

ASSETS OF COMMUNITY VALUE GUIDE

BLIGHTING OF DEVELOPMENT OR BOOSTING THE LOCAL COMMUNITY

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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 community enthusiasts. In doing so it probably offends both sets of interests. It is neither a right to buy nor a pre-emption right (unlike in Scotland) but a right to bid leaving the landowner free to proceed with a disposal as it wishes. If a community group is interested a moratorium is imposed to allow the bid by a community group to be organised.

This right is part of a parcel of community measures focused on by the 2011 Act – Community Right to Bid; Community Right to Challenge; Community Asset Transfer; Community Right to Reclaim Land; and Community Right to Build. This right seeks to address the concern that properties which are or have been used for the benefit of a local community are being developed and lost to the community. It does so by providing a procedure by which properties may be nominated to be added to a list of community assets maintained by the local authority and then allowing time in which a community group can arrange a bid to acquire the property if the owner intends to dispose of it. At present the period is six months from notification of the intention to dispose of the property if a community group expresses interest within six weeks of notification of the decision to dispose of the property. Crucially the right does not confer a right to compel an owner to accept such a community bid even if the bid equals or exceeds any other offer unless the

owner is a charity or trustee. There is no statutory pre-emption right as under the Landlord and Tenant Act 1987.

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

It has been noticed recently 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 to enfranchise.

(ii) Local community - from the local community's perspective the right merely defers a disposal and does not allow the community to compel a purchase which is why so few listed properties have been acquired for the community. As yet listing does not (save as regards public houses) result in greater control over the use of the property and this is particularly a concern when the character of the property is such that a change in use can occur without the need for a fresh planning permission due to the application of permitted development rights. 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. This has been particularly prevalent with pubs which have been converting to supermarkets at the rate of two a week in the two year period beginning January 2012. Other pubs have been converted to furniture stores or fast food outlets. CAMRA has provided more recent figures which show that in December 2014 there were 54,914 public houses but this had reduced by 1,234 to 53,444 in June 2015 with 598 lost in the suburbs which is a rate of 17 a week being lost. The launch of the Pub Loan Fund of £1.5 million by the government in September 2015 may slow that rate of loss and encourage the growth in numbers of community pubs. The acceptance of the offer to purchase the listed Black Bull in Lowick by a community benefit society also in September 2015 and the sale of the listed Dog Inn in Belthorn to a community company are examples that this trend is beginning to grow encouraged by the success of earlier community pubs such as the Old Crown in Hesketh Newmarket in Cumbria started in 2003 and the Antwerp Arms in Tottenham which was listed in September 2013 and purchased by a community company in March 2015. 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.

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

Local authorities will also be affected as property owners. A number of applications have been made by town councils or local groups in relation to properties owned by the Borough or District Council administering the list. This can place the Borough or District Council in a difficult position particularly when the property is also on the Council's list of assets to be disposed of by that Council. One reason for the presence of the asset on that list may be that the authority faces a large bill for works if the asset is to be retained. For example, the Priory in Orpington is owned by Bromley LBC and has until this year housed the local museum in its medieval building. It has been listed as an ACV following an active local campaign to retain the property for the local community.

It is estimated that the authority would need to spend £1.7 million on the property. Instead the authority intends to sell on the open market. Steps are now being taken to organise a community interest group 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 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. It must obviously take particular care with such nominations. 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.

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 have been listed. From the flow of daily news items relating to ACVs the feel is that the pace of nomination is increasing. However, at that time at most 11 had been purchased by the community with the most prominent being the Ivy House pub in Nunhead. In all according to the evidenced provided to the Commons Committee there have been 122 community bids of which 60 have 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 the landing site on the South Bank for the proposed Garden Bridge may threaten whether the proposal can proceed. 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 thirteen of the twenty three reported cases have related to pubs.

However, there is a wide range of properties which have been the subject of applications. These cover both properties which are being used for commercial purposes and those which are already being used for public purposes. Properties nominated including sports fields and clubs, tennis club (West Norwood), cricket club (Yeadon Leeds), horse club (Lambeth), gyms (Hackney and Henley), dog racing stadiums (Sandy Lane Oxford), village shops, cafés, tea rooms, schools (former Penkhull infants school Stoke), nurseries, playgrounds, outdoor activity centres, post offices, pharmacies, hospitals, health clinics, surgeries, residential care home, former ambulance station, former police station, theatres, libraries, museums (Type Museum Stockwell), golf courses (Western Park in Leicester), swimming pools, ice rink (outstanding nomination at Ryde) Turkish baths (Newcastle), community centres (Formby Hall Wigan), day centres, bingo hall (Ealing), theatres (Greenwich Theatre), markets (the 112 year old Queens Market in Newham), old corn exchanges (Hadleigh), town halls (Hornsey Haringey), council administrative office (Howden Customer Service Centre) allotments (Coombe Stroud), business start-up centres, art gallery, churches and chapels, scout huts, allotments, car parks, public toilets (Penge), bus shelters, phone boxes, war memorials, fields (such as Pier Field Skegness which is now for sale with bids received under a tender process), windmills, community gardens (at Portishead produced from “eyesore” vacant land), parks such as Dulwich park, public amenity land, a lake, city farms (Twerton Hill), public footpaths (two listed by Huntingdonshire DC), cycle tracks, disused railway line, coast guards station (Kingsbridge) and greens. Strikingly, and imaginatively, successful applications have been made in relation to the Lakeland fell Blencathra and the Undercroft at the South Bank used for skate boards as well as the Stockwell Skate Park. 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. 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.

It is noticeable from viewing the lists of ACV kept by the authorities that there is a great discrepancy between authorities. Some even now have no ACV listed whilst others have over fifty. Some give the impression that there has been a careful assessment of the area and a variety of assets located over the whole of the authority's area have been listed. Some give the impression that the focus has been on particular types of assets. This may reflect the character of the area. The focus on the ACV list kept by St Albans is on meadows, open spaces and nature reserves.

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. 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 as this was before the 2015 Regulations taking listed pubs out of the permitted development regime. This has been particularly prevalent with pubs which have been converting to supermarkets at the rate of two a week in the two year period beginning January 2012. It will be interesting to see whether the need to obtain a new planning permission affects the rate of loss in the long term.

4. Qualifying Assets – the regime applies to unbuilt-on land and to buildings or to a combination of both unless exempt (as to which see section 6 below). It does not matter who is the owner including the Crown Estate and local authorities. It does not matter whether the asset is

owned by a commercial concern or a non-profit making body. It does not have to be in single ownership.

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

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

The potential for uncertainty is increased by the criteria not imposing absolute requirements. The relevant test is not whether the criteria have been satisfied but 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. The authority cannot adopt an interpretation of the statutory wording which is incorrect (*Tesco Stores v Dundee City Council* [2012] UKSC 13).

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*¹). At some stage I would expect this approach to be challenged. If correct there is no point in having the reference to the authority's opinion which is out of line with other areas.

However, that is not the complete picture. At present there is no appeal from a refusal to list. A nominator can only challenge a refusal to list by way of judicial review. I have seen this with a case in which a local authority refused an application by a Town Council to list a property owned by the authority which was used by a mixture of commercial tenants and community tenants including the Town Council holding council meets there. The issue raised was whether or not the community uses were ancillary and there was a threat by the Town Council to commence judicial review proceedings. If proceedings are commenced in such circumstances will the *Wednesbury* principles apply even though they do not with listing appeals under the regime? There would not seem to be justification for any approach other than to apply the *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*).²

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 deciding whether there has been use of the nominated land a "common sense" approach is to be adopted.³ 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.⁴ Specifically in the *Banner* case use of two narrow public

¹ CR/2913/0005

² [2015] EWHC 518 (Admin)

³ Judge Lane in *Banner Homes v St. Albans* (CR/2014/0018) at para. 16

⁴ Sullivan J. in *Cheltenham Builders Limited v South Gloucestershire* [2003] EWHC 2803 (Admin) at para. 29.

footpaths across a meadow could not as a matter of common sense constitute the physical use of the meadow.

5.1 Current actual user –

(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 if there is a current actual use which is a community use. These two conditions in section 88(1) of the 2011 Act are:-

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

(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) 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 each of cultural, recreational and sporting interests (section 88(6)). Each local authority is to decide what it considers falls within the phrase. In *Crostone v Amber Valley DC*⁵ Judge Lane described this issue as a “highly contextual question, depending upon all the circumstances of a particular case.”

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. These are open to the local community and so use by the club is regarded as furthering the social wellbeing and social interest of the local community. However, it is not to be expected that all clubs will be treated in this manner.

⁵ CR/2014/0010 at para. 17

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

Magistrates' courts, fire stations and police stations have been refused by some authorities on the basis that they are not within the type of community use required. Bromley rejected a former police station because the public only had access to a small part of the building. 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. Some authorities consider that car parking does not qualify whilst others do. Following the decision in *Trouth v Shropshire*⁶ it is clear that land consisting only of a car park can be listed as an ACV if the use of it is not viewed as ancillary to the use of a larger unit. Bus depots, Mecca Bingo halls and nightclubs have also been refused as not satisfying the criteria yet at least one authority has listed a bus station. It emphasises that the manner in which the listing regime is operated can vary from one authority to another with different views being held as to what types of property may qualify for listing.

Interestingly in the *General Conference of the New Church v Bristol City Council*⁷ Judge Lane considered it significant that the list of social interests did not include religious interests. He then went on to hold that "it does not encompass religious observances in a church, mosque or synagogue etc...". Such a building will only come within section 88 if there is non-ancillary use which furthers social wellbeing or social interests of the local community (as to non-ancillary use see (d) below). Some authorities have listed churches and chapels but possibly on the basis that religious worship is a use for a community benefit.

I have seen a case in which the focus of the nomination was on retaining the building to enhance the character of the local area. It involved a boat house by the side of a canal. My view is

⁶ CR/2015/0002

⁷ CR/2014/0013

that this is not sufficient to cause the building to qualify as an ACV. 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 planning law.

There have been a number of appeals to the First-tier Tribunal General Regulatory Chamber. One concerned the Kassam Stadium which was listed by Oxford City Council and was appealed by the owner in Firoka (Oxford United Stadium) Limited v Oxford City Council⁸. The core issue was whether the football use should be viewed as ancillary. In deciding this issue Judge Nicholas Warren had to consider condition (i) above. He held that this condition had been satisfied. His justification for this holding started at paragraph 10 of his judgment:-

““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 a recent appeal concerning the Black Bull in Lowick – Hawthorne Leisure Acquisition Limited v Northumberland CC⁹ - 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

⁸9th May 2014 – CR/2013/0010

⁹ CR/2014/0012

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).

The types of factor taken into account in determining whether the social wellbeing or social interests of the local community is being furthered by a use is wide. In *Matterhorn Capital v Bristol City Council*¹⁰ 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*¹¹ 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 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 means 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.

(c) realistic continuation of community use – in the *Gullivers Bowls Club v Rother DC*¹² Judge Warren rejected the argument that this required the anticipated community activity to be commercially viable or even to have a foreseeable long-term viability (para. 12). In the Tribunal decisions there is a very marked acceptance that financial problems can be overcome if there is a strong sense of local community especially if it has engaged with the particular property and has available to it credible advisers with experience of community projects. This particular aspect is

¹⁰ CRB/2013/0006 at para. 15

¹¹ CR/2014/0011

¹² CR/2013/0009

more likely to be a live issue in the context of “recent past” cases than where there is a current actual use which already furthers a community benefit (see section 5.2(d) below).

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

However, there is no definition or guidance as to what this means and so it is left to each local authority to decide. It is an issue which can cause real problems for local authorities. In a briefing paper for the House of Lords Report Stage prepared by Locality it was stated that ancillary meant “an incidental and minor feature of the use of asset”. I have seen cases in which it is argued on behalf of the nominator that all that is required is that the community use is not supportive of a main non-community use. In my view this is not correct. For example, if a local disabled group comes to a farm once a month that use is not supportive of the principal agricultural use of the farm but that should not cause the farm to qualify as an ACV. In the assessment forms used by Hounslow LBC it is stated that a working definition of “non-ancillary” “is that the usage is not providing necessary support (e.g. cleaning) to the primary activities carried out in the asset but is itself a primary, additional or complementary use”. An example is the rejection of the nomination of Basing House by the Three Rivers DC on the basis that the museum occupied less than 20% of the office use of the building.

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

Judge Warren made the point that it is not necessary that the community use is the “primary use” (para. 9) which the legislators could have easily provided but omitted to do so. This

is in contrast to the view expressed by Locality that a secondary use is ancillary and that the community use must be the principal use.

Nor did the judge accept the submission that the Community Right to Bid regime should be read as part of the general planning law. He accepted that material planning information will form an important part of the factual context but that planning concepts such as “planning unit” should not be imported. This is part of a trend. The CIL regime has a general exclusion of planning definitions from the Planning Acts albeit that the two subjects are linked. In consequence terms used in the CIL regime such as “lawful use” will bear their own interpretation.¹³

In that case he 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 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 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 decision in the Kassam Stadium case the judge upheld the appeal against listing in *Dorset County Council v Purbeck DC*¹⁴ 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 schools were closed. He considered that the school closure should be viewed as

¹³ R (oao Hourhope Limited) v Shropshire CC [2015] EWHC 518 (Admin) at para.

¹⁴ CR/2013/0004

merely temporary¹⁵ and so the significance of the closure was reduced. In consequence the playing fields were ancillary to the school. This will not always be the outcome. In *Idsall School v Shropshire CC*¹⁶ the listing of the playing fields of a private school were 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.

A more analytical approach was adopted 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). 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 a wider unit of land. This was addressed by Judge Lane in *Trowth 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. This is necessary because the land nominated may be defined 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. He considered that Parliament could not have envisaged the ACV regime catching the café or restaurant. There was no threshold test which

¹⁵ At para. 19

¹⁶ CR/2014/0016

would prevent a nomination being made which limited the listing to the café or restaurant and so reliance had to be placed on the ancillary test. With the example suggested the unit was the garden centre and the use of the cafe and restaurant would be ancillary to the use of the garden centre. What constitutes the unit for this purposes is a matter of fact and degree.

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

5.2 User in the recent past –

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

(i) there was a time in the recent past when an actual use furthered community benefit which was not an ancillary use (the wording of this condition is different to all the other conditions in that it refers to furthering the social wellbeing or interest of the local community rather than social wellbeing and social interest but Judge Warren read in the word “social” in the St. Gabriel case at para. 27);

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

(b) Recent past - With regard to these conditions one question is what is meant by recent past. There is no statutory definition or guidance. Some authorities, such as Thanet DC, have treated the recent past as being the five year period preceding the nomination. Others such as Hounslow LBC use a three year period as a working test for the purposes. There have been a number of nomination 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.

However, it seems clear now that there is no specific period beyond which it is definite that it is not included in the recent past.

In *Scott v South Norfolk DC*¹⁷ 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.¹⁸ In that case the pub had been closed for six years¹⁹ and the authority stated that there had been no community use currently or in the recent past on the basis of which finding could only result in a decision not to list albeit that the authority did list and this was set aside on the appeal. It is worth noting that as the appeal was a rehearing it was open to the judge to find that the authority’s conclusion in the review decision that the six year period was longer than the recent past was wrong. He did not do so and so must have considered it to be correct in the circumstances of the case. The nomination related to the Kings Head in Pulham St. Mary in Norfolk and parts of the building dated back to the 14th or 15th 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.

This was also the judge’s stance in *Worthy Developments v Forest of Dean DC*²⁰ when he stated that it could not have been intended to import the five year period from the future condition when Parliament had failed to set out a precise period for the past condition.

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

In the official guidance it is suggested that if there has been user of the land for purposes such as use by the Ministry of Defence for live ammunition practice the period could be ten to

¹⁷ CR/2014/0007

¹⁸ Para. 7

¹⁹ Para. 2 and 11

²⁰ CR/2014/0005 at para. 14

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*²¹ 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. It was nearly two hundred years. The implication seems to be that the longer the period of use furthering a community benefit the longer the period which will constitute the recent past.

To date 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; and
- (iv) the degree of connection between the asset and the community.

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

In *Reed v Shropshire CC*²² 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.

²¹ CR/2014/0010 at para. 14

²² CR/2013/0007

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 – a prime battle issue will be whether there is a realistic prospect that there could be a future community use of the nominated property which is not an ancillary use. The test does not require the likely future use of the relevant building to be determined but rather to determine whether future community use is one of a number of realistic options for the building (the Worthy case – paragraphs 18 and 19). The test is not whether such future use is wholly unrealistic but whether it is realistic to think that there could be 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”²³. This approach was repeated by Judge Lane in *Gibson v Babergh DC*²⁴ who added that the possibility must not be “fanciful” (para. 18). In *Crostone* supra²⁵ Judge Lane referred to the 2011 Act allowing an asset to qualify as an ACV when there are a “number of realistic outcomes co-existing”.

It is another issue in the ACV regime which is very fact-sensitive. This approach was reaffirmed by the judge 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. Judge Lane suggested that temporary community use might be a

²³ CR/2014/0015 at para. 15.

²⁴ CR/2014/0019

²⁵ At para. 22

possible solution in order to prevent the creation of an obstacle to the grant of planning permission (para. 13).

The owner's stated intentions should be taken into account "as part of the whole set of circumstances" (para. 11 Warren J. in *Patel v Hackney BC*²⁶) but those intentions will not be decisive alone. This is shown by the actual decision in *Patel v Hackney*. It concerned the Chesham Arms pub which had been purchased by Mr. Patel who then closed it with a view to converting it into flats. There was evidence that there was interest in running it as a pub and that it had been run profitably. Mr Patel's evidence was that the residential development was going to proceed. The judge considered that there were three planning possibilities and each was realistic. One option was that a planning application would be refused and the pub reopened (para. 16). This shows that it is enough that there are a number of realistic possibilities and one of them is a community use.

In contrast in *Spirit Pub v Rushmoor BC*²⁷ Judge Warren considered that there was no realistic prospect that the Tumbledown pub would revert to use as a pub or any other community use. This was a pub which although first established in 1600 had been closed since 2008. Before the coming into force of the 2011 Act McDonalds had purchased it subject to a tenancy in favour of Spirit. In consequence a transfer to McDonalds was not caught by the moratorium provisions. Further shortly before the hearing of the appeal planning permission had been granted for use of the property as a restaurant/takeaway. Judge Warren considered that he should take account of these factors. McDonalds had acquired the property and secured the necessary planning permission so no other possibility was realistic particularly as large sums would be required to be raised for a community use and no-one had been motivated to run the pub during the five years of closure. Similarly the Woolwich Grand Theatre was not listed by Greenwich LBC because the owner already had planning permission for redevelopment.

The Bailey (formerly the Castle) public house on the Holloway road, Islington was listed in May 2015 but on review was removed from the list. This was because further evidence was

²⁶ CR/2013/005

²⁷ CR/2013/0003

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 the permitted development regime. In consequence there was no realistic prospect of it continuing as a public house.

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

This point has been repeated more than once. An example is *Worthy Developments v Forest of Dean DC* supra which concerned another closed pub, the Rising Sun. The owners provided evidence that in the last five years the pub had only been open at the most for eighteen months and that this indicated that there was no realistic prospect that the use could be resumed in the next five years. With regard to such evidence Judge Warren stated that “I accept these demonstrate that there are obstacles. It is important, however, not to confuse commercial viability with what altruism and community effort can achieve.” (para. 21). Notwithstanding the financial problems the judge considered that this did not demonstrate that the proposals of the “Save Our Sun” committee were not realistic. Strong backing within the community is a factor that will be taken into account when deciding whether there is a realistic prospect of future community use (see also *Gibson v Babergh DC* supra).

A similar decision was made in *Sawtel v Mid-Devon DC*²⁸ 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.

²⁸ CR/2014/0008

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*²⁹). 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).

Even the failure to operate a pub successfully on a quasi-volunteer basis by the commercial owner will not by itself convince the tribunal that there is no realistic prospect of a future non-ancillary use of the nominated asset for community benefit. In the appeal against the listing of the Rose Hill Tavern in *Evenden Estates v Brighton and Hove City Council*³⁰ Judge Lane considered that it leaves open the possibility of “a genuine community-run organisation operating the Rose Hill Tavern on a not-for-profit basis” (para. 14).

In this regard Judge Lane made reference in the *Crostone* case supra to the Anglers Rest in Bamford in the Peak District. This was the first community pub to be started having been acquired by the Bamford Community Society with funding provided by 328 members. It is a not-for-profit co-operative registered under the Co-operative & Community Benefit Societies Act 2014. It incorporates a pub with a café and a post office. Another example is the Dog Inn in Belthorn which has recently been acquired by a community co-operative. The Ship in South Norwood was converted into flats without the necessary planning permission. There are is now an application for

²⁹ CR/2014/0010

³⁰ CR/2014/0015

retrospective planning permission to include a re-instated pub on the ground floor and basement. A share scheme has been set up to fund a community pub. When considering whether future community use is a realistic possibility these provide an example of an alternative operating model which must be taken into account.

Again it was emphasised in the Evenden Group case that there was no need to support the listing with a worked out business plan. In that case what impressed the judge was that the action group has “committed assistance from individuals with relevant experience” (para. 16). The expected increase of the population in the ward by just over 430 students and the impact of the introduction of several hundred students on a public house was an additional factor taken into account by the judge in that case.

A further decision on this issue is *Matterhorn Capital v Bristol City Council*³¹. 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 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 permission had been previously granted but only on condition that part of the site was available for community use.

However, in *General Conference of the New Church v Bristol CC* supra Judge Lane stated that although a formal business plan was not required the proposals did need to be realistic and in that case the suggested proposed use was “entirely speculative” (para. 29). There was no evidence to suggest that there was a real interest in the proposed use. One factor in rejecting the nominated of the Westminster Fire Station was that it had been on the market for twenty-one

³¹ CR/2013/0006

months but there had been no interest in purchase shown by any community group. The suggestions for future community use appeared nebulous. It indicates that there has to be an appetite amongst the local community for the proposed future community use.

Evidence directed at showing that the use is not commercially viable by itself will not be enough to persuade the judge that there is no realistic prospect of non-ancillary future community use. What really has to be shown is that there is no appetite for a future community use or that if there is there are not the means whereby it can be carried on.

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

- (i) Whether the owner is in a position to prevent any further community use during the next five years; and if not then
- (ii) what are the possible future uses of the nominated assets during the next five years;
- (iii) as regards those possibilities which further the social wellbeing or social interests of the local community whether the chances of such use is more than fanciful;
- (iv) if it is then whether such use is ancillary or non-ancillary. Such a non-ancillary use will satisfy the second condition of the second stage.

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 an approach is permitted 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 permitted was made in the Punch Partnerships case and rejected as it was “not possible rationally to contend that the community’s relevant use is confined” to those areas (para. 15). In that case the use of the Shovel pub by the community “manifestly extends to the outdoor areas”.

This 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. For example, New River Retail applied to Sandwell Council for planning permission to convert the car park of Halden Cross Inn to a Co-Op supermarket. This was refused and the position of the local community has been strengthened by the pub including the car park been listed as an ACV. The decision in Punch Partnerships v Wyrie supra is particularly important in this respect in that it considers the individual issues concerning the pub car park and the pub’s grassed area. Attempts to split the pub building from the surrounding areas of land such as the car park will be subject to very close scrutiny and the presumption will be that the building and the areas of land enjoyed with the building will be included in the listing.

To be listed a car park does not have to be part of a larger unit. In Trough 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) 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*³² which concerned land which had been leased in 1910 to local residents to be used as a private recreation ground. The lease expired in 2006 but the use continued after the purchase of the site by a developer. A village green application had been made but failed. The basis for this decision was that it is “a matter of common sense” that it will not encourage bad behaviour or breed disrespect. This would seem to miss the point that it is reliance on a wrongful act.

This decision was applied by Judge Lane in *Banner Homes Limited v St. Albans City and District Council*³³ 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.

³² CR/2014/0006

³³ CR/2014/0018

(5) Use of easement – one submission in the Banner Homes case was that the use of two public footpaths across the meadows was sufficient to form the basis for satisfying the user condition in section 88 in respect of the whole of the meadows. This was not accepted by Judge Lane. This is linked in with the issue whether a visual amenity can constitute a community benefit (see (8) below). However, public footpaths have been listed – for example, by Huntingdonshire DC.

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

(7) Part of nominated property not in use – merely because part is not in use it does not follow that it should be excluded from the listing. This point was considered in *Gullivers Bowls Club v Rother*³⁴. The whole of the Bowls Club had been listed notwithstanding that one of the two bowls greens had been closed along with two small outbuildings alongside that green. This represented about 37% of the site. The Club objected on the basis that there was no current or recent use for that part of the site. Judge Warren considered that it was a feature that sports club may have some facilities that are redundant (para. 8) but it would be artificial to split that part off. He held that it was correct to list the whole site. Interestingly an application for planning permission for residential development and new club facilities has been successful and has withstood a challenge by judicial review (see section 9(b) below).

(8) Visual amenity – it was argued in the *Gullivers Bowls Club* case that the social wellbeing of the local community was furthered by the visual amenity enjoyed by the residential care homes overlooking the bowling greens. Judge Warren doubted that this could ever be possible although if there is a statute or mural that might be a special case (para. 10). A similar point arose in the Banner Homes case. Viewing flowers from a footpath would not have been actual use for the purposes of section 88 which the judge stated requires a physical use (para. 18) otherwise any

³⁴ CR/2013/0009

land would run the risk of being listed merely because it could be viewed from the public highway (para. 19).

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

(10) 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 in my view the sensible step is not to put such evidence or claims forward until the issue of listing has been finally resolved. The local authority is fully aware of the risk of compensation claims and does not need it to be spelt out. However, in some cases it will be hard for the adviser to withstand such pressure as it will be a factor which is upper most in the mind of the owner.

In that 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).

(11) 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).

(12) 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*.³⁵ 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 authority was correct when including the upper floors in the listing (see discussion of case in section 6 below).

However, both the facts underlying the determination of a planning unit and the planning position of the nominated asset will be a relevant and an 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*³⁶ 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 use³⁷. Such a policy required with regard to a nomination that evidence be put forward on that aspect to show that planning permission would be likely to be granted. In the *Crostone* case it was absent so the authority and the tribunal proceeded on the basis that there was no certainty that a change of use would be permitted.

6. Excluded land and buildings – three categories of land and building are excluded from the operation of the listing regime in accordance with Schedule 1 to the Assets of Community Value (England) Regulations 2012 ("the 2012 Regulations") (see Second Schedule hereto for full terms of Schedule 1). The principal exclusion relates to residences. The other two exclusions are caravan sites and land held by a statutory undertaking for its operations. The latter covers transport complexes such as airports and railway stations. 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

³⁵ CR/2015/0007 at para. 22

³⁶ CR/2014/0014

³⁷ See para. 27

housing and shops. It was also the reason that the nomination of Audley End railway station was rejected.

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 the Hawthorn Leisure case (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 as the description was the building was not what would be described in ordinary language as a hotel and the primary use was not the letting of rooms to paying guests. It is material that there were only four guest rooms in that building.

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

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

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.

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

“Land which falls within sub-paragraph (1) may be listed if—

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

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

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

In the October 2012 non-statutory guidance given by the DCLG it is stated at para. 3.7 that paragraph 1(5) applies “where an asset which could otherwise be listed contains integral residential quarters such as accommodation as part of a pub or a caretaker’s flat.” This is intended to cover shops or pubs with integral living accommodation but the scope of this limitation on the residence exclusion could be unexpectedly wide. It is a gloss on the statutory wording and care must be taken not to treat this particular piece of guidance as having the same effect as if contained in a statute.

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

The issue has now been argued before Judge Lane in *Wellington Pub Limited v Kensington & Chelsea BC*³⁸ 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 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 is 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 reached the pub internally.

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

³⁸ CR/2015/0007

(i) caution should be exercised when interpreting paragraph 1(5) because it is an exception to a general exception;³⁹

(ii) whether or not a part of a building was a separate planning unit was not determinative as to whether paragraph 1(5) applied.⁴⁰ Account could be taken of the factors causing a part of a building to be a planning unit but just because a part of a building was a planning unit it did not follow that it was automatically so treated for the purposes of the ACV regime. To do so would be to make paragraph 1(5) meaningless.

(iii) the planning decision in *Henriks v SSE*⁴¹ that identifiable component parts of a building are to be treated as separate building for the purposes of the General Development Order 1977 did not provide assistance with regard to the operation of the ACV regime.

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

(v) for the purposes of the ACV regime not every component part would be treated as a separate part. What constitutes a building for these purposes is a question of fact and degree.⁴²

(vi) the test is not whether the part of the building is necessary for the nominated asset to function.⁴³ This again would rob paragraph 1(5) of any meaning.

(vii) to be part of the listed ACV there must be a current physical and functional relationship between the residential part and the remainder.⁴⁴ The decision has to be based on the all the relevant facts as to whether sufficient physical and functional relationship between the residential area and the remainder of the nominated asset.⁴⁵

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

(ix) on the facts of the case there was both a physical and functional relationship.

³⁹ Para. 39

⁴⁰ Para. 22

⁴¹ 59 P CR 443

⁴² Para. 25

⁴³ Para.s 26 and 27

⁴⁴ Para. 39

⁴⁵ Para. 28

What is clear is that these provisions could operate in a harsh and unexpected manner.

7. Community Nomination –

(a) Nominators - to be considered for listing the local authority has to receive a community nomination. This requires that the nomination is made by any one of the local parish councils or in Wales the community council or by a voluntary or community body with local connections (section 89(2)). The definition is not identical to the community interest group which can make a written request to be treated as a potential bidder of a listed asset (see section 8(e) below).

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

- (a) a body designated as a neighbourhood forum pursuant to section 61F TCPA 1990;
- (b) a parish council but no other public or local authority⁴⁶;
- (c) an unincorporated body with at least 21 individual 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 1965⁴⁷) which meets one of the conditions in section 1 of the 1965 Act) which does not distribute any surplus it makes to its members.

A body 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. If the body is an unincorporated body, company limited by guarantee or industrial and provident society then not only must it not be able to distribute any surplus to its members but the surplus must be applied in whole or part for the benefit of a local authority's area or a neighbouring authority's area. A

⁴⁶ Reg. 5(2)

⁴⁷ Reg. 5(3)

formal constitution puts the matter beyond doubt but there is no statutory requirement that the body should have a formal constitution.

In the case of an unincorporated association there must also be 21 local members which requires them to have a registered address on the electoral roll for the local authority area or the neighbouring authority's area. With ACVs nominations often groups of local residents may have come together informally solely with regard to the particular asset such as a public house. In some cases a point may be taken by the owner that there is no unincorporated association in existence and so the nomination is invalid and cannot result in a listing. This point as to what is needed to constitute an unincorporated association has been considered recently in the context of more formal litigation. It has had to be considered in judicial proceedings in the Administrative Court as a result of increasing challenges by protest groups.

It has been long recognised that an unincorporated association is not a separate legal entity⁴⁸ and that the relationship between the members is based on contract alone.⁴⁹ For the purposes of Court proceedings HHJ Cotter QC in *Williams v Devon CC* [2015] EWHC 568 (Admin) had to consider what prerequisites need to be satisfied. He considered that there were two:-

(i) an identifiable membership;

(ii) an agreement between the members which will usually be reflected in "a set of identifiable rules or code or a contractual or other bond between them."⁵⁰

What was described in that case as a "loosely assembled group" who had started the litigation was held by the judge not to be an unincorporated association. This was important in the context of that litigation as it had costs consequences. It was pointed out by the judge that the difficulties could have been avoided by an individual member of the group being chosen as a representative claimant of the group.⁵¹ Such an approach may assist on an appeal to the First-tier Tribunal but it will not help as regards the question of the validity of a nomination. A nomination

⁴⁸ O'Connor LJ in *Currie v Burton* Times 12th February 1998

⁴⁹ Walton J. in *re Bucks Constabulary Widows' and Orphans' Fund Friendly Society (No 2)* [1979] 1 WLR 936 at page 952

⁵⁰ Para. 49

⁵¹ Para. 52 following *Artistic Upholstery v Art Forma (Furniture) Limited* [1999] 4 AER 277

by an individual representing a group will not be sufficient. However, if there is a definite group of 21 local individuals acting together rather than just signing a petition then on appeal the judges of the First-tier Tribunal are likely to accept that there is an unincorporated association. This is less likely to be a live issue than in the context of judicial review proceedings albeit that reliance is being placed on this recent decision to contest nominations. It is noted in De Smith's Judicial Review (7th Ed.) at paragraph 2-012 that in judicial review proceedings "a flexible approach is appropriate". Unincorporated associations have been permitted to both defendants and claimant in such proceedings. Such flexibility will undoubtedly be followed with regard to ACV nominations. However, there could be a problem if people are automatically treated as joining a group without any proper consideration.

In addition to such bodies a voluntary or community body will include charities or community interest companies which have qualifying local activities and also neighbouring parish councils within reg. 4(2).

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 the Hawthorne Leisure case *supra* a group of 25 local residents without a formal constitution was held to be a voluntary unincorporated association. The requirements as to the distribution of any surplus was treated as satisfied because there was no surplus but the judge did indicate that in appropriate cases the authority should seek a written assurance that no surplus would be distributed to members (para. 12).

The application of these regulations to branches of national organisations has been considered in *St. Gabriel Properties v Lewisham LBC* *supra*. The nomination resulting in listing in that case had been made by the South East London branch of CAMRA. It was argued that the nomination was invalid because CAMRA had no local connection. Judge Warren held that the nominating body was subject to a hybrid treatment. CAMRA is a company limited by guarantee and this in turn governs the characterisation of the branch and determines whether the requirements regarding distribution of surplus are satisfied. However, the activities of the branch

rather than the national activities of CAMRA will determine whether the branch has a local connection. Even if wrong on this Judge Warren accepted that a branch could be an unincorporated body as this is a broad term including community groups of many descriptions. It is not necessary for such a body to have a written constitution containing a rule that any surplus cannot be distributed to members. It was open to the Tribunal to consider the evidence regarding the actual application of the body's funds in order to decide whether the requirement regarding distribution was satisfied.

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 to build a retail unit over part of the pub car park and grassed area. Judge Lane stated that there was no legal requirement for the Council to investigate that issue (para. 7) and an asset may be listed even whilst being used for the relevant community purpose.

(b) Nomination – each local authority will normally provide a standard form for nominating an ACV. The nominator must

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

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

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

(iv) set out evidence of the nominator's eligibility.

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 Walsal, the Penny Ferry Inn in Latchford and the Pensby Hotel in Wirral. These serve to emphasise the importance of ensuring that satisfactory evidence is included and accompanies the nomination. There can be no certainty that a fresh nomination will be permitted with supplementary evidence to make good the initial flaw in the first nomination.

A recent development with nominations is multiple nominations. The Otley Pub Club applied to Leeds City Council for a blanket classification of all 20 pubs in Otley. 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 application has been accepted and all twenty pubs have been listed. 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. From the press reports it appears that there may be 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.

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 I remain of the view that it is a dangerous development. 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.

(c) Timetable – an authority has eight weeks from receipt of the community nomination to decide whether or not to list (reg. 7). Following receipt 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 occupants⁵². 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). 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. In *Higgins v Barnet BC* such a failure was described as an administrative error but it was stated that nothing turned on it.⁵³ 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 *Higgins*.

In *Sawtell v Mid-Devon DC*⁵⁴ 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

⁵² Reg. 8

⁵³ Para. 2

⁵⁴ CR/2014/0008 at para. 4

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 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.

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

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

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

Such a failure could give rise to an issue when the asset nominated is a public house. The nomination will cause the public house to be taken outside the permitted development regime and before there can be development a fresh planning permission would be needed. Does this mean that once the eight week period expires the public house remains outside the permitted development regime or does it fall back into it? I consider that the answer is that it stays outside the permitted development regime because of the definition of “specified period” in the 2015 Regulations⁵⁵. 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. This means in my view that 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.

(d) Assessment – some authorities helpfully place their 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

⁵⁵ See section 9(a).

not to recommend the listing. There are four steps in the process with a number of questions to be answered in some of the steps. In the case of Hounslow LBC these steps are as follows:-

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

Questions

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

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

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

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

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

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

Questions

3.1 Who benefits from the use?

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

3.1.2 Who will lose if the usage ceases?

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

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

3.3 How strongly does the local community feel about the usage as furthering their social interests?

Each of the four sections is to be scored out of 25.

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

Step 4 – Determines whether it is realistic to think that there can continue to be non-ancillary use of the building or other land which will further (whether or not in the same way) the social wellbeing or social interests of the local community.

Questions

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

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

The standard assessment has boxes not just for a summary of the evidence supplied by the nominee but also for feedback from other parties and other information or evidence gained in relation to the particular criterion. The ACV regime does not provide for the gathering of information and evidence from other sources or even the owner of the nominated assets when deciding whether or not to list. It treats both the nomination and any appeal as if an “ex parte” procedure involving only the nominator or the appellant (as appropriate). Sensibly this is not the approach that has been adopted by the authorities. As regards the process by which the listing decision is reached the Hounslow assessment allows for input from other sources including the owner but also other departments of the Council which may have relevant information regarding the nomination. It is clearly preferable for the listing authority to have as much information as possible upon which to base the listing decision. The drip feed in of information can lead to unnecessary appeals and expense. It has to be borne in mind that there are tight timetables to be observed by the authority which do not allow for a relaxed gathering of information.

(e) 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)).

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 listing 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*⁵⁶ 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

⁵⁶ CR/2015/0001

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 Land in *Wellington Pub Limited v Kensington & Chelsea BC*⁵⁷ but without disapproving of any earlier stance by the Tribunal.

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.

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.

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 is then each will be considered and determined separately as was the case in the *Trouth* case.

⁵⁷ Supra at para. 41

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

If it could not 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(f) below there is not an express prohibition in the statutory regime relating to a renewed application.

Another example of a partial listing is Warren Farm in Ealing. 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 the whole of Warren Farm. Clearly Ealing LBC considered that it has the power to register only part of the nominated land.

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.⁵⁸ For these purposes as well as being in single ownership the two parts (listed and non-listed) must be accessible from each other.

(f) 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)).

(g) 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.⁵⁹ The same is true as regards a listing following a rejection. It will be interesting to see what happens with the renewed nomination to list Soddy Gap near Cockermouth in Cumbria. The first nomination was rejected because the primary use of the area which is the former site of open cast coal mining is agricultural and forestry and the small community use as a nature reserve was ancillary to that primary use.

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

⁵⁸ See section 8(e)(vii)

⁵⁹ See section 10(i) below

(h) 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 a disposal within the protected period. For example 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. What is not provided for is a fresh nomination after the removal. 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.

(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 authority's 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 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.

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

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

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

8. Moratorium –

(a) General operation of moratorium – if an owner wishes to make a relevant disposal of a listed ACV then written notice must be given to the local authority which will trigger a moratorium (section 95). The local authority has no discretion which will allow the owner to dispose of the listed asset during the moratorium period other than in accordance with the rules imposed by the ACV regime. This is a point which some owners find difficult to understand. In the Chadwick case the claimants acting in person felt that the local authority should have diluted or modified the operation of the ACV regime partly because of the ill health of one of the claimants. In consequence it was expressly emphasised by Judge Lane⁶⁰ 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 has 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. This is in addition to an offer by a community interest group. Even if it wants to Fullers cannot accept that offer by the publicans because of the operation of the moratorium provisions. The local group opposing the sale of the closed Red Lion for development cannot authorise such a sale and as there is no continuing business it cannot qualify as an exempt disposal. In consequence Fullers is waiting for the expiry of the moratorium period before making any statement.

⁶⁰ 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”. My reading of this is 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. If correct this will mean that an owner can serve a notice with a view to allowing the six month moratorium period and then setting about selling the asset in the following year.

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

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

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

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.

The owner of the listed asset cannot be compelled to dispose of the listed asset to a community group nor can the owner be compelled to negotiate with such a group. It is open to the owner to serve a notice of intention to dispose and then sit out the moratorium period. By way of example, a special school in Shipley owned by Bradford Council was listed but the Council

wishes to sell at auction. Having served a notice of intention to dispose of the school it has waited and will put the school into auction once the moratorium period expires. It has pointed out that there is no obligation to negotiation 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.

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

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

- (i) a disposal with vacant possession of the freehold estate in the listed ACV;
- (ii) a grant of a lease for a term of twenty-five years or more; or
- (iii) the assignment of a leasehold estate when the original term was for twenty-five years or more.
- (iv) a contract to make a disposal within (i), (ii) or (iii) is a relevant disposal when the agreement “becomes binding”.

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

(e) Exempt disposals – this is an important aspect of the regime as regards landowners. Not all relevant disposals trigger the operation of the moratorium provisions. A disposal of the type set out in section 95(5) or Schedule 3 to the 2012 Regulations (their full terms are set out in the Third

Schedule hereto) will not be a relevant disposal and so can proceed without triggering the moratorium even if the subject matter is a listed ACV.

In the DCLG Guidance it is advised that if an owner is uncertain whether an exempt disposal will be carried out notice of intention of intention to dispose as a precaution (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 which are more likely to occur. The following disposals are included amongst those which are exempt disposals:-

- (i) gifts including a transfer into settlement (sub-section (5)(a));
- (ii) distributions by personal representatives (sub-section (5)(b)) and a sale if to raise funds for one of a number of specified purposes such as the payment of taxes or the deceased's debts (sub-section (5)(c));
- (iii) changes in trustees (sub-section (5)(g)) or a transfer from a trustee to a beneficiary (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));
- (v) changes in membership of a partnership (sub-section (5)(i));
- (vi) as part of a sale of an on-going business (sub-section (5)(f)). This has given rise to criticism as a route by which the moratorium can be avoided. For example, a sale of a pub business together with the pub will not be subject to the moratorium and the purchaser may then convert the pub to a store although now a planning permission will be required. It has been recommended by a House of Commons committee that this exclusion be removed.
- (vii) part-listed disposals (sub-section (5)(e) and para 11 Sch. 3) – a disposal of land which is in part listed and in part not will not be a relevant disposal if both (1) the land is in single ownership (even if not the same registered title); and (2) each part of the land can be accessed

from the other without having to cross land owned by a another person (para. 11(1) Sch. 3). Land divided by a road, railway, river or canal will still satisfy condition (2) if it is reasonable to think that the condition would be satisfied if such intervening land were removed and there was no such gap (para. 11(2) and (3) Sch. 3). These conditions are similar to those applicable when considering the extent of a residence excluded from the operation of the regime (see section 6 above).

This could be particularly relevant if land adjoining a residence in single ownership is listed. I have had to advise on a nomination that would have had such an outcome if it had been successful. The nomination had been made when the property was on the market and an offer made to purchase. I suspect that the nominator had not appreciated that listing would not have stopped a sale from going ahead without any wait.

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.

(viii) Separation agreement 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)). 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 moratorium and the sale can be completed without having to wait.

This 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. The completion of such a contract will not trigger a moratorium because the disposal will be treated as having occurred when the contract became binding. Section 96(4) of the 2011 Act provides that a

relevant disposal made in pursuance of a binding agreement is treated as entered into “when the agreement becomes binding”. A “subject to contract” contract will not be sufficient for these purposes as it is not binding. The listing of an asset will 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.

An example of this is the Centurion pub in Chester which has been recently listed. 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.

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 and before the grant of planning permission satisfying of the condition the asset is listed does that mean that completion of the contract can take place without regard to the ACV regime if a satisfactory planning permission is granted or must notice be given and the moratorium provisions complied with? It would be objectionable that there should be such an interference with contractual relationship and if there is to be then it should require explicit statutory wording. Even with a conditional contract the owner will be bound to comply with the terms of the contract. This does not just mean that there will be the obligation to sell if the condition is satisfied. The owner will as a minimum be immediately subject to the obligation not to act in a manner which defeats the contract. It will not be open to the owner to walk away from the sale and in consequence the owner is bound by the agreement even if at the start not bound to transfer the land. Some contracts provide for a sale and purchase but make the obligation to complete conditional. That would certainly seem to be covered by 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.

The local paper has reported that an application has been made by the supporters trust to list Plymouth FC's Home Park Stadium. The club is in private ownership but the stadium is owned by Plymouth CC. However, the owner of the club has an option to purchase the stadium and so even if the ground is listed will be able to acquire the stadium upon exercising the option without regard to the moratorium provisions.

(xi) certain disposals in relation to compulsory purchase – the transfer back to the original owner after a compulsory purchase (para. 5) and the acquisition by statutory compulsory purchase (para. 8);

(xii) sale by way of enforcing security (para. 6);

(xiii) pursuant to insolvency proceedings (para. 7);

(xiv) inter-group transfer (para. 10).

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.

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

That transfer 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 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 which is a relevant disposal. What is not clear is whether this covers a conditional contract. It seems to me that 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 negligently 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 title back to the original owner. 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 successful will there be a good claim against the Land Registry for an indemnity against loss?

9. Planning –

(a) Control of use – in the DCLG Guidance (para. 2.20) it is stated that the ACV provisions “do not place any restriction on what an owner can do with their property..” as that is a matter for planning policy. Listing as an ACV brings in controls relating to the disposal of the ACV but not as to the use of the listed ACV. This means in particular that the owner retains the unfettered ability to change the use of the listed ACV in accordance with the Permitted Development Rights regime

save now as regards nominated or listed public houses. Until the recent statutory order a pub could be converted to use as a restaurant, office or residential or retail use. It was occurring at a rate of two a week. Listing did not, therefore, necessarily achieve the desired objective of saving the asset for the community as exemplified by the George IV pub (see section 2(ii) above).

As regards a building with a Class A4 use (principally pubs) with effect from 6th April 2015 listing will prevent demolition, change of use or temporary change of use if the building has been nominated for listing and then if listed⁶¹. This prohibition covers not just the period of listing but also a period during which such an asset is nominated. Before commencing development the developer must send a written request to the local planning authority to ascertain whether the building has been listed. This request must include specified details (address of the building; developer's contact address; and developer's e-mail address) (Article 3). No development can be commenced before the expiry of 56 days following the request. If the building is nominated for listing as an ACV (whether before or after the request) then the local planning authority must notify the developer as soon as reasonably practical. Once notified the developer cannot carry out the development for so long as the building is subject to nomination or listed. If there is no nomination then after the expiry of the 56 day period the development can commence and must be completed within a period of one year from the date of the developer's request.

Also Article 4 directives are being given to remove specified classes of assets from the Permitted Development Rights regime. Wandsworth LBC is introducing such a directive to cover all 121 public houses in its area with effect from April 2016. For the purposes of the planning position this will have the same consequence as if they had been listed as ACV as a fresh planning application will be needed for any new development.

(b) Material consideration - at present listing does not automatically cause the listing of the ACV to be treated as a material consideration when considering planning applications relating to the listed ACV. That is a matter for the local planning authority to decide (para. 2.20 DCLG Guidance). It is certainly not a guarantee that there will be no planning permissions granted contrary to the community use of the listed asset.

⁶¹ Town and Country Planning (General Permitted Development) (Amendment) (England) Order 2015/659

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

This point was emphasised in *R (on the application of East Meon Forge and Cricket Ground Protection Association) v East Hampshire District Council*⁶². The case concerned a planning application for permission to convert the first floor of the Forge to a flat. The Forge in Petersfield had been the site of the ancient village blacksmith and was listed as an ACV as it “has a special resonance for the local community and furthers the cultural interest of the community”. The planning officer concluded in his report that the listing had very little bearing on the proposed development and should be given negligible weight. In the judicial proceedings this conclusion was challenged. Lang J. DBE stated at para. 100 that in so far as this advice “was based upon the inherent limitations of the community asset scheme, it was a matter for the Committee to decide upon in the exercise of its planning judgment. Accordingly the officer could properly so advise.”

In some areas the listing of an ACV will be treated as a material consideration for the planning purposes. A planning application to change the use of the closed and listed Pear Tree pub in Hildersham has been refused citing the importance of the pub to the community as illustrated by the listing as an ACV. However, listing will not always be enough to defeat an application for planning permission. The Friendship pub in Plymouth was the first ACV to be listed in 2013 by the authority. It was sold to a developer and an application for planning permission made for a flat to be constructed on each of the three floors. Permission was granted for the first and second floors but not for the ground floor. On appeal the Inspector overturned the refusal and allowed the conversion of the pub on the ground floor to a flat because there was nothing to show that future use as a pub was viable.

The same point has arisen in respect of the Gulliver’s Bowling Club in Bexhill. The bowling club land and buildings were listed by Rother DC and that listing decision was upheld by the First-tier Tribunal on appeal. Following the listing a planning application was made for planning

⁶² [2014] EWHC 3543

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

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

However, even if a material consideration it may be possible to overcome this by the provision of an alternative community facility. For example, the Queensbury public house in Willesden Green was listed by Brent LBC. On an application for planning permission to demolish and create 53 residential units together with a new pub and communal facilities the Inspector, B. Lyons, took account of the listing in her decision on 23rd March 2015 but did not consider that it was a reason for refusing permission because a new public house was to be provided and so there would be no net loss of community facilities (para. 72). This allows the facility to be replaced

possibly at a different location which is not allowed for in the ACV regime. The application was refused on the ground of harm to the character of the area and its impact on the local heritage.

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

This flexibility in planning law which allows the provision of alternative community facilities to be taken into account when deciding a planning application is not mirrored in the ACV regime. However, it is taken into account to the extent that the planning permission is relevant particularly in the context of the issue whether there is a realistic prospect of future community use. An example of this is *Matterhorn Capital v Bristol City Council*⁶³. 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.

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

An example of this latter class of planning application is the decision of the Planning Inspector (APP/Y5450/W/14/3001921 - 12th May 2015) in respect of a planning application for permission to convert the Alexandra in Haringey into two three 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

⁶³ Para. 24

legislation sets out specific tests which are narrower than the planning considerations before me. The primary purpose of ACV listing is to afford the community an opportunity to purchase the property, not to prevent otherwise acceptable development. Accordingly, whilst I afford it some weight in this case it is not determinative.” Perhaps significantly in reaching his decision the Inspector considered that the needs of the community could be met by the other public houses in the area.

In contrast in a decision involving the Bittern pub in Southampton Hampshire the Planning Inspector, Mr. Lloyd Rogers, refused an application for permission to convert a listed public house to a drive through McDonalds. The evidence was not cogent that the pub could not be commercially viable in the future. There was a shortage of alternative facilities in the area and the loss of this pub would reduce the community’s ability to meet day to day needs. The objection of many locals was considered to be a material consideration. Account was taken of para. 70 of the National Planning Policy Framework which provides that planning decisions should “guard against the unnecessary loss of valued facilities and services particularly where this would reduce the community’s ability to meet its day-to day needs”. This had been backed by the core strategy written before NPPF. Such a precautionary approach resisting the unnecessary loss of community facilities will favour the retention of public houses even though such assets are not specifically mentioned in the NPPF.

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

In each cases it will depend on the individual evaluation of the circumstances and the evidence. Does the particular asset provide a valued facility or service? Will the loss of the asset affect the community’s ability to meet its day-to-day needs? Is the loss unnecessary? The differing outcomes shows that even when the asset is listed there is still everything to play for on each side and that the listing of the asset does not end the possibility of change. It may be that such an

application in respect of a listed asset will stand a greater chance of success before a planning committee than a planning inspector.

10. Review and appeal –

(a) Nominator - a nominator currently has no right to request a review or appeal from a refusal to list. This means that if a nominator wishes to challenge such a decision the only option is to pursue judicial review proceedings. I have seen threats to take such a step but it means that the challenge will be governed by the Wednesbury principles and the Court will not consider the listing nomination afresh in contrast with a listing appeal.

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

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

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

There is no provision for representations to be made by the nominator on the review. To be able to do so properly the nominator would need to have seen those of the owner and there is no provision permitting them to be disclosed. Care should be taken to ensure that there is no objection to providing evidence to the nominator if the authority wishes to allow such involvement. Similarly there is no provision allowing the involvement of the nominator or interested parties at the review hearing if one is held. Some authorities do allow this but again care needs to be taken to ensure that there is no valid objection by the owner.

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.

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.

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 Farmer's 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* DC⁶⁴ 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 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 Community Right to Bid are allocated to the General Regulatory Chamber and the procedure is governed by the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009/1976 (as amended). The time limit is

⁶⁴ CR/2014/0019

28 days from the review decision (rule 22(1)). There have been a number of such appeals and the majority end with the review decision being upheld but not all. To date there have been twenty-three decisions (including two on costs alone). The listing will not be suspended pending the determination of the appeal and so the moratorium and infringement provisions will apply if the owner wishes to sell before the appeal is decided.

At present 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* (planning permission granted after listing); and *Patel v Hackney supra* at para. 7). Judge Warren has emphasised that this type of appeal is an ordinary appeal and not subject to the narrow limitations applicable to judicial review proceedings applying the “Wednesbury unreasonable” principles (para. 3 of *Scott v South Norfolk DC*⁶⁵). 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.⁶⁶

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

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).

⁶⁵ CR/2014/0007

⁶⁶ Para. 16 *Westminster Pub case*

It is possible for the parties to agree that the appeal will be decided on the basis of written representations without an oral hearing as happened in *Spirit Pub Co v Rushmoor BC* (para. 6) and *Dorset CC v Purbeck DC* (para. 3). Often the community interest group which has nominated the property for listing will also be joined as an interested party.

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*⁶⁷).

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.⁶⁸ This is an advantage to both the authorities and citizen. He did not consider that the authority had acted unreasonably especially taking into account that it is a relatively new jurisdiction “in which local authorities are still finding their way.” (para. 5). This was despite the authority having listed the pub notwithstanding that it had been found as a fact that there had been no community use in the recent past. However, a successful appellant can seek to recoup the reasonable costs of appeal by way of compensation (see section 11 below).

An appeal from a decision in the First-tier tribunal is to the Upper Tribunal.

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

⁶⁷ CR/2014/0001

⁶⁸ Para. 3 CR/2014/0007 on 2nd October 2014.

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.⁶⁹ This is contrary to 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 by listing”. This is a very significant point which will need to be fully argued at some stage. In the Chadwick case it was not material to the issues in the case.

(a) Measure - the local authority is obliged to pay compensation if the owner incurs “loss or expense in relation to the land which would be likely not to have been incurred if the land had not been listed” (reg. 14(2)). Two types of loss are highlighted as being included in this cover by reg. 14(3). One is loss due to a delay in selling due to the operation of a moratorium – for example wasted payments such as interest or rates. As was highlighted by Judge Lane in para. 15 of the decision in the Chadwick case this type of loss must be “wholly caused” by the operation of the moratorium provision. The DCLG Guidance states that it is assumed that most claims will in this way (para. 10.2) but that assumption is questionable. The second is reasonable legal expense incurred in a successful appeal to the First-Tier Tribunal in relation to listing, a refusal to pay compensation or the amount of compensation.

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

⁶⁹ Para.17 in Chadwick v Rossendale BC CR/2015/0006

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

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

What if the owner has lost an opportunity which required to be funded by the net proceeds of sale? Will such a loss be outside the compensation scheme because it is not a loss “in relation to the land”?

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

price. Is this attributable to the listing of the asset or is it due to the nature and use of the asset? Although there is a loss does it justify a compensation payment?

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

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

What if the loss includes or relates to adjoining land to the listed asset owned by the same person. In such cases the part listed exception may apply so that a disposal will not be subject to the moratorium provisions. However, notwithstanding this loss could still occur as regards the value of the part of the land not listed but will such a reduction in value of that land be recoverable as compensation.

Nor will it cover loss that has occurred prior to listing. It is not hard to predict arguments on behalf of a local authority that a significant portion of any loss has been incurred as a result of the prospect of listing rather than the actual listing. Will the market value of the asset immediately following a nomination be less than its market value immediately before the nomination? What account should be taken of the possibility of listing? There is no guidance in the provisions. Such an approach should not succeed as it would defeat the intention behind the compensation provisions in the regime.

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

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

(i) a written claim must be made;

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

There has been one appeal with regard to compensation decisions - the Chadwick case⁷⁰. In this Judge Lane took the opportunity to emphasise that compensation claims must be properly made and articulated when made to the local authority⁷¹. It did not preclude further types of loss being subsequently claim but it would be difficult to persuade a Tribunal judge on appeal in respect of a claim or part of a claim that had had not previously featured in the process.

(iii) state the amount of compensation claimed;

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

The burden of proof will be on the claimant. In the case of claims for loss due to the operation of the moratorium provisions it will be necessary to prove that the loss was "wholly

⁷⁰ CR/2015/0006

⁷¹ Para. 16

caused” by the moratorium. It means that the evidence put forward must establish that the whole reason for the loss was the delay in being able to sell on the open market. If the evidence shows that this was not the whole cause then the claim must fail. In the Chadwick case the claim was that the operation of the moratorium provision had lost the claimants a sale. However, the evidence from the prospective purchaser showed that it was not the listing and the moratorium which had caused the sale not to proceed. He had not been deterred by that as it was in fact beneficial financially to delay the purchase. The reason for not going ahead was the perceived attitude of the Council. This evidence was fatal to the claim because clearly the lost sale was not wholly caused by the moratorium provisions.⁷²

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

(c) Procedure – it is for the local authority to determine 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 the amount to be paid. In consequence care will need to be taken to avoid accusations of unfairness by the claimant.

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).

⁷² Para. 26

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.⁷³ 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.

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

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

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

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

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

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

⁷³ Para. 16

(f) Appeal – it is proposed that the nominator have a right to appeal from a refusal to list an asset which will be likely to increase the number of cases heard by the First-tier Tribunal.

(g) Going concern disposals – concern was expressed that sales of an ACV as part of a continuing business were a loop hole allowing the moratorium restriction to be avoided. It was proposed that this be removed but care will have to be taken as this change could result in substantial compensation claims.

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

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

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

(i) Relocating site – it has been suggested that in order to allow a development to progress there should be an ability to substitute an alternative site for the listed ACV. This relocation can 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.

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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 the Third Schedule to the 2012 Regulations

Section 95(5) Localism Act 2011

- (5) Subsection (1) does not apply in relation to a relevant disposal of land--
- (a) if the disposal is by way of gift (including a gift to trustees of any trusts by way of settlement upon the trusts),
 - (b) if the disposal is by personal representatives of a deceased person in satisfaction of an entitlement under the will, or on the intestacy, of the deceased person,
 - (c) if the disposal is by personal representatives of a deceased person in order to raise money to--
 - (i) pay debts of the deceased person,
 - (ii) pay taxes,
 - (iii) pay costs of administering the deceased person's estate, or
 - (iv) pay pecuniary legacies or satisfy some other entitlement under the will, or on the intestacy, of the deceased person,
 - (d) if the person, or one of the persons, making the disposal is a member of the family of the person, or one of the persons, to whom the disposal is made,
 - (e) if the disposal is a part-listed disposal of a description specified in regulations made by the appropriate authority, and for this purpose "part-listed disposal" means a disposal of an estate in land--
 - (i) part of which is land included in a local authority's list of assets of community value, and
 - (ii) part of which is land not included in any local authority's list of assets of community value,
 - (f) if the disposal is of an estate in land on which a business is carried on and is at the same time, and to the same person, as a disposal of that business as a going concern,
 - (g) if the disposal is occasioned by a person ceasing to be, or becoming, a trustee,
 - (h) if the disposal is by trustees of any trusts--
 - (i) in satisfaction of an entitlement under the trusts, or
 - (ii) in exercise of a power conferred by the trusts to re-settle trust property on other trusts,
 - (i) if the disposal is occasioned by a person ceasing to be, or becoming, a partner in a partnership, or

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

SCHEDULE 3

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

Regulation 13

- 1** A disposal pursuant to an order made by a court or by a tribunal established by or under an Act.
- 2 (1)** A disposal made pursuant to a separation agreement made between spouses or civil partners.
- (2) A disposal made pursuant to an agreement--
- (a) made between spouses or civil partners in connection with their separation, or between former spouses or former civil partners, and
 - (b) relating to the care of a child dependent on a party to the agreement.
- 3 (1)** Any disposal made under, or for the purposes of, any statutory provision relating to incapacity.
- (2) In this paragraph--
- (a) "incapacity" includes any of the following (whether temporary or permanent)--
 - (i) physical impairment,
 - (ii) mental impairment, and
 - (iii) lack of, or impairment to, capacity to deal with financial and property matters; and
 - (b) "statutory provision" means any provision contained in an Act or in an instrument made under an Act.
- 4 (1)** Subject to sub-paragraph (2), a disposal--
- (a) to a particular person in pursuance of a requirement that it should be made to that person under a planning obligation entered into in accordance with section 106 of the Town and Country Planning Act 1990; or
 - (b) made in pursuance of the exercise of a legally enforceable--
 - (i) option to buy,

- (ii) nomination right,
- (iii) right of pre-emption, or
- (iv) right of first refusal.

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

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

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

- (a) the land was acquired by T or by a predecessor in title of T by a purchase that was a statutory compulsory purchase ("the original purchase"); and
- (b) T has made a first offer of the land to the former owner, in accordance with an obligation to offer back the land to the former owner before disposing of the land on the open market.

(3) In this paragraph--

(a) "former owner" means--

- (i) the person, "P", from whom the land was acquired under the original purchase; or
- (ii) a successor to P; and

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

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

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

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

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

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

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

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

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

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

(2) Sub-paragraph (1)(b) is satisfied where a part of the land cannot be reached from every other part of the land by reason only of intervening land in other ownership on which there is a road, railway, river or canal, provided that the additional requirement in sub-paragraph (3) is met.

(3) 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.

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