

Cabinet Meeting: 30 March 2017

Item 8. Nomination for Railway Arms Public House, Saffron Walden to be listed as an Asset of Community Value

Comments on letter of 13 March sent by Freeths, Solicitors, on behalf of Charles Wells Ltd, the owner.

The letter from Freeths is included with the agenda at Appendix B to this item, with the enclosures to the letter forming Appendices C and D. This note comments on the points raised in the letter.

A. Failure to determine the first and second nominations. (Paras 1 to 10.)

This part of the letter claims that earlier nominations should have been placed on the register of unsuccessful nominations. It also says that the property cannot be listed as an ACV on the basis of the current application as, to include the property on both lists “would be an abuse of process and contrary to the legislature’s intent”.

The earlier nominations were not accepted by the Council as it did not consider they had been made by a “voluntary or community body” or other body that may make a “community nomination” under section 89 of the 2011 Act. Community nominations may only be made by bodies that qualify under section 89(2)(b). A nomination made by anyone else is not a “community nomination”.

The obligation under section 93 is to “maintain a list of land in its area that has been nominated by an unsuccessful community nomination”. As explained, the Council did not consider these applications because it did not consider them to be “community nominations”. They did not therefore fall within the obligation to list imposed by section 93.

Even if the Council had been under an obligation to list these “nominations”, the claim that “to include the Property on both lists would be an abuse of process and contrary to the legislature’s intention” is mistaken. If there is evidence that circumstances have changed, or if additional information is drawn to the attention of the Council, it might well reach a different conclusion. In fact, it would be open to challenge if it considers that an earlier determination precludes it entirely from considering a later nomination.

B. Sale and development of the property.

In summary, the point made in the letter is that Saffron Walden Town Council is using the nomination ‘as a “weapon” to try to block development’. The letter claims that the application is made with the “wrongful and injurious primary aim of prejudicing any proposed sale and development of the Property

The basis for the allegation is not set out and is unclear. The Council is under an obligation to accept and to determine valid community nominations. It must

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determine them by reference to the criteria in the Localism Act, as supplemented by regulations. It would be acting unlawfully if it took into account a view of the motivation of the nominating body, even if the characterisation of the nomination as a “weapon” was accepted.

C. Invalid nomination – legal framework.

The letter states that the Council has to satisfy itself that the nomination is a community nomination. It claims that the qualifying criteria for submitting a nomination “must be narrowly construed”. It then summarises the potential consequences of a property being listed as an ACV and the provision for compensation.

The letter states correctly that the Council needs to satisfy itself that a nomination is a community nomination. In doing so, the Council needs to apply the statutory criteria correctly.

Accepting a nomination of a property as an ACV may give rise to a liability to pay compensation. However, liability to pay compensation is not a factor that the Council can take into account in determining whether a property meets the tests for listing as an asset of community value. It would open to challenge if it declined to list a property which met the statutory tests because it did not want to pay compensation.

D. Insufficient evidence of eligibility to nominate – invalid nomination

The letter suggests that the Council is obliged to look behind the nomination by Saffron Walden Town Council and to call for evidence of its decision-making process. It raises the prospect of the nomination being made by “a clerk or councillor on a frolic of their own”.

The Council’s obligation is to satisfy itself that a nomination is a “community nomination”. Saffron Walden Town Council is a parish council for the purposes of the legislation. The property is within its area. It is, therefore, a “community nomination”. Uttlesford District Council is entitled to accept the nomination at face value and is not obliged to conduct an investigation into the *vires* of the nomination. Neither is the nominating body obliged to submit evidence of its decision-making process.

Nonetheless, the Town Clerk has informed me that the decision to submit the nomination was made by resolution of the Town Council’s Planning & Road Traffic Committee, acting under delegated powers, on 3rd December 2015. She has provided me with an extract from Minutes:

410. *Assets of Community Value – The Railway Arms*

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The Committee noted that UDC's preference is for the Town Council to nominate assets of community value. It was

RESOLVED:

That the Town Council nominates The Railway Arms as an asset of community value to UDC for their consideration at a future Cabinet meeting.

E. The nomination was not made in the spirit of the legislation.

The letter says that there is no indication that the nominator wishes to purchase the property or that other bodies do. It suggests that the Town Council is using the listing process "to achieve indiscriminate listing of public houses without regard for the primary purposes of the legislation or the impact on private property owners".

Whilst plans put forward by the nominator or others may have a bearing on whether land is of "community value", they are not relevant in determining whether a nomination is valid. In considering a nomination, the legislation obliges Uttlesford District Council to consider three things:

1. Is it a "community nomination"?
2. Is the land within the Council's area?
3. Is the land of community value?

If it meets these tests, section 90(4) is quite clear that the Council **must** list the land as an asset of community value.

F. Insufficient evidence that the Property is of any Community Value.

This part of the letter expresses the owner's views regarding the key question of whether the property falls within the statutory definition of "land of community value". Members should refer to the letter and read carefully the points made on behalf of the owner.

As The Railway Arms is currently closed, the tests to be applied are whether, in the reasonable opinion of the Cabinet:

- (a) there is a time in the recent past when an actual use of the building or other land that was not ancillary land 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 a 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.

Was there a time in the recent past when an actual use of the building or other land that was not ancillary land furthered the social wellbeing or interests of the local community?

The letter does not lend itself to brief summary, which is one reason why members should refer to it and not rely solely on this note. However, the following points may assist, taking first the question of whether there [was] a time in the recent past when an actual use of the building or other land that was not ancillary land furthered the social wellbeing or interests of the local community:

- There is no statutory definition of “recent past”. The property was in use as a pub until 6 January 2017. In common sense terms, members are entitled to consider this to be within the recent past. The owner’s solicitors suggest that a period of five years is taken.
- Of course, not only must the property have been operating as a pub within the recent past, its use must also have been “furthering the social wellbeing or interests of the local community” within the recent past. Its mere existence as a pub in the recent past is not enough. Care needs to be taken as there is some suggestion within the public representations received that community use has diminished over time, including a comment in the email from Steve Langford that:

“Sadly the pub was taken over by Charles Wells approx. 5 years ago and their sole intent was to sell tenancy agreements to incompetent licensees over the past few years and the pub went into decline.”

- The Act states that “social interests” “includes (in particular) each of the following – (a) cultural interests; (b) recreational interests; (c) sporting interests.” This is not an exclusive definition and it is quite clear that the use of a building as a pub is capable of furthering the social wellbeing or interests of the local community.
- The letter points out, correctly, that not all pubs will fall within the definition. Members need to apply the two-part test to this specific pub with its specific attributes and circumstances.
- The letter refers to “unsubstantiated allegations” in the nomination. Members should look critically at claims made but are entitled to give weight to the statements made by the Town Council, along with the content of representations made by supporters and opponents of the nomination. Members are also entitled to bring their own local knowledge to bear. In the light of this, members must form their opinion, which has (of course) to be reasonable.

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- Reference is made to the “preponderance of other nearby public houses which are demonstrably of community value”, and the usage and availability of other community facilities. The task before members is to consider whether the nominated property meets the criteria for listing. The availability of other facilities is only relevant to the extent that this might suggest that the Railway Arms was not, in fact, furthering the social wellbeing or interests of the local community in the recent past.
- The letter addresses, in some detail, the attributes claimed for the pub and argues that these are not evidenced and are of no relevance to whether the property should be listed. The letter is correct in stating, for example, that the mere fact that the property “has featured regularly in good beer and good pub guides” is not enough to qualify it as an asset of community value. However, the description in the nomination form helps to paint a picture of the uses to which the property has been put. The task for members is to decide whether, in its reasonable opinion, in the recent past, an actual use of the building or other land that was not ancillary land furthered the social wellbeing or interests of the local community. In forming its opinion, members may take account of the nomination as a whole, alongside other representations including those made on behalf of the owner, and alongside any relevant local knowledge.
- The letter deals, at some length, with the status of the garden. It appears to argue that the garden should be disregarded, as its use is ancillary to that of the pub. My advice is that this point is of limited relevance. If the application was based solely on the use of the garden for purposes furthering the social wellbeing or interests of the local community, then this point might be pertinent. Similarly, if members conclude that the pub itself fails the test but that the garden meets it. However, the property in respect of which the application is submitted includes the garden and members are entitled to take account of the use of the garden, along with the use of the building, in determining whether the property taken as a whole should be listed.

Is it realistic to think that there is a time in the next five years when there could be a 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?

Even if members conclude that the use of the property furthered the social wellbeing or interests of the local community in the recent past, it should not be added to the register of assets of community value unless members reasonably conclude that it is realistic to think that there is a time in the next five years when there could be a non-

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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.

In considering whether it is “realistic”, the threshold is that the possibility is more than fanciful. The test is not one of the balance of probabilities. There does not have to be a detailed plan or proposals – the extended moratorium period, if triggered, provides an opportunity for detailed plans and proposals to be put together.

If members conclude that it is “not realistic to think that there is a time in the next five years when there could be a 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” then the nomination should be refused.

It should be noted that the way in which the social wellbeing or social interests of the local community would be furthered does not have to be the same as at present. This would include meeting the social wellbeing or social interests of the local community in a different way, and in operating the facility in a different manner.

The letter sent on behalf of the owner enclosed accounts showing that the pub had operated at a loss. These are included with Appendix D to the report. The letter summarises, at paragraph 136, the reasons why the owner believes that the prospect of non-ancillary community use within the next five years is “wholly unrealistic”.

- (a) *The owner has decided no longer to operate any part of the property as a pub. The Owner’s intentions are relevant to whether future operation as a pub is realistic (Patel v London Borough of Hackney... at paragraph 11.)*

The owner’s intentions are relevant but are not the only consideration. The judgment in the case cited sums up the position as follows:

9. *It is convenient to deal next with a submission on behalf of the appellant in his reply concerning the weight to be given to Mr Patel’s intentions. It is said that:-*

“The intentions of the appellant are clear and should indeed be the determinative factor in this appeal.”

10. *Whilst I have no doubt that it is reasonable to take into account Mr Patel’s intentions as part of a general consideration of the circumstances, I cannot accept this assertion about the weight to be given to them.*

11. *If correct, it would seem to follow that that an owner need only say “I have set my face like flint against any use of community value” and listing will be avoided. This almost makes the scheme voluntary. I think it more reasonable to take into account Mr Patel’s intentions as*

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part of the whole set of circumstances. After all, they are the current owner's present intentions and the legislation requires an estimate of what will happen over the next five years.

In the *Patel* case, as here, there was no planning consent for alternative use at the time of listing. Paragraph 16 of the judgment concludes:

“On the material I have, it seems to me that I must treat both the grant and the refusal of planning permission as realistic possibilities. One realistic outcome therefore is that the Chesham will be converted into flats. What if permission is not granted? A second outcome might be that the Chesham is rented out as one flat plus office space – but the current permission for office use expires in two years time. A third outcome might be that a refusal delivers a fatal blow to Mr Patel’s current investment strategy. It seems to me that he might realistically then decide to cut his losses and sell to someone interested in running the building as a pub. I agree with Hackney that all these three options are realistic. It follows that they were correct to list the Chesham as an asset of community value.”

Incidentally, the existence of a planning consent would not necessarily be determinative but would be a factor to which weight should be given.

- (b) *“The property cannot profitably operate as a pub, because it is now closed.”*

In itself, this says nothing about whether it is realistic to think that there is a time in the next five years when there could be a 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.

- (c) *“Commercial viability is not the end of the matter: see *Worthy Developments Ltd v Forest of Dean DC*... at paragraph 21. However if the Nominator is alleging that it has the funds to purchase the Property, then the allegation requires positive evidence- not only that the community has some kind of plan or proposal to run the pub, but also that the community is prepared to bear any relevant financial losses.”*

Paragraph 21 in the *Worthy Developments* case states:

“I took into account the detailed appraisals produced by Worthy Developments Ltd of the viability of The Rising Sun returning to community use. I accept that these demonstrate that there are obstacles. It is important, however, not to confuse commercial viability with what altruism and community effort can achieve. The calculations advanced by Worthy Developments Ltd do not, in my judgment, demonstrate that the committee’s plans are not realistic. Although

there was some discussion of the figures at the hearing, it does not seem to me necessary to go into further detail on this point. The legislation does not require a detailed business case at this stage.”

- (d) *“However, there is no such evidence. Judge Lanes’s comments in STO Capital v London Borough of Haringey... at paragraph 15 apply equally to this case:”*

“I see no evidence of any attempt on the part of the Company or anyone else to raise funds (or even begin to formulate proposals) in order to make proposals for the Alexandra. Although as the Tribunal has explained, there is no requirement for a fully fledged business case to be submitted by the Company or anyone else, there is in the present case, simply no evidence to suggest that a community group might make a realistic bid for the Alexandra.”

“In this case, like in STO, the Nominator has provided no evidence whatsoever to suggest that it has even begun to formulate proposals to make a realistic offer for the Property.”

There would need to be a reasonable basis for the Cabinet to be able to conclude that “it is realistic to think that there is a time in the next five years when there could be a 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.

- (e) This paragraph cites *Corstone v Amber Valley Borough Council* as indicating that “even in communities where there is a volunteering spirit... the nominator still had to show ‘*alternative, realistic models*’ as to how the site could be used”. The relevant part of the judgment states:

“Mr Lynch vigorously cross-examined Councillors Tatler and Matthews over the absence of any business plan from the Parish Council. Each case of this kind is, however, fact specific. In the present circumstances, I do not consider that the absence of a business plan of the kind prepared by Mr Crosby is significant. The relevant language of the Localism Act 2011 is consistent with a number of realistic outcomes coexisting. On the facts, Mr Crosby’s outcome is, I find, not the only realistic one. Councillor Matthews gave evidence of there being a volunteering spirit in the locality, of which her evidence shows she is an exemplar. Although it is true to say that current events and activities are on a small scale, I accept the respondent’s evidence, to the effect that the local community has a desire to see the Black Swan reopen as a pub and that this desire is not merely “pie in the sky” or fanciful. The desire is demonstrated by 72% of those who responded to the questionnaire submitted by the Vision Idridgehay and Alton,

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Ashleyhey Neighbourhood Plan Steering Group stated that they would like to see the Black Swan reopen (the response rate was 69% of those distributed with the questionnaire)."

- (f) This sets out the Owner's submission that *"in addition to everything else set out above, the above factors are fatal to the nomination."*
- (g) This paragraph quotes at some length the judgment in *Fernwick Ltd v Mid Suffolk District Council*. This judgment emphasises the need to be realistic in deciding whether community use is realistic in the next five years. This was a case where extensive, unsuccessful, steps had been taken to make a pub viable. These, along with *"the absence of any commercial or any meaningful voluntary sector interest in running this pub in this location and the absence of any evidence that proposals which might improve the viability of the [pub] being acceptable to the First Respondent in this location lead me to conclude that it is not realistic to think that public house use of the building within the next five years."*

The letter points out correctly that there is nothing in the nomination form indicating any plans, proposals etc. for the future of the pub. This may be because the Council's nomination form does not clearly ask for information of this sort. There is no question in the body of the nomination form regarding plans or proposals, or viability, and the issue is only lightly touched upon in the guidance notes. (Officers will review the nomination form for the future.)

However, there is other material that is of relevance in the submissions made by members of the public, collated in Appendix E to the report. In particular, members should refer to:

- The letter of 15 March sent by the Chair of the "Save the Railway Arms Pub". This states:

"The recent STRAP AGM mandated the expanded committee to investigate putting in place a legal entity (possibly a Community Benefit Society or Community Interest Company) with the ability to put in a bid for the Railway, to put together a business case and explore the level of interest within the wider community. Should we proceed, we will seek to ensure that the re-opened pub would be family friendly and attractive to all parts of the community, with good quality food and drinks priced to suit all pockets. Thus it is clear that the second and third tests are passed.

"In the few weeks since then, we have seen coverage in the local press and our membership numbers have soared, reaching close to 100. We have been accepted onto the Plunkett Foundation's 'More Than A Pub' programme and

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have completed the associated action plan. We are now in contention for a bursary of £2,500 to meet early set up costs....”

- The email from P Hoskins on behalf of the Essex Saffron Brewery in Henham. The letter includes this paragraph:

“The vendor a large brewer is acutely aware of the value uplift of planning were to be gained for redevelopment of the site. We have tendered an offer to buy the Public House and are confident that we can retain it as a profitable trading concern within our portfolio. It has become very clear that the vendors have little or no intention at present to look at selling on with the current use in place and are firmly set on profit for redevelopment, they are selling a number of properties from their portfolio. An ACV will test their metal (sic) and challenge their resolve that it cannot be traded as a public house. Many of the tenants that the brewer has had in the premises have pointed to excessive rent and costs of product purchase under tie as reasons for failure, lack of choice and overbearing repair costs not the support from the community which is strong.”

Conclusion

Members should pay careful heed to the submissions made on behalf of the Owner, and all other material before them, including the nomination form and representations, when reaching their decision on the application. They are also entitled to bring to bear their local knowledge, to the extent that this is relevant.

In summary, the questions members need to address are:

- a. Whether this is a valid nomination
- b. Whether, in the recent past, the use of the building furthered the social wellbeing or interests of the local community. use of the building (current or recent past) furthers the social welling or interests of the community.
- c. Whether it is realistic to think that in the next 5 years the building could be used to further the social wellbeing or interests of the community.

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28 March 2017