to whether the vendor had been slow in proceeding with the sale and could have achieved an exchange before the ACV listing. If the vendor has been slow will this be a failure to mitigate the possible loss?

(b) Costs of successful appeal – reasonable legal expenses incurred in a successful appeal to the First-tier Tribunal can be recovered as compensation.\(^{432}\) The appeal can relate to an ACV

\(^{432}\) Reg. 14(3)(b)
listing, a decision not to award compensation or the amount of compensation. The compensation is triggered by success in an appeal. Whether the local authority acted reasonably in contesting the appeal is wholly irrelevant. This can act harshly. For example, in New Barrow Limited v Ribble Valley BC Judge Lane stated that the local authority had been correct to list the land as an ACV and to retain it on the ACV list on the review. What caused the land to cease to qualify as an ACV was a licence agreement entered into by the owner and the developer on the day of the appeal hearing. In such circumstances the local authority had no chance to avoid the costs of the appeal but faced the prospect of a compensation claim in respect of the owner’s cost of the appeal because the owner had been successful.

Compensation under reg. 14(3)(b) will not cover costs incurred in opposing listing prior to the listing decision or in the review of the listing decision. It must be costs incurred in the appeal to the First-tier Tribunal. Although such costs are not within reg. 14(3)(b) is it possible to recover them under reg. 14(2) on the ground that such costs would not have been incurred but for the ACV listing. This will not help costs incurred in opposing the nomination because to be recouped as compensation the costs must be incurred whilst the property is listed as an ACV. However, costs incurred in seeking the removal of the property from the ACV list on a review would satisfy that requirement and could be within reg. 14(2). If the owner fails on the review then the incurring of the costs could be attributable to the decision to contest the listing which has failed rather to the listing itself. If, however, the owner is successful on the review in achieving the removal of the property from the ACV list are the costs incurred in doing so costs which it was not likely that they would have been incurred but for the ACV listing? If such costs can be claimed by reason of reg. 14(2) then why was there a need for reg. 14(3)(b) or does the inclusion of reg. 14(3)(b) mean that no other legal costs incurred opposing a listing can be recovered by way of compensation? Further if such costs are recoverable by compensation then what is the position regarding legal costs incurred on a review by an owner who is successful on appeal to the First-tier Tribunal? Can the owner then make a compensation claim in respect of such costs incurred in relation to the review and if the owner can how will the time limit operate in relation to such a

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433 CR/2016/0014
claim? Does the date of the appeal decision act as the finishing of the incurring of the costs or could there be a serious risk that it will be too late to make such a claim other than for the costs of the appeal to the First-tier Tribunal?

Reg. 14(3)(b) is silent as to what happens if the appeal is partly successful. For example, if the ACV listing is upheld but as to part only of the building can the owner make a claim for all the costs on the ground that there has been success? Alternatively, should the costs be apportioned between the various issues which had to be decided in the appeal and only those apportioned to the issue on which the owner was successful recovered as compensation? Finally should a claim for compensation in such circumstances fail because the owner has not been wholly successful?

Is this compensation claim restricted to fees paid to lawyers or will it cover all the types of expenditure normally recovered by a costs order? Reg. 14(3)(b) refers to “legal expenses”. Is this to be construed in a limited manner or can it cover items of expenditure such as an expert’s costs?

All claims for compensation are subject to tight time limits. This claim for compensation in relation to legal expenses must be made within thirteen weeks from the incurring of the legal expenses or their being finished being incurred.\(^{434}\) How is this applied? Is it thirteen weeks from the incurring of the particular legal expense or from the date that the decision is made? Until there has been a successful appeal such a compensation claim cannot be made so it should be thirteen weeks from the appeal decision. Those acting for the successful owner must take care to ensure both that the compensation claim is made and that it is within the time limit. There is no express power to extend the time limit and I consider that it must be complied with if there is to be a valid compensation claim.

(iii) Extent of loss recoverable – the need to have the two specific classes of compensation spelt out in reg. 14(3) suggests that reg. 14(2) is not as wide as it first appears. Expenditure incurred due to the operation of the moratorium provisions was the focus of discussion of compensation when the introduction of the ACV regime was being introduced. The impression given was that this would be the principal type of loss and expense which would be recouped as

\[^{434}\] Reg. 14(5)(5)(b).
compensation. It was this which led to the low estimate of the average cost of a compensation claim. It would suggest that other claims under reg. 14(2) are less likely.

One reason for this is perhaps because the ACV regime only imposes a delay on sales and even that restriction does not apply to all types of sale. In consequence there is an expectation that if a property is listed all the owner has to do if there is a wish to sell in a way which triggers the moratorium period is wait out the moratorium period and then sell on the open market. On the face of it the most likely loss that will be suffered is the expenditure that has had to be incurred due to the delay in selling. The property has had to be owned for longer than otherwise would be the case. However, there is obviously the risk of different types of loss.

The mere listing of a property as an ACV may cause the open market value to be reduced. Can this be recovered? Alternatively, an ACV listed property may be sold by an exempt disposal which is not caught by the moratorium provisions. If such a disposal is at a reduced price due to the moratorium can the amount of the reduction in the sale price be recovered as compensation? The loss is not due to delay caused by a moratorium and so is not within reg. 14(3)(a). Can it be claimed pursuant to reg. 14(2)?

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.435 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 listed”.436 In the Policy Statement it was stated437 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.”

Judge Lane stated this view albeit as an obiter dicta because notwithstanding the opening words of reg. 14(3) it did not appear that the legislature intended an owner to recover

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435 Para.17 in Chadwick v Rossendale BC CR/2015/0006
436 Para. 10.2
437 At page 5
compensation in respect of the diminution of the value of the property by reason of its listed status. He considered that had this been the intention “one would have expected to see express reference being made in regulation 14 to this type of claim.” It is not clear whether this is limited to cases in which the market value of the listed property has been reduced due to the listing but the property is still owned by the same owner. If so then without more no loss has actually been incurred at that stage. Alternatively, does it cover cases in which the owner of the listed property has suffered loss due to the property being sold for a market value which has been reduced by the ACV listing. To the extent that the reduction in the market value is due to the ACV listing why should this not be a type of loss which is within reg. 14(2)? The wording of reg. 14(2) is very wide. A mere reduction in open market will probably not be within this provision as no loss will have been incurred but that is not a reason for excluding such a loss when it is actually sustained by a disposal of the property.

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 and did not have to be decided.

(iv) **Incurred** – reg. 14(2) relates not to “loss or expense” but to “incurred loss or expense”. The addition of “incurred” is important. This indicates that the loss or expense must have accrued and so be an actual loss or expense. It is not enough that there may be a speculative loss or expense which has not yet been crystallised and can only be estimated. It must have been sustained. Such a meaning has been given to incurred in other legislative contexts in this country\(^{438}\) and in the Commonwealth.\(^{439}\)

The importance of the loss or expense being incurred is emphasised by other provisions in regulation 14. The time limit for making a claim is determined by reference to the incurring of the

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\(^{438}\) *Little Hutton v Jackson* (68 JP 451) concerning the recovery of expenses proved to have been incurred by extraordinary traffic under section 23 Highways and Locomotive (Amendment) Act 1878. Lord Alverstone at page 452 held that such expenses had to have been actually incurred and not be estimated expenses.

\(^{439}\) *Hawkins v Bank of China* (1992) 7 ACSR 349 with regard to a permissible tax deduction.
loss or expense or when the loss or expense is finished being incurred.\textsuperscript{440} The legal expenses which may be claimed by reason of reg. 14(3)(b) must have been “incurred in a successful appeal”.

This point will be particularly important as regards any compensation claims made on the basis that the listing of a property as an ACV has caused the property’s market value to be reduced. I do not consider that the mere fall in market value by itself will be an incurred loss and so will not be within reg. 14(2).

(v) Causation - the usual issues of remoteness will not be relevant. There is nothing explicit or implicit in regulation 14 which will require the loss or expense to be foreseeable or within the contemplation of the parties. Regulation 14 provides its own tests. Although there is debate over the issue it would appear that these are all embracing and do not permit other tests to be applied as well.

To succeed with a claim under reg. 14(3)(a) it must be shown that the loss or expense arising from delay was “wholly caused” by the operation of the moratorium period. This is a stiff test as it appears to exclude claims in which the loss or expense was caused by a number of reasons including the moratorium period.

A claim in respect of the legal expenses of a successful appeal to the First-tier Tribunal under reg. 14(3)(b) requires the expenses to be incurred in connection with the appeal.

Any loss or expense the subject of a claim not within reg. 14(3) but within reg. 14(2) must be proved to be loss or expense “which would be likely not to have been incurred if the land had not been listed.” The application of this test may give rise to difficulties. Just because a property is listed it does not automatically follow that expenses relating to the listed property during the listing will be recoverable. Compensation is payable only if the expenses have been incurred wholly due to delay falling within reg. 14(3)(a) or otherwise under reg. 14(2) if it is likely that the expenses would not have been incurred but for the listing. It may be that listing thwarts the implementation of a plan that the owner had for the property and causes the owner to adopt a

\textsuperscript{440} Reg. 14(5)(b)
different plan. If the carrying out of the original plan would have avoided the owner incurring expenses should those be recoverable as compensation even if the replacement plan will require them to be incurred? In such circumstances it is not likely that the expenses would have been incurred if the property had not been listed. However, the change in plan caused by the listing means that the expenses would have needed to be incurred in any event. Is it enough that the listing caused the change of plan. I would expect the owner’s replacement plan to be taken into account and to be regarded as the cause of the expenses being incurred rather than the listing. Otherwise all the expenses incurred subsequent to the listing will be recoverable for so long as the property is listed. This illustrates that determining whether the listing is part of the background or the cause of the loss or expense being incurred may be a difficult issue.

As stated in the government statements regarding the ACV regime a further significant factor in determining the amount of compensation payable, if any, is the state of the property market. Should an owner be able to recover loss attributable to a fall in the property market? For example, if a delayed sale caused by the operation of the moratorium period results in a reduced purchase price due to a fall in market values generally does that mean that the loss has not been wholly caused by the listing but by the state of the property market and so compensation is not payable?

(vi) Measure of loss – the expectation seems to be that there will be no permanent loss in market value due to an ACV listing because once the moratorium period has expired the owner is free to sell upon whatever terms the owner wishes and to any third party. However, will this be as complete an answer as is hoped particularly by listing authorities? Once the moratorium period has expired 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 ACV list 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 its value when 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 as an ACV? 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 significantly reduced. There is plenty of scope for argument not just as regards the causation issues (see (v) above) but also as regards valuation issues. The issues raised by such arguments will not be simple to resolve.

Reg. 14 does not make clear whether incurred losses or expenses are looked at in isolation or whether account should be taken of profits and gains made by the owner. To focus just on individual losses or expenses risks providing a claimant owner with an undeserved benefit which if the wider picture had been looked at would not have been paid. The difficulty is that as regards expenses there is nothing to justify such a broader approach. In the context of losses it may be that it is only possible to ascertain whether a loss has been incurred by considering the broader financial picture.

(vii) Changes to Permitted Development Rights Regime (“PDR”) - it is significant that the changes to the PDR regime in respect of nominated and listed public houses were enacted in 2015 sometime after the coming into force of the ACV regime. This means that the statutory provisions of the ACV regime did not take account of those changes. In turn this means that the impact of those changes will have to be worked out as they do not fit harmoniously into the ACV regime. One serious issue which has not been addressed is the impact the changes have on the operation of the compensation provisions. This applies equally to the further changes taking effect on 23rd May 2017 which exclude all drinking establishments including public houses and not just those which have been nominated or listed as an ACV.

An intended consequence of the 2015 changes in relation to nominated or listed public houses is that it is no longer possible to convert from use as a public house to a different use
permitted by the PDR without obtaining the grant of a fresh planning permission. From 6th April 2015 until 23rd May 2017 this has prevented changes of use from Planning Use Class A4 to Planning Use Classes A3 (restaurant); A2 (financial and professional services); A1 (retail); B1 (office) for two years; C2 (temporary use as state-funded school for a single academic year extended to two as from 6th April 2017)\textsuperscript{441}. From 23rd May 2017 such conversions are still prevented without a grant of planning permission but this now applies to all drinking establishments and not just those that have been nominated or listed as an ACV.\textsuperscript{442} Two new rights under PDR have been introduced with effect from 23rd May which are not caught by the exclusion of PDR rights in relation to drinking establishments. These permit a change of use from drinking establishment (A4) to drinking establishment (A4) mixed with restaurant/cafes (A3) (known as “drinking establishments with expanded food provision”) and from such a drinking establishment with expanded food provision to a drinking establishment.\textsuperscript{443} The rights under the PRD which are prevented also extends to exclude the ability to demolish such a public house without first obtaining planning permission.

Up until 23rd May 2017 an owner intending to effect such a change in use or to demolish a public house may, therefore, be thwarted by a community nomination being made. The likelihood of this happening had been increased by the need for the owner of any public house (whether or not listed) to write to the listing authority to ask whether the pub has been nominated for listing and to wait 56 days before acting. Until 23rd May 2017 the making of a community nomination has taken away the owner’s ability to exercise the rights conferred by the PDR in relation to public houses. Inevitably this raises the question whether the owner will be compensated for the loss of those rights under the PDR.

The statutory instruments imposing such restrictions do not make any provision for statutory compensation. There is the possibility of compensation under section 108 TCPA 1990 if a planning application required because of the amendment of the PDR fails within twelve months

\textsuperscript{441} Reg. 4 Town and Country Planning (General Permitted Development) (England) (Amendment) Order 2017/391
\textsuperscript{442} Section 15 Neighbourhood Planning Act 2017 and reg. 3 Town and Country Planning (General Permitted Development) (England) (Amendment) (No. 2) Order 2017/619
\textsuperscript{443} Reg. 3(b) 2017 Order referred to in footnote immediately above
of the amendment coming into force. During the Communities and Local Government Select Committee Inquiry into Community Rights it was stated in the Government response that the loss of rights under the PDR will not give rise to any ACV compensation.\textsuperscript{444} The justification for this statement was not given. As a matter of general law restrictions placed on the use to which a property can be put do not constitute the “taking of property” so that such restrictions do not give rise to an entitlement to compensation without a specific statutory authorisation.\textsuperscript{445} By itself that does not mean that reg. 14 cannot apply to a loss resulting from the loss of rights under the PDR.

The intention behind the 2015 changes now extended by 2017 changes is to protect public houses and to reduce the number being converted to other uses. It follows from this that there will be an impact on the owners. In those cases in which the owner incurs a loss because of the removal of the PRD rights should this be capable of being compensated pursuant to reg. 14? An alleged fall in the market value of the pub will not by itself be an incurred loss (see (iii) and (iv) above). In the Chadwick case it was claimed that a sale was lost due to the operation of the moratorium and this resulted in an incurred loss. The claim failed because the evidence of the prospective purchaser showed that the sale was lost for other reasons and that the moratorium period was viewed by the prospective purchaser as an advantage. Had the evidence proved that the prospective purchaser had withdrawn due to the moratorium provisions then the claimant would have been successful. If the reason for withdrawal had been the loss of the rights under the PDR would that have been different in principle? The owner would have the option of making a planning application to achieve the objective that it had been intended to achieve by exercising a right under the PDR. If no planning application is made would it be that failure which is the cause of the loss?

With many public houses the intention is to increase market value by obtaining planning permission for an exclusively residential use. Loss of rights under the PDR will not directly affect that because a grant of planning permission has always been needed in all cases in order to

\textsuperscript{444} para. 13
\textsuperscript{445} Belfast Corporation v OD Cars Limited [1960] AC 490) and in particular Viscount Simmonds at pages 517/518 and Lord Radcliffe at pages 523/525.
convert to residential use. Listing a public house as an ACV may stop a prospective purchaser from seeking to exercise a right under the PDR as a stepping stone to then subsequently converting to residential use. It is unlikely that thwarting such an approach will be accepted as created an incurred loss.

In any event if a prospective purchaser withdrew because rights under the PDR can no longer be exercised how certain was it that that prospective purchaser would have proceeded to exchange? With all public houses there must to varying degrees of likelihood be a risk that the public house will be the subject of a community nomination especially once a written request had been to the listing authority prior to any change of use or demolition.

The 2015 changes to the PDR in relation to public houses undoubtedly introduced significantly greater uncertainty. It is an issue which has been receiving greater mention in owner’s letters of opposition to a community nomination. This has made it harder for listing authorities to administer the ACV regime and has the potential to increase compensation payments. Such uncertainty is undesirable.

The effect of the 2017 changes so that all public houses are treated in the same manner will remove this uncertainty. A community nomination will no longer trigger the removal of PDR rights and such no claim for compensation can be made based on the listing causing the loss of such rights. Now that all owners of public houses cannot exercise many of the rights previously available under the PDR this may discourage the pursuit of compensation claims in relation to the period between the coming into force of the 2015 changes and the 2017 changes.

(viii) *in relation to the listed land* – reg. 14(2) limits compensation claims to loss or expenses incurred in relation to the listed land. What if the owner has lost an opportunity which required to be funded by the net proceeds of sale of the listed land due to the operation of the moratorium period? 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? There is no wording in reg. 14(3)(a) which imposes such a limitation. However, I would expect it to be regarded as
being carried over from reg. 14(2) by reason of the reference in reg. 14(3)(a) to a claim meaning a claim under reg. 14(2).

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 (if the statutory conditions are satisfied\textsuperscript{446}) so that a disposal will not be subject to the moratorium provisions. However, notwithstanding this exclusion from the operation of the moratorium provisions 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. For example, contracts for the sale and purchase of a house and adjoining facility used by the local community may be about to exchange when a community nomination is made in respect of the adjoining facility only. The facility is listed and the prospective purchaser withdraws. The owner subsequent sells but at a reduced price. The wording of reg. 14(2) is such that only loss incurred in relation to the facility can be recouped by way of compensation. Arguably a claim under reg. 14(3)(a) could apply to the whole loss but it would seem very unlikely that this could succeed. Assuming this type of loss is recoverable apportioning the loss to the facility will be difficult.

(ix) loss prior to listing – compensation cannot be claimed for loss or expense that has been incurred prior to listing. If the compensation claim is that the ACV listing has reduced the value of the listed asset how much of that reduction will have accrued prior to listing but after the making of the community nomination? 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 following the making of a community nomination rather than the actual listing. Will the market value of the asset immediately following a listing be less than its market value immediately before the listing? What account should be taken of the possibility of listing once a community nomination has been made? There is no guidance in the provisions. Will the reduction in value be viewed as a continuing process which does not finish until the asset is listed as an ACV and when it is finished the full reduction is taken into account when determining the amount of the

\textsuperscript{446} see section 8(e)(vii)
compensation payable? Such an approach may be too simplistic as the nature of the asset may be such that even before the community nomination is made the risk of an ACV listing must have been appreciated in the market. Yet to take account of the effect of the making of a community nomination on value would seem to defeat the intention behind the compensation provisions in the regime.

(x) loss after removal from the ACV list – compensation is only payable in respect of loss or expense incurred whilst the asset is on the ACV list.\(^{447}\) Once the asset has been removed from the ACV list for whatever reason any loss or expense incurred after the removal cannot be compensated. This may give rise to difficulties. For example, a closed public house is about to be sold when it is listed but on review is removed from the ACV list. The listing delays the proposed sale and so the owner has incurred expenses which it would not otherwise have incurred. Following the removal from the ACV list the prospective purchaser decides to go ahead with the purchase but has used the funds originally available for the purchase. As a result the purchaser is slow in proceeding whilst arranging for fresh funds to be made available and so the vendor is obliged to pay out more by way of expenditure. As such expenditure is incurred after the removal of the asset from the ACV list will this prevent the vendor claiming compensation. An argument that such expenditure is incurred because the vendor owned the asset whilst it was listed as an ACV is unlikely to succeed because the expenditure must be incurred whilst the asset is listed.

What if a fall in the property market occurs after the removal of the property from the ACV list but before the owner is able to sell the property. Will this be a loss which was not incurred whilst the asset was a listed ACV? Will a sale at a reduced price after removal from the ACV list be treated as incurred when the property is not listed regardless of the state of the property market because the sale is subsequent to removal? It is felt that it should not be but there is an available argument.

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

\(^{447}\) reg. 14(2)
(i) it must be made by a private property owner and not by a public body or authority. 

(ii) a written claim must be made;

(iii) the claim must be made before the end of thirteen weeks after the loss or expense was incurred or (as the case may be) finished being incurred. There is clearly plenty of scope for disputes as to the date at which the thirteen week 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.

If a claim is made outside the statutory time limit will this bar it from being pursued? It is a matter for statutory construction and determining the purpose of the statutory provisions. The intention would appear to be to achieve certainty. Time limits applied to local authorities seeking to recoup the costs of works have been applied strictly so that if not complied with the power to demand payment is lost. Similarly it has been held that the time limit regarding the delivery of a case stated to the High Court within thirty days of receipt from the Special Commissioners specified in section 56 ICTA 1970 has to be strictly complied with and late delivery is ineffective.

There has been one appeal with regard to compensation decisions – Chadwick v Rossendale BC. In this Judge Lane took the opportunity to emphasise that compensation claims must be properly made and articulated when made to the local authority. However, he did not preclude further types of loss being subsequently claim but stated that it would be difficult to

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448 reg 15  
449 For example, Cullimore v Lyme Regis Corporation [1962] 1 QB 718.  
450 Gurney (HMIT) v Petch [1994] EWCA Civ 27. Millett LJ stated that unless there is a power to extend or some other and final mandatory time limit is spelt out from the statute a time limit cannot be relaxed without dispensing with it altogether and such dispensation cannot happen unless the substantive requirement is also dispensed with.  
451 CR/2015/0006  
452 Para. 16
persuade a Tribunal judge on appeal in respect of a claim or part of a claim that had not previously featured in the process.

(iv) state the amount of compensation claimed;

(v) 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 it is possible 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 within reg. 14(3)(a) 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 strictly 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 the moratorium 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.  

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 evidence must stand up to being 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.

One difficulty which has not been considered in the guidance is whether the listing authority should provide evidence and if it should what evidence that should be. This may depend on the nature of the decision that a listing authority should make in response to the claimant’s evidence. If the listing authority considers that the evidence supporting the compensation claim is inadequate should it reject the claim rather than take into account other evidence and attempt to reach a different decision from that sought by the claimant. For example if there is a valuation issue and the local authority regards the claimant’s valuation evidence as inadequate should it reject the compensation claim for that reason or obtain valuation evidence of its own with which it may arrive at a different figure to that claimed. For local authorities whether to obtain alternative valuation advice may be a difficult decision. If it does so it gives the claimant a fall back position to argue.

(d) 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 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 then 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. This will increase the administrative burden and the cost.

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.

(e) Burden of compensation claims – When the ACV regime was introduced it was structured so that central government ultimately bore any compensation payments made by a listing authority to the extent which singly or in aggregate those compensation payments exceeded £20,000 in any financial year. It was a requirement that the Treasury must sanction any compensation payment. It is not clear that this financial support has continued past the financial year ending in March 2015.

The possibility of a significantly increasing number of compensation claims has risen noticeably. There are a number of reasons for this. The number of community nominations has increased and in turn so has the number of assets placed on ACV lists. This is particularly true with public houses leading to a degree of frustration amongst owners who have opposed listing for what they regard as practical and sound reasons. This has been sharpened by the accelerating gap between the market value of public houses and the market value of public houses converted to dwellings. The restrictions on the operation of the PDR with regard to public houses has further complicated this area of the ACV regime.

The 2011 estimates of the costs of compensation payments may prove to have seriously underestimated the amounts to be paid out. Compensation for the legal expenses of successful ACV appeals could by themselves disrupt the estimates. If this were to be the case then this area would need to be reconsidered and possibly amended.

\[454\] Para. 16
12. FUTURE CHANGES

The February 2015 Report proposed that certain changes be made to the Community Right to Bid regime but save in relation to the operation of the PDR regime with regard to public houses none have been implemented. These were:-

(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 was 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. The obvious drawback with this is that it extends the period in which the owner cannot sell and will increase the likelihood of compensation claims.

(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 at the time this was opposed strongly by the government. In consequence the proposed change in 2015 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 continued to campaign for the planning protection to be extended to all pubs and not just those that are nominated or listed. This was achieved by the 2017 changes.

(d) **Material consideration** – to avoid uncertainty it was proposed that the listing of an ACV should automatically be treated as a material consideration for planning purposes. No change has been made so that it remains a matter for each individual local planning authority to decide. It is also a matter for the planning committee to decide what weight is to be attached to the ACV listing if it is regarded as a material consideration.
(e) **Termination of moratorium** – if a community bid ends during the moratorium period it was 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 was proposed that the nominator have a right to appeal from a refusal to list an asset which would 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 would have to be taken as this change could result in substantial compensation claims.

(h) **Renewed nominations** – it was proposed that there be a specific ability to renew a nomination that had 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 was proposed that more funding be made available to assist community bids.

Since that report there have been further pressure for change. In November 2016 Locality issued a paper headed “Places and Spaces – the future of community asset ownership”. This recommended that

(i) there should be a fund of £1 billion set up for the acquisition of community assets;

(ii) the moratorium period should be extended to one year but with evidence of fund raising required;

(iii) the recent past should be at least a minimum of five years but preferred that it became just “in the past”;

(iv) recent fallow years should be disregarded when determining the recent past and long community use should carry extra weight.
Apart from the 2017 changes removing all public houses from the PDR regime save as regards the new use class AA more funding has become available particularly focused on public houses. In September 2015 the Pub Loan Fund of £1.5 million was launched by the government. In April 2016 funding of £3.6 million was provided by the Community Pub Business Support Programme “More than just a Pub”. Separately from government funding there is now a better understanding of community pubs and the chances of raising funds have improved generally. Local communities are raising funds mixed with grants and borrowing from commercial lenders. Funding will always be an issue but there has been a significant improvement in the chances of raising the necessary funding or involving a “white knight”.
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 happen 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.

To be added to this list of issues is the problem that may be faced by owners when wanting to raise finance secured on a listed asset. This may in part be addressed by a broader understanding of the ACV regime.
First Schedule – Section 88 Localism Act 2011

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 regulation 13 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.

Regulation 13 of the 2012 Regulations

13(1) Where the responsible authority receives notice under section 95(2) of the Act in relation to any listed land, an owner of the land may enter into a relevant disposal of any of that land to a community interest group with a local connection at any time in the eighteen months beginning with the date of receipt of the notice.

(2) Section 95(1) of the Act does not apply to a relevant disposal of listed land in the cases set out in Schedule 3.
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.

12 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.

13 (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.

14 (1) 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.

15 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.