

FREETHS

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Dear Sirs

THE RAILWAY ARMS PUBLIC HOUSE, STATION ROAD, SAFFRON WALDEN CB11 3HQ –
ACV NOMINATION

As you are aware, we act for Charles Wells Limited (“**the Owner**”), the freehold owner of The Railway Arms, Station Road, Saffron Walden, CB11 3HQ (“**the Property**”). We refer to the nomination of the Property (“**the Nomination**”) as an Asset of Community Value (“**ACV**”) pursuant to the Community Right to Bid provisions of the Localism Act 2011 (“**the Act**”), such nomination having been made by Saffron Walden Town Council (“**the Nominator**”) by way of a nomination form dated 6 February 2017 (“**the Nomination Form**”).

We are instructed to challenge the Nomination, and by way of comment on behalf of Charles Wells Limited, we have the following points to make to Uttlesford District Council (“**the Council**”) in connection with the nomination of the Property as an ACV, in particular in relation to (a) the invalidity of the Nomination and (b) the various demerits of the Nomination.

A. Failure to determine the first and second nominations– the Property should have been added to the Council’s published list of unsuccessful community nominations pursuant to section 93 of the Localism Act 2011 (‘the Act’)

1. The first nomination dated 12 October 2015 (“**the First Nomination**”) was made by STRAP, asserted to be an “*Unincorporated Body of 21 named members*” whose constitution was submitted to the Council along with a list of alleged members. Our client was informed about this nomination by way of a letter from the Council dated 19 October 2015.

2. Under the Localism Act 2011 (“the **Act**”), where a local authority receives a community nomination, it must consider the nomination (s. 90(2)) and must accept the nomination if the land nominated is in the authority’s area and the Council forms the opinion that it is of community value (s. 90(3)). Thus the wording of the Act imposes clear obligations on the Council to actively consider and accept community nominations that meet the relevant criteria.
 3. In accordance with Regulation 7 of the Assets of Community Value (England) Regulations 2012 (“the **Regulations**”), the Council “must decide whether land nominated by a community nomination should be included in the list within eight weeks of receiving the nomination” (underlining added for emphasis).
 4. Our firm made various representations in response to the First Nomination by letter dated 11 November 2015. Subsequently our firm received a letter from you dated 18 November 2015 in which the Council stated:

“... After assessing the nomination for The Railway Arms Saffron Walden to be an Asset of Community Value officers have come to the decision that it cannot proceed with this due to the lack of information provided. The group are free to submit another nomination for the Railway Arms with additional information at any point. The assessment will be based on the information provided and any written representations from yourselves. We will of course notify you if a new nomination is submitted...” (our underlining added for emphasis).
 5. Therefore, the First Nomination was effectively rejected by the Council within the prescribed period of eight weeks. It is not clear what information was lacking within the nomination however we observe that a community nomination which has been rejected within the mandatory timescales set by Parliament can only be an unsuccessful nomination.
 6. We adopt this view because the Council must ‘*consider the community nominations it receives – it does not have the discretion just to forget about them*’ (Hansard, HC Public Bill Committee, 12th Sitting, 511 and 512 (February 10, 2015)). Therefore, it is our client’s primary contention that the Previous Nomination should be placed in the Council’s unsuccessful list of community nominations in consequence and that the Council is in breach of its duty to do so, which breach is actionable by our client by way of an application to the Administrative Court for a mandatory injunction, in respect of which our client’s rights are now reserved should the breach continue.
 7. Separately, a second nomination was made dated 4 December 2015 (“the **Second Nomination**”) and it was, again, made by STRAP asserted to be an “*Unincorporated Body of 21 named members*” whose constitution was submitted to the Council along with a list of alleged members, an Agenda for a meeting which allegedly took place between members of STRAP on 23 November 2015, and Minutes of that meeting.
 8. Our firm made various representations in response to the Second Nomination by letter dated 11 November 2015. Subsequently our firm received a letter from you dated 31 December 2015 in which the Council stated:
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“At this point in time I am not satisfied that STRAP does fall within the Regulations. The nomination will not therefore be considered further. For the reasons stated above this does not mean that the premises will be included in the list of unsuccessful community nominations. Further I see no reason why STRAP should not be in a position to make a further nomination if and when it is able to demonstrate that it does fall within the Regulations”.

9. The Second Nomination was withdrawn due to the ineligibility of the nominator and, therefore, was unsuccessful by definition. Accordingly the Property should have been added to the Council’s list of unsuccessful nominations, having due regard to the intention behind the requirement to keep a list of unsuccessful nominations, which is ‘to ensure transparency and avoid multiple nominations of assets that do not meet the definition’ of an ACV (Community Right to Bid: Non-statutory advice note for local authorities, Department for Communities and Local Government (October 2012)).
10. On the basis that the First and Second Nominations ought to have resulted in the Property being on the Council’s unsuccessful list, the current Nomination cannot be considered by the Council for inclusion of the Property in the Council’s list of ACVs. To include the Property on both lists would be an abuse of process and contrary to the legislature’s intention.

B. Sale and development of the Property

11. We are obliged, at this juncture, to highlight an apparent and most unsatisfactory use of the ACV regime by the Nominator to try and block any contemplated sale and development of the Property. The Property recently closed for business and is currently for sale.
 12. Unfortunately, it is clear that the Nominator is using the ACV nomination process as a “*weapon*” to try and frustrate a proposed sale and development of the Property. The position is wholly unsatisfactory. The Nominator has clearly made the Nomination to protect the Property from what, in its opinion, it considers as inappropriate development. However if local authorities fail to ensure that the ACV listing mechanism is used correctly, then there is a significant risk that ACV nominations will be reduced to a vehicle for opportunistic infringement of property rights, as in this case.
 13. Indeed, even if the Property is listed as an ACV (which would be wrong given the lack of reality concerning the future path for the Property as a pub- explained in detail below), the primary purpose of the ACV legislation is to give community interest groups time to bid to acquire a property, not to prevent otherwise acceptable development. This was confirmed in a planning decision which highlighted that the primary purpose of the ACV regime is categorically **not** to frustrate the development and planning application process: see the decision of the Planning Inspectorate in APP/Y5450/W/14/3001921- 12 May 2015 (concerning a planning application for permission to convert the Alexandra in Haringey, London into two 3-bedroomed dwellings). In this case, the listing of the premises as an ACV was accorded negligible weight and this resulted in the grant of planning permission. The planning Inspectorate overturned the decision of Haringey Council to refuse planning permission. We enclose a copy of the Appeal Decision.
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14. As part of the decision-making process, the Planning Inspectorate considered the general community value of the pub and its impact on planning considerations and stated:

(Paragraph 22) *“The listing of the premises as an ACV does provide a tangible demonstration that a section of the community considers that, through recreation, the pub furthered the social wellbeing or social interests of the local community. I am aware also that the Council has reviewed the listing and considers that there is a realistic chance that, as a non-ancillary use, the property could do so again within the next five years (whether or not in the same way as before). However, the Council’s finding regarding re-use of building is contingent upon the current appeal being dismissed. The relevant ACV legislation sets out specific tests which are narrower than the planning considerations before me. **The primary purpose of ACV listing is to afford the community an opportunity to purchase the property, not to prevent otherwise acceptable development.** Accordingly, whilst I afford it some weight in this case it is not determinative”* (underlining added for emphasis).

15. Significantly, the Planning Inspector in reaching his decision considered that the needs of the community could be met by the other public houses in the area. A similar decision was also made in respect of the Seven Stars public house in Sedgley which was listed as an ACV in October 2014, but where an Inspector granted in July 2015 permission for change of use to retail so that it could become a Morrisons supermarket.
16. In this instance the Nominator has not indicated at any stage that either it or any other eligible community interest group has any genuine intention to purchase the Property, or that any other person meeting the relevant criteria under the Localism Act 2011 is able to do so, or even that there is a remote hint of such a person coming into existence at any point in the future.
17. Therefore, the Council should regard the Nomination as abusive as it is transparent that the Nomination is made with the wrongful and injurious primary aim of prejudicing any proposed sale and development of the Property.
18. Further, for the reasons which follow, the Nomination is not a community nomination at all but instead an invalid nomination.

C. Invalid nomination – legal framework

19. S.89(1)(a) of the Localism Act 2011 (“**the Act**”) states that land may only be included in a local authority’s list of ACVs in response to a *community nomination* (our emphasis). Under s.89(2)(b)(i), a community nomination (in relation to a local authority), means a nomination which nominates land in the local authority’s area (s.89(2)(a) of the Act) and which is made by (inter alia) “a parish council in respect of land in England in the parish council’s area” (s.89(2)(b)(i) of the Act).
20. In order that a local authority may be satisfied that a nominating body satisfies the relevant conditions, there is a statutory requirement that a nominating body supplies evidence that the conditions are satisfied. In particular:
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- Regulation 6(a) of the Asset of Community Value (England) Regulations 2012 (“**the Regulations**”) requires that a community nomination provides a “*description of the nominated land including its proposed boundaries*”.
 - Regulation 6(d) requires that a community nomination must include “*evidence that the Company is eligible to make a community nomination*”. This is so that the Council may assess whether or not any nomination made is indeed a community nomination. If it is not, for example, because there is no evidence provided with the nomination to show that the Nominator is eligible to make a community nomination, then the Council should refuse it because it is not a community nomination, and the Property added to the Council’s list of unsuccessful nominations (s.90(5) of the Act).
21. Before even considering the merits of a nomination, a local authority must be satisfied that the nomination is a community nomination.
22. Each of regulations 6(a) and 6(d) must be narrowly construed in the light of the following facts and matters which have serious and far reaching consequences for the owners of ACV listed property:
- (a) The removal of permitted development rights for change of use to class A1 (shops), class A2 (financial and professional services), and class A3 (restaurants and cafes) for 5 years, whilst the property in question remains listed.
 - (b) The removal of permitted development rights for demolition of the building erected upon the property in question.
 - (c) The entry of a restriction on title, preventing the owner of the property in question from entering into a relevant disposal, which means a sale of the freehold or the grant of a leasehold interest for more than 25 years, in either case with vacant possession, without first having followed the moratorium procedures contained in the Act.
 - (d) The potential imposition of a moratorium against dealing with the property for either six weeks (the interim moratorium) or, if the Council receives notice of an intention to bid from a community interest group (as defined in the Regulations), for six months. This consequence can render the property in question substantially more illiquid for either the current or future owner, causing a proposed sale or letting of the property in question to fail.
23. Further, the listing of property as an ACV can also have serious consequences for listing Councils, who are placed at risk of the requirement to compensate affected owners, and the Owner relies upon the following in this regard:
- 23.1 Regulation 14 requires Councils to compensate owners of ACV listed land where they make a claim in respect of loss and expense that would likely not have been incurred had the Council in question not decided to list the property as an ACV.
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- 23.2 The Department for Communities and Local Government's Non-statutory Advice Note is careful to state at paragraph 10.2 that:

"The assumption is that most claims for compensation will arise from a moratorium period being applied; however the wording allows for loss or expense arising simply as a result of the land being listed".

- 24.23 It is instructive to consider how Courts at the highest level have interpreted compensation provisions in statutory schemes. Paragraph 7(1) of Schedule 4 to the Electricity Act 1989 creates a right to compensation where a wayleave is granted over a landowner's land, in the following terms:

"(1) Where a wayleave is granted to a licence holder under paragraph 6 above— (a) the occupier of the land; and (b) where the occupier is not also the owner of the land, the owner, may recover from the licence holder compensation in respect of the grant."

- 24.24 In *Arnold White Estates Ltd –v- National Grid Electricity Transmission plc* [2014] Ch. 385, the Court of Appeal interpreted that provision. Briggs LJ said as follows at [14]:

"it was broadly common ground that, like other statutory provisions for compensation for the compulsory acquisition of, or of a right over, private property, compensation for the grant of a statutory wayleave is to be quantified in accordance with what has come to be known among compulsory purchase lawyers as the principle of equivalence. In its earliest and classic form, the principle is encapsulated in Horn -v- Sunderland Corpn [1941] 2 KB 26 , 40, per Scott LJ. Speaking of the Acquisition of Land (Assessment of Compensation) Act 1919 , he said:

"The word 'compensation' almost of itself carried the corollary that the loss to the seller must be completely made up to him, on the ground that, unless he received a price that fully equalled his pecuniary detriment, the compensation would not be equivalent to the compulsory sacrifice."

24. If Uttlesford District Council erroneously decides to list the Property as an ACV, then the Owner will be forced to consider any losses it suffers as a consequence, and the Council will be placing itself at risk of a compensation claim from the Owner: neither situation would be satisfactory and the Council must therefore consider the nomination in its correct statutory context, construing statutory requirements and gateways to ACV listing narrowly to avoid the opening of floodgates to compensation claims.
25. For obvious reasons, the Owner has no desire to have to consider a claim for any loss whatsoever. However it is clearly the case that at the moment Councils are exposed to considerable risk should land be ACV listed as a consequence of the acceptance of an ACV nomination as a community nomination where, in fact, there is no realistic prospect of a community interest group (as defined in Regulation 12) forming at any time to consider bidding for the property in question should the Owner give notice of an intent to enter into a
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relevant disposal. The largest risk to Councils takes the form of a potential claim for diminution in value to the property in question as a consequence of the listing. In an appropriate case, this may run to seven figures

26. To be clear, a local authority's first task in assessing any nomination, before even considering the merits of a nomination, is to determine whether it is a community nomination as required by s.89(1)(a) of the Act. A nomination is a community nomination if and only if the nominating body satisfies the Council that the nomination has been properly made by a person authorised to do so in accordance with the Parish Council's own rules. A local authority must satisfy itself that the evidence requirement, set out above, has been met. Any nomination received from a nominating body that does not satisfy the evidential burden should be rejected as not being a community nomination at all.

D. Insufficient evidence of eligibility to nominate- invalid nomination

27. In this case the Nomination purports to have been made by a Town Council responsible for the area where the Property is situated i.e. Saffron Walden Town Council, the Nominator. We note from the Council's website that the Nominator is listed as one of the town/ parish clerks within Uttlesford <http://www.uttlesford.gov.uk/article/3526/Town-and-Parish-Councils>.
 28. Further, in order to comply with Regulation 6(d), and as a bare minimum to establish its eligibility to make a community nomination as defined by s.89(1)(a), the Nominator should have provided the Council with evidence that its own decision-making process had been complied with (including by the provision of minutes of the relevant meeting) and that the officer responsible for submitting the Nomination therefore had the authority to do so on behalf of the Nominator. Given that such evidence goes to the very issue of whether a nomination is emanating from the local community, rather than someone such as a clerk or Councillor on a frolic of their own, our client's position is that the requirement to provide evidence under regulation 6(d) is mandatory and in this instance and the Council has no discretion to treat the requirement as directory.
 29. In this case, it does not appear from the papers provided by the Council to us, that evidence of the Nominator's decision-making process was provided with the Nomination Form.
 30. A perusal of the Nominator's website contains minutes of meetings that have taken place (<http://saffronwalden.gov.uk/documents/type/council-minutes/>). We cannot locate any Minutes in which the Nominator resolved to nominate the Property as an ACV. In particular, we have reviewed the most recent sets of Minutes: those dated 9 January 2017, 12 December 2016, and 14 November 2016.
 31. However none of the sets of Minutes referred to make reference to the Nominator's decision to nominate the Property as an ACV.
 32. Therefore, the Nominator has supplied no evidence that its own decision-making process has been observed in relation to the Nomination. Having looked over the last few months' minutes we have seen no publically available evidence of a minuted decision being made
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to nominate the Property to be listed as an ACV. Nor have any further minutes/ evidence been provided with the Nomination (as far as we are aware).

33. In light of the restrictive effect that the ACV listing has on our client's rights to deal with the Property, and since the relevant ACV legislation imposes no duty on the Council to actively pursue evidence from the Nominator, it seems to us that the Nomination may not be accepted as a community nomination without the Council checking that the Nominator properly resolved to make the nomination.
34. Accordingly it is the Owner's submission that the Nominator made no proper resolution to make the nomination and it is not a community nomination at all, but rather the product of a Town Council acting without following its rules. As such, the nomination has been made *ultra vires* and cannot be accepted by the Council as a community nomination at all.

Invalid nomination - summary

35. By way of summary:
 - A property may only be listed as an ACV in response to a community nomination (s.89(1)(a)).
 - A community nomination must include a description of the nominated land including its proposed boundaries (Regulation 6(a)).
 - A community nomination must include evidence of the nominator's eligibility to make a community nomination (Regulation 6(d)). This is mandatory in this case in view of the fact that such a nomination can only be made following a decision of the Parish Council, in order for the nomination to emanate properly from the local community rather than, for example, one disgruntled parishioner. Had a decision been properly made, then evidence of the same would have been easy for the Nominator to provide to the Council.
 - The Nominator has provided no evidence whatsoever of the satisfaction of its decision making rules, failing to satisfy Regulation 6(d).
 - The Nomination is not therefore a community nomination and cannot be considered by the Council. Without more, the Nomination should therefore be rejected as not being a community nomination.
36. Given the above, the Nomination should be rejected as invalid.

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

37. The Council is respectfully reminded that the purpose of Part 5, Chapter 3 of the Act is to provide "*an achievable time frame for community interest groups to organise themselves and to raise finance*", should they wish to bid for land of community value at a time when the owner wishes to enter into a relevant disposal (Hansard, HC Public Bill Committee, 12th Sitting, cols 533 and 534 (February 15, 2011)).
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38. There is no indication on the face of the Nomination that the Nominator has any interest in raising finance to purchase the Property, or indeed that any other body or organisation does, in the event that the Owner enters into what would constitute a relevant disposal under the Act.
39. Although the Council may take the view that it is not strictly necessary for a nominator to prove an intention to purchase a nominated asset in order for an ACV nomination to succeed (our client's position on this is entirely reserved), we submit that the clear absence of *any intention whatsoever* of any person or community interest group to purchase the assets nominated should count against the Nomination.
40. The Nominator is attempting to make improper use of the ACV listing process to achieve indiscriminate listing of public houses, without regard to the primary purpose of the legislation or the impact on private property owners. Accordingly, accepting such a nomination would be an improper use of the Council's powers, which are "*designed to ensure that we do not have vexatious, silly or inappropriate nominations included on the register*" (Hansard, HC Public Bill Committee, 12th Sitting, cols 505 and 506 (February 10, 2011)), and the Council is, therefore, respectfully invited to reject the Nomination as invalid.

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

41. Without prejudice to the invalidity of the Nomination in the first instance, we are obliged to draw the wholly inadequate nature of the Nomination itself to the attention of the Council.
 42. Before examining the detail of the Nomination Form, we respectfully remind the Council that the test to establish whether a validly nominated property is in fact an asset of community value is spelled out in s.88 of the Act and the relevant provisions of the Regulations. The relevant statutory provisions do not identify any "classes" or "types" of property that automatically pass the test for community value and the test itself *must* be applied on a case-by-case basis to the facts of each and every individual nomination, without exception.
 43. By extension (and in terms relevant to the current Nomination), it clearly cannot have been the intention of Parliament in drafting the relevant provisions of the Act and of the Regulations that all pubs should satisfy the test set out in s.88 by virtue of being pubs alone. The bar set by s.88 requires more than mere use of a property as a public house. Indeed in *Patel v London Borough of Hackney and another* [2013] UKFTT CR/2013/0005 (GRC) at paragraph 4 (enclosed) Judge Warren stated that "*for the appellant, Mr Turney, correctly pointed out that not all pubs would come within Section 88(2)(c)*" (it is clear that the Judge meant s.88(2)(a) or (b), given that there is no sub-section (c), and also from wider context in that case).
 44. It follows that it is not sufficient, in attempting to satisfy the criteria for community value under s.88 of the Act, for a nominator simply to say of a pub that it is a pub. Pubs do not qualify by definition as assets of community value and identifying a property as a pub does not alleviate the Nominator's responsibility to establish that the property satisfies s.88 of the Act. If the Nominator cannot provide sufficient reasons (over and above the simple fact that
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the property is a pub) as to why a property satisfies the test under s.88 of the Act, then the nomination must be unsuccessful.

45. Turning to the test for community value itself, the relevant provisions of the Act and of the Regulations are as follows:

(a) For the Property to be land of community value, the Council must reasonably form the opinion that either:

- i. an actual current non-ancillary use of the Property must further the social wellbeing or social interests of the local community and it is realistic to think that this can continue (s.88(1) of the Act); or
- ii. there must be a time in the recent past when an actual non-ancillary use of the Property furthered the social wellbeing or interests of the local community and it is realistic to think that there is a time in the next five years that there could be such use (s.88(2) of the Act).

(b) In the absence of a statutory definition or guidance as to the meaning of “*ancillary*” within s88 of the Act, the term must be given its ordinary and natural meaning within the context of the facts of the matter under consideration (as has already been discussed). The shorter and little Oxford English Dictionaries define ancillary as meaning “*subservient*”, “*subordinate*”, “*auxiliary*”, “*providing essential or necessary support to the primary activities or operation of an organization or system*”.

(c) “*Social interests*” include cultural, recreational and sporting interests (s.88(6) of the Act). “*Social wellbeing*” is not defined by the Act, but it seems that it is the wellbeing of *society* itself that is important (in the sense of the maintenance and strengthening of bonds between people, the promotion of societal cohesion and unity, etc) rather than just the wellbeing of a number of individuals within a given society. The Act focuses on communities, not individuals.

(d) A community nomination must include sufficient reasons for the Council to conclude that the Property is of community value (Regulation 6(c)).

46. In this case the reasons why the Nominator considers that the Property is of community value are set out on pages 4 and 5 of the Nomination Form. Many of the unsubstantiated allegations set out in the Nomination Form are not remotely appropriate to the Council’s decision-making process. They simply bear no relevance at all to the criteria set out in s.88 of the Act.

47. By way of general comment it is our client’s respectful submission that:

(a) The Nomination consists of self-serving statements intended to stand as evidence of their own truth in satisfaction of the community value criteria contained in section 88 of the Localism Act 2011, despite the paucity of detail and corroborating contemporaneous documentary evidence to support the statements made. The Nominator has provided no evidence to support its reasons as to why the Property

allegedly furthers the social wellbeing or social interests of the local community. Without evidence, these are simply bare assertions on the strength of which no reasonable decision-maker could conclude that the Property is of community value

- (b) The Nomination has ignored the preponderance of other nearby public houses which are demonstrably of community value. Further, the Nomination has ignored other nearby community facilities and their usage and availability for use by the local community.
- (c) The Nomination is characterised by pointless references to physical features of the Property, which are of no relevance to the community value criteria, and make reference to irrelevant, purely ancillary or otherwise marginal activities, which only serve to highlight the weakness of the argument for the Property satisfying the community value criteria.
- (d) The majority of the reasons why the Nominator proposes that the Property is of community value fail to engage the s.88 criteria for community value in any way and are therefore completely irrelevant to the Council's decision-making process. Those of the Nominator's reasons that actually engage the s.88 criteria are insufficient for the Council to conclude that the Property is of community value.

48. We will address the various allegations made in the Nomination, below, however before we do so we have been instructed to make it clear to the Council that the primary reason for closure of the Property was that the Owner was unable to continue running the Property profitably. Specifically:

- (a) The short point is that the Property could no longer be operated as a pub. The Owner was unable to use its financial and other resources to make a success of the business carried on from the Property. In view of this, it is completely unrealistic to consider the Property an ACV at all.
- (b) Bearing this in mind, we have the following points to make regarding the alleged reasons for listing the Property as an asset of community value.

Under the heading, “*Why do you feel the property is an asset of community value?*”

The statement that “Community pubs represent the very essence of a community asset, providing a meeting place where social networks are strengthened and extended and where people can mix with others from different backgrounds to their own. Pubs host a wide variety of community-orientated events and activities that add considerably to local civic life”

49. We note that the Nominator spends the first paragraph in response to Question 5 on the Nomination Form describing why pubs can be community assets. Whilst this information is helpful when considering pubs generally, they are not reasons that the Council should have regard to when assessing the merits of the nomination of the Property as an ACV.

50. Quite apart from the above point, this unparticularised and bare allegation is of no evidential quality whatsoever to the assessment of whether or not the community value criteria in respect of the Property has been met. Further, the use of the Property for mere enjoyment of individuals would not in any event be sufficient to qualify a Property as an ACV, hence the criteria set out in s.88. There is no demonstration within this short and unevicenced statement that the community value criteria are even approaching being met.
51. The Property closed recently. Accordingly the Council must consider the community value criteria under s.88(2) of the Act, as opposed to s.88(1) of the Act, and in doing so arrive at a determination of whether or not the Property has been used in such a way as to satisfy the community value criteria “*in the recent past*”.
52. To assist the Council in its consideration of this issue, we refer it to the First Tier Tribunal case of *Scott –v- South Norfolk District Council* (copy enclosed), in which the Kings Head in Pulham St Mary, Norfolk, closed in 2007 and was nominated for listing as an ACV in October 2013. In that case the Council concluded that there had been no use of the pub in the “*recent past*”, the pub having been shut for six years. The learned Judge upheld the owner’s appeal on the basis that the reviewing officer was correct in his finding of fact, to the effect that there had been no use of the Property in the recent past.
53. Further, other local Councils, such as Thanet District Council, quite sensibly consider the recent past to require that community use of a nominated asset be shown within the last 5 years. We enclose a copy of Thanet District Council’s nomination form, showing the same.
54. For the reasons that follow, it is our client’s position that the Council cannot make a determination that the Property has been used in a way which satisfied the community value criteria under s.88(2) of the Act:
- (a) In considering whether or not the criteria under s.88(2) is met, the Council has to arrive at a reasoned decision of what constitutes the recent past, and whether or not the reasons advanced by the Nominator for listing the Property as an asset of community value have occurred within the recent past.
 - (b) Bearing in mind the above discussion, it is our client’s position that the recent past means a period of the last 5 years.
 - (c) Without prejudice to whether or not the matters relied upon by the Nominator can properly be said to satisfy the community value criteria under s.88(2), there is no evidence provided as to *when* those things are said to have occurred. Without such evidence, the Council cannot make a properly reasoned decision on this point at all. Instead, the Council must reject the Nomination for want of evidence and/or particularity.

The statement that “As well as injecting an average of £80,000 into their local economy each year, pubs play a key role in raising money for local charities- it is estimated that the average pub raises around £3000 a year for charity”

55. We note that the Nominator spends the second paragraph (in describing its reasons for the Nomination) explaining the potential for use of the Property in a way which might satisfy the community value criteria.
56. This unparticularised and bare allegation is of no evidential quality whatsoever to the assessment of whether or not the community value criteria has been met and it is a statement that the Council should have no regard to when assessing the merits of the nomination of the Property as an ACV.
57. In addition, any charitable fundraising efforts of pubs are not a use which of itself satisfies the community value criteria contained in the Act. This allegation fails to engage the Section 88 criteria in that the fact that some pubs may raise money for charitable causes is not sufficient to establish that the Property furthered the social wellbeing or social interests of the local community in the sense intended under the Act.
58. Whilst the charity fundraising efforts of pubs are commendable, charity events within a pub would not be part of the public house business, which is the sale of alcoholic or non-alcoholic beverages with and without food. Occasional and infrequent use of a pub for the purposes of hosting charitable fundraising events would in any event be subordinate to the commercial use of the pub as generating trade from the sale and supply of drinks and food, and *de minimis*, in the sense that it is an insignificant use in any event. Therefore, this reason bears no relevance to the criteria laid out in s.88 of the Act. The Council needs to assess whether the use of the Property as a pub in the recent past furthered the social wellbeing or social interests of the local community.
59. Further, absent any satisfactory evidence in support of these allegations, they are no more than bare assertions which fail to engage the community value criteria and the Council should give no weight to them, drawing adverse inferences from the paucity of information provided. The fact that patrons of a pub, i.e. drinkers within it, can donate money whilst they imbibe alcohol does not further the social wellbeing or interests of the local community.

The statement that “The Institute of Public Policy Research (IPPR) has used ‘Social Return on Investment’ methodology to quantify the wider social value which pubs generate for their communities, which cannot be captured in financial terms. These wider community benefits range from the amount of money the pub raises for charity to the reduced risk of social isolation through opportunities for pub-goers to make new friends and strengthen community ties. The IPPR’s research found that each pub generates between £20,000 and £120,000 of wider social value to their communities”

60. We presume that the research to which the Nominator refers is the publication “Pubs & Places- the Social Value of Community Pubs” by Rick Muir and published by the Institute for Public Policy Research in January 2013 (“the **Report**”). We note that this has not been submitted as a supporting document in respect of this ACV nomination.
61. The Report referred to as evidence in support of the Nomination, while interesting, does not relate specifically to the Property. We fail to understand what relevance the Report has to the question of whether the Property (not pubs generally) furthered the social wellbeing or social interests of the local community. The report appears to deal with a number of
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matters in relation to pubs generally, including: (a) what is a community pub; (b) pub closures; (c) why pubs matter; (d) measuring the social value of community pubs; and (e) recommendations for change.

62. In short, the contents of the report are entirely irrelevant. The Property was traded as a traditional pub. It was not known as a community pub. Patrons (i.e. the drinkers within it) imbibed alcohol at reasonable prices. The Property was no different to other pubs in the area. In this case, the Nominator has not provided any evidence that the Property furthered the social wellbeing or social interests of the local community in any particular way. We would invite the Council to draw adverse inferences from the Nominator's lack of evidence of community value underlying this bare assertion. These statements do not identify or evidence an actual non-ancillary use of the Property (current or prospective) that furthered the social wellbeing or social interests of the local community.
63. The mere fact that the Property was a public house in which people could meet and socialise and build a sense of belonging, is insufficient to establish that it was of community value as defined by s.88 of the Act. It clearly cannot have been the intention of Parliament in drafting the relevant provisions of the Act and of the Regulations that all pubs should satisfy the test set out in s.88 by virtue of being pubs alone. The bar set by s.88 requires more than mere use of a property as a public house. Indeed in *Patel v London Borough of Hackney and another* [2013] UKFTT CR/2013/0005 (GRC) at paragraph 4 (enclosed) Judge Warren stated that "for the appellant, Mr Turney, correctly pointed out that not all pubs would come within Section 88(2)(c)" (it is clear that the Judge meant s.88(2)(a) or (b), given that there is no sub-section (c), and also from the wider context in that case.
64. Whilst this information is helpful when considering the benefits of pubs generally, it is not relevant to the Council's determination when assessing the merits of the nomination of the Property as an ACV. Although we acknowledge that social hubs are valuable and necessary, the Nominator has failed to establish that the Property was such a place, nor that it could reasonably be expected to become one. In addition, it is evident from the examples included within this letter of other pubs within close proximity to the Property, that there are numerous other places which serve the local residents and where they can meet.
65. The Report is entirely irrelevant to the Nomination of the Property as an ACV, and fails to address the issue of whether *this specific* Property satisfies the test under s.88 of the Act. Indeed:
- i. to the extent that the Nominator is asserting that the Report establishes that every public house is an ACV by definition, this is manifestly untrue;
 - ii. to the extent that the Nominator is asserting that the Report establishes that some public houses may be ACVs, the Nominator is attacking a straw man – this point was never in dispute. It is clear that some public houses are capable of satisfying the s.88 criteria but this does not assist the Nominator in establishing that the Property itself is appropriate for ACV listing; and
 - iii. to the extent that the Nominator is asserting that the Report is evidence of the Property's specific, actual community value, this clearly is not the case.
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The Report does not refer to the Property at all, or to any of the alleged specific uses to which it was formerly put by the local community.

66. It follows that the Report is clearly irrelevant to the Council's decision-making process.

The statement that "The Railway Arms functioned, until its recent closure, as a viable business, selling real ale and other drinks to a regular clientele drawn largely, though by no means exclusively, from the southern part of the town, where it is one of only two traditional pubs remaining. It is located in a residential area and as such caters to a different audience to Saffron Walden's town centre pubs. In this respect, in the absence of television screens and recorded music, and in its historic association with the town's railway it provides a different offering to its competitors"

-"Viable business"

67. The Property was, first and foremost, a property from which a commercial business was run for the sale of alcoholic and non-alcoholic beverages. Any social and community use was de minimis since the Property only sold a limited number of pints per day, before it closed.
68. We enclose the following trading documents:
- (a) Balance sheet, for 2013- 2014;
 - (b) Draft Accounts for 1 June 2014- 31 May 2015;
 - (c) Excels spreadsheet- figures for 2016; and
 - (d) MAT (Moving Annual Total) volume and sales figures for a 2-year period.
69. This trading information shows that the Property has struggled to make any significant profits for a number of years. The barrellage for the last few years is far below what would be expected for site of this size. In addition, the Owner did not collect rent from tenants over significant periods to assist them financially. Following the departure of the last tenant in 2015, the Owner kept the Property open and marketed it in an attempt to find a new operator. However, the Property received minimal interest and the only applicant who did send a business proposal, unfortunately, did not have a robust and viable business plan.
70. The profitability of the business has declined substantially year on year. The decline is primarily as a result of the business not being able to compete in the current market. It is clear from the accounting information provided that the locals have not supported the business over the last few years. This factor is essential for a public house business to be able to compete satisfactorily nowadays. It is unlikely that a sustainable profit could be made in the future by either a tenant or owner-occupier. In any event there is no shortage of alternative customer choice within the vicinity of the Property, which provide facilities for the local community.
71. Substantial investment would be needed into the public house and, bearing in mind the competition in the area, such an investment would be considered extremely risky. Even if investment were made to the public house, the Owner is of the opinion that the business that could be generated would still no longer provide a sufficient income for an operator in
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the medium term as the fundamental requirements of a successful modern public house could not be provided.

72. In short, the Property is not a viable public house business, and will not be in the future because it lacks the necessary characteristics, desirability for investment and there is strong competition within the village, which the differentiating characteristics of the Property (whatever those may be) cannot overcome. All the above figures ignore the fact that the Owner has been providing the tenants over the years with a substantial rent concession in order to support him. If it were not for the rent concession, then the business of the Property would be even more loss making.
73. These are facts and matters, based in reality, therefore which the Nominator do not take into account in their Nomination Form:
- (a) **The strength of the local public house competition.** Not only are there are 12 pubs within a 2 mile radius of the Property, 8 of which are in truth covering the same catchment area as the Property, but there are nearby community pubs within neighbouring villages (see the enclosed whatpub printout). The closest alternative is a 1 minute walk which cannot, on any common-sense view, be said to be a difficult journey to make.
 - (b) **The number of residents within the village who attend the Property,** served by ample choice of competing public houses. It is abundantly clear from the trading figures that the Property does not attract the requisite support from the locals. The Owner's view is that the Property is not a viable business.
 - (c) **The local availability of the community activities** referred to in the Nomination Form (see below).
 - (d) **That the convenience of location of the Property cannot be determinative of its future use as a pub.** Whilst the nearby locals might wish to retain the Property as a public house, there are other stronger public house offerings within the nearby vicinity and the Property will not survive as a public house. Therefore the only likely consequence of effectively opposing the nomination, for the benefit of a very small section of the society would be to sterilise the land, which would be in no-one's interests.
 - (e) **That the facilities available at the Property are all available elsewhere in the village and in neighbouring villages.** The other pubs in the village have bars where groups of people and parties can occur. All the pubs in the village, are within walking distance.
74. Therefore, the Nominator's assertion that the Property "*is a viable business*" is simply false and uncorroborated. The Nominator has provided no evidence whatsoever to substantiate this allegation and it would seem that the purpose of such an allegation is to make out that the Property is a successful commercial enterprise; this is simply not the case as it has already failed. There is a clear lack of community support for the Property, most clearly demonstrated through the continuous decline in trade.
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75. It is entirely unclear what the Nominator's understanding as to the viability or financial success (or lack thereof) of the Property is based upon. Without access to the relevant account, trading history, or experience of operating licensed premises, it seems that the Nominator's assertion as to the viability or otherwise of the business is little more than bar-room speculation. This bare assertion should therefore carry no weight with the Council. That the Property purportedly functioned as a viable business is simply no good or remotely an appropriate reason for listing the Property as an ACV, bearing no relevance, as it does, to the criteria laid out in s.88 of the Act, and it should be disregarded by the Council accordingly.
76. The Property could be used by all patrons of the pub, whether locals or those from further afield. However whether the Property served a "*regular clientele*", no more furthers the social wellbeing or social interests of the local community, than those who frequented it from the eastern or western part of the town. The Nominator has provided no evidence whatsoever to show the nature of the past users of the Property, especially its alleged regulars. These are simply bare assertions. The Council should draw adverse inferences from the absence of any actual evidence presented.
77. The test to be satisfied is whether the Property furthered the social wellbeing or social interests of the local community. The business could well be unviable, but if in the opinion of the Council it satisfies the test then the Property is *prima facie* a community asset. In any event, the Property recent closed and no longer operates as a pub.
- "One of only two traditional pubs remaining"*
78. There are a preponderance of other nearby public houses and other community facilities, which are of genuine community value.
79. In any event, whether or not the Property is one of two traditional pubs remaining in Saffron Walden is not a factor to be considered by the Council when assessing whether the Property itself furthered the social wellbeing or social interests of the local community. The particular mode of operation of a property is not a matter to be considered when looking at the community value criteria. This reason should be disregarded by the Council.
80. To the extent that the Nominator attempts to emphasise that the Property is the only pub in the vicinity, there are 12 pubs within a 2 mile radius of the Property (we enclose a web-print out from CAMRA's What Pub guide). There are clearly many alternative community pubs within a short distance of the Property that provide the same/similar facilities to the amenities previously alleged to have been provided in the Property:
- (a) The Duke of York, which is located 0.1 miles from the Property (a 4 minutes drive or comfortable 1 minute walk), is described in CAMRA's What Pub guide, a web print-out of which is enclosed (<https://whatpub.com/pubs/ENW/11351/duke-of-york-saffron-walden>), as, "*A newly refurbished and repainted terraced pub with a single room and a central bar. Children are welcome. Sky Sports is unusually available here too. The pub car park is accessible from an alleyway on the Debden Road. Darts is played and there have been occasional musical events*".
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The Duke of York: (a) offers lunchtime meals, (b) has a pub garden, (c) has traditional pub games, (d) is dog friendly and family-friendly, (e) hosts live music, (f) has parking, (g) has sports TV, and (h) has a smoking area.

The Duke of York's website (<http://thedukeonline.com/>) provides that it hosts a quiz night every second and fourth Thursday of the month. In addition, it hosts occasional live music gigs on a Friday or Saturday night. It is also stated on the website that the Duke of York actively supports Saffron Walden Round Table in their charitable activities.

- (b) The Old English Gentleman, which is located 0.3 miles from the Property (a 6 minutes walk or 3 minute drive), is described in CAMRA's What Pub guide, a web print-out of which is enclosed, as *"An 18th Century town-centre pub with log fires and a welcoming atmosphere. Serves a selection of guest ales and an extensive menu of bar food and sandwiches that changes regularly. Traditional roasts and chef's specials are available on Sunday in the bar or dining area, where a variety of works of art is displayed. Saffron Walden is busy on Tuesday and Saturday market days. There is a heated patio at the rear and a wood burning stove too"*.

The Old English Gentleman: (a) has a pub garden, (b) offers lunchtime meals, (c) is dog friendly, (d) has a smoking area, and (e) offers WiFi.

81. Notwithstanding the above, the mere existence or lack of existence of other facilities is not a relevant factor so far as the community value criteria are concerned because they do not relate to actual past or current use of the same at the Property.
82. The mere fact that the Property was a public house in which people could potentially meet and socialise and build a sense of belonging is insufficient to establish that it is of community value as defined by s.88 of the Act. There are numerous pubs nearby the Property and the surrounding area.
83. The Property was traded as a traditional pub. Patrons (i.e. the drinkers within it) imbibed alcohol and ate food at reasonable prices. We observe that there are many pubs near to the Property, which are clearly active within, and serve, the community and where residents can meet, if they wish to socialise and imbibe alcohol.
84. Outside of pubs, there are several other places within proximity to the Property where residents can meet to socialise, participate in activities/ events, and/ or host meetings. It is surprising that the Nominator has, in essence, asserted that the Property should be listed as an ACV based on bare allegations (further details are provided below). The bar set by s.88 requires more than mere use of a property as a public house.

-"It is located in a residential area"

85. The past convenience of location of the Property cannot be determinative of its future use as a public house. Whilst the nearby residents might wish to retain the Property as a public house, there are other much stronger public house offerings within the nearby vicinity and the Property would not survive as a public house. Therefore, it is respectfully submitted that
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otherwise acceptable development cannot be held up for the benefit of a small section of the local community. The other nearby public houses can easily accommodate the additional custom.

86. The Nominator has provided no evidence whatsoever to substantiate this allegation and this non-specific allegation does not identify an actual, past non-ancillary use of the Property that furthered the social well being and interests of the local community. Further, the past convenience of the geographic location of the property to a particular class or type of person can in no way be a consideration for the Council as to whether or not the community value criteria are satisfied. Whilst the geographic location of the pub might have catered "*to a different audience*" and been more convenient for some members of the community than the other, such discrimination does not identify a use of the Property that furthered the social well being and interests of the village at all: mere enjoyment of a pub does not count. Further the closest alternatives to the Property are only a 3/4 minutes car journey away. On any common-sense view, this could not be seen as a difficult journey for a person to make.
87. In this case, the Nominator has merely made statements which beg the question and has not, in any way, sought to address specific past uses of the Property which might meet the community value criteria. The Council needs to assess whether the Property furthered the social wellbeing or social interests of the local community. It goes without saying that merely because a property has hosted events in the past, it does not prima facie make the Property of community value. There must be something more.

-*"Historic association with the town's railway"*

88. The Council is respectfully referred to our comments above regarding dissipation of any community value which might feasibly be attributed to the Property (which is none, as the community value criteria is not engaged by dint of the ancillary nature of the various uses referred to in the Nomination Form) in the light of the availability of a number of alternative venues with public house use. Without having established that the Property is currently of community value, the Nominator's contention that the locals have enjoyed using the pub for a long time is based on a false premise.
89. This allegation primarily relates to the desired protection of the physical presence of the building as a pub, and not to any community use of the Property. The ACV regime is not an appropriate way to seek to protect the physical presence of the building: its primary purpose is to enable community interest groups to bid for the Property.
90. It is clearly the case that the future of the Property lies in a path other than pub use. Whilst this is deeply regrettable, the useful use of buildings upon the Property would be best sought through appropriate development for an alternative use, such as residential use.
91. The Nominator refers to the Property's historic association with the town's railway. To the extent that the Nominators imply that the age of the Property is a relevant consideration, the process of ACV listing is not the appropriate method to protect old or historic buildings (unless of course such buildings by coincidence also satisfy the s.88 requirements). The appropriate way to protect old or historic buildings is through the process of listing
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properties on the National Heritage List for England and the appropriate way to protect whole areas of special architectural or historic interest is through the designation of conservation areas by local authorities.

92. The Property was not heritage listed. It did not deserve any special protection. Each listing regime has a clear statutory purpose and they are neither interchangeable nor complementary. The ACV regime is not the place for the Nominator to speculate as a future use of the Property which has no basis in reality.

The statement that “Its character remains identifiably Victorian both inside and out and its relationship with the nearby Railway Station building is a reminder of the town’s pre-Beeching place on the rail network. This historic group value is further enhanced by the presence of the original red post box, though the telephone kiosk situated just outside until recently has been removed. The station and pub were built together in the same style and the pub’s outbuildings relate to the same function and purpose. The Railway Arms is the only publicly accessible part of this historic line in the town, the station building having been converted to residential use, and this access is worthy of protection. Old photographs and memorabilia relating to the line have adorned the walls and could do again; transport links remain since the Cambridge bus stops nearby”

93. We note that this paragraph describes the past character of the Property, its relationship with the nearby Railway Station, the presence of an original red post box, the historic nature of the relationship between the Property and the Railway Station, and accessibility/transport links etc.
94. This allegation fails to engage with the criteria for ACV listing under s.88 of the Act. There is no explanation as to how these alleged facts promote the social wellbeing and/ or social interests of the local community. Without further explanation, the fact of the Property’s character and historic links are completely irrelevant to the process of considering the Property’s community value, or rather local thereof.
95. As stated above, the appropriate way to protect specific old or historic buildings is through the process of listing properties on the National Heritage List for England. Absent any evidence in support of these allegations, they are no more than bare assertions and the Council should give no weight to it.

The statement that the Property “has featured regularly in good beer and good pub guides”

96. Whilst this was, of course, a commendable feature of the Property, it has absolutely no bearing on the test to be considered by the Council, and should be disregarded by the Council. The inclusion of the Property in good beer and pub guides is not a use/ feature which of itself satisfies the community value criteria contained in the Act. It is not information that the Council should have regard to when assessing the merits of the nomination of the Property as an ACV. These statements do not identify or evidence an actual non-ancillary use of *this* Property (past or prospective) that furthered the social wellbeing or social interests of the local community.
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97. In any event, the fact that the Property may have been included in a good beer and good pub guide does not mean that it furthered the social wellbeing or interests of the local community. It means that it was a successful pub business that served good beer. We cannot see any link between the Property's past popularity and it serving good beer, and it furthering the social wellbeing or interests of the local community. Accordingly, the Council should give no weight to these references
98. There is no explanation as to how these matters are alleged to be relevant to the past main use of the Property in a way which might have furthered the social wellbeing and/ or social interests of the local community. What is important is whether the use of the Property as a pub furthered the social wellbeing or social interests of the local community. The Nominator has not attempted to establish how this allegation satisfies s.88 of the act nor has it provided any evidence to support this allegation. We respectfully direct the Council to the requirements of the Act.

The statement that the Property "*is Cask Marque accredited*"

99. Whilst this was, of course, a commendable feature of the Property, it has absolutely no bearing on the test to be considered by the Council, and should be disregarded by the Council. Further, the Nominator has provided no evidence whatsoever to substantiate this allegation and this non-specific allegation does not identify an actual, past non-ancillary use of the Property that furthered the social well being and interests of the local community.

The statement that the Property "*occasionally hosts live acoustic music and open mic events*"

100. The Nominator has provided no evidence whatsoever of live music events having been hosted at the Property, or of any specific or identifiable value which might be attached to them, were this allegation true. Such evidence, were the statement true as to the factual occurrence of the hosting of these events, would be easy to provide, for example via letters of support or statements from any of the individuals that attended such events at the Property. Although we acknowledge that music venues are valuable and necessary, the Nominator has failed to establish that the Property was such a place, nor that it could reasonably be expected to continue to be one.
101. The Council needs to assess whether there was a time in the recent past when the use of the Property furthered the social wellbeing or social interests of the local community, not whether an environment existed which offered regular live music. It goes without saying that merely because a property has hosted such events in the past, it does not prima facie make the Property of community value. There must be something more.
102. However in this case the Nomination Form is completely bare and devoid of any explanation of how such events might have been for the benefit of the local community as part of the main use of the Property as a public house, as opposed to an odd event in the distant past for the benefit of others outside of the local community on an ancillary basis as part of someone else's business (which is entirely possible: a third party might have been paying a concession to the public house to run live music nights from the Property). Further there is no evidence as to whether or not those who attended such events (if they take
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place) that use the Property are from the local community, or from further afield. Therefore in making a determination on this point the Council would be making an unjustifiable leap of faith.

103. In any event, if this allegation were true, such events would be ancillary to the past main use of the Property as a public house, which is the sale of alcoholic and non-alcoholic beverages to the public with or without food. There is no suggestion that the live music nights were part of the public house operation, or that the attendance will not now occur at other local venues.
104. The test in s.88(2)(a) of the Act refers to the actual non-ancillary use of the Property. In the absence of a statutory definition or guidance as to the meaning of “ancillary” within s.88(2)(a) of the Act, the term should be given its ordinary and natural meaning, within the context of the facts of the matter under consideration. The shorter and little Oxford English Dictionaries define ancillary as meaning “*subservient*”, “*subordinate*”, “*auxiliary*”, “*providing essential or necessary support to the primary activities or operation of an organization or system*”.
105. Public house use, the main use of the Property, is the supply or sale of alcoholic and other beverages to the public with or without the provision of hot or cold food. All other uses of the Property which are provided in addition to this use, such as sporting facilities such as darts, pool etc., live music, board games, meeting rooms, and so on, are clearly subordinate to the commercial use of the Property as generating trade from the sale and supply of drinks and food.

The statement that “Newspapers are often available and local cultural events are advertised”

106. This reason bears no relevance to the criteria laid out in s.88 of the Act. The Council needs to assess whether the use of the Property as a pub furthered the social wellbeing or social interests of the local community, not whether an environment existed in which people could keep up to date with current affairs. The provision and/ or availability of newspapers at the Property is entirely irrelevant, and in any event entirely ancillary to the past use of the Property as a pub. Society can keep abreast of news and current affairs by watching television, purchasing newspapers, via the internet at home and/ or obtaining a copy of a free newspaper such as the Metro.

The statement that the Property “has a beer garden which is used by local people and regularly held beer festivals offering a range of local beers”

107. The Property closed recently. Accordingly the Council must consider the community value criteria under s.88(2) of the Act, as opposed to s.88(1) of the Act, and in doing so arrive at a determination of whether or not the Property has been used in such a way as to satisfy the community value criteria “*in the recent past*”.
108. When the Property was open and trading, the garden could be used by all patrons of the pub, whether locals or those from further afield. However the fact that the Property had a
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garden no more furthers the social wellbeing or social interests of the local community than having the ability to sit inside the pub.

109. The provision of a garden or outside area for drinkers is ancillary (on any common sense reading of the word) to the main use of the Property as a public house. The test in s.88(2)(a) of the Act refers to the actual non-ancillary use of the Property. In the absence of a statutory definition or guidance as to the meaning of “ancillary” within s.88(2)(a) of the Act, the term should be given its ordinary and natural meaning, within the context of the facts of the matter under consideration. The shorter and little Oxford English Dictionaries define ancillary as meaning “*subservient*”, “*subordinate*”, “*auxiliary*”, “*providing essential or necessary support to the primary activities or operation of an organization or system*”.
 110. The use of the garden was not an integral part of the main use of the Property and was clearly subordinate to the supply or sale of alcoholic and other beverages to the public with or without the provision of hot or cold food, being the defining features of public house use. Without the garden the public house building would have continued to function for the main purpose, but the converse would not be true.
 111. Adopting the Nominator’s analysis, any place which has a garden area is capable of becoming an ACV, and therefore should be an ACV. This plainly cannot be correct. The fact that something existed does not mean it was utilised for the criteria set out in the Act, or at all, and the Nominator provides no evidence to suggest that the garden was, at any stage, used.
 112. This allegation therefore fails to engage the s.88 criteria in that the presence and use of a garden is not sufficient to establish that the Property furthered the social wellbeing or social interests of the local community in the sense intended under the Act. Use of the garden does not satisfy the definition of “*social interest*” under s.88(6) of the Act, being neither a cultural, recreational, nor sporting interest. Nor does use of the garden further “*social wellbeing*” in the sense of maintaining and strengthening societal cohesion and unity. Mere enjoyment is not sufficient to qualify a Property as an ACV, hence the criteria set out in s.88.
 113. It simply is no reason, of itself, to list the Property as an ACV, bearing as it does no relevance to the criteria laid out in s.88 of the Act, and should be disregarded by the Council. The fact that patrons of the pub, i.e. drinkers within it, could sit in a garden whilst they imbibed alcohol does not further the social wellbeing or interests of the local community. A garden, although desirable in a public house, is a feature rather than a use of the Property.
 114. Furthermore there are a number of pubs in close proximity to the Property (within a 1.5 mile vicinity) which have pub gardens- we enclose a web-print out from CAMRA’s What Pub guide. Therefore the Council should draw adverse inferences from the absence of any actual evidence presented. The Council is respectfully referred to our comments above regarding dissipation of any community value which might feasibly be attributed to such use (which is none, as the community value criteria is not engaged by dint of the ancillary nature of such use) in the light of the availability of a number of alternative venues with beer gardens in use.
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115. Moreover, the Nominator alleges that the Property regularly held beer festivals offering a range of local beers. Again, this allegations fails to engage the s.88 criteria in that the fact that the Property was used for beer festivals is not sufficient to establish that the Property furthered the social wellbeing or social interests of the local community. Although we acknowledge that social hubs are valuable and necessary, the Nominator has failed to establish that the Property was such a place, nor that it could reasonably be expected to become one. Mere enjoyment is not sufficient to qualify a property as an ACV. Even if the Property held such events, they were ancillary to the use of the Property as a public house
116. Further the Nominator has provided no evidence whatsoever to substantiate this allegation and this non-specific allegation does not identify a past or current, non-ancillary use of the Property that furthered the community's social interests (i.e. cultural, recreational or sporting interests) or social wellbeing and so fails to engage with the s.88 criteria at all. This bare assertion should therefore carry no weight with the Council.

The statement that "Wine tastings were planned and food plays a significant part in the business and life of the pub"

117. Whilst the availability of a range of drinks and food was, of course, a beneficial feature of the business carried on from the Property, it has absolutely no bearing on the test to be considered by the Council, and should be disregarded by the Council. The consumption of drinks and food is not a use which of itself satisfies the community value criteria contained in the Act, being the past main use of the Property. In addition, the Council should draw adverse inferences from the absence of any actual evidence presented.
118. Adopting the Nominator's analysis, any place which serves/ served food and drinks is capable of becoming an ACV, and therefore should be an ACV. This plainly cannot be correct. What is important is whether the use of the Property as a pub furthered the social wellbeing or social interests of the local community. The Nominator has not attempted to establish how this allegation satisfies s.88 of the act nor has it provided any evidence to support this allegation. We respectfully direct the Council to the requirements of the Act.
119. Use of the Property for the purposes of the consumption of drinks or food does not satisfy the definition of "social interest" under s.88(6) of the Act, being neither a cultural, recreational, nor sporting interest. Furthermore there are a number of pubs and other facilities and businesses in close proximity to the Property (within a 1 mile vicinity) which serve drinks and lunchtime and evening meals.
120. In any event, a pub is not the only place where residents can eat and drink. There are a number of local restaurants, within driving distance from the Property, which serve the local residents and those from further afield.

The statement that the Property "is a dog- and family-friendly establishment which has been used by many clubs and societies for meetings, events and charity fundraising. These include: The Railway Music Club, SW Operatic society (inc. celebration event following final performance of the season), SW Choral Society, Saffron Striders running club, Saffron Scorpions rugby (Saffron Walden 3rd team), 5-a-side football team and fantasy football

league, Coffee and breakfast morning events for mums and kids, Saturday morning keep fit class, The Saffron Walden "Boobiebellion" saw more than 200 people wearing booby bobble hats help raise money for cancer charities many of which were knitted in the pub"

Dog and family friendly

121. The Nominator has provided no evidence whatsoever to substantiate this allegation and this non-specific allegation does not identify a past or future, non-ancillary use of the Property that furthered the community's social interests (i.e. cultural, recreational or sporting interests) or social wellbeing and so fails to engage with the s.88 criteria at all. A family friendly area, although desirable in a public house, is a feature rather than a use of the Property. This bare assertion should therefore carry no weight with the Council.

Meeting spaces

122. Whilst the availability of meeting spaces within the Property was, of course, a useful feature of the Property, it has absolutely no bearing on the test to be considered by the Council, and should be disregarded by the Council.
123. The Nominator asserts that the Property has been used "*by many clubs and societies for meetings, events and charity fundraising*". The Nominator has listed: (i) the groups that allegedly used the Property as a meeting place, and (ii) the events and charity fundraising that allegedly took place at the Property. However, the Nominator has provided no evidence whatsoever to support the allegation that any local community groups/ charities met at the Property. For example, the Nominator has not provided any evidence of: (i) the groups that allegedly used the Property as a meeting space i.e. SW Choral Society, (ii) any club meetings actually taking place at the Property and/ or their frequency. It is our client's respectful submission that had organised community group meetings occurred at the Property then this evidence would have been easy to provide, (iii) the events (such as coffee and breakfast morning events) taking place. It would have been easy to present letters of support from particular individuals and groups who use the Property. This generalised and unhelpful statement should therefore carry no weight with the Council. To the contrary, the Council should draw adverse inferences from the absence of any actual evidence of club meetings presented
124. Further it is not clear on the face of the Nomination whether the "meetings" that allegedly took place at the Property were organised gatherings of the club(s)/ social groups referred to for the purposes of discussing some business or issue relevant to their group or whether the Nominator is simply stating that such groups of people occasionally frequented the Property as a pub. In the absence of evidence of any organised gatherings our client's submission is that the latter interpretation is correct. The Council is respectfully reminded that pub use alone is not sufficient to satisfy the criteria under s.88 of the Act.
125. Further, even if the Property was used as a venue by community groups to hold meetings, such use was ancillary to the use of the Property as a public house. Public house use, the main use of the Property, was the supply or sale of alcoholic and other beverages to the public with or without the provision of hot or cold food. Use of the Property as a club meeting place was clearly subordinate to the commercial use of the Property as generating
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trade from the sale and supply of drinks and food. Such additional activities, if they occur, were not an integral part of the main public house use at all.

126. Further still, even if spaces in the Property were used by groups to hold informal meetings, this is irrelevant unless the Nominator has established that there was a time in the recent past when an actual non-ancillary use of the Property furthered the social wellbeing or interests of the local community and it is realistic to think that there is a time in the next 5 years that there could be such use (s.88(2) of the Act). The Nominator has satisfied neither limb of the community value criteria.
127. The Council is also referred to our comments above in respect of alternative public houses and other venues in the vicinity. The existence of these alternative public houses and community halls/ centres for similar ancillary use means that even if the community value criteria were engaged (which it is not), the community value attributable to such use would be dissipated as a consequence of the availability and use of such alternative venues.
128. Without any evidence, this is no more than a bare assertion against which the Council should draw adverse inference for want of detail or evidence in support. There is not even a hint of a suggestion that community groups met at the Property otherwise than as part and parcel of the main use of the Property for the sale of alcoholic and non-alcoholic drinks with or without food.
129. In any event, even if this allegation were true, occasional (and infrequent) past use of the Property as a meeting place for clubs would in any event be: (a) subordinate to the past commercial use of the Property as generating trade from the sale and supply of drinks and food, and (b) *de minimis*, in the sense that it is an insignificant use in any event.
130. Such marginal additional activities would not be an integral part of the main public house use at all and would be ancillary to the main public house past use of the Property, and therefore irrelevant for the purposes of s.88 of the Act.
131. Accordingly, the unsupported allegation that the Property was used as a space for meetings or the like, should not form part of the Council's analysis as to whether the Property furthered the social wellbeing or social interests of the local community. Without more, this reason should only be treated by the Council as a bare assertion and we would invite the Council to draw adverse inferences from the Nominator's lack of evidence underlying this bare assertion.

Is it realistic to think that use of the Property engaging the community value criteria might resume in the next 5 years?

The statement that "It is therefore perfectly realistic to suppose that the pub can continue, over the next five years and more, to further the social wellbeing and social interests of the local community. As such this application, supported by many locally registered voters, is made to list the Railway as an Asset of Community Value"

132. The Nominator's entire case is out of necessity centred on the bare allegations set out above, because there is no factual substance to them. However without prejudice to this it
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is the Owner's respectful submission that it is unrealistic to think that there is a time in the next 5 years that there could be such use i.e. use of the Property which furthers the social well-being and interests of the local community. In this context the Council must have regard to the following.

133. The term "realistic" must be given its ordinary, natural meaning in context. The dictionary definition of "realistic" is "*regarding things as they are*", "*based on facts rather than ideals*". In other words the Council must consider the uses forming part of the past pub use of the pub building alleged by the Nominator to be of community value and whether or not, regarding things as they are, it is realistic to think that those uses can resume.
134. Without prejudice to the fact that community value does not attach to the Property in the sense envisaged by s.88 of the Act, it would in any event not be realistic to think that there will continue to be use of the Property which furthers the social well-being and interests of the local community.
135. The accounts of the Property demonstrate that whatever social benefit was derived from the local residents was not being returned in sufficient custom to keep the business going as a viable public house. It may be the case that the village is growing however consumer trends of on-market purchase of alcohol have structurally changed over the last 10 years and the consequence of this together with the inhibited opportunity for the Property to adapt its business model are such that any consequent growth in the catchment for the various pubs in the village would not in any event benefit the Property.
136. The question is whether, notwithstanding the Owner's clear intentions, it is realistic to think that the Property could be used for non-ancillary community uses within the next five years. That prospect is wholly unrealistic because:
 - (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 CR/2013/0005* at paragraph 11).
 - (b) The Property cannot profitably operate as a pub, because it is now closed.
 - (c) Commercial viability is not the end of the matter: see *Worthy Developments Ltd v Forest of Dean DC CR/2014/0005* at paragraph 21. However if the Nominator is alleging that it has the funds to purchase the Property, then that 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.
 - (d) However, there is no such evidence. Judge Lane's comments in *STO Capital v London Borough of Haringey CR/ 2015/0010* 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 an offer 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.

- (e) Any suggestion that the Nominator or the local community could realistically purchase the land at the Property is fanciful. Even in communities where there is a “volunteering spirit” like in the Crostone v Amber Calle Borough Council CR/2014/0010 case, the nominator still had to show “*alternative, realistic models*” as to how the site could be used. Here the Nominator has provided no evidence at all of this.
- (f) It is the Owner’s respectful submission to the Council that, in addition to everything else set out above, the above factors are fatal to the nomination.
- (g) We refer to the judgment of Judge Simon Bird QC in Fernwick Limited v Mid Suffolk District Council CR/2015/0024. In this case, the pub had been marketed for a significant period of time, and the absence of sufficient interest showed that the property had no commercial interest as a pub. Further, despite significant investment and substantial rent concessions, the pub struggled to make a profit (as in the case of the Property). The judge’s conclusions at paragraphs 27- 29 apply here:

“27. Whilst there is community support for retention of the Cross Keys as a pub, that has to be seen in context. The support is for the continued protection of the use rather than any clear support in the form of willingness to take on the Cross Keys and an attempt to run it as a going concern. On the evidence, the Parish Council’s priority is, understandably, the Village Hall. It has no apparent interest in acquiring or assisting in the running of another licensed premises to serve the parish. Likewise, the Second Respondent as Company for inclusion in the ACLV, acted to protect and not to involve itself in the acquisition and/ or operation of this pub.

28. Taken together, the inability of the Appellants to make a success of the business despite significant investment, the absence of any commercial or any meaningful voluntary sector interest in running this public house in this location and the absence of any evidence that proposals which might improve the viability of the Cross Keys being acceptable to the First Respondent in this location lead me to conclude that it is not realistic to think that public house use could be made of the building within the next five years.

29. I also conclude that it is not realistic to think that the building could be used for any other use that would further the social well-being or social interests of the local community. Whilst the building might be of a form and/ or design which might be suitable for such a use, there is no evidence that there are any realistic proposals for such uses or that there is any prospect of such proposals emerging in the next five

years. Whilst there is no requirement that there be business plans or similar to support suggested uses which might be made of buildings, there must be more than speculation to support a finding that it is realistic to think that they could materialise in the next five years in a building located some distance from the settlement(s) it would principally serve. There is no such evidence in this case”.

137. In consequence, the Property does not and cannot meet the test at s.88(2)(b) of the Act.
138. There is no serious intention on the part of the Nominator or any other person to purchase the Property. If local authorities fail to ensure that the ACV listing mechanism is used correctly, then there is a significant risk that ACV nominations will be reduced to a vehicle for opportunistic infringement of property rights, as in this case. In the light of this the Council cannot, and should not, consider the Nomination at all. To do so would be a significant abuse of process and contrary to the legislature’s intention.

Insufficient evidence that the Property is of any Community Value – Summary

139. In summary, there is no evidence furnished by the Nominator to support an assertion that the Property, or any part of it, is of community value for the reasons stated within the nomination. In fact some of the allegations made suggest that the Council should be very cautious in relying upon the reasons asserted, and instead draw adverse inferences from the absence of evidence provided.
140. The ACV listing mechanism exists to allow the local community to purchase a property which is considered to be an Asset of Community Value. Whilst the Nominator makes broad-brush and self-serving allegations about the Property, neither it nor any other person has indicated at any stage that it might wish to purchase the Property or shown any understanding as to the liabilities, costs, finance, turnover and profit margins required to run a pub such as the Property.
141. If local authorities fail to ensure that the ACV listing mechanism is used correctly, then there is a significant risk that ACV nominations will be reduced to a vehicle for opportunistic infringement of property rights, as in this case.

Conclusion

In conclusion, our client objects to the Property being listed as an ACV because the Property should already be on the Council’s list of unsuccessful nominations with the consequence that it cannot now be accepted as an asset of community value by the Council and also appear on the list of successful nominations.

Further, the Nomination is not a valid community nomination, having not been made by a qualifying body in accordance with the Act at all, and being as it is completely devoid of any “*evidence that the nominator is eligible to make a community nomination*” (as required by regulation 6(d) of the Regulations).

Further still and in the alternative, the Nomination makes a number of demonstrably bare assertions, which are presented as reasons to list the Property as an ACV. The Council must draw

adverse inferences from the lack of supporting evidence provided in support of these assertions. The Council has not been provided with any evidence that the Property satisfied the community value criteria at any particular point in the past, whereas there is clear evidence of other nearby properties, which currently further the social wellbeing and social interests of the community.

Failure to assess the relevance and credibility of a nomination in light of the evidence provided, or the lack thereof as in this case, defeats the central purpose of the Act, which seeks to allow communities the opportunity to protect land that furthers the social wellbeing or social interests of the local community. If local authorities fail to ensure that successful nominations are based on actual and credible evidence, then there is a significant risk that ACV nominations will be reduced to a mechanism for opportunistic infringement of property rights, as in this case.

There is no basis in reality for thinking that the Property might be used in a way engaging the community value criteria in the next 5 years. The law is clear that there has to be some basis in reality for concluding that the Property might be so used. However the Council has absolutely nothing in this regard, and all the relevant factors militate in the opposite direction.

It is, therefore, the Owner's contention that no reasonable authority, addressing its mind to the correct matters to be considered and limiting itself to the absence of evidence provided, could possibly conclude that the Property is an ACV.

Should the Council conclude otherwise, then we shall advise our client to not only consider challenging such a decision, but to also claim for all its losses, including diminution in value of the Property as a consequence of listing the Property as an ACV. The Council must therefore consider all of the above matters with care in exercising its quasi-judicial function, in determining the nomination and we hope that the above comments are helpful and will be carefully considered and taken into account before the Council reaches its decision.

Yours faithfully



Freeths LLP